



IMEL

INSTITUTE OF MARINE
& ENVIRONMENTAL LAW

THE NATURE, SCOPE AND PURPOSE OF SPATIAL PLANNING IN SOUTH AFRICA

Towards a more coherent legal framework under SPLUMA

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Date of Submission: 1 September 2015

Submitted to **The University Of Cape Town**

in fulfilment of the Minor Dissertation Component for MPhil

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DECLARATION

Research dissertation paper presented for the approval of Senate in fulfilment of part of the requirements for the MPhil Environmental Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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

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ABSTRACT

Planning law has a significant role to play in facilitating and governing development within a country. In South Africa, a shift has occurred from the utilisation of planning laws to regulating development, to facilitating it. A key area of this legal discipline is spatial planning, which determines the ideal utilisation and allocation of an area for certain land uses. The history of spatial planning in South Africa, and more specifically in the Western Cape, is an interesting one as the planning system that exists is fragmented and fraught with confusion. This has resulted in issues, confusion and conflicts which has resulted in numerous court cases. Previous attempts to reform the planning regime have proven to be somewhat unsuccessful as inherent challenges persist whilst new challenges have arisen. Prior to the introduction of the Constitution, spatial planning was utilised to promote Apartheid ideologies. In 1994 South Africa entered into a democratic era, entrenching equal rights and subjecting all laws to the Constitution. This had hefty impetus for spatial planning and its instruments which, to a large extent, were racially biased and therefore became unconstitutional. The legal regime governing spatial planning was tasked with addressing the ills of apartheid and simultaneously striving towards the goal of sustainable development. Issues and challenges have arisen, which have resulted in a fragmented and incoherent planning dispensation. These challenges and issues include the persistence of old order planning legislation and sector policies with activities operating parallel to the planning discipline. Consequently, there is overlap and confusion with regard to the purpose and legal status of spatial planning instruments. To address this at the national sphere, in 2013 contemporary planning reform was embarked upon, with the enactment of Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA). In light of recent planning reform triggered by the commencement of SPLUMA, the aim of this dissertation is to determine if SPLUMA provides a more coherent legal regime governing spatial planning in South Africa. This is pursued by understanding the role spatial planning has had in South Africa, by determining the nature, scope and purpose that spatial planning under the legal regime prior to SPLUMA. During Apartheid a dichotomy of planning systems existed, where different areas were governed by different laws which were underpinned by racial segregation. This resulted in significant issues of fragmentation and confusion. The transition to democracy brought about significant changes to the legal landscape, including planning as the nature, scope and purpose of spatial planning was tasked with addressing the ills of apartheid and promoting sustainability. Although legislative reform was triggered by democracy, clarity of the legal framework governing spatial planning did not occur. One of the contributing factors of this was the persistence of old order legislation and the spatial planning instruments it provided for. The commencement of SPLUMA has triggered wholesale reform which aims to provide a more coherent legal regime governing spatial planning. Positive strides towards this are evident, including the uniform approach which is applicable throughout South Africa that SPLUMA adopts.

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LIST OF ABBREVIATIONS

BauGB	Baugesetzbuch- Federal Building Code (Germany)
CoCT SDF	City of Cape Town Spatial Development Framework
DEA	Department of Environmental Affairs
DEA&DP	Department of Environmental Affairs and Development Planning (Western Cape)
DFA	Development Facilitation Act 67 of 1995
DRDLR	Department of Rural Development and Land Reform
EIA	Environmental impact assessment
IDP	Integrated development plan
LDO	Land development objectives
LG:MSA	The Local Government: Municipal Systems Act 32 of 2000
LUPA	Land Use Planning Act of the Western Cape Act 3 of 2014
LUPO	Cape Land Use Planning Ordinance 15 of 1985
NDP	National Development Plan
NEM:ICMA	National Environmental Management Integrated Coastal Management Act 24 of 2008
NEM:PAA	National Environmental Management Protect Areas Act 50 of 2003
NEMA	National Environmental Management Act 107 of 1998
NEM:BA	National Environmental Biodiversity Act 10 of 2004
NPAES	National Protected Areas Expansion Strategy
NPDP	National Physical Development Plan
NPPF	National Planning Policy Framework (UK)
NSDP	National Spatial Development Perspective
PAJA	Promotion of Administrative Justice Act 3 of 2000
PPA	Physical Planning Act
PPS	Planning Policy Statement (United Kingdom)
PSDF	Provincial spatial development frameworks
ROG	Raumordnungsgesetz - Federal Regional Planning Act (Germany)
RSS	Regional Spatial Strategies (United Kingdom)
SALGA	South African Local Government Association
SDF	Spatial development framework
SEA	Strategic environment assessment
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
UK	United Kingdom
VROM	Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Netherlands)
WCPSDF	Western Cape Provincial Spatial Development Framework

WRO

Wet op de Ruimtelijke Ordening – Spatial Planning Act (Netherlands)

CHAPTER 1: INTRODUCTION

1.1 Understanding the Context

Planning is a dynamic, complex and constantly changing discipline. It arose as a mechanism to regulate and control land use. Different eras, and the temporal priorities characterising them, have shaped the planning discipline and the associated land use planning laws and instruments into the diverse and complex 'beast' it is today.¹ Planning developments have occurred in response to phenomena and challenges which societies have been faced with. The Industrial Revolution of the nineteenth century resulted in increased environmental and social pressures. These included increased pollution levels, increased population density and deteriorating environmental conditions, which prompted squalor and unhygienic living conditions.² These unhygienic living conditions and deteriorating quality of life stimulated the growth and need for planning.³

Planning was given statutory effect through planning laws which provided for various land use controls. Urbanisation, increased land utilisation and associated social issues have resulted in the emergence of these laws.⁴ Embedded within these planning laws are legal instruments which inform and regulate how land can be used and developed.⁵ At the heart of planning is the need to demarcate land for use which is in the best interests of society and in order to do this, social issues need to be considered.⁶ After World War I, more orderly planning evolved which relied on the demarcation of specific areas for certain uses. This was fuelled by the technical revolution and the introduction of the motor car.⁷ In the United Kingdom (UK), national Acts were passed to alleviate the squalor and social issues.⁸ In South Africa, town-planning ordinances were adopted based on the concepts of the UK Acts.⁹ Initially, land use planning laws and the instruments which gave rise to it, were reactive and underpinned by control.¹⁰

¹ Van Wyk J *Planning Law* (1999) Juta Cape Town 82.

² Glazewski J & du Toit L "Planning Law and the Environment" In Glazewski J & du Toit L *Environmental Law in South Africa* (2013) 4.

³ In the UK issues such as pollution, overcrowding and squalor associated with the Industrial Revolution sparked development in planning law. Van Wyk *Planning Law* (1999) 82; refer generally to Huffman J & Plantico R "Towards a theory of Land use planning: lessons from Oregon" 1979 (14) *Land & Water Law Review* 1-74.

⁴ Bosselman F & Callies D *The Quiet Revolution in land use control* (1971) Council on Environmental Quality Government Printing Office, Washington D.C 12.

⁵ Llyod M & Peel D "Shaping and designing model policies for land use planning" 2007 (24) *Land Use Policy* 154; Van Wyk *Planning Law* (1999) 81.

⁶ *Ibid* at 28.

⁷ Glazewski J & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 4.

⁸ *Ibid* at 5. Examples include the Housing, Town Planning Act 1909 and the Town and Country Planning Act 1947.

⁹ The ordinances developed in South Africa included the Transvaal Townships and Town Planning Ordinance 11 of 1931, Orange Free State Townships Ordinance 20 of 1947, Township Ordinance (Cape) 22 of 1934 and Natal Private Township and Town-Planning Ordinance 10 of 1934.

¹⁰ Refer to Van Wyk *Planning Law* (1999) 81-105.

Historically, old forms of planning were hinged on regulation and control which were typically aimed at the planning of urban areas.¹¹ However, planning and its laws have progressed to encompass a wider range of aspects and areas demanding the need for integration with other sectors, in order to address the challenges society currently faces.¹² By nature, planning law is interdisciplinary as elements of constitutional law, administrative law, environmental law, property law and criminal law are apparent within it.¹³ Furthermore, it involves governments and their mandates, thus political agendas can have an effect on land use planning laws.¹⁴

Land use planning laws play a crucial role in guiding and influencing the behaviour of society. The consequences of land use decisions and the planning laws which provide for and guide these decisions, have the potential to substantially affect the environment.¹⁵ Towards the end of the twentieth century there was a rise in environmental concern.¹⁶ Currently, environmental issues are at the forefront of political agendas with a drive towards sustainability.¹⁷ It has been advocated that integration of environmental policies into other sectors of society, such as land use planning, needs to occur to ensure that the environmental pressures induced by economic development are addressed.¹⁸ Sustainable development has been advocated as the mechanism to achieve this, as it is widely acknowledged that sustainability relates to planning, as the goals of sustainability are integrated into planning.¹⁹ Land use planning laws are fuelled by the stresses of sustainable development and dealing with conflicts that arise due to the competing interests.²⁰ Sustainable development therefore provides direction and an ideal that can guide planning agendas.²¹

Spatial planning is a key aspect of land use planning that has been identified as an important tool in striving towards sustainable development.²² Spatial planning demonstrates a shift in planning focus to a more pro-active and forward-looking approach. This approach encompasses a broader range of aspects and has been described

¹¹ Todes A "Rethinking spatial planning" 2008 (53) *SSB/TRP/MDM* 9.

¹² Van Wyk J *Planning Law* 2nd ed. (2012) Juta Cape Town; Her Majesty Government (2007) *White Paper Planning for a Sustainable Future* 117; Smith H, Maes F, Stojanovic T & Ballinger R "The Integration of land and marine spatial planning" 2011 (15) *Journal of Coast Conservation* 291.

¹³ Van Wyk *Planning Law* (1999) 41.

¹⁴ Morriss A & Meiners R "The Destructive Role of Land Use Planning" 2000 (14) *Tul. Envtl. L.J.* 109.

¹⁵ For the potential that land use planning decisions and status of planning laws see, *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and the Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC). Tewdwr-Jones M, Gallent N & Morphet J "An Anatomy of Spatial Planning: Coming to Terms with the Spatial Element in UK Planning" 2010 (18) *European Planning Studies* 241.

¹⁶ Huffman & Plantico 1979 *Land & Water Law Review* 12.

¹⁷ The link between sustainability and planning has been explored by various authors, see briefly *the Journal of Planning Literature* volume 9 (4) which pertains to sustainability.

¹⁸ Simeonova V & van der Valk A "The need for a communicative approach to improve environmental policy integration in urban land use planning" 2009 (23) *Journal of planning Literature* 241.

¹⁹ Berke P & Conroy M "Are We Planning for Sustainable Development?" 2000 (66) *Journal of the American Planning Association* 21; A widely accepted definition of sustainable development is, 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.' *World Commission on Environment and Development, Our Common Future* (Report) 1987 8; Jepson ED "Sustainability and Planning: Diverse Concepts and Close Associations" 2001 (15) *Journal of Planning Literature* 499.

²⁰ Godschalk D "Land Use Planning Challenges: Coping with Conflicts in Visions of Sustainable Development and Liveable Communities" 2004 (70) *Journal of the American Planning Association* 5.

²¹ Berke & Conroy 2000 *Journal of the American Planning Association* 30.

²² Smith et al., 2011 (15) *Journal of Coast Conservation* 291.

as a tool which 'goes beyond traditional land use planning to bring together and integrate policies for the development and use of land with other policies and programmes which influence the nature of places and how they function'.²³ Spatial planning demonstrates an approach which overcomes the narrowly defined and implemented purpose of traditional planning.²⁴ The form spatial planning has taken over time has not always been clear which can be attributed to various factors. Firstly, there is no hard and fast definition of spatial planning as it is a term which has different meanings in various parts of the world.²⁵ Furthermore, spatial planning can have different statutory and non-statutory homes, as well as different guises.²⁶

As previously mentioned, planning and spatial planning take place in a multifaceted and dynamic arena.²⁷ Challenges and issues that planning needs to account for are constantly evolving, consequently there is the need for frequent associated legal reform. Planning law changes can occur through incremental changes of the laws and instruments or total planning reform.²⁸ Planning reform is no easy task, as it is complex and fraught with difficulties requiring a substantial amount of resources and capacity to bring about this change.²⁹ Revising and implementing new laws are only part of the solution, thus there needs to be a better understanding of the planning laws themselves, the approaches which govern planning, and the integration between other sectors of society.³⁰

The planning dispensation and spatial planning in South Africa prior to the commencement of the Spatial Planning and Land Use Management Act (SPLUMA)³¹ was fraught with confusion, conflict and largely fragmented.³² This dispensation has been shaped by political ideologies of the apartheid era and a Constitutional dispensation.³³

During the apartheid era, a dichotomy of planning systems existed which were underpinned by racial segregation.³⁴ The implications of this meant that different laws applied in different areas across South Africa.³⁵ With the introduction of the democratic era, it was evident that the planning system and laws were inappropriate

²³ Stated by the UK Government in Office of the Deputy Prime Minister (2005a) Planning Policy Statement 1: Delivering Sustainable Development 12, para 30 when referring to spatial planning in the UK.

²⁴ Vincent N "The emergence of the spatial planning approach in England" 2007 (22) *Planning Practice & Research* 43.

²⁵ Economic Commission for Europe "Spatial Planning: Key Instrument for Development and Effective Governance" 2008 *Economic Commission for Europe* 1; European Commission, Regional development Studies "The EU compendium of spatial planning systems and policies" 1997 *European Commission* 25.

²⁶ *White Paper on Spatial Planning and Land Use Management: Wise Land Use* Ministry of Agriculture and Land Affairs GG 22473 (20 July 2001) 6.

²⁷ Berrisford S "Revising spatial planning legislation in Zambia: A case study" 2011a (22) *Urban Forum* 237.

²⁸ Vincent 2007 *Planning Practice & Research* 44.

²⁹ *Ibid* at 43, 53.

³⁰ *Ibid* at 44, 56.

³¹ 16 of 2013.

³² Kotzé L & de la Harpe S "The good, the bad and the ugly: Using good and cooperative governance to improve environmental governance of South African World Heritage Sites: A case study of the Verdefort Dome" 2008 (11) *PER* 218.

³³ Claassen P "Spatial planning with the Western Cape Province as a case study" in Strydom H & King N *Environmental management in South Africa* 925.

³⁴ Paterson A "South Africa" (Draft Case Study) 2015 *IUCN Environmental Law Centre Integrated Planning Project* 1.

³⁵ Legislation such as the ordinances applied in what were considered urban white areas, whereas separate land use planning laws were operating in areas which were scheduled native areas. This will be discussed further in section 3. Refer further to Berrisford S "Unravelling Apartheid Spatial Planning Legislation in South Africa" 2011b (22) *Urban Forum* 248-249 and Paterson (2015) 1-3.

and fell short of meeting the objectives and goals of a democratic society.³⁶ To address this, in 1995 the Development Facilitation Act (DFA)³⁷ was introduced. This was a flagship national Act which sought to bring about the much needed change.³⁸ The intention of the Act was to introduce a uniform planning system across the country and that provinces would follow suit and develop their own Acts, mimicking the flavour of the DFA.³⁹ This was not fully realised as not all provinces developed new Acts and in some provinces, Acts were developed yet they failed to come into effect.⁴⁰ Consequently, planning reform was not adequately achieved as new Acts operated parallel to old order planning ordinances.⁴¹

This situation is further complicated by laws which have developed in other sectors throughout South African planning history that influence land use planning.⁴² In contemporary times numerous sector laws influence land use planning, however, there has been an attempt at rationalising land use planning laws and the relationship between other sectors.⁴³ The substantive number of laws dealing with planning has contributed to a planning system which is fragmented and fraught with confusion.⁴⁴ This is further perpetuated by different spatial planning instruments having different statutory homes and different statuses.⁴⁵ Problems such as these are common and have given rise to a number of court cases.⁴⁶

Prior to South Africa's new planning reform a situation existed where a wealth of laws governed planning and more specifically spatial planning. These laws include chapters of ordinances which have persisted from the pre-Constitutional era, planning laws which were developed after the enactment of the Constitution,⁴⁷ and sectoral laws.⁴⁸ Over time there have been attempts at incremental and total planning legislative reform to address these issues.⁴⁹ It can be argued that these have been largely unsuccessful in bringing about the intended legal reform

³⁶ Berrisford 2011b (22) *Urban Forum* 251.

³⁷ 15 of 1995.

³⁸ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 6.

³⁹ Ibid.

⁴⁰ Ibid at 39. The Kwazulu-Natal Planning and Development Act 6 of 2008, Northern Cape Planning and Development Act 7 of 1998, Western Cape Land and Development Act 7 and Gauteng Planning and Development Act 3 of 2003 were developed, however the latter two failed to commence.

⁴¹ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 928.

⁴² Ibid at 925-928. In the Environmental sector these laws include the Environment Conservation Act 73 of 1989, National Environmental Management Act 107 of 1998, National Environmental Biodiversity Act 10 of 2004, National Environmental Management Integrated Coastal Management Act 24 of 2008, and National Environmental Management Protected Areas Act 57 of 2003.

⁴³ This is apparent through the legal reform introduced by SPLUMA.

⁴⁴ Broadly these laws include laws which prescribe for plans and policies to manage land use, laws which regulate land use, laws that regulate protected areas, laws which regulate land reform and laws of general relevance. The environmental law discipline is an example where various laws have been developed that effect land use planning. Ibid at 928; Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 30.

⁴⁵ Abrahams G & Berrisford S "Addressing the crisis of planning law reform in South Africa" (Report) 2012 South African Cities Network 11; *White Paper on Spatial Planning and Land Use Management* 2001 6.

⁴⁶ Van Wyk *Planning Law* (1999) 1. Various cases of relevance will be discussed further in section 3.

⁴⁷ Constitution of the Republic of South Africa, 1996 (the Constitution).

⁴⁸ An example of an ordinance which persisted is the Land Use Planning Ordinance 15 of 1985, examples of planning laws include the Less Formal Township Establishment Act 113 of 1991, Physical Planning Act 125 of 1991 and Development Facilitation Act 67 of 1995. Refer to footnote 42 for examples of sectoral laws.

⁴⁹ Refer to generally to Berrisford 2011b (22) *Urban Forum* 247-263.

and have further perpetuated fragmentation and confusion which has persisted over time.⁵⁰ To address the issues and complexities that exist, the South African Government committed to the process of planning reform with the enactment of SPLUMA. SPLUMA has commenced as of 1 July 2015, triggering a new planning dispensation.⁵¹

One hopes that the new planning dispensation which South Africa has embarked on will address the issues and inherent problems present in the land use planning discipline. Therefore it is important to consider spatial planning and its intricacies to be able to explore what it encompasses and how effect has been given to it during different eras in South African planning history.⁵²

1.2 Aim and purpose

Given the complex and dynamic nature of planning and its laws, and in light of legal reform in South Africa, this dissertation aims to ascertain if SPLUMA provides a more coherent legal regime governing spatial planning in South Africa and more specifically in the Western Cape. This is achieved through understanding the role spatial planning has had and how the law makers have sought to give effect to spatial planning pre and post SPLUMA. This is pursued by determining whether SPLUMA is moving towards providing greater clarity in terms of which laws govern spatial planning, the form and content of spatial planning instruments, the purpose and legal status of the instruments and lastly the manner in which they integrate with other relevant planning instruments.

This is relevant given that the current planning reform in South Africa will bring about significant changes to the regulatory framework which governs spatial planning. Changes include providing a uniform framework to spatial planning and land use management which is applicable for the whole country.⁵³ These changes aim to address the issues in the previous framework which was confusing, fragmented and in dire need of clarity.⁵⁴ Ascertaining the issues which mounted to confusion and fragmentation in the pre-SPLUMA era enables an assessment of whether SPLUMA provides a coherent legal framework governing spatial planning. This is pertinent as sections of SPLUMA have commenced, altering the spatial planning dispensation, therefore there is a need to determine whether SPLUMA will provide the clarity and certainty which was lacking prior to its commencement.⁵⁵

⁵⁰ Examples of unsuccessful attempts of reform include publications of Bills and Acts which have not been adopted or come into effect. In 2001 the *Land Use Management Bill* which was published, which was never adopted. Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 928; Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 6.

⁵¹ Proclamation of SPLUMA in ref GG No. 38828 (27 May 2015). Refer to section 3.2.1 for repealed laws.

⁵² Tewdwr-Jones et al., 2010 (18) *European Planning Studies* 241.

⁵³ Long title of SPLUMA.

⁵⁴ Abrahams & Berrisford (2012) *South African Cities Network* 6.

⁵⁵ SPLUMA commenced as of 1 July 2015. Proclamation of SPLUMA in ref GG No. 38828 (27 May 2015).

1.3 Methodology and structure

This dissertation will take the form of a desktop study, which reviews the old and new planning laws and frameworks which have been in effect in South Africa. The scope of this dissertation focuses on whether SPLUMA addresses the issues that have transpired and are apparent in South Africa's fragmented planning system and more specifically, in the Western Cape, focusing on whether the legal reform addresses past issues and challenges that have arisen and persisted prior to the introduction of SPLUMA. The Western Cape has been chosen for a number of reasons. Firstly, the nature and extent of this paper is not large enough to explore the contexts in all nine provinces. Secondly, the Western Cape has experienced many issues and problems associated with fragmentation and confusion in land use planning laws, which has given rise to numerous instances of litigation and thirdly, the recent enactment of provincial planning legislation in the province which has been developed to be consistent with SPLUMA, which makes the province an appropriate choice.⁵⁶

Prior to undertaking the analysis of South Africa's spatial planning dispensation, it is necessary to theoretically contextualise an understanding of what spatial planning is. This enquiry involves three parts. Firstly, it is necessary to explore issues of terminology. This includes understanding the form and nature of spatial planning and how this differs from other relevant concepts such as planning, land use planning, land use management and land development management. Secondly, it is necessary to distil the essential characteristics of spatial planning which include the different purposes it can fulfil, the spatial and temporal scales it can operate at and mechanisms which are used to promote integration. Lastly, the role of the law in promoting spatial planning is considered. This is ascertained by considering issues of terminology, the content and scope, the purpose and status of legal instruments and how integration is provided for. This theoretical enquiry forms the focus of Chapter 2 and draws heavily on perspectives from Europe. A European focus is justified on the basis that that it has been argued that spatial planning arose in Europe, as the approach that was needed to address the social and environmental challenges due to economic development.⁵⁷ Furthermore, there is extensive literature available with respect to European spatial planning legal regimes.

Contextualising this will enable an investigation into what place spatial planning has had in South Africa, and the role the law has played in promoting it while identifying the inherent issues and challenges that have persisted and subsequently arisen. Drawing from this theoretical analysis will enable the assessment of whether the reform is likely to address current issues and give effect to the planning needs and goals of South Africa. Chapter 3 analyses SA's legal regime governing spatial planning and is divided into two main eras. The first section is the pre-SPLUMA era which aims to contextualise the spatial planning framework and laws that have occurred in South Africa and the Western Cape. The second era is the post-SPLUMA era where the new legal regime will be

⁵⁶ Although the Land Use Planning Act 3 of 2014 (LUPA) in the Western Cape has been enacted it is still yet to come into effect.

⁵⁷ Smith et al., 2011 (15) *Journal of Coast Conservation* 292.

unpacked, delaminating the form and role spatial planning is likely to have. To ensure consistency, both eras will be divided into four main sections. Firstly, an overview of the relevant spatial planning laws and instruments will be established. Secondly, the content, form and nature of the different spatial planning instruments will be discussed. Thereafter, the legislative status and purpose of the different instruments will be explored. Lastly, what provisions are made for integration of the spatial planning regulatory instruments with other relevant instruments and sectors will be explored.

The main conclusions are outlined in Chapter 4.

CHAPTER 2: UNDERSTANDING SPATIAL PLANNING

The purpose of this chapter is to explore what is meant by planning and more specifically spatial planning. The initial focus of this chapter is to contextualise the terms planning, land use planning, land use planning law and spatial planning. This is complex as the terms can be used differently in various parts of the world, encompassing different things and can be mandated by various authorities/bodies.⁵⁸ The essential characteristics of spatial planning are then delaminated, the chapter then focuses on identifying the role the law can have in promoting spatial planning. This is explored through considering how terminology is used differently, the content, and scope, purpose and legislative status of spatial planning and its instruments. Lastly, avenues of integration within spatial planning and other sectors are explored.

2.1 Understanding Key Concepts: Planning, Land Use Planning and Spatial Planning

2.1.1 Issues of terminology

Planning or land use planning can be defined as ‘a formulated or organised method according to which something is to be done, a scheme of action’.⁵⁹ Land use planning is concerned with the control and regulation of land and the development thereof.⁶⁰ This gives rise to the notion that planning does not occur in a vacuum and involves other aspects of society such as economic, environmental, social and political issues.⁶¹ Recent times have seen the shift towards planning that is more integrated and a shift away from a focus on physical aspects which traditional planning was hinged on.⁶²

Land use planning necessitates a legal basis in order to be effective.⁶³ Land use planning law involves the way in which society interacts with land, and involves the allocation and determination of land for certain uses.⁶⁴ It is ‘that area of law which provides for the creation, implementation and management of a sustainable planning process to regulate land use, with the purpose of ensuring the health, safety and welfare of society as a whole and

⁵⁸ Economic Commission for Europe (2008) 15; Berrisford 2011a (22) *Urban Forum* 238; Faludi A “European spatial planning: past, present and future” (Centenary Paper) 2010 (81) *Town Planning and Review* 2.

⁵⁹ Van Wyk *Planning Law* (2012) 12.

⁶⁰ *Ibid* at 1; Smith et al., 2011 (15) *Journal of Coast Conservation* 292.

⁶¹ Van Wyk *Planning Law* (2012) 1; Berrisford 2011b (22) *Urban Forum* 258-259.

⁶² Berrisford 2011a (22) 238.

⁶³ Purpose/long title of The Planning Act in Denmark Consolidated Act 813 of 2007.

⁶⁴ Van Wyk *Planning Law* (1999) 3.

taking into account environmental factors'.⁶⁵ In essence, land use planning law involves the determination of land use and the regulation and management thereof.⁶⁶

Confusion arises when delaminating what land use planning law comprises of. Land use planning alludes to forward spatial planning, land use management and land development management.⁶⁷ Different laws and instruments are used to give effects to these components. Determining what instruments give effect solely to spatial planning is no easy task, as overlap with the other areas of land use planning law occurs.⁶⁸ Furthermore, different countries have different configurations of planning and spatial planning.⁶⁹

Prior to exploring different configurations of spatial planning, an understanding of what spatial planning, land use management and land development management is necessary. Various instruments have been utilised to give effect to land use planning over time. Early instruments consisted more of a land use management flavour which involves the regulation of land development.⁷⁰ These approaches were reactive and examples include restrictive covenants, conditions on titles and zoning schemes.⁷¹ Historically, the effects of social and environmental processes were largely ignored.⁷² Consequently traditional planning instruments have proved inappropriate in dealing with current challenges, thus a shift to more strategic approaches has occurred, namely spatial planning.⁷³

Spatial planning is the avenue of planning that is used to affect the future use of land.⁷⁴ The scope of which is broader than traditional planning, as spatial planning aims to ensure the coordination between sectors and government institutions.⁷⁵ The purpose of spatial planning is largely guiding, playing an informative and persuasive role.⁷⁶ This is different from land use management and land development management which aims to be prescriptive.⁷⁷ The purpose of which is to ensure that land uses and the associated development rights are demarcated and prescribed.⁷⁸ Commonly, regulatory and land use management schemes of land use management and development management are influenced by spatial planning or operate alongside spatial planning.⁷⁹

⁶⁵ Ibid at 5. This is the definition for 'planning law', it is argued that 'planning law' and 'land use planning law' allude to the same thing.

⁶⁶ Ibid.

⁶⁷ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another* 2009 (1) SA 337 (CC) para 128.

⁶⁸ Salet W "The Authenticity of Spatial Planning Knowledge" 2014 (22) *European Planning Studies* 294.

⁶⁹ Ibid.

⁷⁰ Todes A, Karam A, Klug N & Malaza N "Beyond master planning? New approaches to spatial planning in Ekurhuleni, South Africa" 2010 (34) *Habitat International* 415; Nadin V & Stead D "European Spatial Planning Systems, Social Models and Learning" 2008 (172) *disP – The Planning Review* 40.

⁷¹ Ibid; Todes et al., 2010 (34) *Habitat International* 415.

⁷² Ibid.

⁷³ Ibid; Albrechts L "Bridge the Gap: From Spatial Planning to Strategic Projects" 2006 (14) *European Planning Studies* 1487.

⁷⁴ European Commission (1997) 24.

⁷⁵ Ibid.

⁷⁶ Paterson (2015) 12.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ This is discussed further in Gawroński K, Van Assche K & Hernik J "Spatial Planning in the United States of America and Poland" 2010 *Infrastructure and Ecology of Rural Areas*, Polish Academy of Science 54, 65 and Douvere F & Ehler C "New perspectives on sea use management: Initial findings from European experience with marine spatial planning" 2009 (90)

One definition of spatial planning is impossible to find, however common elements of spatial planning can be found in various planning systems throughout the world.⁸⁰ For the purpose of this dissertation, spatial planning is a broad and forward-looking concept which aims to take into account different elements of society, including environmental conditions, economic factors and social elements.⁸¹ Other terms which are used by various European countries that allude to the same thing, include strategic spatial planning and to an extent strategic planning.⁸²

There are a variety of instruments which have been utilised to give effect to spatial planning. These include policies, strategies, frameworks, guidelines, structure plans, spatial development frameworks/plans, spatial plans, strategic plans, regional plans and local plans.⁸³ Generally these instruments serve the same purpose of being future orientated, broad instruments which seek to guide, however they can operate at different scales.⁸⁴

2.1.2 Essential Characteristics of Spatial Planning

Globally changing circumstances such as an increase of technology, globalisation, and a change in social and cultural interaction have led to new challenges.⁸⁵ These challenges and associated spatial impacts have led to a shift in the planning systems across the world.⁸⁶ Spatial planning has developed in response to economic, societal and environmental issues as a mechanism to manage and guide the way in which land is used.⁸⁷ There has been the increased acceptance that planning is a multi-faceted discipline and an integrated approach is needed, resulting in greater utilisation and growth of spatial planning and its instruments.⁸⁸ It plays a role in dealing with the interaction and 'the problem of coordination or integration of the spatial dimensions of sectorial policies through a territorially-based strategy'.⁸⁹ Spatial planning is an integrated, process orientated approach and is geared towards sharing responsibilities at the appropriate level of government.⁹⁰

Journal of Environmental Management 78; Van den Broeck P "The Changing Position of Strategic Spatial Planning in Flanders. A Socio-Political and Instrument-Based Perspective" 2008 (13) *International Planning Studies* 261.

⁸⁰ Economic Commission for Europe (2008) 1.

⁸¹ Van der Valk A "The Dutch Planning Experience" 2002 (58) *Landscape and Urban Planning* 202.

⁸² Refer further to Todes et al., 2010 (34) *Habitat International* 415; Albrechts L "Strategic (spatial) planning reexamined" 2004 (31) *Environment and Planning B: Planning and Design* 743-744.

⁸³ For further detail of instruments refer generally to European Commission (1997) 53-66 & Economic Commission for Europe (2008) 20-22.

⁸⁴ For more details regarding the scope, content and purpose of these instruments refer European Commission (1997) 53-66 and Economic Commission for Europe (2008) 20-22.

⁸⁵ Albrechts 2006 (14) *European Planning Studies* 1487.

⁸⁶ *Ibid* at 1488.

⁸⁷ Smith et al., 2011 (15) *Journal of Coast Conservation* 291.

⁸⁸ *Ibid*.

⁸⁹ *Ibid* at 292; Economic Commission for Europe (2008) 1.

⁹⁰ Eggenberger M & Rosário Partidário M "Development of a framework to assist the integration of environmental, social and economic issues in spatial planning" 2000 (18) *Impact Assessment and Project Appraisal* 203.

The aspiration of spatial planning is introducing a framework which operates over the long-term that allows for development and the coordination of other sectors of society.⁹¹ Another key aspect is that it can streamline efforts, avoiding overlapping and duplicated sectorial policies. Importantly, spatial planning is used to promote and achieve the three ideals of sustainable development, namely economic development, social development and environmental consideration.⁹² The increase in the commitment to sustainable development has promoted greater utilisation, reshaping and strengthening of spatial planning systems.⁹³

Spatial planning emerged in the 1960s and 1970s in a number of countries.⁹⁴ One of the reasons spatial planning occurred was due to the growing recognition of issues such as fragmentation, growing unplanned developments, and rising environmental concerns. This prompted responses that were more strategic. Initially early forms of spatial planning informed the location, form, intensity and amount of land demarcated for certain activities.⁹⁵ These spatial planning instruments served as guidelines but were often trumped by other sector policies and agendas.⁹⁶

Broadening the scope of what spatial planning entails has affected the spatial and temporal scales at which spatial planning operates. Spatial refers to the 'where' of places, activities and things. Broadening the scope of spatial planning has increased the number of spatial dimensions which need to be considered.⁹⁷ The notion of sustainable development underpinning planning systems has translated into the need to incorporate the social, economic and environmental issues and their spatial expressions.⁹⁸

Furthermore, due to the nature of spatial planning there is the challenge for it to work across spaces and spatial scales such as administrative and geographical boundaries.⁹⁹ Consequently there is the need for spatial planning to be able to articulate perspectives and different issues on the national, regional and local scale.¹⁰⁰ Ensuring that a system of comprehensive planning occurs at and between governments operating at different spatial scales.¹⁰¹ The temporal scale of spatial planning is complex as long term visions and ideals for areas need to be captured while ensuring that spatial planning influences short and long term actions.¹⁰²

⁹¹ Economic Commission for Europe (2008) 2.

⁹² Ibid; Lestrelin G, Castella J & Bourgoin J (2012) "Territorialising Sustainable Development: The Politics of Land-use Planning in Laos" 2012 (42) *Journal of Contemporary Asia* 582; Todes A, Sim V & Sutherland C "The relationship between planning and environmental management in South Africa: The Case of KwaZulu-Natal" 2009 (24) *Planning, Practice & Research* 412.

⁹³ Economic Commission for Europe (2008) 2.

⁹⁴ Albrechts 2006 (14) *European Planning Studies* 1489-1490.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 748.

⁹⁸ Ibid.

⁹⁹ Allmendinger P & Haughton G "Soft spaces, fuzzy boundaries, and metagovernance: the new spatial planning in the Thames Gateway" 2009 (41) *Environment and Planning A* 619.

¹⁰⁰ Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 749.

¹⁰¹ Albrechts 2006 (14) *European Planning Studies* 1489.

¹⁰² Actions include decision making and planning making. Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 744, 747, 753.

One of the fundamental tasks of spatial planning is to harmonise and integrate activities and issues of society effectively.¹⁰³ In the realm of spatial planning, three dimensions of integration are of importance, namely substantive integration, sectorial integration and spatial integration.¹⁰⁴

Difficulties associated with integration are rife as a drive towards achieving the three pillars of sustainable development often conflict in practice.¹⁰⁵ This is complicated by different sectors and their activities as well as different levels/spheres of government operating over different spatial scales.¹⁰⁶ Globally, countries are in various stages of transition to spatial planning systems.¹⁰⁷ Examples exist where planning has adopted a crucial role in the drive towards sustainability whereas in other instances, environmental spheres have developed separately with separate legal and institutional machinery, resulting in parallel systems with attempts at integration between the two.¹⁰⁸

Typically, ineffective integration results in fragmented systems with inherent confusion and duplication of activities which can be costly.¹⁰⁹ This occurs both between sectors and different levels of government.¹¹⁰ In contemporary planning times a key level that planning takes place is at local authority/government.¹¹¹ This has been recognised as a key player in shaping and giving effect to planning. Consequently, greater roles and responsibilities have been afforded to this level of authority and the structure and character of local government has a significant influence on how spatial planning operates.¹¹²

Effective integration that spatial planning requires is often inhibited by turf wars' between the different sectors which results in numerous rules and regulations.¹¹³ A big drive towards integration and challenging departmental and organisational barriers is evident in the plan making process, where there is the requirement for consultation from different administrative levels and sectors of government.¹¹⁴

¹⁰³ Eggenberger & Rosário Partidário 2000 (18) *Impact Assessment and Project Appraisal* 203.

¹⁰⁴ Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 753.

¹⁰⁵ Todes et al., 2009 (24) *Planning, Practice & Research* 413.

¹⁰⁶ Eggenberger & Rosário Partidário 2000 (18) *Impact Assessment and Project Appraisal* 203.

¹⁰⁷ Economic Commission for Europe (2008) 2.

¹⁰⁸ Eggenberger & Rosário Partidário 2000 (18) *Impact Assessment and Project Appraisal* 204; Todes et al., 2009 (24) *Planning, Practice & Research* 411.

¹⁰⁹ Albrechts L "Shifts in strategic spatial planning? Some evidence from Europe and Australia" 2006 (38) *Environment and Planning A* 1158.

¹¹⁰ Ibid.

¹¹¹ Her Majesty Government (2007) 116.

¹¹² In Denmark the contemporary spatial planning Act recognises the shift of greater responsibility to the local level of planning. Refer to the purpose/long title of The Planning Act in Denmark Consolidated Act 813 of 2007. Galland D & Enemark S "The National Spatial Planning Framework" (draft version) 2012 *Planning for States and Nation/States: A TransAtlantic Exploration*, Dublin 9; refer generally to Economic Commission for Europe (2008) 17 and European Commission "The EU compendium of Spatial planning systems and policies United Kingdom" (European Union Regional Policy) 2000 *European Commission* 63.

¹¹³ Van den Broeck 2008 (13) *International Planning Studies* 262.

¹¹⁴ Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 745; Healey P "The Treatment of Space and Place in the New Strategic Spatial Planning in Europe" 2004 (28) *International Journal of Urban and Regional Research* 45.

Importantly, spatial planning aims to ensure integration in terms of objectives and functions as well as processes.¹¹⁵ Due to the nature of planning it is not possible to plan a country in one document or using one instrument, instead there needs to be a combination thereof.¹¹⁶ As systems are in various stages of implementing spatial planning and utilisation of spatial planning instruments, it is important to recognise the link between spatial planning, land use management and development management instruments.¹¹⁷ As these regulatory instruments, such as zoning give effect to, and implement the policies and plans which have been developed in the realm of spatial planning.¹¹⁸ Furthermore, spatial planning instruments are being used in conjunction with, or replacing traditional instruments, requiring effective integration.¹¹⁹

2.2 Role of Law in Promoting Spatial Planning

2.2.1 Relevant Spatial Planning Laws, Instruments and Use of Terminology

Planning systems across the globe differ for a variety of reasons as the form, nature and outcomes of the planning system are context specific and are influenced by various practices and relationships.¹²⁰ These include the actors, cultural attitudes and ideologies, the policies and the commitments.¹²¹ Furthermore, institutional and administrative structures of a country effect the way in which planning occurs and is mandated.¹²²

Planning terms which are commonly used have different implications in different countries or regions which is further complicated when translating terms between different languages.¹²³ The meaning of which are usually given context and effect in the country's planning laws.¹²⁴ This highlights the need for an effective legal framework and embedded instruments to give effect to the planning system.¹²⁵ Key mechanisms which are incorporated into

¹¹⁵ Albrechts 2006 (38) *Environment and Planning A* 1158.

¹¹⁶ Van Wyk *Planning Law* (1999) 80.

¹¹⁷ Ibid at 21.

¹¹⁸ Economic Commission for Europe (2008) 24-25.

¹¹⁹ These instruments include town and country schemes. Tewdwr-Jones et al., 2010 (18) *European Planning Studies* 239.

¹²⁰ Schmidt S & Buehler R "The Planning Process in the US and Germany: A Comparative Analysis" 2007 (12) *International Planning Studies* at 65; Albrechts 2006 *European Planning Studies* 1492; Todes et al., 2009 (24) *Planning, Practice & Research* 413.

¹²¹ Ibid.

¹²² Mertins G & Marburg M "Regional Planning in Germany. Institutional framework, instruments and effectiveness" in Luzón J & Cardim M *Estudio de casos sobre planeación regional* (eds) Edicions, University of Barcelona 36.

¹²³ By way of example what one country defines as a territory can have a population of less than half a million inhabitants whereas another territory can consist of several million people. European Commission (1997) 25; Healey 2004 (28) *International Journal of Urban and Regional Research* 46.

¹²⁴ An example of this is local plans, which in Denmark regulate local land use and are legally binding, whereas in England they are guiding instruments which do not prescribe binding regulations. European Commission (1997) 25.

¹²⁵ Examples of long standing spatial planning legal frameworks are in the Netherlands (*Wet op de Ruimtelijke Ordening*, (WRO)) and in Germany (*Raumordnungsgesetz* (ROG)) both enacted in 1960s and have undergone amendments. Refer further to Needham B "The New Dutch spatial planning Act: Continuity and change in the way in which the Dutch regulate the practice of spatial planning" 2005 (20) *Planning Practice & Research* 327; Pahl-Weber E & Henckel D "The Planning

the legal frameworks include goals, principles, guidelines and statements which seek to guide planning activities.¹²⁶ Conversely, some of these features can be incorporated into other instruments such as policies and programs.¹²⁷

The legal framework commonly provides for policies, perspectives, plans and frameworks which are intended to provide spatial planning guidance and can be developed on various administrative levels.¹²⁸ When developed on a national level, these usually prescribe for the entire country.¹²⁹ Frameworks are instruments which contain a general spatial pattern and they outline the general framework for the designated area and usually rely on regulatory instruments to be implemented.¹³⁰ Locally developed frameworks and to a certain extent local plans, are widely utilised throughout Europe and are commonly the contemporary locally developed planning instrument.¹³¹ These have statutory homes in spatial planning laws or other relevant Acts.¹³²

2.2.2 Content and Scope

The content and scope of spatial planning and its instruments differ in different jurisdictions, as the instruments are related to the strategic issues of importance to the jurisdiction.¹³³ Generally, the content and scope of spatial planning instruments are prescribed for in the relevant planning laws.¹³⁴ Usually, the planning laws contain provision for what and how instruments need to be developed and implemented.¹³⁵ In certain instances

System and Planning Terms in Germany: A Glossary” 2008 *Academy for Spatial Planning Research ARL*, Hanover Germany 35; Economic Commission for Europe (2008) 19.

¹²⁶ See for example the ROG (Germany) which contains the general principles and concepts of spatial planning, statements and policies of spatial development which include reports, guidelines and programmes. Refer further to Pahl-Weber & Henckel 2008 *Academy for Spatial Planning Research ARL* 39 and 70; Pahl-Weber E, Henckel D, Klinge W, Lau P, Schwarm D, Rütenik B & Besecke A, “The Planning System in the Federal Republic of Germany” (BSR Interreg III B Project) 2006 *COMMUN Germany, European Union* 12.

¹²⁷ Economic Commission for Europe (2008) 20-21.

¹²⁸ *Ibid* at 30; European Commission (2000) 42-43.

¹²⁹ Examples of this include national spatial development frameworks (Denmark and Netherlands), National spatial strategies (Nota Ruimte in the Netherlands), national planning frameworks (National Planning Policy Framework (NPPF) in England) and national guidance and statements (Planning Policy Guidance notes (PPG) and Planning Policy Statements (PPS) in England) refer further to Department for Communities and Local Government (2012) National Planning Policy Framework 1. (NPPF (2012)); Interdepartementaal Project (2010) Nota Ruimte National Spatial Strategy - Creating space for development (Summary) 2; The Netherlands Ministry of Housing, Spatial Planning and the Environment (VROM) (2007) The new Spatial Planning Act gives space 4; Economic Commission for Europe (2008) 20-24.

¹³⁰ *Ibid*; European Commission (1997) 54, 63-66.

¹³¹ Examples of the local frameworks are the *Flächennutzungsplan* (Germany), *Yleiskaava* (Finland), *Kommuneplaner* (Denmark) and locally developed frameworks in England. For more examples refer to European Commission (1997) 65.

¹³² In Germany locally developed frameworks and local plans have statutory homes in the Federal Building Code (Baugesetzbuch) not the spatial planning law (ROG). Pahl-Weber & Henckel 2008 *Academy for Spatial Planning Research ARL* 39, 70; European Commission (2000) 63.

¹³³ Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 748.

¹³⁴ See for example chapter 2 and 3 of the WRO (Netherlands) which prescribes for and the contents of strategic plans and land-use plans. Refer further to European Centre for Nature Conservation SPEN “Interactions between Policy Concerning Spatial Planning and Ecological Networks in Europe: Country study for the Netherlands” 2008 at 7; Commission for Europe (2008) 38.

¹³⁵ *Ibid*.

where the laws do not provide the content, authorities are mandated to develop rules and regulations regarding the content of instruments.¹³⁶

Commonly the legal framework identifies the principles and goals of the planning systems as well as delimiting the scope of planning processes and activities.¹³⁷ Generally, the common trend is for legal frameworks to set out the roles and responsibilities of different levels of government, however in some cases this can occur in specific policies.¹³⁸

Strategic/spatial plans are long term plans, which contain frameworks, goals, visions, objectives, guidelines, principles and the form of development envisioned.¹³⁹ They are broad in nature and demonstrate a shift away from older detailed plans.¹⁴⁰ Implications of economic and social policy on land use are usually outlined as well as the priorities of the political system.¹⁴¹ The size of the country, the population and how government is structured influences the content and scope of these plans.¹⁴² Often they cover specific administrative areas such as a province/region, however they can be developed for functional regions or special areas.¹⁴³

As previously highlighted, most jurisdictions utilise frameworks which can be created at all levels of authority.¹⁴⁴ Commonly, the frameworks contain general spatial patterns of an area, ideal future spatial patterns, the general distribution of infrastructure, areas of conservation and patterns of development for the designated area and usually rely on regulatory instruments to be implemented.¹⁴⁵ In some countries the content of frameworks facilitate and support the development of relevant policies for specific priorities.¹⁴⁶

¹³⁶ See for example S54 ss6 The Planning Act in Denmark Consolidated Act 813 of 2007.

¹³⁷ See for example the Polish Spatial Planning and Development Act 2003. Gawroński et al., 2010 *Infrastructure and Ecology of Rural Areas* 53.

¹³⁸ Examples of this include the Spatial Planning Decree 1999 (Flanders) which identifies the obligations of different levels of government, in the Netherlands this is captured in the Nota Ruimte (National Strategy) and in the WRO under each type of instrument. For more detail regarding different roles and responsibilities that different levels of government can have refer to Economic Commission for Europe (2008) 15-18. Refer further to Van den Broeck 2008 (13) *International Planning Studies* 261; Nadin & Stead 2008 (172) *disP – The Planning Review* 42.

¹³⁹ See for example most UK structure plans which demonstrate this and typically span a time frame of 15-20 years. Refer further to Swindon Borough Council and Wiltshire County Council (2006) 6; The Moray Council (2007) Moray Structure Plan 3. Refer generally to European Commission (2000) 57; The Presidency Republic of South Africa (2006) National Spatial Development Perspective (SA NSDP) Annex B 4.

¹⁴⁰ Watson V “The planned city sweeps the poor away’: urban planning and 21st century urbanisation” 2009 (73) *Progress in Planning* 168.

¹⁴¹ See for example the Nota Ruimte (Netherlands) in Ministry of Infrastructure and the Environment (2011) Summary National Policy Strategy for Infrastructure and Spatial Planning 21 and Interdepartementaal Project (2010) Nota Ruimte 5-6.

¹⁴² European Commission (1997) 57-58; Müller H & Siebold M “Land Use Control and Property Registration in Germany—Procedures, Interrelationships, IT Systems” (Conference proceedings) 2007 *International Federation of Surveyors, Hong Kong* 3.

¹⁴³ See for example Art 12 of the Law on Spatial Planning (Kosovo) 14 of 2003 for plans that are developed for a special area such as a national park; Commission for Europe (2008) 22, 38.

¹⁴⁴ *Ibid* at 38; European Commission (1997) 54.

¹⁴⁵ *Ibid*; European Commission (2000) 169; Economic Commission for Europe (2008) 22-24.

¹⁴⁶ In England the NPPF contains the framework from which specific policies are developed such as the PPS which have an important role in outlining the Government’s stance on planning related issues. NPPF (2012) 1.

Associated with strategic spatial planning, is the growth of regional planning which has occurred in response to a shift to a more strategic focus.¹⁴⁷ The contents of regional plans are hard to define as they differ in different countries. In some countries the contents of regional plans which are described in the legal framework include, giving effect to planning principles and the intended spatial structure.¹⁴⁸ Regional plans can highlight general locations for intended uses or they can contain much more specific detail and identify specific locations.¹⁴⁹ However, regional plans commonly build upon the detail found in national strategies and policies.¹⁵⁰

National plans, perspectives and policy guidance are relatively common across Europe. National perspectives or plans contain the spatial development pattern of the area, highlighting territorial impacts and general location of development.¹⁵¹ National policy and guidance usually contains general principles, goals and objectives that the spatial planning system is hinged on.¹⁵² Policies generally have a broad scope containing the government's general policy which applies to the whole jurisdiction/area.¹⁵³ From which more detailed or sector specific policy containing the specific sector's priorities and visions can be developed.¹⁵⁴

At the local level spatial planning laws commonly provide for locally developed plans or local plans. Generally these contain the general view and overarching guide to land use.¹⁵⁵ This instrument can outline the future ideal of land use and importantly, identify the criteria for the preparation of other plans such as zoning schemes.¹⁵⁶ Whereas in other jurisdictions, an instrument at this level can contain the strategy as well as the land-use regulatory instrument.¹⁵⁷ This can include the general land use, infrastructure and zoning patterns of the area which are often captured in maps, in the frameworks.¹⁵⁸

¹⁴⁷ Commission for Europe (2008) 22; refer generally to Albrechts L, Healey P & Kunzmann K "Strategic Spatial Planning and Regional Governance in Europe" 2003 (69) *APA Journal* 113-129.

¹⁴⁸ See for example Art 2 S7(1)-(2) of ROG; Pahl-Weber et al., 2006 *COMMUN* Germany 15.

¹⁴⁹ See for example the *Landesraumordnungsprogramm* (Austria) which is a much more specific and detailed plan. European Commission (1997) 175.

¹⁵⁰ Economic Commission for Europe (2008) 16-17.

¹⁵¹ Spatial development perspectives are produced in Austria (*Österreichisches Raumordnungskonzept*) which provide guidance on territorial and sectorial planning. Other variations of this exist such as the Danish (*Landsplan perpektiv*) which identifies all the goals for future development up to 2018 and contains all the current national policies. European Commission (1997) 55-56.

¹⁵² *Ibid*; Economic Commission for Europe (2008) 20-21.

¹⁵³ European Commission (1997) 51.

¹⁵⁴ See for example National Policy Statements (England) which are part of the overall policy framework and drawn up for various sectors of society, the contents of which deal with the issues and needs of that sector. European Commission (2000) at 55, 56. See for example Department for Communities and Local Government (2008) Planning Policy Statement 12: Local Spatial Planning (PPS 12 (2008)).

¹⁵⁵ *Ibid* at 3.

¹⁵⁶ Her Majesty Government (2007) 124; The Moray Council (2015) Moray Development Plan Scheme 2; European Commission (2000) 65.

¹⁵⁷ This occurs in Denmark where the municipal plan consists of a strategy and land-use regulations. Galland & Enemark 2012 *Planning for States and Nation/States: A TransAtlantic Exploration* 18.

¹⁵⁸ European Commission (2000) 66. For more detail refer to Office of the Deputy Prime Minister (2005b) The Planning Systems: General Principles para 4; The Planning Inspectorate "Local Development Frameworks, Examining Development Plan Documents: Learning from Experience" 2009 5.

2.2.3 Purpose and legal status

A legal framework is crucial for a spatial planning system as it prescribes how the spatial planning system will operate.¹⁵⁹ One of the main functions of spatial planning legislation is prescribing mandates, roles and responsibilities. This enables the development and implementation of spatial planning, land use management and development management instruments.¹⁶⁰ Prescribing this brings spatial planning into the realm of other legal disciplines such as constitutional and administrative law. In certain jurisdictions, constitutional law plays a key role in delimiting the powers and responsibilities of different spheres/levels of government.¹⁶¹

Importantly, a common trend is for the legal framework to facilitate planning activity. This includes prescribing principles and criteria which guide and inform planning activities such as plan development and decision-making/authorisations.¹⁶² This importantly creates a way of thinking for authorities when performing administrative duties.¹⁶³ Spatial planning instruments generally have an informative/persuasive or prescriptive legislative status.¹⁶⁴ Instruments which have a prescriptive status will bind authorities in their administrative duties.¹⁶⁵ Whereas instruments which have more of a persuasive status commonly guide planning authorities.¹⁶⁶ Furthermore, the legal framework and instruments can clarify the relationship between issues which include different rights, different plans and what rights/plans prevail in certain circumstances.¹⁶⁷

Policies, perspectives, guidance and frameworks serve the purpose of identifying what the government's planning policy and strategy is.¹⁶⁸ The aim of these instruments is to guide and support planning, the development of other instruments and outlining the criteria from which development can take place.¹⁶⁹ Furthermore, instruments can be required to give effect to plans developed at different levels.¹⁷⁰

¹⁵⁹ Economic Commission for Europe (2008) 19.

¹⁶⁰ European Commission (2000) 64.

¹⁶¹ See for example Switzerland, where the Constitution outlines roles, obligations and responsibilities of the different levels of planning authority. Swiss Federal Office for Spatial Development (2008) *Spatial Planning and Development in Switzerland* 33.

¹⁶² Refer further to Economic Commission for Europe (2008) 20 and European Commission (1997) 63-69.

¹⁶³ Ovens W, Kitchin F, Parnell S & Williams A "Land Management and Democratic Governance in City of Johannesburg" (Overview Report) 2007 *Urban LandMark, Planact and CUBES* 13.

¹⁶⁴ Refer to Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 744-745

¹⁶⁵ Ibid. Wording in the legal framework such as 'binding', 'accordance' and 'must not contradict' allude to a prescriptive legal status. An examples of this is structure plans (Switzerland) that are binding for authorities. Swiss Federal Office for Spatial Development (2008) 34.

¹⁶⁶ Wording in the legal framework such as 'guide', 'inform', 'have regard to' and 'observed' allude to a persuasive legal status. See for example German objectives and principles of regional plans which need to be observed in the decision-making process. Art 1 S4(1)-(2) of ROG; refer to Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 744-745.

¹⁶⁷ See for example the Polish Spatial Planning and Development Act 2003 which provides for the relationship between property rights and spatial development plans. Gawroński et al., 2010 *Infrastructure and Ecology of Rural Areas* 54.

¹⁶⁸ European Commission (1997) 51-52.

¹⁶⁹ Ibid at 26, 51-52.

¹⁷⁰ See for example England where it is required that the NPPF needs to be taken into account when subordinate plans are developed. NPPF (2012) 1. Refer generally to Economic Commission for Europe (2008) 20-23 and NSW Government (2012) Green Paper: A New Planning System for NSW 5.

A common purpose that the legal framework and other instruments serve is capturing and promoting the goals, visions and principles which underpin the planning system.¹⁷¹ An example of this is facilitating sustainable development and ensuring that social, development and environmental issues and considerations occur.¹⁷² Goals and principles are extensive overall concepts that seek to provide direction and guidance on ideals to strive towards.¹⁷³ The legal status of goals and principles is usually informative and serve as guidance, however there are jurisdictions where they have more of a prescriptive status.¹⁷⁴

Generally, the status of spatial planning instruments are persuasive, which inform and guide planning activity both in terms of spatial planning and sectoral planning.¹⁷⁵ Furthermore, the legal status of spatial planning instruments can be affected by requirements of administrative law as spatial planning is hinged on processes and decisions which bring planning into the realm of administrative action.¹⁷⁶ Instruments can be given more weight due to provisions which require authorities to fulfil their roles and responsibilities in a manner that is administratively just.¹⁷⁷ This can involve certain requirements that authorities need to follow such as taking a relevant spatial planning instrument into account.¹⁷⁸ Consequently, failure to do so will fall foul of just administrative action. In this way spatial planning instruments which are informative and persuasive by nature can be afforded greater weight.

2.2.4 Integration

Widening the scope of what spatial planning encompasses has required the need for effective integration.¹⁷⁹ This requires horizontal and vertical integration which needs to happen between different administrative planning authorities and in terms of different sectors.¹⁸⁰

¹⁷¹ See for example the Nota Ruimte (Netherlands) which identifies the national spatial policy and vision and see Regional Spatial Strategies (RSS) which identify the spatial vision for a region (UK). Ministry of Infrastructure and the Environment (2011) 21; Her Majesty Government (2007) 98. Refer generally to European Commission (2000) 9, 156.

¹⁷² See for example Art 1 S1(2) of ROG which prescribes for it in the law or NPPF (England) which identifies the stance on sustainable development in a framework. NPPF (2012) 2.

¹⁷³ Federal Office for Building and Regional Planning "Spatial Development and Spatial Planning in Germany" 2001 Bonn: Federal Office for Building and Regional Planning Deichmannsau 43; Economic Commission for Europe (2008) 9-12.

¹⁷⁴ In Germany it can be argued that goals have a prescriptive status as they are binding requirements and need to be followed. Whereas principles have a persuasive status as they need to be taken into account by authorities when carrying out their mandates. See Art 1 S3 & S4 of ROG; Pahl-Weber & Henckel 2008 *Academy for Spatial Planning Research* ARL 70.

¹⁷⁵ Refer to Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 744-745; Pahl-Weber et al., 2006 *COMMIN* Germany 14.

¹⁷⁶ Van den Broeck 2008 (13) *International Planning Studies* 275 Paterson (2015) 46; Van Wyk *Planning Law* (2012) 158.

¹⁷⁷ Refer generally to the WRO (Netherlands) which makes numerous references to activities being subject to the General Administrative Law Act (Algemene wet bestuursrecht) 1994.

¹⁷⁸ See for example Art1 S4 of ROG.

¹⁷⁹ Eggenberger & Rosário Partidário 2000 (18) *Impact Assessment and Project Appraisal* 203; Counsell D, Allmendinger P, Houghton G & Vigar G "Integrated' spatial planning – is it living up to expectations?" (2006) *Town & Country Planning* 243.

¹⁸⁰ *Ibid.*

A common trend of vertical integration is the requirement in the legal framework for conformity and mandatory alignment between plans developed at different tiers/spheres of authority.¹⁸¹ At the local level/sphere there is generally the requirement for mandatory alignment of locally developed plans/frameworks with plans which have been developed at different levels/spheres and different sectors.¹⁸² Furthermore, consultation and regard to other spatial plans is frequently required when developing plans¹⁸³

Strategic spatial planning in various countries has demonstrated significant innovation and advancement in coordination and integration between sectors and functional areas of government.¹⁸⁴ It provides the opportunity to enable other sectors to comprehend the spatial dimensions of their sector and the overall pattern of spatial development that is intended.¹⁸⁵ In terms of vertical integration it has the potential to influence and direct planning at lower levels.¹⁸⁶ Commonly, the intention of establishing the regional level of planning has been pursuing the coordination of spatial planning and sector issues and policies, with a focus on horizontal and vertical integration.¹⁸⁷

As previously discussed, one of the key elements of spatial planning is sustainable development and ensuring that environmental consideration takes place.¹⁸⁸ The drive towards this notion in planning, is captured in the legal frameworks and numerous instruments.¹⁸⁹ One of the biggest challenges faced by spatial planning in terms of sustainable development is the co-ordination and harmonisation of policies developed in different sectors.¹⁹⁰ Evidence of integration in terms of sectors policies exist where sectoral strategies and policies are incorporated into planning instruments.¹⁹¹ Furthermore, sector priorities and issues can also be given effect to in the goals and objectives of the spatial planning system by producing integrated objectives and goals, such as that of sustainable development.¹⁹² An example of this is environmental considerations which can be incorporated into the various instruments which are developed at different levels.¹⁹³ Another avenue of sectorial integration which

¹⁸¹ See, for example S10a ss2 & S11 ss4 of the Planning Act in Denmark Consolidated Act 813 of 2007.

¹⁸² European Commission (1997) 63.

¹⁸³ See, for example S19 (1)-(2) of the Planning and Compulsory Act 2004, when developing local development documents.

¹⁸⁴ Vincent 2007 *Planning Practice & Research* 46.

¹⁸⁵ Economic Commission for Europe (2008) 21-22.

¹⁸⁶ NSW Government (2012) 6.

¹⁸⁷ Refer further to Chapter 7 S1 of Planning and Building Act (Sweden) 2010; European Commission (2000) 76.

¹⁸⁸ Berke & Conroy 2000 (66) *Journal of the American Planning Association* 21.

¹⁸⁹ See, for example S33a ss2-3 of the Planning Act in Denmark Consolidated Act 813 of 2007; S5 of Planning Act (Northern Ireland) 2011; S39 of the Planning and Compulsory Act 2004.

¹⁹⁰ Eggenberger & Rosário Partidário 2000 (18) *Impact Assessment and Project Appraisal* 201.

¹⁹¹ See, for example England where the Department of Transport prepares the regional transport strategy which is included in the RSS. Whereas in Germany, structure plans need to be drawn up with all relevant sectorial plans taken into account which include transport, housing and environmental plans. Counsell et al., (2006) *Town & Country Planning* 243; Pahl-Weber & Henckel 2008 *Academy for Spatial Planning Research* ARL 73; Pahl-Weber et al., 2006 *COMMUN* Germany 43.

¹⁹² See for example the aims and goals of national planning policy (Scotland) which seek social, economic development and environmental conservation. The Moray Council (2007) 4.

¹⁹³ On a national level the Nota Ruimte (Netherlands) contains successful strides towards sector integration of water resource management. This is demonstrated in section 7 of the English summary of the Nota Ruimte (2006) which is titled: "Going with the anticipated flow". In Denmark spatial planning goals contained in the *Denmark Towards the Year 2018* are formulated in respect to environmental concerns. Nota Ruimte (2006) National Spatial Strategy (Summary); European Commission (1997) 123-124. Refer generally to Van Assche K & Djanibekov "Spatial planning as policy integration: The need for evolutionary perspective. Lessons from Uzbekistan" 2012 (29) *Land Use Policy* 179.

exists in certain countries is the combination of different departments and ministries, which speaks to bridging the institutional divide.¹⁹⁴

The environmental sector is a prominent priority on national planning agendas.¹⁹⁵ One of the main reasons why integration is so crucial for the environment is because decisions that involve land use are at the core of environmental issues.¹⁹⁶ Consequently, environmental considerations have a significant place in the spatial planning arena and integration debates.¹⁹⁷ This has led to the development and implementation of various mechanisms and instruments which aim to protect and conserve the environment.¹⁹⁸ One of these mechanisms is the provision that planning instruments cannot contradict sector plans such as environmental plans.¹⁹⁹

A key mechanism that has been advocated to facilitate the drive towards sustainable development is linking environmental assessments to spatial planning.²⁰⁰ Environmental impact assessments (EIA) have been common practice in numerous countries at the project level.²⁰¹ Recent trends have demonstrated a shift to pursuing strategic environmental assessments (SEA), which focuses on policies, plans and programmes and the environmental impact of these.²⁰² It demonstrates a greater pro-active approach than the reactive approach of EIAs.²⁰³ Both, EIAs and SEAs have become common practice as they form an integral part of plans and the plan making process, ensuring that sustainable development occurs.²⁰⁴

In other cases where strategies and sector priorities are not included in the spatial planning instruments, there is the requirement for spatial planning instruments to be read and used in conjunction with other sector policies.²⁰⁵ This is increasingly important as criteria for cross-consultation and integration can be required in planning activities. Commonly the legal framework prescribes for this in activities such as decision making.²⁰⁶ Furthermore, requirements for plan making consultation are common, where criteria can include taking into account

¹⁹⁴ An example of this is in the Dutch planning system where the Ministry of Housing, Spatial Planning and Environment exists under one department (*VROM*). Marshall T "Infrastructure and Spatial Planning Netherlands" (Working Paper) 2009 Department of Planning, Oxford Brookes University 11.

¹⁹⁵ European Commission (2000) 101.

¹⁹⁶ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 4.

¹⁹⁷ European Commission (2000) 111.

¹⁹⁸ *Ibid* at 101.

¹⁹⁹ See for example S11(ss4) & S13(ss4) of The Planning Act in Denmark Consolidated Act 813 of 2007.

²⁰⁰ Eggenberger & Rosário Partidário 2000 (18) *Impact Assessment and Project Appraisal* 201.

²⁰¹ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 923.

²⁰² *Ibid*.

²⁰³ *Ibid*.

²⁰⁴ See for example the UK system where various plans are subject to sustainability appraisals that review the economic, social and environmental issues of a plan refer to Planning and Compulsory Purchase Act 2004 S5(4)(a) for RSS and S19(5)(a) for development plan. In Germany it is required that environmental aspects are a key part of the land use planning process, which includes EIAs. Senatsverwaltung für Stadtentwicklung "Land Use Plan Berlin" (2009 Revised Edition) 2010 14.

²⁰⁵ See for example the Nota Ruimte (Netherlands) which aim is to coordinate and ensure the inclusion of other strategies, which are spatially significant in other sectors. In some areas where inclusion has not occurred the strategy needs to be read in conjunction with other sector strategies. Marshall 2009 Department of Planning Oxford 21-22.

²⁰⁶ See for example part 3.5, Art 3.5.1; Art 3.6.3 & Art 3.6.3 of WRO (Netherlands) which provides for the co-ordination of decisions in terms of implementing spatial policy at the municipal, provincial and central government level.

relevant plans from other sectors.²⁰⁷ Environmental plans which aim to protect and conserve areas of environmental importance are an example of this.²⁰⁸ Additionally, requirements for consultation during the plan making process to ensure integration can be prescribed for in the legal framework.²⁰⁹

In terms of instruments, national plans, policies, frameworks and strategies have a key role to play in achieving governmental and sectoral integration by enabling coordination.²¹⁰ This is achieved by identifying development perspectives that are integrated for the entire country.²¹¹

This chapter demonstrates that understanding the content, scope, purpose and legal status of the different spatial planning instruments is important, as spatial planning is not, or does not, involve one single instruments but rather it is a combination thereof.²¹² There is no single exemplar for spatial planning, however common elements in systems across different jurisdictions can be found.²¹³ Due to the scope of spatial planning there is a need for effective integration in order for planning systems to face the challenges and issues that arise. Different types and levels of Integration exist, and spatial planning systems and instruments need to be relevant to the circumstances experienced by the jurisdiction.²¹⁴

²⁰⁷ See for example Art 2 S14 of ROG; S2ss2 the Planning Act in Denmark Consolidated Act 813 of 2007 where the planning report of the Minister of the Environment needs to be used when developing other plans.

²⁰⁸ Plans can be developed for specific areas such as coastal areas, this has occurred in Portugal where special coastal physical plans have been developed. Refer further to European Commission (1997) 101-103.

²⁰⁹ Refer to Chapter 5 S11 of the Planning and Building Act (Sweden) 2010.

²¹⁰ European Commission (2000) 76.

²¹¹ *Ibid.*

²¹² Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 747.

²¹³ Nadin & Stead 2008 (172) *disP – The Planning Review* 40.

²¹⁴ Albrechts 2004 (31) *Environment and Planning B: Planning and Design* 748.

CHAPTER 3: EXPLORING SOUTH AFRICA'S SPATIAL PLANNING DISPENSATION

South Africa's current spatial planning dispensation needs to be understood in terms of its geographical context and past social and political background which have shaped it.²¹⁵ Historically South Africa, like numerous other countries, had a planning system which was focused on physical and spatial factors that translated into the control of development.²¹⁶ The country faces immense social and developmental pressures, which are often pursued at the expense of environmental concerns. However, recently there has been an increase in the drive towards sustainable development.²¹⁷ Having distilled key elements embedded in spatial planning legislation in chapter 2, the dissertation now turns to consider the legal regime which has governed spatial planning prior to and post the commencement of SPLUMA, in South Africa and in the Western Cape. This chapter is divided into two main eras which are pre-SPLUMA and post-SPLUMA. Each era is comprised of four main parts and initially an overview of the legal framework and issues of terminology are delaminated, followed by highlighting the content and scope of the spatial planning instruments. The purpose and legislative status of the spatial planning instruments are then discussed and lastly mechanisms of integration are explored.

3.1 Pre-SPLUMA

3.1.1 An Overview of the Relevant Spatial Planning, Instruments and Terminology

Regulation of land use occurred as early as the 1830s in South Africa and during this time, it predominantly consisted of restrictive covenants and official conditions.²¹⁸ In the 1870s, a series of Gold Laws were implemented and towards the beginning of the twentieth century, subdivision took place.²¹⁹ Planning in these early years was largely focused on the physical regulation of land use.²²⁰ The early forms and instruments of planning law largely originated from the UK and the United States of America.²²¹

In 1910, South Africa became the Union and was designated into four provinces.²²² In each of the four provinces, provincial ordinances based on the UK planning system were drawn up and adopted, one of which

²¹⁵ Ovens et al., 2007 *Urban LandMark, Planact and CUBES* 8.

²¹⁶ Berrisford 2011a(22) *Urban Forum* 238.

²¹⁷ Van Niekirk W "Translating disaster resilience into spatial planning practice in South Africa: Challenges and champions" 2013 (1) *Jambo Journal of Disaster Risk Studies* 1.

²¹⁸ Van Wyk J & Oranje M "The post-1994 South African spatial planning system and Bill of Rights: A meaningful and mutually beneficial fit?" 2014 (3) *Planning Theory* 354.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 4.

²²² These were the Transvaal, Natal, Orange Free State and the Cape Province.

occurred in the former Cape Province, namely the Township Ordinance.²²³ Embedded within these ordinances were avenues of forward planning in the town planning schemes which were implemented.²²⁴ Towards the middle of the twentieth century, zoning and town-planning schemes became common, demonstrating the strongly regulatory nature of the planning system in South Africa at the time.²²⁵

The apartheid era had significant effects on the spatial planning and the spatial pattern of South Africa.²²⁶ The racial underpinning upon which planning was hinged led to racial and economic zoning which resulted in unjust economic spatial patterns across the country.²²⁷ This was facilitated through a myriad of legislation and various institutional arrangements.²²⁸ Land was divided on a racial basis, which involved the designation of areas for certain races and a dichotomy of planning systems operated in the different areas.²²⁹ Provincial ordinances were concerned with the urban areas and similarly fell with what was deemed 'white areas' during apartheid rule.²³⁰ Areas which were set aside for black occupation, initially relied upon the Native Land Act,²³¹ as well as the Black Administration Act²³² to be set up.²³³ Furthermore, 'black laws' that involved land use planning which applied to these areas included the Development Trust and Land Act,²³⁴ Group Areas Act,²³⁵ Prevention of illegal Squatting Act,²³⁶ Black Authorities Act²³⁷ and Blacks Resettlement Act.²³⁸ These laws will not be discussed further due to the scope of this dissertation and the nature and content of these laws, which mainly consist of land use management flavour with limited spatial planning.²³⁹

In 1967, national planning legislation was enacted through the Physical Planning Act (PPA).²⁴⁰ One of the instruments that the PPA 1967 provided for were guide plans.²⁴¹ These are traditional spatial plans that were a key spatial planning instrument during this era that embodied a wider concept of planning and elements of forward

²²³ 33 of 1934. The other ordinances were the Transvaal Townships and Town Planning Ordinance 11 of 1931, Orange Free State Townships Ordinance 20 of 1947, and Natal Private Township and Town-Planning Ordinance 10 of 1934. Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 5.

²²⁴ Urban Sector Network (USN) and Development Works "Scoping Study: Urban Land Issues" (Final Report) 2004 *DFID* 50.

²²⁵ Van Wyk & Oranje 2014 (3) *Planning Theory* 355.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ Ovens et al., 2007 *Urban LandMark, Planact and CUBES* 8; SA NSDP (2006) Annex C, 6. Christopher A "Racial land zoning in urban South Africa" 1997 (14) *Land Use Policy* 311.

²²⁹ Mabin A "Origins of segregatory urban planning in South Africa, c.1900–1940" 1991 (13) *Planning History* 8.

²³⁰ Paterson (2015) 3.

²³¹ 27 of 1913.

²³² 38 of 1927.

²³³ Paterson (2015) 3; McCusker B & Ramuduli M "Apartheid spatial engineering and land use change in Mankweng, South Africa 1963-2001" 2007 (173) *The Geographical Journal* 59.

²³⁴ 18 of 1936.

²³⁵ 41 of 1950 and 36 of 1966.

²³⁶ 52 of 1951.

²³⁷ 68 of 1951.

²³⁸ 19 of 1954.

²³⁹ Furthermore racially-based laws were largely repealed by the Abolition of Racially Based Land Measures Act 108 of 1991. Refer further to Van Wyk *Planning Law* (2012) 43-49.

²⁴⁰ 88 of 1967.

²⁴¹ Van Wyk *Planning Law* (2012) 41.

planning.²⁴² Planning legislative changes in the national sphere occurred when the PPA 1991 was enacted.²⁴³ One of the key implications of this was that guide plans were largely repealed, as this Act introduced national, regional development plans, regional structure plans and urban structure plans.²⁴⁴ Furthermore, the Act prescribed for transitional provisions to convert guide plans of the PPA 1967 to urban and regional structure plans.²⁴⁵

South Africa's transition to a constitutional democracy in the mid-1990s triggered legislative reform, to address the inherent social inequalities.²⁴⁶ Importantly this included the enactment of the Constitution, which had hefty legal impetus as equal rights were entrenched and all laws were now subject to it.²⁴⁷ The implications of this meant that rights had to be respected, protected, promoted, and fulfilled.²⁴⁸ Rights which are relevant to planning include the environmental right,²⁴⁹ just administrative action,²⁵⁰ and the enforcement of rights.²⁵¹

This era also sought to address the global planning shift towards an approach that strives towards sustainability and flexibility, in response to the rising complex challenges.²⁵² In South Africa, democratic planning and the approach adopted, followed this trend with the desire to adopt strategic planning, offering greater spatial and socio-economic flexibility while planning for sustainable development which is not a simple matter.²⁵³

An important change that the Constitution brought about was the introduction of three different spheres of government and dividing South Africa up into nine provinces.²⁵⁴ Consequently, previously separated areas were coordinated into nine provinces and numerous local municipalities.²⁵⁵ Legislative planning reform sought to develop a single system that was applicable everywhere and for everyone.²⁵⁶ Firstly, all planning laws which were racially based were amended, repealed and crossed off the statute books. This included all the 'black laws'. Secondly, national reform occurred in 1995 with the introduction of the Development Facilitation Act 1995 (DFA),²⁵⁷ which aimed to bring the dichotomy of planning under one legal regime which mimicked the flavour of the Constitution. It was intended that the DFA would be an interim measure and the intention was for the Land Use Management Bill

²⁴² Ibid at 41-42.

²⁴³ 125 of 1991; Van Wyk *Planning Law* (1999) 99.

²⁴⁴ S4(1)(a), S4(1)(b), S4(2) and S22 of PPA 1991; Van Wyk *Planning Law* (1999) 99.

²⁴⁵ S6 & S37 of PPA 1991.

²⁴⁶ Kidd M "Land Use and Planning" in Kidd M *Environmental Law* (2nd Ed) (2011) Juta Cape Town 210.

²⁴⁷ The Constitution states that 'law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled' S2 of the Constitution.

²⁴⁸ Van Wyk *Planning Law* (2012) 50.

²⁴⁹ S24 of the Constitution.

²⁵⁰ S33.

²⁵¹ S38. For more rights relevant to planning refer further to Van Wyk *Planning Law* (2012) 50, 77, 583.

²⁵² Berke & Conroy 2000 (66) *Journal of the American Planning Association* 21-30.

²⁵³ Godschalk 2004 (70) *Journal of the American Planning Association* 5.

²⁵⁴ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 6, 10.

²⁵⁵ Harrison P & Todes A "The use of spatial frameworks in regional development in South Africa" 2001 (35) *Regional Studies* 67.

²⁵⁶ Van Wyk & Oranje 2014 (3) *Planning Theory* 356.

²⁵⁷ Todes et al., 2010 (34) *Habitat International* 416.

2001 to replace it, however it was never promulgated.²⁵⁸ Importantly, sections of the DFA were declared unconstitutional which affected the planning legal regime.²⁵⁹

In terms of national planning policy, the National Physical Development Plan (NPDP) was developed and published in 1975.²⁶⁰ The development of the plan arose from recommendations and a desire for a national plan.²⁶¹ In 2003 the National Spatial Development Perspective (NSDP) was developed and updated in 2006.²⁶² During this era other policies which had implications for planning law were developed. After the transition to democracy and the need to address the ills of apartheid, the Reconstruction and Development Programme²⁶³ and the White Paper on South African Land Policy²⁶⁴ were published.²⁶⁵ The latter marked the beginning of South Africa's program of land reform, facilitating land restitution, land redistribution and land tenure reform, all of which have relevance to, and effect planning law.²⁶⁶ Additional policies of relevance to planning, include the National Development Plan 2030 (NDP) which was published in 2012 and other policies such as the New Growth Path in 2012, and the Medium Term Strategic Framework 2014-2019 which support the NDP.²⁶⁷ It can largely be agreed that all of these promote economic development that is sustainable and address the ills of apartheid.²⁶⁸ One of the main ways this is envisioned, is through infrastructure development.²⁶⁹ This is important as the Infrastructure Development Act,²⁷⁰ provides that large-scale strategic infrastructure projects can expedite planning procedures.²⁷¹ Furthermore, the NDP acknowledges the role spatial planning needs to play in achieving its objectives.²⁷²

Legal planning reform in the provincial sphere attempted to bring the provinces' planning laws in line with the Constitution and the new planning landscape. This reform included the development of the Kwazulu-Natal Planning and Development Act,²⁷³ the Northern Cape Planning and Development Act,²⁷⁴ the Western Cape Land and

²⁵⁸ South African Local Government Association (SALGA) "An introduction to Municipal Planning within South Africa" 2011 *South African Planning Institute* 5; Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 928.

²⁵⁹ This occurred in *the Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) case, refer to para 95.

²⁶⁰ Drewes E & Van Aswegen M "National planning in South Africa: A temporal perspective" 2013 (62) *SSB/TRP/MDM* 23; Van Wyk *Planning Law* (1999) 94.

²⁶¹ Refer further to SA NSDP (2006) Annex C, 6.

²⁶² Drewes & Van Aswegen 2013 (62) *SSB/TRP/MDM* 24.

²⁶³ *White paper on reconstruction and development* GN 1954 GG No. 16085 (23 November 1994).

²⁶⁴ Department of Land Affairs, *White Paper on South African Land Policy* (1997).

²⁶⁵ Paterson (2015) 8.

²⁶⁶ Van Wyk *Planning Law* (2012) 136.

²⁶⁷ Department of Rural Development and Land Reform (DRDLR) (2014) SDF Guidelines (Final Draft) 10.

²⁶⁸ Paterson (2015) 8.

²⁶⁹ *Ibid.*

²⁷⁰ 23 of 2014.

²⁷¹ Paterson (2015) 8.

²⁷² DRDLR (2014) 7-11; Refer further to The Presidency Republic of South Africa, National Planning Commission (2012) National Development Plan 2030 (Executive Summary).

²⁷³ 6 of 2008.

²⁷⁴ 7 of 1998.

Development Act,²⁷⁵ and the Gauteng Planning and Development Act,²⁷⁶ however the latter two failed to come into effect.

In the Western Cape, the Township Ordinance was later replaced by the Land Use Planning Ordinance (LUPO)²⁷⁷ which introduced structure plans.²⁷⁸ Structure plans represented an important instrument of forward planning in the Western Cape with a statutory backing.²⁷⁹ Although LUPO was developed in the apartheid era it has since been amended and has persisted in the democratic era, and has remained the primary planning law in the Western Cape.²⁸⁰ As previously mentioned, an attempt at provincial planning reform occurred in the Western Cape, which has failed to commence. However, contemporary reform is taking place as the Western Cape Land Use Planning Act (LUPA)²⁸¹ was enacted in 2014, this Act is likely to commence in the near future. Another spatial planning instrument which has been developed in the Western Cape is the Western Cape Provincial Spatial Development Framework (WCPSDF), which was approved under a LUPO structure plan in 2005 and updated in 2009.²⁸² The WCPSDF is currently being updated.²⁸³

A key feature of contemporary planning systems is integrated development planning. The need for a broader instrument which ensured coordination, led the way for the development of integrated development plans (IDPs), which occur at the local government sphere.²⁸⁴ Local government's role significantly changed as they were afforded greater legislative powers and functions.²⁸⁵ The Constitution was the primary reason for this as three distinct, interdependent and interrelated spheres of government were prescribed for with associated powers and mandates.²⁸⁶ The form, powers and functions of local government were additionally dealt with in the Local Government: Municipal Structures Act.²⁸⁷ IDPs and integrated development planning are mentioned in various laws, this includes the principles of the DFA.²⁸⁸ Additionally, the Local Government Transition Act,²⁸⁹ provides that

²⁷⁵ 7 of 1999.

²⁷⁶ 3 of 2003.

²⁷⁷ 15 of 1985.

²⁷⁸ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 925.

²⁷⁹ Department of Environmental Affairs and Development Planning (DEA&DP) (2008) Circular 9/2008 Western Cape Government para 1.

²⁸⁰ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 927.

²⁸¹ 3 of 2014.

²⁸² The city SDF was given status under S4(6) of LUPO. Table Bay District Plan Spatial Development Plan & Environmental Management Framework (2009) Technical Report 6; Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 42.

²⁸³ Western Cape Provincial Spatial Development Framework (WCPSDF) (2013) Draft for Public Comment 6.

²⁸⁴ Harrison P "Integrated development plans and Third Way Politics in Democracy and Delivery" in Pillay U, Tomlinson R & du Toit J *Democracy and Delivery* (2006) HSRC Press Cape town 195.

²⁸⁵ Coetzee J "The transformation of municipal development planning in South Africa (post-1994): Impressions and impasse" 2012 (61) SSB/TRP/MDM 11; Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 13.

²⁸⁶ S44 of the Constitution, refer to Schedule 4 and 5 for government competences.

²⁸⁷ 117 of 1998.

²⁸⁸ S3(b) of DFA; Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 13-14.

²⁸⁹ 209 of 1993.

metropolitan councils must draw up and implement a metropolitan integrated development plan which encompasses aspects such as land use planning and transport planning.²⁹⁰ Furthermore, the Local Government: Municipal Systems Act (LG:MSA)²⁹¹ was introduced in 2000 which required that each municipality draws up an IDP for their area of jurisdiction.²⁹² One of the requirements of IDPs was the inclusion of a spatial development framework (SDF), which represents strategic planning.²⁹³

It is impossible to consider land use planning without considering other sectors and the instruments which have emerged in these sectors in the two last decades.²⁹⁴ One of which is the environmental sector, where various environmental laws exist which are relevant to spatial planning and planning law.²⁹⁵ On a national level these include the National Environmental Management Act (NEMA),²⁹⁶ and the suite of laws which are implemented under this Act containing planning elements.²⁹⁷ These include the National Environmental Management: Integrated Coastal Management (NEM:ICMA),²⁹⁸ which prescribes for national and provincial coastal management programmes.²⁹⁹ The National Environmental Management Biodiversity (NEM:BA),³⁰⁰ which prescribes biodiversity, and bio-regional planning.³⁰¹ Additionally, the National Environmental Management Protect Areas Act (NEM:PAA),³⁰² governs protected areas.

3.1.2 Content and Scope

National planning which governed spatial planning was largely absent prior to the introduction of PPA in 1967, which prescribed for guide plans. Guide plans usually provided for a time period of up to 25 years.³⁰³ PPA 1967 provides that the competent authority/national minister could assign the development of a guide plan for a specific area which contained the guidelines for future spatial development of that area.³⁰⁴

²⁹⁰ See further Van Wyk *Planning Law* (1999) 140-166.

²⁹¹ 32 of 2000.

²⁹² Chapter 5 of LG:MSA prescribes for IDPs. McDiarmid N "Implementing spatial planning for government" 2005 (3) *IMIESA* 31.

²⁹³ S26(e) of LG:MSA; Todes et al., 2010 (34) *Habitat International* 416.

²⁹⁴ These sectors include transport, housing and environmental sector. SALGA 2011 *South African Planning Institute* 15.

²⁹⁵ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 30.

²⁹⁶ 107 of 1998.

²⁹⁷ SALGA 2011 *South African Planning Institute* 14.

²⁹⁸ Act 24 of 2008.

²⁹⁹ Chapter 6 of NEM:ICMA.

³⁰⁰ Act 10 of 2004.

³⁰¹ Chapter 3 of NEM:BA.

³⁰² Act 50 of 2003.

³⁰³ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 931.

³⁰⁴ S6A(1) of PPA 1967; *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 3 SA 441 (WCC) (here after *Shelfplett*) para 8.

The structure plans which were developed under PPA 1991 contained guidelines for the future physical development of an area, which incorporated the interest of all inhabitants and promoted orderly development.³⁰⁵ The nature of the guidelines are broad, however they can include that certain land can only be used for certain activities.³⁰⁶

The next national planning law was the DFA which introduced land development objectives (LDO), which need to be prepared by local authorities and approved at the provincial sphere.³⁰⁷ The detail and content of these objectives are not clear but they do however, include services relating to health, water and transport.³⁰⁸ The application and use of LDOs has been fairly limited during the course of their existence.³⁰⁹ Furthermore the DFA contained principles and objectives of planning and spatial planning, the content of which are general in nature and relate to land development and decision-making.³¹⁰

National policies developed during this era were largely informative instruments which had broad scopes. The NPDP identified various planning instruments with the two main elements that the plan contained were a growth strategy and framework which identified planning regions that were recommended, based on a socio-economic basis.³¹¹ Additionally, the NPDP was underpinned by national planning which was spatially unbalanced.³¹² The NSDP (2003 & 2006) contains guidelines on spatial planning and infrastructure development, however it does not include actual spatial development plans.³¹³ Importantly, the NSDP contains social, economic and environmental trends advocating for shared understanding of what these are, in terms of the national space economy.³¹⁴ The NSDP was one of the first instances that identified where development was to take place.³¹⁵

Early provincial ordinances contained elements of spatial planning and land-use control.³¹⁶ Ordinances contained the details and procedures which needed to be followed when developing town-planning schemes.³¹⁷ These town planning schemes contained initial avenues of spatial planning which existed during the twentieth century, and usually prescribed for a period of between 25-30 years.³¹⁸ They were only drawn up for land which

³⁰⁵ S5 & S6 of PAA 1991.

³⁰⁶ S6(1)-(2); Kidd "Land Use and Planning" in *Environmental Law* (2011) 212.

³⁰⁷ Harrison "Integrated development plans and Third Way Politics in Democracy and Delivery" in *Democracy and Delivery* (2006) 195.

³⁰⁸ S28(a)-(d) of DFA; Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 21.

³⁰⁹ Van Wyk *Planning Law* (2012) 269.

³¹⁰ Refer to S3 & S4 for principles and S28 for land development objectives of DFA. Van Wyk *Planning Law* (2012) 91-94.

³¹¹ Van Wyk *Planning Law* (2012) 4, 37-38; SA NSDP (2006) Annex C 6; Drewes & Van Aswegen 2013 (62) *SSB/TRP/MDM* 23.

³¹² *Ibid.*

³¹³ *Ibid* at 25.

³¹⁴ SA NSDP (2006) 1.

³¹⁵ Atkinson D & Marais L "Urbanisation and the future urban agenda in South Africa" in Pillay U, Tomlinson R & du Toit J *Democracy and Delivery* (2006) HSRC Press Cape town 22.

³¹⁶ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 924.

³¹⁷ Van Wyk *Planning Law* (1999) 173.

³¹⁸ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 923.

fell within urban areas and typically consisted of a map, which designated areas based on intended uses and regulations that accompanied each area/zone.³¹⁹

In the provincial sphere, structure plans in the Western Cape were prescribed for by LUPO and applicable for a ten year time period.³²⁰ Different levels of structure plans were approved, the scope of which is broad, containing guidelines that covered aspects such as the requirements for development plans, urban renewal and urban design.³²¹ The situation in the Western Cape was complex as structure plans could be developed in terms of LUPO and PPA 1991. Consequently, structure plans were governed by two different laws which were implemented at different spheres of government. This situation was further complicated by guide plans under PPA 1967 which were converted to plans under the PPA 1991 Act.³²²

The scope and content of the WCPSDF 2009 is currently being reviewed for reasons that include the changing economic context, greater clarity in terms of planning roles and responsibilities and the development of plans such as the NDP.³²³ What the WCPSDF needs to contain, is highlighted in the 2013 draft.³²⁴

The principles of the DFA advocate for integrated planning which led the way for the development of IDPs.³²⁵ IDPs are all-inclusive development plans at the municipal level which need to be revised annually.³²⁶ IDPs contain social and economic development planning in a broad manner as well as strategic planning.³²⁷ The LG:MSA brought about important changes for IDPs, as minimum contents for IDPs were introduced and principles used to guide the process.³²⁸ The IDPs contain the vision for long term development, local development priorities and objectives, an assessment of existing level of development, a SDF, operational strategies, a disaster management plan and a financial plan and performance indicators.³²⁹ Importantly they need to contain land use planning, transport planning, infrastructure planning and integrated economic development.³³⁰ IDPs need to be adopted and developed when municipal councils are elected, which is every five years.³³¹ A crucial spatial component of IDPs is the SDF, which generally prescribes for a period of 20 years.³³² The Municipal Planning and Performance

³¹⁹ Ibid at 924-926, land which fell outside the urban areas was zoned rural and did not have town planning schemes. Refer further to Van Wyk *Planning Law* (2012) 278-281.

³²⁰ S4(8) of LUPO.

³²¹ S5.

³²² Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 16.

³²³ Refer further to WCPSDF (2013) 6, 10-11.

³²⁴ Ibid at 6.

³²⁵ Harrison "Integrated development plans and Third Way Politics in Democracy and Delivery" in *Democracy and Delivery* (2006) 195.

³²⁶ SA NSDP (2006) xiv; SALGA 2011 *South African Planning Institute* 7.

³²⁷ Todes et al., 2009 (24) *Planning, Practice & Research* 421.

³²⁸ Refer further to S26 of LG:MSA for minimum content of IDPS. Harrison "Integrated development plans and Third Way Politics in Democracy and Delivery" in *Democracy and Delivery* (2006) 198.

³²⁹ S26 of LG:MSA.

³³⁰ Schedule 2 of Local Government Transition Act 209 of 1993.

³³¹ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 930.

³³² SDFs are required in terms of S26(e) of LG:MSA; Harrison & Todes 2001 (35) *Regional Studies* 69; City of Cape Town Spatial Development Framework (CoCT SDF) (2012) Statutory Report 8.

Management Regulations³³³ contains the details pertaining to SDFs. SDFs generally contain a spatial plan of the ideal spatial development and form of the area.³³⁴ The contents of which, identify the directions and growth for the municipality, an SEA, the direction on capital spending and the strategies and objectives of spatial form.³³⁵ Common elements include the urban edge, special development areas where growth must be directed and importantly, the desired patterns of development and land use.³³⁶

3.1.3 Purpose and status

In terms of national legislation, the intention of the PPA 1967 was to create a framework for co-ordinating environmental planning, resource utilisation and land use planning.³³⁷ Furthermore, the purpose of the Act was to guide the compilation and approval of guide plans.³³⁸ Guide plans were intended to order and structure physical development for the areas they were drawn up for.³³⁹ As recognition grew that uncoordinated development could no longer occur, guide plans were afforded statutory backing, the purpose of which were to be organisational frameworks that were intended to be blueprints by nature, consisting of a comprehensive flavour.³⁴⁰ The legal status of these plans is unclear as they are policy plans, however everything done in relation to them must be consistent.³⁴¹ Permission could not be granted for zoning, town planning or any other land law if it was inconsistent with the guideline.³⁴² The status of guide plans were deliberated on in the *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning*,³⁴³ stating that planning permissions may not be granted if they are inconsistent with the guide plan, advocating for a prescriptive status even though they are policy plans.³⁴⁴ Many shortcomings of guide plans have been identified, however they were a prominent land use planning instrument for a number of years.³⁴⁵

The purpose of PPA 1991 is to promote orderly physical development and provide a framework for planning in which existing planning systems could exist, adopting a consistent approach through the hierarchy of plans.³⁴⁶

³³³ GNR 7146 GG No. 22605 (24 August 2001).

³³⁴ Todes et al., 2010 (34) *Habitat International* 416.

³³⁵ Ibid; Harrison "Integrated development plans and Third Way Politics in Democracy and Delivery" in *Democracy and Delivery* (2006) 187; McDiarmid 2005 (3) *IMIESA* 31.

³³⁶ Landman K "Planning in the African Context: reconsidering current approaches to gated communities in South Africa" 2002 CSIR, Pretoria 4.

³³⁷ Long title of PPA 1967.

³³⁸ Ibid.

³³⁹ Harrison & Todes 2001 (35) *Regional Studies* 66.

³⁴⁰ Watson V "Planning under political transition: lessons from Cape Town's metropolitan planning forum" 1998 (3) *International Planning Studies* 340; Van Wyk *Planning Law* (1999) 97.

³⁴¹ S6A(12) of PPA 1967.

³⁴² Ibid.

³⁴³ 2012 3 SA 441 (WCC).

³⁴⁴ S6A(12) of PPA 1967; refer further to *Shelfplett* para 8.

³⁴⁵ Van Wyk *Planning Law* (2012) 42.

³⁴⁶ These plans include a national development plan, regional development and regional structure plan. Long title of PPA 1991; Kidd "Land Use and Planning" in *Environmental Law* (2011) 213.

PPA 1991 largely repealed guide plans and introduced structure plans which were regarded as policy plans.³⁴⁷ The purpose of policy plans are 'to promote the orderly physical development of the area to which it relates to the benefit of all its inhabitants'.³⁴⁸ Demonstrating a persuasive and informative flavour, however the legal status is complicated by land use management aspects such as zoning, town planning and subdivision which are not allowed to be inconsistent with the structure plan, alluding to a prescriptive status.³⁴⁹ PPA 1991 additionally provided an avenue for guide plans to be saved and converted into regional and urban structure plans.³⁵⁰ Thus affording them the status of urban and regional structure plans.³⁵¹

Changes to the national legal planning regime occurred with the introduction of the DFA, the purpose of which was to address the racially based planning Acts of the previous planning era.³⁵² The main flavour of which is to ensure that development and land released is fast tracked, to address the ills of apartheid and ensure equality.³⁵³ This is coupled with international trends of planning which included sustainability, and achieving horizontal and vertical integration.³⁵⁴ One of the objectives the DFA was to ensure that 'the current legislation incoherence must be transformed into an integrated, efficient and equitable planning and development system'.³⁵⁵ One of the aims of the DFA was to set out the tone from which provincial planning legislation that would replace the ordinances, would occur.³⁵⁶ Attempts were made at this but it has largely been unsuccessful as there are instances where a number of planning laws/ordinances, plans and objectives of the old planning order have persisted into the new democratic South Africa.³⁵⁷ Subsequently the DFA has operated alongside them.³⁵⁸

Furthermore, the DFA was to create a policy framework which guides current and future development.³⁵⁹ It was intended that the principles in the DFA are to be far-reaching guidelines which guide the development and implementation of plans and decision-making.³⁶⁰ Additionally, the DFA principles seek to guide the principles contained in the provincial legislation.³⁶¹ In the *Municipality City of Port Elizabeth v Rudman*,³⁶² the principles of the DFA were examined which highlighted their purpose and status in guiding future land development.³⁶³ LDOs contained in the DFA represent an instrument which was initiated to guide integrated future land use and planning.

³⁴⁷ Chapter 2 & S6 of PPA 1991. Kidd "Land Use and Planning" in *Environmental Law* (2011) 212.

³⁴⁸ S5 of PPA 1991.

³⁴⁹ S5 & S27.

³⁵⁰ S27 & S37.

³⁵¹ S27.

³⁵² Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 928.

³⁵³ Ovens et al., 2007 *Urban LandMark, Planact and CUBES* 11; Van Wyk & Oranje 2014 (13) *Planning Theory* 356.

³⁵⁴ *Ibid.*

³⁵⁵ Kidd "Land Use and Planning" in *Environmental Law* (2011) 215.

³⁵⁶ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 7.

³⁵⁷ CoCT SDF (2012) 12.

³⁵⁸ Van Wyk *Planning Law* (1999) 89.

³⁵⁹ Van Wyk *Planning Law* (2012) 91-94.

³⁶⁰ These plans include the physical plan, structure plan, zoning scheme and transport plan, refer to S2(b)-(c) of DFA. Van Wyk *Planning Law* (2012) 92.

³⁶¹ *Ibid.*

³⁶² 1998 (4) BCLR 451 (SE).

³⁶³ Van Wyk *Planning Law* (1999) 35.

The status of which is that they do not confer or take away rights, however, applications that are inconsistent with the LDOs may not be approved.³⁶⁴ This creates confusion over the status of LDOs, however the utilisation of them has been limited.³⁶⁵ Complications arose as parts of the DFA were declared unconstitutional in the case *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,³⁶⁶ which has resulted in a planning legislative landscape which is similar to that of 1995.³⁶⁷

The purpose of the NPDP was to guide and direct development towards the political and developmental ideals of the time.³⁶⁸ The intention of the NPDP was to be a physical development plan for South Africa which would depict the current and future development intentions of the government.³⁶⁹ The NPDP was the primary mechanism from which decentralised policy was carried out, which is achieved by providing a framework from which policies can be generated.³⁷⁰ The NPDP was never taken to the Cabinet for approval or afforded statutory backing but was acknowledged and accepted as guidelines from the public and private sectors.³⁷¹ In terms of the NSDP, the purpose was for it to be an indicative tool for all spheres of government that provided guidance on spatial planning and infrastructure development.³⁷² The perspective was intended to provide a framework that identified spatial priorities that were in line with the Constitution.³⁷³ It serves to guide and coordinate government action through principles, although it is not considered a development plan.³⁷⁴

Ordinances were the primary legal regime which governed planning in the twentieth century.³⁷⁵ The main purpose of these ordinances was to ensure development was coordinated, harmonised and social welfare was enhanced.³⁷⁶ Early ordinances provided for town planning schemes and the purpose of these instruments was twofold. Firstly, it was to serve as an instrument for land regulation and control, and secondly, for long-term future planning.³⁷⁷ Town planning schemes were for a length of time the only planning tool that was available to local authority and key elements of forward planning were evident in this instrument.³⁷⁸ These schemes created confusion, as rights were conferred in terms of immediate land use and forward planning. In the Western Cape,

³⁶⁴ S29(1) of DFA.

³⁶⁵ Van Wyk *Planning Law* (2012) 269.

³⁶⁶ 2010 (6) SA 182 (CC).

³⁶⁷ Abrahams & Berrisford (2012) *South African Cities Network* 13.

³⁶⁸ Drewes & Van Aswegen 2013 (62) *SSB/TRP/MDM* 23.

³⁶⁹ SA NSDP (2006) Annex C, 6.

³⁷⁰ Drewes & Van Aswegen 2013 (62) *SSB/TRP/MDM* 23; Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 932; Van Wyk *Planning Law* (1999) at 94.

³⁷¹ *Ibid*; SA NSDP (2006) Annex C, 7.

³⁷² *Ibid* at i; Drewes & Van Aswegen 2013 (62) *SSB/TRP/MDM* 24.

³⁷³ Glaser R & Cohen B "Overview of Legal and Policy Instrument and Arrangements: Relating to Transport, Land Use and Spatial Planning in South Africa" 2012 *WWF South Africa* 19.

³⁷⁴ SA NSDP (2006) 1, 6 & annex C 8.

³⁷⁵ Refer further to Van Wyk *Planning Law* (2012) 30-36.

³⁷⁶ In relation to the Townships Ordinance 33 of 1934, refer further to Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 924.

³⁷⁷ *Ibid*.

³⁷⁸ DEA&DP (2008) Circular 9/2008 para 1; Van Wyk *Planning Law* (1999) 21.

this changed with the enactment of LUPO which resulted in significant shifts from the old ordinance as long-term planning and land use management/control were separated.³⁷⁹

Initially, structure plans were not afforded statutory backing, consequently they were often overlooked, only finding favour when they supported developments.³⁸⁰ Alternatively, they were regarded as non-statutory beings that outlined one of numerous possible futures.³⁸¹ The status of which was relatively weakly persuasive.³⁸² The introduction of LUPO provided a statutory home for structure plans. The purpose of structure plans was 'to lay down guidelines for the future spatial development of an area which will most effectively promote the order of the area as well as the general welfare of the community concerned'.³⁸³ Structure plans under LUPO are long-term spatial planning instruments and importantly identify desirable types of development, the status of which is persuasive as they 'do not confer or take away any right in respect of land'.³⁸⁴ This advocates for their use as informative guidelines.³⁸⁵ Further weight for structure plans occurs in terms of zoning/rezoning and planning applications, as they may only be approved if they are in accordance with the structure plan.³⁸⁶ Furthermore, planning applications and decision-making are bound by the grounds of desirability.³⁸⁷ A situation exists, where LUPO stipulates that planning permissions must be refused if a lack of desirability is evident. Structure plans have the potential to demonstrate a 'lack of desirability' upon which a land use application can be refused.³⁸⁸

In the *Shelfplett* case, it was highlighted that the structure plan was rooted in apartheid policy and unconstitutional.³⁸⁹ This prompted the evaluation of the status of structure plans and former guide plans in the Western Cape.³⁹⁰ It was declared that only six structure plans would be renewed until 2017, and the rest will no longer be applicable.³⁹¹ Furthermore, the seven saved regional and urban structure plans (former guide plans) were withdrawn.³⁹²

Additionally, in the Western Cape, the aim of WCPSDF is to give spatial expression to the development agendas of the provincial and national government whilst ensuring coordination, integration and alignment of

³⁷⁹ Ibid; Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 925.

³⁸⁰ Van Wyk & Oranje 2014 (3) *Planning Theory* 355.

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ S5(1) of LUPO.

³⁸⁴ S5(3). Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 925.

³⁸⁵ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 16.

³⁸⁶ S5(2) of LUPO.

³⁸⁷ Mammon N "Provincial Land Use Legislative Reform Western Cape Province: Status Report September 2011" (Report) 2011 *South African Cities Network* 5.

³⁸⁸ S36(1) of LUPO.

³⁸⁹ Referring to the Knysna-Wilderness-Plettenberg Bay Regional Structure Plan; Van Wyk J "Planning in all its (dis)guises: spheres of government, functional areas and authority" 2012 (15) *PER/PELJ* 310. Refer to Department of Environmental Affairs and Development Planning (DEA&DP) (2012) Circular 14/2012 Western Cape Government.

³⁹⁰ See, DEA&DP (2012) Circular 14/2012.

³⁹¹ Refer to 2.2 for list of saved structure plans, DEA&DP (2012) Circular 14/2012.

³⁹² Refer to 4.1 for a list of withdrawn plans, DEA&DP (2012) Circular 14/2012.

programmes and plans.³⁹³ Furthermore, the purpose of the WCSDP includes readdressing the spatial legacy of the past, providing support for municipalities, guiding locally developed IDPs/SDFs and ensuring that the development intentions are communicated to society.³⁹⁴ There is no requirement for the development of a provincial SDF, consequently the WCPSDF was approved in terms of LUPO and has the same status as a LUPO structure plan.³⁹⁵ The status of which largely can be agreed to be informative/persuasive as the instrument needs to be taken into account.³⁹⁶

The introduction of LG:MSA requires that municipalities prepare IDPs and SDFs.³⁹⁷ The purpose of IDPs is to provide a framework, from which integrated planning which encompasses a multi-sectoral approach can take place.³⁹⁸ The instrument seeks to achieve sustainability and sustainable development.³⁹⁹ At the local level the instrument informs spatial planning and guides local authorities.⁴⁰⁰ Decision-making and planning permissions are focal areas that IDPs intend to guide.⁴⁰¹ An integral part of IDPs are SDFs, which essentially are the spatial expression of the IDP and facilitate the achievement of IDP objectives.⁴⁰² The general purpose of SDFs is to provide guidance on future development and importantly highlight the spatial challenges faced and providing guidance for land use management.⁴⁰³ They represent strategic planning which focuses on flexibility and long term objectives, which is a shift away from older, more detailed and rigid plans.⁴⁰⁴ SDFs demonstrate progressive steps towards good spatial planning, however the nature and form differ drastically due to the lack specifics of what they need to contain.

IDPs and SDFs are afforded legal status as they are approved through the LG:MSA.⁴⁰⁵ The status of IDPs and the SDFs is confusing, as it is to 'guide' all development decisions and planning but it is further provided that it is 'binding' on the exercise of executive authority.⁴⁰⁶ The former wording gives it a persuasive flavour whereas the latter gives the instrument more of a prescriptive flavour.

³⁹³ Van Zyl P "Provincial Approach to Development in the Western Cape" (Presentation to WCPDF Conference 2014) 2014 *Western Cape Government: Environmental Affairs and Development Planning* 29.

³⁹⁴ Ibid. This is not a complete list, refer further to Western Cape Provincial Spatial Development Framework (WCPSDF) (2009) Statutory Report: Directives and Guidelines 2.

³⁹⁵ S36(1) of LUPO.

³⁹⁶ WCPSDF (2009) 2-3.

³⁹⁷ S25 of LG:MSA; Steenkamp L & Winkler T "Linking Spatial Planning and Land Use Management in the City of Cape Town: The Case of the Package of Plans" 2014 (25) *Urban Forum* 336.

³⁹⁸ Todes A "Regional Planning and Sustainability: Limits and Potentials of South Africa's Integrated Development Plans" 2004 (47) *Environmental Planning and Management* 844.

³⁹⁹ Ibid at 849.

⁴⁰⁰ Landman (2002) CSIR 4.

⁴⁰¹ Harrison & Todes 2001 (35) *Regional Studies* 70.

⁴⁰² CoCT SDF (2012) 8.

⁴⁰³ Harrison & Todes 2001 (35) *Regional Studies* 66; Ovens et al., 2007 *Urban LandMark, Planact and CUBES* 23; McDiarmid 2005 (3) *IMIESA* 31.

⁴⁰⁴ Mammon 2011 *South African Cities Network* 8; Steenkamp & Winkler 2014 (25) *Urban Forum* 336.

⁴⁰⁵ Steenkamp & Winkler 2014 (25) *Urban Forum* 336.

⁴⁰⁶ S35(1) of LG:MSA.

As highlighted earlier, the Constitution entrenched certain rights which are relevant to planning, one of which is the right to just administrative action.⁴⁰⁷ To give effect to this right, the Promotion of Administrative Justice Act (PAJA)⁴⁰⁸ was promulgated. This was significant for the planning domain as land use planning decisions constitute what is regarded as administrative action that needs to be lawful, reasonable and procedurally fair.⁴⁰⁹ The implications of this are that spatial planning instruments can be afforded greater weight in decision-making due the provisions of PAJA and the Constitution.⁴¹⁰ This is particularly important for instruments which have a persuasive legal status as they are afforded greater weight in the decision-making context.

3.1.4 Integration

During the apartheid era the planning law landscape was complex and fragmented as a dichotomy of planning systems existed with limited mechanisms of integration.⁴¹¹ The introduction of the Constitution triggered wide scale legal reform, as numerous laws/plans/programmes/policies were developed to address the issues and challenges present in the legal system, including the planning regime. This necessitated the need for integration as many issues and challenges persisted from the apartheid era and new issues have arisen. Various mechanisms of integration have been utilised during the pre-SPLUMA era with different levels of success, although it can largely be agreed that the legal regime governing spatial planning is still fragmented and incoherent.⁴¹²

As discussed in chapter 2, integration is crucial for an effective spatial planning system.⁴¹³ Integration has occurred substantively in terms of linking different issues such as sustainable development, between different sectors and at different spatial scales which involves linking national, regional and local planning. Through time, different legal frameworks have provided for the integration and harmonisation of spatial planning instruments with other relevant planning regimes. This has included compulsory plan alignment, cross-consultation and cross-representation of authorities during plan development, compulsory decision-making criteria and trumping mechanisms.

In terms of national legislation, integration was demonstrated by guide plans under PPA 1967 which were intended to co-ordinate and harmonise planning and policies that involved land use such as transport and infrastructure.⁴¹⁴ Furthermore, trumping mechanisms were utilised, as LUPO structure plans were not allowed to

⁴⁰⁷ S33 of the Constitution, refer to section 3.1.1.

⁴⁰⁸ 3 of 2000.

⁴⁰⁹ S33 of the Constitution.

⁴¹⁰ Refer further to Van Wyk *Planning Law* (2012) 158-180.

⁴¹¹ Especially between planning ordinances and 'black laws'.

⁴¹² Van Wyk *Planning Law* (2012) 580.

⁴¹³ Refer section 2.1.2 & 2.2.1.

⁴¹⁴ Van Wyk *Planning Law* (1999) 97.

be inconsistent with PPA 1967 guide plans.⁴¹⁵ The implications of this is that PPA 1967 guide plans prevailed over the LUPO structure plan, demonstrating attempts at integration.⁴¹⁶

NPDP represented national policy that alluded to integration, however one of the major critiques of this plan was that it did not incorporate economic factors.⁴¹⁷ Furthermore, this plan attempted to plan a country in one document, which was unsuccessful.⁴¹⁸ One of the Purposes of the NSDP was to ensure that the environmental, economic and social objectives are pursued through coordinated government efforts.⁴¹⁹ The intention is that each sphere of government needs to incorporate the approach and flavour of the NSDP ensuring strategic alignment and coordination.⁴²⁰ Merits of this instrument are evident, as the principles and overarching guidelines of the NSDP have influenced the principles and guidelines of the WCPSDF.⁴²¹ Importantly, the NSDP highlights that a focus on just integration is not enough and that there needs to be the implementation of mechanisms and processes which facilitate coordination, integration, and alignment.⁴²² In certain circumstances, the NSDP has not been supported strongly by different sectors due to impressions that some areas would be disadvantaged by its implementation.⁴²³

The introduction of the Constitution had significant implications for integration in the planning domain as it introduced the Bill of Rights,⁴²⁴ one of these rights is the environmental right which meant that integration and promotion of this right needed to occur. Additionally, the Constitution provided for principles of co-operative governance, which promotes integration.⁴²⁵

Elements of sectoral integration can be found in the DFA as the principles prescribe that economic, social, institutional and physical aspects of land development need to be facilitated and promoted.⁴²⁶ A general flavour of the DFA is the inclusion of environmental considerations through sustainable development.⁴²⁷ Principles include 'encourage environmentally sustainable land development practices and processes'.⁴²⁸ Adherence is required when plans and policies are formulated, demonstrating attempts at sectoral integration and plan alignment.⁴²⁹ These provisions demonstrated positive strides towards integration of the environmental sector as environmental authorisations were required in planning approvals.⁴³⁰ However, the primary aim of the DFA was to speed up

⁴¹⁵ S4(11) of LUPO; Ketelbey H & Cummins P "Delegation in the Land Use Planning Ordinance" (Report) 1987 *Cape Town City Council, City Planner's Department* Cape Town : City Planner's Department 46.

⁴¹⁶ *Ibid.*

⁴¹⁷ Van Wyk *Planning Law* (1999) 94.

⁴¹⁸ *Ibid*; Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 942.

⁴¹⁹ SA NSDP (2006) 1 & annex C ii.

⁴²⁰ *Ibid* at 12.

⁴²¹ WCPSDF (2009) 2.

⁴²² *Ibid* at 11.

⁴²³ Harrison P & Mathe K "Towards a Spatial Vision for South Africa" (Presentation) 2010 *National Planning Commission, Development Bank of Southern Africa* 7.

⁴²⁴ Chapter 2 of the Constitution.

⁴²⁵ Refer further to Chapter 3 of the Constitution.

⁴²⁶ Refer to S3 of DFA for guiding principles. Van Wyk *Planning Law* (1999) 29.

⁴²⁷ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 20.

⁴²⁸ S3(1)(c)(viii) of DFA.

⁴²⁹ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 21.

⁴³⁰ Kidd "Land Use and Planning" in *Environmental Law* (2011) 216.

development and the planning approval process, which meant environmental authorisations could be expedited and other laws suspended in various situations.⁴³¹ Furthermore, trumping mechanisms are also prescribed for in the DFA as LDOs prevail over plans under PPA of 1991 and structure plans.⁴³² However, as previously discussed, the use of LDOs have been fairly limited.

One of the issues of integration which has been evident in the pre-SPLUMA era was the persistence of ordinances. This was contemplated in the *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*⁴³³ case where it was highlighted that,

‘The difficulty with these ordinances is that they apply only in those territories that formed part of the old Cape, Natal, Orange Free State and Transvaal Provinces. They have no application to the former “independent” homelands and self-governing territories, which were governed by a parallel system of planning legislation. Furthermore, the creation of the nine provinces has meant that there has been further fragmentation as each province may be subject to a multiplicity of territorially-based legislative regimes’.⁴³⁴

Furthermore, complications have arisen with constitutionality of these ordinances such as LUPO in the Western Cape.⁴³⁵ An attempt at rectifying this was evident in the DFA as one of the intentions was that provinces would follow suit and develop provincial laws, which would replace old order ordinances.⁴³⁶ For various reasons which include political will, financial resources and capacity, this has not occurred in numerous provinces.⁴³⁷ In the Western Cape there was an unsuccessful attempt to replace LUPO with the Western Cape Planning and Development Act,⁴³⁸ but this failed to come into effect.⁴³⁹ Consequently, DFA operates in parallel with ordinances and demonstrates inefficient integration and alignment.⁴⁴⁰

Structure plans have largely been replaced by IDPs/SDFs in terms of LG:MSA, however complexity exists in the Western Cape as LUPO is still effective.⁴⁴¹ The implications of this are that structure plans/converted guide plans still have effect during this era.⁴⁴² The problems associated with the persistence old order planning instruments have been demonstrated in courts. In the *MEC for Environmental Affairs and Development Planning*

⁴³¹ Refer to S51(2)(d) of the DFA; Kihato, M. *Integrating planning and environmental issues through the law in South Africa: learning from international experience* Unpublished LLM Research Report (University of South Africa, 2012) 35.

⁴³² S29 of DFA; for further information on LDOs see Van Wyk *Planning Law* (2012) 269.

⁴³³ 2010 (6) SA 182 (CC).

⁴³⁴ Para 32.

⁴³⁵ Berrisford S & De Visser J “Important legal issues for provincial legislation dealing with Spatial Planning and Land Use Management” (A Discussion Document) 2012 *South African Cities Network* 13.

⁴³⁶ Glazewski & du Toit “Planning Law and the Environment” In *Environmental Law in South Africa* (2013) 19.

⁴³⁷ *Ibid.*

⁴³⁸ 7 of 1999.

⁴³⁹ Claassen “Spatial planning with the Western Cape Province as a case study” in *Environmental management in South Africa* (2009) 927.

⁴⁴⁰ *Ibid* at 928.

⁴⁴¹ *Ibid* at 927.

⁴⁴² *Ibid.*

v Clairison's CC,⁴⁴³ demonstrates the conflict that can arise between two spatial planning instruments which are governed by different laws. Situations have arisen where conflict is created between provincial and municipal governments between the desirability clause of structure plans and the municipal SDF.⁴⁴⁴ Theoretically the municipal SDFs should prevail over the structure plans, however there is confusion around whether this is the case.⁴⁴⁵ In *Parkhurst Village Association v Capela & Others*,⁴⁴⁶ the confusing status of the LG:MSA SDF was the issue. It is provided that the status of the SDF contained in the IDP prevails over the old order structure plans and converted guide plans.⁴⁴⁷ However confusion is still apparent as to whether this occurs.⁴⁴⁸

A closer look at the Western Cape reveals that a disconnect between land use management and spatial planning occurs.⁴⁴⁹ One of the main reasons for this is the operation of two different laws which are implemented by different spheres of government.⁴⁵⁰ Consequently, the effect that spatial planning has had on land use management and decision-making is far from the intended situation.⁴⁵¹ Attempts at addressing this are evident in the City of Cape Town, as the city attempted to bring IDPs/SDFs into the realm of provincial planning by approving the plan in terms of the structure plans provisions of LUPO and LG:MSA.⁴⁵² The intention was to align spatial planning and decision-making.⁴⁵³ However, this has created a situation where the amendments of the SDF need to occur at the provincial level and the City (municipality) is the competent authority on most of the land use applications.⁴⁵⁴ This is problematic as a situation is created where two spheres of government are involved in planning activities, demonstrating the inherent issue of fragmentation.⁴⁵⁵

One of the main purposes of integrated development planning is to facilitate and support institutional and sectoral integration and spatial co-ordination.⁴⁵⁶ Numerous evaluations of IDPs effectiveness have occurred, which demonstrate varied levels of success.⁴⁵⁷ Positive strides towards integration are evident in integrated development planning in terms of integrating various planning instruments such as spatial planning, zoning and environmental assessment.⁴⁵⁸ In terms of vertical integration, IDPs are intended to give practical effect to the principles and LDOs of the DFA.⁴⁵⁹ The SDFs forms a crucial instrument in ensuring coordinating government action and alignment as

⁴⁴³ (408/2012) [2013] ZASCA 82.

⁴⁴⁴ SDFs in terms of LG:MSA and structure plans in terms of LUPO. Mammon 2011 *South African Cities Network* 9.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ [2010] JOL 25759 (GSJ).

⁴⁴⁷ S35(2) of LG:MSA.

⁴⁴⁸ Mammon 2011 *South African Cities Network* 18.

⁴⁴⁹ Steenkamp & Winkler 2014 (25) *Urban Forum* 346.

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.*

⁴⁵² S4(6) LUPO and S34 of LG:MSA; CoCT SDF (2012) 2.

⁴⁵³ Steenkamp & Winkler 2014 (25) *Urban Forum* 345-346.

⁴⁵⁴ *Ibid* at 346.

⁴⁵⁵ *Ibid*; CoCT SDF (2012) 2.

⁴⁵⁶ Harrison & Todes 2001 (35) *Regional Studies* 66.

⁴⁵⁷ Harrison "Integrated development plans and Third Way Politics in Democracy and Delivery" in *Democracy and Delivery* (2006) 198.

⁴⁵⁸ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 15.

⁴⁵⁹ *Ibid* at 15 and 25; Van Wyk *Planning Law* (1999) 152.

they have potential to be an effective integration tool for IDPs.⁴⁶⁰ The purpose of the SDF is to integrate areas which are fragmented and facilitate sectoral and spatial planning integration.⁴⁶¹ Furthermore, they need to ensure that alignment between national and provincial spatial development goals, strategies and policies takes place.⁴⁶²

A critique of numerous SDFs is that they are vague, broad and insufficiently link to the regulation and land use management.⁴⁶³ Consequently they were interpreted in numerous ways, causing a disconnect between the frameworks/plans and decision-making.⁴⁶⁴ Furthermore, there have been various instances where they have contradicted other policies.⁴⁶⁵ A prominent critique of why IDPs/SDFs demonstrate insufficient levels of integration is due to a lack of skills and capacity of municipalities, resulting in an inability to fulfil mandates.⁴⁶⁶ However, IDPs have demonstrated strides towards sector integration through focusing on the issues and challenges facing the municipality.⁴⁶⁷ Integration of issues of sustainability and environmental concerns are evident as local government is tasked with ensuring that the requirements of the environmental planning prescribed in the environmental Acts are reflected and given effect to.⁴⁶⁸ One of the key ways this is achieved is through SEA or preparing conservation plans.⁴⁶⁹ Furthermore, strategic environmental plans need to be incorporated into IDPs, demonstrating progressive steps towards integration.⁴⁷⁰ However it has been argued that more environmental consideration needs to occur while ensuring that planning is adapted to the local context.⁴⁷¹

Different levels of sectoral integration have been apparent throughout South Africa's planning history. Sectoral integration during the pre-Constitutional era was fairly limited, this is demonstrated in situations such as infrastructure planning, which was intended to follow land use planning but took place in isolation resulting in fragmentation.⁴⁷² Furthermore, developments in the environmental discipline and planning discipline occurred in isolation.⁴⁷³ In terms of integrating environmental concerns into planning the provincial ordinances which were a main planning instrument gave little weight to environmental concern and issues.⁴⁷⁴ However, LUPO states regard

⁴⁶⁰ SA NSDP (2006) 5; McDiarmid 2005 (3) *IMIESA* 31.

⁴⁶¹ Harrison & Todes 2001 (35) *Regional Studies* 69; Steenkamp & Winkler 2014 (25) *Urban Forum* 334-336.

⁴⁶² CoCT SDF (2012) 8.

⁴⁶³ Todes et al., 2010 (34) *Habitat International* 416.

⁴⁶⁴ Ibid at 416-417; Steenkamp & Winkler 2014 (25) *Urban Forum* 336.

⁴⁶⁵ Todes 2008 (53) *SSB/TRP/MDM* 9. For issues arising from SDFs refer loosely to Breetzke K "From Conceptual Frameworks to Quantitative Models: Spatial planning in the Durban metropolitan area, South Africa – the link to housing and infrastructure planning" 2009 *Planning Sustainable Cities: Global Report on Human Settlements*.

⁴⁶⁶ Ovens et al., 2007 *Urban LandMark, Planact and CUBES* 6.

⁴⁶⁷ SA NSDP (2006) xiv.

⁴⁶⁸ SALGA 2011 *South African Planning Institute* 14.

⁴⁶⁹ SDFs need to undergo a strategic assessment of the environmental impacts, Chapter 2, regulation 2(f) of GNR 7146 GG No. 22605 (24 August 2001); Todes et al., 2009 (24) *Planning, Practice & Research* 425.

⁴⁷⁰ Ibid at 426, these include water and waste plans; Harrison "Integrated development plans and Third Way Politics in Democracy and Delivery" in *Democracy and Delivery* (2006) 187.

⁴⁷¹ Todes 2004 (47) *Environmental Planning and Management* 843.

⁴⁷² Todes 2008 (53) *SSB/TRP/MDM* 11.

⁴⁷³ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 933; Todes et al., 2009 (24) *Planning, Practice & Research* 417.

⁴⁷⁴ Ibid.

'to the preservation of the natural and developed environment' needs to occur when considering applications.⁴⁷⁵ Nationally, PPA required that environmental considerations occur within the planning process.⁴⁷⁶

Although the environmental and planning spheres emerged separately during the apartheid era, institutional integration existed nationally prior to the Constitution in the form of The Department of Planning and the Environment.⁴⁷⁷ Institutional integration also occurred in the Western Cape with the merging of planning and environment into one department, the Department of Environmental Affairs and Planning (DEAD&P).⁴⁷⁸ Thus attempting to address the underlying barriers that institutional structures pose.⁴⁷⁹ Albeit this, it has been argued that in terms of legal procedures, to an extent the two sectors still function separately in the Western Cape.⁴⁸⁰

Sectoral planning has been effected by the enactment of various environmental Acts which contain elements of spatial planning. Different levels of integration have been experienced, however in most instances, relatively weak integration between the planning disciplines has occurred.⁴⁸¹ A common element between the two departments is that policies and laws for both have principles pertaining to sustainability.⁴⁸² In practice it can be argued that sustainability in the planning discipline favours economic and social concerns, whereas there is an ecological bias in the environmental discipline.⁴⁸³

NEMA which was enacted to give effect to the environmental right, contains provisions which have implications for land use planning.⁴⁸⁴ This includes principles which effect decision-making and are applicable throughout South Africa.⁴⁸⁵ The importance of these principles was highlighted in the *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*,⁴⁸⁶ where it outlined the environmental principles contained in NEMA must be taken into account by other departments of government when preparing plans, which includes IDPs.⁴⁸⁷

NEMA prescribes for integrated environmental management, which seeks to facilitate that environmental considerations are apparent in every stage of the developmental process.⁴⁸⁸ Importantly this includes the promotion of the principles of integrated environmental management into all decisions which have an effect on the environment, this would include land use planning decisions.⁴⁸⁹ Furthermore, listed activities of the EIA regime

⁴⁷⁵ S36(2) of LUPO.

⁴⁷⁶ Todes et al., 2009 (24) *Planning, Practice & Research* 417.

⁴⁷⁷ Van Wyk *Planning Law* (1999) 94.

⁴⁷⁸ Glazewski & du Toit "Planning Law and the Environment" In *Environmental Law in South Africa* (2013) 43.

⁴⁷⁹ Todes et al., 2009 (24) *Planning, Practice & Research* 430.

⁴⁸⁰ Mammon 2011 *South African Cities Network* 19.

⁴⁸¹ Ibid.

⁴⁸² Todes et al., 2009 (24) *Planning, Practice & Research* 423.

⁴⁸³ Ibid.

⁴⁸⁴ Paterson (2015) 18.

⁴⁸⁵ Refer to S2 of NEMA; Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 928.

⁴⁸⁶ 2001 (3) SA 1151 (CC).

⁴⁸⁷ Para 68.

⁴⁸⁸ S23 of NEMA; Van Wyk *Planning Law* (1999) 247.

⁴⁸⁹ S23(2) of NEMA.

are prescribed for which can include certain development applications requiring environmental authorisations.⁴⁹⁰ NEMA further requires that environmental implementation and environmental management plans must be formulated by departments which exercise functions that may affect the environment.⁴⁹¹ These plans speak to integration as the purpose of this is to ensure that co-ordination between departments, plans, policies and principles and programmes occurs.⁴⁹²

In terms of integrated coastal management, NEM:ICMA requires that coastal management programmes need to be prepared and adopted at a national, provincial and municipal sphere.⁴⁹³ Integration is prescribed for as alignment and co-ordination between different spheres and programmes needs to occur.⁴⁹⁴ Additionally, NEM:IMCA offers an avenue for alignment and integration between coastal management and land use planning instruments.⁴⁹⁵ One of these is IDPs, as municipalities need to promote integration of coastal management objectives and considerations into its IDPs and SDFs.⁴⁹⁶

NEM:BA contains an array of planning provisions which have implications to land use plans such as IDPs and SDFs.⁴⁹⁷ These include the national biodiversity framework, bioregional plans, listed ecosystems, and biodiversity management plans and invasive species control plans. The content of most of these plans advocate for considerations and prescribing guidelines in land use planning and decision-making.⁴⁹⁸ Generally NEM:BA requires that conservation, resource and land use, which is sustainable, be integrated and apparent in all levels of planning (all spheres).⁴⁹⁹ Furthermore, a requirement for cross-consultation and cross-representation processes are prescribed for by NEM:BA when adopting any of these plans.⁵⁰⁰ Additionally, plan co-ordination, alignment and consistency are required between these plans and other environmental and land use planning legal frameworks.⁵⁰¹ An example of this is that these plans cannot conflict with IDPs, SDFs and other land use plans.⁵⁰²

Furthermore, in terms of protected areas there is an extensive legal regime that operates, which has relevance to land use planning.⁵⁰³ Two of these instruments include the management planning regime and the *National Protected Areas Expansion Strategy (NPAES)*⁵⁰⁴ which are governed by NEM:PAA. The management

⁴⁹⁰ Chapter 5 of NEMA. Refer to GNR 982-985 GG No. 38282 (4 December 2014) for listed activities.

⁴⁹¹ S11 of NEMA. The Departments are listed in Schedule 1 of NEMA, and include the Department of Rural Development and Land Reform; Van Wyk *Planning Law* (1999) 245.

⁴⁹² *Ibid* at 245-249.

⁴⁹³ S44 of NEM:IMCA, refer to S44-S50 for further information.

⁴⁹⁴ S51 & S52.

⁴⁹⁵ S52(1)(b), for further examples of plans/policies refer to S52.

⁴⁹⁶ SALGA 2011 *South African Planning Institute* 15.

⁴⁹⁷ Paterson (2015) 25.

⁴⁹⁸ For more detail regarding the content of these instruments and how they relate to planning refer to Paterson (2015) 25-29.

⁴⁹⁹ McDiarmid 2005 (3) *IMIESA* 33.

⁵⁰⁰ S47, S99-S100 of NEM:BA.

⁵⁰¹ S48.

⁵⁰² *Ibid*.

⁵⁰³ Paterson (2015) 29.

⁵⁰⁴ Government of South Africa, *National Protected Areas Expansion Strategy for South Africa* (2009).

planning regime requires management plans to be developed for protected areas under NEM:PAA.⁵⁰⁵ Importantly these plans need to ensure alignment between other environmental plans and land use plans.⁵⁰⁶ Furthermore the NPAES identifies areas which need to be incorporated into land use plans and taken into account in the decision-making.⁵⁰⁷

Integrated spatial planning in terms of sectoral planning, specifically the environmental sector has had a relatively weak position during this era.⁵⁰⁸ There is often conflict between the aims and objectives of policies which have spatial elements, resulting in a difficult task of developing effective spatial frameworks.⁵⁰⁹ *Maccsand (Pty) Ltd v City of Cape Town*,⁵¹⁰ demonstrated the lack of coordination and integration between laws and sectors, mainly an overlap between mining and planning legislation.⁵¹¹ The case highlighted that parallel approval processes are needed in terms of mining/environmental and planning sectors.⁵¹² In terms of land use changes, there are numerous instances where environmental authorisations are required over and above planning authorisations.⁵¹³

The racially biased and restrictive planning system of the apartheid era meant that an inconsistent and fragmented system was inherited.⁵¹⁴ The planning discipline needed to respond to the new goals of equal rights and integration.⁵¹⁵ This shift resulted in significant changes in legislation, policies, strategies and institutional arrangements with greater attempts at integration.⁵¹⁶ Albeit this, in these changes clarity was not provided which was demonstrated in the *Camps Bay Ratepayers and Residents Association and Others v The Minister of Planning, Culture and Administration (Western Cape) and Others*,⁵¹⁷ which highlighted that the current planning statutory framework is fragmented and cumbersome, which leads to inconsistent decision-making.⁵¹⁸ The case highlighted that 'vast bureaucratic machine to administer all these provisions. This inevitably leads to certain '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'.⁵¹⁹ To address the current planning challenges national and provincial legislative reform has been embarked upon through SPLUMA.⁵²⁰

⁵⁰⁵ S37-S39 of NEM:PAA.

⁵⁰⁶ S39(3)-(4).

⁵⁰⁷ Refer to Government of South Africa, *National Protected Areas Expansion Strategy for South Africa* (2009); Paterson (2015) 30.

⁵⁰⁸ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 934-935.

⁵⁰⁹ Harrison & Todes 2001 (35) *Regional Studies* 67.

⁵¹⁰ 2012 (4) SA 181 (CC).

⁵¹¹ Mammon 2011 *South African Cities Network* 10.

⁵¹² Abrahams & Berrisford 2012 *South African Cities Network* 14.

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid* at 16.

⁵¹⁵ Landman (2002) CSIR 3.

⁵¹⁶ Ovens et al., 2007 *Urban LandMark, Planact and CUBES* 8.

⁵¹⁷ 2001 (4) SA 294 (C).

⁵¹⁸ Griessel J at 329B-F.

⁵¹⁹ *Ibid.*

⁵²⁰ Van Zyl (2014) *Western Cape Government: Environmental Affairs and Development Planning* 29; Van Wyk & Oranje 2014 (3) *Planning Theory* 356.

3.2 Post-SPULMA

3.2.1 An Overview of the Relevant Spatial Planning Laws, Instruments and Terminology

To be able to address the inherent challenges of the current planning system, it is important to comprehend how apartheid and democratic ideologies have shaped the planning system.⁵²¹ In light of the issues of fragmentation and confusion which have been highlighted, this section aims to examine the likely effects associated with the planning reform triggered by SPLUMA.⁵²²

A definition of spatial planning is not given by SPLUMA, however it captures crucial elements of spatial planning.⁵²³ These include development principles, norms and standards, integrated development plans and spatial development frameworks.⁵²⁴

SPLUMA prescribes development principles which apply to spatial planning, land use management and land development and all organs of state and other authorities which implement legislation related to planning.⁵²⁵ Furthermore, SPLUMA provides for the development of norms and standards nationally which will have implications for planning activities procedures, land use management and land development.⁵²⁶

IDPs which are governed by the LG:MSA remain the main planning instruments available to local authorities post the commencement of SPLUMA. Prior to the commencement of SPLUMA, SDFs were largely developed at the local level and formed part of the IDPs that were governed by the LG:MSA.⁵²⁷ Under the new planning dispensation, SDFs will now be governed by SPLUMA.⁵²⁸ Furthermore, SPLUMA provides that SDFs must be developed at the national, provincial and local level, and they may be drawn up at the regional level.⁵²⁹

Importantly, the commencement of SPLUMA triggers the repeal of various laws inherent in the fragmented planning system.⁵³⁰ The Removal of Restrictions Act,⁵³¹ PPA,⁵³² Less Formal Township Establishment Act,⁵³³ and DFA are repealed with the commencement of SPLUMA.⁵³⁴ As previously discussed the legal regime governing

⁵²¹ Ovens et al., 2007 *Urban LandMark, Planact and CUBES* 8.

⁵²² Proclamation of SPLUMA in GG No. 38828 (27 May 2015).

⁵²³ Paterson (2015) 12.

⁵²⁴ Ibid.

⁵²⁵ S6-7 of SPLUMA.

⁵²⁶ S8.

⁵²⁷ Refer to 3.1.1-3.1.3; Paterson (2015) 12.

⁵²⁸ Ibid.

⁵²⁹ Chapter 4 of SPLUMA.

⁵³⁰ Pienaar J, Olivier N & du Plessis W "Land matters and rural development" 2011 (26) *SAPL* 237 & 340.

⁵³¹ 84 of 1967.

⁵³² 88 of 1967 & 125 of 1991.

⁵³³ 113 of 1991.

⁵³⁴ S59 of SPLUMA.

spatial planning is not limited to planning law, the importance and implications of the Constitution and other laws of relevance to planning will largely still operate in the same capacity they did prior to the commencement of SPLUMA.⁵³⁵ The implications of this are that SPLUMA will operate alongside the LG:MSA and other relevant laws such as those developed in the environmental sector and the environmental planning instruments they prescribe for.⁵³⁶ Additionally, in terms of policy, SPLUMA and the instruments embedded within the Act will play a crucial role in achieving objectives of national policy, such as those contained in the NDP.⁵³⁷

SPLUMA prescribes for a three sphere system, and provides the framework from which the nine provinces need to develop provincial Acts.⁵³⁸ Consequently, wholesale provincial planning reform is needed, where provincial Acts will mimic the flavour of SPLUMA and importantly, repeal the old ordinances.⁵³⁹ The provinces are in various stages of developing and implementing these laws.⁵⁴⁰ The Western Cape has been progressive in developing LUPA as the overall form, nature and content of LUPA embraces SPLUMA, however it has not commenced yet.

At the local sphere, SPLUMA requires municipalities to develop integrated zoning schemes, municipal planning tribunals and planning by-laws.⁵⁴¹ Importantly these planning by-laws need to ensure that the planning issues in SPLUMA are regulated which includes issues under spatial planning, land use management and land development.

3.2.2 Content and Scope

SPLUMA importantly provides a uniform legal regime which governs spatial planning, land use management and land development management under one law which is applicable across South Africa.⁵⁴² The contents of the development principles are prescribed for in SPLUMA, these include principles of spatial justice, spatial sustainability, efficiency, spatial resilience and good administration.⁵⁴³ Additionally, the national authority is

⁵³⁵ See discussions in 3.1.1, 3.1.3 & 3.1.4; refer further to Paterson (2015) 14-36.

⁵³⁶ Van Wyk *Planning Law* (2012) 247; Berrisford S, de Visser J "Preparing for SPLUMA Implementation- The Main Points of Discussion" 2015 presentation compiled by Cameron R for UCT CPD Programme 11.

⁵³⁷ McCusker & Ramuduli 2007 (173) *The Geographical Journal* 9.

⁵³⁸ Van Wyk & Oranje 2014 (13) *Planning Theory* 357.

⁵³⁹ An example of this is LUPA in the Western Cape which replaces LUPO and other Acts, refer to S77 of LUPA for repealed laws.

⁵⁴⁰ The Kwa-Zulu Natal Planning and Development Act 6 of 2008 is potentially contemporary enough to undergo amendments that will align it to SPLUMA. The other provinces are in the process of drafting new Acts these include the Mpumalanga Planning Bill 2013, Limpopo Spatial Planning and Land Use Management Bill 2012, Eastern Cape Planning and Development Bill 2012, Northern Cape Spatial Planning and Land Use Management Bill 2012, Gauteng Planning and Development Bill 2012, North West Spatial Planning and Land Use Management Bill 2013 and the Free State Provincial Planning and Development Bill 2013.

⁵⁴¹ Chapter 5 and 6 of SPLUMA.

⁵⁴² Long title and S2.

⁵⁴³ S7.

mandated to prepare norms and standards, the scope of which will affect planning activities of provincial and local authorities.⁵⁴⁴

SPLUMA has significantly changed the scope and scale at which SDFs are developed and operate, as national, provincial and local authorities are required to develop this instrument.⁵⁴⁵ Furthermore, SPLUMA importantly gives more guidance on what SDFs need to contain as the Act prescribes the content of the frameworks which was lacking under the LG:MSA regime.⁵⁴⁶ The inclusion of more detail on what the instruments should contain has the potential to aid plan development. Municipal SDFs contain greater detail than that of national, provincial and regional SDFs.⁵⁴⁷ Importantly, municipal SDFs need to provide for the short and long term, which are for 5 years and 10-20 years respectively, as a significant amount of planning activity occurs at the municipal level.⁵⁴⁸ The contents need to include provisions of population growth and demands for housing.⁵⁴⁹

3.2.3 Purpose and status

SPLUMA advocates for long term strategic planning, across South Africa and a developmental approach of an overarching framework which will guide future development and regulate land use.⁵⁵⁰ The purpose of this is to ensure that effective and consistent spatial planning, land use management and land development occurs throughout the country, while promoting the inclusion of economic and social issues and co-operative governance.⁵⁵¹ Additionally, the purpose of the Act is to ensure that development principles norms and standards are prescribed, and importantly ensuring that imbalances of the past are readdressed through fair spatial development planning and land use.⁵⁵² Furthermore, a crucial purpose of SPLUMA is to coordinate and inform provincial and local planning.⁵⁵³

The purpose of the principles are to guide and inform the content of all policies and plans which are to give effect to spatial planning, land use management and land use development.⁵⁵⁴ The development principles and norms and standards apply to all planning activities under SPLUMA and include decision-making and plan development, advocating for an informative and persuasive status of these instruments.⁵⁵⁵

⁵⁴⁴ S8.

⁵⁴⁵ Chapter 4.

⁵⁴⁶ Refer to SPLUMA S14 (national), S14 (provincial), S19 (regional) and S21 (municipal) for contents of SDFs. Refer further to section 3.1.2.

⁵⁴⁷ S21 of SPLUMA.

⁵⁴⁸ S21(b)-(c). Pienaar et al., 2011 (26) *SAPL* 239.

⁵⁴⁹ S21 of SPLUMA.

⁵⁵⁰ S2; Pienaar et al., 2011 (26) *SAPL* 238; Van Wyk & Oranje 2014 (3) *Planning Theory* 357.

⁵⁵¹ S3(a)-(e) of SPLUMA.

⁵⁵² S3(c)-(f).

⁵⁵³ Paterson (2015) 11.

⁵⁵⁴ S6-7 of SPLUMA.

⁵⁵⁵ S6-8.

The purpose of all the SDFs, are to inform and facilitate guidance in terms of decision-making and the authorities' discretion, in terms of SPLUMA or any other law which relates to land use and development.⁵⁵⁶ The wording of this alludes to an informative and persuasive status of SDFs. However, confusion is still apparent as it is prescribed that land development decisions may not be approved if they are inconsistent with the municipal SDFs.⁵⁵⁷ The use of the word 'must' and 'consistent', demonstrates prescriptive flavour and raises questions of whether clarity is given.⁵⁵⁸ A similar situation occurs with regard to the provincial SDFs which cannot confer, or take away, rights.⁵⁵⁹ However, all provincial development plans and programmes must be consistent with the provincial SDF.⁵⁶⁰

The requirement of provincial SDFs has important implications for the Western Cape, as the WCPSDF potentially has a statutory home and defined purpose and legal status. This should address the issues of confusion that were raised due to the WCPSDF being approved as a LUPO structure plan.⁵⁶¹

The SDFs will further be tasked with giving spatial expression to the NDP.⁵⁶² At a national level the SDF will need to give spatial expression to the NDP itself, while coordinating and integrating other policies such as the Integrated Urban Development Framework.⁵⁶³ Similar expectations are conferred to the provincial SDFs which need to give spatial expression to the agendas of the NDP and other policies such as Growth and Development Strategies.⁵⁶⁴ At the municipal level, the IDPs are a key instrument which will support and facilitate the NDP.⁵⁶⁵

It is evident from the above discussion that the spatial planning instruments embedded within SPLUMA mainly have a persuasive legal status that aim to guide and inform planning activities.⁵⁶⁶

3.2.4 Integration

The provisions and reform triggered by SPLUMA advocate for a significantly more integrated and coherent planning regime. Firstly, the principles and objectives facilitate a consistent and flexible approach to decision-making and provide a link between the spatial plans, land use management and land development.⁵⁶⁷ Furthermore,

⁵⁵⁶ S12(2)(b); Harrison & Todes 2001 (35) *Regional Studies* 65.

⁵⁵⁷ S22(1) of SPLUMA.

⁵⁵⁸ Refer to S17(2) & S22(1).

⁵⁵⁹ S17(3).

⁵⁶⁰ S17(2).

⁵⁶¹ Refer to section 3.1.3.

⁵⁶² McCusker & Ramuduli 2007 (173) *The Geographical Journal* 9.

⁵⁶³ Ibid; refer further to The Presidency Republic of South Africa, National Planning Commission (2012) National Development Plan 2030 (Executive Summary).

⁵⁶⁴ McCusker & Ramuduli 2007 (173) *The Geographical Journal* 9.

⁵⁶⁵ Ibid.

⁵⁶⁶ Paterson (2015) 12.

⁵⁶⁷ Refer to long title and preamble of SPLUMA.

when principles are adopted in plans such as SDFs and used to guide decision-making, alignment and consistency is created between the two.⁵⁶⁸

In terms of spatial integration, the previous regime adopted different approaches for urban and rural development which were addressed in separate chapters in the DFA.⁵⁶⁹ SPLUMA seeks to overcome this through providing for the four levels of overarching frameworks (SDFs) which apply across South Africa.⁵⁷⁰

As previously mentioned, one of the main approaches which has been advocated for integrated spatial planning is the tiered approach, where a national plan is developed effecting the development of provincial plans, which then cascades down into district plans and locally developed plans.⁵⁷¹ This speaks to vertical integration, which is supported by the new legal regime as frameworks need to be consistent at different spheres of government.⁵⁷² The frameworks are underpinned by a set of development principles, norms and standards, advocating for a consistent approach throughout South Africa.⁵⁷³ Additionally there is the requirement for participation and co-ordination to ensure SDFs are consistent and in harmony between the different spheres of government.⁵⁷⁴ One set of rules and guidance which needs to be adhered to and is applicable throughout South Africa promotes cohesion and provides clarity.

In the Western Cape, a number of structure plans have been saved from the previous dispensation and will still be effective, however structure plans are being phased out and will be replaced by SDFs.⁵⁷⁵ This will address issues that have arisen in the Western Cape such as spatial planning and land use management being governed by two different laws, namely LUPO and LG:MSA and two different spheres of government.

SPLUMA emphasises the importance of sectoral integration as the objectives seek to ensure social and economic inclusion as well as facilitating sustainable land use.⁵⁷⁶ One of the main aims of the new legal regime is to ensure compliance with environmental legislation and environmental consideration occurs.⁵⁷⁷ SPLUMA requires that other instruments such as environmental management instruments, bioregional plans and environmental management frameworks need to be taken into account and included into land use planning instruments.⁵⁷⁸ Furthermore, SDFs need to give spatial effect to and integrate policies and plans from other sectors.⁵⁷⁹ All of these provisions in SPLUMA are examples which promote positive sectoral integration which establishes horizontal and

⁵⁶⁸ S 25; Steenkamp & Winkler 2014 (25) *Urban Forum* 346.

⁵⁶⁹ Pienaar et al., 2011 (26) *SAPL* 238.

⁵⁷⁰ S6 of SPLUMA. Pienaar et al., 2011 (26) *SAPL* 238.

⁵⁷¹ Berrisford 2011a (22) *Urban Forum* 242.

⁵⁷² S12(2)(a) SPLUMA; Pienaar et al., 2011 (26) *SAPL* 238.

⁵⁷³ S6, S7 & S8 of SPLUMA, refer further to chapter 4 which provides for SDFs.

⁵⁷⁴ S12(2)(a).

⁵⁷⁵ S16 of LUPA, structure plans will become provincial SDFs in terms of S4(1) of LUPA or are valid for a period of two years after the Act comes into effect.

⁵⁷⁶ S3(b) & S3(d) of SPLUMA. Pienaar et al., 2011 (26) *SAPL* 238.

⁵⁷⁷ S24(2)(b).

⁵⁷⁸ Refer to chapter 5.

⁵⁷⁹ S12(3)-(5).

vertical integration between the environmental discipline and spatial planning.⁵⁸⁰ Furthermore, when a situation arises where authorisations are required in terms of SPLUMA and other laws, the relevant authority may pursue separate or integrated authorisations.⁵⁸¹ Thereby emphasising that the avenue exists for integration, however in this case the authorities are not compelled to do so.

The legislative reform demonstrates an approach which is proactive and a shift away from the control flavour inherent in previous legal regimes.⁵⁸² Additionally, the introduction of SPLUMA advocates for better integration and strengthens the link between spatial planning, land use management and land development management.⁵⁸³ This is demonstrated as all aspects of land use planning have been brought under one uniform system and approach.⁵⁸⁴ Furthermore, the strengthening of this link and integration is evident in instances such as land use schemes need to give effect to and be consistent with the municipal SDFs.⁵⁸⁵

⁵⁸⁰ Van Wyk & Oranje 2014 (3) *Planning Theory* 363.

⁵⁸¹ S30(1) of SPLUMA.

⁵⁸² Van Wyk & Oranje 2014 (3) *Planning Theory* 356.

⁵⁸³ Steenkamp & Winkler 2014 (25) *Urban Forum* 347.

⁵⁸⁴ *Ibid*; Pienaar et al., 2011 (26) *SAPL* 237.

⁵⁸⁵ S25(1) of SPLUMA.

CHAPTER 4: CONCLUDING REMARKS

Land use planning, and more specifically spatial planning and land use management, are highly complex issues.⁵⁸⁶ The range and depth of issues that planning now has to face and encompass has increased, and consequently a far more complex and ever evolving planning environment exists.⁵⁸⁷ Broadening of the scope of spatial planning has resulted in its encroachment into other sectors, necessitating the need for integration.⁵⁸⁸ Incremental and total planning reform has occurred in numerous countries to face the current and growing economic, social and environmental challenges.⁵⁸⁹ Planning reform in the 21st century seeks to place people at the forefront of planning decisions with an underlying focus on public interest.⁵⁹⁰ Planning reform is tasked with alleviating past issues while addressing current challenges and promoting sustainable development.⁵⁹¹ This is no easy feat, requiring effective vertical and horizontal integration.

In South Africa, prior to SPLUMA a fragmented legal planning regime that is fraught with confusion and complexity existed.⁵⁹² This is due to issues and challenges which arose prior to the Constitution which persisted into the democratic era. This situation has been exacerbated by issues which have arisen post the enactment of the Constitution. There is little debate that planning reform was needed in South Africa, as a situation existed that 'cries out for legislative reform',⁵⁹³ due to the dire planning situation.⁵⁹⁴

The statutory home that spatial planning has had through South African history is complex and has been confusing at times. Initial avenues of spatial planning were limited in the twentieth century. During the Apartheid era a dichotomy of planning systems that were based on ensuring racial segregation operated, where different laws governed different areas. During apartheid, spatial planning was more prominent in the provincial ordinances and PPA of 1967 and 1991, all of which provided a statutory home for spatial planning. At the national sphere, PPA 1967 was the statutory home for guide plans which were prominent spatial planning instruments of its time. PPA 1991 replaced guide plans with a hierarchy of plans. LUPO, which was the provincial ordinance of the Cape Province and operated in the Western Cape provided the statutory home for structure plans. It is important to note that during this era spatial planning had forms in other laws.⁵⁹⁵ The transition to democracy had implications for planning regime. An attempt at integrating the dichotomy of planning systems under one uniform approach was evident in the enactment of the DFA. However, various flaws have arisen with regard to this Act which include

⁵⁸⁶ Pienaar et al., 2011 (26) *SAPL* 237.

⁵⁸⁷ Her Majesty Government (2007) 117.

⁵⁸⁸ Economic Commission for Europe (2008) 19.

⁵⁸⁹ The Planning Inspectorate (2009) 6.

⁵⁹⁰ NSW Government (2012) 2.

⁵⁹¹ Claassen "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 936.

⁵⁹² *Ibid* at 938.

⁵⁹³ 2010 (6) SA 182 (CC) para 33.

⁵⁹⁴ Abrahams & Berrisford (2012) *South African Cities Network* 6.

⁵⁹⁵ Berrisford 2011b (22) *Urban Forum* 249.

sections being declared unconstitutional. Post the Constitution there was the requirement for integrated development planning in the form of IDPs which were mentioned by various Acts. A crucial component of the IDP is an SDF, both of which are provided for and governed by the LG:MSA. During this time the statutory home of spatial planning and its instruments was complicated by the persistence of old order ordinances such as LUPO. The commencement of SPLUMA has significantly changed the statutory home of spatial planning as one uniform approach and home of spatial planning now exists.

Initially, the content and scope of spatial planning was largely focused on the physical plan of areas for certain activities.⁵⁹⁶ This was largely expressed in town planning schemes which captured the way land was to be managed and allocated uses for demarcated areas.⁵⁹⁷ Guide plans and their successor structure plans were constructed and implemented unevenly across South Africa during this era.⁵⁹⁸ The nature of these instruments was broad, the content of which aimed to manage and control growth in certain areas.⁵⁹⁹ Structure plans were an important spatial planning development in South Africa and extensively utilised in the Western Cape. The content and scope of which were broad and contained guidelines for planning.

All municipalities are mandated to prepare IDPs, which were introduced in a staggered manner.⁶⁰⁰ The scope and contents of IDPs are prescribed for in the LG:MSA, which prescribes the core components of the instrument reasonably well.⁶⁰¹ In terms of clarity of the content and scope of SDFs, it has altered significantly with the commencement of SPLUMA. Previously SDFs were required as part of a municipality developed IDP, this has changed under SPLUMA as SDFs are now required at the local, provincial and national level and can be created at the regional level. Furthermore, SPLUMA provides clarity on the content of what these SDFs need to contain.

The legal status of spatial planning instruments can largely be agreed to be persuasive which serve to guide and inform. However, confusion has arisen with regard to structure plans, guidelines and SDFs as the wording in certain Acts alludes to a more prescriptive status, this is perpetuated by different laws governing the instruments. Importantly, SPLUMA provides a uniform approach and home for the spatial planning instruments, rectifying the problem of different laws governing different instruments. The legal status of the spatial planning instruments under SPLUMA is persuasive and informative. However, it can be argued that confusion still exists with regard to the legal status of SDFs as SPLUMA provides that land development decisions must be consistent with certain SDFs.⁶⁰²

Integration during the apartheid era was limited and one of the primary reasons for this was due to a dichotomy of planning systems which operated. Consequently, different laws governed different areas and were

⁵⁹⁶ Todes et al., 2010 (34) *Habitat International* 416.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ Refer to para 30-32 of 2010 (6) SA 182 (CC).

⁵⁹⁹ Claassen PE "Spatial planning with the Western Cape Province as a case study" in *Environmental management in South Africa* (2009) 931; Harrison & Todes 2001 (35) *Regional Studies* 69.

⁶⁰⁰ Van Wyk *Planning Law* (2012) 270.

⁶⁰¹ *Ibid* at 271.

⁶⁰² Refer to section 3.2.3.

implemented by different authorities. Furthermore, the scope of planning was fairly narrow and environmental issues were largely neglected. In South Africa, the scope of what planning and environmental management entails has broadened in line with international trends.⁶⁰³ This has resulted in considerable overlap, due to sectoral departments operating in parallel to planning and creating dual processes.⁶⁰⁴ There is a definite lack of clarity and alignment, consequently ambiguity and confusion exists between the various laws which effect land use planning.⁶⁰⁵ However, over the past two decades there have been various legislative and policy interventions to try and address the issues which have persisted.⁶⁰⁶ Post the enactment of the Constitution and prior to SPLUMA there has been the rise of more integrated planning approaches, as the number of spatial planning instruments which have been tasked with horizontal and vertical integration has increased. Integration has occurred in terms of substantive issues such as sustainable development, in terms of sectors and spatial scales. This has resulted in attempts at integration with differing effects. These mechanisms include cross-consultation and cross-representation during plan development, compulsory plan alignment, trumping mechanisms and the prescription of compulsory decision making criteria. Furthermore, institutional integration in the Western Cape has occurred which demonstrates progressive integrational strides in terms of planning and the environmental sectors.

It has been demonstrated that there is a desire and need for a new system which links spatial planning and land use management that is flexible.⁶⁰⁷ The inclusion of spatial planning, land use management and land development all under SPLUMA demonstrates strides towards this. The flexibility that is needed involves fundamentals which speak to integration and alignment, while enabling adaptation to local circumstances.⁶⁰⁸ SPLUMA addresses this by providing a framework from which provincial Act can be developed, ensuring harmonisation and alignment. Additionally, integration is advocated as SPLUMA prescribes for principles, norms and standards and SDFs at all levels, requiring alignment and co-ordination between the different spheres of government.⁶⁰⁹

The importance of sectoral integration is evident in SPLUMA as the objectives of SPLUMA seek to ensure social and economic inclusion as well as facilitating sustainable land use.⁶¹⁰ Additionally in terms of the environmental sector, SPLUMA requires consideration and compliance with environmental legislation and the incorporation of environmental planning instruments into planning.⁶¹¹ One of the primary avenues for this is through SDFs which need to give spatial effect to, and integrate, policies and plans from other sectors.⁶¹² Furthermore, when a situation arises where authorisations are required in terms of SPLUMA and other laws, the relevant

⁶⁰³ Todes et al., 2009 (24) *Planning, Practice & Research* 423.

⁶⁰⁴ Ibid at 424; Harrison & Todes 2001 (35) *Regional Studies* 70.

⁶⁰⁵ Mammon 2011 *South African Cities Network* 9.

⁶⁰⁶ Pienaar et al., 2011 (26) *SAPL* 237.

⁶⁰⁷ Ovens et al., 2007 *Urban LandMark, Planact and CUBES* 16.

⁶⁰⁸ Ibid.

⁶⁰⁹ Van Wyk & Oranje 2014 (3) *Planning Theory* 357.

⁶¹⁰ See for example S3 & S12(3)-(5) of SPLUMA.

⁶¹¹ S24(2)(b) of SPLUMA.

⁶¹² S12(3)-(5).

authority may pursue separate or integrated authorisations.⁶¹³ Thus emphasising that the avenue exists for integration, however the authorities are not compelled to do so.

The reform that SPLUMA triggers demonstrates progressive steps towards a more coherent legal framework governing spatial planning in South Africa. The nature, scope and purpose of spatial planning has been significantly altered by SPLUMA from the previous spatial planning dispensation. How effective and coherent the new legal regime will be in practice, remains to be seen. With SPLUMA coming into effect as of 1 July 2015, these answers may come to light in the near future.⁶¹⁴

⁶¹³ S30(1).

⁶¹⁴ Proclamation of SPLUMA in GG No. 38828 (27 May 2015).

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