COUNTRY REPORT: SOUTH AFRICA

The Spatial Planning and Land Use Management Act 16 of 2013

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A very important new Act, *the Spatial Planning and Land Use Management Act (SPLUMA)* was enacted late in 2013. In order to appreciate the substance of the Act, it will be useful to consider the historical and legislative context from which it emerged.

Context

Before the sea change brought about by the new Constitution in 1994, municipal planning (usually referred to as 'town planning') was regulated by provincial laws (Ordinances) and implemented primarily at local government level. In the new Constitution of 1996,[1] municipalities were given *executive* authority and the right to administer the 'functional area' of municipal planning, which was also designated as a 'functional area' of concurrent national and provincial *legislative* competence. Municipal planning and the question of which level of government can carry out the function has been a significant question before the courts in several cases.[2] Precise detail of this jurisprudence is beyond the scope of this note, but the basic finding of the courts is that municipalities have exclusive executive competence in respect of municipal planning. In other words, the individual town planning decisions may only be made by municipalities. In several provinces, town planning decisions are still made in terms of pre-Constitutional provincial Ordinances.

After 1994, one of the major aims the new government adopted was, unsurprisingly, upliftment of those sectors of the population who had been under-resourced in respect of

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[1] Constitution of the Republic of South Africa, 1996.
[2] See, for example, Lagoon Bay Lifestyle Estate (Pty) Ltd vs Minister of Local Government, Environmental Affairs & Development Planning (Western Cape) and Others [2011] (4) All SA 270 (WCC); LagoonBay Lifestyle Estate (Pty) Ltd v Minister for Local Government, Environmental Affairs and Development Planning, Western Cape [2013] ZASCA 13; Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning 2012 (3) SA 441 (WCC); and Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning Case 26165/2010 (WCC) paras 55-62.

services, infrastructure and housing. This and related objects were the focus of the so-called Reconstruction and Development Programme (RDP). *The Development Facilitation Act* (DFA)[3] was enacted in order to expedite development decision-making in respect of the types of developments that would further the aims of the RDP, such as low-cost housing and infrastructural development such as roads and water reticulation works and the like. Over time, though, it became apparent that the provisions of the DFA were not confined to so-called RDP developments, but that any physical development (including upmarket housing estates and golf courses, for example) could be approved through the DFA processes. The effect of this was that many 'municipal planning' decisions were being made by the provincial Development Tribunals (the authorising bodies established by the DFA) and not by municipalities, whose approval processes were eschewed by developers in favour of the quicker, cheaper DFA processes. This was challenged in the well-known case of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal,*[4] in which certain provisions in the DFA were declared unconstitutional. These provisions were the central operative provisions in the Act. Instead of an order of immediate retrospective invalidity, the Constitutional Court ordered that the declaration of invalidity would be suspended for 24 months in order to allow for the legislation to be amended. This was due to the fact that, in many parts of the country, the only land-use planning decisions were being made by Development Tribunals in terms of the DFA due to lack of appropriate procedures and human capacity in many municipalities.

The Spatial Planning and Land Use Management Act (SPLUMA) repeals the DFA and is primarily aimed at replacing the process and decision-making bodies under that Act, as required by the Constitutional Court order discussed above.

The SPLUMA

The objects of the Act are to –

- provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic;
- ensure that the system of spatial planning and land use management promotes social and economic inclusion;
- provide for development principles and norms and standards;

[3] Act 67 of 1995.
[4] [2010] ZACC 11.

- provide for the sustainable and efficient use of land;
- provide for cooperative government and intergovernmental relations amongst the national, provincial and local spheres of government; and
- redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems.[5]

The Act applies throughout the country and 'no legislation not repealed by this Act may prescribe an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development in a manner inconsistent with the provisions of this Act'.[6] This clearly envisages that there may be other planning measures or mechanisms that are not provided for by the Act itself, but these must be consistent with the Act. Since spatial planning is currently regulated primarily at provincial level (the provincial legislation providing for the powers of municipalities in this regard), SPLUMA does not envisage the repeal of such legislation, although certain amendments will probably be necessary to ensure consistency with SPLUMA.

This is reinforced by section 4, which states that the spatial planning system in South Africa consists of four components:

- Spatial development frameworks to be prepared and adopted by national, provincial and municipal spheres of government;
- Development principles, norms and standards that must guide spatial planning, land use management and land development;
- The management and facilitation of land use contemplated in Chapter 5 through the mechanism of land use schemes; and
- Procedures and processes for the preparation, submission and consideration of land development applications and related processes as provided for in Chapter 6 and provincial legislation.

This appears to envisage a hierarchy of planning mechanisms and procedures, those at the top of the hierarchy being derived from SPLUMA and the detail of the planning decision-making processes being derived from both SPLUMA and provincial legislation.

[5] Section 3.
[6] Section 2.

The courts have recently grappled with the question of how to define 'municipal planning' vis-à-vis other planning functional areas, for which provinces have Constitutional powers.[7] In order (presumably) to provide some clarity as to where the planning functions of the different spheres of government begin and end, SPLUMA sets out three categories of spatial planning – municipal planning, provincial planning and national planning – and sets out the elements of each of these three categories in section 5. This provides some substance to the concepts of 'provincial planning' and 'national planning'. The former, in particular, since it appears in the Constitution[8] and may well have to be distinguished from 'municipal planning',[9] will benefit from legislative meaning since it has not received explicit interpretation in the cases. There may well still be some controversy about the extent of the municipal competence referred to as 'the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest'.[10] This requires drawing a line between a land use which does affect the provincial planning mandate of the provincial government or national interest, and that which does not. In practice, this line will have to be drawn initially by administrative decision-makers, but will doubtless end up in the courts for review at some stage.

Chapter 2 deals with development principles and norms and standards. The principles themselves consist of a long list in section 7 and consist of five 'umbrella' principles – spatial justice; spatial sustainability; efficiency; spatial resilience; and good administration – under which more specific principles are listed. 'Spatial justice' is aimed at the effects of past discrimination and related imbalances, and includes the principle (often a very important one in practice) that a decision-maker may not be impeded or restricted in the exercise of its discretion 'solely on the ground that the value of land or property is affected by the outcome' of the relevant decision-making process.[11]

'Spatial sustainability' principles include the 'triple bottom line' of economic, environmental and social considerations, including protection of agricultural land and limiting urban sprawl. 'Efficiency' encompasses principles of optimising existing resources and infrastructure; and designing procedures to 'minimise negative financial, social, economic or environmental impacts'.[12] 'Spatial resilience' is described as involving 'flexibility in spatial plans, policies

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[7] See, for example, the *Gauteng Development Tribunal* case (n4); and cases referred to in n2 above.
[8] Schedule 5 of the Constitution.
[9] See Gauteng Development Tribunal (n4), for example.
[10] Section 5(1)(c).
[11] Section 7(a)(vi).
[12] Section 7(b)(ii).

and land use management systems [being] accommodated to ensure sustainable livelihoods in communities most likely to suffer the impact of economic and environmental shocks'.[13] 'Good administration' aims at integration of land use management approaches, timely decision-making and public participation.

The role of the principles is much the same as the national environmental management principles in *the National Environmental Management Act (NEMA)*,[14] in that they 'apply to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land',[15] and guide various decisions and functions in terms of any land use planning law.

The Minister is empowered to make norms and standards after consultation with relevant organs of state in all three spheres of government, and they must not only reflect the principles, but they must, inter alia, include –

- a report on and an analysis of existing land use patterns;
- a framework for desired land use patterns;
- existing and future land use plans, programmes and projects relative to key sectors of the economy; and
- mechanisms for identifying strategically located vacant or under-utilised land and for providing access to and the use of such land;

'Intergovernmental support' (Chapter 3) encompasses primarily 'national support and monitoring' (of provinces and municipalities) and provincial support and monitoring. The former involves support in terms of sections 125(3) and 154(1) of the Constitution respectively; and monitoring by the Minister of aspects related to implementation of the Act, including the capacity of provinces and municipalities to implement the Act.[16] Since the interface between municipal and provincial powers in respect of land use planning has been a fairly frequent area of contestation in the courts, it is likely that this part of the Act will be very important in delineating the relevant powers of support and monitoring. It is also important to bear in mind that municipal capacity is often lacking (as recognised in the *Gauteng Development Tribunal* case) and there are important responsibilities of both provincial and national government in regard to enhancing this capacity.

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[13] Section 7(d).
[14] Section 2 of Act 107 of 1998.
[15] Section 6(1).
[16] Section 9.

National and provincial government's monitoring and supporting of municipalities must take into account the 'unique circumstances of each municipality',[17] and the Act sets out the factors that would apply to this. This is important in order to avoid a 'one size fits all' approach which would fail to recognise differences between, for example, metropolitan municipalities which have been carrying out municipal planning very effectively (as was the case with Johannesburg and Ethekwini in the *Gauteng Development Tribunal* case) and poorly-resourced largely rural municipalities with little or no historic planning capacity and experience.

Chapter 4 provides for a hierarchical network of spatial development frameworks. The Act provides for the mandatory preparation by all three spheres of government of spatial development frameworks, the objectives of which are set out in section 12. These entail coherent, forward-thinking spatial development planning that meets the development principles mentioned above. A spatial development framework (SDF) must 'guide and inform the exercise of any discretion or of any decision taken in terms of SPLUMA or any other law relating to land use and development of land by that sphere of government'.[18] The national SDF 'must contribute to and give spatial expression to national development policy and plans as well as integrate and give spatial expression to policies and plans emanating from the various sectors of national government, and may include any regional spatial development framework'.[19] A provincial SDF 'must contribute to and express provincial development policy as well as integrate and spatially express policies and plans emanating from the various sectors of the provincial and national spheres of government as they apply at the geographic scale of the province'.[20] A municipal SDF must 'assist in integrating, coordinating, aligning and expressing development policies and plans emanating from the various sectors of the spheres of government as they apply within the municipal area'.[21] Sections 13 and 14 provide for the preparation process of the national SDF and its content respectively. The SDF must, inter alia, 'coordinate and integrate' provincial and municipal SDFs.[22] The Act does not make clear whether the national SDF must precede the others or whether this process of co-ordination and integration would take place with the SDFs from other spheres already in existence. There are similar provisions for the preparation and content of provincial SDFs,[23] and their legal effect envisages all provincial development

[17] Section 11(1).
[18] Section 12(2)(b).
[19] Section 12(3).
[20] Section 12(4).
[21] Section 12(5).
[22] Section 14(c).
[23] Sections 15 and 16.

plans, projects and programmes to be consistent with the provincial SDF.[24] The Act notes that the provincial SDF cannot 'confer on any person the right to use or develop any land except as may be approved in terms of this Act, relevant provincial legislation or a municipal land use scheme'.[25]

The regional SDF is established for a 'region', a geographic area which the Minister may declare.[26] At the lowest level, the municipal SDF is required to be part of the municipality's integrated development plan. Its content is set out in section 21.

A Municipal Planning Tribunal (discussed below) or any other authority making a land development decision in terms either of SPLUMA or any other law, may not make a decision inconsistent with a municipal SDF,[27] but the authority may depart from the SDF only if site-specific circumstances justify a departure.[28] Where a provincial SDF is inconsistent with a municipal SDF, the Premier must take the necessary steps, including technical assistance, to support the revision of the SDFs to ensure consistency.[29] The Act is silent as to what happens if there is inconsistency between the national (or regional) SDF with any of the other SDFs. It is not immediately evident why this is not addressed.

In Chapter 5, headed 'land use management', the Act deals with land use schemes. A municipality is required, within five years from SPLUMA's commencement, to adopt and approve a single land use scheme for its entire area. The compulsory components of the scheme include, inter alia, provision for 'appropriate categories of land use zoning and regulations for the entire municipal area, including areas not previously subject to a land use scheme'; cognisance of relevant environmental management instruments; 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'; affordable housing.[30] A municipal SDF may also include, amongst others, provisions relating to use and development of land only with the written consent of the municipality and certain variations of conditions of a land use scheme.[31]

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[24] Section 17(2).
[25] Section 17(3).
[26] Section 18.
[27] Section 22(1).
[28] Section 22(2).
[29] Section 22(3).
[30] Section 24(2).
[31] Section 24(3).

Local municipalities within a district municipality are empowered by agreement to request a district municipality to prepare a land use scheme applicable to the municipal area of the district's constituent local municipalities.[32] This will be useful where there are capacity deficiencies at local municipality level.

A land use scheme must give effect to and be consistent with the municipal SDF and determine the use and development of land within the municipal area to which it relates in order to promote economic growth; social inclusion; efficient land development; and minimal impact on public health, the environment and natural resources.[33] It must include scheme regulations setting out the procedures and conditions relating to the use and development of land in any zone; a map indicating the zoning of the municipal area into land use zones; and a register of all amendments to the land use scheme. The land use scheme is thus essentially the same as current town-planning schemes. The name used is different presumably because schemes under existing legislation are largely urban, whereas SPLUMA provides for wall-to-wall (i.e. urban and rural) spatial planning.

Once adopted and approved, a land use scheme has the force of law, and all land owners and users of land, including a municipality, a state-owned enterprise and organs of state within the municipal area are bound by the provisions of the scheme.[34] In addition, the scheme replaces all existing schemes within the municipal area to which the land use scheme applies; and provides for land use and development rights.[35] As pointed out earlier, a land use scheme may take up to five years to adopt (if the law is complied with – possibly longer as experience suggests), so it is important that the transition period be regulated, which it is in section 26 read with Schedule 2.

There is provision for the change, amendment and review of schemes.[36] Review is mandatory every five years. Alignment of authorisations (where a land use requires authorisation under another law) is provided for in section 30. Enforcement provisions for land use schemes are set out in section 32, including provision for the passing of by-laws and the power of municipalities to apply for appropriate court orders. This section also provides for inspectors and their powers.

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[32] Section 24(4).
[33] Section 25(1).
[34] Section 26(1)(a).
[35] Section 26(1)(b) and (c).
[36] Sections 26(4) and (5); 27(1) and 28.

'Land development management', in Chapter 6 of the Act, deals with the land use decision-making processes. The Act requires every municipality to establish a Municipal Planning Tribunal (MPT) within its area to determine land use and development applications.[37] An alternative process is permitted, whereby a municipality may authorise certain applications to be considered and decided by a municipal official,[38] the municipality determining which type of application to be determined by the MPT and which by the official. The MPT, at least five members, must consist of a combination of municipal officials and persons appointed by the municipal Council 'who are not municipal officials and who have knowledge and experience of spatial planning, land use management and land development or the law related thereto'.[39]

The decision-making process of the MPT is set out in section 40. The factors relevant to the decision, including the SPLUMA's development principles, are contained in section 42, and there is explicit reference to compliance with environmental legislation. Section 45 provides that the land development application may only be submitted by an owner of the land (including the State); a person acting as the owner's agent; 'a person to whom the land concerned has been made available for development in writing by an organ of state or such person's duly authorised agent'; or a service provider responsible for providing infrastructure or utilities. The inclusion of a person to whom the land has been made available for development is interesting. This would appear to include a person who has been granted mineral rights over land that is owned by another person. In the *Maccsand* case,[40] involving the application of the Western Cape Land Use and Planning Ordinance (LUPO), the applicants argued that insistence on a holder of mining rights securing the appropriate zoning of land for mining before commencing with the mining operation would be problematic in that particular case (and similar cases) because only the owner could apply for rezoning in terms of LUPO. A non-owner holding mineral rights would therefore be precluded from applying for rezoning. Section 45(1)(c) of SPLUMA seems to address that concern. The section also provides for participation in the process by an 'interested person', the onus resting on such person to establish his/her status as an interested person. The Act does not specify what this would entail. Development applications 'affecting the national interest' must be referred to the Minister.[41]

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[37] Section 35(1).
[38] Section 35(2).
[39] Section 36(1). Term of office and disqualification from membership of MPTs is dealt with in sections 37 and 38 respectively.
[40] Maccsand (Pty) Ltd v City of Cape Town 2012 (4) SA 181 (CC).
[41] Section 52.

The Act provides that a person 'whose rights are affected'[42] by a decision taken by an MPT may appeal against that decision, and the appeal is decided by the 'executive authority of the municipality'[43] (either the executive committee or executive mayor, failing which a committee of councillors appointed by the Municipal Council). A municipality may authorise that a body outside of the municipality or 'in a manner regulated in terms of provincial legislation', assume the obligations of an appeal authority.[44] Currently, most (if not all) provincial planning legislation provides for appeal from municipalities to provincial appeal bodies. This will now not be the default position, but it appears as if the Act envisages such an appeal body only where authorised by a municipality.

Of the general provisions (including the power to make regulations and offences and penalties), there are transitional provisions, which will be important in the immediate future. These primarily deal with transitionary arrangements in respect of decisions under the DFA, which is repealed by SPLUMA, which are to be deemed to be decisions of municipalities taken in terms of the new Act.[45] In addition to the DFA, SPLUMA also repeals the following Acts: *Removal of Restrictions Act 84 of 1967; Physical Planning Act 88 of 1967; Less Formal Township Establishment Act 113 of 1991; and the Physical Planning Act 125 of 1991*.

The manner in which SPLUMA operates alongside the provincial planning legislation and the extent to which the latter will require changes to comply with the requirements of the new Act will be interesting to see. Probably the most intriguing aspect is whether the municipalities that were not carrying out their own planning decisions at the time of the *Gauteng Development Tribunal* judgment are in any better position to do so now. New legislation designed to address the shortcomings of the legislation it is replacing does not automatically ensure that those required to implement it are able to do so, after all.

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[42] See section 51(4).
[43] Section 51.
[44] Section 51(6).
[45] Section 60.