

Not in my backyard: Strategic Infrastructure Projects and the decision-making criteria to be applied to land-use planning applications

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

TABLE OF CONTENTS

1. INTRODUCTION	5
2. THE HISTORIC FOCUS ON MAINLY PROCEDURE RELATING TO LAND-USE PLANNING MATTERS	8
3. WHERE TO FIND THE LAND-USE PLANNING DECISION- MAKING CRITERIA.....	11
4. LAND-USE PLANNING DECISION-MAKING CRITERIA - NATIONAL.....	13
5. LAND-USE PLANNING DECISION-MAKING CRITERIA - PROVINCIAL.....	22
6. LAND-USE PLANNING DECISION-MAKING CRITERIA - LOCAL.....	30
7. HOW SHOULD THESE LAND-USE PLANNING DECISION- MAKING CRITERIA BE INTERPRETED?.....	31
8. CONCLUSION	34
9. BIBLIOGRAPHY	37

LIST OF ABBREVIATIONS

DFA	Development Facilitation Act 67 of 1995
LUPO	Land-use Planning Ordinance 15 of 1985
NEMA	National Environmental Management Act 107 of 1998
NCPDA	Northern Cape Planning and Development Act 7 of 1998
Orange Free State Ordinance	Township Ordinance 9 of 1969
PAJA	Promotion of Administrative Justice Act 3 of 2000
PDA	Kwa-Zulu-Natal Planning and Development Act 6 of 2008
SIPS	Strategic Infrastructure Projects
SPLUMA	Spatial Planning and Land Use Management Act No 16 of 2013
Transvaal Town-Planning and Township Ordinance	Town-Planning and Township Ordinance 15 of 1986

1. INTRODUCTION

South Africa's National Development Plan¹ can be described as an ambitious document that recognises the need for much needed infrastructure development in South Africa.² The strategic infrastructure projects ("SIPS")³ which are identified in the National Development Plan as being required to propel economic development in South Africa, have been listed in an equally ambitious piece of draft legislation in the form of the draft Infrastructure Development Bill.⁴ Through a number of initiatives this Bill is aimed at fast tracking strategic infrastructure development.⁵ However, it remains to be seen whether this draft legislation will pass Constitutional law scrutiny in its passage through Parliament.⁶ What is clear, however, is that the South African Government recognises the need for infrastructure development and appears to be determined to fast-track the development of strategic infrastructure projects in South Africa.

It is fair to say that South Africa has observed a steady increase in land-use development over the medium-term and it is fair to predict that South Africa is likely to enjoy continued development into the future. This is irrespective of whether the draft Infrastructure Development Bill is promulgated into law or whether some other legal mechanism or initiative is used to roll-out the SIPS identified in the National Development Plan. If, however, the draft Infrastructure Development Bill and the development goals of the National Development Plan are implemented in South Africa, the existing steady

¹ Dated 11 November 2011.

² Chapter 4 of the National Development Plan, page 137 – 170.

³ These SIPS are listed in Schedule 1 of the draft Infrastructure Development Bill and include the following: national and international airports; communication and information technology installations; education institutions; electricity transmission lines; health care facilities; human settlements and related infrastructure and facilities; economic facilities; mines; oil or gas pipelines, refineries or other installations; ports and harbours; power stations or installations for harnessing any source of energy; productive rural and agricultural infrastructure; public roads; railways; and sewage works.

⁴ Published in GN R 99 in GG No. 36139 of 8 February 2013. The Bill was introduced by the Department of Economic Development, headed by Minister Ebrahim Patel, in February 2012 and was approved by Cabinet in December 2012. Written comments on the Bill were invited until 27 March 2013. In terms of GN R 1078 of 2013 the Minister of Economic Development gave notice of its intention to introduce the Bill into Parliament during November 2013. The Bill aims to enhance the co-ordination of the country's Planned Strategic Infrastructure Projects (SIPS), which have been compiled by the Presidential Infrastructure Co-ordinating Commission (PICC) and to govern their implementation. The PICC currently monitor 44% of all state infrastructure projects and is focused on the 18 SIPS.

⁵ In terms of this proposed Bill for example, these strategic integrated projects or SIPS will fall under the responsibility of a designated Minister who will appoint a steering committee made up of organs of state at national, provincial and local level who are anticipated to be representatives of those authorities that would typically issue the required authorisations and consents for such developments.

⁶ For example, the Bill, in its current form (i) allows for the encroachment of authority by national and provincial authorities into the competencies allocated to local authorities; (ii) provides for a mechanism in terms of which a negative decision on an authorisation is referred internally for deliberations which subverts the usual process of appeal and judicial review; and (iii) questions around fair administrative justice will no doubt be raised with respect to its tight public participation procedures.

increase in land-use development in South Africa has the potential to rise to unprecedented levels. But infrastructure development that is identified by the national sphere of government, requires the co-operation and buy-in of both the provincial and local spheres of government, before such development becomes a reality in South Africa.

The Constitution of the Republic of South Africa, 1996 entrusts our local municipalities with the gargantuan responsibility of deciding whether a proposed development site is appropriate from a municipal planning point of view⁷ and our Constitutional Court⁸ has made it clear that these local authorities effectively have a veto decision when it comes to deciding whether such development is to take place at all. It therefore becomes critical to identify the objective criteria that these local authorities are to consider in making such important decisions at a local level.

The rule of law is a founding value of the South African Constitution and our Constitutional Court in *Dawood v Minister of Home Affairs*⁹ confirmed that this value includes the requirement that legal rules are to be conveyed in a clear and accessible manner. In the land-use planning context, the conveyance of clearly defined decision-making criteria for land-use planning decisions would allow project developers greater certainty when identifying the likelihood of their projects fulfilling such criteria and ultimately being granted land-use planning authorisation for their development. This level of certainty allows for greater investor confidence and would be an attractive feature to increase private sector investment in infrastructure developments in South Africa.

Further, the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) allows for the judicial review of administrative decisions that are, *inter alia*, arbitrary¹⁰ or that were taken where irrelevant considerations were taken into account or where relevant considerations were not taken into account.¹¹ By

⁷ “Municipal planning” is an exclusive municipal competence in terms of Part B of Schedule 4 of the Constitution.

⁸ *Maccsand (Pty) Ltd v City of Cape Town and Others (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) (12 April 2012) and Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape & others (320/12) [2013] ZASCA 13 (15 March 2013).*

⁹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (8) BCLR 837 (CC).*

¹⁰ Section 2(e)(vi) of PAJA.

¹¹ Section 2(e)(iii) of PAJA.

having an objective set of criteria that stipulate the required relevant considerations that are to be applied, the consistency of decisions amongst decision makers should, in theory, be increased and where these criteria are not correctly applied, such decisions could be subjected to administrative review. As a result, a codified set of decision-making criteria should reduce arbitrary decision-making and should improve efficient administration and good governance by promoting accountability, openness and transparency.¹² This paper aims to identify whether South Africa has such a codified set of decision-making criteria in its land-use planning laws and, if so, aims to identify what these are and what they mean.

This paper will first provide a brief background to the focus the majority of our court judgments have had on procedural related matters in the land-use planning context. Turning to substantive matters, the paper will identify where one finds the relevant land-use planning decision making criteria as these are to be found at national, provincial and local level. The detailed decision-making criteria stipulated in the national framework legislation of SPLUMA will first be considered, followed by the decision-making criteria that apply in each of the respective provinces and finally the potential municipal decision-making criteria will be considered at the local level. The paper will then comment on how these decision-making criteria are to be interpreted and will conclude that the existing fragmented land-use planning regime may not necessarily have been simplified by the overhaul of the land-use planning regime envisaged by SPLUMA.

The ambit of the enquiry will be limited to only those post-Constitutional provincial planning and development laws that are applicable in the Northern Cape Province and KwaZulu Natal and the old order ordinances that still apply in what was historically known as the Transvaal, Orange Free State and the Cape Province. It is recorded that a number of other potentially applicable regulations and laws are potentially applicable in the former homelands that have now been incorporated into the existing nine provinces.

¹² For a general discussion on PAJA and judicial review see Chapter 1 of De Ville JR *Judicial Review of Administrative Action in South Africa*.

Although relevant, an analysis of these laws falls outside the scope of this paper.¹³

In the land-use planning context there are also a number of potentially applicable land-use planning applications that a developer may need to bring, depending on the circumstances. These may include applications for rezoning, sub-division, consent use, departure, amendments to structure plans and town planning schemes and applications for the removal of restrictive title deed conditions. For the purposes of this paper, the focus will only be on the relevant decision-making criteria applicable to rezoning applications as the decision-making criteria relating to sub-division, consent use and the removal of restrictive title deed conditions each have their own decision-making criteria and fall outside the scope of the analysis of this paper.

2. THE HISTORIC FOCUS ON PROCEDURE RELATING TO LAND-USE PLANNING MATTERS

The majority of judicial energy and focus in South Africa's recent jurisprudence on land-use planning law has been on matters unrelated to the decision-making criteria that are to be applied by the relevant local authorities. The core of this substantive enquiry has been neglected by our developing land-use planning jurisprudence as the focus has been on providing clarity to the distracting preliminary procedural matters relating to who decides what and when.¹⁴ This clarity has been sorely needed as a result of the land-use planning statutory vacuum that followed the promulgation of our Constitution. With the exception of the stuttering, spluttering and ultimately faltering Development Facilitation Act 67 of 1995

¹³ These include: Regulations enacted in terms of the Black Communities Development Act 4 of 1984 and the Black Administration Act 38 of 1927; Legislation of the homelands (or so called self-governing territories) of KwaZulu Natal, Gazankulu, KaNgwane, Lebowa, KwaNdebele and QwaQwa; and Legislation of the homelands (or so called independent states) of Transkei, Bophuthatswana, Venda and Ciskei.

¹⁴ Jafta J in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others 2010 (6) SA 182 (CC)* provides at paragraphs 54-56:

"The Constitution confers "planning" on all spheres of government by allocating "regional planning and development" concurrently to the national and provincial spheres, "provincial planning" exclusively to the provincial sphere, and executive authority over, and the right to administer "municipal planning" to the local sphere. The first functional area mentioned also indicates the close link between planning and development. Indeed it is difficult to conceive of any development that can take place without planning. It is, however, true that the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. But that notwithstanding, they remain distinct from one another. ... The distinctiveness lies in the level at which a particular power is exercised. The constitutional scheme propels one ineluctably to the conclusion that, barring functional areas of concurrent competence, each sphere of government is allocated separate and distinct powers which it alone is entitled to exercise."

(“DFA”),¹⁵ old order land-use planning laws were all that could be relied upon in trying to make sense of the undefined Constitutional mandates allocated to the three spheres of government in the land-use planning context.

These undefined Constitutional mandates include the concurrent national and provincial legislative competence of “environment”, “regional planning and development” and “urban and rural development”; and the exclusive provincial legislative competence of “provincial planning”; and the exclusive executive local government authority over “municipal planning”.¹⁶

Determining where the boundaries of these different mandates begins and ends is not easy as the Constitution contains no definitions of these different legislative and executive functional areas and as mentioned there has not historically been a post-Constitutional national framework land-use planning law in place to provide the much needed flesh to these bare definitional bones.¹⁷

With this lack of legal direction arising from the dearth of post-Constitutional land-use planning statutes, it is no wonder that so much judicial ventilation has been given by our courts on the simple matters of deciding who is to decide what and when. In this regard our courts have decided on whether the provincial or local competent authority is entitled to decide land-use planning matters¹⁸ and what “municipal planning” means.¹⁹ Our courts have

¹⁵ In terms of the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* 2010 (6) SA 182 (CC).

¹⁶ See in this regard the discussion on the three spheres of government and their land use planning competencies in Van Wyk J *Planning Law* 103–127.

¹⁷ One of the most controversial issues relating to spatial planning facing the courts in recent times has been the question of how to define municipal planning (as an exclusive municipal executive function in terms of the Constitution) and how to distinguish this from other planning functional areas (e.g. provincial planning), for which provinces have Constitutional powers; *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs & Development Planning (Western Cape)* [2011] (4) All SA 270 (WCC); *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister for Local Government, Environmental Affairs and Development Planning, Western Cape* [2013] ZASCA 13; *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoon Bay Lifestyle Estate (Pty) Ltd and Others* Case CCT 41/13 [2013] ZACC; *Shellplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 (3) SA 441 (WCC); *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning* Case 26165/2010 (WCC) paras 55-62 and *MEC for Environmental Affairs and Development Planning v Clairison's CC* (408/2012) [2013] ZASCA 82 (31 May 2013).

¹⁸ In this regard see *Habitat Council and Another v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others*; *City of Cape Town v Provincial Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape and Others* (6227/2013; 23061/2009) [2013] ZAWCHC 112; 2013 (6) SA 113 (WCC) (14 August 2013) at page 18 in which it was held:

“Control of land-use entails the provincial government taking decisions concerning zoning and the establishment of townships, which, because of the nature and scale of land-use to which they relate, have substantial regional or provincial planning effects. When exercising the power, the provincial government must confine itself to the regional provincial effects, that is, it is not at large to reject a proposal because it approves of a feature which has only intra-municipal effects... To this end, it must follow that the provincial government may regulate the manner in which municipalities exercise their executive authority, which entails a ‘broad managing or controlling rather than a direct authorisation function’... Accordingly, within the context of the present dispute, provincial government may also assess the outcome of the municipal planning processes. Provincial government may require that the decision be reconsidered by a municipality if the manner in which it was taken, the justification for the decision, or the nature and effects, or likely the effect of the decision

also decided whether such decisions override or are overridden by decisions to approve the same developments by different competent authorities in terms of different mandates in terms of different laws.²⁰ Finally our courts have decided whether different competent authorities tasked with analysing similar if not identical criteria need to repeat an analysis already undertaken by a different competent authority.²¹ Fortunately, a good body of case law has developed to provide answers to these procedural questions which have been codified to a large extent in the recently promulgated and much needed post-Constitutional national framework land-use planning law, the Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”). In this regard, SPLUMA was assented to by the President on 2 August 2013²² and its effective date is imminent.

SPLUMA now provides that it is the municipality that is to receive land use planning applications and it is the newly established Municipal Planning Tribunals that are to decide such applications, thereby giving express recognition to local government’s “municipal planning” competence.²³ With regard to appeal proceedings, in recognition of the exclusive municipal

undermines the effective performance by the municipality of its forward planning and land-use control functions. This constitutes an approach which harmonises the relationship between the two levels of government, rather than being destructive of local government powers and their conflation with provincial powers.”.

¹⁹ In *City of Johannesburg v Gauteng Development Tribunal (335/08) [2009] ZASCA 106 (22 September 2009)* the Supreme Court of Appeal stated that:

“it is clear that the word planning, when used in the context of municipal affairs, is commonly understood to refer to the control and regulation of land-use, and I have no doubt that it was used in the Constitution with that common usage in mind. The prefix municipal does no more than to confine it to municipal affairs.”.

The term “municipal planning” as used in Part B of Schedule 4 was further considered in *Maccsand (Pty) Ltd v City of Cape Town and Others (SCA) [2011] ZASCA 141; 2011 (6) SA 633 (SCA); [2011] 4 All SA 601 (SCA) (23 September 2011)* where the SCA approved the dictum cited in the *Johannesburg City Council* case and went on to state:

“Returning to the meaning of municipal planning, the term is not defined in the Constitution. But planning in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land the establishment of townships.”.

This was confirmed on appeal by the Constitutional Court, which held that:

“it is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed.”.

²⁰ In this regard, see *Maccsand (Pty) Ltd v City of Cape Town and Others (CCT103/11) (CC) [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC) (12 April 2012)*.

²¹ *Fuel Retailers Association of Southern Africa v Director – General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others 2007 (6) SA 4 (CC)* makes it clear that the enquiry into need and desirability by local government in the land-use planning context is a distinct enquiry with different criteria to those that are to be considered by the competent authority assessing need and desirability in the EIA context. Reliance on an authorisation by a separate sphere of government acting in terms of a separate competency in terms of the Constitution is not sufficient for the purposes of discharging one’s own Constitutional mandate. A land-use planning authority will need to consider the effects on the environment independently of the findings of the environmental authority. Similarly, the environmental authority will need to consider the need and desirability of a development independently of the findings of the land-use planning authority. Although there may be an element of duplication in the enquiry, such an enquiry is to be done through the respective lenses of environmental, social and economic considerations (with respect to the environmental authority) on the one hand and municipal planning on the other (with respect to the land-use authority).

²² GN R 559 in GG 36730 of 2013-08-05.

²³ Section 35(1) of SPLUMA.

competence in matters relating to “municipal planning” SPLUMA²⁴ is careful to ensure that only the local authority and not the provincial authority makes decisions on land use planning appeals with it being envisaged that appeal decisions will be made by the executive authority of the municipality.²⁵ It is only in very specific circumstances relating to developments that are likely to affect the national interest that SPLUMA provides that land development applications must also be referred to the National Minister of Rural Development and Land Reform in addition to the relevant Municipal Planning Tribunals.²⁶

SPLUMA codifies and provides clarity on who is doing what and when from a procedural point of view. Local government’s “municipal planning” competence has been expressly recognised and the circumstances in which this municipal competence may be subjected to further scrutiny by national government, expressly codified. The focus will now be shifted to the substantive enquiry of identifying the considerations that must be taken into account when making such decisions by the relevant local authorities.

3. WHERE TO FIND THE LAND-USE PLANNING DECISION-MAKING CRITERIA

National and provincial governments may both make and implement laws on functional areas relevant to land-use planning, listed in Schedule 4 of the Constitution. National government may regulate municipal planning, and have done so historically through the DFA and now SPLUMA. SPLUMA is national framework legislation and repeals a number of national land-use

²⁴ SPLUMA determines that development management decisions in the first instance will be taken by Municipal Planning Tribunals or municipal officials. SPLUMA furthermore determines that the internal appeal mechanism of a municipality is applicable to development management decisions. Against that backdrop, SPLUMA proposes a provincial role in the appeal procedure in the municipal sphere. The Minister will, in selected cases, comment on appeals before a Municipal Council and thereby support these municipal processes. An appeal suspends the original decision and the municipal council is compelled to consider the Minister’s comment.

²⁵ Section 51(2) of SPLUMA.

²⁶ Section 52(1) of SPLUMA provides that land development applications must be referred to the Minister where such an application materially impacts on (a) matters within the exclusive functional area of the national sphere in terms of the Constitution (b) strategic national policy objectives, principles or priorities and (c) land use for a purpose which falls within the functional area of the national sphere of government. Section 52(2) provides that a land development application must be referred to the Minister where the outcome of the application may impede the effective performance of the functions by one or more municipalities or provinces relating to matters within their functional area of legislative competence. Section 52(3) obliges an applicant who believes that his or her application is likely to affect the national interest to submit a copy of the application to the Minister and section 52(4) obliges Municipal Planning Tribunals to inform the Minister of an application and provide him or her with a copy of such application where the application may affect the national interest. Section 52(5)(b) allows the Minister to decide such land use planning applications however section 52(7) provides that all applications are to be lodged and considered by the relevant Municipality before being referred to the Minister.

planning laws²⁷ and in particular replaces the existing national framework legislation, the DFA. This simplifies the enquiry marginally as we now have a single national land-use planning law, as opposed to multiple potentially applicable national laws, to review when determining what land-use planning decision-making criteria are stipulated at the national level. SPLUMA remains framework legislation however and all provinces will be required to implement provincial legislation to provide the detail to the land-use planning framework that SPLUMA provides.²⁸

Section 4 of SPLUMA provides that the spatial planning system in South Africa consists of, *inter alia*, the consideration of land development applications and related processes as provided for in (i) SPLUMA and (ii) provincial legislation. Accordingly, the “nuts and bolts” of the planning decision-making processes are derived from both SPLUMA and provincial legislation.²⁹ All nine provinces have provincial legislation that, in some way or another, deal with municipal planning. Some of these provincial laws³⁰ predate the Constitution and are constitutionally problematic. Some provinces have already adopted new laws to deal with municipal planning under the current Constitution.³¹ In this regard only two of the nine provinces have enacted post-Constitution provincial planning legislation. These are the Northern Cape Planning and Development Act 7 of 1998 in the Northern Cape Province and the KwaZulu- Natal Planning and Development Act 6 of 2008 in KwaZulu Natal. However, as a result of the recently promulgated SPLUMA, it is likely that amendments to these new order planning laws in the Northern Cape and KwaZulu Natal will need to be made to take into account the national framework legislation set out in SPLUMA.³² All of the other provinces have pre-Constitutional land-use planning laws that were

²⁷ The laws that will be repealed include: Development Facilitation Act 67 of 1995; Removal of Restrictions Act 84 of 1967; Less Formal Township Establishment Act 113 of 1991; Physical Planning Act 88 of 1967; and Physical Planning Act 125 of 1991.

²⁸ Already in the Western Cape, land-use planning legislation is under consideration that is set to replace the old order LUPO and so too in Gauteng. As early as December 2011, tenders were issued to draft new planning legislation in the Eastern Cape, Free State, Limpopo and Mpumalanga and it can be anticipated that detailed provincial land-use planning laws, replacing old order pre-constitutional laws, will be on the statute books in the not too distant future.

²⁹ Kidd M *Environmental Law Sibergramme*.

³⁰ These include the Land Use Planning Ordinance 15 of 1985 in respect of the Western, Eastern and North West Provinces, the Town-Planning and Township Ordinance 15 of 1986 in respect of the North West Province, Gauteng, Limpopo and Mpumalanga and the Township Ordinance 9 of 1969 in respect of the Free State Province.

³¹ Berrisford S and Prof De Visser J *Important Legal Issues for provincial legislation dealing with Spatial Planning and Land-use Management*.

³² Schedule 1 of SPLUMA provides that matters to be addressed in provincial legislation include, *inter alia*, the repeal or amendment of provincial legislation, including ordinances which are inconsistent with SPLUMA.

enacted before the Constitution.³³ Until each of the provinces passes provincial legislation that are aligned with SPLUMA these existing provincial laws will remain relevant in determining what land-use planning decision-making criteria apply in each relevant province.

In addition, SPLUMA provides for municipalities to pass by-laws to enforce their respective land-use schemes.³⁴ It is not inconceivable that, arising from the local authorities' municipal planning competency in terms of the Constitution, these municipal planning by-laws may contain additional decision-making criteria to those prescribed in national and provincial planning legislation. Each of the national, provincial and municipal decision-making criteria will now be considered in turn below.

4. LAND-USE PLANNING DECISION-MAKING CRITERIA - NATIONAL

With regard to national decision-making criteria, these are set out in SPLUMA which expressly provides that in considering and deciding an application for rezoning the relevant competent authority must, *inter alia* (i) be guided by the development principles set out in Chapter 2 (“Development Principles ”); (ii) make a decision which is consistent with (a) norms and standards, (b) measures designed to protect and promote the sustainable use of agricultural land, (c) national and provincial government policies and (iv) the municipal spatial development framework (“Guidelines and Frameworks”); (iii) take into account (1) the public interest (2) the constitutional transformation imperatives and the related duties of the State (3) the facts and circumstances relevant to the application (4) the respective rights and obligations of all those affected (5) the state and impact of engineering services, social infrastructure and open space requirements and (6) any factors that may be prescribed, including timeframes for making decisions (“Public Considerations”);³⁵ and ensure compliance with environmental legislation (“Environmental Legislation”).³⁶

³³ These include the Land Use Planning Ordinance 15 of 1985, Town-Planning and Township Ordinance 15 of 1986 and the Township Ordinance 9 of 1969.

³⁴ Section 32 of SPLUMA.

³⁵ Section 42(1) SPLUMA.

³⁶ Section 42(2) SPLUMA.

Each of these national framework decision-making criteria will be considered in turn below.

4.1 Development Principles (*be guided by the development principles set out in Chapter 2*):

SPLUMA's development principles must guide spatial planning, land-use³⁷ management and land development.³⁸ SPLUMA provides that the development principles apply to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land and are to guide the consideration by a competent authority of any application that impacts or may impact upon the use and development of land.³⁹ The development principles include spatial justice,⁴⁰ spatial sustainability,⁴¹ efficiency,⁴² spatial resilience,⁴³ and good administration.⁴⁴

Of particular relevance for rezoning applications for SIPs are the spatial sustainability principles of (i) ensuring that special consideration is given to the protection of prime and unique agricultural land; (ii) upholding consistency of land-use measures in accordance with environmental management instruments; (iii) considering all current and future costs to all parties for the provision of infrastructure and social services in land developments; and (iv) promoting land developments in locations that are sustainable and limit urban sprawl.

These development principles are not prescriptive and a failure to meet any one of these principles is unlikely to be the sole basis for a refusal to approve a rezoning application. But the relevant applicant for a rezoning application would need to sufficiently motivate that their application is in line with these

³⁷ "Land-use" means the purpose for which land is or may be used lawfully in terms of a land-use scheme, existing scheme or in terms of any other authorisation, permit or consent issued by a competent authority, and includes any conditions related to such land-use purpose.

³⁸ "land development" means the erection of buildings or structures on land, or the change of use of land, including township establishment, the subdivision or consolidation of land or any deviation from the land-use or uses permitted in terms of an applicable land-use scheme.

³⁹ Section 6(1)(d) SPLUMA.

⁴⁰ Section 7(a) of SPLUMA.

⁴¹ Section 7(b) of SPLUMA.

⁴² Section 7(c) of SPLUMA.

⁴³ Section 7(d) of SPLUMA.

⁴⁴ Section 7(e) of SPLUMA.

development principles and the relevant competent authority would have a discretion to reject such a rezoning application if, on balance, any one of the development principles is not fulfilled. However, the competent authorities would need to provide very detailed reasons for their decisions to avoid review proceedings on the basis that any one of these development principles was not properly taken into account, as a relevant consideration, in guiding them with their relevant decision.

4.2 Guidelines and Frameworks (*make a decision which is consistent with (i) norms and standards, (ii) measures designed to protect and promote the sustainable use of agricultural land, (iii) national and provincial government policies and (iv) the municipal spatial development framework*):

These Guidelines and Frameworks require consistency with a number of policies, measures and frameworks. The first sub-criteria relates to norms and standards which are yet to be published by the Minister⁴⁵ and/or the Premier of a relevant province.⁴⁶ Once published these norms and standards⁴⁷ will not only be required to guide competent authorities with respect to their decisions but all relevant decisions will need to be consistent with these norms and standards.⁴⁸

The second sub-criteria, requires that any relevant decision is consistent with any measures designed to protect and promote sustainable use of agricultural land. Not only must the competent authority ensure that special consideration is given to the protection of prime and unique agricultural land in terms of the Development Principle referred to above, it must also ensure that its decision is consistent with measures designed to protect and promote the sustainable use of agricultural land.

The third sub-criteria, requires that any relevant decision is consistent with national and provincial government policies.⁴⁹ To the extent that such

⁴⁵ Section 8 and section 54 of SPLUMA.

⁴⁶ Section 10(4) of SPLUMA.

⁴⁷ Section 8(2) of SPLUMA provides that the norms and standards must, *inter alia*, (i) reflect the national policy, national policy priorities and programmes relating to land use management and land development (ii) promote social inclusion, spatial equity, desirable settlement patterns, rural revitalisation, urban regeneration and sustainable development and (iv) include existing and future land use plans, programmes and projects relative to key sectors of the economy.

⁴⁸ Section 42(1) SPLUMA.

⁴⁹ For example, at a national level, the decision would need to be consistent with the South African National Climate Change Response Paper (2011) which provides that, *inter alia*,

national and provincial government policies usurp the local authorities “municipal planning” competence, this very broad and general sub-criteria may be challenged in due course on Constitutional law grounds.⁵⁰

The fourth and final sub-criteria requires consistency with municipal spatial development frameworks. Spatial Development Frameworks (“SDF”) are to be prepared by national and provincial spheres of government and each municipality.⁵¹ SPLUMA, expressly provides that a provincial SDF must be consistent with the national SDF.⁵² Interestingly, there is no equivalent express requirement with respect to the municipal SDF relative to the provincial SDF. There is however, a less prescriptive requirement that the national government, provincial government and municipality participate in the spatial planning and land-use management processes that impact on each other to ensure that the plans and programmes are coordinated, consistent and in harmony with each other.⁵³

Using the SIPs as an example, such projects would need to be provided for in the national SDF which would then need to be consistently provided for in the provincial SDF. The national and provincial government would be entitled to participate in the development of municipal SDF to ensure that there is coordination, consistency and harmony with the national and provincial SDF, however, there is no express requirement that the municipal SDF be consistent with the provincial SDF and the national SDF. The Legislature appears to have treaded lightly around this issue so as not to expressly usurp the exclusive “municipal planning” competency assigned to municipalities in terms of the Constitution in the hope that co-operative

“[South Africa must] take account of the potential impact of sea-level rise and intense weather events, such as storm surges, on infrastructure development and investment in coastal areas, particularly in terms of the location of the high-water mark and coastal set-back lines that demarcate the areas in which development is prohibited or controlled”.

For example, at the provincial level, the decision would need to be consistent with the Western Cape Climate Change Strategy and Action Plan (2008) which provides that the province’s coastline is sensitive to sea level rises, which will impact on coastal ecology, particularly where developments are too close to high-water lines. In terms of this document, the Western Cape Government undertakes to incorporate climate change issues (to include coastal vulnerability, the impacts of sea level rise and storm surge risk) into development planning and approval processes and to develop practical planning tools to assist local government in taking predicted climate change impacts into consideration.

⁵⁰ Using the climate change example above, municipalities that are labelled “climate change denialists” may not necessarily agree with the national and provincial policies on climate change restricting development in coastal areas and may argue that having to adhere to such policies infringes on their “municipal planning” competence, as enshrined in terms of the Constitution.

⁵¹ Section 12 of SPLUMA.

⁵² Section 15(2) of SPLUMA.

⁵³ Section 12(2)(a) of SPLUMA.

governance mechanisms⁵⁴ will allow for the required harmonious alignment of municipal SDFs with their provincial and national counterparts. It is not inconceivable therefore, that municipal SDFs may not necessarily reflect the same spatial development plans and development patterns intended by national and provincial government.

But what is the status of these municipal SDFs in terms of SPLUMA? SPLUMA provides that national, provincial and municipal SDFs are generally required to guide provincial departments and municipalities in taking any decision or exercising any discretion in terms of SPLUMA or any other law relating to spatial planning and land-use management systems.⁵⁵ However, when it comes to making a land development decision, for example with respect to a rezoning application, SPLUMA is clear that the relevant competent authority may not make a decision which is inconsistent with a municipal SDF.⁵⁶ This is in contrast to recent case law decided prior to SPLUMA, in the form of the *Parkhurst Village Association*,⁵⁷ which provided that municipal SDFs are not prescriptive and do not have the force of law. These provisions of SPLUMA are welcome statutory developments that provide much needed certainty and confirmation that municipal SDFs are not discretionary guides but are prescriptive land-use planning instruments that need to be adhered to.⁵⁸ The upshot of these legislative developments is if the relevant proposed development or land-use is inconsistent with the municipal SDF, the rezoning application must fail.

4.3 Public Considerations (*take into account (i) the public interest (ii) the constitutional transformation imperatives and the related duties of the State (iii) the facts and circumstances relevant to the application (iv) the respective rights and obligations of all those affected (v) the state and impact of*

⁵⁴ Section 22(3) of SPLUMA provides that where a provincial spatial development framework is inconsistent with a municipal spatial development framework, the Premier must, in accordance with the Intergovernmental Relations Framework Act, take the necessary steps, including the provision of technical assistance, to support the revision of those spatial development frameworks in order to ensure consistency between the two.

⁵⁵ Section 12(1)(e) of SPLUMA and section 12(2)(b) of SPLUMA.

⁵⁶ SPLUMA does not provide clarity on the legal status of national SDFs and provincial SDFs. Section 22(1) of SPLUMA provides that a Municipal Planning Tribunal may not make a decision which is inconsistent with a municipal SDF. However, section 22(2) of SPLUMA provides that a Municipal Planning Tribunal may depart from the provisions of a municipal SDF only if site-specific circumstances justify a departure from the provisions of such municipal spatial development framework.

⁵⁷ *Parkhurst Village Association vs. M.A. Capela, Hollyberry Props 3 (Pty) Ltd and City of Johannesburg Case No 09/32813.*

⁵⁸ Section 22(1) of SPLUMA provides that a Municipal Planning Tribunal or any other authority required or mandated to make a land development decision in terms of SPLUMA or any other law relating to development, may not make a decision which is inconsistent with a municipal SDF.

engineering services, social infrastructure and open space requirements and (vi) any factors that may be prescribed, including timeframes for making decisions):

The competent authority is required to take into account a number of requirements in terms of the Public Considerations and presumably a failure to demonstrate that any one of these requirements has not been taken into account, would be sufficient grounds for a review. The first sub-criteria requires the competent authority to take into account the public interest. Presumably, when the Minister publishes the regulations relating to public participation that are contemplated in SPLUMA⁵⁹ the manner in which the interests of the public will be communicated to and received by the competent authority will be codified and the competent authority will need to take such public interest into account. The second sub-criteria requires the competent authority to take into account the constitutional transformation imperatives and the related duties of the State. Presumably, this requires the competent authority to take into account legislative and other measures designed to protect or advance persons disadvantaged by unfair discrimination⁶⁰ and the related socio-economic rights referred to in the Bill of Rights of the Constitution.⁶¹ The third sub-criteria requires the competent authority to take into account the facts and circumstances relevant to the applications which goes without saying and similarly the fourth and sixth sub-criteria respectively requires the competent authority to take into account the respective rights and obligations of all those affected and requires the competent authority to take into account any factors that may be prescribed, including timeframes for making decisions.

The fifth sub-criteria requires the competent authority to take into account the state and impact of engineering services, social infrastructure and open space requirements. This is an interesting decision-making criteria in the context of rezoning applications for large infrastructure projects as presumably the relevant applicant will need to motivate and demonstrate that the relevant development will be adequately provided for by all relevant private sector and/or municipal utility providers. Engineering services relating

⁵⁹ Section 54(1)(j) of SPLUMA.

⁶⁰ Section 9(2) of the Constitution.

⁶¹ Chapter 2 of the Constitution.

to water, sewage and road infrastructure, for example, will need to be taken into account and the socio-economic analysis typically reserved for the environmental impact enquiry is also required to be taken into account by the relevant competent authority as they are to take into account social infrastructure. Finally, with regard to open space requirements, on the one hand developments such as, for example, health care facilities and human settlements that are proposed to be developed outside the urban edge will fall foul of the development principle requiring limitations on urban sprawl as referred to above. On the other hand, if these developments are to take place within the urban edge, they will need to be sensitive so as not to encroach on public open space as provided for in these Public Considerations.⁶²

4.4 Environmental Legislation (*ensure compliance with environmental legislation*):

The final decision-making criteria requires the competent authority to ensure compliance with environmental legislation.⁶³ It is likely that this decision-making criteria requires a development that triggers a listed activity in terms of the National Environmental Management Act⁶⁴ (“NEMA”) to receive an environmental authorisation prior to it being granted a rezoning. This Environmental Legislation is largely in line with the practical way in which rezoning applications are granted. Typically, rezoning applications are only granted once an environmental authorisation is secured, if an environmental authorisation is in fact required.⁶⁵

⁶² “Open space” is defined in SPLUMA to mean, in relation to a land area, land set aside or to be set aside for the use by a community as a recreation area, irrespective of the ownership of such land.

⁶³ Environmental legislation includes, not only NEMA, but may include, *inter alia*: the Environment Conservation Act 73 of 1989; the National Water Act 36 of 1998; the National Environmental Management: Protected Areas Act 57 of 2003; the National Environmental Management: Biodiversity Act 10 of 2004; the National Environmental Management: Air Quality Act 39 of 2004; the National Environmental Management: Integrated Coastal Management Act 24 of 2008; the National Environmental Management: Waste Act 59 of 2008 or the World Heritage Convention Act 49 of 1999.

⁶⁴ Act 107 of 1998.

⁶⁵ The Western Cape Department of Environmental Affairs and Development Planning issued a circular in 2008 (Circular 3/2008) that specifically provides for guidelines on the interaction between planning and environmental decision-making. This circular provides that it is not legally necessary to wait for the actual issuing of the environmental authorisation (“EA”) before a decision is taken in terms of LUPO, however, from a practical point of view, a LUPO application is unlikely to be decided before the EA is issued. For that reason a municipality must await the issuing of the EA before taking a decision on the LUPO application and municipalities must be in possession of all the relevant documents generated during the EIA process carried out in terms of the EIA regulations, and officials must use this information when assessing an application in terms of Section 36 of LUPO.

It often happens that an application must be made to rezone property in addition to obtaining an authorisation in terms of environmental legislation.⁶⁶ This can lead to conflicting decisions by the different authorities. A well-known case in this regard is the *Fuel Retailers case*.⁶⁷ In this case, the Constitutional Court had to consider an appeal against the decision of the Supreme Court of Appeal on the nature and scope of the obligations of environmental authorities when they make decisions that may have a substantial detrimental impact on the environment. The Constitutional Court found that a municipality considers its decision-making criteria from a town planning perspective when deciding on a rezoning application. An environmental authority, conversely, considers whether a proposed development is environmentally justifiable. A municipality focuses, in particular, on what land-uses it will allow on a particular piece of land and is constrained by the applicable law to consider whether there is a need for the proposed land-use and whether it is desirable. By contrast, the environmental authorities are required to consider the impact of the proposed development on the environment and socio-economic conditions.⁶⁸

This Constitutional Court case law suggests that a proposed development could satisfy the decision-making criteria from a town planning perspective and receive rezoning yet fail from an environmental perspective and not receive an environmental authorisation and vice versa. In other words, the principle established by this case law is that the land-use enquiry and the environmental impact enquiry are separate and distinct enquiries that do not hinge on one another. Despite this case law, “ensuring compliance with environmental legislation” seems to suggest that a rezoning application could only be approved if an environmental authorisation is first secured, if required.

It is unlikely that “*ensuring compliance with environmental legislation*” could be interpreted to mean that a municipality will have to apply its mind to the

⁶⁶ See eg *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C).

⁶⁷ *Fuel Retailers Association of Southern Africa v Director – General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).

⁶⁸ The *Fuel Retailers case* specifically provided that:
 “The local authority is not required to consider the social, economic and environmental impact of a proposed development as the environmental authorities are required to do by the provisions of NEMA. Nor is it required to identify the actual and potential impact of a proposed development on socio-economic conditions as NEMA requires the environmental authorities to do.”

information submitted as part of the environmental impact assessment process when assessing a rezoning application so as to independently decide whether there has been compliance with applicable environmental legislation. “Environment” is a concurrent competency for national and provincial authorities in terms of the Constitution and it is for this reason, that environmental impact assessments are undertaken by national and provincial authorities in terms of NEMA. Had it been the intention of the architects of our Constitution that local municipalities also be required and authorised to undertake such assessments, they would have included “environment” under Part B of Schedule 4 or Schedule 5 of the Constitution thereby mandating local authorities to undertake such assessments.⁶⁹

There is no doubt that there is a blur between these two separate enquiries and our Courts have previously held that the environmental authority correctly took into account land-use considerations relating to the urban edge and structure plans when considering an environmental authorisation application.⁷⁰ These are clearly considerations relevant to the land-use planning context and although relevant to the enquiry relating to need and desirability in the EIA context it is generally thought that the Court in this case could have done more to clarify this interplay and overlap between these two procedures.⁷¹ More recently our Constitutional Court⁷² has held that it is quite possible that different decision-makers may consider some of the same factors during different approval processes.⁷³ What is clear from this Constitutional Court judgment is that environmental authorities and planning

⁶⁹ This notwithstanding the questionable judgment in *Le Sueur and Another v Ethekwini Municipality and Others* (9714/11) [2013] ZAKZPHC 6 (30 January 2013) where the court held at paragraph 37 and paragraph 39 that: “It is clear, therefore, that Municipalities are entitled to regulate environmental matters from micro level for the protection of the environment...Hence, although environmental matters stood as the apparently exclusive area for National and Provincial governance at those levels, it is clear that the authority of the Municipalities at Local Government level to manage the environment at that level has always been and is still recognised. It is inconceivable that the drafters of the Constitution intended by the manner in which the constitution was framed to exclude Municipalities altogether from legislating in respect of environmental matters at the local level.”

⁷⁰ *MEC for Environmental Affairs and Development Planning v Clairison’s CC* (408/2012) [2013] ZASCA 82 (31 May 2013).

⁷¹ *Lagoonbay Lifestyle Estate (Pty) Ltd v Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* [2013] CC where the court held at paragraph 65:

“It is quite possible that different decision-makers may consider some of the same factors during different approval processes... It seems clear that environmental authorities and planning authorities may therefore consider some of the same factors when granting their respective authorisations. But that cannot detract from their statutory obligations to consider those factors, and indeed to reach their own conclusions in relation thereto.”

⁷² *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoon Bay Lifestyle Estate (Pty) Ltd and Others* Case CCT 41/13 [2013] ZACC 39.

⁷³ *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoon Bay Lifestyle Estate (Pty) Ltd and Others* Case CCT 41/13 [2013] ZACC 65.

authorities may consider some of the same factors when granting their respective authorisations but that this cannot detract from their statutory obligations to consider those factors, and indeed to reach their own conclusions in relation thereto. Utterances like this from our Constitutional Court suggest that the Environmental Legislation may need to be interpreted to mean that the land-use planning competent authority is required to do more than simply ensure that an environmental authorisation is in place and may be interpreted to require such an authority to satisfy itself that relevant environmental legislation has been complied with.

4.5 *National decision-making criteria concluding remarks*

It is clear from the analysis above that the local authorities faced with rezoning applications have a number of decision-making criteria to take into account when making their respective administrative decisions. Regardless of where in the country a land use planning application is made, the relevant local authorities will need to take into account the national framework decision-making criteria as provided for in SPLUMA, as these decision-making criteria apply throughout the country.

5. LAND-USE PLANNING DECISION-MAKING CRITERIA – PROVINCIAL

Having considered the national decision-making criteria of SPLUMA, as set out above, the relevant provincial decision-making criteria with respect to a rezoning application will now be considered. These are specific to each province and accordingly differ from province to province. Each of the relevant provinces and their respective decision-making criteria will now be considered in turn below.

5.1 Western Cape Province and Eastern Cape Province

In the Western Cape Province and Eastern Cape Province, land-use planning is primarily regulated by the Land-use Planning Ordinance 15 of 1985 (“LUPO”). The relevant decision-making criteria in LUPO are found in section 36.⁷⁴ In this regard, a rezoning application⁷⁵ may be refused solely (i)

⁷⁴ Section 36(1) of LUPO provides that any application under Chapter II or III shall be refused solely on the basis of a lack of desirability of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability, or on the basis of its effect on existing rights concerned (except any alleged right to protection against trade competition). Section 36(2) of LUPO provides that where an

on the basis of a lack of desirability; (ii) in terms of the guidelines for a structure plan insofar as it relates to desirability; and (iii) on the basis of its effect on existing rights concerned, except any alleged right to protection against trade competition. If a rezoning application is not refused solely on this basis, regard shall be had to: (i) the safety and welfare of the members of the community concerned; (ii) the preservation of the natural and developed environment concerned; or (iii) the effect of the application on existing rights concerned, with the exception of any alleged right to protection against trade competition.⁷⁶

With regard to the decision-making criteria of desirability, *Hayes v Minister of Finance and Development Planning*⁷⁷ held that the test of desirability is conclusive and that in terms of section 36(1) a departure application “shall be refused solely on the basis of a lack of desirability”. This case held that although the test is phrased in the negative, it lays down a positive test: the test is the presence of a positive advantage which will be served by granting the application. However, desirability is not defined in LUPO and this concept has been open to fierce interpretation by parties for and against a development as any number of arguments could be raised as to what is and isn’t desirable. LUPO suggests that desirability should be considered in the context of the contemplated utilisation of land concerned including the guideline proposals included in a relevant structure plan in so far as it relates to desirability. Fortunately, the draft Western Cape Land-use Planning Bill,

application under Chapter II or III is not refused by virtue of the matters referred to in subsection (1) of this section, regard shall be had, in considering relevant particulars, to only the safety and welfare of the members of the community concerned, the preservation of the natural and developed environment concerned or the effect of the application on existing rights concerned (with the exception of any alleged right to protection against trade competition).

⁷⁵ The relevant criteria relating to consent use applications are found in the Scheme Regulations made in terms of section 8 of LUPO and promulgated under Provincial Notice 353 dated 20 June 1986, which provide that:

“in considering such application, regard shall be had to the question whether the use for which the building is intended or designed, or the proposed building, is likely to mar the amenity of the *neighbourhood, including marring owing to the emission of smoke, fumes, dust, noise or smells.*”.

⁷⁶ *Booth NO v Minister of Local Government, Environmental Affairs Planning, Western Cape 2013 JDR 0732 (WCC)* held at paragraph 46 that:

“The section as a whole thus make more sense if s 36(1) is read as providing that the only grounds on which an application may be refused (though refusal is not mandatory in these circumstances) are lack of desirability and effect of existing rights, with s 36(2) then meaning that if the application is not refused (but instead granted), the terms of approval (for example, the extent and duration of a permitted departure or the conditions imposed under s 42 in respect of a departure or rezoning or the detailed content of a subdivision decision) must take into account only the matters specified in s 36(2) (which are in essence, once again, matters going to desirability and effect on existing rights). It must be conceded that s 36(2) does not expressly state that it is dealing with the case where an application is approved, and the phrase ‘in considering the relevant particulars’ is hardly the most natural way to refer to the conditions or terms of an approval. Nevertheless, the overlap between the criteria in s 36(1) and s 36(2) and the other matters I have mentioned make it difficult to avoid the conclusion that in context s 36(2) is dealing with the case where the decision-maker has decided not to refuse the application but to grant it.”.

⁷⁷ *(Western Cape) 2003 (4) SA 598 (C)*.

2013 (“LUPA”) draws decades of debate to a close over what “desirability” entails in the land-use planning context by codifying a number of considerations to be taken into account by the relevant competent authority. These include whether or not a development is desirable within the context of the applicable spatial development framework as well as number of other principles and objectives set out in chapter 5 of LUPA. It remains to be seen whether this codification of the concept of desirability will find its way into the final version of this draft Bill.

5.2 Northern Cape Province

In the Northern Cape Province, land-use planning is regulated by the Northern Cape Planning and Development Act (“NCPDA”), which repealed LUPO in the Northern Cape Province.⁷⁸ The relevant decision-making criteria in the NCPDA are found in section 64.⁷⁹ In this regard, when considering a rezoning application, the relevant competent authority is to decide whether the relevant development is desirable. In the Northern Cape Province the desirability of a development shall be considered in relation to the following criteria: (i) its compatibility and consistency with the general principles as prescribed in Chapter I, section 3, of the DFA;⁸⁰ (ii) its compatibility and consistency with an applicable and approved provincial plan, district council plan and/or land development plan and (iii) its effect on existing rights (except any alleged right to protection against trade competition).

5.3 Kwa-Zulu Natal Province

KwaZulu-Natal was the first province to replace its previous pre-Constitutional planning law with the enactment of the KwaZulu-Natal Planning and Development Act.⁸¹ The Act repealed the previous Town Planning Ordinance (Natal)⁸² and numerous other pieces of legislation

⁷⁸ Glazewski J *Environmental law in South Africa* Paragraph 9-37.

⁷⁹ In considering any application made in terms of the NCPDA, the desirability of the outcome of the application shall be considered in relation to the following criteria: (a) its compatibility and consistency with the Principles referred to in Chapter I; (b) its compatibility and consistency with an applicable and approved Provincial Plan, District Council Plan and/or Land Development Plan; and (c) its effect on existing rights (except any alleged right to protection against trade competition).

⁸⁰ Which will shortly be repealed by SPLUMA.

⁸¹ Act 5 of 1998.

⁸² Ordinance 27 of 1949.

dealing with planning and land development in KwaZulu-Natal.⁸³ This Act has since been repealed⁸⁴ by the Kwa-Zulu-Natal Planning and Development Act (“PDA”), which apart from certain provisions commenced on 1 May 2010.⁸⁵

In Kwa-Zulu Natal one needs to apply for the amendment of the relevant scheme, to the extent the zone in the relevant scheme does not contemplate one’s development. In this regard, the relevant decision-making criteria in the PDA are found in section 19 which provides that for the purposes of determining the merits of a proposal to use or develop land in a manner that is not permitted in terms of a scheme, a municipality must take the following matters into account: (i) comments received from the public in terms of the public participation process provided for in the PDA; (ii) a registered planner’s written evaluation and recommendation on the proposal; (iii) the criteria for granting permission and the conditions to which they will be subject if permitted as provided for in the relevant scheme⁸⁶ of the relevant municipality in which the development is to take place.⁸⁷ These criteria vary depending on the applicable scheme of the municipality in which the development is to take place.⁸⁸ Chapter 2 of the PDA deals with the preparation, adoption and amendments of schemes which came into effect on 1 April 2010. Municipalities have been given 5 years from this date to adopt their schemes unless an extension is granted by the MEC for local

⁸³ Glazewski J *Environmental law in South Africa* Paragraph 9-33.

⁸⁴ The PDA replaces previous provincial legislation including the Town Planning Ordinance of 1949, and all its amendments, the Pietermaritzburg Extended Powers Ordinance of 1936, and the Durban Extended Powers Consolidated Ordinance of 1976, the Removal of Restrictions Act of 1967, the Statutory Bodies Period of Office Ordinance of 1985, several proclamations, the KwaZulu Natal Planning and Development Act of 1998 and its amendments, and the KwaZulu Natal Rationalisation of Planning and Development Laws Act of 2008.

⁸⁵ Glazewski J *Environmental law in South Africa* Paragraph 9-33.

⁸⁶ The KwaZulu Natal Department of Co-Operative Governance and Traditional Affairs User’s Manual on the KwaZulu-Natal Planning and Development Act, 2008 provides that a scheme is a tool used by a municipality to manage the development which occurs within its area of jurisdiction. It comprises a set of maps and associated clauses (development controls) which guide and manage land-use.

⁸⁷ In this regard, section 5(d) of the PDA provides that a scheme must, *inter alia*, specify (i) kinds of land-uses and development that are permitted and the conditions under which they are permitted; (ii) kinds of land-uses and development that may be permitted with the municipality’s permission, the criteria that will guide the municipality in deciding whether to grant its permission, and the conditions which will apply if the municipality grants its permission; (iii) kinds of land-uses and development that are not permitted.

⁸⁸ The KwaZulu Natal Department of Co-Operative Governance and Traditional Affairs User’s Manual on the KwaZulu-Natal Planning and Development Act, 2008 provides that municipalities will have a single planning scheme which must cover their entire area of jurisdiction. Therefore, across the province in every municipality, all land, including Ingonyama Trust land, will be allocated a land-use zoning in order to promote orderly development. All developments need to be in accordance with the municipality’s planning scheme, which can be obtained from the local or metropolitan municipality. The scheme is used to manage development, is formally approved and consists of a map and regulations to manage land-use and buildings. Before embarking on any building or development, it is important to consult the municipality’s scheme.

government.⁸⁹ This means that all local and metropolitan municipalities in Kwa-Zulu Natal should have prepared and adopted a scheme by 1 April 2015. In this regard, the KwaZulu – Natal Land-use Management System Guidelines for the Preparation of Schemes for Municipalities – Update 2011 provides its own guidance on what these decision-making criteria should be.⁹⁰

5.4 Gauteng Province

Despite the preparation of the Gauteng Planning and Development Act 3 of 2003, which was assented to in 2003 but has not yet been passed, the Town-Planning and Township Ordinance 15 of 1986 (“Transvaal Town-Planning and Township Ordinance”) still applies in the Gauteng Province.⁹¹

The Transvaal Town-Planning and Township Ordinance provides that an owner of land who wishes to have a provision of a town-planning scheme relating to his land amended may, in such manner as may be prescribed, apply in writing to the local authority.⁹² The local authority is to consider the application with due regard to every objection lodged, all representations made and every reply and comment received and may for this purpose (a) carry out an inspection or institute any investigation (b) request any person to furnish such information as it may deem expedient.⁹³ If objections have been received or the local authority provides a negative recommendation, the application is presented to the relevant board who are to consider the

⁸⁹ The KwaZulu Natal Department of Co-Operative Governance and Traditional Affairs User’s Manual on the KwaZulu-Natal Planning and Development Act, 2008.

⁹⁰ KwaZulu Natal Land-use Management System Guidelines for the Preparation of Schemes for Municipalities, 2011 provides that when deciding which uses should be freely permitted, which should be permitted by consent and which should be prohibited, and which development parameters of controls should be imposed, a municipality must take into account the impact a land-use is likely to have on the amenity of the surrounding area. This is determined in terms of the following criteria (based on Section 40 of the Town Planning Ordinance, Ordinance No. 27 of 1949 as amended)(underlining added): Health: Making adequate provision for airflow, access to natural light, privacy, prevention of pollution and exposure to radiation; minimization of noise; ensuring access for basic services such as water and sewer connections; Safety: Ensuring adequate access for fire and ambulance services, safe traffic conditions; the potential to reduce crime; Amenity: Enhancing factors that contribute to pleasantness of an area such as recreation, human need, open space, trees, built form, architecture, privacy and views; Environmental Services: Improving the quality, regulation and supply of water, air quality, soil control; control of animal and plant populations, production of food and raw materials; access to recreation, cultural and educational facilities; Economic Potential: Maximizing the desirability of the area for economic development by managing adjoining and ancillary uses; protecting important view sheds and by controlling traffic and access; Social Conditions: Consideration of the impact on women, children, the elderly and disadvantaged people; and adequate provision of social facilities; Traffic Flow: Consideration of the impact on free flow of traffic and on the provision of adequate facilities for loading, parking, pedestrians and public transport; Heritage: Protecting architectural, historical, cultural and environmentally important land and buildings; Engineering Services: Roads, sewerage, stormwater, water, electricity, etc. – the type of use permitted and the intensity of development needs to take account of existing service levels and those that will be required to be provided by the municipality to service future development in terms of the zoning proposed.

⁹¹ As does the Division of Land Ordinance 20 of 1986 with respect to subdivision applications.

⁹² Section 45(1) of the Transvaal Town-Planning and Township Ordinance.

⁹³ Section 45(7) of the Transvaal Town-Planning and Township Ordinance.

application with due regard to every objection lodged and all representations made, and may also (a) carry out an inspection or institute any investigation (b) request any person to furnish such information as it may deem expedient.⁹⁴ On receipt of an application that has been received directly from the local authority in circumstances where there have been no objections or upon receipt of an application from the relevant board in circumstances in which there have been objections the Administrator is to consider the application and he may (a) approve the application subject to any amendment he may deem fit or refuse it (b) postpone a decision on the application, either wholly or in part.⁹⁵

Schedule 7 of the regulations made under the Town-Planning and Township Ordinance⁹⁶ contains a specimen application form to be completed by a person who wishes to apply for an amendment of a town-planning scheme in terms of section 45 of the Ordinance. Part C of Schedule 7 lists documents and reports that must be submitted together with the application. Item C requires the applicant to enclose a report which: (i) explains the proposed maps, annexures and schedules, if any; (ii) provides information on the geotechnical conditions and use of the land as well as traffic, including public transport, roads and parking facilities, where applicable; (iii) contains a motivation for the need and desirability of the amendment proposed. These provide a useful indication of the decision-making criteria that apply in the Gauteng Province, but it is a pity these are not codified in the relevant Ordinance and are relegated to a specimen in a Schedule to the Ordinance.

5.5 The North West Province, Limpopo Province and Mpumalanga Province

The North West Province has not as yet produced any new planning legislation. In this regard LUPO was assigned to the North West Province with effect from 17 June 1994.⁹⁷ As a result, the relevant decision-making criteria identified above with respect to LUPO apply in the North West Province.

⁹⁴ Section 45(12) of the Transvaal Town-Planning and Township Ordinance.

⁹⁵ Section 45(18) of the Transvaal Town-Planning and Township Ordinance.

⁹⁶ In terms of section 138 of the Town-Planning and Townships Ordinance, 1986 dated 10 June 1987.

⁹⁷ In terms of GN R 110 in GG 15813 of 1994-06-17.

In addition the North West Province is also still applying the Town-Planning and Township Ordinance. Limpopo, formerly known as the Northern Province, has not yet commenced drafting new planning legislation. It is accordingly still applying the Town and Planning and Townships Ordinance.⁹⁸ Similarly, Mpumalanga Province has not as yet passed its own planning and development legislation and relies on the Town-Planning and Townships Ordinance.⁹⁹ As a result, the relevant decision-making criteria identified above with respect to the Town-Planning and Township Ordinance applies in the North West Province, Limpopo Province and Mpumalanga Province.

5.6 Free State Province

The Free State has not made any progress yet regarding the passing of new provincial legislation.¹⁰⁰ It is accordingly still applying the Township Ordinance 9 of 1969 (“Orange Free State Ordinance”).¹⁰¹ In terms of section 25 of the Orange Free State Ordinance the general purpose of a scheme and provisions which may be included in a scheme are to co-ordinate the harmonious development of the area to which it is to apply in such a way as will most effectively promote the health, safety, order, amenity, beauty, convenience and general welfare of such area as well as to provide for considerations of efficiency and economics in the process of such development. There are no provisions in the Orange Free State Ordinance that permit third parties to apply to the local council for an amendment to the scheme if their land is not zoned appropriately for a proposed development. In this regard, a local authority may of its own accord and shall, if so required by the relevant responsible member of the executive council of the province prepare an amendment of an approved scheme and submit it to the board.¹⁰²

In terms of the fifth schedule of the regulations promulgated under the Orange Free State Ordinance¹⁰³ a number of considerations are identified in respect of the preparation of a scheme.¹⁰⁴ These same considerations would

⁹⁸ Glazewski J *Environmental law in South Africa* Paragraph 9-36. The Division of Land Ordinance 20 of 1986 applies with respect to subdivision applications.

⁹⁹ In terms of GN 161 GG No. 16049 dated 31 March 1994.

¹⁰⁰ Glazewski J *Environmental law in South Africa* Paragraph 9-31.

¹⁰¹ In terms of GN R 113 in GG 15813 of 1994-06-17.

¹⁰² Section 30 of the Orange Free State Ordinance.

¹⁰³ Dated 1 May 1970.

¹⁰⁴ Matters to be considered in the preparation of a scheme include: The regulation of streets; Drainage; Sewerage and sewage disposal; The prohibition, regulation and control of the deposit or disposal of waste materials and

presumably apply to amendments to such schemes and are likely to be the applicable decision-making criteria for amendments to schemes that are required to provide for strategic infrastructure projects.

5.7 Provincial decision-making criteria concluding remarks

In addition to the national decision-making criteria, the relevant local authorities will also need to take into account the provincial decision-making criteria that apply in their respective provinces. It is clear from the above that these provincial decision-making criteria differ from province to province.

These differences are so marked that it is not possible to distil a consistent set of recurring provincial decision-making criteria that are stipulated for each province. This is largely because the various Ordinances and Provincial Acts were promulgated at different times in history in different legal contexts with specific consideration being given to criteria specific to that province at that particular time. Notwithstanding the consolidation and consistency achieved with the national framework decision-making criteria in terms of SPLUMA, it is clear that the decision-making criteria to be applied for each province are quite different with very little consistency between the provinces.

As mentioned above, it is envisaged that the old order provincial ordinances and new order provincial Acts will be overhauled by provincial land-use planning legislation that is in line with SPLUMA. This presents a golden opportunity to create consistency in decision-making criteria at provincial level, but without a legal mechanism for this and without directive language to ensure this in SPLUMA it is quite possible that we may be faced with an equally diverse array of provincial land-use planning decision-making criteria going into the future under the new SPLUMA regime. Particularly since each province is mandated to legislate independently on this in terms of their provincial planning competency enshrined in the Constitution.

refuse; The zoning of land to be used exclusively for specific purposes, including agricultural purposes; The subdivision, size and dimensions of erven; The regulation of buildings; Systems of lighting and water supply; The replanning of any developed area, and the desirability or otherwise of altering the layout of existing unimproved erven; The aesthetic control of any place that may constitute a public nuisance; The preservation of places of natural beauty and of buildings or places of local or national interest; The reservation of land for national, provincial or local government purposes and other public requirements; Any of the matters mentioned in section 25 of the Ordinance if not already referred to in this schedule; Any other matter reasonably incidental to the purposes of the Ordinance.

6. LAND-USE PLANNING DECISION-MAKING CRITERIA – LOCAL

6.1 *Local by-laws, a new layer of decision-making criteria*

In addition to the national decision-making criteria and the provincial decision-making criteria, SPLUMA enables municipalities to pass by-laws to enforce their respective land-use schemes.¹⁰⁵ In this regard, in future the zoning schemes, as understood in planning terms, will be approved as "by-laws"¹⁰⁶ in terms of the standard procedures contained in the Municipal Systems Act 33 of 2000. Zoning scheme regulations will in future be approved as zoning scheme by-laws which will regulate the day to day planning activities at municipal level.¹⁰⁷ Applications for rezoning, subdivision and consent uses, as well as the procedures for such applications, will be contained in these municipal planning by-laws.¹⁰⁸ It is not inconceivable that, arising from the local authorities' municipal planning competency in terms of the Constitution, municipal decision-making criteria will be provided for in these "by-laws".

When one considers that South Africa has 46 district municipalities, 232 local municipalities and 6 metropolises it is clear that there is the potential for there to be ballooning myriad of decision-making criteria that will be specific to each municipality. Although it is anticipated that provincial departments will prepare model municipal planning by-laws which will be available to municipalities to adopt or amend according to their own circumstances,¹⁰⁹ there is no guarantee of uniformity amongst these multiple municipalities.

6.2 *Local decision-making criteria concluding remarks*

The significance of the Constitutional competency allocated to local government is immense. Requiring the local government to decide on whether to grant land-use planning approval effectively provides local government with a veto decision as to whether or not a development gets to

¹⁰⁵ Section 32 of SPLUMA.

¹⁰⁶ Western Cape Province Circular 4 of 2013 "What to Expect Under the new Regime".

¹⁰⁷ Western Cape Province Circular 4 of 2013 "What to Expect Under the new Regime".

¹⁰⁸ Western Cape Province Circular 4 of 2013 "What to Expect Under the new Regime".

¹⁰⁹ Western Cape Province Circular 4 of 2013 "What to Expect Under the new Regime". For the municipalities without adopted by-laws at the time of implementation of LUPA, the "Model Municipal Planning Bylaw" will be enacted as regulations, which will apply automatically to these municipalities.

take place. A perusal of some court decisions¹¹⁰ show that municipalities either do not understand their constitutional and statutory rights and obligations or are loath to take them seriously. Municipalities are, at times, seen to be looking for loopholes in the law and instead of embracing their constitutional duties, they try to find ways to escape them.¹¹¹ Once implemented and in force, the national decision-making criteria, the provincial decision-making criteria and the local decision-making criteria and the respective laws and procedures to which they relate will need to be extensively and thoroughly work shopped and appropriate training and up-skilling will be required to ensure that the critical Constitutional competency of “municipal planning” is fulfilled and effectively realized on the ground in all municipalities in South Africa. Failure to do this is very likely to hamper the effective and efficient roll out of SIPS in the country.

7. HOW SHOULD THESE LAND-USE PLANNING DECISION-MAKING CRITERIA BE INTERPRETED?

Whatever the decision-making criteria may ultimately be it is clear from the many different criteria that are to be considered and taken into account by local authorities that a large discretion is afforded these local authorities in making their respective land-use planning decisions.¹¹² The judgment of *Booth and Others*¹¹³ suggests a shift away from the accepted test of desirability set out in the *Hayes* judgment.¹¹⁴ Decision-makers are now given a wider discretion to allow or disallow rezoning applications based on the facts of the particular case and are no longer obliged to refuse an application where an applicant has failed to establish desirability.

The relevant local authorities have a broad discretion within the limits set by the law. In these circumstances the discretion is broad as the local authority

¹¹⁰ *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape, and Others* 2001 (4) SA 294 (C); *Hayes and Another v Minister of Finance and Development Planning, Western Cape and Others* 2003 (4) SA 598 (C); *Van Rensburg and Another NNO v Nelson Mandela Metropolitan Municipality and Others* 2008 (2) SA 8 (SE); *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Others* 2012 (2) SA 104 (CC).

¹¹¹ *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34 (6 December 2011).

¹¹² See, for example *Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning and Another* [2013] ZAWCHC 47; 2013 (4) SA 519 (WCC) (*Booth*) at paras 47-9, for an indication of the breadth of the discretion.

¹¹³ *Booth and Others NNO v Minister of Local Government, Environmental Affairs and Development Planning and Another* [2013] ZAWCHC 47.

¹¹⁴ *Hayes and Another v Minister of Finance and Development Planning, Western Cape and Others* 2003 (4) SA 598 (C).

exercises its discretionary power by having regard to a broad range of criteria which include wider issues such as government policy and the public interest.

¹¹⁵ Although such a wide discretion is sensible given the flexibility required for such a dynamic area of administrative law, such as land-use planning and land-use development, it does open up the possibilities for abuses of discretion where the multiple criteria are not each individually taken into account and balanced against each other in the decision-making process in circumstances where a decision may already be preordained resulting in the local authority failing to apply its mind to the matter at hand.¹¹⁶

Critical to this balancing act of considering and taking into account each of the specified decision-making criteria referred to above is an understanding of the interpretive lens through which such an analysis is to be undertaken by the local authorities. The seminal judgment on this is the Constitutional Court *Fuel Retailers* case.¹¹⁷ As mentioned above, the Constitutional Court found that a municipality considers its decision-making criteria from a town planning perspective when deciding on a rezoning application.¹¹⁸

But what does this mean? Our Constitutional Court had an opportunity to bring further clarity to what this may mean in the GDT case¹¹⁹ where the court held that “planning” in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. The Court held that in relation to municipal matters the Constitution employs

¹¹⁵ Burns Y & Beukes M *Administrative law under the 1996 Constitution* 161.

¹¹⁶ Burns Y & Beukes M *Administrative law under the 1996 Constitution* 161.

¹¹⁷ *Fuel Retailers Association of Southern Africa v Director – General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).

¹¹⁸ The *Fuel Retailers* case specifically provided at paragraph 85 that:

“The local authority is not required to consider the social, economic and environmental impact of a proposed development as the environmental authorities are required to do by the provisions of NEMA. Nor is it required to identify the actual and potential impact of a proposed development on socio-economic conditions as NEMA requires the environmental authorities to do.”

¹¹⁹ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11. In this case the Court held that the DFA sought to encroach upon this municipal competence by granting the authority to decide land-use planning applications to Provincial tribunals established in terms of the DFA. Accordingly, the relevant provisions of the DFA that provided for this were declared unconstitutional. This clear articulation of municipal land-use competency and the Constitutional Court’s rejection of the encroachment into this local sphere of governance by Province was blurred in the *Lagoon Bay Case* (CHC 2011) which upheld the Provincial Minister’s decision not to grant rezoning and subdivision. Although there is sense in recognizing the broad constitutional mandate of provincial authorities over “regional planning and development” and “provincial planning”, recognizing a Provincial Minister’s decision relating to rezoning and subdivision clearly blurs the distinctions set out in earlier jurisprudence. Fortunately, this confusion was remedied on appeal in the *Lagoon Bay Case* (SCA 2013) which cited *Johannesburg Metropolitan Municipality (2011)* and held the Provincial Minister’s decision relating to zoning and subdivision to be unlawful on the ground that the Minister had usurped for herself a power that had been reserved for the relevant municipality.

“planning” in its commonly understood sense. In this regard, our Courts have held that “municipal planning” could include the determination of the size of erven in certain areas, building restrictions, height and density restrictions, regulations with regard to rezoning and the granting of consent uses.¹²⁰

Although this defines the scope of the enquiry, this more recent case law does not give much further insight into what considerations are to apply when the local authorities apply their broad discretion.

Although these comments by our Courts are useful in providing some context to the interpretive lens through which our local authorities are to consider the relevant multiple decision-making criteria when making a land-use planning decision, they do not provide absolute certainty on what falls within and outside the scope of the enquiry for these local authorities. This will largely be left to the discretion of the relevant local authorities when making their relevant decisions when applying the relevant decision-making criteria.

Earlier cases have held that the essence of a town planning scheme is that it should be conceived in the interests of the community to which it applies¹²¹ and that a zoning scheme is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by the scheme or, at any rate, those inhabitants that would be affected by a particular provision.¹²² It being recognized that municipalities should attempt to promote the order of an area as well as the general welfare of the community concerned¹²³ with considerations such as health, welfare, safety and good order playing a role in determining the use rights and their control by a municipality.¹²⁴

Further, the need and desirability of developments must be measured against the contents of the credible integrated development plan (“IDP”), SDFs and environmental management framework for the area, and the

¹²⁰ See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC).

¹²¹ *Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A). See also *McCulloch v Munster Health Committee* 1979 (4) SA 723 (D) 726C-D).

¹²² *CS of Birnam (Suburban)(Pty) Ltd v Falcon Investments Ltd* 1973 (3) SA 838 (W) 844-846; *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C) 400H-401B; *Bedfordview Town Council and Another v Mansyn Seven (Pty) Ltd and Others* 1989 (4) SA 599 (W); *Hayes and Another v Minister of Finance and Development Planning, Western Cape, and Others* 2003 (4) SA 598 (C) 623 D-E.

¹²³ *CS of Birnam (Suburban)(Pty) Ltd v Falcon Investments Ltd* 1973 (3) SA 838 (W) 844-846; *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C) 400H-401B; *Bedfordview Town Council and Another v Mansyn Seven (Pty) Ltd and Others* 1989 (4) SA 599 (W); *Hayes and Another v Minister of Finance and Development Planning, Western Cape, and Others* 2003 (4) SA 598 (C) 623 D-E.

¹²⁴ *Esterhuysen v Jan Jooste Family Trust and Another* 1998 (4) SA 241 (C) 249E.

sustainable development vision, goals and objectives formulated in, and the desired spatial form and pattern of land-use reflected in, the area's IDP and SDF.¹²⁵ Decisions as to the uses that a municipality will allow will necessarily be influenced by local considerations including its capacity to provide the necessary infrastructure and services within the constraints of its budget.¹²⁶

Given the broad array of decision-making criteria to be applied by the local authorities, it is inevitable that the neatly compartmentalised Constitutional law competencies of “environment”, “regional planning and development”, “urban and rural development” and “provincial planning” and “municipal planning” will overlap and will need to be taken into account at the local level of decision-making by the Municipal Planning Tribunals. Our Courts appear to recognize this inevitability.¹²⁷

The case law referred to above can be interpreted to mean that when applying their discretion, the local authorities will need to consider the applicable decision-making criteria through the lens of: (i) what may be desirable to the relevant localised area and the adjacent local community and their general welfare; (ii) what may be desirable not only on a local level but what may be desirable at a greater municipal level in terms of the applicable IDP and SDF; and (iii) what may be desirable not only at a local and municipal level but what may be desirable strategically at a regional, provincial and possibly even national level.

8. CONCLUSION

As far back as 2001, Griesel J, in *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration, Western Cape and Others*,¹²⁸ expressed many of the problems encountered

¹²⁵ Guideline on Need and Desirability, EIA Guideline and Information Document Series, 2010.

¹²⁶ *Lagoonbay Lifestyle Estate (Pty) Ltd v The Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape & others (320/12) [2013] ZASCA 13 (15 March 2013)*.

¹²⁷ *Shelfplett 47 (Pty) Ltd vs MEC for Environmental Affairs and Development Planning and the Bitou Municipality WCHC (5 March 2012)* held at paragraph 103:

“I thus conclude that the MEC was authorised by the 1991 PPA and section 29(3) of the DFA to base his decisions on the considerations he did, even if some or all of them were matters of ‘municipal planning’”. *Lagoonbay Lifestyle Estate (Pty) Ltd v Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape and Others [2013] CC* held at paragraph 65:

“It is quite possible that different decision-makers may consider some of the same factors during different approval processes.”

¹²⁸ 2001 (4) SA 294 (C) 329C-E.

in the planning system with the statement, reiterated in his 2011 Lagoon Bay decision¹²⁹ that:

“the statutory framework regulating planning and building regulations in its present form is fragmented and cumbersome in the extreme...it requires a vast bureaucratic machine to administer all these provisions. This inevitably leads to “practices” which develop in the course of time in the administration of these pieces of legislation, which may or may not necessarily correspond with the legislative regime which underpins the process. The system also frequently...gives rise to conflicting and inconsistent decisions taken by different functionaries, officials and organs at different levels of local and provincial government.”

Support for this view was reiterated in the Constitutional Court when it indicated that the fragmentation in the planning system required urgent legislative reform.¹³⁰ Legislative reform has finally arrived with SPLUMA, but as a result of the Constitutional law competencies allocated to the three spheres of government it is not possible to provide uniformity and consistency amongst the 9 provinces and 232 local municipalities when it comes to the decision-making criteria to be applied by the relevant local authority.

We now have uniformity at a national level, through SPLUMA, with regard to the decision-making criteria to be applied by local government as directed by national government. However, the decision-making criteria to be applied by the local government as directed by provincial government is likely to differ from province to province in terms of the provincial land-use planning laws that will be promulgated in due course to replace the pre-constitutional ordinances. In addition, when one considers the possibility of different municipal decision-making criteria being applied in the 232 local municipalities in addition to different provincial decision-making criteria being applied in each of the 9 provinces it can be anticipated that the Courts will in

¹²⁹ *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* [2011] 4 All SA 270 (WCC) held at paragraph 25:

“Different decision makers are involved at different phases, applying different tests dictated by different pieces of legislation. If this should eventually result in conflicting and inconsistent decisions taken by different functionaries, officials and organs at different levels of local and provincial government then this is the result of a fragmented and cumbersome administrative process.”

¹³⁰ *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at paragraph 33.

the future be quoted with similar sighs of exasperation to those quoted above by Griesel J. Not as a result of the historic procedural fragmentation, that has arguably been overcome with SPLUMA, but as a result of the substantive fragmentation and the lack of consistently applied decision-making criteria throughout South Africa.

All of this raises the possibility that SIPS that straddle more than one municipal boundary will be faced with two distinct sets of decision-making criteria. Leaving aside matters relating to provincial and/or regional planning and issues with respect to whether a provincial authority should have exclusive or joint authority to decide such applications, the point is that the larger one's development and the more municipalities your infrastructure is likely to straddle, the greater the number of land-use planning variables and risks one's project will be exposed to as a result of these diverging and differing provincial and municipal decision-making criteria. This makes for great lawyering as inevitably local government will be tripped up in the web of decision-making criteria they will need to apply but does very little to enhance private sector investor confidence in large and important strategic infrastructure projects in South Africa.

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