

**THE EFFECT OF RECENT LEGISLATION ON  
THE DRAFT PLANNING AND DEVELOPMENT  
BILL FOR THE WESTERN CAPE**

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The object of urban planning is to improve the quality of life and the welfare of the community involved. However, planning policies and controls need to be embodied in legislation in order to make them applicable to the general public. Planning law has suffered from many shortcomings. It has reflected the racial bias of the past which has led to fragmented and unco-ordinated legislation. It reflects the previous Constitutional hierarchical allocation of powers which has resulted in centralised, "top down" planning with local authorities depending on Provincial government for delegated powers. It is control rather than development orientated. In order to provide a context for examining the effect of recent legislation on planning law, a brief summary of existing legislation will be set out.

The Constitution No 108 of 1996, amendments to the Local Government Act No 209 of 1993 and the Development Facilitation Act No 67 of 1995 have highlighted the inadequacies of planning law. This dissertation will examine how the Constitution has radically altered the structure of government and the impact this has on the autonomy of local government in respect of planning matters. This is important since local government is perceived as the ideal sphere to work in partnership with the community to deliver services where they are needed most and to take the initiative in development programmes. It also empowers local government to play a key role in reversing previous planning policies by creating integrated, densified cities. This dissertation will also examine the effect of the duty of local government to provide democratic and accountable government to local communities. It will examine the principles of responsive government namely participation by communities, accountability and openness of government. Their effect on planning law will be assessed. The allocation of powers between Metropolitan and Substructure levels of local government as set out in the Local Government Transition Act will be discussed. The concept of linking integrated development plans to financial budgets

and the impact this will have on planning law will be assessed. Finally, the Development Facilitation Act will be examined. This Act introduces innovative procedures to expedite land development.

It has become clear that the existing legislation in the Western Cape is unable to accommodate these changes and a draft Planning and Development Bill has been published for comment. In order to assess its compliance with principles contained in recent legislation, criteria will be extracted from that legislation and used to analyse the draft Bill.

## THE LEGISLATIVE CONTEXT OF PLANNING

The purpose of urban planning is to:

“improve the quality of life and the welfare of the community involved.”<sup>1</sup>

This is achieved through a series of guide plans, structure plans and zoning schemes which, in order to be binding on the general public and government bodies, are given statutory force.

It is impossible to give a full exposition of what planning law consists of and that is not the purpose of this dissertation. There are however four crucial points which must be made.

First, planning law straddles both private and public law<sup>2</sup>. It interfaces with property law, administrative law, environmental law, nuisance law and criminal law<sup>3</sup>. On the private law side, it places constraints on ownership by prescribing the uses to which property can be put. On the public law side, it governs the relationship between the State (in the guise of National, Provincial or Local government) and a community or, in some cases, between State and individual. This role was crisply outlined by Botha JA:

“[T]here are potentially conflicting interests at stake: those of the applicant owner who wishes to use his property to his own best advantage; those of neighbouring owners in the locality who may be adversely affected by the

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1 Section 5 of the Land Use Planning Ordinance 15 of 1985(C)

2 Van Wyk : “Planning Law - will Cinderella emerge a princess?” 1996(59) *THRHR* 6

3 Van Wyk (fn2) 6

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subdivision; and those of the local authority itself, which is charged with the supervision of the orderly, harmonious and effective . . . . development of the area .... In coming to a decision on the application, the local authority must weigh up the conflicting interests involved<sup>4</sup>."

Secondly, planning law has traditionally suffered from "top down" control. Central Government created the broad planning policies through legislation and then delegated the power to administer the legislation and to create subordinate planning policies to Provincial Government<sup>5</sup>. Local Government's role in creating strategic development planning was limited and prescribed by the policies set at higher levels of government and it concentrated on adjudicating land use control matters if and when such powers were delegated down to it via Structure Plans or Scheme Regulations by the Provincial level of Government<sup>6</sup>.

Thirdly, despite its noble, idealistic aim, planning law in South Africa has evolved into a control orientated system, focusing on the physical and spatial aspects of planning which does little more than regulate land use<sup>7</sup> rather than adopting a holistic, multi-dimensional, developmental approach towards planning. The bias towards physical and spatial planning places emphasis on the ideal arrangements of land uses in order to create a pleasant city to live in and one which functions effectively.

Fourthly, planning law has been racially based. This has lead to fragmented, unco-ordinated and duplicated legislation.

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4 Knop v Johannesburg City Council 1995(2) SA 1 (A) at 30E-G

5 Section 11 of Financial Relations Act No 65 of 1976

6 See for example the General Structure Plan approved in terms of section 4(b) as read with sections 5(2) and 42(1) of LUPO which authorises Council to grant or refuse rezoning applications.

7 Claasen & Milton : "Land Use Planning" in Fuggle & Rabie (eds) *Environmental Management in South Africa* (1992) 716

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A brief outline of the most important legislation governing planning in the Western Cape is set out below.

The Physical Planning Act (PPA)<sup>8</sup> in theory, sets the base-line for all planning law. It aims "to promote the orderly physical development of the Republic"<sup>9</sup>. It attempts to achieve this by methodically dividing South Africa into development regions<sup>10</sup> and providing for a hierarchial set of policy plans which consist of broad guidelines for the future physical development of a particular area<sup>11</sup>. National Government has the power to create a national development plan for the whole of the Republic<sup>12</sup>, and regional development plans for each region<sup>13</sup>. The Administrator of a Province has the power to create a regional structure plan for any portion of a region<sup>14</sup>. At local government level, the Administrator may prepare an urban structure plan for any portion of a region<sup>15</sup>. Each policy plan is subordinate to the plan above it<sup>16</sup>.

Although the Act was promulgated in 1991, none of the policy plans have been implemented. In the Western Cape, the guide-plan for the Cape Metropolitan Area approved in 1988 under the previous Physical Planning Act<sup>17</sup> is still in effect and has

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- 8 Act 125 of 1991. Hereafter referred to as the PPA  
9 Preamble to the PPA  
10 Section 3(1)(a)  
11 Section 5  
12 Section 4(1)(a)  
13 Section 4(1)(b)  
14 Section 4(2)  
15 Section 22  
16 Section 28  
17 Act 88 of 1967

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recently been deemed to be an urban structure plan<sup>18</sup>. This plan contains a “co-ordinated overall spatial development policy for the future development of the Peninsula” and makes reference to the “Cape Town Area” as well as the “Cape Township Committee” (Khayalitsha, Langa, Nyanga and Gugulethu)<sup>19</sup>. It entrenches racial policies by perceiving the traditionally Black areas as the only areas for Black development. The envisaged solution for the scarcity of land is to increase the residential density in the formerly Black areas<sup>20</sup>. The plan marginalises the Black population, setting them far from work opportunities and reinforcing the perception of Black areas as dormitory towns, where labour required by the Central Business District, industrial areas and homes in affluent suburbs, can retire at the end of the day. The plan sets out similar outdated ideas for Coloured and Indian population groups.

It seems anomalous that a policy plan which encourages urban sprawl and racially based planning has been retained at a time when densification and integration of cities is required. This plan is extremely important as it serves as a binding framework for more detailed planning. A structure plan created in terms of the Land Use Planning Ordinance and any consequent rezonings of land must be consistent with it as well.

Van Wyk recently stated:

“Although still on the Statute books, the negative features of the system it represented as well as the fact that it does not fit the new Constitutional

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18 Notice No 160 published in Government Gazette No 16966, dated 9 February 1996. See also section 14(1)(h) of Proclamation No 27 of 1996 published in Provincial Gazette Extraordinary No 5051 dated 27 May 1996.

19 Cape Metropolitan Area guide plan 1988. Volume 1 : Peninsula paragraph 1.3 of Part II.

20 *Ibid.* Paragraph 4.2.3

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system, makes its future uncertain.”<sup>21</sup>

This sentiment has been confirmed by a circular from the Province of the Western Cape to the effect that the powers to administer this Act at Provincial level which were drawn back to National level in terms of section 235(6) of the Interim Constitution<sup>22</sup>, will not be re-assigned to the Provinces since the Act is to be re-written<sup>23</sup>.

At Provincial level, the legislation was predicated on the racial policies which were in force at the time. The Black Communities Development Act (BCDA)<sup>24</sup> and regulations promulgated in terms of it governed planning in previously Black areas. The Land Use Planning Ordinance (LUPO)<sup>25</sup> applied to all other areas.

The BCDA permitted the Minister of Constitutional Development and Planning to designate an area as a development area in which townships could be established. The Act specifically excluded the provisions of LUPO which was “a law in force relating to the establishment of townships”<sup>26</sup>.

Two sets of regulations govern development areas. One set deals with the subdivision of land and the technical aspects of establishing townships<sup>27</sup>, the other

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21 Van Wyk (fn 2) pg 12

22 Act No 200 of 1993

23 Circular No C/13/1995 dated 13 October 1995

24 Act 4 of 1984. Hereafter referred to as the BCDA. The major portion of this Act has been repealed by section 72 of the Abolition of Racially Based Land Measures Act 108 of 1991. Regulations promulgated under the BCDA were saved by section 72 of Act 108 of 1991.

25 Ordinance No 15 of 1985 (C). Hereafter referred to as LUPO.

26 Section 35(2) of the BCDA

27 Regulations relating to Township Establishment and Land Use published in Government Notice R1897 of 12 September 1986

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with the establishment and approval of Town Planning Schemes and subsequent amendments to it through a process of rezoning, substituting town planning conditions or departures<sup>28</sup>. Both sets of regulations continue to apply<sup>29</sup>.

The decision making power rests at the Provincial level of Government and these regulations are control orientated. They have the twin disadvantages of fulfilling the same function as LUPO as well as being totally inappropriate in areas which require less emphasis on control and more on development and urban renewal. Enforcement of these regulations has been sporadic or in some areas, non-existent.

These regulations were complemented by the Less Formal Townships Establishment Act<sup>30</sup> created to regulate the uncontrolled squatting which occurred once influx control measures were lifted and to serve as a development mechanism after the BCDA was repealed. This Act created shortened procedures for the designation, provision and development of land for both townships and less formal forms of residential settlement namely squatter areas<sup>31</sup>. The Act conferred drastic powers on the Administrator of a Province to suspend planning laws or restrictive conditions and servitudes which inhibited development in designated areas<sup>32</sup>.

Where squatting occurred in undesignated areas, it was ruthlessly controlled by the Prevention of Illegal Squatting Act<sup>33</sup> which *inter alia* permitted the eviction of people

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- 28 Regulations relating to the Establishment and Amendment of Town Planning Schemes for the former Province of the Cape of Good Hope published in Provincial Notice 723 of 22 September 1989
- 29 Proclamation No 27 of 1996 published in the Provincial Gazette Extraordinary No 5051 dated 28 May 1996
- 30 Act 113 of 1991
- 31 The Preamble and Chapters 1 & 2.
- 32 Section 3
- 33 Act 52 of 1951

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and the dismantling of their shacks without an order of court<sup>34</sup>.

In all other areas, LUPO applies. Its emphasis on control is evident from its purpose which is "to regulate land use planning"<sup>35</sup>. LUPO differs from other Provincial Ordinances governing planning in that in addition to the control aspect in the form of a Zoning Scheme (Town Planning Scheme under the BCDA and in other Provinces), which functions at local level, it also has a strategic planning or developmental aspect in the form of a provision for Structure Plans.

The Zoning Scheme determines the use rights applicable to an erf and controls the exercise of those rights. The Zoning Scheme achieves this by first using the mechanism of a Zoning map which delimits an area into a series of zones, each one indicated by a different colour on the map, secondly by Scheme Regulations which set out the use rights for each zone; for example residential or general commercial, as well as the degree of development permitted in terms of bulk, building line set backs, height and parking and thirdly by having a register to keep a record of all changes to the Scheme<sup>36</sup>.

Should an owner wish to change the use rights on his land, he needs to apply for a rezoning<sup>37</sup> or temporary departure<sup>38</sup>. This entails an application to a local authority, possibly a process of public participation and, if there are delegated powers, a decision by the relevant Standing Committee of a local authority. This constitutes an adjudication of rights. Should an owner wish to alter any of the land use restrictions

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34 Section 3B

35 Preamble to LUPO

36 Definition of Zoning Scheme in section 2

37 Section 17

38 Section 15(2)

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on his land, he must apply for a departure<sup>39</sup>. He may also apply to subdivide<sup>40</sup> his land or obtain additional use rights via Council's consent<sup>41</sup>.

LUPO uses the rather limited mechanism of structure plans to plan future development. The general purpose of these structure plans is:

“to lay down guidelines for the future spatial development of the area in such a way as will most effectively promote the order of the area as well as the general welfare of the community concerned.”<sup>42</sup>

Two types of plans are provided for. The first<sup>43</sup> caters for the broad strategic planning of an area and contains the basic development principles and policies for the area<sup>44</sup>. This plan also has the power to confer delegated power on a Council to grant rezonings if they are in accordance with the structure plan. The power to create the values underlying this plan and the subsequent approval lie at Provincial level. This power includes determining the level of participation of citizens in creating the plan.

The second structure plan<sup>45</sup>, created at local authority level, deals with the precise issues confronting a specific area and gives practical effect to the broad principles laid down in the first structure plan<sup>46</sup>.

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39 Section 15(1)

40 Section 24

41 Section 15 of the Zoning Scheme : Scheme Regulations

42 Section 5(1)

43 Section 4(6)

44 Mercer, “Development plans under the Land Use Planning Ordinance”, *Town and Regional Planning* Vol 22 1987 19

45 Section 4(10)

46 Mercer (fn 44) 19

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At present, there are no structure plans for Cape Town. In order to delegate powers relating to rezonings, the Administrator has created a "general structure plan"<sup>47</sup> which sets criteria for determining when a local authority may approve rezonings.

The situation is further complicated by the fact that State land is not subject to the provisions of LUPO. Large tracts of State land are unzoned. Problems arose when the State privatised the railways and created the South African Railway Commuter Corporation (SARCC) and Transnet Ltd. To remedy this situation, the Legal Succession to the South African Transport Services Act<sup>48</sup> exempted the SARCC and Transnet Ltd from the relevant Zoning Schemes by means of a transitional provision which permitted zonings to be obtained by agreements with local authorities<sup>49</sup>. This section has recently been amended to incorporate these areas into the Zoning Schemes.

To sum up : First, planning powers vest mainly at the Provincial level of Government. Local authorities are dependant on delegation via Structure Plans and Scheme Regulations for their powers. In Black areas, there is no delegation at all. Secondly, planning law is duplicated. At present the City of Cape Town controls three types of Zoning Schemes; those created in terms of sections 7 & 8 of LUPO and town planning schemes approved in terms of regulations promulgated in terms of the BCDA. In addition, zoning has to be determined for SARCC and Transnet land even under the new amendments to the Legal Succession Act. Thirdly, planning law is control orientated and the local authority's energies and resources are directed towards enforcement. In certain areas, these control mechanisms are inappropriate. Fourthly, the local authority's capacity to facilitate development is limited to assessing

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47 See fn 6

48 Act No 9 of 1989

49 Section 13

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proposals relative to approved spatial structure plans. This is problematical since the structure plans in terms of the PPA and LUPO do not exist so development occurs on an ad hoc basis. The only structure plan which does exist entrenches apartheid planning and does not permit appropriate development planning. Also, structure plans are limited mechanisms for planning since they concentrate on physical and spatial aspects and do not take a holistic approach to development.

All this legislation was created prior to 1994 to cater for a particular planning ideology. Recent legislation such as the Interim<sup>50</sup> and Final Constitutions,<sup>51</sup> the Local Government Transition Act<sup>52</sup> and the Development Facilitation Act<sup>53</sup>, forged in the light of the need to create a new order, to break down apartheid, to permit large scale development, to remedy the past injustices and to develop democratic and accountable government at "grassroots" level, have highlighted the inability of current planning legislation to carry out these directives. The next chapter will assess this recent legislation and extract principles which will be used to analyse the proposed Western Cape Planning and Development Bill<sup>54</sup> which has been drafted in an attempt to meet the new planning needs.

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50 Act No 200 of 1993 (referred to as the Interim Constitution)

51 Act 108 of 1996 (hereafter referred to as the Constitution or in some cases, the Final Constitution)

52 Act 209 of 1993. Hereafter referred to as the LGTA

53 Act 67 of 1995. Hereafter referred to as the DFA.

54 PN 450 dated 23 October 1996 published in Provincial Gazette Extraordinary No 5085 dated 24 October 1996. Hereafter referred to as the P & D Bill.

## RECENT LEGISLATION IMPACTING ON PLANNING LAW

### 1 Introduction

The Constitution has had a major impact in the planning field : It has radically altered the allocation of powers between levels of government as well as conferring a duty to provide democratic and accountable government<sup>55</sup>. The fundamental rights Chapter reinforces this democratic vision by conferring on individuals the right to administrative justice<sup>56</sup> which encompasses the right to participate in decision making and the right to reasoned decisions. There is also a right of access to information<sup>57</sup> and the relaxation of *locus standi* provisions<sup>58</sup>. The Local Government Transition Act (LGTA) and the recent amendments thereto commonly termed “bridging legislation”, is restructuring and transforming Local Government. It gives practical effect to the Constitutional allocation of powers by spreading powers and responsibilities between Metropolitan and Local levels of Local Government<sup>59</sup> and by directing the local sphere to create integrated development frameworks linked to financial budgets in order to plan when and where development will take place<sup>60</sup>. The Development Facilitation Act (DFA), central government legislation, is aimed at introducing extraordinary measures to facilitate and speed up the implementation of the RDP programmes by allowing for a system of fast-track land development and creating a set of principles

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55 See for example section 152(1) of the Constitution

56 Section 33 of the Constitution. However, in terms of section 23(2) of Schedule 6, section 33(1) and (2) is regarded to read as section 24 of the Interim Constitution until legislation envisaged in section 33(3) is enacted.

57 Section 32 of the Constitution provides for access to information. However, in terms of section 23(2) of Schedule 6, Section 32(1) is regarded to read as section 23 of the Interim Constitution until legislation envisaged in section 32(2) is enacted.

58 Section 38 of the Constitution

59 Section 106

60 Schedules 2 and 2A

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aimed at restructuring planning decisions<sup>61</sup>, which because they constitute essential national standards, apply throughout the Republic and must be incorporated into any local planning law<sup>62</sup>. Finally, there are policy documents such as the Reconstruction and Development Programme<sup>63</sup> and draft policy documents such as the Urban Development Strategy<sup>64</sup> which perceive Local Government as the crucial sphere of government for the delivery of services, for the promotion of local social and economic development and as the mechanism for fostering democratic participation and accountable government in the communities they serve. The policy documents will not be discussed.

## **2 Final Constitution**

The Final Constitution changes fundamentally and permanently the hierarchical relationship between levels of government and confers an unprecedented amount of autonomy on Local Government. The change in the structure of government is signalled in Chapter 3 which introduces the concept of "spheres" (as opposed to tiers) of government which are separate, distinctive, interdependent and interrelated<sup>65</sup>.

The principles of co-operative government which govern the relationship between the spheres enjoin them to respect each others Constitutional states, institutions, powers and functions<sup>66</sup>. No sphere may assume a function which has not been

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61 See preamble to the DFA

62 Section 44(2) of the Constitution

63 The Reconstruction and Development Programme : A Policy Framework : Johannesburg : African National Congress 1994

64 Urban Development Strategy of the Government of National Unity Notice No 1111 of 1995, published in Government Gazette No 16679 dated 3 November 1995

65 Section 40(1)

66 Section 41(1)(e)

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Constitutionally conferred<sup>67</sup>. When exercising their own powers and functions they may not intrude upon the geographical, functional or institutional integrity of another sphere<sup>68</sup>. They have a duty to co-operate with each other in a spirit of mutual trust and good faith<sup>69</sup> by *inter alia* assisting and supporting each other<sup>70</sup> and co-ordinating their actions and legislation<sup>71</sup>. This concept of co-operative government implies a partnership as opposed to the traditional subordinate relationship between levels of government, a commitment to jointly address problems and to facilitate consensus between the spheres<sup>72</sup>.

Local Government is no longer dependant on other levels of government for its existence and for powers to act. The idea of local government as a separate and independent sphere is reinforced by the fact that a municipality<sup>73</sup> is granted the right to govern the local affairs of its community on its own initiative<sup>74</sup>.

This right to govern falls neatly within the definition of autonomy. However, this autonomy is subject to National and Provincial legislation required in terms of the Constitution. It is these limitations which must be examined since the allocation of power and the ability to exercise such power determines the degree of autonomy.

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67 Section 41(1)(f)

68 Section 41(1)(g)

69 Section 41(1)(h)

70 Section 41(1)(h)(ii)

71 Section 41(1)(h)(iv)

72 De Villiers : "Federalism in South Africa : Implications for individual and minority protection" 1993 *South African Journal on Human Rights* 373

73 The term "local authority" and "municipality" will be used interchangeably

74 Section 151(3)

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The key to determining the allocation of specifically legislative powers is found in Schedules 4 & 5. Schedule 4 lists the areas of concurrent National and Provincial competence : Regional Planning and Development and Urban and Rural development are such examples. Schedule 5 sets out the areas of exclusive Provincial competence of which Provincial Planning is an example. Matters pertaining to local government are set out in Part B of Schedules 4 & 5. Municipal Planning falls into Part B of Schedule 4. The crucial phrase which restricts National and Provincial legislative powers in respect of local governance reads as follows:

“Functional areas of concurrent National and Provincial Legislative competence

. . . . The following local government matters to the extent set out in sections 155(6)(a) and (7).”<sup>75</sup>

Before discussing these provisions in detail, it is necessary to note that National and Provincial government do have powers to create municipalities. The Constitution sets out the categories of municipality<sup>76</sup>. National legislation may determine the different types of municipality which may be established within each category<sup>77</sup> and Provincial legislation must determine the types of municipalities to be established in the Provinces<sup>78</sup>.

Once municipalities are established, the Provincial level has to relinquish control and assume an indirect supportive role. Evidence of this “hands-off” role abounds in this

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75 See Part B of Schedule 4. Part B of Schedule 5 has the following preamble “.... the following local government matters to the extent set out for provinces in sections 155(6)(a) and (7)”.

76 Section 155(1)

77 Section 155(2)

78 Section 155(6)

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Chapter. A Province has the duty to provide legislative or other means to monitor and support local government<sup>79</sup>. This echoes the co-operative government principle which enjoins national and provincial governments to actively support and provide practical measures to strengthen the capacities of local government to manage their own affairs and exercise their powers and functions<sup>80</sup>. National and provincial governments also have a negative duty not to compromise or impede a municipality's ability to exercise its powers or perform its functions<sup>81</sup>. The Constitutional Court has perceived this supportive role as including powers to strengthen and in fact prevent a decline in local government structures<sup>82</sup>. This interpretation is borne out by the provisions of section 139 which has the unfortunate heading: "Provincial supervision of local government" and provides that if a municipality cannot fulfil one of its executive obligations, Provincial Government must intervene.

This supportive role is closely linked to Provincial powers to monitor Local Government. Chaskalson J, described the term "monitor" to : "observe" or "keep under review" and viewed it as the underlying power from which the Provincial power to support, promote and supervise local government emerges:

".... [I]t does not represent a substantial power in itself certainly not a power to control local government affairs but has reference to broader powers of supervision and control. .... We do not interpret the monitoring power as bestowing additional or residual powers of provincial intrusion on the domain of local government beyond perhaps the power to test at intervals local government compliance with national and provincial legislative directives or

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79 Section 155(6)(a)

80 Section 154

81 Section 151(4)

82 Certification of the Constitution of the Republic of South Africa CCT 23/96 paragraph 371

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with the new text itself. What the new text seeks hereby to realise is a structure for local government that on the one hand reveals a concern for the autonomy and integrity of local government, and on the other acknowledges the requirement that higher levels of government monitor local government functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands - on component of the relationship."<sup>83</sup>

It is respectfully submitted that Chaskalson J is correct in perceiving this as not granting other spheres of interference unless absolutely necessary. This is borne out by the provisions of section 155(7) which grants national and provincial government the power to regulate a municipality's executive authority but only in cases when it is not performing its functions effectively. Thus if a municipality is functioning correctly, neither sphere has the legislative or the executive power to interfere.

Municipalities are granted executive authority and the right to administer the local government matters listed in Parts B of Schedules 4 and 5<sup>84</sup> and any other matters assigned to it by national or provincial legislation<sup>85</sup>. National and Provincial spheres are obliged to assign matters within their competence which relate to municipal government if the matter can be administered more effectively at that level and the municipality has the requisite capacity. In accordance with the principles co-operative government, such assignments can only occur with the agreement of a municipality<sup>86</sup>. Legislative authority is vested in the Municipal Councils, not the Provincial level of Government<sup>87</sup>. The legislative power is to be exercised by making

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83 *Ibid.* Paragraphs 372 and 373

84 Section 156(1)(a)

85 Section 156(1)(b)

86 Section 156(4)

87 Section 43(c)

by-laws for the effective administration of these matters<sup>88</sup>. By-laws may not conflict with Provincial and National legislation except if that legislation intrudes on a municipality's ability to exercise its powers or perform its functions<sup>89</sup>. In this case it seems that the by-law would override another sphere's legislation. The Provincial Gazette must publish the by-laws on request of the Municipality<sup>90</sup>. By-laws no longer have to be approved by Province. It is submitted that the term "by-laws" now must be interpreted as laws made by a local government sphere just as laws are made by Provincial sphere and Acts are made by the National Government sphere.

Since local government can now legislate for all matters set out in Part B of Schedules 4 and 5, the autonomy conferred on municipalities is substantial. Thus in the context of municipal planning, national and provincial government only have the power to draft laws which will monitor, support, build capacity or regulate in the event of a municipality failing to function effectively. In all other circumstances, a municipality has legislative and executive power in respect of municipal planning.

However, it is not that easy to define the precise limits of municipal and provincial planning. There is much seepage from one category to another. A regional road system could have implications on municipal and provincial planning. Similarly, a large scale development, either residential or commercial, having a large social and economic impact on an area could form part of municipal and provincial planning.

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88 Section 156(2)

89 Section 156(3)

90 Section 162(2)

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Provincial government has argued that whatever is not Regional planning and development, urban and rural development or Provincial planning must be municipal planning<sup>91</sup>. A municipality therefore has to be satisfied with the “left overs”. I submit that one needs to take a more pro-active approach to determine what municipal planning is. Starting point would be reference to the principles of legal interpretation and the Constitution itself.

The literal rule of interpretation permits one to interpret the words of a statute in their ordinary literal meaning<sup>92</sup>. The shorter Oxford English Dictionary defines “municipal” as “pertaining to the local self government or corporate government of a city or town”. “Planning” is defined as “a formulated or organised method according to which something is to be done”<sup>93</sup>. Words of a statute must also be interpreted in their context<sup>94</sup>. When analysing the contextual meaning of the words, the circumstances existing at the time the Constitution was adopted are relevant<sup>95</sup>. At present this must include planning functions currently provided under delegated authority by municipalities such as enforcing the zoning scheme, adjudicating land use applications as well as drafting structure plans and other policy plans for approval by the Administrator. However, the limited delegated powers currently exercised by municipalities are a product of the hierarchial system of government. Municipalities had very little power and since the emphasis in planning was on regulation and control, municipalities tended to expend their energies in this direction.

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91 Anneke Müller, representing the Provincial sphere of Government at a workshop held between the Provincial sphere and local spheres on the draft Planning and Development Bill on 1997-02-27

92 Cockram: *Interpretation of Statutes* 3ed (1987) 36

93 Van Wyk (fn 2) 2

94 Cockram : (fn 92) 41

95 S v Makwanyane and Another 1995(6) BCLR 655 (CC) at 678G

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The Constitution has crystallised the functions of municipalities in the form of an objects clause<sup>96</sup> and has conferred developmental duties on it<sup>97</sup>. The objects clause obliges a municipality to promote social and economic development. In terms of its developmental duties, a municipality has *inter alia* to structure its administration budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community<sup>98</sup>. It must therefore be argued that the term “municipal planning” goes beyond the regulation of land use and must permit a municipality to develop its role as the sphere of government responsible for urban development. Any municipal planning legislation will have to ensure that it complies or at least is not in conflict with provincial planning documents. When drafting this legislation, a municipality will have to liaise with the Provincial sphere and both spheres will need to co-ordinate their legislation.

### **3 Democratic and accountable government**

Local government, due to its close relationship with the communities it serves, is perceived as the ideal vehicle for service delivery and for facilitating urban development and has been granted sufficient powers in terms of the Constitution to be able to achieve those aims. However, the decision as to where development and service delivery should take place is not left up to the municipality alone. The Constitution also sets the duty to provide democratic and accountable government for local communities<sup>99</sup> and to encourage the involvement of communities and community organisations in local government<sup>100</sup>. These key concepts of democratic

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96 Section 152

97 Section 153

98 Section 153(a)

99 Section 152(1)(a)

100 Section 152(1)(e)

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and accountable government need further analysis.

Democracy has traditionally meant universal franchise coupled with the opportunity to influence government by voting once every five years. Burns<sup>101</sup> argues that in more recent times, democracy has been equated with responsive government. Responsiveness is achieved through public participation and by having a system of administrative justice which includes administrative accountability and openness<sup>102</sup>. Participation in a decision taken by government means an opportunity to influence the decision maker and thus affect the outcome of a decision<sup>103</sup>. Administrative accountability means that a government must justify its decisions to its citizens<sup>104</sup>. Openness means that information about government decision making is quickly and easily obtained and that the proceedings are open to the public. This is the form of democracy which is envisaged in the Constitution.

The principles of participation, accountability and openness need to form part of any future legislation.

### 3.1 *Participation*

The duty to provide responsive government and by extension to allow participation by citizens is reinforced by provisions relating to Public Administration which state that "people's needs must be responded to and the public encouraged to participate in policy making"<sup>105</sup>. These duties are mirrored in the fundamental right of an

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101 Burns : "Administrative Justice" in *SA Public Law* Vol 9 1994 347

102 *Ibid.*

103 Mureinik "Reconsidering Review: Participation and Accountability" in *Acta Juridica* 1993, 36

104 *Ibid.*

105 Section 195(1)(e) of the Constitution

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individual to:

“procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened”<sup>106</sup>.

Constitutionally, this right is only available where rights or legitimate expectations are affected. This clause fits Mureinik’s<sup>107</sup> extended deprivation theory since it includes interests at stake which happen to resemble a legal right. It does not include the determination of rights despite the fact that the government’s power to determine an individual’s rights can have a decisive effect on his future.

The concept of procedurally fair administrative action was discussed recently in ***Van Huysteen v the Minister of Environmental Affairs and Tourism of the National Government***<sup>108</sup> Farlam J, declined to “read down” the concept of fair administrative action to mean merely a codification of the existing law:

“... even if section 24(b) is to be regarded as codifying the previous law on the point, a party entitled to procedural fairness under the paragraph is entitled in appropriate cases to more than just the application of the *audi alteram partem* and *nemo iudex in sua causa* rules. What he is entitled to is . . . . the principles and procedures . . . which, in [the] particular situation or circumstances, are right and just and fair.”<sup>109</sup>

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106 See fn 56

107 Mureinik (fn 103) 37

108 1996(1) SA 283(C)

109 *Ibid.* At 305 (Jutastat version, no paragraph references)

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He further stated that the Court is enjoined to:

“promote the values which underlie an open and democratic society based on freedom and equality and in interpreting any law and in the application and development of the common law to “have due regard to the spirit, purport and objects of [the] chapter”.<sup>110</sup>

Thus the section must be interpreted generously and in a manner suitable to give individuals the full measure of fundamental rights referred to. Legalistic and narrow interpretations must be avoided<sup>111</sup>.

Since planning decisions taken by government have a material effect on peoples' lives, it is necessary to determine what principles and procedures are right and just and fair in a planning context.

First, and as a pre-requisite to considering what procedures are required for participation, there needs to be an informed<sup>112</sup> and educated community. A community needs to be informed at an early enough stage of the creation of a policy to permit their values and ideas to be incorporated at the initial stages<sup>113</sup>, instead of the local authority creating the values on which the policy is based and then informing the community.

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110 *Ibid.*

111 *Ibid.*

112 Cowen : “Public participation in the planning process” 1980 Vol 13 *Planning and Building Developments* 13

113 Boden : “Public participation and the planning process” in 1979 *Planning and Building Developments*, 15

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But merely informing a community is not sufficient. A community must be able to react positively to that information and make a useful, constructive input. Participation requires a certain standard of education in order to understand the implications of policy statements of a structure plan or the contents of a plan<sup>114</sup>. In the context of the new South Africa, education takes on a different meaning. One may have an affluent, well educated vociferous group who oppose the concept of integration or perhaps densification since this is perceived to lead to the creation of slums. They may wish to adopt a "gatekeeper" approach in order to preserve the status quo. If this group is not able to subvert the process of participation, they are left with a bitter sense of frustration and hostility towards the local authority<sup>115</sup>. The next time they are invited to participate, they either refuse or adopt a truculent, obstructive attitude as they feel that the process is cosmetic.

The type of education required here is very different to the education required in a formerly disadvantaged area where the emphasis may be on service delivery and urban renewal. Here people may be uneducated or may have minimal education. Education will take place on two levels. First, building an understanding of what is being achieved. This may require setting out the constraints under which the plan is being created and reducing unrealistic expectations. Secondly, it will require capacity building to enable people to participate. This may mean a local authority funding civic groups or ratepayer organisations.

Public participation must not amount to airing emotional grievances. Without education, participation cannot be informed, relevant, objective and disciplined<sup>116</sup>. Without discipline, participation can be lengthy and time consuming and can slow

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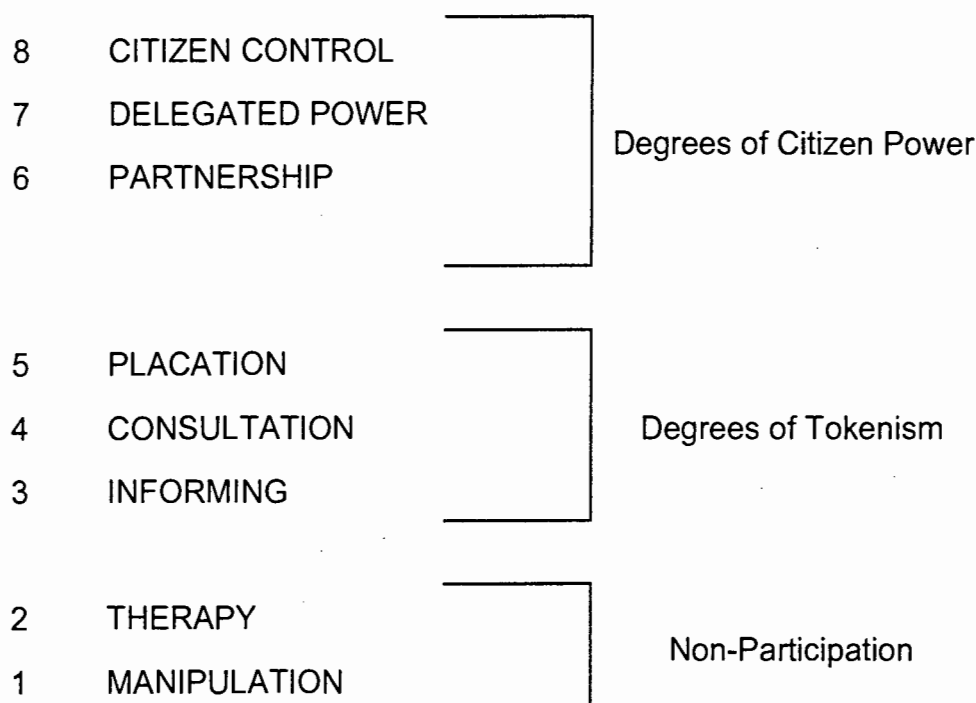
114 Faccio : "The development of planning controls in Britain and South Africa" *Planning and Building Developments* 1975 39.

115 McAuslan : *Land Law and Planning* 1979 109

116 Cowen : (fn 112) 13

down programmes aimed at development.

In determining what principles and procedures are right and just and fair, it is important to establish the degree of participation required. Arnstein<sup>117</sup> has organised citizen participation into an eight-rung ladder, with each rung corresponding to a degree of citizen power ranging from citizen control to non-participation:



The two lowest rungs do not constitute effective participation. Van Wyk states that: "Their real purpose is not to enable people to participate in planning but to enable those in power to "educate" or cure the participants. The technique is to inform the community of possible future actions and subsequently, to tacitly assume citizen

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117 Arnstein : "A ladder of citizen participation" 1969 *American Institute of Planners Journal* 216 as discussed in Burdzik : "The effect of public participation in land use planning on the concept of ownership in South Africa." Unpublished LLM dissertation, University of Witwatersrand 1987 18 - 19 and also discussed in Van Wyk : "ICPLA II, public participation in planning and the South African connection" in 1993 *SA Public Law* 206 - 207

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support because of lack of substantial opposition"<sup>118</sup>. The next three rungs are termed levels of tokenism. Citizens have the right to make a contribution but do not have the power to ensure that their contribution will influence the decision makers<sup>119</sup>. The parameters of their involvement are drawn by the decision makers<sup>120</sup>. Placation allows various groups to have an opportunity to participate, but the final right to decide remains with the decision makers. On the partnership rung, Kahn argues that: "citizens are able to enter into partnerships which permit them to negotiate and engage in trade-offs with the decision makers"<sup>121</sup>. This seems to imply a relationship of equality between citizens and the power holders. On the last two rungs, the citizens gain the majority of the decision making power<sup>122</sup>. The higher up the ladder that participation takes place, the closer to democratic decision making the citizen comes, since the citizen is capable of exerting more influence on the decision maker.

It is submitted that the Constitution and various policy documents clearly envisage participation in strategic planning aspects to take place at the "partnership" level. In the adjudication of land uses, participation should be at the level of placation. At present, formal participation in planning ranges from "therapy" to "placation" with occasional incursions into the "partnership" level.

Whilst a "partnership" level of participation is possible and desirable at local government level, the same degree of participation is not possible for other spheres of government because other spheres deal with broader, more technical policy issues which do not have an immediate impact on citizens. Policies set by the central government sphere would for example require a more consultative approach with

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118 Van Wyk: (fn 117) 207

119 Kahn : *Planning, process and participation* (1982) 13

120 Van Wyk (fn 117) 207

121 Kahn : (fn 119) 14

122 Kahn : (fn 119) 14; Van Wyk (fn 117) 207

input from professionals rather than individuals.

The method of inviting participation and the mechanisms for conveying citizen participation to the decision makers are vitally important. On the developmental or strategic planning side, conventional methods of inviting participation such as exhibitions and displays, public meetings, advertisements, leaflets and brochures serve merely to inform the public. They are not mechanisms for true participation.

Since participation programmes occur at two different levels namely future policy planning and land use adjudication, it is clear that different types of participation are necessary. Policy plans such as structure plans, are forms of legislation, and the community should participate in their creation. The notice and comment rule making process would be an appropriate mechanism of participation. A public authority is obliged to publish its proposed standards together with a reasoned explanation of their purpose along with an invitation to the Public to comment by a certain date. Comments are analysed by the authority which responds by adapting the proposed policy and then publishing the final document along with an explanation of its response to comments received<sup>123</sup>.

There are many cases which hold that the principle of affording a fair hearing does not apply to legislation<sup>124</sup>. The Van Huysteen judgment adopts a far wider approach to procedural fairness. It concentrates on the underlying duty of fairness rather than a categorising approach. Therefore there is no reason why procedural fairness of the

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123 Baxter : "Rule-making and policy formulation in the South African administrative law reform" in *Controlling Public Power*, 93; O'Regan : "Rules for rule making" in *Controlling Public Power* 113

124 See *South African Roads Board v Johannesburg City Council* 1991(4) SA 1AD at 12 E-G where Milne JA moved away from the categorising approach but still held that statutory powers which when exercised, affect equally members of public at large, the public authority must be guided solely by what it believes is best for the community and failure to give individuals affected a hearing does not violate any rule of Natural Justice.

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type mentioned above should not be extended to generic administrative decisions, or decisions which affect large numbers of people.

Greater use could be made of bodies such as Civic Associations and advisory bodies such as the Provincial Development Council<sup>125</sup>. Its functions are *inter alia* to coordinate, facilitate and initiate consensus amongst stakeholders on provincial, regional and local development planning, policy objectives and development strategies in the formulation of a policy plan known as an integrated development framework<sup>126</sup>.

The notice and comment procedure does have some disadvantages. It consumes large amounts of people resources. The process can be subverted in favour of the interests of those who are well funded and articulate. Therefore, to be affordable and accessible, the procedure must be informal and flexible but strict deadlines need to be adhered to in order to prevent the matter from proceeding indefinitely<sup>127</sup>.

On the control side, participation has traditionally been limited to written objections and comments by those whom the Town Clerk determines are adversely affected or have an interest the matter<sup>128</sup>. This is compliance with the minimum requirements of natural justice and adopts Mureinik's extended deprivation theory<sup>129</sup>. This limited and prescriptive form of participation assumes that (a) people have the ability to write and (b) have sufficient understanding of the application to formulate relevant objections. It is adversarial, relies on the local authority to adjudicate the matter and thus is participation at the "placation" level.

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125 Created in terms of the Provincial Development Council Law No 5 of 1996

126 *Ibid.* Section 4

127 Baxter (fn 123) 97

128 Sections 15(2), 17(2) and 24(2) of LUPO

129 Mureinik (fn 103) 36

The methods of informing people of their right to participate are limited to registered letters and publication in the press and Provincial Gazette<sup>130</sup>. In certain areas, registered letters are associated with final letters of demand for monies owing and therefore never collected. Ordinary citizens never read the Provincial Gazette and press notices are found at the back of newspapers. If a person does not subscribe to the newspaper or fails to see the relevant notice sandwiched amongst several others, then he or she loses their opportunity to participate. Legislation needs to be flexible enough to allow appropriate methods of informing people of their right to participate.

A procedure needs to be found which is sufficiently flexible to permit compliance with the underlying duty of fairness : to allow for the principles and procedures which are right and just and fair. Participation should range from "placation" to "partnership" level depending on the circumstances. For instance, if a large development is taking place in a neighbourhood, the citizens should be involved from the beginning of the project and be able to liaise on a "partnership" level.

Local authorities should be encouraged to look beyond traditional adversarial methods of participation. Mediation is a mechanism which allows a more equal form of participation and is flexible. It also reflects a culture of justification rather than authoritarianism. It is often perceived to give "greater party satisfaction, participation, flexibility, which in turn leads to a fairer result in the eyes of the parties and therefore the decision achieves greater legitimacy"<sup>131</sup>. Mediation itself may be problematic from an Administrative Law perspective. The power is granted to an administrative body, a political committee, to take decisions. One of the basic principles of Administrative Law is that nothing may preclude the exercise of this discretion and

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130 Section 2, definition of "advertise" in LUPO and Section 1 definition of "advertise" in PN 733/1989 dated 22 September 1989

131 Boule L : "ADR applications in administrative law" in *Controlling Public Power* 161

an administrative body may not abdicate its powers to another body<sup>132</sup>. Therefore, what is the status of an agreement on an application as reached by a mediator? During the mediation proceedings, the entire Committee will not be present. Council would probably be represented by officials who had received some form of mandate from the Committee. If the official goes beyond the mandate, the Committee does not have to be bound by the mediation agreement. This could lead to an unhappy result.

### 3.2 *Accountability*

The second pillar of participative democracy is a system of administrative justice that fosters accountability. It is a fundamental tenet of the Constitution that holders of power at National, Provincial or local government level must be accountable to those who are governed. This duty to account also indicates a move from a culture of authoritarian government to one of justification. Mechanisms of accountability can be judicial or non-judicial and no single method of control is sufficient to ensure accountability.

Active participation in decision making by those who are governed, particularly when complemented by the duty to give reasons for a decision, is a good form of accountability. Decision makers need to have good reason for not taking information obtained by participation into account.

Since the fundamental rights provisions refer to lawful administrative action and reasons for decisions and since these foster accountability, these will be discussed in more detail.

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### 3.2.1 Lawful Administrative Action

"Discretion arises when the effective limits on a decision makers power leave him free to chose between different courses of action"<sup>133</sup>. Discretion is often viewed with distrust since it is associated with unpredictability, arbitrariness, uncertainty and inconsistency<sup>134</sup>. The conferral of subjective discretion, signalled by phrases such as "if he is satisfied", has traditionally negated accountability by ousting the Court's jurisdiction. Whilst under the Constitution there would still be the duty to give reasons for a decision, the ability of a Court to enquire into subjective discretion would be hampered and there is a strong possibility that this would not constitute lawful administrative action.

Discretion, not necessarily the subjective kind, is necessary. Boule<sup>135</sup> states that discretion is a "necessary, normative ingredient of individualised justice ... It engenders creativity and development and legal flexibility".

In planning law, different types of discretion are required. On the development side, flexibility is required when creating strategic policy frameworks with the community. On the control side, the function of a decision maker is adjudicative so circumscribed discretion is sufficient. It is the degree of discretion which needs to be assessed.

One way of ensuring flexibility and also circumscribing discretion is to create empowering rather than prescriptive legislation. This entails creating a set of guidelines set out in legislation which act as a framework for what the policy plan must deal with and which are sufficiently flexible to meet all contingencies which may

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133 Boule : "Administrative justice and public participation" in American and South African Law" 1986 *TSAR* 138

134 *Ibid.*

135 *Ibid.* 139

arise. If the plan meets the guidelines then the plan must be approved by the decision maker. The legislation might also set out circumstances in which the plans may be rejected. If the decision maker rejects the policy plans, he must furnish reasons for this decision. This type of procedure reduces the degree of discretion which the decision maker has, but permits sufficient flexibility to accommodate the planning requirements of different communities.

On the control side, discretion is used in two different ways. Firstly, LUPO confers subjective discretion on the Town Clerk to decide who is adversely affected and thus to determine who participates in the decision making process<sup>136</sup>. There is only a Constitutional duty to give reasons if asked for. Whilst it is necessary to limit participation in order to prevent clogs on good government, the method of determining who participates, of determining peoples fundamental rights, should not be left to subjective discretion. It is very easy to convert a subjective discretion phrase such as "in his opinion" into an objectively determinable discretion by using phrases such as "has reasonable grounds to believe". This immediately creates more effective conditions of accountability.

Secondly, LUPO gives to a Council of a local authority circumscribed discretion to decide whether to grant or refuse an application made in terms of the Ordinance. The discretion is rigidly prescribed in that the application must be refused if a certain situation exists i.e. if the application is undesirable or if it adversely affects existing rights. If it passes this test, then the section outlines the only other criteria which may be taken into account; namely the safety and welfare of members of a community, the preservation of the natural and developed environment or the effect on existing rights<sup>137</sup>. In this case, discretion may be too rigidly prescribed, especially when there

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136 Section 15(2) and 24(2) of LUPO

137 Section 36

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are other criteria which should be taken into account such as the policy promulgated in terms of the Environmental Conservation Act<sup>138</sup> or the results of a public inquiry carried out in terms of the Environmental Conservation Act<sup>139</sup>.

### 3.2.2 Reasons for decisions

Section 24(c) of the Constitution confers a right on an individual to be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless reasons for such action have been made public.

The duty to give reasons forces a government to acknowledge a responsibility to justify its decision. This obliges a decision maker to consider in advance the specific factors relevant to their decisions and this in turn ensures that their decisions have better justification<sup>140</sup>.

Section 24(c) does not explicitly state whether reasons should be furnished as a matter of course or only on request. Baxter<sup>141</sup> is of the view that reasons should be furnished automatically since a good administrator would formulate his findings and reasons before deciding. This approach could lead to an unnecessary waste of time and money if reasons are furnished where none are required. De Ville<sup>142</sup> submits that reasons only need to be furnished on request but that the decision maker should be obliged to formulate reasons during the decision making process. I support this view.

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138 Section 2 and 3 of the Environmental Conservation Act No 73 of 1989

139 Section 15

140 Mureinik : (fn 103) 40

141 Baxter (fn 132) 232

142 De Ville : "A contribution to section 24 debate" Part of a research project of the Community Law Centre at the University of the Western Cape, 7

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De Ville<sup>143</sup> also points out that no distinction is made between different types of administrative action. This implies that reasons should be furnished for legislation created and gives credence to using a form of notice and comment when creating policy plans. As Mureinik states:

“even a rudimentary form of notice and comment would make legislative agencies immeasurably more responsive to their subjects than they are now and it would substantially improve their legislation because the discipline of responding to comments received would compel legislators to confront the deficiencies of their proposed enactments.”<sup>144</sup>

Is a decision-making body bound by the reasons provided under section 24(c) when being reviewed under section 24(d)? Mureinik<sup>145</sup> submits that the two paragraphs should not be read together and a body should be able to supplement its reasons to ensure that they are drafted meticulously enough to survive the rigours of judicial review. I concur with this view. Reasons formulated under section 24(c) are often hastily formulated by officials. The volume of requests for reasons is high. Reasons formulated in response to an application for judicial review are analysed by the Legal Office and by Advocates. It would be totally impractical and unfair to state that a body is limited to reasons set out in terms of section 24(c) when being reviewed under section 24(d).

At present, on the control side, officials are encouraged to jot down at the time the decision is taken, the reasons for making a particular decision instead of relying on memory. In an opposed matter, where a committee takes a decision, the reasons for

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143 *Ibid.* 9

144 Mureinik (fn 103) 38

145 Mureinik : “A bridge to where? : Introducing the Interim Bill of Rights” in 1994 10 *SAJHR*, 41-42

a decision are submerged in the text of a report to the Committee. The reasons are then snared by the Committee Secretariat during the debate on the matter. The Committee itself does not specifically vocalise its reasons for either accepting or rejecting a report.

General legislation is required to give guidance on how to implement the duty to give reasons for decision. Such legislation will need to cover areas such as time limits for requesting reasons, what actually constitutes a reason, the costs of providing reasons. Perhaps, like the Australian Administrative Decisions (JR) Act of 1977, legislation may require an official to furnish a statement in writing setting out the findings on a material question of fact, referring to the evidence and material on which the finding was based and giving reasons. It might also set out the circumstances in which reasons may be refused.

Until such legislation is promulgated, there is no reason why planning legislation cannot set out a requirement to give reasons for a decision and give guidelines as to the practical implementation of this.

### 3.3 *Openness*

The third pillar of a responsive government is openness. This value is reinforced by provisions conferring on public administrations the duty to foster transparency by providing the public with timely, accessible and accurate information<sup>146</sup>.

Access to information has been enshrined as a fundamental right. Section 23 permits every person “the right of access to information held by the State or any of its organs in any sphere of government in so far as this information is required for the

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exercise or protection of their rights"<sup>147</sup>. The right of access is limited to information held by the State and is subject to the limitations clause. The purpose of section 23 is to subordinate organs of State, including municipalities to a new regime of openness and fairness when dealing with the Public<sup>148</sup>. Section 23 has been held to be a necessary adjunct to an open democratic society committed to the principles of openness and accountability<sup>149</sup>.

Access to information fosters active participation since it enables citizens to obtain full information which allows them to "engage in a public contest of ideas and to offer alternatives to proposed official policies"<sup>150</sup>. It also facilitates accountability since "citizens have access to documents on which a decision is based as well as reasons for those decisions. Officials, knowing that the public has a right to this information, make more of an effort to make justified decisions"<sup>151</sup>.

It is clear that legislation such as the draft Open Democracy Bill is required to give practical expression to this right. This legislation will also need to clarify what "information" is. Overseas, records usually embrace papers, plans, maps, documents, photographs, films, audio-tapes, radio-tapes<sup>152</sup>.

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147 See fn 57

148 Van Niekerk v City Council of Pretoria 1997(1) All SA 305 (T) at 315 B-C.

149 Qozoleni v Minister of Law and Order and Another 1994(3) SA 625(E) at 642 E -F

150 Johannessen, Klaaren and White : "A motivation for legislation on access to information" in *South African Law Journal* VI 112, February 47

151 *Ibid.* 48

152 Hazell : "Freedom of Information in Australia, Canada and New Zealand" in *Public Administration* Vol 67 Summer 1989 194

How do the values of transparency and access to information impact on planning law? When holding Committee meetings on land use matters, transparency will mean that such meetings must be open to the public unless it is reasonable to close them<sup>153</sup>. This will impact on the amount of matters which are confidential and are placed on “green “ and “deep green” paper.

The type of information released needs to be clarified. Do informal discussions - not minuted - which contribute to a decision constitute information? Does “information” include an explanation of plans, documents? One aspect is clear : all “ hidden” manuals<sup>154</sup> such as the manual for applications in terms of LUPO<sup>155</sup> and policies will need to be made more freely available.

Access to information plays a vital role in planning matters. Access to information is usually requested in the following circumstances:

- (1) an objector to an application for rezoning wishes to see the plan or motivation for the application or to obtain a copy of the policy plan for the area so that he may make an informed decision;
- (2) people think the procedure was flawed or unfair and wish to have access to the file to check the procedure followed prior to launching a review application.

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153 Section 160(7) of the Constitution

154 Hazell (fn 150) 204

155 Published by the Directorate of Planning, Province of the Western Cape

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A few of the practical problems experienced in dealing with access to information are listed below.

- (1) Applicants confuse requesting reasons for decisions and requesting access to information.
- (2) A request for access to information evolves into a trial by correspondence. For example : Access to a file relating to a rezoning application is requested. Information is provided. Further written questions will follow, often inviting debate on questions of law or even querying an official's qualifications. In my opinion, this does not fall under an access to information request.
- (3) Confusion results from a vague understanding of what rights and interests are protected. A person who is conducting a panel-beating spray painting business in a single dwelling residential use zone, will be reported by a neighbour and he is requested to apply for a consent use. He is also prosecuted for contravening the zoning scheme. He will demand to know the name of the complainant so that he can "sort the matter out".
- (4) Further problems occur when the local authority has to balance rights. For example the right of privacy<sup>156</sup> against the right of access to information. Building plans submitted for approval are subject to the Copyright Act<sup>157</sup>. Often, before a plan be approved, it will require a departure. Once the plan and departure have been approved, a person who was not given the opportunity to object or comment, will request access to the file and plan.

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156 Section 14 of the Constitution

157 Act No 98 of 1978. Section 2 of the Copyright Act *inter alia* provides that "artistic works" are eligible for copyright. The phrase "artistic work" is defined in section 1 as meaning *inter alia* "paintings, sculptures, **drawings**, engravings. "Drawing" is defined as "any drawing of a technical nature or any diagram, map, chart or plan".

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Access to copies of the plans would breach the Copyright Act, unless the owner of the plans gives written consent. Viewing access may breach an owner's right to privacy.

It would be useful to follow the example set in Canada. The protection of copyright is governed by federal legislation known as the Copyright Act. This act specifically exempts the release copyrighted material if such is requested under access to information. Recipients of the copyrighted materials are still subject to the Copyright Act. This provision is repeated in provincial legislation governing access to information and privacy which is called is the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)<sup>158</sup>. Council officials stamp the words "copyright applies to use and reproduction" and advise recipients in writing that the plan is subject to the provisions of the Copyright Act . Where there are security concerns (for example a request for plans to a jail or foreign consulate) then such plans are not released<sup>159</sup>.

Any new planning legislation should take account of these concerns. Access to information entails a fundamental change in mind set. It has lead to a total re-examination of procedures and an attempt to inculcate a method of thinking that reasons : "Why should information not be released" instead of "why should it be released".

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158 The copy provided to the writer has no number or year. It is merely preceded by the words "Chapter M.56"

159 Information provided by letter from Jane Speakman, Legal Department, City Hall, Toronto

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## **The Local Government Transition Act No 209 of 1993 (LGTA)**

This Act deals with the transformation of local government. The recent amendments<sup>160</sup> commonly known as “bridging legislation” are the key to the powers of local government as these sections re-inforce, build on and give practical effect to the Constitutional allocation of powers. For the purposes of the Cape, Local Government consists of a Metropolitan Council (CMC) and Metropolitan Local Councils (Substructures). Schedule 2 sets out the powers and functions of a CMC and Schedule 2A, the powers and functions of the substructures. The Act permits the re-allocation of the powers and duties listed in the schedules by agreement<sup>161</sup>. However, powers may not be allocated or delegated unless a substructure is also given sufficient resources to exercise the powers and it is practical to exercise the powers at that level<sup>162</sup>.

The CMC has a duty to promote integrated economic development, to redistribute municipal resources and to deliver services on an equitable basis<sup>163</sup>. The mechanism for achieving this is an integrated development plan. This, as its name indicates, is a plan aimed at integrated development and management of an area which is compiled in accordance with the general principles contained in Chapter 1 of the DFA and where necessary, in accordance with any land development objectives which have been set<sup>164</sup>. There are two levels of plans. The first plan is formulated by the CMC. It must take into account the development needs and priorities as set by Substructures and will deal with land use, transport, infrastructure planning and

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160 The insertion of Part VI A and amendments to Schedules 2 & 2A of the LGTA promulgated in terms of section 5 of Act 97 of 1996.

161 Section 10C (4) of the LGTA

162 Section 10 C(2)(b)(i) and (ii)

163 Section 10 C(1)(a), (b) & (c)

164 Section 10B

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methods of promoting integrated economic development<sup>165</sup>. The second plan is formulated by the Substructure. It deals with the same issues as the CMC plan but on a local level<sup>166</sup>. The creation of both these plans must be done using the principles of co-operative government.

The Act is unique in that it compels municipalities to prepare their financial budgets to meet the objectives set out in the integrated development plans<sup>167</sup>. Municipalities are also given a clear directive to restructure the budgeting, administration and planning processes in order to prioritise the basic needs of their communities and to promote social and economic development<sup>168</sup>. This provision repeats the developmental duties set out in the Constitution<sup>169</sup>. The plans also provide the criteria to measure the performance of municipalities<sup>170</sup>. This also fosters participation by the community and accountability since a municipality must report to a community on a yearly basis and receive comments from the community relating to the objectives set out in the integrated development plans<sup>171</sup>.

These plans are important since they translate the ideas and hopes of a community into the type of development that a local authority has the resources to provide.

Whilst these plans cover a much wider ambit than structure plans, any strategic policy plans created in terms of land use planning legislation must take these plans into account and complement them. Legislation must take into account the allocation of

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165 Schedule 2, Section 3

166 Schedule 2A, Section 2

167 Section 10G(1)(c)

168 Section 10G(1)(d)

169 Section 153 of the Constitution

170 Section 10G(1)(f)

171 Section 10 G(1)(g)

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powers between the CMC and Substructure level.

### **The Development Facilitation Act (DFA)**

The DFA is legislation created by central government to urgently address land delivery needs by introducing “extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land”<sup>172</sup>. The Act focuses on fast-track, multi-sectoral planning and development and is designed to run in parallel with existing legislation.

There are five areas of innovation:

1. Chapter One provides general, broad principles which impact on the administration of any physical plan, guide plan, zoning scheme, guide the exercise of decision making powers exercised by tribunals under the DFA and by political bodies in terms of any other law relating to land development. They serve as a framework for the Development and Planning Commission and for the formulation and implementation of land development objectives<sup>173</sup>.

The principles themselves deal with planning aspects such as restructuring the spatial environment (by discouraging urban sprawl, encouraging integration of the cities, locating residential and work opportunities in close proximity)<sup>174</sup>. They acknowledge the importance of the environment by encouraging environmentally sustainable land development practices<sup>175</sup>. They encourage

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172 Preamble to the DFA

173 Section 2(b), (c) and (d)

174 Section 3(1)(c)

175 Section 3(1)(c)(viii)

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participation by fostering community participation in the process of land development<sup>176</sup>. They encourage open government and access to information by making information about legislation and the people who administer it easily obtainable<sup>177</sup>. They set standards for laws, procedures, and administrative practice; these should be clear and readily available, must provide guidance as well as regulation, must provide legitimacy and give further content of the fundamental rights set out in the Constitution<sup>178</sup>.

The principles are unique in that they permit an enabling and flexible approach to decision making. Instead of relating only to the physical and spatial environment, they adopt an integrated holistic approach to planning.

The reason that they are able to have such a pervasive influence on decision making by all spheres of government is because they constitute essential norms and standards. This enables National Government to pass legislation falling within a functional area listed in schedule 5<sup>179</sup>.

2. The DFA creates an advisory body known as the Development and Planning Commission<sup>180</sup> consisting of government, non-government organisations and members of the private sector who are directly involved in land development. It will give advice to all spheres of government and will participate in setting the values and principles for laws and policies at the conceptual stage. This enables indirect participation of communities in the creation of laws.

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176 Section 3(1)(d)

177 Section 3(1)(f)

178 Section 3(1)(g)

179 Section 44(2)(c) of the Constitution

180 Chapter II

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3. The DFA creates Development Tribunals as decision making bodies for land development applications brought in terms of the DFA<sup>181</sup>. The tribunals consist of technical experts including officials from Provincial or local government as well as experts in *inter alia* planning, environmental management and law<sup>182</sup>. The tribunals use a fast track procedure by holding hearings at which all interested and affected parties have an opportunity to participate instead of utilising the traditional method of inviting objections and comments in writing. They have tremendous power since they may cut across various time consuming procedures applying in different racial zones, may waive technical aspects which restrict development such as restrictive conditions, servitudes and laws and may override structure plans if they are overly restrictive<sup>183</sup>. They have powers to subpoena and to take evidence on oath<sup>184</sup> and to refer a matter to mediation<sup>185</sup>. Accountability is created since the land development applications must comply with the land development objectives set by the local authority. Until land development objectives are formulated, the Tribunals will use the Chapter 1 principles to guide decision making<sup>186</sup>.
4. The DFA introduces the concept of Land Development Objectives (LDO's)<sup>187</sup>. These objectives reflect the new approach to planning since they clearly envisage a local authority as being responsible for development. They foster transparency, accountability and participation. These objectives set a series

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181 Chapter III

182 Section 4(2)(b)

183 Section 33 and 34

184 Section 18

185 Section 22

186 Section 29

187 Chapter IV

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of goals as a method by which a local authority can achieve the aim of land development. These include setting objectives; for the standard of services for land development; relating to urban and rural growth with specific reference to integration of areas, sustainable utilisation, transportation, provision of bulk services, the type of density, and land use control and; creating development strategies and quantifying the degree of development which a local authority can afford<sup>188</sup>. These objectives must be created in participation with the community<sup>189</sup>. Accountability is enhanced since the Member of the Executive Council is obliged to approve the LDO's if they comply with the section<sup>190</sup>. These LDO's fulfill a similar function to structure plans in that they provide a binding framework for development. The Tribunals are obliged to take them into account<sup>191</sup>. They will override any inconsistent structure plan created in terms of the PPA<sup>192</sup>.

Finally, they set out objective criteria against which performance by a local authority can be measured<sup>193</sup>. This obliges a local authority to perform effectively and creates conditions for transparency and accountability.

5. The DFA introduces the concept of initial ownership<sup>194</sup>. Once a land development application is approved by the tribunals, the applicant may apply for the registration of a form of title known as initial ownership in the Deeds

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188 Section 28

189 Section 27(4)(a)

190 Section 27(1)

191 Section 29(1)

192 Section 29(2)

193 Mike Parker, Principle Planner, City of Cape Town

194 Section 62

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Office<sup>195</sup>. There are 2 pre-requisites; first, a professional land surveyor must certify that beacons have been placed in accordance with the layout plan of subdivision and this plan will be approved; secondly, a conveyancer must certify that there is no substantial risk that the transfer of the actual erven will not take place<sup>196</sup>. The right entitles the holder to occupation and use of the erf as if he or she were owner, the right to acquire ownership at a future date, the right to mortgage the initial ownership immediately and the right to sell initial ownership but not the land<sup>197</sup>. Once the erf which is the object of initial ownership becomes registerable, initial ownership may be converted into full ownership<sup>198</sup>. The concept facilitates earlier access to loans and state subsidies and earlier delivery of housing.

The Act is not perfect. First, the principles are vague, complex and lack conciseness. As legislative principles, they need to be direct enough for people who comprise the political decision makers and whose knowledge of town planning is slight, to be guided by them. At the same time, they need to be flexible enough to meet all contingencies. Secondly, sections 3 and 4 are confusing since they both deal with general principles for decision making.

Thirdly, tribunals are not elected and the question of their accountability has been raised. Theoretically, the LDOs set the framework for their decisions. However, until the LDOs are created, only the Chapter One principles apply. Tribunals may ignore all planning which is already in existence. This permits ad hoc planning decisions.

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195 Section 61

196 Section 61(4)

197 Section 62(4)

198 Section 62(7)

A further danger is that if no LDO's are in place and the tribunals fail to consult adequately with the local authority, they may approve a development which requires massive upgrading of the existing services. The local authority may not have the resources to cope with this. The tribunal system infrastructure is also very expensive to set up and maintain<sup>199</sup>.

Fourthly, this legislation runs parallel to existing legislation. There are fears that it will cause confusion as well as extra administrative costs.

Fifthly, participation is acknowledged to be time consuming. The emphasis in the DFA is on "fast track" land development. Procedures for participation are not set out in any detail and there is the danger that participation will be sacrificed at the altar of delivery.

Sixthly, the development problems differ from province to province. Certain people are of the opinion that legislation drafted to meet this need should "be of their own customised design; with different or additional underpinnings to recognise special political circumstances and demography in the form of traditional political structures and land tenure systems as well as other local conditions"<sup>200</sup>.

Finally, the Act has not been enthusiastically embraced by all sectors of the population. A recent report in the Financial Mail indicates a growing wariness towards the aims of the DFA:

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199 See page 40 infra for the concerns raised by the Provincial Administration of the Western Cape

200 Miller (MEC for Kwazulu Natal) : "Peter Miller examines the effect of the DFA". in *Housing South Africa*, March 1996 8.

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The DFA and RDP policies are “devices which in the name of equity and entitlement, plan to turn leafy suburbs like Atholl into the mess of Soweto instead of the other way round ... It is not the swingeing increases in property taxes alone that has stirred ratepayers into rebellion, but something much more fundamental. It’s that the ... town planning policies ... have summarily been changed. Johannesburg’s substructures have jettisoned what they call the “apartheid planning” of the past ... and are now drawing up new parameters for metropolitan planning that are aimed at soaking the rich ... The fact is that plans once carefully negotiated with householders are being thrown out so that ... what are considered to be elite suburbs are (by greater densification) to be turned into areas the income mix of which satisfies the political prejudices and entitlement aspirations of the new councillors ... If communities that make up the individual substructures want this new process of democratisation to reflect their interests too, they need to become involved in a planning process that’s now proactive (or authoritarian) and places those who have to react to it at a disadvantage.”<sup>201</sup>

Despite the obvious benefits of the DFA, the Provincial Administration for the Western Cape flexed its newly found Constitutional muscles on 30 August 1995 and resolved not to implement the DFA<sup>202</sup>. Reasons given were that planning was a provincial competence (under the provisions of the Interim Constitution) and the Act did not fulfil the needs of the Western Cape as:

- “1. There are already three sets of legislation governing planning in the Western Cape. A further act, running in tandem with existing legislation would add administrative costs, cause confusion and delay rather than

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201 Author unknown : “Authoritarianism Rules the Waves” in *Financial Mail*, 30 August 1996 24

202 Province of the Western Cape, Circular No C/28/1995 dated 30 October 1995

accelerate development. The province needed to rationalise existing legislation, not create more.

2. The costs of creating and maintaining the tribunal system, which is integral to the decision-making process in the DFA, would amount to approximately R2,5 million and this money could be better used for development projects.
3. The decision making process done by a nominated technical tribunal rather than democratically elected political representatives was undesirable.”

It was decided to draft a Provincial Law which would: rationalise duplicating legislation such as LUPO, the Less Formal Townships Establishment Act, the Removal of Restrictions Act and Regulations promulgated in terms of the BCDA and at the same time establish a more development orientated approach to planning. This is to be done in two phases. During the first phase urgent amendments are to be made to LUPO. The second phase will consist of drafting a completely new law.

The draft Planning and Development Bill, which is the culmination of the first phase was published for comment on 23 October 1996<sup>203</sup>. The following chapter will analyse the Bill according to certain specified criteria.

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203 Provincial Notice No 450 dated 23 October 1996 published in Provincial Gazette Extraordinary No 5085 dated 24 October 1996

## **AN ANALYSIS OF THE DRAFT PLANNING AND DEVELOPMENT BILL**

Listed below are principles extracted from the legislation discussed in the previous chapter which will need to guide the drafting of the Planning and Development Bill.

1. Legislation must take into account the Constitutional empowerment of the local government sphere.
2. Legislation must take into account the principles of democratic and accountable government. This will entail:
  - 2.1 making suitable provision for active participation by communities to enable them to feel involved in the policies and plans produced; and
  - 2.2 providing suitable procedures for holding local government accountable as well as;
  - 2.3 fostering the principles of openness, transparency and access to information which in turn will facilitate participation and accountability.
3. Legislation must be development orientated. First, legislation must include a procedure to enable a local authority to carry out "fast track" development. Secondly, any strategic plans created must complement the integrated development plan created in terms of the LGTA. Thirdly, it must either adopt the general principles of decision making as set out in chapter one of the DFA or create compatible principles.

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## THE ANALYSIS

### **1. *Compliance with the Constitutional allocation of powers to the local government sphere.***

The entire Bill is tainted with the failure by the Provincial sphere of government to get to grips with the philosophy contained in the Constitution. Power and control remain vested in Provincial government. The Bill does this in three ways. First, it retains the power to determine the principles and policies for planning in a municipal area and is able to control when and where “fast track” development takes place; secondly, it uses the power of delegation through structure plans, development frameworks, scheme regulations and a delegations clause to control the amount of power which a local authority has in respect of municipal planning; and thirdly it legislates for a right of appeal to the Provincial government from a local authority decision. By doing so, the provincial sphere violates the autonomy of local government as well as the principles of co-operative government set out in sections 41(1)(f) and (h)(iii) and (iv), sections 151(4) and 154(1) of the Constitution and ignores its duties to support and to strengthen the capacity of local government to manage its own affairs.

The structure plans and development frameworks (policy plans) grant the Provincial sphere the power to set the parameters for future development. The procedure is exactly the same as in LUPO. A local authority (either Metro or local level) either requires the consent of or must be directed by the Responsible Member<sup>204</sup> to create a policy plan<sup>205</sup>. The manner of preparation, and the method of citizen participation

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204 Section 2 of LUPO defines the Responsible Member as the member of the Executive Council of the province of the Western Cape responsible for planning and related matters or any other member designated by the Premier to carry out a specific function.

205 Section 4(1)

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are determined by the Provincial sphere<sup>206</sup>. The plans are also finally approved by the Provincial sphere<sup>207</sup>. A local authority only has the power to create and approve specific development frameworks<sup>208</sup>. Since all of these policy plans are created for land within the area of jurisdiction of a local authority and since these plans are an integral part of municipal planning, the decision making power relating to all aspects of the policy plans should lie with local government. There is no need to provide for delegations in either of the plans. At most, these plans should be submitted to the provincial sphere for comment to ensure that they are consistent with Provincial frameworks. This would also be in accordance with the principles of co-operative government. As presently set out, they undermine and intrude on the powers of local government as they rely heavily on the concept of local government being the subordinate tier of government.

The same problem occurs when dealing with the provisions relating to the drafting of Scheme Regulations for zoning schemes. The Provincial sphere may authorise a council to grant applications for departures, consent uses, the removal of restrictions and subdivisions<sup>209</sup>. The power to determine what uses will be permitted and the degree of utilisation of land in a particular area is the very essence of municipal planning. A local authority should be able to make its own decisions on land use changes. The scheme regulations also permit the Provincial sphere to *inter alia* determine primary and consent land uses for a zone, to control the aesthetic aspects of an area, to detail measures for the protection of the environment and the protection of various architectural and historical areas of interest<sup>210</sup>. Again all these areas fall within the ambit of municipal planning.

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206 Section 4(4) and (5)

207 Section 4(6)

208 Section 4(10)(a)(iii)

209 Section 9(3)(a)

210 Section 9(3)(b) - (k)

The Responsible Member also has the power to make regulations aimed at achieving any objective set out in the development frameworks and structure plans<sup>211</sup>. Apart from subsections (a) and (d), which state respectively that measures may require development frameworks to be consistent with one another and measures may be binding on the State, these provisions give the Responsible Member the power to interfere with local government autonomy by prescribing *inter alia* the methods of participation, preparation and the implementation of policy plans.

In addition to being able to create policy documents, the Responsible Member also has the power to determine how a specific development framework or structure plan created and approved by a local authority is to be implemented<sup>212</sup>. This gives the Responsible Member the power to intervene in local government affairs by determining priorities and development programmes<sup>213</sup>.

The provisions relating to accelerated development permit the Responsible Member to intervene in and undermine the responsibility that local government has for development. The Responsible Member alone has the power to designate an area for accelerated development<sup>214</sup>. Fast track development is entirely at his discretion. This will be discussed in more detail below<sup>215</sup>. Similarly, decisions as to whether restrictive title deeds and servitudes should be uplifted or planning legislation overridden lies with the Responsible Member<sup>216</sup>.

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211 Section 5(6)

212 Section 5(4)

213 Mike Parker, Principle Planner, City of Cape Town, representations made by the City of Cape Town to Province in response to the P & D Bill

214 Sections 33 and 35

215 See *infra* page 69

216 Section 36 as read with section 48

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The Responsible Member retains the right to hear an appeal by an affected party from a decision taken by a local authority<sup>217</sup>. This right, which exists in LUPO<sup>218</sup>, appears to be based on the old hierarchical concept which permitted a higher level of government to re-examine the decision of a subordinate level by means of a legislated internal appeal. This constitutes a great inroad on a municipality's autonomy especially since the decision by the Responsible Member is deemed to be a decision made by the municipality<sup>219</sup>. In terms of LUPO, in circumstances where the Administrator did not delegate powers to a municipality, there is no appeal against his decision to Central Government.

In municipal circles, it is held that the hearing of an appeal is not part of the monitoring or supportive role that the Provincial sphere should adopt since it constitutes direct interference in a municipality's affairs. This view is contested by Provincial officials. They perceive the term "monitor" as permitting provincial government to check the decisions of a local authority.

The right of appeal however, is an invaluable safeguard. As Baxter states : "It provides an aggrieved individual with an assurance that the decision will be reconsidered by a second decision maker. The appellate body is able to exercise a calmer, more objective and reflective judgment"<sup>220</sup>.

It may be possible to have a technical body to act as an appeal tribunal. Examples such as the town planning appeal board already exist in Kwa-Zulu Natal. The traditional arguments raised against this is the fact that a decision of a political body,

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217 Section 64

218 Section 44 of LUPO

219 Section 64(3)(c)

220 Baxter (fn 132) 255

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which may have a large policy aspect to it, will be re-examined by a nominated, technical body.

## 2.1 *Participation*

The Bill relies on various methods of participation depending on whether broad strategic planning or local level adjudicative decisions are being made.

Certain of the general principles guide the participation process. Examples of this are: "members of communities affected by planning and development should be actively involved in the planning and development process"<sup>221</sup>. Other principles expand the traditional participative process by suggesting that if desirable, disputes should be referred to mediation<sup>222</sup> or "before any important decision is taken, ... a public enquiry should be conducted if practicable"<sup>223</sup>.

The participative value of these principles will be discussed below. At the level of principles, they are vague and loosely formulated and need to be crisply defined. For example, how does one determine if a decision is "important"? Even the smallest departure application is important to the surrounding neighbours. What does "should" mean? It seems to indicate discretion. What does "if practicable" mean? In the *Saldahna Steele*<sup>224</sup> case, the court held that the rezoning application to be heard by Province could not be heard until the Board of Inquiry set up in terms of the Environmental Conservation Act had completed its inquiry. It is easy to decide that it was practical to hold the public inquiry here. But what if the proposal had been for

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221 Schedule IV of the D & P Bill

222 *Ibid.*

223 *Ibid.*

224 *Van Huysteen's case* (fn 108)

a housing development and a smaller industry in an environmentally sensitive area, and the housing development was part of the “fast track” delivery programme. How does one determine “practicable” in these circumstances? The vagueness of the principles means that their effect on decision making is weakened.

The participative mechanisms for the creation of Structure Plans and Development Frameworks (Policy Plans) are disappointing. The method of participation remains almost identical to LUPO since it grants the decision maker the discretion to determine the nature and degree of participation : “the manner and stages in which the Plans are to be made known and the involvement and right of inspection and the making of representations of all interested parties”<sup>225</sup>.

This method of participation can be perceived as flexible in that it permits the Responsible Member to structure the form of participation to suit the needs of the community. Therefore, if the community is given the opportunity to participate in setting the values, principles and parameters of the policies, and to further participate at certain defined stages, and the community has the capacity to do this, then it may work well as a system of participation fostering responsive government. On the other hand, the system is open to abuse. Province could set the parameters of the policy without input from the community, could permit limited participation by merely advertising in newspapers and allowing the application to lie open for inspection at an inconvenient, inaccessible place. Participation under these circumstances is pointless.

It is submitted that the notice-and-comment procedure<sup>226</sup> would be a more appropriate form of participation and would have the added benefit of making the

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225 Section 4(4). See also section 4(5)

226 Supra pages 28

Provincial level immeasurably more accountable than the present system.

The method of participation in the Accelerated Development process also gives cause for concern. Whilst it is recognised that “fast track” development is urgently required and that participation can slow down the delivery process, the legislation should still attempt to achieve a balance between the two. The mechanisms for participation appear perfunctory, pay scant regard to the general principles relating to participation and may not be a reasonable limitation on the right to administrative justice.

Participation is invited through notices published in the Provincial Gazette and in one case, publication occurs in the prescribed manner<sup>227</sup>. The definition of “notice” specifies when and where an application is available for inspection and to whom objections can be lodged<sup>228</sup>.

This<sup>1</sup> constitutes minimum compliance with the *audi alteram partem* principle. Publishing notices in a Provincial Gazette does not foster active participation. Gazettes are notoriously difficult to obtain. Even if a person knows where to obtain Gazettes, unless he or she has prior knowledge that the notice will be published on a particular date, he or she will still not receive notice. The method of allowing written objections and for the application to lie open for inspection indicates a lack of willingness to allow full participation by people affected by this application. This form of participation does nothing to build capacity of people to actively participate and does nothing to make participation system user friendly. It is difficult to see how this complies with the general principle that “a community ... must be actively involved in

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227 Sections 33(1) and (3) and 35(1)

228 Section 68(1)(b)

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the planning and development process<sup>229</sup>. It is also difficult to see how this complies with Farlam J's injunction that people are entitled to the principles and procedures which are right and just and fair in the circumstances.

On the control side, the Bill maintains the prescriptive mechanism of inviting written objections and comments to an application as a minimum standard for participation. Again the Chief Executive Officer has the power to determine who participates and the degree of participation<sup>230</sup>. The Bill recognises that there are circumstances where this procedure might not be "right and just and fair" and therefore permits further participation through mediation and in some cases, public inquiries.

Section 65 permits a dispute to be referred to mediation and for a mediator to prepare a report to the parties to the dispute regarding the outcome of mediation. It represents a move away from an adjudicative, adversarial method of participation on the "placation"/"consultation" level, towards a more flexible, consensual method of participation on the "partnership" level which is more in line with the ideals of participative democracy.

The concerns about mediation have already been raised<sup>231</sup>.

The provision for a public inquiry before any decision is made if it is practicable to do so<sup>232</sup> dove-tails neatly into Farlam's exposition of this situation:

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229 Schedule IV

230 Sections 15(2), 17(2) and 24(2)

231 Supra pages 30 & 31

232 Schedule IV

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“I am not saying that in every opposed rezoning application, a public hearing must be held .... What I am saying is that: in the special circumstances of this case where such an enquiry is going to be held and the whole matter thoroughly gone into by a board which will enjoy substantial advantages over those engaged in a departmental investigation, then there will be procedural unfairness if the departmental investigation is not held in abeyance until the board has finalised its investigation”.<sup>233</sup>

It is assumed that the form of “public inquiry” as set out in the Bill, goes beyond the inquiries that the planning board has the power to carry out<sup>234</sup> and would include inquiries set up by any other bodies. This provision not only implies a willingness to adapt procedures to meet the circumstances in accordance with underlying principles of fairness but also recognises the principles of co-operative government.

Informal, non-statutory participation has been encouraged by local authorities for a long time. For example, if a developer wishes to create a high density development of 50 units on a fairly small erf in a single dwelling residential area, he will show the proposed development to the community, who will often request changes such as a decrease in density or height restrictions. These concerns may be imposed as conditions of rezoning. In return for these concessions, the community will not oppose the rezoning application. At this level, the community negotiates on an equal footing with the developer embarking in “trade-offs” and participation is often on the “partnership” level. The local authority does not interfere with this process and will approve the rezoning provided it complies with the structure plan and sound principles of town planning.

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233 Van Huysteen’s case (fn 108) at 307-308

234 Section 52

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Because of the prescriptive nature of the participation process in this legislation, it is impossible to set this form of participation into the D & P Bill. Perhaps the solution is to make the legislation far less prescriptive and merely enabling so that it is able to adapt the participative process to include the “partnership” level participation, mediation or Public inquiries depending on the individual circumstances of a matter.

Indirect citizen participation is fostered through the Planning Board. The Responsible Member appoints members who have knowledge and experience in planning matters. However, the nomination of the candidates is subject to a public participation process<sup>235</sup>. This Board has the power to *inter alia* make recommendations on development frameworks or structure plans when objections are received, on any application brought in terms of the Bill, and on any appeal. The Board also has the power to conduct enquiries and may furnish recommendations regarding the implementation of the Bill<sup>236</sup>. This is an additional safeguard for the participation process, and the provision permitting the public to influence the nomination of those who will represent them is welcomed.

## **2.2 Accountability**

The mechanisms relating to accountability depend on the type of decisions being made.

At present, the Responsible Member has the following constraints on his discretion to approve structure plans and development frameworks (Policy Plans).

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235 Section 49(3)

236 Section 51

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He must:

1. Apply the general principles as set out in Schedule IV<sup>237</sup>;
2. Have regard to the protection of the natural and developed environment and environmentally sustainable development in general<sup>238</sup>;
3. Consider the objections lodged or representations made to the policy plans which fulfills the requirements of citizen participation<sup>239</sup>.

These factors give the Responsible Member a fairly broad discretion which in turn gives flexibility. However, this form of discretion is open to abuse. The principles are vague and may be difficult to apply in practice and the public participation process might be superficial. Should this be the case, apart from the duty to give reasons for his decision, the decision maker has almost unlimited discretion. It is therefore a mechanism which has the potential to create actively participative , creatively formed policy plans or to fail abysmally.

It is suggested that a modified form of the notice and comment procedure would be appropriate in these circumstances. The method of creating and approving LDOs in the DFA could be used as a starting point<sup>240</sup>. The method of achieving these objectives and the degree to which they are achieved is left to the individual local authority. The Member of the Executive Committee (MEC) is obliged to approve the LDOs unless; they do not deal adequately with the subject matter prescribed for the

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237 Section 53

238 Section 4(9)

239 Section 4(6)

240 Sections 27 and 28 of the DFA

LDOs, they are inconsistent with other objectives already set or with another planning law in the Province or procedures relating to consultation and participation have not been complied with. If he rejects the LDOs on any of these grounds, he is obliged to provide the local authority with his written reasons why he did so<sup>241</sup>. Thus the emphasis in the legislation is on approval of such plans.

In the case of the new Bill, the objectives for development which the structure plans and development frameworks must achieve could be set out in the Bill. The Bill could then go through a notice and comment procedure so that the community participates in setting these objectives. The Bill has to be published for comment anyway and it would just require extra manpower to adopt the procedure. Once the objectives are set and the Bill approved, plans would be created in partnership with the Community. Once created, the local authority would be obliged to approve such plans unless the criteria set out in the new Act had not been complied with. In these circumstances, the local authority would be obliged to set out written reasons as to why it refused to approve such plans. This procedure would promote flexibility and permit the creation of development orientated plans but still provide an effective method of holding the decision maker accountable.

Another area of concern is the frequent use of subjective discretion in areas where flexibility is required. The phrase "in his or her opinion" is used to confer subjective discretion on the Chief Executive Officer to determine who is adversely affected in applications for rezonings, departures and subdivisions<sup>242</sup>. The Responsible Member has the same discretion when he decides whether a restrictive condition is causing unnecessary delays in development or is otherwise inappropriate and must be

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241 Section 27 of the DFA

242 Sections 15(2), 17(2) and 24(2)

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uplifted<sup>243</sup>.

Although it can be argued that the Constitutional duty to give reasons would ensure that the decision maker would have to justify the exercise of his discretion, it would be far more consistent with the ideals of responsive government to make this an objectively determinable discretion. Phrases like "if he has reasonable grounds to believe" confer sufficient discretion to permit flexibility yet allow Courts to enquire into the exercise of discretion. The duty to provide reasons would indicate what the reasonable grounds are.

The Bill also introduces a new phrase : "If the Responsible Member is **convinced** that there is a need for accelerated development in an area ...."<sup>244</sup>. This appears to be a stronger form of "is of the opinion". This is still a conferral of subjective discretion and again there is no reason why this cannot be transformed into an objectively determinable use of discretion.

The principles state that "reasons in writing for a decision in terms of this Law should be furnished on request"<sup>245</sup>. If policy plans are created in the manner suggested above, the legislation will need to make it compulsory for a local authority to give reasons is such plans are refused.

The principles also incorporate a duty on a department head at Provincial sphere and the Chief Executive Officer at the local sphere to keep a record of decisions taken by the Provincial Administration of the Western Cape and Council respectively. This should be extended to include the duty to record reasons as and when a decision is

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243 Section 48

244 Section 35(1)

245 Schedule IV

taken, however minor the decision is. Further, there should be some guidance as to what constitutes a reason, the time within which reasons should be furnished, the method of calculating the cost of providing reasons and an address to which people requesting reasons can write to.

### **2.3 Openness**

Open government will be dealt with from two aspects. First, the ability of the Bill to foster transparent government by requiring that meetings be open and secondly its ability to encourage timely, accessible, accurate access to all information relating to planning matters.

The Bill does not go far enough in emphasising the duty for all meetings of Council or its standing committees to be conducted in an open manner. The general principles merely contain the statement that if a public inquiry is to be held, it must be open to the public<sup>246</sup>. This is tautologous. By definition a public inquiry is open to the public. The principles could more usefully contain a statement similar to that contained in the Constitution, namely that a Council or a standing committee must conduct its meeting in an open manner and may close its sittings only when reasonable to do so, having regard to the nature of the business conducted<sup>247</sup>. This would enable confidential matters to be dealt with on green paper. The reason for duplicating the Constitutional provision in planning legislation is simply that the ordinary layperson who reads the planning law may not be aware of the Constitutional provision which is tucked away at the back of the Constitution.

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246 *Ibid.*

247 Section 160(7) of the Constitution

Access to legislation is well catered for in the principles<sup>248</sup>. There is a duty on authorities to provide particulars of legislation relating to planning and development and the names of the officials administering it, to anyone who asks for such information. Policy plans and manuals issued internally and used in administering legislation must be available to people affected by them. This means that the legislation itself and section 9 scheme regulations which are notoriously difficult to obtain, will be freely available. Records of decision are also open for inspection and may be published by anyone.

Provisions relating to the practical application of the duty to provide access to information, such as what information is to be released and guidelines relating to the weighing up of conflicting rights to privacy and copyright and access to information, are lacking. Provisions relating to a duty to educate the public on what access to information, is in a planning content is and what the public are entitled to is also lacking.

Whilst legislation such as the Open Democracy Act will cater for the broad content of access to information, it will not deal with the specifics relating to planning law and therefore some guidance on these aspects is required in planning legislation. Perhaps the Canadian example of providing a special exemption from the provision of the Copyright Act for plans required under access to information can be incorporated in future. This however will require co-ordination between the Copyright Act, the Open Democracy Act and the Planning and Development legislation.

### **3. *Developmental Aspects***

Does the Development and Planning Bill facilitate development?

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In contrast to the DFA which is designed to run in parallel with other legislation, the Bill incorporates existing legislation, namely the regulations promulgated under the BCDA, the Less Formal Townships Establishment Act which becomes the basis for accelerated development, the Removal of Restrictions Act which is modified to permit certain restrictive conditions to be removed without the necessity of going through a lengthy removal of restrictions procedure, and finally it selectively adopts the general principles contained in Chapter 1 of the DFA which constitute essential norms and standards.

The general principles are important since they are designed to remedy previous planning imbalances and will impact on every planning decision. However, the Development and Planning principles, whilst seeming to be identical to those in the DFA, are in fact watered down and less focussed. For example, the DFA provision states:

“Policy, administrative practice and laws should provide for a speedy land development”<sup>249</sup>.

The Development and Planning Bill version is more loosely formulated:

“Accelerated land development should be promoted”<sup>250</sup>..

This pattern is found throughout the principles<sup>251</sup>. This makes them more difficult to apply practically when taking a decision. Their ability to stimulate change and foster development is therefore weakened. There is also a concern that they do not

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249 Section 3(1)(i) of the DFA

250 Schedule IV

251 See comments on the participation principles on page 56 & 57

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constitute essential norms and standards and therefore the principles contained in the DFA will continue to apply.

Whilst the P & D Bill is promoted as development orientated legislation, it retains a control aspect. The Bill seeks to unify all land use control measures. Thus town planning schemes approved in terms of BCDA regulations are deemed to be zoning schemes in terms of this legislation<sup>252</sup>. Whilst the amalgamation of the apartheid based laws into one general law is commendable and necessary in terms of the equality provisions of the Constitution, it may have unintended consequences. Town Planning Schemes in areas such as Ikapa were either ignored or only partially implemented. This was mostly due to the loss of legitimacy and subsequent collapse of the Black Local Authorities during the 1980's. It is also unlikely that these Schemes were ever negotiated with the communities affected by them. Unauthorised structures have mushroomed in these area. A culture of community rule has also developed; if the community does not mind the structure or the use to which the land is being put, then the structure or use is permitted. Having been brought within the ambit of the Zoning Scheme, a local authority is now compelled to enforce such schemes<sup>253</sup>. Any attempt to enforce these control mechanisms, which are inappropriate anyway, will probably be met with vigorous resistance. Selective enforcement of the Scheme only in the wealthier areas will result in calls of discrimination and may be liable to Constitutional Challenge.

The formerly disadvantaged areas require programmes of urban renewal and development rather than rigid control. It has been suggested that a way of remedying the situation is "to expand the definition of zoning schemes to enable a development

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252 Section 7

253 Section 57(1)(b)

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process to precede control"<sup>254</sup>. The operation of the town planning schemes could be suspended and a participation process which fosters development could be implemented for a limited period. Thereafter a system of control and land use management appropriate to the area could be negotiated and implemented<sup>255</sup>. This process would avoid needless confrontation, accord with the principles of responsive government, and indicate a government committed to serving a community instead of one imposing controls on a community in an authoritarian manner.

The D & P Bill lacks a procedure to permit a local authority to carry out fast track development. The decision whether to permit accelerated development lies entirely with the Responsible Member<sup>256</sup>. This could have serious consequences. First, since only the Provincial sphere can implement accelerated development, a local authority which is charged with developmental duties in terms of the Constitution, has no mechanism to implement fast track development on its own initiative. The Provincial sphere has argued<sup>257</sup> that it considers accelerated development to be a concurrent competence with the national sphere and therefore the provisions contained in the Bill are correct. It argues that a local authority may use the usual mechanisms of structure plans and development frameworks for development. These mechanisms do not give a local authority any capacity to implement "fast track" development. Secondly, there is no provision to compel the Provincial sphere to take a decision which complies with the integrated development frameworks created by a local authority or the integrated development plans created in terms of the LGTA. Thus a Provincial accelerated development programme could conflict with any development which a local authority had planned and negotiated with a community.

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254 Mike Parker, Principle Planner, City of Cape Town, representations made by the City of Cape Town to Provincial Government in response to the P & D Bill.

255 *Ibid.*

256 See fn 214

257 Anneke Müller : (fn 91)

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This also constitutes interference with a local government function.

The mechanisms in the Bill which permit development are structure plans and integrated development frameworks. The structure plans which deal only with the spatial aspects of planning, set out guidelines for the reconstruction, integration and urban renewal of an area<sup>258</sup>. The structure plans form one aspect of an integrated development framework<sup>259</sup>. The integrated development frameworks adopt a holistic approach to development planning by attempting to integrate “economic, spatial, transport, constitutional, administrative, fiscal, environmental and other strategies to attain the optimal allocation of scarce resources in an ... area”<sup>260</sup>. Their purpose is to lay down guidelines through development planning to promote the aims of the general principles set out in schedule IV. There are certain problems with the structure plans and integrated development frameworks (policy plans):

1. The policy plans make no provision for accelerated development projects of a local authority.
2. The policy plans adopt a holistic approach to development planning but make no reference to the integrated development plans provided for in the LGTA. These plans deal with broader issues but incorporate land use and infrastructure planning. The policy plans will need to complement the integrated development plans. It is important that they do so since the financial budgets of a local authority are linked to the integrated development plans.

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258 Section 5(1)(c)

259 *Ibid.*

260 Definition. Section 2

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3. In terms of section 4(11), an urban structure plan in terms of the PPA is deemed to be a structure plan in terms of the P & D Bill. Thus a structure plan<sup>261</sup> which encourages urban sprawl and racially based planning will form part of an integrated development framework until it is repealed.

It is clear that the P & D Bill fails to deal adequately with the Constitutional allocation of powers, its participative mechanisms are prescriptive, its procedures relating to accountability are limited, its principles for decision making are weaker than those in the DFA, it fails to provide a fast track development programme for local authorities and the integrated development frameworks are not linked to the integrated development plans in the LGTA.

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261 The Cape Metropolitan Area guide plan was deemed to be an urban structure plan in terms of the PPA. See fn 18 & 19.

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**CONCLUSION**

The draft Planning and Development Bill has been prepared in an attempt to rectify the shortcomings in current planning legislation.

It has been assessed in terms of principles contained in recent legislation and found to be inadequate.

The Constitution has granted local government autonomy in respect of municipal planning. The powers of other spheres in respect of municipal planning are restricted to those of monitoring, support, capacity building and regulating when municipalities fail to function effectively. It is difficult to assess exactly what constitutes municipal planning. It has been suggested that it consists of all powers to deal with rezonings, departures, subdivisions and consents relating to land as well as sufficient powers to enable it to carry out its developmental duties. The Planning and Development Bill has failed to take account of the empowerment of local government. Power to create structure plans, development frameworks and scheme regulations remains with Provincial Government. The Bill retains the mechanism of delegation to confer powers on local government which are already conferred as of right by the Constitution.

The Constitution, as part of responsive democracy, emphasizes the value of participation. Active and effective participation depends on an informed and educated community influencing decision-making at the "placation"/"partnership" level. It may be necessary to build capacity to make participation effective. When deciding on the procedures for participation, the principles and procedures which are right and just and fair in the circumstances need to be followed. In general, the participative mechanisms in the Bill are disappointing. When creating policy plans, the level and degree of participation is determined by the Responsible Member. It

was suggested that a notice and comment procedure would be more appropriate form of participation. The procedures for participation in the accelerated development process are perfunctory. On the control side, whilst the Bill creates procedures such as mediation and public inquiries, it relies mainly on the prescriptive method of inviting participation through written objections and comments. It was suggested that the Bill be drafted in a more enabling manner to permit appropriate methods of participation, which are right and just and fair in the circumstances.

Accountability is another of the pillars upholding responsive democracy. Whilst discretion for a decision maker is necessary in order to permit flexible decision making, limits should be prescribed. Objectively determined discretion is favoured above subjective discretion. The requirement to give reasons, especially when linked to an active form of participation is an excellent method of accountability. The Bill does not foster accountability. When approving policy plans, the guidelines for the use of discretion are vague. It was suggested that a modified form of notice and comment be implemented. The Bill also makes frequent use of subjective discretion. This must be amended to an objectively determined discretion. It was recommended that if the modified form of notice and comment is adopted, the Bill should compel the decision maker to furnish reasons should he reject a plan which complies with the objectives set out in the Bill.

Openness is the third pillar of responsive democracy. It manifests itself through transparency which includes holding open meetings and by permitting access to information held by the government. The Bill does not go far enough in encouraging transparent government. It was suggested that a provision similar to that contained in the Constitution encouraging open meetings, be adopted. Legislation is required to assist in the practical application of duty to grant access to information. The Bill has useful provisions relating to access to legislation, however, access to information is not dealt with. It was suggested in the light of the practical problems experienced

with access to information that the Bill should set guidelines as to what constitutes information and how to weigh up conflicting rights such as those of privacy and copyright against access to information.

Land development is important in South Africa. Legislation such as the DFA sets out mechanisms for speeding up land development and introduces general principles which must guide all decision making. In the Bill, the provisions relating to accelerated development grant the Responsible Member the power to determine when and where accelerated development occurs. The local authority has no power to implement "fast track" development. Part of the problem is that the Provincial sphere is of the opinion that any type of development is a provincial function not a local government function. This ignores the fact that local government has developmental duties. This dispute will need to be addressed urgently. The principles guiding decision making are weaker than those contained in the DFA. They will not have the same impact on decision making and there is doubt as to whether they comply with the criteria of essential national standards.

The provisions relating to the creation of structure plans and development frameworks make no reference to the integrated development plans contained in the LGTA. Further, the Bill permits the use of an outdated structure plan. Overall, the Bill is control orientated, utilising the mechanisms of the zoning schemes to regulate land use. The enforcement of a zoning scheme may create problems in areas such as Ikapa where there has been no, or at most sporadic enforcement in the past.

Generally, the draft Bill has failed to take account of the principles embodied in recent legislation. The fact that the powers of local government are ignored, makes the Bill fatally flawed. The Bill must be redrafted.



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Full Catalogue Details

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SHELF NUMBER..... K 582.130968715 SHEA 94/20296 95/938-40
SHELF NUMBER..... BDJ 582.13096824 SHEA 94/19951
TITLE..... Karoo/ text by David Shearing; illustrations by
                Katryn van Heerden
1 AUTHOR..... Shearing, David
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3 CORPORATE AUTHOR - S Botanical Society of South Africa
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4 SERIES..... South African wild flower guide; 6
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