

# Municipal Law Making under SPLUMA: A Survey of Fifteen "First Generation" Municipal Planning By-Laws

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## Abstract

The legal framework for spatial planning and land use management changed with the introduction of the new *Spatial Planning and Land Use Management Act* 16 of 2013 (SPLUMA). SPLUMA facilitates the shift of power over critical areas of land use management from provincial governments to local governments, which results from the *Constitution* allocating "municipal planning" to municipalities. With this comes a responsibility for municipalities to adopt municipal planning by-laws. This article focuses on four of the many challenges SPLUMA needed to address namely (1) the division of responsibilities between national, provincial and local government, (2) the interrelationship between plans and rights, (3) planning and informality and (4) making government cohere. The article introduces these four challenges and examines how SPLUMA seeks to address them. In particular, it conducts a preliminary assessment of fifteen "first generation" municipal planning by-laws to assess how they address the four themes in SPLUMA.

## Keywords

Local government; municipalities; municipal planning; *Spatial Planning and Land Use Management Act* 16 of 2003; Spatial Development Framework; *Local Government: Municipal Systems Act* 32 of 2000; By-laws; zoning scheme; town planning.

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## 1 Introduction

### 1.1 *The importance of spatial planning and land use management*

Land use management is essential for cities, towns and villages to shape the future of their communities. The law, underpinning this role, is equally important. In essence, "planning law determines which buildings are legal and which are not".<sup>1</sup> Planning law gives birth to planning instruments that shape economies and influence social and political life in cities and towns as well as in rural areas.

Spatial planning generally refers to the articulation of a spatial vision for a particular area or jurisdiction. In the South African context, these are laid down in spatial development frameworks (SDFs), which may be adopted at local, regional, provincial, or national levels.<sup>2</sup> Land use management refers to the management of land use through the granting of land use rights to individuals or legal entities that seek to develop land. Generally, this is done through the granting of zoning rights or decisions on various types of land use applications.<sup>3</sup> The main difference between spatial planning and land use management is that the latter grants actual land-use rights, while the former does not.

These planning instruments are adopted and implemented in order to mediate a range of different objectives, such as attracting and guiding private and public infrastructure investment, protecting environmental resources, discouraging inappropriate development, mitigating environmental risks etc. Given the high levels of informality and insecurity of tenure in urban and rural settlements in South African municipalities, planning laws and decisions can play a critical role in ending the exclusion of informal dwellers from urban management systems. If municipalities use their planning instruments to extend greater security of tenure to informal dwellers, it improves their connection to public services, their access to capital and makes life more dignified and predictable. Planning law systems in Africa have often failed to do so.<sup>4</sup>

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<sup>1</sup> Berrisford 2011(a) *Urban Forum* 211.

<sup>2</sup> Section 1 of the *Spatial Planning and Land Use Management Act* 16 of 2013 (SPLUMA).

<sup>3</sup> Section 1 of SPLUMA.

<sup>4</sup> Berrisford 2011(a) *Urban Forum* 210.

In the South African context, the apartheid spatial divide continues to dominate where and how people live. Under apartheid, planning law and its planning instruments were used to segregate and exploit.<sup>5</sup> Today, spatial settlement patterns are still instrumental in excluding the majority of South African citizens from meaningful access to services and opportunities. The transformation of planning law is thus critically linked to issues of service delivery and development in South African cities, towns and villages.<sup>6</sup>

## **1.2 The focus of this article**

The legal and policy framework for spatial planning and land use management recently underwent a fundamental transformation, with the introduction of the new *Spatial Planning and Land Use Management Act* 16 of 2013 (SPLUMA). One of the most fundamental aspects of the reform was the devolution of planning powers to local government. Essentially, power over land use planning and control shifted from provincial governments to local governments. It can even be argued that municipalities possessed these powers long before the introduction of SPLUMA, namely by virtue of the *Constitution* itself. However, in practical terms, it was SPLUMA that made the devolution real for municipalities.

This article focuses on four crucial challenges SPLUMA needed to address namely (1) who does what, (2) the interrelationship between plans and rights, (3) managing informality and (4) making government cohere. The article introduces these four challenges and examines how SPLUMA seeks to address them. In particular, it reviews fifteen municipal planning by-laws to assess how they address the four themes in SPLUMA.

## **1.3 Four crucial themes in SPLUMA**

The first concerns the question: who will do what? There are organs of state in all three spheres of government that exercise spatial planning and land use management powers. This makes the system complex.<sup>7</sup> Therefore, SPLUMA was expected to assist in delineating roles and responsibilities between and within spheres of government.

The second theme deals with the relationship between plans and rights. Before SPLUMA, the law was not clear on the relationship between spatial planning (ie the adoption of spatial development frameworks) and actual land use rights. This compromised government's ability to guide infrastructure projects through budgets and plans. For as long as land use management decision-making remained disconnected from the forward thinking expressed in SDFs, the long term spatial goals as expressed in the

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<sup>5</sup> Western Cape Government *Land Use Planning* 32.

<sup>6</sup> Berrisford 2013 *Urban Forum* 214.

<sup>7</sup> Van Wyk 2010 *PELJ* 215.

SDF would be frustrated and difficult to realise.<sup>8</sup> At the same time, there was a concern that a dogged insistence on enforcing spatial plans would be unrealistic, inflexible and would discourage creativity. The question is thus how the content of a planned vision for the area ought to influence the actual decision making with respect to land use rights? What legal mechanism to use? Are the spatial plans soft guidelines, legally binding instruments or something in between?

Thirdly, any new planning framework needed to respond sensibly to the reality of the 'unplanned' nature of many settlements or, for the lack of a better word, 'informality'. A rather crude, but nevertheless useful distinction is between rural informality and urban informality. Rural informality is a direct product of apartheid's segregated system of planning. Under apartheid, land in former homelands and *bantustans* was generally not subject to same formal town planning laws that applied in the former British colonies (see below under paragraph 2). Instead it was subject to a highly fragmented combination of national controls and customary laws.<sup>9</sup> This produced a form of rural informality that exists still today.<sup>10</sup> The new planning framework needed to formulate a credible response to this. The inclusion of "unplanned" rural areas was going to be crucial to enable democratically elected governments to guide and facilitate development in these areas. At the same time, existing traditional systems of managing land use had to be respected. Furthermore, the feasibility of the immediate inclusion of vast tracks of rural land in formal planning frameworks is a daunting task. On the other hand, urban informality relates to the disjuncture between legislated land use rights that generally apply to urban land parcels and the reality of urban dwellers making homes and building communities outside of those legal frameworks. The effects are particularly pernicious in the South African reality of a segregated past and the legacy of laws aimed at keeping the black majority away from city centres.<sup>11</sup> The new planning framework needed to address this issue in various ways, one of which is by including informal areas in SDFs and address their inclusion and integration into the spatial, economic, social and environmental objectives of the relevant sphere.<sup>12</sup>

The fourth theme concerns the need to make government cohere. Development, i.e. the building of infrastructure for residential, commercial, industrial or transport purposes, will always attract the attention of multiple organs of state who may subject it to regulatory controls. The interests of these organs of state in controlling the development will vary from

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<sup>8</sup> Pieterse 2007 *Urban Forum* 18.

<sup>9</sup> Berrisford 2011(b) *Urban Forum* 249.

<sup>10</sup> De Visser 2016 *UJMPPS* 100.

<sup>11</sup> Watson 2009 *Progress in Planning*.

<sup>12</sup> Section 12(1)(h) of SPLUMA.

environmental protection, protection of agricultural production, heritage protection, and water resource management to "ordinary" town planning.<sup>13</sup> This may be made more complicated by the fact that these organs of state may be located in different spheres of government. The larger the infrastructure project, the more likely it is that the developer will have to secure a large number of approvals from different organs of state in different spheres of government before actual building may proceed.<sup>14</sup> At one level, this is inevitable in a complex environment and in the context of decentralised governance. It is something that ambitious developers, homeowners must equip themselves to absorb. However, excessive bureaucracy and "red tape" surrounding development is indeed a serious impediment to development. Governments are obliged to make every effort to ensure coherence across organs of state and spheres of government. This is also an issue that the transformation of the planning framework needed to address. There is no silver bullet for it, however. Each regulatory control responds to a specific interest that is often legitimate in principle. Furthermore, each of these controls is exercised in terms of validly enacted legislation. It is therefore not for one law and its regulatory controls to simply 'trump' or obviate another law and its regulatory controls.

The next paragraph provides more background to the new emerging role of local government in land use planning and briefly introduces the key features of SPLUMA. Paragraph 3 will then outline how SPLUMA responds to the abovementioned four challenges. This will then set the scene for an examination, in paragraph 4, of how municipal by-laws are following through on SPLUMA's direction in this respect.

## 2 The emerging role of local government in planning

Ever since the *South Africa Act* of 1909 which brought the former British colonies together into the Union of South Africa, and throughout the periods of the *Constitutions* of 1961 and 1983, South Africa's provinces were firmly in charge of the regulation of "town and regional planning". The position at the beginning of the 1990s was thus one of planning law reflected in provincial laws ("ordinances"). This at least was the position in the four provinces.<sup>15</sup> Provincial governments not only were the source of most law regarding planning, they were also the administrators and thus took most planning decisions. Gradually, local governments were "authorised" to take certain planning decisions provided they complied with certain conditions in some provinces. However, the pace of decentralisation was carefully controlled and strict supervision over local governments firmly in place. In the former homelands and *bantustans* there were 'national' planning laws

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<sup>13</sup> Steytler and de Visser *Local Government Law* 289.

<sup>14</sup> Steytler and de Visser *Local Government Law* 288.

<sup>15</sup> Steytler and de Visser *Local Government Law* 4.

and regulations. The four provincial Ordinances did not apply in these areas as they were governed by a parallel system of planning legislation.<sup>16</sup> The adoption of the *Interim Constitution* did not materially change this.

The 1996 *Constitution*, however, ushered in important changes.<sup>17</sup> It distributes planning authority across national, provincial and local government. It does so by listing fewer than five constitutional powers that either directly refer to land use or have a significant impact on it.<sup>18</sup> First, the *Constitution* lists "municipal planning" as a municipal competence in Schedule 4, Part B. This means that local governments have authority to legislate and administer municipal planning and that national and provincial governments only have limited oversight powers with regard to "municipal planning".<sup>19</sup> Secondly, "provincial planning" is listed by the *Constitution* as an exclusive provincial competence.<sup>20</sup> Provincial governments may legislate and administer provincial planning. Thirdly, "urban and rural development" is a power shared by national and provincial governments.<sup>21</sup> Both may legislate and administer urban and rural development. Should conflicts arise, they are ultimately resolved by the courts<sup>22</sup>. Fourthly, "regional planning and development" is also a power shared by national and provincial governments.<sup>23</sup> In addition to the above four planning related powers, the power to legislate and administer "environment" deserves mention. Again, the *Constitution* allocates this to national and provincial governments concurrently.<sup>24</sup> This constitutional division of planning powers was laid over the complex web of national planning laws and provincial planning ordinances that had been adopted under apartheid.

The incoming ANC-led government was reluctant to immediately untangle this web. The risk of the planning framework collapsing and infrastructure development stalling was too great. At the same time, it was concerned with the roll-out of its ambitious Reconstruction and Development Programme (RDP) and particularly the infrastructure related components of it, which would include introducing low income subsidy housing after 1994. There was a real possibility that local government, which at the time was still transitioning from a race-based system to a democratic system, would retard the roll-out of the RDP. Government therefore passed the

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<sup>16</sup> Van Wyk 2010 *PELJ* 218.

<sup>17</sup> Steytler and de Visser *Local Government Law* 12.

<sup>18</sup> *Constitution of the Republic of South Africa, 1996 (the Constitution)* (municipal planning, provincial planning, regional planning and development, urban and rural development, environment).

<sup>19</sup> Sections 155(6) and (7) of the *Constitution*.

<sup>20</sup> Schedule 5A of the *Constitution*.

<sup>21</sup> Schedule 4A of the *Constitution*.

<sup>22</sup> Section 146 of the of the *Constitution*.

<sup>23</sup> Schedule 4A of the of the *Constitution*.

<sup>24</sup> Schedule 4A of the *Constitution*. See also Van Wyk 2010 *PELJ*.

*Development Facilitation Act* (DFA),<sup>25</sup> which provided for extraordinary measures to speed up and facilitate the implementation of reconstruction and development programmes and projects in relation to land. Drafted under the *Interim Constitution*, the Act was meant to "provide a temporary stop-gap, pending the enactment of comprehensive land use legislation that would rationalise the existing laws".<sup>26</sup>

Other than the passing of the DFA in 1997, the web of laws and ordinances regulating planning remained in place. Provincial governments continued to exercise planning powers in terms of the ordinances, often with the help of municipalities exercising delegated powers. They did so in the areas of the four old provinces.<sup>27</sup> In the former "independent" homelands and "self-governing" territories, the ordinances were not applicable and the patchwork of national laws (sometimes assigned to provinces) and customary laws was used to plan and regulate land use.<sup>28</sup>

While the framework for land use *management* remained unchanged, spatial *planning* underwent important changes on the back of the introduction of the Integrated Development Plan (IDP). The most notable change was the introduction, in 2000, of the *Local Government: Municipal Systems Act*.<sup>29</sup> This law compels municipalities to adopt spatial development frameworks as part of their strategic plan (the Integrated Development Plan). Municipalities therefore started to lay down their spatial vision for the future development of the municipal area in these SDFs.<sup>30</sup> However, there was no statutory connection between the land use management activities of provincial governments (or municipalities acting in terms of delegated powers) and the municipal SDFs. The first was exercised in terms of old order ordinances and the second was adopted in terms of the *Municipal Systems Act*. This disjuncture impeded government's ability to plan and guide developments through budgets and spatial plans (see above under para 1.2).

The much-needed rationalisation of planning legislation eluded the national government for over ten years. Despite a number of attempts at comprehensive national framework legislation on planning, the situation remained unchanged. By 2010, thirteen years after the adoption of the Constitution, there was still no legal clarity on this situation. It needed South Africa's biggest city, Johannesburg to take the matter to the Constitutional

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<sup>25</sup> *Development Facilitation Act* 67 of 1995 (the DFA).

<sup>26</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR 859 (CC) para 33.

<sup>27</sup> Van Wyk 2010 *PELJ* 216.

<sup>28</sup> Steytler and de Visser *Local Government Law* 8.

<sup>29</sup> *Local Government: Municipal Systems Act* 32 of 2000.

<sup>30</sup> Pieterse 2007 *Urban Forum* 17.

Court.<sup>31</sup> The City of Johannesburg took issue with the DFA, and particularly the decisions taken by its tribunals, overriding city planning. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,<sup>32</sup> the Court was asked to confirm a Supreme Court of Appeal judgment declaring parts of the DFA unconstitutional. Gauteng and other provinces joined in an effort to save the DFA. The arguments revolved around the meaning of "municipal planning" and around the effects of striking down the DFA. The key question was whether the term "municipal planning" in the Constitution includes the power to authorise land rezoning and the establishment of townships, something provincial tribunals were doing in terms of the DFA. Gauteng argued that "municipal planning" deals with forward planning only. The *Constitution* empowers municipalities to conceptualise plans not to administer and implement them, so the argument went. The Constitutional Court disagreed with Gauteng and held that the term "municipal planning" "has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land". The Court also held that none of the provincial powers of "regional planning and development" "provincial planning" and "urban and rural development" (see Schedules 4A and 5A) gave provincial governments the right to authorise land rezoning and establish townships similar to that of municipalities. The Court thus agreed with the Supreme Court of Appeal that the DFA is unconstitutional insofar as it empowers provincial tribunals to grant applications for rezoning and establish townships. In many parts of the country, the DFA had become indispensable. The Court therefore suspended the order for two years. The tribunals could thus continue for another two years with determining applications for rezoning and establishing townships. However, the Court ruled that they were compelled to consider IDPs, SDFs and urban development boundaries and they were prohibited from using their powers to exclude the operation of certain laws and by-laws in respect of land over which they are deciding. The *Gauteng Development Tribunal* judgment provided new impetus to the development of national planning legislation and clarified the meaning of "municipal planning". During the subsequent years, government worked feverishly to adopt a new planning law before the Court's deadline, still missing it by more than two years. SPLUMA followed through on the *Gauteng Development Tribunal* judgment and located municipalities at the epicentre of the planning framework.

In the meantime, more litigation surrounding municipal planning powers reached the Constitutional Court. In fact, the municipal planning power

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<sup>31</sup> De Visser 2016 *UJMPPS* 102.

<sup>32</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR 859 (CC) para 95.



became the subject of no fewer than six Constitutional Court judgments, following each other in rapid succession. Without fail, each judgment confirmed the approach taken in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,<sup>33</sup> namely that national and provincial governments may not usurp the powers of municipalities with respect to "municipal planning". The national government does not trump municipal land use decisions by issuing mining licenses (*Maccsands*).<sup>34</sup> Provincial governments may not subject municipal land use decisions to a veto even if the development impacts an entire region (*Lagoon Bay*).<sup>35</sup> Provincial governments may also not subject municipal land use decisions to provincial appeals (*Habitat Council*,<sup>36</sup> *Pieterse*<sup>37</sup> and *Tronox*).<sup>38</sup> The interplay of these judgments and the development of SPLUMA impacted municipal powers on municipal land use management powers significantly by making it clear that national and provincial governments may not interfere with this power.<sup>39</sup>

Not one of the six judgments deals with local government's legislative authority, however. They did not need to because the powers that municipalities were defending were executive and administrative decision making powers which were being exercised in terms of provincial laws. Therefore, the division of municipal legislative authority was not raised in any of the cases. However, the *Constitution* and the manner in which the Constitutional Court interpreted local government's role in planning, also has important consequences for the question as to who makes the planning laws.

What does this mean for municipal by-laws? Section 156(2) provides that a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.<sup>40</sup> Given that the *Constitution* provides that municipalities may administer municipal planning, a municipality may make by-laws on municipal planning.

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<sup>33</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR 859 (CC).

<sup>34</sup> *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province In re: Minister for Mineral Resources and Swartland Municipality and Maccsand (Pty) Ltd and The City of Cape Town* 2012 9 BCLR 947 (CC).

<sup>35</sup> *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v LagoonBay Lifestyle Estate (Pty) Ltd* 2014 2 BCLR 182 (CC).

<sup>36</sup> *Habitat Council v Provincial Minister of Local Government, Environmental Affairs and Development Planning, Western Cape* 2014 4 BCLR 591 (CC).

<sup>37</sup> *Pieterse v Lephale Local Municipality* 2017 2 BCLR 233 (CC).

<sup>38</sup> *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* 2016 3 SA 160 (CC).

<sup>39</sup> Except when the municipality is subject to an intervention in terms of s 139 of the *Constitution*.

<sup>40</sup> Section 156(2) of the *Constitution*.

The notion of municipalities passing municipal by-laws to regulate planning matters was a new and rather disruptive element during the already unsettling planning reform trajectory. Before SPLUMA, those municipalities that were authorised to exercise land use management responsibilities did not do so in terms of their own by-laws. They exercised their land use management powers in terms of laws passed elsewhere (mostly provincial ordinances). In the run-up to the adoption of SPLUMA and even thereafter, it was often assumed that, despite the new constitutional protection of municipal decision making power, the rules for making decisions would continue to be laid down in provincial and/or national laws. In other words, the assumption was that municipalities would exercise their constitutionally protected decision making powers in terms of provincial and/or national planning laws. However, it then became clear that the municipality's power to exercise land use management powers includes the power to make by-laws in that area. This constitutional position caused considerable anxiety, particularly among developers. The relative comfort of a regime of provincial ordinances, which at least ensured provincial uniformity of procedures and requirements, coupled with the possibility of an appeal to the provincial executive was going to be removed. It was set to be replaced with 257 different by-laws, each providing for different procedures and requirements with respect to land use management.

The risk of fragmentation of land use management rules and procedures in 257 different municipal by-laws is mitigated somewhat by the *Constitution* itself. Municipalities are not free to determine the content of their municipal planning by-laws. Municipal planning by-law must be consistent with the *Constitution*, including the Bill of Rights. Secondly, the content of the by-law may not conflict with a national or provincial law. If it does, the by-law is invalid.<sup>41</sup> This is different only if the conflict exists with a national or provincial law that "compromises or impedes a municipality's ability or right to exercise its powers or perform its functions".<sup>42</sup> In that case, the by-law prevails.

Whether or not a national or provincial law is 'compromising or impeding' is determined with reference to section 155(7) and 155(6)(a) of the *Constitution*. Section 155(7) of the *Constitution* provides that national and provincial governments may regulate how municipalities exercise their municipal planning function.<sup>43</sup> It therefore sets a limit to how far national and provincial governments may go in regulating how municipalities deal with municipal planning. The purpose of the national or provincial law must be "to see to the effective performance of the function". Section 155(6)(a) of

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<sup>41</sup> Section 156(3) of the *Constitution*.

<sup>42</sup> Section 151(4) of the *Constitution*.

<sup>43</sup> Section 155(7) of the *Constitution*.

the *Constitution* empowers national and provincial governments to pass legislation to "monitor and support".<sup>44</sup> The Constitutional Court has not yet pronounced itself in detail on the extent of that oversight power. One of the few times it expressed itself on these provisions was in the *Habitat Council* judgment when Judge Cameron indicated that this is a power to issue "norms and guidelines".<sup>45</sup> It is suggested the Court's use of the term "guidelines" should not be interpreted to mean that municipalities are free to ignore national and provincial regulations on municipal planning. However, the message of the Court's remark is clear: national and provincial rules on municipal planning must be "hands-off". It must be limited to framework legislation with minimum standards for municipalities.<sup>46</sup>

Many provisions in SPLUMA fall in this category: they provide a framework for how municipalities must exercise their municipal planning powers. In addition, there may be provincial planning legislation that regulates municipal planning powers. At the time of writing, the *Western Cape Land Use Planning Act 3* of 2014 was the only example.<sup>47</sup> This Act was adopted in the wake of the adoption of SPLUMA and is closely aligned to SPLUMA. However, provincial planning laws that were adopted prior to SPLUMA are also judged by the same standard. Examples are the *KwaZulu-Natal Planning and Development Act 6* of 2008 and the *Northern Cape Planning and Development Act 7* of 1998. These Acts were adopted prior to SPLUMA and prior to the *Gauteng Development Tribunal* judgment so a significant number of their provisions are bound to be out of sync with the *Constitution*.

In summary, the municipal planning by-law is emerging as an essential component of the planning framework. The demise of the provincial ordinances, with their detailed procedures and norms for the municipal exercise of land use management powers, has left a vacuum that municipal by-laws had to fill. Neither the national government, nor the provincial government is competent to prescribe the kind of detail required for municipal officials or tribunals (see below) to effectively carry out land use management powers. What is more, it is suggested that, as the planning framework develops further, the municipal planning by-law will further increase in importance. While national and provincial planning laws will continue to provide outer parameters and overall guidance, the municipal planning by-law is "where the rubber hits the road" and where municipalities can provide locally relevant solutions to some of the problems set out

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<sup>44</sup> Section 155(6)(a) of the *Constitution*.

<sup>45</sup> *Habitat Council v Provincial Minister of Local Government, Environmental Affairs and Development Planning*, *Western Cape* 2014 4 BCLR 591 (CC) para 22.

<sup>46</sup> Steytler and De Visser *Local Government Law* 297.

<sup>47</sup> *Western Cape Land Use Planning Act 3* of 2014.

earlier. The next part of this article will locate the municipal planning by-law within the framework provided by SPLUMA.

### **3 The *Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA)***

#### **3.1 Overview**

What follows is a short overview of SPLUMA and how it plays this much anticipated role as a framework for planning across three levels of government. The Act is not discussed in detail but concepts and provisions that are most crucial to the theme of this research paper are introduced.

Aside from setting out the objectives and different components of spatial planning, the Act distinguishes and defines national, provincial and municipal planning in Chapter 1.<sup>48</sup> This is a clear manifestation of SPLUMA's role as framework legislation, providing an overall architecture for planning at the three levels of government.

Chapter 2 contains development principles that must guide all organs of state engaged in spatial planning and land use management. Amongst other things, it emphasises the need to redress the imbalances of the past and to ensure equity in the application of planning systems.<sup>49</sup>

Chapter 3 contains provisions that focus on the monitoring and support efforts to be provided by the national government to provinces and municipalities. It furthermore deals with provincial support to municipalities.<sup>50</sup> In a number of curiously phrased provisions, the Act locates provincial legislation as part of the overall planning framework. Section 10(1) provides that provincial laws may provide for certain listed matters, matters of provincial interest and remedial measures to deal with municipal problems. Section 10(2) provides that provincial laws may provide for structures and procedures that differ from SPLUMA, as long as the provincial law is "not inconsistent" with SPLUMA. It is not clear how provincial legislation can provide different structures and procedures without being inconsistent with SPLUMA.<sup>51</sup>

Chapter 4 deals with spatial development frameworks. It instructs national government to adopt a National Spatial Development Framework and provinces to adopt provincial spatial development frameworks (PSDFs).<sup>52</sup> These provisions now entrench the national and provincial spatial development frameworks as statutory plans. Before SPLUMA, national and

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<sup>48</sup> Chapter 1 of SPLUMA.

<sup>49</sup> Chapter 2 of SPLUMA.

<sup>50</sup> Chapter 3 of SPLUMA.

<sup>51</sup> Section 10(2) of SPLUMA.

<sup>52</sup> Chapter 4 of SPLUMA.

provincial development frameworks were adopted without any specific basis in law. This is now different with SPLUMA setting out (1) how they must be prepared and published and (2) what they must contain as a minimum. This new status does not drastically alter the legal status of the national and provincial SDFs, though. They remain policy documents that bind the governments that adopted them but that do not bind others.<sup>53</sup>

Section 15(3) of SPLUMA provides clearly that the PSDF does not confer land use rights.<sup>54</sup> The Act permits the national Minister to publish a regional spatial development framework for a region that straddles provincial and/or municipal boundaries. The Act also regulates municipal spatial development frameworks (MSDFs). MSDFs already had a basis in law because section 26(e) of the *Municipal Systems Act* instructs municipalities to adopt an MSDF as part of the integrated development plan.<sup>55</sup> SPLUMA thus explicitly refers to and then elaborates on the provisions of the *Municipal Systems Act* (and its regulations). Compared to the provisions on the MSDF and PSDFs, SPLUMA is more ambitious about the legal status of MSDFs. It specifically prohibits municipalities to take decisions that are inconsistent with the MSDF.<sup>56</sup> Importantly, the same applies to other organs of state making land development decisions. This is further outlined in para 4.3 below.

Chapter 5 of the Act regulates land use management and in what is perhaps one of its most crucial provisions. SPLUMA introduces the concept of "wall-to-wall" land use schemes in section 24(1). Within five years of the Act coming into operation, each municipality must have adopted a land use scheme for its entire area. The Act sets out minimum requirements governing the content of land use schemes and makes it clear that no land may be used for purposes not permitted in the land use scheme.<sup>57</sup>

Chapter 6 of the Act governs land use development management and introduces the "municipal planning tribunal" (MPT).<sup>58</sup> Each municipality must establish an MPT and populate it with officials and experts (councillors are barred). In principle, the MPT decides on land use applications but the municipality may designate an official to deal with certain categories of applications. SPLUMA sets out the MPT's powers and provides minimum requirements for land use management decision making in municipalities.

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<sup>53</sup> Section 17(3) of SPLUMA.

<sup>54</sup> Section 15(3) of SPLUMA.

<sup>55</sup> Section 26(c) of the *Local Government: Municipal Systems Act 32 of 2000*.

<sup>56</sup> Section 22(1) of SPLUMA.

<sup>57</sup> Section 26(2) of SPLUMA.

<sup>58</sup> Chapter 6 of SPLUMA.

### **3.2 SPLUMA on by-laws**

SPLUMA only reluctantly accepts that municipalities will make by-laws. Only twice does it mention municipal by-laws on municipal planning. First, section 6(1)(a) of SPLUMA provides that the development principles apply to the preparation, adoption and implementation of municipal by-laws on spatial planning and land use management. The fact that SPLUMA does not embrace the notion of local law making is a pity. The idea that municipalities would adopt municipal planning by-laws only started featuring very late in the drafting process. In that sense, an opportunity may have been missed to more deliberately deal with the role of municipal by-laws in the planning framework.

Furthermore, section 32(1) of SPLUMA provides that a municipality may pass a by-law aimed at enforcing its land use scheme.<sup>59</sup>

## **4 What the fifteen by-laws do with the four challenges**

### **4.1 Introduction**

The remainder of this article examines a sample of fifteen municipal planning by-laws and assesses how they give content to SPLUMA's approach to the four challenges outlined in section 1 of this article. It proceeds on the basis of the premise that the direction given by SPLUMA on how to solve these challenges can only succeed if it finds resonance in the content of municipal by-laws.

### **4.2 Selection of by-laws and methodology**

The fifteen planning by-laws were selected from all nine provinces. Care was taken to include both metropolitan and local municipalities and to cover both rural and urban areas. This was to ensure that the sample included a reasonable cross-section of municipalities, across provinces, municipal categories and urban/rural realities. The research for this article took place in 2016 so the assessment pertains to the content of the municipal planning by-laws as they existed between June-November 2016. They thus represent "first generation" by-laws, ie the first by-laws adopted after the coming into operation of SPLUMA. Changes subsequent to November 2016 have not been included in this review. The fifteen by-laws were subject to an assessment. The scope of the research did not permit a comprehensive and detailed assessment but rather a preliminary assessment of what the by-law provides on the four issues under consideration.

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<sup>59</sup> The latter provision is superfluous because the *Constitution*, not SPLUMA, empowers municipalities to pass municipal planning by-laws.

### **4.3 Who does what? How does the by-law relate to provincial law?**

Given the expectation that implementing SPLUMA will demystify the division of powers between national, provincial and municipal planning powers, it is important to examine whether and how municipal by-laws relate to provincial laws under the SPLUMA dispensation. This is particularly important, given the history of land use management as the preserve of provincial governments who delegated powers to municipalities (see paragraph 2 above). Provincial governments made all the rules, implemented them with (or without) the help of municipalities and exercised stringent oversight. In the new dispensation, municipalities (1) have their own planning powers, (2) must make rules on how to use those powers and (3) are supervised by provinces. How will this work and more specifically, do the by-laws reflect on this delicate balancing act between municipal decision making and provincial oversight? While it goes outside of the scope of this article to examine this in detail, an important first step is to assess whether the by-law works in conjunction with a provincial law. Therefore, the question with respect to each by-law reviewed is whether or not the text of the by-law reflects the existence or possibility of provincial legislation impacting on municipal planning. In other words, does the by-law work in conjunction with a provincial law? Lastly, it must be noted that some of these provincial laws which the by-laws refer to, are drafts that have not yet been passed by the respective province.

The by-laws under review provide some insight into how different provinces and municipalities approach this question, in particular the relationship between municipal by-laws and provincial legislation.

It appeared that the majority of municipalities adopted by-laws that, one way or another, worked in conjunction with provincial planning legislation. In fact, in six out of the nine provinces, by-laws made reference to provincial law. Mbombela in Mpumalanga does recognise the relationship between its planning by-law and provincial planning legislation. Section 3 (1) of its municipal planning by-law provides that the by-law is subject to the relevant provisions of SPLUMA *and provincial legislation*.<sup>60</sup> The Western Cape is currently the only province with a post-SPLUMA provincial planning law, the *Land Use Planning Act 3 of 2014* (LUPA). The municipal planning by-law of George local municipality very clearly requires the by-law to work in conjunction with LUPA. In Gauteng, the City of Johannesburg's planning by-law recognises provincial legislation. Section 10 of the by-law refers to provincial planning legislation which is yet to be promulgated. However, the by-law delivers a shot across the bow in providing that, in case of conflict with the provincial law, it gives effect to "municipal planning", a warning to

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<sup>60</sup> Section 3(1) of the Mbombela Local Municipality Spatial Planning and Land Use Management By-law.

the provincial government not to adopt provisions that trespass on municipal planning powers. Legally, the provision is irrelevant: should a conflict arise between the by-law and a (future) provincial law, it will not be decided in terms of the provisions of the Johannesburg by-law but in terms of the provisions of the *Constitution*.<sup>61</sup> In the Eastern Cape, section 3(1) of the planning by-laws of the Engcobo and Kouga local municipalities require the by-law to work in conformity with a provincial law.<sup>62</sup> The by-laws of Nongoma and Ubuhlebezwe local municipalities in KwaZulu-Natal clearly envisage a relationship between the by-law and provincial legislation. For example, section 54 (4) (a) of both by-laws states that the Municipal Planning Approval Authority may not approve an application for municipal planning approval that is inconsistent with the provincial planning norms and standards.<sup>63</sup> In the North West province, Madibeng and Rustenburg acknowledge provincial legislation.

With respect to the three other provinces, the findings were that no reference is made to provincial legislation. In the Northern Cape, the Dikgatlong and Sol Plaatjie by-laws contained not a single reference to provincial law. In the Free State, Tswelopele and Mantsopa were silent on provincial legislation and in Limpopo, the by-law of Mogalakwena municipality did not mention provincial legislation.

It goes beyond the scope of this study to provide detailed analysis of how exactly municipal by-laws refer to provincial legislation but a brief analysis of the City of Tshwane's by-law gives some insight into how provincial legislation intersects with municipal by-laws: For example, sections 4(2) and 5(4)(c)(vii) provide that the City will have regard to provincial legislation when drafting its MSDF. while sections 9(3)(c) and 10(2)(b)(v) provide that the City's land use scheme must consider provincial legislation. Lastly, section 20(4)(d) provides that the concept of an "objector" in SPLUMA is as defined in provincial legislation. These are some of the few examples that provide insight into how the by-laws view the role of provincial legislation in regulating planning.

#### **4.4 Linking forward planning and land use management**

SPLUMA makes a concerted effort to strengthen the link between municipal spatial planning and land use management. Two provisions stand out in this respect. First, as already mentioned, section 22(1) prohibits land use management decisions that are inconsistent with an MSDF.<sup>64</sup> A deviation

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<sup>61</sup> Section 156(3) of the *Constitution*.

<sup>62</sup> Section 3(1) of the Kouga Local Municipality and Engcobo Local Municipality Spatial Planning and Land Use Management By-laws.

<sup>63</sup> Section 14(4) of the Ubuhlebezwe and Nongoma Local Municipality Spatial Planning and Land Use Management By-laws.

<sup>64</sup> Section 22(1) of SPLUMA.



from the MSDF is permitted only if "site-specific circumstances" justify it. Secondly, the land use scheme adopted by the municipality "must give effect to municipal spatial development frameworks". Given that land use schemes grant land use rights this suggests that MSDFs will somehow have a direct bearing on land use rights.

Therefore, it is important to assess whether the municipal planning by-law includes any provisions that link the mandate of the MPT or the authorised official to the municipality's IDP, including the MSDF? In particular, does the by-law make reference to the MSDF when it addresses the criteria for their decision making? Does it include any provisions that somehow facilitates or makes obtaining land use approvals "easier" if the development is envisaged in the MSDF?

The findings indicate that, in almost all municipalities in the sample, the by-law makes an effort in connecting land use management to forward planning. The by-laws of Johannesburg (Gauteng), Mbombela (Mpumalanga), Nongoma and Ubuhlebezwe (KwaZulu-Natal), Engcobo and Kouga (Eastern Cape), Madibeng and Rustenburg (North West), Tswelopele and Mantsopa (Free State) and Mogalakwena (Limpopo) all include provisions that compel the MPT or the Authorised Official to consider the MSDF before taking a land use decision. The Northern Cape bucks the trend with the by-laws of Dikgatlong and Sol Plaatjie being silent on connecting land use management to forward planning.

Upon closer examination of the by-laws, different approaches emerge. For example, the Ubuhlebezwe by-law prohibits the municipal planning authority, ie (Municipal Planning Tribunal or Authorised Official) to take decisions that are inconsistent with the IDP. Inconsistency is defined as a development that is either specifically prohibited or irreconcilable with the IDP. Furthermore, if the IDP makes it clear that the engineering services required for the development will not be made available, the development is also inconsistent with the IDP. Ubuhlebezwe goes further in pursuing consistency between the IDP and planning decisions by providing that the IDP may be amended to ensure consistency between the planning approval and the content of the IDP. The decision to amend the IDP may be made conditional on the development being approved.

None of the by-laws under review contained provisions that linked consistency of the development with the IDP with a softening of ordinary application requirements or criteria. Inconsistency with the IDP is used to discourage inappropriate development but, consistency with the IDP does not necessarily obviate the usual requirements and criteria: they still apply.

#### **4.5 Dealing with informality**

The response of the planning framework to informality, either in the form of urban informal settlement or currently "unplanned" communal land is crucial. SPLUMA directs municipalities specifically to address this. Perhaps the most direct instruction appears in section 24(2)(c) where SPLUMA provides that the land use or zoning scheme "must include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme".<sup>65</sup> While the instruction targets the land use or zoning scheme, it seems that in order for this to work, municipal by-laws must give further content to this. So the first question is whether the municipal planning by-law includes provisions aimed at facilitating the incremental introduction of land use management systems in informal or currently "unplanned" areas.

The second, and related, question is whether the municipal planning by-law includes any provisions that differentiate between formal, informal and/or communal areas. Perhaps more importantly, if it does, what are the criteria for the distinction? Thirdly, if the by-law distinguishes informal from formal areas, what, if any, is the consequence of that for the implementation of the by-law? For example, are the criteria for decision making different? Are the application fees and/or liability for notice costs different? Does it differentiate when it comes to methods of notification, or perhaps with respect to the enforcement of the by-law?

Most of the by-laws reviewed do differentiate between formal, informal and communal areas. For example, the by-laws of Mbombela, Johannesburg, Engcobo, Mogalakwena, Kouga, Nongoma, Ubuhlebezwe, Madibeng, Rustenburg, Tswelopele, as well as Mantsopa all differentiate between formal, informal and communal areas. The Dikgatlong, Sol Plaatjie and George municipalities' by-laws were the exceptions in that they did not provide any differentiation among formal, informal and communal areas.

A number of by-laws contained no definitions of informal or communal land. The Dikgatlong, Sol Plaatjie and George by-laws naturally contained no definition as the by-law itself does not differentiate. The by-laws of Tswelopele in the Free State suggest that differentiated systems apply but did not include a definition of what the differentiation is based on.

The by-laws of Engcobo and Kouga in the Eastern Cape and Mbombela in Mpumalanga (three municipalities with large tracts of "unplanned" land) contained identical definitions of "communal land". These by-laws define "communal land" with reference to two matters. The first is the jurisdiction of a

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<sup>65</sup> Section 24(2)(c) of SPLUMA.

traditional council in terms of post-apartheid legislation on traditional leadership. The second is either the land having being vested in an apartheid government trust to control land acquisition by "natives" or in the government of one of the self-governing territories. The KwaZulu-Natal by-laws of Ubuhlebezwe and Nongoma introduce a more fluid definition of unplanned land by referring to "land that is occupied in an unstructured manner by a traditional community or indigent households".<sup>66</sup>

Turning to the challenge of defining informality in the urban context, section 1 of the Johannesburg by-law includes a definition of an informal settlement. It defines "informal settlement" as being the result of "informal occupation of land by persons none of whom are the registered owner of such land, which persons are using the land for primarily residential purposes, with or without the consent of the registered owner and established outside of the provisions of this By-law or any other applicable planning legislation".<sup>67</sup>

A further question is whether the criteria for decision making differ when it comes to formal, informal and/or communal areas. The general trend in the by-laws under review is that they do not: the same criteria apply across the board. However, three "rural" by-laws, namely those of Nongoma, Ubuhlebezwe (KwaZulu-Natal) and Madibeng (North West), did include provisions that differentiated. Section 30(1)(xxiv) of the Madibeng by-law distinguishes traditional use applications relating to communal lands from other land use applications.

In the same vein, schedule 7 of both Nongoma and Ubuhlebezwe local municipality's by-law provides the criteria for decision-making in relation to informal or communal areas. The type of differentiation applied in Nongoma and Ubuhlebezwe relates to matters such as *who* may apply and the *information* that must be supplied. Applications with respect to dwellings on communal land may be made by the head of a household that seeks to erect a dwelling as opposed to the owner of the land in other types of applications. Similarly, applications with respect to dwellings on communal require information such as the name of the household which the applicant represents, the name of the traditional area and of the isiGodi where the land is situated.

The inquiry extended to a number of issues, namely defining different types of tenure arrangements, differentiating with respect to issues such as the criteria for approval, fees, notice costs and enforcement measures. In

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<sup>66</sup> Section 44 of the Ubuhlebezwe and Nongoma Local Municipality Spatial Planning and Land Use Management By-laws.

<sup>67</sup> Section 1 of the Johannesburg Metropolitan Municipality Spatial Planning and Land Use Management By-law.

addition, a search was done for provisions that aim at facilitating the introduction of land use management in informal or "unplanned" areas.

None of the by-laws under review connect public participation methods (notices etc) to tenure types. The same applies to application fees, enforcement and inspection measures: in all the by-laws these applied across the board. However, the Ubuhlebezwe and Nongoma by-laws express reluctance to introduce rigid enforcement measures in formerly unplanned areas (see below). Further differentiation is likely to manifest in policies under the by-law as opposed to in the by-law itself. For example, section 39(6) of the Mogalakwena by-law empowers the municipality to determine criteria for and grant exemptions to application fees. This enables the municipality to differentiate the fees applicable between formal, informal or communal areas.

The final question is whether the by-laws contain provisions that seek to follow through on SPLUMA's aim of expanding formal planning system into unplanned areas. In this respect, only the by-laws of Johannesburg, Nongoma, Ubuhlebezwe and Rustenburg contain provisions aimed at introducing land use management systems in informal or unplanned areas while the rest of the by-laws do not. For example, section 6(2) of the Johannesburg by-law provides for the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme. In the same vein, section 44 of the Nongoma and Ubuhlebezwe by-laws provide for a framework within which the introduction of land use management systems in informal or unplanned areas may be introduced. These by-laws contain elaborate frameworks for the gradual inclusion of traditional land into land use schemes. This framework is based on four key tenets:

- a) The municipality is instructed to identify all existing non-residential and non-agricultural informal rights to the land, identify the land uses associated with the rights and the nature and extent of the rights. Furthermore, these rights must be located on a map, together with the details of the rights holders, their households and the applicable traditional areas and leaders. This information must assist the municipality in preparing a land use scheme.
- b) The by-law establishes the principle that their inclusion in the land use scheme must not unduly disturb the community's accepted land use patterns and land use management practices.
- c) Land use controls and enforcement associated with the inclusion in the land use scheme may only be introduced if the council is of the

opinion that adherence to the land use scheme warrants their introduction.

- d) Consultation with the community and its leadership, including traditional leaders must be central to the municipality's efforts.

#### **4.6 Reducing red tape**

The two key concerns here are the duration of decision making on land use applications and the proliferation of approvals needed for a single development. With regard to the first, SPLUMA may of course only address planning approvals. It is not competent to put strictures on other processes, such as environmental impact assessments, heritage or agriculture approvals. Section 40(9) of SPLUMA provides that an MPT must decide a land use application without undue delay and within a prescribed period.<sup>68</sup> Section 44(1) empowers the Minister to prescribe timeframes for decision making by MPTs which the MPT is then obliged to adhere to.<sup>69</sup> SPLUMA does not prescribe the consequences of not adhering to the prescribed timeframes. Does the municipality become incompetent to decide outside the timeframes? Or can the (absence of a) decision be taken on appeal? These are matters that the municipal by-law must give further content to. So the question then becomes whether the municipal by-law includes provisions that implement maximum timeframes for decision making.

Section 21(l)(ii) of SPLUMA contains an important directive. It stipulates that the MSDF "must identify areas in which shortened land use development procedures may be applicable". In other words, the MSDF must indicate in which areas the municipality may implement land development procedures that are "shorter than normal".<sup>70</sup> The "shortening" of land use development procedures, referred to in SPLUMA, can really only be done in the municipality's by-law. Municipalities are best placed, both legally and practically to determine if and how that can be done. This means that the implementation of section 21(l)(ii) of SPLUMA, which is intended to address concerns surrounding the duration of decision making procedures, hinges on concomitant provisions in municipal by-laws. The review of by-laws therefore examines whether the by-law contains provisions intended to implement section 21(l)(ii) of SPLUMA by providing for shortened land use development procedures.

With respect to the proliferation of approvals needed for a single development, SPLUMA contains a framework for the alignment of authorisation procedures and even for the complete integration of authorisation decision making. Different organs of state (deciding in terms

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<sup>68</sup> Section 40(9) of SPLUMA.

<sup>69</sup> Section 44(2) of SPLUMA.

<sup>70</sup> Section 21(1)(ii) of SPLUMA.

of different laws) may "exercise their powers jointly" by issuing separate authorisations.<sup>71</sup> The joint exercise of powers refers to the alignment of procedures, such as for example the alignment of public participation processes. SPLUMA goes further as it permits these different organs of state to merge their authorisations into one single decision.<sup>72</sup> In theory therefore, a municipal planning approval, an environmental impact assessment, an agricultural approval and a heritage approval could all be combined into one single integrated decision. SPLUMA demands that all relevant provisions of all applicable laws must be complied with and that it is clear who the original decision makers were.<sup>73</sup> By all accounts, section 30 SPLUMA is very ambitious. Different organs of state, tasked with assessing different interests affected by a development (ie environmental, agricultural, heritage, water provision, land use planning etc), will not readily surrender control over their decision making processes to a joint process, let alone a joint decision. This is even more so if those organs of state are located in different spheres of government. With local government now firmly in the picture, this will almost always be the case.

At the same time, section 30 of SPLUMA represents an important opportunity for government to mobilise internal coherence around development projects. So it is important to assess the feasibility of these mechanisms. A municipality's participation in these mechanisms again hinges on the provisions of its by-law, particularly if the municipality's decision is merged with another organ of state's decision.

The review of by-laws therefore assessed whether the municipal planning by-law includes any provisions that signal the municipality's intention to align decision making procedures with other organs of state or even integrate decision making authority with other organs of state.

All the by-laws reviewed (except Rustenburg) instructed the municipality to take decisions within a specified time-frame. There is considerable differentiation, though, with respect to both the time period chosen as well as the method of determining when the clock starts ticking. For example, section 37 of the Dikgatlong by-law stipulates that a decision must be taken within 100 days from the date of the application.<sup>74</sup> Section 92 of the by-law of Mbombela provides for a maximum of 120 days from the closing date of submission of comments or objections.

The majority of by-laws (all except Dikgatlong, Rustenburg and Mogalakwena) went further and also included provisions aimed at

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<sup>71</sup> Section 30(1)(a) of SPLUMA.

<sup>72</sup> Section 30(1)(b) of SPLUMA.

<sup>73</sup> Section 30(2) of SPLUMA.

<sup>74</sup> Section 37 of the Dikgatlong Local Municipality Land Use Management By-law.

addressing non-compliance with the specified time-frames. For example, section 106 of the Engcobo by-law provides that, if no decision is made by the Municipal Planning Tribunal within the period required in terms of the Act, it is considered undue delay in terms of section 40(9) of SPLUMA. The applicant or interested person may report the issue to the municipal manager, who must then report it to the municipal council and the mayor. Another consequence of exceeding the maximum time period may be that it opens up recourse for the applicant in the form of an appeal. For example, section 42 of the Sol Plaatjie by-law provides that an applicant may lodge an appeal to the Appeal Authority if the authorised employee or the MPT fails to decide on an application within the period referred.<sup>75</sup>

A review of the by-laws suggests that there hardly is any appetite for the integration of authorisations. Out of the fifteen municipalities, only Johannesburg made reference in its by-law to the possibility of issuing integrated authorisations. The situation is different with respect to the alignment of decision making procedures to which a substantial number of by-laws (including Johannesburg) made reference. This is not to say that the by-laws always took the matter much further than what is provided in SPLUMA. For example, section 47(3) of the Tswelopele by-law provides that, if a municipality and an organ of state elect to exercise their powers jointly, they may enter into a written agreement that provides a framework for the coordination of the procedural requirements for applications submitted in terms of the municipal by-laws and other legislation. This essentially restates SPLUMA. Schedule 5 of the Nongoma by-law goes a little further by providing for the joint publication of land use application and environmental authorisation notices. In other words, it provides that an applicant may alert the public of both an application for municipal planning approval and an application for environmental authorisation in the same notice.

## 5 Assessment

Against the backdrop of a series of Constitutional Court judgments, SPLUMA put municipalities at the epicentre of land use planning and land use management. The role of national and provincial governments has been reduced. An important consequence of this has been that municipalities must now adopt municipal planning by-laws. This adds a new layer of law to the existing planning framework. This planning framework is expected to address a range of challenges. Four of those are unpacked in this article. How does the by-law (1) relate to provincial law (2) link land use management to forward planning (3) address urban and rural informality and (4) reduce red tape? These four challenges by no means represent the

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<sup>75</sup> Section 42 of the Sol Plaatjie Local Municipality Land Use Management By-law.

full range of issues that the planning framework is expected to respond to but they do address some of the core issues. The central question of this article is what can be observed in the text of these new municipal planning by-laws. Do they begin to address these challenges through locally specific arrangements?

This touches on a possible advantage of clarifying the scope and nature of the planning powers of municipalities. Freed from provincial control, municipalities can now use their newfound legislative authority to innovate around these four challenges. Successful innovations can be emulated elsewhere by other municipalities. In the same vein, the impact of a failed experiment remains limited to a single municipal jurisdiction and does not drag the entire country or province down. On paper, it ought to work. However, the review of by-laws presents a mixed picture.

On the question of linkages with provincial law, references could be found in most by-laws with City legislation (Tshwane) containing numerous references to provincial law. It is clear that those municipalities envisage and attempt to regulate the intersection between provincial law and municipal law. As the planning system settles and more provincial laws are adopted, this intersection will become more and more pronounced and will start throwing up specific challenges such as finding new ways of exercising provincial supervision over land use management by municipalities. There were also municipalities that did not refer to provincial law at all, particularly in the Northern Cape, Free State and Limpopo. If and when new provincial laws are adopted in those municipalities, the by-laws will probably have to be revisited.

On the question of linking land use management to forward planning, different approaches emerge. Most municipalities contain some general provision to compel the decision maker to have regard to the IDP and/or the MSDF. Some municipalities go further and stipulate that a decision that goes contrary to the IDP can only be given on the condition that the IDP is amended. The question is whether it is appropriate to make a land use management decision, based on technical and professional considerations, dependent on a council decision to amend the IDP. Not only will it delay decision making but it also brings political decision making back into the decision. There were no specific references to giving MSDFs the opposite effect, namely relaxing the criteria or procedures when the development is consistent with the MSDF.

Most by-laws differentiate between formal and informal areas. Rural informality is sometimes defined with relative precision, i.e. by referring to the specific (old order) laws that govern this land. There are also more 'fluid' definitions that relate more to the manner in which the land is currently occupied. Some careful attempts are made in the by-laws to follow through



on the differentiation, for example with respect to who may apply for a land use approval (head of a household as opposed to the owner) and what information needs to be submitted. Only a few by-laws dealt specifically with the instruction in SPLUMA to expand the planning system into unplanned areas. Most municipalities did not go further than a general reference. However, in KwaZulu-Natal, a comprehensive framework for including traditional areas into land use schemes appears in the by-laws. It appears to be a four-pronged approach based on 1) conducting an audit, 2) being sensitive to existing practices, 3) relaxing strict controls and enforcement and 4) consultation.

Unsurprisingly, all the by-laws included timeframes for decision making with different approaches to the length and start date. Many by-laws also included consequences for the failure to meet timelines but did so in different ways. Some provide for an automatic right to appeal if the deadline is passed, others provided that the issue must be reported to the municipal manager. The review of by-laws indicates that the time is not ripe for municipalities to surrender their decision making authority to some sort of joint decision making with other organs of state, such as the provincial department responsible for issuing environmental impact assessments or the department of agriculture. The suggestion by SPLUMA to that effect is not carried through into the by-laws. However, there is considerable recognition throughout the by-laws that there is scope to align and coordinate the various procedures.

The content of the municipal planning by-laws is only a very rudimentary indicator of the direction in which the planning framework is moving on the four challenges. Much of the innovation around these matters will emerge outside of the by-laws, ie as exemptions, policies, practices and/or financial arrangements. Also, there are a myriad of challenges to the planning framework that lie outside of the SPLUMA framework and relate much more to sectoral legislation (on agriculture, environment etc). However, it does provide a useful insight into how municipalities approach these four issues.

The majority of these "first generation" by-laws seem to focus on ensuring that the transfer of power to municipalities occurs in an orderly fashion. There are very few grand schemes aimed at tackling informality or streamlining decision making across organs of state. Given the timing of the research, the magnitude of the transformation of the framework, the complexity of the issues and the interests involved, this may not be unwise. However, it is submitted that municipalities will start discovering and asserting their law making powers and use it to put forward more new and innovative approaches in the future. The framework for extending land use schemes in traditional areas in KZN is may be an early example of this.

## Bibliography

### Literature

Berrisford 2011(a) *Urban Forum*

Berrisford S "Why it is Difficult to Change Urban Planning Laws in African Countries?" 2011 *Urban Forum* 209-228

Berrisford 2011(b) *Urban Forum*

Berrisford S "Unravelling Apartheid Planning Legislation in South Africa: A Case Study" 2011 *Urban Forum* 247-263

De Visser 2016 *UJMPPS*

De Visser J "Devolution by Court Injunction: The Case of Land Use Planning and Management in Africa" 2016 *UJMPPS* 92-107

Pieterse 2007 *Urban Forum*

Pieterse E "Tracing the Integration Thread in the South African Urban Development" 2007 *Urban Forum* 1-31

Steytler and De Visser *Local Government Law*

Steytler N and De Visser J *Local Government Law of South Africa* (LexisNexis Durban 2009)

Van Wyk 2010 *PELJ*

Van Wyk J "Parallel Planning Mechanisms as a Recipe for Disaster" 2010 *PELJ* 214-234

Watson 2009 *Progress in Planning*

Watson V "'The Planned City Sweeps Away the Poor...': Urban Planning and 21st Century Urbanisation" 2009 *Progress in Planning* 151-193

Western Cape Government *Land Use Planning*

Western Cape Government *Land Use Planning Law Reform in the Western Cape* (Western Cape Government, Environmental Affairs and Development Planning Cape Town 2016)

### Case law

*City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 9 BCLR 859 (CC)

*Habitat Council v Provincial Minister of Local Government, Environmental Affairs and Development Planning, Western Cape* 2014 4 BCLR 591 (CC)

*Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v LagoonBay Lifestyle Estate (Pty) Ltd* 2014 2 BCLR 182 (CC)

*Pieterse v Lephalale Local Municipality* 2017 2 BCLR 233 (CC)

*MEC for Local Government, Environmental Affairs and Development Planning, Western Cape Province In re: Minister for Mineral Resources and Swartland Municipality and Maccsand (Pty) Ltd and The City of Cape Town* 2012 9 BCLR 947 (CC)

*Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal* 2016 3 SA 160 (CC)

### **Legislation**

*Constitution of the Republic of South Africa*, 1996

*Development Facilitation Act* 67 of 1995

*KwaZulu-Natal Planning and Development Act* 6 of 2008

*Local Government: Municipal Systems Act* 32 of 2000

*Northern Cape Planning and Development Act* 7 of 1998

*Spatial Planning and Land Use Management Act* 16 of 2013

*Western Cape Land Use Planning Act* 3 of 2014

### **Municipal by-laws**

City of Tshwane Land Use Management By-law

Dikgatlong Local Municipality Land Use Management By-law

Engcobo Local Municipality Spatial Planning and Land Use Management By-law

George Local Municipality Land Use Planning By-law

Johannesburg Metropolitan Municipality Spatial Planning and Land Use Management By-law

Kareeberg Spatial Planning and Land Use Management By-law

Kouga Local Municipality Spatial Planning and Land Use Management By-law

Madibeng Local Municipality Land Use Planning By-law

Mantsopa Local Municipality Land Use Planning By-law

Mbombela Local Municipality Spatial Planning and Land Use Management By-law

Mogalakwena Local Municipality Land Use Planning By-law

Nongoma Local Municipality Spatial Planning and Land Use Management By-law

Rustenburg Local Municipality Spatial Planning and Land Use Management By-law

Sol Plaatjie Local Municipality Land Use Management By-law

Tswelopele Local Municipality Land Use Planning By-law

Ubuhlebezwe Local Municipality Spatial Planning and Land Use Management By-law

## List of Abbreviations

DFA	Development Facilitation Act
IDP	Integrated Development Plan
LUPA	Western Cape Land Use Planning Act 3 of 2014
MPT	Municipal Planning Tribunal
MSDF	Municipal Spatial Development Framework
PELJ	Potchefstroom Electronic Law Journal
PSDF	Provincial Spatial Development Framework
RDP	Reconstruction and Development Programme
SDF	Spatial Development Framework
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
UJMPPS	Ugandan Journal of Management and Public Policy Studies