

**THE URBAN EDGE: A SPATIAL PLANNING TOOL OR DEVICE FOR LAND  
DEVELOPMENT MANAGEMENT: A WESTERN CAPE PERSPECTIVE**

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I hereby declare that I have read and understood the regulations governing the submission of LLM Environmental Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations

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## Acronyms for frequently used terms

Development Facilitation Act	DFA
environmental impact assessment	EIA
integrated development plan	IDP
Land Use Planning Ordinance No. 15 of 1985	LUPA
Local Government Municipal Systems Act No. 13 of 2000	LGMSA
Municipal spatial development framework	MSDF
Physical Planning Act	PPA
Provincial spatial development framework	PSDF
Reconstruction and Development Plan	RDP
spatial development framework	SDF
Spatial Planning and Land Use Management Act No. 16 of 2013	SPLUMA
Western Cape Land Use Planning Act No. 3 of 2014	WCLUPA
Western Cape spatial development framework	WC SDF

## 1. Introduction

The regulation of South African land use planning law is challenging; it is a field that is complex and not fully understood.<sup>1</sup> One reason for the complexity in the past was the number of laws that were in force.<sup>2</sup> Other factors include the number of authorities that are involved, the irregular implementation of the land use planning tools and the gap that is prevalent generally between planning theory and practise.<sup>34</sup>

The assortment of laws is implemented by authorities using land use planning tools.<sup>5</sup> An array of land use planning tools, such as zoning and urban edge boundaries, are used in the planning process to distinguish the various aspects of development from one another.

The combined English and Roman Dutch sources of our planning law passed down traditional land use planning devices such as: zoning schemes, subdivision and title deed restrictions.<sup>6</sup> A range of unique South African tools, such as; guide plans, regional plans and urban structure plans were used for regional planning during apartheid times.<sup>7</sup> Several new planning tools have been created since 1994 to give effect to changing policy, such as; land development objectives, environmental impact assessments (EIAs), integrated development plans (IDPs), spatial development frameworks (SDFs), the designation of different types of

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<sup>1</sup> Van Wyk Planning Law 1.

<sup>2</sup> National: Removal of Restrictions Act No. 84 of 1967, Physical Planning Act No. 88 of 1967, Black Communities Development Act No. 4 of 1984, the Environment Conservation Act No. 73 of 1989, Less Formal Township Establishment Act No. 113 of 1991, Physical Planning Act No. 125 of 1991. Development Facilitation Act, Spatial Planning and Land Use Management Act Provincial: Townships Ordinance No 9 of 1969 (Free State), Cape Land Use Planning Ordinance No 15 of 1985 (applied in: Eastern Cape, North West, Western Cape), Transvaal Town Planning and Townships Ordinance No 15 of 1986 (applied in: Gauteng, Limpopo, Mpumalanga) the Northern Cape and KwaZulu-Natal have replacement legislation but some parts of the Natal Town Planning Ordinance No 27 of 1949 were applied until 2015.

<sup>3</sup> Pierce 2005 *Biological Conservation* 454.

<sup>4</sup> Watson 2009 *Urban Studies* 2259.

<sup>5</sup> Van Wyk Planning Law 246.

<sup>6</sup> Regulated by provincial ordinances, Deeds Registries Act No. 47 of 1937, Subdivision of Agricultural Land Act No. 70 of 1970 and zoning schemes respectively.

<sup>7</sup> Regulated in terms of the Physical Planning Act No 88 of 1967 (PPA 1967) and the Physical Planning Act No. 125 of 1991 (PPA 1991).

protected areas; urban edge lines and marine set back delineations.<sup>8</sup> This thesis will analyse the status of the urban edge as a land use planning tool.

In 1996 the Constitution introduced three spheres of government that are not hierarchical tiers, but operate as 'distinctive, interdependent and interrelated authorities'.<sup>9</sup> Four types of planning are listed in the schedules to the Constitution, namely; 'regional planning and development' and 'urban and rural development' (which are both areas of concurrent national and provincial legislative competence), whilst 'provincial planning' and 'municipal planning' are matters of exclusive responsibility in their respective spheres.<sup>10</sup>

The various authorities responsible for making planning law decisions have not been certain as to the full ambit of their power and they have used diverse tests and land use planning tools (some pre-dating the Constitution), which resulted in often divergent conclusions at municipal, provincial and national level with regard to the same developments.<sup>11</sup> Numerous cases have exposed the ambiguous approval process for developments generally and specifically for those close to or outside of the urban edge.<sup>12</sup> Developers have been able to take advantage of uncertainty that existed in these interactions and exploit those laws and authorities that are more likely to result in the approval of their plans.<sup>13</sup>

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<sup>8</sup> In terms of the Development Facilitation Act No. 67 of 1995 (DFA); National Environmental Management Act No 107 of 1998 (NEMA); National Environmental Management Protected Areas Act No. 57 of 2003 (NEMPA), Local Government: Municipal Systems Act No. 32 of 2000 (LGMSA) and National Environmental Management Integrated Coastal Management Act No. 24 of 2008(NEMICMA) respectively.

<sup>9</sup> Constitution Act 200 of 1993; section 40 distinguishes national, provincial and municipal government.

<sup>10</sup> Van Wyk 2012 PER/PELJ 288. The functional areas of concurrent and exclusive authority of each sphere are listed in Schedules 4 and 5 of the Constitution.

<sup>11</sup> *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 3 SA 441 (WCC). An application for development outside the urban edge that had been approved by the municipality was refused by the MEC; the court confirmed the MEC's position and found that the Knysna-Wilderness-Plettenberg Bay regional structure plan was outdated and unconstitutional.

<sup>12</sup> *Hentru Developers & Contractors CC v Hanekom NO* [2005] JOL 15650 (T). Developers sought to establish a security village on farmland outside of the urban edge that was being used as an informal settlement; a zoning change was determined to be a benefit to the land.

<sup>13</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR 859 (CC); 2010 6 SA 182 (CC) where developers attempted to obtain approval for their plans by using the process created by the DFA, an application was made to the Gauteng Development Tribunal after the Johannesburg Metropolitan Municipality had refused township development applications for areas outside of the urban edge.

The confusion created by multiple laws, tools and decision makers has been aggravated by a poor understanding of the distinctions between different types of planning and the roles of each sphere of government.<sup>14</sup> The functions of planning tools are linked to the general purpose of planning, which is to regulate a framework for land use and development, whilst ensuring the welfare, safety and good health of society.<sup>15</sup> The legal questions to be answered in this research will focus on the status of planning tools and particularly that of the urban edge.

To understand all of the processes involved in planning, the classification of the planning tools is linked, in theory, to the broader division of planning law into three categories, namely: spatial planning, land use management and land development management.<sup>16</sup>

The distinction between these categories is crucial to determining the legal status of the tools: that is, to answer the delicate question whether they are administrative actions (implementing legislation) or policy.<sup>17</sup> An understanding of the regulatory status of the tool would facilitate compliance. The question that has challenged those who make decisions regarding the status of the urban edge is: whether it is *prescriptive* or *informative* (emphasis added). Policy is informative and persuasive and cannot be challenged in the same manner as the justifiable administrative action in compliance with legislation.<sup>18</sup>

The purpose of zoning as a planning tool is more familiar than the urban edge and may be used to illustrate the distinction between policy and the implementation of laws: zoning has been called both a legislative administrative act (rulemaking) and a legislative administrative action (subordinate or delegated legislation).<sup>19</sup> The value and distinction of the categories of planning tools and planning theory is reviewed in chapter 2.

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<sup>14</sup> Van Wyk 2012 *PER* 288.

<sup>15</sup> Van Wyk *Planning Law* 55.

<sup>16</sup> Van Wyk *Planning Law* 57.

<sup>17</sup> *President of the RSA and Others v SARFU and Others 1999 (10) BCLR 1059 (CC)* at para. 141. The question in this case related to the status of decisions of the executive. One of the conclusions was that "What matters is not so much the functionary as the function".

<sup>18</sup> *President of the RSA and Others v SARFU and Others 1999 (10) BCLR 1059 (CC)* at para. 142-143.

<sup>19</sup> Freedman 2014 *PER* 581/612.



A series of legal questions will be used to interrogate the 'urban edge'; its status, classification and enforcement in planning law. This is necessary because interpretations of the purpose and scope of the urban edge are ambiguous in planning law and policy documents, its usefulness as a planning tool to address inefficient urban development is disputed in plans and case law.<sup>20</sup>

A definition for the 'urban edge line' from the City of Cape Town Municipal Planning By law calls it 'a development edge line to demarcate the appropriate geographic limit to urban growth or to protect natural resources'.<sup>21</sup> Terminology used for the urban edge in South African planning discourse is manifold and includes: "development edge"<sup>22</sup>, "growth boundary"<sup>23</sup>, "protection zone"<sup>24</sup>, "urban fringe"<sup>25</sup>, "buffer zone"<sup>26</sup> and urban areas of partial control or "urban transition zones"<sup>27</sup>. These varied definitions provide an indication of its vague status in legislation, policies and plans. As a tool relevant to municipal planning the urban edge is mentioned in both the IDP regulations<sup>28</sup> and section 2 of the National Environmental Management Act. Where it is described in local government documents such as SDF's or urban edge policies; there is some uncertainty as to how decisions regarding changes should be adjudicated, is it part of forward planning or land use management?<sup>29</sup> The Cape Town Development Edges policy contains the following definition: the urban edge is a demarcated edge line defining the outer limits of urban development for a determined period of time. This definition requires further qualification from other sources to decide how long this line will be fixed. The Western Cape Spatial Development Framework (2014)

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<sup>20</sup> *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoon Bay Lifestyle Estate (Pty) Ltd and Others*, CCT 41/13 [2013] ZACC 39.

<sup>21</sup> City of Cape Town Municipal Planning By law, 2015 PN 204 in Provincial Gazette 7413, Monday 29 June 2015.

<sup>22</sup> City of Cape Town Development Edges Policy, Draft for comment, August 2009.

<sup>23</sup> Provincial Urban Edge Guidelines, Western Cape, December 2005.

<sup>24</sup> City of Cape Town Development Edges Policy, Draft for comment, August 2009.

<sup>25</sup> Disaster Management Act no 57 of 2002.

<sup>26</sup> National Environmental Management: Protected Areas Act No. 57 of 2003 GN 106 of 8 February 2012, (Government Gazette No. 35020) Biodiversity Policy and Strategy for South Africa: Strategy on Buffer Zones for National Parks.

<sup>27</sup> The South African National Roads Agency Limited and National Roads Act No. 7 of 1998, *GNR.1402 of 22 December 2000: Repeal of certain Regulations and making of Regulations on Advertising on or Visible from National Roads*.

<sup>28</sup> GNR.796 of 24 August 2001: *Local Government: Municipal Planning and Performance Management Regulations published in terms of the LGMSA*.

<sup>29</sup> Van Wyk 2012(15) PELJ.

specifically refers to a housing density that should be achieved before the urban edge line may be adjusted.

Certainty is a function of law, notwithstanding the complex history and large number of laws and planning tools. In our legal system the principle of 'stare decisis' (to stand by that which is decided) means that the decisions of our courts create precedents.<sup>30</sup> The binding force of earlier (and similar decisions) provide guidance as to the application of different laws (and planning tools).<sup>31</sup> The persuasive or prescriptive weight of the various tools has evolved.<sup>32</sup> The judiciary had the difficult task of making sense of the history and theory of land use planning law during the transition from a parliamentary sovereign system to a democracy.<sup>33</sup> The synchronisation of planning law with the Constitutional principles has taken place more slowly than other areas of law.<sup>34</sup> The classification struggle for planning law has been demonstrated in the protracted drafting process for a national framework planning law, namely the Spatial Planning and Land use Management Act<sup>35</sup>, which took more than ten years to finalise.<sup>36</sup>

It is necessary to review the scope of the urban edge in legislation and planning documents to adjudicate its function and integration with other tools. As South African planning law moves to a more streamlined structure with a framework national law, will we find that the interaction of planning tools is rationalised and their status is clarified?

In order to address the chronological development of the land use planning tool in the South African legal framework it is also necessary to consider how the law has changed in relation to questions about its status. For the purposes of this research South African planning law will be divided into three periods 'past era, transitional time and the future. The past or the pre-democratic era (before the

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<sup>30</sup> Paterson & Kotze "Introduction" in *Environmental Compliance* 14.

<sup>31</sup> Paterson & Kotze "Introduction" in *Environmental Compliance* 14.

<sup>32</sup> *Habitat Council and another v Provincial Minister of Local Government, Environmental Affairs and Development Planning, Western Cape and others* 2013 JOL 30666 (WCC).

<sup>33</sup> *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* (CCT78/07) [2008] ZACC 12; 2009 (1) SA 337 (CC).

<sup>34</sup> Pieterse 2011 *Development Update* 85.

<sup>35</sup> 16 of 2013 (SPLUMA)

<sup>36</sup> Van Wyk *Planning Law* 9.

promulgation of the interim Constitution) is discussed in chapter 3. The transitional era was a revolutionary time from the beginning of democracy to the passing of the SPLUMA. The present era, which will be referred to as the 'future' for the purposes of this dissertation, began with the coming into effect of (most sections of) the SPLUMA on 1 July 2015.<sup>37</sup>

Legislation, case law and commentary will provide the basis for review of the status, scope and interactions of the urban edge in the past, the transitional time (in chapter 4) and the future (in chapter 5). The format of the analysis will be that of a consistent assessment of the relevant legal framework by answering the same legal questions during each era: Did an urban edge exist and if so in terms of what policy or law? What is or was the nature, scope and legal status of the urban edge? How did the urban edge interact or overlap with other relevant land use planning tools? How is the urban edge reflected in or integrated with other planning instruments? How did the urban edge influence municipal land use planning decision-making?

The uncoordinated development of planning law means that provinces and cities have diverse mechanisms and approval processes in place; it would be simply unmanageable to canvas all of these forms in the scope of a dissertation. This thesis will focus on the Western Cape, where the planning resources, natural landscape, history and case law provide a suitable scenario for review.

The Western Cape is home to some of the better resourced municipal and provincial planning authorities, in particular the City of Cape Town metropolitan municipality. The city and the provincial government have produced comprehensive urban edge, development edge and densification policies and detailed SDF's; these documents will enrich and hopefully inform the analysis.

The variety and controversy of legal decisions in the Western Cape will also provide sources of analysis, particularly the decisions in Plettenberg Bay; namely *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs & Development Planning and Another*<sup>38</sup> and *MEC for Environmental Affairs and Development Planning v*

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<sup>37</sup> *Government Gazette* 38828 of 27 May 2015 P.N. 26/2015.

<sup>38</sup> 2012 3 SA 441 (WCC).

*Clairison's*.<sup>39</sup> The history of planning law will also be compared with the untested legislation in the form of both SPLUMA and the Western Cape Land Use Planning Act.<sup>40</sup>

Having completed the systematic analysis, it will be necessary to consider the outcomes and provide conclusions in Chapter 6 as to whether South African planning law has progressed to provide greater clarity as to the form, nature, status and influence of the urban edge in local land-use planning decision-making.

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<sup>39</sup> CC (408/2012) [2013] ZASCA 82.

<sup>40</sup> Act No 3 of 2014 (WCLUPA), *Provincial Gazette* 7250 of 7 April 2014 P.N. 99/2014.

## 2. Understanding the planning law context: Relevance of the Urban Edge

### 2.1. What is planning law?

As noted in the introduction, planning law is difficult to define. Broadly, it involves the use of a framework to control and regulate land use.<sup>41</sup> As a distinct field of law it is not always clearly delimited.<sup>42</sup> Planning law interacts with other laws that regulate the compromises such as, the balancing of interests for: the protection of property rights, the exercise of personal freedoms and the protection of the environment.<sup>43</sup> A contributing factor to the perceived vague boundaries, relative to other fields of law, is the fact that planning law is a new and evolving field.<sup>44</sup>

The management of town planning, or urban design, is not new; there is physical evidence that extensive town planning was practised by ancient societies, including the ancient Egyptians from around the third century BC.<sup>45</sup> Towards the end of the eighteenth century some land owners and authorities designated the separation of land uses (which we now call zoning) in response to the increase of squalor, pollution and slums around industrial sites.<sup>46</sup>

South African planning law is the product of both these early civilisations, its colonisers, combining English and Dutch influences and indigenous land use practices.<sup>47</sup> Planning theory evolves with public policy and it is recognised that planning reflects political programmes; as was the case during apartheid, when it was used to achieve long term objectives such as separate development.<sup>48</sup> Planning law globally has been affected by changing attitudes and South African planning law was influenced by elements of international philosophy during each of the planning eras to be reviewed in this thesis.<sup>49</sup> Apartheid planning with distinct separation of land use functions, such as housing for male migrant workers, was justified, in theory, as a practical application of the modernist

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<sup>41</sup> Van Wyk Planning Law 1.

<sup>42</sup> Nugent JA determined that the word 'planning', based on the understanding of its normal meaning, was used to refer to the control and regulation of the use of land. *Johannesburg Municipality v Gauteng Development Tribunal and Another 2010 (2) SA 554 (SCA)* para 40.

<sup>43</sup> Kaczmarek 2011 ICC 1.

<sup>44</sup> Van Wyk Planning Law 9.

<sup>45</sup> Glazewski, Environmental Law 196.

<sup>46</sup> Glazewski Environmental Law 196.

<sup>47</sup> Van Wyk Planning Law 20.

<sup>48</sup> Klosterman 1978 *Journal of the American Institute of Planner* 39.

<sup>49</sup> Scott 2003 *Journal of Southern African Studies* 236.

planning approach of “containment and control”.<sup>50</sup> As planning theory shifted towards a normative approach, which incorporates the rational consideration of factual and ethical questions; equitable principles began to replace the narrow regulatory systems of the modern age.<sup>51</sup>

The South African experience has confirmed that the definition of planning law is not static and this evolution will be analysed to answer the questions regarding the legal status of planning tools.<sup>52</sup> The timing of the replacement of the modernist planning style with so-called normative planning, in South Africa began with the start of the Transitional Era and the passing of the Development Facilitation Act.<sup>53</sup> The DFA (which introduced planning guided by principles) originally mandated the setting of land development objectives by municipalities.<sup>54</sup> With the passing of SPLUMA the development principles contained in the DFA were supplemented by norms and standards.<sup>55</sup> Planning ideally provides for the preparation of sustainable spatial plans in a framework that administers land use and land development and satisfies the main purpose of the discipline, namely improving the health, safety and welfare of the residents or an area whilst addressing long term concerns such as the protection of the environment and transport links.<sup>56</sup>

## **2.2. What are the key components of Planning Law?**

As noted above, the generally accepted purpose of planning is: to improve the lives of citizens through improved health, safety and welfare by limiting harmful and offensive land use(s).<sup>57</sup> The drafters of the policy papers preceding SPLUMA confirmed the classification of all planning processes into three different categories mentioned in the introduction, namely spatial planning, land use management and land development management.<sup>58</sup> The distinct categories of planning law guide the implementation process and legal status, as each category of tools is applied in a different manner.

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<sup>50</sup> Coetzer 2009 *SAJAH* 1.

<sup>51</sup> Harrison 2001 *Regional Studies* 66.

<sup>52</sup> Van Wyk *Planning Law* 9.

<sup>53</sup> No. 67 of 1995 (DFA).

<sup>54</sup> DFA Section 27 and 28.

<sup>55</sup> SPLUMA Chapter 2.

<sup>56</sup> Van Wyk *Planning Law* 10.

<sup>57</sup> Mabin 1995 *Journal of Southern African Studies* 40.

<sup>58</sup> Van Wyk *Planning Law* 245.

An understanding of the distinction between these categories assists in the interpretation of the legal status of the tools. The passing of the Promotion of Just Administrative Action Act with a constitutionally supported foundation of just administrative action has gone some way to providing a lens for making this distinction.<sup>59</sup> The implementation of legislation is regarded as administrative action; this is confirmed in section 1 of PAJA and in the various decisions of the Constitutional Court.<sup>60</sup>

### **2.3. Classification of planning processes and relevant to their status**

“Spatial planning” is for higher level or long term forecasting such as zoning, guide plans or integrated development plans. “Land use management” deals with changes to land use such as rezoning and the removal of restrictions. “Land development management”, the third category, is related to the control of development, an example being subdivision.<sup>61</sup>

#### **2.3.1. Spatial Planning**

The first category known as spatial planning for long term framework development is presently effected through zoning schemes, integrated development plans and spatial development frameworks.<sup>62</sup> The *White Paper on Wise Land Use* proposed that the term “spatial planning” be used sparingly, to describe “only a high level planning process that is inherently integrative and strategic, that takes into account a wide range of factors and concerns, and addresses the uniquely spatial aspects of those concerns”.<sup>63</sup> Spatial planning is therefore *future planning* that involves the drafting of an initial plan or framework

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<sup>59</sup> Promotion of Administrative Justice Act No. 3 of 2000 (PAJA). s1(1): “administrative action” means any decision taken, or any failure to take a decision, by (a) *an organ of state*, when (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, or (b) *a natural or juristic person*, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include...” (emphasis added).

<sup>60</sup> *President of the RSA and Others v SARFU and Others 1999 (10) BCLR 1059 (CC)* at par. 142 and 143.

<sup>61</sup> Van Wyk Planning Law 57.

<sup>62</sup> Van Wyk Planning Law 246.

<sup>63</sup> Department of Land Affairs, *White paper on Wise Land Use* (2001) published in Government Gazette 22473, 20 July 2001.

(emphasis added).<sup>64</sup> Long term planning of land use provides an outline for the future development of an area.<sup>65</sup>

Recent European planning models propose that the practice of spatial planning should ideally be process oriented and integrative (with consultation from communities) by including a broad assessment of the potential limitations and impacts (positives and negatives) of all development.<sup>66</sup> This configuration has been incorporated into the South African LGMSA in the form of the IDP and SDF documents; and the purpose of this analysis is to determine the status of the urban edge within the changing planning law paradigm.

During apartheid land ownership was a right reserved almost exclusively for the minority. All rights are now balanced in the Constitutional system as provided in the Bill of Rights, and no right is absolute.<sup>67</sup> Zoning and planning law is a limit on the absolute right of ownership and a balance is required to ensure that both the general public and owner's use of their property are exercised and protected.<sup>68</sup> An understanding of the legal status of spatial development frameworks relative to other tools with the passing of SPLUMA is relevant to the status of the urban edge as a poorly understood land use planning tool.

### **2.3.2. Land Use Management**

The second planning law category; land use management (otherwise known as development control) is the administration and alteration of plans or the regulation of changes (such as rezoning and the removal of restrictions).<sup>69</sup> Planning law is evolving on a comprehensive scale with the passing of framework legislation, but on a more tangible level for property owners and municipalities, amendments to specific plans and applications are frequently required.<sup>70</sup> If changes are required to statutory plans there is usually a prescribed review process, or changes are

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<sup>64</sup> Louw 2003 *Urban Design International* 1.

<sup>65</sup> LAWSA 2<sup>nd</sup> edition vol 14 at 71.

<sup>66</sup> Eggenberger 2000 *Impact Assessment and Project Appraisal* 200 203.

<sup>67</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3 Chaskalson CJ: 'The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality' para.104.

<sup>68</sup> Parnell 1995 *Journal of Southern African Studies* 51.

<sup>69</sup> Van Wyk Planning Law 57.

<sup>70</sup> Van Wyk Planning Law 326.



considered on a schedule, such as for municipal integrated development plans (IDP's), which must be reviewed annually.<sup>71</sup>

Case law has provided insight into the hierarchy of plans and the important status of zoning schemes relative to other tools.<sup>72</sup> Municipalities and administrators require certainty when making decisions and an understanding of the status of tools ensures that equitable decision making is in line with long term plans.<sup>73</sup> SPLUMA requires that zoning schemes be consolidated and standardised to streamline the fragmented systems that have been in place, large municipalities inherited multiple confusing zoning schemes.<sup>74</sup>

### **2.3.3. Land development management**

The third category, land development management, is the control of development that occurs after the land use has been determined, such as township layout and subdivision and other processes such as building, mining and consolidation.<sup>75</sup> Development is defined in the National Environmental Management; Integrated Coastal Management Act<sup>76</sup> (NEMICMA) to include a number of processes including, construction processes, rezoning, changes to the topography and the destruction of indigenous or protected vegetation.<sup>77</sup>

Judge Yacoob, in his minority judgement in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*, confirmed that planning law potentially affects multiple government functions such as housing, transport, infrastructure and the environment.<sup>78</sup> This would imply that policy makers should cooperate at national, level such as was the case in the drafting of the White Paper on Wise Land Use in 2001, when the

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<sup>71</sup> Section 34 of the LGMSA.

<sup>72</sup> *Parkhurst Village Association (aka Parkhurst Village Residents Association) v Capela & others* [2010] JOL 25759 (GSJ). The Regional Spatial Development Framework (RSDF) provided that no more coffee shops could be developed along the popular strip, namely Fourth Avenue, but the property was zoned for use as Business 1 and the court held that the municipality should retain the discretion to approve the use.

<sup>73</sup> *JDJ Properties v Umngeni Local Municipality (873/11) [2012] ZASCA 186 (29 November 2012)/ JDJ Properties and another v Umngeni Local Municipality and another* [2013] 1 All SA 306 (SCA) The requirements of the town planning scheme were unlawfully relaxed for the approval of a mall development by the municipality, the relevant building plans should not have been approved and the municipality's decision to approve plans contrary to the scheme was set aside.

<sup>74</sup> Section 23 of SPLUMA.

<sup>75</sup> Van Wyk Planning Law 358.

<sup>76</sup> 24 of 2008.

<sup>77</sup> Definitions section 1 of NEMICMA.

<sup>78</sup> *2008 (1) SA 337 CC* at par.128sarf.

Minister of Land Affairs, together with the Ministers for Housing and Constitutional Development were involved.<sup>79</sup> The urban edge is an area where cooperation between the spheres of government would be useful as it is a contentious physical area for municipal regulation of development and conservation.<sup>80</sup>

#### **2.4. Origin of the urban edge**

The reservation of an urban edge is a planning tool that many attribute to Ebenezer Howard, who produced research and models for the ideal urban habitat, which became known as a garden city.<sup>81</sup> His initial work which was published in 1898 under the title “Tomorrow: Peaceful Path to Real Reform” and later retitled “Garden Cities of Tomorrow” in 1902; contained a description of a city with 30,000 people located in the centre of a 6000 acre tract of agricultural land.<sup>82</sup> The fundamental basis of Howard’s garden city was to establish small villages, resembling traditional English style villages, where population growth would be limited to about 32,000 people. Each one would be enclosed by a permanent agricultural belt (so-called “green belt”) which would act as both a barrier to continued urban growth and an agricultural zone for the city. In the model, the garden city settlements would be part of a conurbation with transport links to regional towns and a larger city with a maximum population of 58,000 persons.<sup>83</sup>

#### **2.5. The history of the urban edge and its prevalence internationally**

Planning theory was developing rapidly prior to the publication of the Garden Cities books, what distinguishes Howard’s solution from his predecessors and contemporaries, who also exalted rural life, was that it sought to deal with the many problems of 19th century cities, some of which persist today.<sup>84</sup> The evils described by Howard, such as the encroachment of cities on neighbouring rural areas; the migration of the agricultural population to large urban centres and the subsequent decline of rural life; the growth of slums in large cities and the resultant overcrowding; the variability of economic activities in the unindustrialized

<sup>79</sup> Department of Land Affairs: *White paper on Wise Land Use Government Gazette 22473*; 20 July 2001 executive summary.

<sup>80</sup> Sinclair-Smith 2013 *Urban Forum* 314.

<sup>81</sup> Coetzer 2009 *SAJAH* 2.

<sup>82</sup> Batchelor 1969 *Journal of the Society of Architectural Historians* 15.

<sup>83</sup> Batchelor 1969 *Journal of the Society of Architectural Historians*, 185.

<sup>84</sup> Batchelor 1969 *Journal of the Society of Architectural Historians*, 186.

sectors of the economy; the increase in land values in cities which offered no benefit to the local community and the unsanitary conditions experienced by city dwellers were also identified as a justification for apartheid and other planning tools.<sup>85</sup> The problems listed by Howard continue to challenge urban planners and municipalities, particularly as urbanisation in South Africa increased steadily from the 1970's and then more rapidly after 1980.<sup>86</sup>

Urban growth boundaries have been implemented in the United States and they have a slightly different character to garden cities. The most popularly referenced success is the city of Portland in Oregon, which uses an urban growth boundary direct urban grown and restrict development outside of the margin.<sup>87</sup> The Oregon Land Use Act of 1973 makes urban containment plans mandatory. The use of urban growth boundaries is voluntary in some other states of the USA and the concept has the support of the US Environmental Protection Association and the American Planning Association. Planned restrictions have been associated with new towns in other parts of the world such as in China where 'Urban Construction Areas' have been set aside for future development, directing growth rather than allowing unplanned sprawl.<sup>88</sup>

Certainty regarding the status of the urban edge is necessary to resolve considerations such as densification; the need to expand the outer limit of cities for economic growth and the dynamic nature of human settlements.<sup>89</sup>

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<sup>85</sup> Parnell 1995 *Journal of Southern African Studies* 50.

<sup>86</sup> Horn 2010 *European Spatial Research and Policy* .

<sup>87</sup> Senate Bill 100 May 29, 1973. Since 1997, Oregon law stipulates that municipalities must maintain a 20-year supply of land for future residential development inside the urban growth development boundary.

<sup>88</sup> Sinclair-Smith 2013 *Urban Forum* 315.

<sup>89</sup> Jansen van Rensburg 2012 *Urban Forum* 66.

### 3. Past Era: the urban edge before democracy

#### 3.1. What was the nature and form of the Urban Edge?

Until the early 1800's the settlement in Cape Town was compact and the names of the routes at the edges of the development were referred to as the outside edge in Dutch being 'buiten'; Buitenkant, Buitengracht, Buitensingel.<sup>90</sup> Regulation of municipalities began with the Cape Municipal Ordinance No. 9 of 1836 as Cape Town grew and other colonial settlements expanded. It was passed by the British colonial authority to create commissioners in the various towns who administered property taxes and to provide a framework for the drafting of municipal regulations.<sup>91</sup>

The Cape Town municipality was established in 1840 in terms of Ordinance No. 1 of that year, but its territory was limited to the centre of the present day city.<sup>92</sup> In 1883 the neighbouring villages of Mowbray, Rondebosch, Claremont and Wynberg combined under the title of the Liesbeek Municipality.<sup>93</sup> This unity did not last and between 1888 and 1890 each of the listed municipalities seceded. In 1900 there were 11 separate local authorities from Sea Point to Simon's Town and one rural council.<sup>94</sup>

At the time when Ebenezer Howard was publishing his best-selling work on garden cities in 1898, the South African republics and colonies were entering the second Anglo Boer War that eventually led to their unification. Mabin and Smit link the motivation for urban land use regulation at the turn of the (eighteenth) century to both the desire to control the movement and residence of non-whites and the need to regulate private subdivision of land.<sup>95</sup> Other commentators link early the emergence of planning law to public health emergencies and the need to introduce controls related to disease and sanitation.<sup>96</sup> Prior to unification in

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<sup>90</sup> Todeschini 2004 VASSA 46.

<sup>91</sup> Tsatsire 2009 *New Contree* 131.

<sup>92</sup> The Cape was administered by a Governor appointed by the British Government and a Legislative Council

<sup>93</sup> Wall 2012 CSIR 2.

<sup>94</sup> Wall 2012 CSIR 2.

<sup>95</sup> Mabin 1997 *Planning Perspectives* 194.

<sup>96</sup> Van Wyk second edition 21.

1910, only the Orange Free State Republic had drafted planning law that effectively regulated the creation of new towns.<sup>97</sup>

After 1910 the Department of Lands acquired a wide range of responsibilities from the Department of Interior, including the administration of colonial land legislation and the townships boards (municipalities).<sup>98</sup> Abram Fischer, Minister of Lands for the first united department, tried to strengthen his departments' sphere of influence, but the draft National Township Law tabled in 1911 was rejected in parliament. The provinces fought national control and calls for provincial efficiency (in the form of increased income for the province), such as in the 1911 Financial Relations Commission received strong provincial opposition, particularly from Natal. The opposition to national power meant that the efforts to establish national planning legislation lost momentum and each province developed and regulated their own procedures for planning and township development.<sup>99</sup>

At the time when national planning legislation was floundering, the notion of municipal union in Cape Town became popular. The urban edge was not static and the municipal area of Cape Town was adjusted when the smaller municipalities could not provide adequate services (specifically water and sewerage disposal). Various commissions<sup>100</sup> and experts proposed unity of the municipalities because of the expense and inefficiency of providing utilities via multiple authorities.<sup>101</sup> Ordinance 19 of 1913 provided for the merger the eight municipalities of Cape Town, Green Point and Sea Point, Woodstock, Mowbray, Rondebosch, Claremont, Maitland and Kalk Bay and other areas on 8 September 1913.<sup>102</sup> It provided for transfer of the assets of the Suburban Municipal Waterworks to the newly created integrated municipality. The so-called City of Cape Town Unification Ordinance described the outside boundaries in the second schedule from beacons, to the edges of properties and along the rivers.<sup>103 104</sup>

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<sup>97</sup> Recognition of Townships Law Ordinance 6 of 1894.

<sup>98</sup> Parnell 1995 *Journal of Southern African Studies* 52.

<sup>99</sup> Parnell 1995 *Journal of Southern African Studies* 52.

<sup>100</sup> The Cape Peninsula Commission of 1903.

<sup>101</sup> Wall 2012 CSIR 2.

<sup>102</sup> Camps Bay, present day Athlone (then "West London"), and the area around Retreat, Steenberg and Zandvlei.

<sup>103</sup> Ordinance 19 of 28 July 1913: Ordinance to provide for the combination and better government of Municipalities in the Cape Peninsula.

The influence of British planning theory cannot be overstated in South African planning history. South African municipalities enthusiastically accepted the influences of English law, especially in the sphere of town planning. The Public Health Act of 1919 and the Housing Act of 1920 were based on the British Housing, Town Planning Etc. Act of 1909 and contained similar provisions to the resolutions adopted by the attendants at the Allied Housing and Town Planning Congress that was held in Paris in 1920.<sup>105</sup> These laws addressed the problems of overcrowding, funding for housing and slum removals. The drafters of South African planning law used neutral language as separate legislation was passed to regulate non-whites.<sup>106</sup>

Planning initiatives in the past era were frequently linked to public health and efforts to limit the spread of infectious diseases, but in South Africa planning always had a racial slant.<sup>107</sup> In 1901, the outbreak of the plague, and in 1918, the flu, provided the local authorities with justification for the forced removals of thousands of black people from central Cape Town to temporary accommodation at Ndabeni, outside of the city's 'edge' to an area controlled by national departments.<sup>108</sup>

### **3.2. What was the legal home and status of the Urban Edge?**

Following Howard's model the Garden Cities Association was launched by Richard Stuttaford in Cape Town in 1919.<sup>109</sup> Its initial project was the suburb of Pinelands, the first garden city in South Africa with a clearly delineated urban edge.<sup>110</sup>

The first town planning regulation in the Cape after union was the Town Planning Ordinance 13 of 1927 (C).<sup>111</sup> Several further amendments followed in 1948 and

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<sup>104</sup> Second schedule: contained Parts A, B (Claremont), C (Rondebosch), D (Kalk Bay) and Wynberg was described in the third schedule.

<sup>105</sup> Parnell 1995 *Journal of Southern African Studies* 476.

<sup>106</sup> Parnell 1995 *Journal of Southern African Studies* 476.

<sup>107</sup> Parnell 1993 *Journal of Southern African Studies* 479.

<sup>108</sup> Maylam 1990 *African Affairs* 61.

<sup>109</sup> <http://www.gardencities.co.za/code/history.htm> viewed January 2015.

<sup>110</sup> Mabin 1997 *Planning Perspectives* 197.

<sup>111</sup> A system of placates or statutes was in place before 1927 which required that a district be founded (a district) and its boundaries be described before a town was established. The ordinance provided for the establishment of townships and was substantially similar to the processes in

1959 but the most substantial changes were introduced with the Land use Planning Ordinance 15 of 1985(C) (LUPO)<sup>112</sup>

To answer the question how was the urban edge reflected in municipal law and planning it is useful to consider the developments outside of the city's municipal boundaries at Pinelands, Langa and Ndabeni which were altered versions of the garden city model. The latter two were established as housing for male migrant workers and were typical of the modernist planning approach of containment and control.<sup>113</sup>

A parallel system of planning for non-whites was created from 1913 onwards with the promulgation of the Natives Land Act<sup>114</sup> which divided up the country and set aside 'scheduled areas' and 'released areas' for occupation by black people.<sup>115</sup> These areas were physically separated from white areas by boundaries in the form of highways and railways or located on less desirable land. These edges had negligible effect in limiting growth as urbanisation increased dramatically during and after the depression years.<sup>116</sup> Whites experienced relative economic security in the latter half of the century and their suburbs grew, whilst squatting and slums overwhelmed the outskirts of areas designated for blacks as the demand for housing escalated in the wake of rapid urbanisation.<sup>117</sup>

### **3.3. The Intersection of the Urban Edge with other planning mechanisms**

During the 1930's and 1940's no specific body or level of government was identified to deal with uncontrolled urbanisation in South Africa.<sup>118</sup> Between 1935 and 1970 various national planning institutions were set up by parliament; starting with the Social and Economic Planning Council (SEPC) which advised cabinet and produced a number of reports. The fifth version was published in 1944, called 'Regional and Town Planning'. It enumerated numerous urban problems namely:

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place in the rest of the country. This ordinance was replaced when a revised version based broadly on the Transvaal law was adopted as the Townships Ordinance 33 of 1934.

<sup>112</sup> Van Wyk second edition 35

<sup>113</sup> Coetzer *SAJAH* 2009 1.

<sup>114</sup> No. 27 of 1913 also known as Bantu Land Act, 1913 and Black Land Act, 1913.

<sup>115</sup> Van Wyk 2014 *Planning Theory* 354.

<sup>116</sup> Wilkinson 2000 *Cities* 197.

<sup>117</sup> Wilkinson 2000 *Cities* 197.

<sup>118</sup> Mabin 1992 *Journal of South African Studies* 413.

increasing urbanisation, planning and segregation.<sup>119</sup> The SEPC also quoted and incorporated principles from contemporary British planning documents which called for planned neighbourhoods, green belts and housing that was organised reasonably close to places of work. Large scale state intervention was justified initially by local planners, and then gradually by national bodies such as the Industrial Development Corporation and the National Housing Commission. These bodies significantly influenced the SEPC in the various reports released during the 1940s, that dealt with regional and town planning for separate population groups.<sup>120</sup>

No legislation was passed in this period but Smuts' United party did create the Land Tenure Advisory Board (LTAB) and the Natural Resources Development Council (NRDC). These organisations provided more coordinated planning after the election of the National Party in 1948. The Herstigte Nasionale Party (HNP) (Reconstituted National Party), led by the chairman of the LTAB produced a report on town planning, parts of which were published almost simultaneously with the Group Areas Act<sup>121</sup> (GAA) in 1950. The GAA did not prescribe racial zoning which meant that the Land Tenure Advisory Board (LTAB) had an increasingly important role in assessing town planning schemes. Municipalities had to adhere to two legislative processes, one in terms of the LTAB, as well as master zoning plans under the provincial town planning ordinances, the latter form was rarely enforced and schemes were usually controlled by the LTAB.<sup>122</sup>

Parnell and Mabin note that the 'critical coincidence' of the emergence of town planning in South Africa and the modernist philosophy of planning and architecture which made the implementation of apartheid justifiable as necessary part of reconstruction and development.<sup>123</sup>

The term urban edge was not used on planning documents during this time. The Planning Advisory Council of the Prime Minister established guide plan committees in 1971 (initially without a legislated basis). The Physical Planning and Utilisation of Resources Act of 1967 was amended in 1975 to give guide

<sup>119</sup> Mabin 1992 *Journal of South African Studies* 415.

<sup>120</sup> Parnell 1995 *Journal of Southern African Studies* 56.

<sup>121</sup> Mabin 1997 *Planning Perspectives* 193-223.

<sup>122</sup> Mabin 1992 *Journal of South African Studies* 424.

<sup>123</sup> Parnell 1995 *Journal of South African Studies* 55.



plans statutory force, particularly from 1981, when the name of the law was changed again to the Physical Planning Act (PPA).<sup>124</sup>

A procedure was described in the PPA whereby the national Planning Minister, in terms of section 6A(1), could direct that a '*guide plan*' be compiled containing guidelines for the future spatial development of an area (defined specifically in that plan). The Department of Planning established 'central guide plan committees' for metropolitan areas in terms of the amendments to the PPA. After 1975 the plans developed by those committees became potentially statutory instruments, to which local authority plans had to conform as they became control areas.<sup>125</sup>

The Cape Guide Plan committee was established 1981 and the last guide plan that was prepared for the Cape Town area in terms of the PPA was the 1988 version, it had three volumes as the neighbouring towns of Somerset West, Stellenbosch, Wellington, Paarl and Atlantis were also included.<sup>126</sup> In the preface to the CMGP the Minister of Constitutional Development and Planning acknowledged the interdependence of the neighbouring local authorities and what he called the "intermunicipal" character of the functions and problems. Volume 1 of the Guide Plan addressed the plans for the peninsula and contained numerous maps of the study area. None of these maps showed an urban edge for Cape Town (or any of the smaller towns) only a line for the boundary of the plan area. With regard to growth, paragraph 2.10.2 of the CMGP addressed the long-term metropolitan structure (implying growth): the Guide Plan Committee (GPC) endorsed "continued development of the primary metropolitan area (the Peninsula)," which in the past had developed in a linear style along the existing transport corridors (with some infilling), towards the neighbouring towns. With regard to future expansion the GPC went on to note that although it would not be possible to continue growth in all directions, they supported expansion along the west coast from Milnerton towards Atlantis and some growth towards the "Hottentots Holland Basin" (Somerset West). The West Coast was earmarked as

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<sup>124</sup> Originally "Physical Planning and Utilization of Resources Act", substituted by the short title "Environment Planning Act" in terms of Act 73 of 1975 and the PPA in terms of Act 51 of 1981.

<sup>125</sup> Physical Planning Act No. 88 of 1967 section 5 and 6.

<sup>126</sup> Department of Development Planning: *Cape Metropolitan Guide Plan 1988* (CMGP).

the best direction for future development and the CMGP proposed expansion of the transportation corridor with nodal intersections towards Atlantis.<sup>127</sup> Expansion towards Stellenbosch and Paarl/Wellington was discouraged as the climate and high-value agricultural land were considered worthy of protection.

The plan also promoted a multi-nodal growth plan within the metropolitan area to avoid over concentration in the centre of Cape Town. Whilst calling for higher residential densities, the plan also suggested that creating more living and work opportunities in closer proximity to working and shopping would reduce travelling time and costs. Guide plans were intended to be broad frameworks that coordinated planning, they included data regarding projected population growth, information about geology and were not required to take cognisance of public opinion.<sup>128</sup> The rate at which guide plans, zoning schemes and new developments were coordinated was not regulated in a streamlined manner as the multiple changes to the PPA.<sup>129</sup>

After amendments in 1985 section 6A(11) contained a procedure for obtaining comment from the public on proposed plans, following this the Minister could give notice in the government gazette that the guide plan had been approved. Once ministerial approval had been given no town planning scheme or zoning could be approved that was inconsistent with the guide plan in terms of section 6A(12). The guide plan could be amended or withdrawn by the Minister of Planning on application in terms of s 6A(19). The enforcement of guide plans, and the roles of various local and provincial authorities in the event changes to zoning for development were sought, was uncertain until the decision in Shelfplett in 2012.<sup>130</sup>

Guide plans were replaced by regional structure plans in 1991 to be drawn up by administrators and urban structure plans to be drawn up the regional or local authority.<sup>131</sup> The Cape Regional Services Council (established 1 July 1987) was

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<sup>127</sup> CMGP par 2.10.2.3.

<sup>128</sup> Van Wyk Planning Law 43.

<sup>129</sup> The PPA was amended numerous times between 1967 and 1991 to allow for oversight by different administrative authorities, changes to comply with plans and zoning schemes and commentary by members of the public.

<sup>130</sup> *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs & Development Planning and Another* (16416/10) [2012] ZAWCHC 16; 2012 (3) SA 441 (WCC).

<sup>131</sup> Physical Planning Act no. 125 of 1991.

charged with responsibility to ensure that changes in land use within the guide plan area were consistent with the guide-lines laid down in the guide plan until the sections were repealed in 1991.<sup>132</sup>

#### **3.4. What is the Legal Status of these Different Mechanisms?**

Guide plans were relatively strategic for regional planning and did override town planning schemes where amendments were required.<sup>133</sup> In practice they did not contain plans that were implemented as it was not possible to plan as far as 25 years ahead. Since 1994 the integrated plans that municipalities and provinces are required to prepare are reviewed more regularly, particularly as growth of a city is considered important for its survival.<sup>134</sup>

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<sup>132</sup> Regional Services Council Act 109 of 1985 amended section 6A by inserting subsection 12 and 13 'incorporation of reference the PPA to "Minister" and "Administrator" wherever they occur, shall be construed as a reference to "Administrator" and "regional services council concerned", respectively.

<sup>133</sup> Harrison 2010 *Regional Studies* 68.

<sup>134</sup> Van Wyk Planning Law 42 and 1988 CMGP.

#### 4. Transitional Era: The urban edge during the transitional era

##### 4.1. Introduction of the concept of the urban edge into South African law

The preceding review of the planning law during the past era confirms that the modernist planning style implemented during apartheid favoured the increase in suburban, rather than urban development. The construction of free standing dwellings contributed to the rambling growth of towns.<sup>135</sup> When the negotiations to end apartheid began there was no legislated urban edge or growth boundary. South African cities displayed many symptoms of urban sprawl such as: leap frog development outside of built up areas, expanding informal settlements on the periphery or incremental loss of agricultural land to developments at the urban fringe.<sup>136</sup>

The transition to democracy was an opportunity to revise the outdated modernist planning methodologies. The return of the World Bank and other investors to South Africa in the early 1990's brought international expertise and finance, but also criticism of the inefficient urban form that apartheid planning had produced.<sup>137</sup> The World Bank called for densification of urban areas and reconstruction of infrastructure.<sup>138</sup>

Land reform, housing and basic services were the priorities for the first post-apartheid government; which meant that the reform of general planning law was neglected.<sup>139</sup> Whilst the law lagged behind development theories and international planning best practices were referenced in the policy documents and white papers produced by the erstwhile Departments of Provincial and Local Government (now Cooperative Governance and Traditional Affairs) and Land Affairs (now Rural Development and Land Reform).<sup>140</sup>

The urgency of basic needs (such as housing and economic development) for a large proportion of South Africans meant that the regulation of long term planning

<sup>135</sup> Dewar 2000 *Compact Cities* 210.

<sup>136</sup> Jansen van Rensburg 2012 *Urban Forum* 61.

<sup>137</sup> Mabin 1997 *Planning Perspectives* 215.

<sup>138</sup> Coetzee 2012 *Town and Regional Planning* 11.

<sup>139</sup> Sinclair-Smith 2014 *Urban Forum* 313.

<sup>140</sup> Department of Constitutional Development. *The White Paper on Local Government*. Pretoria: March 1998. Department of Land Affairs: *White Paper on South African Land Policy*. April 1997.

was not adequately addressed.<sup>141</sup> The dispersed nature of South African cities was increased during the transitional time by the implementation of building projects such as the construction of new free-standing homes on the urban periphery.<sup>142</sup> The ongoing lack of coordination in planning law and slow reform has been highlighted in many court decisions over the past twenty years.<sup>143</sup>

The devolution model of first the interim, and then the final Constitution mandated the creation of national, provincial and local spheres of government, each being distinctive, interdependent and interrelated.<sup>144</sup> Four types of planning were identified in the schedules to the constitution, namely: 'regional planning and development', 'urban and rural development', 'provincial planning' or 'municipal planning' (listed in Schedules 4 and 5 to the Constitution).<sup>145</sup> The intersection of the four not so distinct types of planning has provided abundant confusion in a field already burdened with many laws, authorities and policies.<sup>146</sup> Planning decisions that are relevant to the urban edge have been the subject of intergovernmental conflict and litigation.<sup>147</sup>

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<sup>141</sup> Horn 2010 *European Spatial Research and Policy* 43.

<sup>142</sup> Building and projects initiated as part of implementation of the Reconstruction and Development Programme (the RDP) (which was released by the Ministry in the Office of the President of the Government of National Unity as the *White Paper on Reconstruction and Development* in *Government Gazette 16085 GN 1954*, 15 November 1994) followed by the Urban Development Framework (Department of Housing White Paper 1997: *Urban Development Framework*); the Rural Development Framework (Department of Land Affairs, 1997 *Rural Development Framework*) and the Development Facilitation Act.

<sup>143</sup> *Camps Bay Ratepayers & Residents Association v Minister of Planning, Culture & Administration, Western Cape* 2001 4 SA 294 (C) Griesel J referred to the planning approval process as clumsy. 10 years later in: *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs & Development Planning, Western Cape & others* [2011] JOL 27684 (WCC) Griesel J referred to planning law as a fragmented and cumbersome system that called out for reform at par. 25.

<sup>144</sup> Constitution: Chapter 3, section 40 which was implemented with the passing of various local government laws, particularly the Local Government Municipal Structures Act No. 17 of 1998 and the Local Government Municipal Systems Act No. 32 of 2000.

<sup>145</sup> In terms of section 156(1)(a) of the Constitution, municipalities have executive authority in respect of, "the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5". Part B of Schedule 4 includes "municipal planning": The first two '*regional planning and development*' and '*urban and rural development*' are listed in part A of Schedule 4 (*Functional Areas of Concurrent National and Provincial Legislative Competence*). The fourth category '*provincial planning*' is listed in Schedule 5, being a 'Functional Areas of exclusive provincial legislative competence'.

<sup>146</sup> Van Wyk 2012 PER/PELJ 288/638.

<sup>147</sup> *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs & Development Planning and Another* 2012 (3) SA 441 (WCC), *Minister of Local Government, Environmental Affairs and Development*

This chapter will examine the emergence of the urban edge during the transitional time. The Constitution empowers the Western Cape government with respect to functioning and oversight of municipal authorities in terms of section 155(6) and (7);<sup>148</sup> whilst the powers of local government are set out in section 156.<sup>149</sup> Cooperative governance at the urban edge has been a delicate matter to regulate, as case studies will illustrate.<sup>150</sup>

Allocating functions to municipalities in the final Constitution was accompanied by the negotiation and recording of their physical extent.<sup>151</sup> The Local Government Transition Act<sup>152</sup> began the process of municipal border realignment and the effect was that municipalities became ‘wall to wall’, meaning that all land within South Africa was brought under the administration of a form of local government.<sup>153</sup> By amalgamating the different urban management bodies, the varying degrees of organisation within each of these institutions had to be accommodated in the new municipalities. Each authority had: multiple zoning schemes, outdated planning documents and diverse levels of legislation.<sup>154</sup>

The Constitutional allocation of “municipal planning” authority specifically to local government requires analysis as its ambit is possibly difficult to delimit.<sup>155</sup> As noted by Judge Kroon in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*, municipalities are now edge to edge; cases decided in the interim with regard to large-scale developments have found that decisions sometimes impact more than

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*Planning, Western Cape v City of Cape Town and Others [2014] ZACC 9* where the decisions of provincial and municipal authorities were different in respect of the same development.

<sup>148</sup> Constitution section 155 Establishment of municipalities: 155(6) provincial governments must establish municipalities [ ] ... and ‘(a) provide for the monitoring and support of local government in the province [ ]’ .

<sup>149</sup> Powers and functions of municipalities:

<sup>150</sup> *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estates (Pty) Ltd and others CCT 41/13* [2013] ZACC 39 (20 November 2013. Mhlantla AJ at par. 2 and 71: The property in question was on the boundary of the George municipality and the Mossel Bay Local Authority. The court confirmed the role of municipal and provincial decision makers and recognised the role of policy in guiding the decision making of the provincial authorities.

<sup>151</sup> *Powell Local Elections in South Africa* 13.

<sup>152</sup> No. 209 of 1993 (LGTA).

<sup>153</sup> *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) Kroon AJ par 26.

<sup>154</sup> *Powell Local Elections in South Africa* 14.

<sup>155</sup> Functional areas of concurrent national and provincial legislative competence (to the extent set out in section 155 (6) (a) and (7)): ‘municipal planning’ listed in part B of Schedule 4.

one municipal area.<sup>156</sup> In such a case, it is necessary to recognise decisions that may be part of both municipal planning and of regional planning and development.

An illustration of how a city with a vast number of management bodies was integrated is Cape Town; where the Cape peninsula between 1988-2000 had to move from having more than 50 different types of municipal and management authorities, each with boundaries that were primarily racially-based, to just one metropolitan authority.<sup>157</sup> In 2000 this conurbation became the City of Cape Town (Metropolitan) Municipality. The decision makers within municipalities and provincial departments had to apply the assortment of “old order” and new planning legislation, often in respect of a single development.<sup>158</sup>

The introduction of the urban edge to South African planning law is attributed to the planning academics at the University of Cape Town, who engaged students and the municipality with theories relating to urban compaction and integration in the late 1980’s and early 1990s.<sup>159</sup> The sustainable city that they proposed was the opposite of the sprawling apartheid model as no new development would be approved on the urban edge and low cost housing would be built on open land available within the city.<sup>160</sup> The efficient compact city could be realised through spatial integration, regenerated business districts, development corridors, improved efficiency and equality by combining development and protecting the environment.<sup>161</sup>

#### **4.1.1. One concept: many laws**

The principles in the DFA, particularly the goal of ‘efficient and integrated land development’ contained in section 3(1)(c) echo the urban planning solutions proposed by Howard and offered by planning theorists as a solution for

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<sup>156</sup> *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estates (Pty) Ltd and others* CCT 41/13) [2013] ZACC 39 (20 November 2013).

<sup>157</sup> Pieterse 2001 *Urban Forum* 14.

<sup>158</sup> ‘Old order legislation’ is defined in Schedule 6 of the Constitution as ‘legislation enacted before the previous (interim) Constitution took effect’.

<sup>159</sup> Todes “Urban Spatial Policy” in *Democracy and Delivery* 52.

<sup>160</sup> Watson 2007 *International Planning Studies* 342.

<sup>161</sup> Sim 2015 *South African Geographic Journal* 39.

international development challenges.<sup>162</sup> General principles for land development listed in 3(1)(c) of the DFA, included numerous ideas such as: the integration of all aspects of land development, *discouraging urban sprawl* and encouraging *environmentally sustainable land development* (emphasis added).<sup>163</sup>

The application of the principles of the DFA filtered into the drafting of conforming definitions in other planning laws, initially in those provinces that replaced their old order ordinances.<sup>164</sup> The terms ‘urban edge’ and ‘development edge’ are now referenced in a number of pieces of national legislation; specifically in regulations published for the environmental impact analysis sector (National Environmental Management Act<sup>165</sup>), municipal land use planning (Local Government: Municipal Systems Act<sup>166</sup>), the biodiversity sector (National Environmental Management Biodiversity Act<sup>167</sup>) and the coastal sector (National Environmental Management: Integrated Coastal Management Act<sup>168</sup>). The status of the urban edge in of each of these fields will be analysed using the legal questions proposed in the introduction.

## **4.2. Land Use Planning Law during the transitional era:**

### **4.2.1. Did an urban edge exist and if so in terms of what policy or law?**

The DFA (1995) and the Constitution (1996) introduced normative regulation; which as explained in chapter two, is an approach to enforcement that guides the impact and purpose of legislation by imposing principles.<sup>169</sup> The legislative shift to

<sup>162</sup> Sinclair-Smith 2014 *Urban Forum* 315.

<sup>163</sup> General principles for land development.(section 3(1)(c) of the DFA. (c) Policy, administrative practice and laws should promote efficient and integrated land development in that they—

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

(ii) ...

(vi) *discourage the phenomenon of “urban sprawl” in urban areas and contribute to the development of more compact towns and cities* (emphasis added);

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

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

<sup>164</sup> Van Wyk Planning Law 585.

<sup>165</sup> No. 107 of 1998 (NEMA).

<sup>166</sup> No. 32 of 2000 (LGMSA).

<sup>167</sup> No. 10 of 2004 (NEMBA).

<sup>168</sup> No. 24 of 2008 (NEM:ICMA).

<sup>169</sup> Nel 2016 *Urban Forum* 80.



normative planning overlapped with old order laws that were still in place as provincial ordinances and by-laws were not repealed.

Together with the Physical Planning Act<sup>170</sup>, the DFA was passed early on in the transitional era to address gaps in the law and to provide tools for reconstruction and development. The PPA (which amended the old order Act of the same name), prescribed the hierarchy of old order planning tools, namely, national development plans, regional development plans, regional structure plans and urban structure plans.<sup>171</sup>

The DFA contained principles for land development and general principles for decision-making and conflict resolution.<sup>172</sup> It was intended as an interim measure to facilitate development but it did not have the intended results due to forum shopping by developers, it was not in force in all parts of the country (most notably the Western Cape) and in 2010 it was declared unconstitutional in parts.<sup>173</sup>

As a result of the motivation provided by the UCT planning theories the urban edge as a planning tool was first utilised in the Cape Metropolitan Council Metropolitan Spatial Development Framework in 1996.<sup>174</sup><sup>175</sup> The Gauteng Provincial Spatial Development Framework of 2000 also delineated an urban edge before national regulations proposed the inclusion of a planned urban boundary.<sup>176</sup>

The Physical Planning Act and the Development Facilitation Act have now been repealed by the SPLUMA and the most important law governing long term land use planning remaining from the transitional period is the LGMSA. The LGMSA gives effect to the principles of 'development local government' adopted by the ANC in the early 1990s and confirmed in the Reconstruction and Development

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<sup>170</sup> No 125 of 1991 (PPA).

<sup>171</sup> Section 27 Effects of Regional and Urban Structure Plans.

<sup>172</sup> DFA Chapter 1.

<sup>173</sup> *Johannesburg Municipality v Gauteng Development Tribunal* supra; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR 859 (CC); 2010 6 SA 182 (CC).

<sup>174</sup> Sim 2015 *South African Geographic Journal* 39.

<sup>175</sup> Cape Metropolitan Council MSDF 1996.

<sup>176</sup> Horn 2010 *European Spatial Research and Policy* 46.

Plan.<sup>177178</sup> Section 25(1) of the LGMSA requires municipalities to adopt an integrated development plan (IDP); and section 35 of the LGMSA describes the IDP as the principal, strategic planning instrument which *guides and informs* all planning and development and all decisions with regard to planning, management and development in the municipality (emphasis added).

#### **4.2.2. What was the legal home for the urban edge in land use planning law?**

One of the components of an IDP is a spatial development framework (SDF).<sup>179</sup> The mandated content of an SDF is listed in the Local Government: Municipal Planning and Performance Management Regulations published in terms of the LGMSA.<sup>180</sup> They include the numerous requirements of an IDP, such as: objectives that reflect the planned spatial form of the municipality, guidelines and strategies for achievement of objectives (which are regularly reviewed).

For the purposes of understanding the legislative reference to an urban edge the LMGSA Performance Management Regulations may be summarised as follows: regulation 2 entitled: 'Detail of integrated development' plan states (at subsection 4) that 'a spatial development framework reflected in a municipality's integrated development plan must (amongst a long list other things): provide a visual representation of the desired spatial form of the municipality', and at:

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<sup>177</sup> Initially released as: A Policy Framework of the ANC in 1994; the RDP was amended before being released by the Ministry in the Office of the President of the Government of National Unity as the *White Paper on Reconstruction and Development in Government Gazette 16085 GN 1954*, 15 November 1994.

<sup>178</sup> RDP: Visions and Objectives at 2.2.1 The RDP links reconstruction and development in a process that will lead to growth in all parts of the economy, greater equity through redistribution, and sustainability. The RDP is committed to a programme of *sustainable development* which addresses the needs of our people without compromising the interests of future generations (my emphasis).

<sup>179</sup> LGMSA section 35. Status of integrated development plan (1) An integrated development plan adopted by the council of a municipality: (a) is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality; (b) binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's integrated development plan and national or provincial legislation, in which case such legislation prevails; and (c) binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a by-law.

(2) A spatial development framework contained in an integrated development plan prevails over a plan as defined in section 1 of the Physical Planning Act, 1991 (Act No. 125 of 1991).

<sup>180</sup> LMGSA Performance Management Regulations *Government Gazette 22605 GN R796*, 24 August 2001.

2(4)(i)(iii) ‘*may delineate the urban edge*’ (emphasis added).<sup>181</sup>

As noted in Chapter 2, spatial planning or forward-planning, in the form of a template or formula for future land use, shapes a municipality on top of the existing zoning scheme.<sup>182</sup> The IDP and SDF are the land use planning tools that most specifically give effect to the notion of development local government and the SDF as the physical plan contains the authorization (using the word ‘may’; the regulation is not mandatory) to demarcate an urban edge.<sup>183</sup>

Municipalities have been required to prepare integrated development plans since the passing of the Local Government Transition Act in 1996; these IDP’s are part of local government developmental planning.<sup>184</sup> The instructions for IDP’s were not easy to implement, particularly for smaller municipalities. IDP’s became part of municipal planning as their goals were intended to be more flexible than comprehensive plans, if properly implemented they should provide a basis for incorporating the efforts of different levels of government and different departments.<sup>185</sup> The difference between old order guide plans and IDP’s is that IDP’s have an important role in ensuring sectoral and institutional co-ordination and they were originally not spatial plans in the manner that structure plans or guide plans were.<sup>186</sup>

#### **4.2.3. What was the nature, scope and legal status of the urban edge?**

The legal status of the urban edge as a land use planning tool is tied to the status of IDP’s and SDF’s, bioregional plans and to zoning or land use plans; all tools which were also challenged during this era.<sup>187</sup> In terms of the LGMSA, IDP’s should provide a level of local control; but our courts have had to resolve disputes that affect the delicate balancing of authority between national, provincial and

<sup>181</sup> LGMSA: Local Government: Municipal Planning and Performance Management Regulations: 2(4)(i)(iii).

<sup>182</sup> Van Wyk Planning Law 246.

<sup>183</sup> Coetzee 2010 *Town and Regional Planning* 20.

<sup>184</sup> Harrison 2001 *Regional Studies* 69.

<sup>185</sup> Harrison 2001 *Regional Studies* 69.

<sup>186</sup> Harrison 2001 *Regional Studies* 69.

<sup>187</sup> *Camps Bay Ratepayers & Residents Association v Minister of Planning, Culture & Administration, Western Cape* 2001 4 SA 294 (C) 326I–327A the municipal spatial development framework in Cape Town was described as an ongoing project setting out a broad framework for physical and spatial planning with no statutory or legal force.

local plans.<sup>188</sup> Certain aspects of IDP's are reviewed annually although they are intended to be long term plans; like SDF's they are on a five year review timetable.<sup>189</sup>

For comparative purposes a review of the integration process between provincial updates and municipalities in Gauteng indicated that normative regulation and the principles in the LGMSA were not sufficient to ensure compliance and cooperation between all levels of government.<sup>190</sup> This review found that the provincial government rejected some of the local urban edge amendment proposals from municipalities so they were not included in updated provincial plans. The municipalities did not make use of mechanisms to deal with urban growth such as: nodes, densification policies or corridors for expansion, until long after the line had become historical (as growth occurred regardless).<sup>191</sup> This non-Western Cape example provides lessons for other municipalities and provincial authorities as agreement on the status of the respective SDF's and urban edges would have been ideal.

#### **4.2.4. Urban Edge: Interaction with other relevant land use planning tools**

The first time that the Constitutional Court had to consider the status of the urban edge was in the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others*.<sup>192</sup> The lower Court decision provided insight as to how the urban edge was reflected in the SDF and how it should be integrated with other planning instruments.<sup>193</sup> The Johannesburg municipality had proceeded, as each municipal council is required to, in terms of section 35 of the LGMSA, to develop a single, inclusive and strategic plan for the development of the municipality (the *City of Johannesburg Spatial Development Framework*

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<sup>188</sup> *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs & Development Planning, Western Cape & others* [2011] JOL 27684 (WCC).

<sup>189</sup> LGMSA section 34 Annual review and amendment of integrated development plan and section 27 Framework for integrated development planning (replacement after election of municipality section).

<sup>190</sup> Horn 2010 *European Spatial Research and Policy* 51.

<sup>191</sup> Horn 2010 *European Spatial Research and Policy* 51.

<sup>192</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR 859 (CC); 2010 6 SA 182 (CC).

<sup>193</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR 859 (CC); 2010 6 SA 182 (CC).

(CJSDF)), which was adopted on 30 May 2002.<sup>194</sup> The WLD held that the IDP, as the principal strategic planning instrument (should) guide and inform all planning and development within the municipal area; its purpose being to bind the municipality in the exercise of its executive authority.<sup>195</sup>

On appeal the main issues before the Supreme Court and then the Constitutional Court were the questions regarding the allocation of municipal planning functions and the constitutionality of sections V and VI of the DFA. The municipality's urban development boundary delineated which areas within the municipality were allocated for urban development. The Supreme Court of Appeal recognised that the SDF was one of the core components of an IDP and the CJSDF incorporated an urban development boundary (or urban edge) as one of its components.<sup>196</sup> The Constitutional Court confirmed the invalidity of the offending sections of the DFA which allowed the tribunal to approve plans outside of the urban edge. The judge re-iterated the requirement that development tribunals were required to ('must') consider plans, by laws and legislation affecting properties that were the subject of applications.<sup>197</sup>

#### **4.2.5. Urban edge: integration with other planning instruments**

As noted in chapter one, numerous policies that reference the urban edge have been produced in the City of Cape Town (CCT) and the Western Cape, with varied definitions. The municipal documents include the 2004 CCT Urban Edge Guidelines manual, the 2009 draft CCT Development Edges Policy for urban and coastal edges, the 2012 CCT SDF, the 2012–2017 CCT IDP (most recent review 2013/2014) and the 2012 CCT Densification Policy. These are in addition to the documents produced by the provincial government of the Western Cape namely the 2014 Provincial SDF and the 2005 Western Cape Provincial Urban Edge Guideline.

<sup>194</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others* [2008] 2 All SA 298 (W) Gildenhuis J par 78.

<sup>195</sup> [2008] 2 All SA 298 (W).

<sup>196</sup> [2009] ZA SCA 106 Nugent JA par 10 and 20.

<sup>197</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR 859 (CC); 2010 6 SA 182 (CC) Par 95.

Within the City of Cape Town planning department international theories on urban growth management have been studied and compared.<sup>198</sup> The CCT 2004 guidelines refer to concepts such as Howard's Garden City scheme, the UK green belts and growth boundaries in the US state of Oregon (in particular Portland) and planned new cities in Asia.<sup>199</sup> These influences on policy are not based in law and deliver the question that this thesis seeks to answer, what is the legal status of the urban edge, is it only persuasive and 'nice to have' or is there an administrative law mechanism which could provide certainty for decision makers.<sup>200</sup>

The two purposes for the urban edge that were identified in the City of Cape Town (CCT) Development Edge Policy and the Western Cape provincial guideline are: firstly that the urban edge is a growth boundary and secondly that it should promote urban and environmental efficiency.<sup>201</sup> These two goals illustrate the gulf between strict regulation (as a boundary) and normative planning (efficiency as a principle).

The 2005 provincial urban edge guideline provides the following definition: [the urban edge] "is a demarcated line to manage, direct and control the outer limits of development. The intention of the *urban edge* is to establish limits beyond which urban development should not be permitted". The drafters of the 2005 Western Cape Provincial Urban Edge document (which is drafted in the style of a textbook) review the dispersed nature of South African cities and consider different types of lines for the regulation of development, such as hard and soft edges.

In addition to these references in the law, regulations and policy, the importance of the urban edge is noted at least eight times in the 2014 Western Cape Provincial SDF (WC SDF).<sup>202</sup> The WC SDF contains five guiding principles namely: 'spatial justice', 'sustainability and resilience', 'spatial efficiency', 'accessibility' and 'quality and liveability' (these are substantially similar to the Development Principles in section 7 of SPLUMA published in 2013).

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<sup>198</sup> Sinclair-Smith 2014 *Urban Forum* 316.

<sup>199</sup> Sinclair-Smith 2014 *Urban Forum* 315.

<sup>200</sup> Horn 2010 *European Spatial Research and Policy* 50.

<sup>201</sup> Western Cape Provincial Government: *Draft Provincial urban Edge Guideline* 2005.

<sup>202</sup> WCSDF 2014 15.

#### 4.2.6. Interpretation and application of these principles and policies

The role of IDP's has changed since they were first introduced in the LGTA. Now local and provincial spheres of government are expected to coordinate planning in terms of the LGMSA. In the Gauteng Development Tribunal cases the municipality was eventually successful in its opposition to the applications for development on the grounds that the proposed developments would be contrary to the town planning scheme and be inconsistent with a number of its policy documents namely, the IDP, the SDF's and the demarcated urban development boundary (urban edge).<sup>203</sup>

The fragmented nature of South African land use planning system has been expounded in detail; even more so in the Western Cape where application of the DFA was excluded and the provincial ordinance (LUPO) remained in effect. In the case of *SLC Property Group (Pty) Ltd and another v Minister of Environmental Affairs & Economic Development (Western Cape)*; the decision makers referred to the 2005 Western Cape Provincial Spatial Development Framework (2005 WC PSDF) as one of the "key factors affecting the refusal of the application".<sup>204</sup> The application for development was made with regard to an agricultural property near to Stellenbosch. The provincial authorities submitted that the 2005 WC PSDF provided clear policy guidelines with regard to development beyond the urban edge and that urban development should only take place within the urban edges of towns and cities. The proposed development was refused for being outside of Stellenbosch and because the decision to approve such an application would go against the policy of limiting urban development to within an urban edge.<sup>205</sup>

The judgement referred to Harms JA's comments in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* which distinguished the implementation of legislation from the enforcement of policy and stated that "policy determinations cannot override, amend or be in conflict with laws (including subordinate

<sup>203</sup> *City of Johannesburg v Gauteng Development Tribunal* [2008] 2 All SA 298 (W).

<sup>204</sup> [2008] 1 All SA 627 (C) Erasmus J par 38. The developer had sought permission to perform activities in terms of the Environment Conservation Act (ECA) and rezoning of the property (in terms of LUPO) to develop an agricultural residential estate. The court found that the imposition of a condition which was aimed at the implementation of a housing policy was not rationally connected to the purpose for which the powers under the ECA were made.

<sup>205</sup> Erasmus J Par 39.

legislation)".<sup>206</sup> This decision is relevant in light of the uncertain status of considerations that affect planning law, whether the implementation of the IDP and SDF are part of administrative law equivalent to subordinate legislation or simply policy?

The nature and form of the urban edge as a planning tool was considered in more detail in *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs & Development Planning and Another*.<sup>207</sup> A review of the status of long term plans is necessary to understand the development of the urban edge and long term planning leading up to this decision. As noted in chapter three, old order guide plans were created on the instruction of the National Minister in terms of section 6A(1) of the Physical Planning Act.<sup>208</sup> In terms of the 1967 PPA no town planning scheme could be put in place if it provided for municipal zoning that was not in harmony with such a guide plan. No authorisation of an application would be possible if the plans were contrary to the directions in the guide plan.

Amendments introduced by the 1991 PPA changed the name of the regional plan to regional structure plan but the process for applying to amend such plans was comparable.<sup>209</sup> The DFA empowered MEC's to consider applications to amend guide plans that had been declared RSP's.<sup>210</sup>

At around the same time the Land Use Planning Ordinance also authorised local government to prepare structure plans for their constituency.<sup>211</sup> The structure plans approved under LUPO and the PPA were not identical; LUPO had guidelines for approval of plans that were contradictory to the long term plan which introduced factors such as the deemed 'desirability' of a development.<sup>212</sup>

Provincial authorities in the Western Cape were pro-active in the approval of a provincial spatial development framework (the 2009 WC SDF) as a structure plan

<sup>206</sup> *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at par 6 and 7.

<sup>207</sup> 2012 (3) SA 441 (WCC).

<sup>208</sup> No. 88 of 1967 (1967 PPA).

<sup>209</sup> No. 125 of 1991 (1991 PPA) section 27.

<sup>210</sup> DFA section 29 Effect of land development objectives and other plans.

<sup>211</sup> LUPO Chapter I Structure Plans.

<sup>212</sup> LUPO section 36 Basis for refusal of applications and particulars applicable at granting thereof.



in terms of s 4(6) of LUPO.<sup>213</sup> They also produced a provincial urban edge guideline in 2009.<sup>214</sup>

Several important lessons emerged from this jurisprudence; firstly the exercise of decision making functions (namely the granting of rezoning and development approvals) was held to be a 'municipal planning' function, even when integrated within a provincial SDF.<sup>215</sup> Secondly, the approval of the provincial Regional Spatial Plan (WC SDF) by the MEC constituted the performance of a provincial planning function and thirdly; although the Constitution determines the areas on which the various levels of government exercise legislative and executive functions; it does not specify the reasons and considerations the different levels of government may take into account (policy).<sup>216</sup>

Rogers AJ referred to the decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Others* which held that a housing policy was invalid and illegal because it was 'inflexible, irrational, arbitrary and unequal in its operation and effects'.<sup>217</sup> In the *Shelfplett* case the court found that the Knysna Wilderness Provincial Regional Spatial Plan (KWP RSP) imposed real restrictions and was therefore a type of subordinate legislation (not policy) and equivalent to 'law' as defined by 172(l)(a) of the Constitution (Judge's own emphasis).<sup>218</sup> The discharge of functions prescribed by law is an administrative act that may be challenged in terms of PAJA, whereas the implementation of policy is at the discretion of decision makers.<sup>219</sup>

Municipalities are obliged to develop IDPs in terms of the LGMSA, whether or not there was a Guide Plan or Regional Structure Plan for the area. As noted previously, section 35 of the LGMSA states that a duly adopted IDP is the principal planning instrument, guiding and informing all planning and development in the municipality, and the SDF (forming part of the IDP) takes precedence over an RSP in terms of the PPA.<sup>220</sup> The KWP RSP was declared invalid with

<sup>213</sup> LUPO section 4 Preparation of structure plans.

<sup>214</sup> PG:WC Urban Edge Guideline.

<sup>215</sup> Van Wyk 2012 *PER/PELJ* 40 / 638.

<sup>216</sup> Van Wyk 2012 *PER/PELJ* 40 / 638.

<sup>217</sup> 2011 (4) SA 337 (SCA).

<sup>218</sup> 2012 (3) SA 441 (WCC) Rogers AJ par 61.

<sup>219</sup> *President of the RSA and Others v SARFU and Others 1999 (10) BCLR 1059 (CC)*.

<sup>220</sup> 2012 (3) SA 441 (WCC) Rogers AJ par 65.

immediate effect and this decision led to the withdrawal of all remaining regional structure plans in the Western Cape.<sup>221</sup>

To summarise, it was held that the function of an RSP (even if it does not prescribe duties and obligations), is to give effect to section 27(1) of the LGMSA.<sup>222</sup> A duly approved RSP (now SDF) is binding subordinate legislation (which in this case was held to be invalid within the meaning of s 172(1)(a) of the Constitution.<sup>223</sup>)

The dispute in *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning*<sup>224</sup> was based on similar questions and on almost adjacent location to the dispute in Shelfplett. For the Clairison's application a number of authorisations were required for a development outside of the urban edge and further changes were sought in respect of the same KWP RSP.<sup>225</sup> The MEC approved the proposed changes to the KWP RSP despite advice from the Provincial Department of Environmental Affairs and Development Planning that it was contrary to policy.<sup>226</sup> Following a protracted application process, the environmental authorisation in terms of the ECA, for the proposed old age home development was rejected (by member of staff of the provincial department) for the following reasons: firstly an area of fynbos required protection, particularly as part of the property contained critical species biodiversity. Secondly the development would amount to leap-frog development that would contribute to urban sprawl. Thirdly the municipality would also struggle to provide services such as water and sewage removal outside of the urban edge and the final

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<sup>221</sup> Western Cape Provincial Government: Department of Environmental and Spatial Planning: Circular 25 June 2012 Withdrawal of Urban and Regional Structure Plans (Former Guide Plans).

<sup>222</sup> LGMSA 27 'Framework for integrated development planning'.

<sup>223</sup> Constitution section 172(1)(a) 'any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'.

<sup>224</sup> [2013] 3 All SA 491 (SCA).

<sup>225</sup> The administrative decision in this second case was made before the RSP was declared unconstitutional in the Shelfplett case.

<sup>226</sup> The aims of the WC PSDF, included: the restructuring of urban settlements to tackle apartheid spatial patterns and urban functional inefficiencies, the protection of biodiversity and agricultural resources. The WC PSDF proposed restricting the outward growth of urban settlements until specified urban densities are achieved and in the area no new, large residential developments were to be allowed to the north of Plettenberg Bay. Nugent JA and Swain AJA par 4.

objection was based on the no-go alternative, to ensure that the area retained its rural setting.<sup>227</sup>

The Supreme Court of Appeal considered the rejection of the application in terms of the ECA and set aside the decision of the court a quo; the full bench held that a government functionary was entitled to refuse the application as it was in conflict with existing (predetermined) policy.<sup>228</sup> This implies that authorities should have regard for the status for the IDP and SDF and is a departure from the decision in *Camps Bay Ratepayers & Residents Association v Minister of Planning, Culture & Administration, Western Cape*<sup>229</sup> and confirmation of the decision in *President of the RSA and Others v SARFU and Others*.<sup>230</sup>

#### **4.2.7. How did the urban edge influence municipal decision making?**

Municipal decisions and plans related to developments relevant to the urban edge such as the Philippi Horticultural Area, the city at Wescape have so far managed to avoid specific legal challenges. The opposition by the communities that occupy these areas to specific developments and the responses that municipalities are expected to administer in local planning require certainty as to the status of the urban edge as a tool.

In October 2010, the City of Cape Town produced a report entitled: Evaluation of Developable Land within Urban Edge. This report consolidated information from SDF's, vacant land assessments and a review of sites to conclude the availability of land within the city limits. One of the conclusions was that: 'The urban edge must restrict the outward growth of urban settlements until such time as average gross densities of 25 dwelling units or 100 people per hectare are achieved'. This goal has been included in the densification policy and the municipal SDF.

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<sup>227</sup> *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning and Another* (26165/2010) [2012] ZAWCHC 44 (16 May 2012) Cloete AJ par 11.

<sup>228</sup> [2013] 3 All SA 491 (SCA) Nugent JA and Swain AJA par 31-32.

<sup>229</sup> 2001 4 SA 294 (C) 326I–327A the municipal spatial development framework in Cape Town was described as an ongoing project setting out a broad framework for physical and spatial planning but with no statutory or legal force.

<sup>230</sup> 1999 (10) BCLR 1059 (CC).

### 4.3. EIA Sector:

#### 4.3.1. Did an urban edge exist and if so in terms of what policy or law?

NEMA does not specifically refer to the urban edge in the main body of the act but it is referenced in the definition of “urban areas” in the listing notices.<sup>231</sup> The stated purpose of the notices is to identify activities that would require environmental authorisation prior to their commencement and to identify competent authorities in terms of sections 24(2) and 24D of NEMA (who would review applications). The 2010 iteration of Listing Notice 1 which contained a list of activities and competent authorities identified in terms of sections 24(2) and 24D of NEMA (requiring an EIA), the definition of: “urban areas” that indirectly references the importance of the urban edge, in that an area is ‘urban’ if it is within the urban edge and this is relevant for numerous potentially significant activities.<sup>232</sup>

The lists attached to NEMA have been updated numerous times since they first appeared in 2006. The 2010 version was updated in December 2014 when revised listing notices were published; these took effect from 18 December 2014.<sup>233</sup> The definition of urban areas was not amended.

#### 4.3.2. How did the urban edge influence land use planning decision-making?

Recently the case of *Durbanville Community Forum v Minister for Environmental Affairs and Development Planning Provincial Government Western Cape and Others* considered the approval of development plans outside of the urban

<sup>231</sup> Previously: *Listing Notice 2: List of activities and competent authorities identified in terms of sections 24 (2) and 24D* (Government Gazette No. 33306).

<sup>232</sup> GNR.545 of 18 June 2010: *Listing Notice 2: List of activities and competent authorities identified in terms of sections 24 (2) and 24D* (Government Gazette No. 33306) [urban areas] means areas situated within the urban edge, as defined or adopted by the competent authority, or in instances where no urban edge or boundary has been defined or adopted, it refers to areas situated within the edge of built-up areas.

<sup>233</sup> GNR 982 *National Environmental Management Act (107/1998): Environmental Impact Assessment Regulations, 20*; GNR 983 *Listing notice 1: List of activities and competent authorities identified in terms of sections 24 (2) and 24 D*; GNR. 984 *Listing notice 2: List of activities and competent authorities identified in terms of sections 24 (2) and 24 and GNR 985 Listing notice 3: List of activities and competent authorities identified in terms of sections 24 (2) and 24 D* (all in Government Gazette No. 38282 4 December 2014).

edge.<sup>234</sup> A protracted battle was fought by the civic alliance, as they challenged the decision to shift the urban edge near to the farm Uitkamp, on the northern edge of Durbanville (the Uitkamp case).

Four of the specific approvals that were required for the development are relevant for the purpose of this analysis, namely: an environmental authorisation for the listed activities, the amendment of the Cape Town Spatial Development Framework (CTSDF) in terms of section 34(b) of the LGMSA to allow the change in description of the land, the amendment of the urban edge to incorporate the proposed development, and the rezoning of the land in terms of section 16 of the LUPO from agricultural zone to a sub divisional area.<sup>235</sup>

The community forum brought a PAJA application to review the decision of the MEC in terms of NEMA. It was found that the plea sought to conflate the decision making powers of provincial and municipal government.<sup>236</sup> Davies J confirmed that the approval of the development based on information in the EIA (NEMA) was not contrary to the policy in the SDF (produced in terms of the LGMSA).

The EIA approval is a distinct part of the procedure; the process for each authorisation is governed by specific pieces of legislation. The decisions in *inter alia Minister of Local Government Environmental Affairs and Development Planning Western Cape v Habitat Council and Others* that separated the requirements and considerations for decision making for developments was quoted approvingly.<sup>237</sup> The court confirmed that the decision may have been different if the application was not review or had been brought as a challenge to the amendment of the SDF. Davis J reiterated that it was not appropriate for the judiciary to make decisions for administrative bodies. The expertise of the municipality and the interpretations that were based on policy and fact meant that administrative decision making could only be challenged on appeal, not in a review such as this case.

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<sup>234</sup> (13854/2013) [2014] ZAWCHC 205; [2015] 2 All SA 187 (WCC) (24 December 2014).

<sup>235</sup> (13854/2013) [2014] ZAWCHC 205 page 3, par. 25-45.

<sup>236</sup> (13854/2013) [2014] ZAWCHC 205.

<sup>237</sup> 2014 (4) SA 437 (CC) at para 19.

### **4.3.3. Interaction or overlap with other relevant land use planning tools**

Judge Davis' decision in the Uitskamp case was not primarily concerned with the urban edge as a municipal planning tool within land use planning law, but rather with the EIA process. His decision confirmed that where there is an overlap with other spheres of government, decision making remains separate, as was the case in *Maccsand (Pty) Ltd v City of Cape Town*<sup>238</sup> The urban edge could not be used as a factor in the EIA decision making process.

### **4.3.4. Urban edge and decision-making in the EIA sector**

To determine whether the urban edge is *reflected in or integrated with other planning instruments it is necessary to refer to the Fuel Retailers Association of Southern Africa v Director General Environmental Management Department of Agriculture and Conservation and Environment Mpumalanga Province and Others case*<sup>239</sup> In the Fuel Retailers case it was confirmed that local government uses the considerations in land use planning law to judge the need and desirability of a development or town planning application. The same development that satisfies the criteria in LUPA may not meet the authority's approval from an environmental law perspective. The application by the developers in the Uitskamp case to make changes to the WC SDF did not affect decisions related to environmental authorisations. Davis J confirmed that planning policies do not constitute binding administrative law which grants or limit rights.<sup>240</sup>

## **4.4. Biodiversity Sector:**

### **4.4.1. Did an urban edge exist and if so in terms of what policy or law?**

A more obscure reference to the urban edge may be found in NEMBA: the notice repeats the instructions contained in the LGMSA Municipal Planning and Performance Management Regulations regarding the detail of IDP plans; and refers to the option to delineate an urban edge (Guideline Regarding the

<sup>238</sup> 2012 (4) SA 181 (CC) Jafta J at paras 42-43.

<sup>239</sup> 2007 (6) SA 4 (CC) at para 85.

<sup>240</sup> (13854/2013) [2014] ZAWCHC 205; [2015] 2 All SA 187 (WCC) (24 December 2014).

Determination of Bioregions and the Preparation of and Publication of Bioregional Plans and Integrated Development Plans (the Guidelines)).<sup>241</sup>

Chapter 4 of the Guidelines specifies the alignment and coordination of bioregional plans with other relevant plans and planning processes and includes reference to the urban edge. A municipality is required “to provide a visual representation of the desired spatial form of the municipality, indicating areas where public and private land development and infrastructure development should take place, desired or undesired utilisation of space in a particular area, *the urban edge*, areas where strategic intervention is required and areas where priority spending is required” (emphasis added).

#### **4.4.2. Integration with other planning instruments**

The City of Cape Town Environmental Resource Management Departments’ Environmental and Spatial Planning Unit prepared a draft Bioregional Plan in 2012. The coordination of IDPs and these environmental plans is challenging as the considerations and motivation of each department within provincial government are at odds with competing economic and ecosystem priorities.<sup>242</sup>

In the Western Cape, and Cape Town in particular, the municipality is required to consider municipal boundaries that touch not only rural areas but also protected areas and marine environments. The Table Mountain National Park is a Sanparks managed area and is un-fenced, meaning that the boundary with the City is open.<sup>243</sup> Models for protection of the boundary have been proposed, such as buffer zones, that take into account the land use, zoning and infrastructure on the edge of the park but the pressure on urban expansion is less in these areas than on the traditional areas of urban growth to the north and east of the city.<sup>244</sup>

The CCT Bioregional Plan is not referenced in the Provincial SDF but is referenced in the CCT SDF review of 2012. The City of Cape Town has recently made efforts to align the urban edge with the coastal edge (although this term is

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<sup>241</sup> GN R 291 of 16 March 2009 *Government Gazette* No. 32006.

<sup>242</sup> 2015 *South African Geographical Journal*.

<sup>243</sup> Shroyer 2000 *USDA Forest Service Proceedings* 22.

<sup>244</sup> Stephens 1998 *South African Geographical Journal* 103.

not defined in NEM:ICMA the definition coastal set back line is clear<sup>245</sup>) by combining the development edges policies and by amending the SDF.<sup>246</sup>

#### **4.4.3. Urban Edge interaction with other land use planning tools**

The overlay zones created in the municipal planning bylaw are intended to provide for an additional use of a particular zone or plan area.<sup>247</sup> Particular detail is included in the zoning rules for areas of tourist, scenic view or economic value.

#### **4.5. Coastal Sector:**

##### **4.5.1. Coastal edge and comparison with urban edge**

The preamble of NEM:ICMA proposes an integrated approach to supervising and conserving coastal resources in order to preserve them, regulate their use and promote social equity. An expansive definition of the coastal zone, contained in section 1 of NEM:ICMA confirms the role of all spheres of government and interactions with the neighbouring land.<sup>248</sup> Broadly the coastal zone: means the area adjacent to the sea characterised by coastal land-forms, and includes beaches, dunes, estuaries, coastal lakes, coastal wetlands, land submerged by the waters of the sea, or of any estuary, coastal lake or coastal wetland, boat-launching sites, proclaimed harbours and recreational use areas.<sup>249</sup> NEM:ICMA mandates the use of multiple tools and plans to administer this integrated approach namely: Coastal Management Programmes, Estuary Management Plans, Coastal Planning Schemes and Coastal Management lines.<sup>250</sup>

In terms of section 62 of NEM:ICMA municipalities are empowered to promulgate legislation that will regulate land in the coastal protection zone.<sup>251</sup> The CCT's Development Edges and Coastal edges policy articulates the two main purposes for urban edges being the prevention of urban sprawl and the protection of

<sup>245</sup> "coastal set-back line" means a line determined by an MEC in accordance with section 25 in order to demarcate an area within which development will be prohibited or controlled in order to achieve the objects of this Act or coastal management objectives;

<sup>246</sup> CT SDF Technical Amendments 2014: new policy par. 23.4.

<sup>247</sup> 'Overlay means a zoning, in addition to the base zoning, stipulating the purposes for which land may be used and the development rule which may be more or less restrictive than the base Zoning'.

<sup>248</sup> NEM:ICMA section 1: means the area comprising coastal public property, the coastal protection zone, coastal access land, coastal protected areas, the seashore and coastal waters, and includes any aspect of the environment on, in, under and above such area.

<sup>249</sup> Colenbrander 2015 *South African Geographical Journal* 14.

<sup>250</sup> NEM:ICMA Chapter 6 Coastal Management.

<sup>251</sup> NEM:ICMA section 62 Implementation of land use legislation in coastal protection zone.



boundaries with natural resources.<sup>252</sup> It notes that coastal edge lines are necessary as coastal resources require protection, hazards should be identified and areas that are at risk of flooding must be delineated.<sup>253</sup> Local and district municipalities are required to play an important role in the co-ordination and integrated management of this area once it is delineated.<sup>254</sup>

Provincial MEC's are obliged to delineate a coastal management line, which replaces what was previously known as the 'set back lines'. The Western Cape Department of Environmental Affairs Development Planning has initiated this process for the West Coast and Overberg areas.<sup>255</sup>

Section 18(1)-(5) requires each municipality to develop a coastal management policy;<sup>256</sup> which in terms of section 48 may form part of the IDP and SDF adopted in terms of the LGMSA.

The City had developed a Coastal Zone Management Strategy in 2003 prior to the passing of NEM:ICMA. The 2009 CT SDF states that a coastal edge has been identified to delineate the "coastal zone".<sup>257</sup> The City finalised an Integrated Coastal Management Policy in May 2015 and made submissions to the provincial authorities for consideration in the management line decision making process. This report acknowledges that piecemeal development exposes the city to high risk from inundation by the sea.

#### **4.5.2. Coastal edge: integration with other planning instruments**

The City of Cape Town combined the processes for assessment of both urban and coastal edges into a draft development edges policy in 2009.<sup>258</sup> The City's

<sup>252</sup> NEM:ICMA uses the definition for municipalities from the LGMSA.

<sup>253</sup> NEM:ICMA section 25: coastal management line, an MEC must by notice in the *Gazette* establish or change coastal management lines (previously set-back lines).

<sup>254</sup> NEM:ICMA Important definitions in the Act include: the coastal zone, which is primarily the area comprising coastal public property, the coastal protection zone (an area along the inland edge of coastal public property), coastal access land (which the public may use to gain access to coastal public property), special management areas (section 23).

<sup>255</sup> NEM:ICMA 25 Establishment of coastal management lines.

<sup>256</sup> NEM:ICMA: 18(1) Each municipality whose area includes coastal public property must within four years of the commencement of this Act, make a by-law that designates strips of land as coastal access land in order to secure public access to that coastal public property.(2) Coastal access land is subject to a public access servitude in favour of the local municipality within whose area of jurisdiction it is situated and in terms of which members of the public may use that land to gain access to coastal public property.

<sup>257</sup> CT SDF 2009 Policy 23 Promote a more compact form of development.

<sup>258</sup> *City of Cape Town Development Edges Policy: Urban and Coastal Edge: Draft August 2009.*

draft set back is set out in the most recent SDF. The stated goal of the City's Environmental Resource Management Department (ERMD) is to consolidate the plans within this document to facilitate the environmental authorisation process.<sup>259</sup>

The notion of a buffer zone within which development is prohibited or highly prescribed and coastal ecosystems are restored and protected aligns with the 'precautionary principle' which is prescribed in NEMA.<sup>260</sup>

#### **4.6. Coastal edge and urban edge interaction**

The role and status of tools in long term plans have changed as the three spheres of government gain an understanding of their planning powers. In *Camps Bay Ratepayers & Residents Association v Minister of Planning, Culture & Administration, Western Cape*<sup>261</sup> the SDF was called a work in progress with no statutory or legal force. Zoning regulation and policies developed since then have contained more detail with regard to coordination of plans but the decisions of the municipal authorities have allowed for ad hoc approval of applications outside of the urban edge.<sup>262</sup> The pertinent decisions in both the Shelfplett and Clairison's cases have confirmed the binding status of the plans in the sdf.<sup>263</sup>

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<sup>259</sup> City of Cape Town: Coastal set back delineation method and process.

<sup>260</sup> NEMA section 2(4)(vii).

<sup>261</sup> 2001 4 SA 294 (C).

<sup>262</sup> Such as in Philippi and the city of Wescape.

<sup>263</sup> *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning and Another* (26165/2010) [2012] ZAWCHC 44 (16 May 2012).

## 5. Future Era

### 5.1. Existence of the urban edge: review of policy and law

The promulgation of the Spatial Planning and Land Use Management Act<sup>264</sup> took ten years and it has now established a framework system to address the numerous planning questions related to policy, integration and consistency in our law.<sup>265</sup> Both SPLUMA and the Western Cape Land Use Planning Act<sup>266</sup> entered into force on 1 July 2015.<sup>267</sup>

SPLUMA aspires to achieve six objects (or goals), contained in section 3; the most relevant of which to this research is the intention to ‘provide for a uniform, effective and comprehensive system of spatial planning and land use management’.<sup>268</sup> It is relevant because tools that provide certainty in planning are necessary to facilitate decision making.

The legislative references to the urban edge in the LGMSA that were highlighted in the previous chapter have not been amended but the preparation of municipal plans is given more comprehensive attention in sections 20 (Preparation of SDF) and 21 (Content of municipal SDF) of SPLUMA. Section 22(c) and (d) contain provisions that provide particular guidance for the planning of urban growth. In terms of Section 22: A municipal spatial development framework must:

“(c) include a longer term spatial development vision statement for the municipal area which indicates a desired spatial growth and development pattern for the next 10 to 20 years (emphasis added);

<sup>264</sup> No 16 of 2013 (SPLUMA).

<sup>265</sup> A draft Land Use Management Bill was proposed in 2001. Initial versions were made available in June 2002, July 2003, January 2006, March 2007 and June 2008. In 2011 a revised Draft Spatial Planning and Land Use Management Bill was published. After revisions it was published as the Spatial Planning and Land Use Management Bill in 2012.

<sup>266</sup> Act No 3 of 2014. *Provincial Gazette* 7250 of 7 April 2014 P.N. 99/2014 (WCLUPA).

<sup>267</sup> *Government Gazette* 38828 of 27 May 2015 P.N. 26/2015.

<sup>268</sup> The objects of this Act are to: (a) provide for a *uniform, effective* and comprehensive system of spatial planning and land use management for the Republic; (b) ensure that the system of spatial planning and land use management promotes social and economic inclusion; (c) provide for development principles and norms and standards; (d) provide for the sustainable and efficient use of land; (e) provide for cooperative government and intergovernmental relations amongst the national, provincial and local spheres of government; and (f) redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems.

(d) identify current and future significant structuring and restructuring elements of the spatial form of the municipality, including development corridors, activity spines and economic nodes where public and private investment will be prioritised and facilitated;”

Section 22(d) makes it compulsory for municipalities to delineate possible expansion areas on the SDF, thus ensuring planned enlargement of urban areas in a pattern, zone or direction that is approved in terms of five year projections. Specific plans indicating future growth direction in an SDF will assist municipalities to make decisions before *ad hoc* applications for development are submitted. These recommendations address questions raised by critics such as Horn; who claimed that developments will occur outside the urban edge unless growth corridors or extension areas are provided for future urban expansion.<sup>269</sup> If plans comply with section 22 then an urban edge boundary would be indicated on an SDF around areas where growth is not ‘desirable’.

Section 4 of SPLUMA provides an overview of the planning system and enumerates the planning tools that will be employed in its implementation. Spatial development frameworks are the first item on the list, followed by normative principles, but land use schemes (zoning) are the balancing tool, listed third, that some may call contradictory to a transformative system.<sup>270</sup> The traditional exclusionary role of zoning schemes and the transformational goals of redress and social justice in municipal plans may be found to contradictory when SDF’s are implemented.<sup>271</sup>

Development principles, the foundation of normative regulation are elaborated in Section 7.<sup>272</sup> ‘Spatial sustainability’ is relevant to the urban edge, as section 7(b) requires that the principle should be used to “promote land development in locations that are sustainable and *limit urban sprawl*” (emphasis added).

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<sup>269</sup> Horn 2010 *European Spatial Research and Policy* 51.

<sup>270</sup> Nel 2015 *Urban Forum* 80.

<sup>271</sup> Nel 2015 *Urban Forum* 80.

<sup>272</sup> SPLUMA Section 7 Development principles, namely: spatial justice, spatial sustainability, efficiency, spatial resilience and good administration.

All three spheres of government are required to prepare SDF's that should not be contradictory.<sup>273</sup> The first draft of the SPLUMA regulations specified significant detail for the contents of these plans for each plan, but these were not promulgated.<sup>274</sup>

## 5.2. Urban edge in policies and plans

The WCLUPA does go much further than the SPLUMA in the replacement of practical detail previously contained in old order legislation such as the Land Use Planning Ordinance. The WCLUPA also extrapolates on the principles contained in SPLUMA, specifically at section 59 which contains a comprehensive explanation for each of the guiding principles.<sup>275</sup> With regard to 'efficiency'; section 59(3)(b)(v) provides that integrated cities and towns should be developed, whereby: "the phenomenon of urban sprawl is discouraged and the development of more compact towns and cities with denser habitation is promoted". The words "speedy land development" in the last subsection of the clause do seem out of place, in a piece of law intended to ensure considered and reliable decision making.<sup>276</sup>

The WCLUPA does not contain any references to the urban edge; instead it refers to the physical edge of the municipality.<sup>277</sup> At section 10(2)(e): MSDF's are required to reflect; (iv) outer limits to lateral expansion; and (v) densification of urban areas.

Draft SPLUMA regulations to supplement the instructions for the drafting of SDF's were not promulgated.<sup>278</sup> In chapter 4 of the draft regulations, in a section entitled "Land Use Management Part B: Preparation of Land Use Scheme by a municipality", a municipality is required to take into account numerous issues for the preparation of land use scheme, and "The preparation of a land use scheme

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<sup>273</sup> SPLUMA section 12: The national and provincial spheres of government and each municipality must prepare spatial development frameworks; (f) that contribute to a coherent, planned approach to spatial development in the national, provincial and municipal spheres.

<sup>274</sup> Government Gazette 37797 GN 526 4 July 2014 Spatial Planning and Land Use Management Act (16/2013): Draft regulations: For public comments.

<sup>275</sup> WCULPA: Section 59 Application of land use planning principles.

<sup>276</sup> WCULPA section 59(3).

<sup>277</sup> WCULPA section 43 (d)&(e) Publication of notices (applications for subdivision both inside and outside the 'physical edge') and section 45 Provincial comment on land use applications.

<sup>278</sup> Government Gazette 37797 GN 526 4 July 2014.

must take into account: (r) *urban edge or urban growth boundary delineation*” (emphasis added).

In 2009 the Western Cape Provincial Spatial Development Framework stated that “the urban edge must restrict the outward growth of urban settlements until such time as average gross densities of 25 dwelling units or 100 people per hectare are achieved”. This was incorporated into the assessment of developable land within the city and the densification policy. The 2012 City of Cape Town Densification policy defined the urban edge as “a demarcated edge line defining the outer limits of urban development for a determined period of time”.

The urban edge is reflected in the 2012 MSDF and 2014 provincial SDF (WC PSDF). The WC PSDF contains two definitions, one for the interim urban edge and the second for the medium term urban edge. The delineation of the medium term urban edge is intended to focus the planning approval criteria on the same targeted average set out in 2009 (25 dwelling units per hectare), to be achieved within 10 years. The definition proposes the consolidation of apartheid suburbs along growth routes and also refers to ensuring security of investment for agriculture by keeping the medium term edge fixed for ten to fifteen years.

### **5.3. Nature, scope and legal status of the urban edge**

Zoning schemes have gradually been assessed and streamlined, as noted in chapter 4; Cape Town’s integrated zoning scheme took effect in 2013. The revised documents clearly state that the new City of Cape Town integrated zoning system does not change legal duties or existing rights.

Cape Town was the first municipality to adopt a municipal planning by-law in terms of the new regime in March 2015.<sup>279</sup> The zoning scheme that was passed in 1985 under LUPA became a schedule to this planning law and is called the City of Cape Town Development Management Scheme (DMS).<sup>280</sup>

Schedule 2 of SPLUMA lists ‘scheduled land use purposes’ or standard zoning categories. The DMS contains numerous references to the urban edge both in the definitions clause and with reference to categories that intersect with this tool, namely; ‘agricultural land’, ‘rural and limited use zones’ and ‘the urban edge overlay zone’.

<sup>279</sup> *Provincial Gazette* 7414 PN. 206 of 2015 City of Cape Town Municipal Planning By-law.

<sup>280</sup> <https://www.capetown.gov.za/en/Planningportal/Pages/Legislation.aspx> viewed 01/02/2016

According to the integrated zoning scheme: an overlay zone is an area that has additional conditions applied, over and above the base zoning category.<sup>281</sup> The zoning rules propose that the purpose of the urban edge overlay zone is to guide development close to the urban edge so as to achieve three main goals, namely: a sensitive transition between urban and rural or conservation areas; containment of urban sprawl and the protection of valuable natural and agricultural resources adjacent to urban development.<sup>282</sup>

#### **5.4. Interact or overlap with other relevant land use planning tools**

Neither the City's zoning scheme regulations nor the planning by-law specify any particular 'Development rules' or 'Specific provisions' for Urban Edge Overlay Zoning (UEOZ).<sup>283</sup> This is in contrast to the section preceding the UEOZ, the Environmental Management Overlay Zoning (EMO) and the following section Scenic Drive Overlay Zoning (SDO) which contain particular detail for their protection and observance.

#### **5.5. Influence of the urban edge on land use planning decision-making**

Decision makers at municipal level are required to comply with section 28 of SPLUMA: which states that "amendment of land use scheme and rezoning" is possible so as to achieve the development goals and objectives of the municipal spatial development framework (MSDF).

The City has also produced a document for decision makers which will provide guidelines for applications that seek to obtain authorisation for developments contrary to the MSDF.<sup>284</sup> This document refers to section 9 of the Municipal Planning By-law and the need for consistent plans. A number of examples of applications outside of the urban edge or contrary to the SDF are used in the document, all of these are provided with a yes, in favour of approving development, in the template answer sheet, indicating approval for development

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<sup>281</sup> DMS: Part III: Overlay zones provide a mechanism for elevating specific policy guidelines, as approved by Council, into land use regulations. In this case overlay zones may be divided into three general types, those that provide development directives, strategic incentives or density targets, and those that incorporating specific management mechanisms (such as the urban edge).

<sup>282</sup> City of Cape Town Planning By-law, Part 3 Section 169 and 170.

<sup>283</sup> DMS: Part III, section 17

<sup>284</sup> Department Energy Environmental and Spatial Planning: 30 June 2015. Circular 3/2015 Guideline 1 Assessing MSDF Consistency and Deviating from its provisions in site specific circumstances.

contrary to the pre-determined urban edge. No grounds for refusal are provided in the template or policy documents.



## 6. Conclusions

### 6.1. What is the status of the urban edge in the Western Cape?

The definitions of the urban edge are varied and confusing. Have the cases and law changed to provide greater certainty for the future of this land use planning tool? It is now necessary to assess whether any of the definitions of the urban edge that have been reviewed in the preceding chapters are enforceable as part of administrative law or policy.

The National Development Plan Vision 2030 (NDP) has slightly different goals and procedures to the requirements of SPLUMA but spatial reform is noted as a particular concern.<sup>285</sup> To address the protection of biodiversity and ecosystem services the delineation of an urban edge in municipal SDF's is noted as a solution by diverting growth pressures away from critical biodiversity areas.<sup>286</sup> The importance of agriculture in the economy is noted at section 3.1.5.2 and the urban edge is offered as a tool to protect unique and high potential agricultural land. At section 3.1.7.2 the value of cultural and scenic assets is highlighted and it is proposed that an urban edge could protect these resources from the danger of urban encroachment.

The decisions in *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs & Development Planning and Another*<sup>287</sup> and *MEC for Environmental Affairs and Development Planning v Clairison's*<sup>288</sup> provided break from the status arguments used in earlier cases. In both of these cases the provincial SDF was accorded binding status (albeit in comments that were not related to the primary decisions).

The SDF's that are prepared in terms of SPLUMA for each sphere of government are now required to consider even longer term goals, as far ahead as 20 years from their finalisation and inclusion in an IDP or other plan.<sup>289</sup>

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<sup>285</sup> *National Planning Commission*: November 2011 Spatial proposals: Develop a national spatial framework, Strengthen the spatial planning system, Start a national conversation about cities, towns and villages, introduce bolder measures to make sustainable human settlements, Support rural spatial development, Build an active citizenry to rebuild local place and community.

<sup>286</sup> NDP at 3.1.3.

<sup>287</sup> 2012 3 SA 441 (WCC).

<sup>288</sup> CC (408/2012) [2013] ZASCA 82.

<sup>289</sup> SPLUMA section 22(c) and (d).

As noted in *President of the RSA and Others v SARFU and Others*<sup>290</sup> administrative action is justiciable in terms of section 33 of the Constitution (and the Promotion of Administrative Justice Act).<sup>291</sup> The IDP prepared in terms of the LGMSA is called the policy framework of the municipality.<sup>292</sup> Davis J also likened the SDF that is drawn up as part of the IDP to the consideration of desirability that was previously required in terms of LUPO.<sup>293</sup>

The 2014 Western Cape Spatial Development Framework requires each municipality to demarcate an urban edge in their municipal SDF to protect a variety of resources including: biodiversity, agricultural and mineral resources, cultural and scenic assets and to manage spatial growth and development. After almost every reference to the proposed boundary the SDF explains that the urban edge is not sufficient protection for these resources on its own.

SPLUMA has put in place requirements for conformity between zoning schemes and SDFS by requiring that “A land use scheme must give effect to and be consistent with the municipal spatial development framework”.<sup>294</sup>

Decision makers at municipal level are required to comply with section 28 of SPLUMA: which states that “amendment of land use scheme and rezoning” is possible so as to achieve the development goals and objectives of the municipal spatial development framework (MSDF). Section 42 goes further and states that the where applications for change are submitted the Municipal Planning Tribunal *must* make a decision that is consistent with inter alia ‘national and provincial government policies and the municipal spatial development framework’ (emphasis added).<sup>295</sup>

This approach, of affording functionaries with discretion to act conforms to the principles of separation of powers. The weight that the decision maker attributes

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<sup>290</sup> 1999 (10) BCLR 1059(CC) at para. 142-143

<sup>291</sup> Act No. 3 of 2000. (PAJA) section 5(1).

<sup>292</sup> LGMSA Section 25.

<sup>293</sup> *Durbanville Community Forum v Minister for Environmental Affairs and Development Planning Provincial Government Western Cape and Others* (13854/2013) [2014] ZAWCHC 205; [2015] 2 All SA 187 (WCC) (24 December 2014).

<sup>294</sup> SPLUMA section 25 Purpose and content of land use scheme.

<sup>295</sup> SPLUMA section 42 Deciding an application. A change to zoning or a departure may be granted if it is in the public interest, furthers the goals of SPLUMA or is in line with the goals of the municipality.

to particular factors in the decision making process, or how much a particular factor affects the final version of the policy, is a matter for the functionaries to decide.<sup>296</sup>

The distinction between delineating the urban edge line (a process that is completed through consultation when finalising the SDF) and making changes to its position should also be acknowledged. The initial determination of the line may be based on historical use (such as in the Philippi-Schaapkraal smallholdings area), areas of particular environmental value (critical biodiversity is listed in the Cape Town Bioregional plan), environmental risk zones (coastal zones affected by rising sea levels and erosion), valuable agricultural land and areas of planned expansion and growth.

International theory has been imported to complete the assessment of interests and it has been found that even within the municipal administrative departments there is a risk of conflict. The coastal and environmental value of the coast in the Western Cape, and in Cape Town in particular, are worthy of protection by the conservation authorities and also offer potential for economic and tourism income.<sup>297</sup>

The passing of SPLUMA has not had a dramatic impact on land use planning law to date and its application will be tested gradually by those entrusted with the coordination of national, provincial and local laws. There has been some criticism of the status given to zoning schemes in the SPLUMA and WCLUPA, as the DMS is traditionally not an integrative tool.<sup>298</sup> The transformative goals of SPLUMA cannot be achieved using existing zoning schemes but the advantage of zoning is that its application is relatively straightforward.

As noted in chapter 5, there is a distinct lack of detail regarding the regulation of the urban edge overlay zone in the Cape Town DMS. The effect of this lack of clarity for decisions regarding maintenance of the delineation of the urban edge or protection from amendments in line with municipal and provincial SDF is unknown. The indirect reference to the urban edge, via the SDF, in section 28 of SPLUMA,

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<sup>296</sup> *MEC for Environmental Affairs and Development Planning v Clairison's CC* (408/2012) [2013] ZASCA 82.

<sup>297</sup> Colenbrander 2015 *South African Geographical Journal* 6.

<sup>298</sup> Nel 2015 *Urban Forum* 29.

places the obligation on those considering changes to the DMS to have regard for the urban edge, which may lead to a more certain status for the urban edge, comparable to so-called 'subordinate legislation' status as proposed by Rogers in the Shelfplett case.<sup>299</sup>

Zoning, the most well-known form of 'forward' or spatial planning has achieved subordinate legislation status. The status of guide plans was lost with the repeal of old order legislation. The requirement that zoning comply with SDF's in future may provide convincing argument for the alignment of the urban edge as a spatial planning tool.<sup>300</sup>

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<sup>299</sup> 2012 (3) SA 441 (WCC) Rogers AJ par 61.

<sup>300</sup> SPLUMA section 25 Purpose and content of land use scheme.

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