

DRAFT GREEN PAPER DEVELOPMENT AND PLANNING

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National Development and Planning Commission
Room S-1134, 184 Jacob Mar? St, Pretoria.
Private Bag X833, Pretoria, 0001.
Tel: (012) 312 9323, Fax: (012) 312 9348
Website: <http://www.dpc.gov.za>

Comments on the Green Paper should be addresses to:

The Director General
The Department of Land Affairs
(For attention: [Mr S Berrisford](#))
Private Bag X833
Pretoria 0001

Fax No: 012 - 312 9323
E-Mail: asberrisford@sqhq.pwv.gov.za

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PREFACE

It gives me great pleasure to present this report of the National Development and Planning Commission, the 'Draft Green Paper on Planning and Development'. The document represents the culmination of a lengthy and challenging process characterised by energetic debate and a great deal of consultation and research. I believe that it represents a key milestone in the development of South Africa's frameworks for land development and planning. Clearly it is not the job of a commission such as the DPC to write final government policy and I trust that the relevant government departments will take up the challenge of developing the document into effective and appropriate policies and laws. I trust too that those policies and laws will in turn lead to real change in the way in which planning and development is carried out in our country. Until we achieve that real change we remain a long way off two key national goals: reversing the divisive and discriminatory legacy of apartheid that remains so evident in the development of our towns, cities and rural areas, and obtaining a sustainable and just future for the people of those same towns, cities and rural areas.

Clearly the development of final government policy and law cannot be done by government alone and I trust that the contents of this document will serve as a useful vehicle for beginning a thorough and meaningful process of public consultation and engagement.

In conclusion, I would like to thank all members of the Commission for the time and effort that they have invested in the work of the Commission over the past 18 months. In particular, I would like to thank Professor Alan Mabin, deputy chairperson of the Commission and convenor of the Task Group that compiled this document and the other Task Group convenors: Professor David Dewar, Ms Erica Emdon and Mr Sandy Lebeso.

Ms Pam Yako
Chairperson: Development and Planning Commission.

EXECUTIVE SUMMARY

When South Africa's first democratically-elected government came into power in 1994 it inherited the fragmented, unequal and incoherent planning systems which developed under apartheid. The Development Facilitation Act no. 67 of 1995 (DFA) was passed to provide a coherent framework for land development according to a set of binding principles, to speed up the approval of development projects, and to provide for the overhaul of the existing planning framework..

The National Development and Planning Commission was appointed in terms of the DFA to advise the Minister of Land Affairs and the Minister of Housing on planning and development. Among other things, the Commission was requested to prepare a Green Paper on planning which would review and, if necessary, recommend changes to the legislation and process of land development in South Africa. This Draft Green Paper is intended to be an input into a Green Paper to be produced by the Department of Land Affairs during 1999. The department will then produce a White Paper to spell out its programme for land development planning into the future.

The Commission decided to focus on the spatial planning system for urban and rural development. It embarked on an extensive process of research and consultation with a wide range of roleplayers to gain an in-depth understanding of the current operation of spatial planning in South Africa, to identify key problems, and to seek innovative approaches to moving forward.

The Draft Green Paper on Development and Planning describes and assesses the historical background to spatial planning in South Africa and the way it has developed since 1994 from a legal, procedural and policy point of view. A key aspect is the Constitution's emphasis on co-operative governance between national, provincial and local spheres of government. While the advent of the DFA and new legislation in several provinces is informed by a new approach to planning, many problems remain. These include a lack of shared vision about what spatial development should be; a lack of co-ordination between different spheres of government and between different departments; a lack of capacity; a high degree of legal and procedural complexity; and a very slow pace of land development approvals.

The Commission emphasises the importance of establishing a shared vision and consistent direction for spatial development based on protecting the rights of people and the environment; making efficient use of resources; achieving a high quality of service from the government; co-ordinating public and private investment; setting appropriate priorities; and avoiding duplication. It supports an incremental approach based on a minimum number of government actions, and suggests setting up a departmental 'home' for development planning in the Department of Land Affairs.

The Commission's recommendations include:

- using the DFA and its principles in an amended form as the basis of national enabling legislation for integrated development planning;
- rewording, re-ordering and expanding the DFA principles so that they can be more widely understood;
- embarking on a campaign to communicate and educate people about the DFA and its principles;
- rationalising the legal framework by assisting provinces to repeal all existing provincial planning legislation and enacting a single piece of planning legislation within a national framework;
- requiring all spheres of government to produce integrated development plans and developing land development management systems which support these plans;
- clarifying the roles of the different spheres of government and the framework for decision making;
- setting up forums to improve co-ordination and integration of land development at government

level;

- putting clear decision-making power in the hands of appropriately qualified people, within a broader framework of plans approved by political decision makers;
- speeding up land development approvals;
- further decentralising decision-making to local government, within a broader framework of national and provincial integrated development plans;
- acting together with educational and professional institutions to address capacity constraints by monitoring, providing assistance and reviewing technical training.

The paper concludes by spelling out how these recommendations should be implemented. It suggests the Commission should continue to exist in a scaled-down form until March 2000 to assist provincial governments to write new planning laws on request; to assist the Department of Land Affairs to popularise the DFA principles; to convene a national workshop on planning education curricula; and to facilitate national debate on the Draft Green Paper.

1. INTRODUCTION

1.1 Origin of the Commission and its terms of reference

The Development Facilitation Act no. 67 of 1995 (DFA), was the first national planning legislation promulgated after the first democratic elections in 1994. It was passed to begin the process of transforming planning to meet the needs of the new democracy. The DFA made provision for a National Development and Planning Commission (the Commission) which was appointed, after a public nomination process, by the ministers of Land Affairs and Housing in September 1997. The Commission's terms of reference, set out in Section 14 of the DFA, require it to advise the responsible ministers (the ministers of Land Affairs and of Housing) on 'policy and laws' on 'planning development generally, including land development'.

When it began, the Minister of Land Affairs requested the Commission, among other things, to prepare a Green Paper on planning. This paper would review, and if necessary recommend changes, to the legislation and process of land development in South Africa.

1.2 Interpretation of the brief

The Commission interpreted its brief to mean the establishment of an efficient, integrated and equitable land planning and development system in South Africa, because this is essential to meet the needs of the country. This aim is articulated in a number of national policies such as the Urban Development Framework, the Rural Development Framework and the White Paper on Local Government.

The emphasis in the terms of reference on the land planning system gave the Commission cause to debate about how broad or narrow its focus should be. The initial debate within the Commission reflected a wider terminological confusion relating to planning matters within the country and the need to develop a common terminological approach. Recommendations for overcoming this confusion are discussed in Chapter.

On the one hand, there was consensus that land planning was just one sub-set of the broader concerns of more holistic development planning. It was recognised that land could not be elevated in status over other (aspatial) development issues, nor did it have an independent logic which allowed it to be pursued in isolation from a broader developmental framework. Indeed, the separation of land from wider planning concerns was characteristic of the apartheid era – something which led to widespread suspicion of the field of land development planning.

On the other hand, it was accepted within the Commission that spatial planning is important, in that most development issues have spatial implications. This aspect needs to be addressed to achieve significant improvements to settlement structure and form and to the quality of life of people living in settlements.

The Commission thus agreed to accept the focus of spatial planning on the clear understanding that developmental spatial planning decisions could not be made without reference to the full range of

social, cultural, economic, political, environmental and technological issues which impact upon, and which are affected by, those decisions.

The term 'spatial' is consciously adopted here in place of 'land'. The term 'land planning' evokes an image of systems which sought to plan all land parcels comprehensively. These are historically common, but are now widely discredited. The term 'spatial planning' refers to the organisation of space. It is a much more limited term than 'land planning'.

This Draft Green Paper focuses on the spatial planning system, particularly on the roles of different planning agencies and the relationships between them. It consequently applies equally to rural and urban areas.

It has become clear to the Commission that many of the problems within the spatial planning environment beset all aspects of planning in South Africa. These include the impact of the apartheid legacy in terms of a fragmented set of legal systems; and poor co-operation on planning between spheres of government, between government departments, and between governmental and non-governmental players. Spatial planning is the prism through which these wider issues have been identified and possible solutions to problems put forward. It is intended that this Draft Green Paper will be read as an input to addressing planning problems at their most general level, as well as one that offers solutions to the specific difficulties encountered in the relatively restricted arena of spatial planning.

Dramatic improvements in spatial planning are a necessary component of the effort to achieve national government objectives in the arena of economic development, employment creation and poverty relief.

1.3 The methods of the Commission

The Commission sought to gain an in-depth understanding of the current operation of the spatial planning system in South Africa, to identify key problems and to seek innovative approaches and solutions. It did this primarily through a process of consultation and participation with wide range of public and private actors in planning, as well as through extensive research. More specifically, the Commission has pursued its task by utilising a variety of mechanisms, including:

- a sequence of plenary sessions;
- the use of smaller task groups which focused on specific issues;
- commissioned research into specific areas such as legal frameworks, international experience and current practices;
- structured meetings with government departments;
- workshops involving stakeholders in spatial planning at national, provincial and local scales;
- calling for and receiving written submissions;
- focused Commission workshops.

1.4 The structure of this document

The document is made up of six chapters. Following this introductory chapter, Chapter 2 provides a broad outline of the history of spatial planning in South Africa, as well as a more detailed assessment of spatial planning practices since 1994. These two sub-sections together represent a contextually-specific problem statement.

Chapter 3 contains an overview of spatial planning and recommendations on this subject. In the first part, a number of central themes, which are cross-cutting in terms of the spheres of government, are identified. These include terminological issues; the need for a common national direction and form of planning; issues relating to co-operation governance and integration; discussion relating to capacity; and the need for the simplification of legal and procedural complexity. The roles of different spheres are then addressed, with particular attention paid to local government. Local government, while only forming one arena of spatial decision-making, lies at the cutting edge of planning in the sense that it is the focus within which most spatial decisions are appropriately made. The integration of two interrelated forms of planning (proactive or forward planning and more reactive land management and change) into a cohesive system, is essential.

Chapter 4 concentrates on land development and land management with recommendations.

Chapter 5 deals with analysis of the current legal complexity and makes recommendations for

simplifying the system.

Chapter 6 provides a 'to-do' list. It summarises a sequence of changes which are required in order to make the planning system more efficient, integrated and equitable.

2. PROBLEM STATEMENT

2.1 The spatial planning context

2.1.1 The spatial planning and institutional context before 1994

The planning system which exists in South Africa today (laws, policies, institutions and practices), has been shaped by many different governments, each responding to the problems which they defined as the most significant of the day. Since all South African governments before 1994 were elected by a minority, the definition of problems and the planning systems created to address them primarily reflected minority interests. The nature of these interests varied regionally so that the planning systems we have today are complex, multiple and contradictory. These systems have had dramatic impacts on urban and rural settlement patterns.

Usually, significant changes to the planning system followed periods of considerable stress and turmoil. A number of milestone periods can be identified in South Africa's planning history.

2.1.1.1 1910 to the 1930s: the spread of British planning influence

Political transformation in this period affected planning through the spread of British planning ideology, approaches and methods following the South African War and intensifying after the First World War. This led to the formulation of land administration mechanisms, such as town planning schemes, the introduction of institutional bodies such as the Township Boards, the introduction of public agencies in the housing supply system, and the location of planning administrative and decision making powers within the provincial realm. As a result, strong provincial influence over land and housing markets emerged, together with an increasing tendency to shape human settlement patterns along racial and class lines. The exclusion of black African people from urban areas took root during this time.

2.1.1.2 The 1930s, the Second World War, and post-war reconstruction efforts

The Great Depression swept through the global economy bringing about similar conditions of economic hardship in South Africa. This intensified already existing poverty levels. This was addressed by the government of the day through the implementation of new approaches to planning such as slum clearance initiatives, mass government housing; job reservation for poor whites, and the development of rigid and unsustainable 'betterment planning' methods in the rural areas. The idea of 'reconstruction' for the post-war period saw the increasingly enthusiastic acceptance of central precepts of the modernist movement such as the separation of land uses, the concept of the inwardly-oriented neighbourhood unit, and the dominance of the private motor car. These concepts powerfully underpin the mainstream practices of South African spatial planning to this day. This period saw the consolidation of the control-oriented and fragmented approach to planning already in place and laid the basis for apartheid planning.

2.1.1.3 The post-1948 era and grand apartheid

The coming to power of the National Party government brought previously oppressive features of planning into the systematic formulation and implementation of a racist planning system, in response to both ideology and shifting economic patterns, including the effects of increased urbanisation. Strengthening of the pass laws and exclusion of black people from towns were a central feature of the system. The implementation of the Group Areas Act, giving effect to the ideology of separate development mostly in urban areas, was accompanied by massive forced removal in rural areas. Increasingly inequitable access to urban and rural economic, social, and political resources along racial and ethnic lines resulted, symbolised by rural 'closer settlements' and the characteristic segregated and alienated urban 'township'. All of these activities were accompanied by the rapid growth of

planning as a distorted and repressive activity which took political ideology as its starting point, rather than something based on a people-centred and environmental ethic. TheNot all planning done during this period – in some quarters efforts were being made to ameliorate the negative effects of the government's approach at that time.

2.1.1.4 The period following the Soweto uprising of 1976

The challenges posed to the political and economic control exercised by the minority government by the 1976 Soweto uprising were met with increased control and oppression. The apartheid government dismissed and thwarted demands for change, resulting, in planning terms, in a strengthening of the control-oriented system. The results included rapidly increasing numbers of informal settlements.

2.1.1.5 Post-1985 late apartheid reforms

In the face of increasing internal and international opposition, and the growing economic and political need to accept the permanence of at least an 'insider' black group within towns and cities (as opposed to the majority of black people, kept outside urban areas by influx control laws), the government was confronted with the necessity for change. The civic movement and various non-governmental organisations pressed for change. Policy responses included the relaxation of the Group Areas Act, the recognition of the permanency of African urbanisation, and the official realisation that municipal planning was unable to tackle development needs in its existing fragmented and unrepresentative form. More rapid and consistent urbanisation, unmatched by sufficient housing, land and services delivery, entrenched the significance of informal housing and economic opportunities in the urban context. It also saw the growing acceptance of the need for security of tenure for an 'insider' group of African urban dwellers.

2.1.2 Characteristics of South Africa's planning system

The planning system which has emerged as a consequence of these influences has a number of overriding characteristics.

2.1.2.1 Fragmentation

The planning system is complexly fragmented, along a number of lines:

- *across scales* - national, provincial and local planning systems interpenetrate in complex and different ways;
- *across race groups* - Historically, different race groups have operated under different planning systems. For example, African 'locations' or 'townships' never fell under local authority planning systems. Instead, parallel systems (own laws and administrations) for controlling African areas were created. Similarly, a system of 'homeland' areas were designated for African occupation and had their own planning laws and systems;
- *across ethnic lines* - The creation of different ethnic homelands and so-called 'independent states' led to different systems operating in these different areas;
- *across geographic areas* - particularly, urban and rural areas have historically operated under entirely different systems;
- *across provinces* - significant differences existed between provinces;
- *across jurisdictional boundaries* - entirely different land planning and allocation systems operate in areas under traditional and tribal leadership;
- *across sectoral uses* - for example, various line function departments undertook planning independently of one another and different norms and standards prevailed;
- *in terms of jurisdictional instruments* - for example, an important historical planning instrument was title deed restrictions on individual erven. These are still very much in force, despite the fact that they frequently contradict Town Planning Schemes.

2.1.2.2 Control

Although mechanisms for forward planning have long existed, the town planning scheme, imported from the United Kingdom, is at the heart of the town planning system. This is based on the erroneous assumption that it is possible, and desirable, to predetermine the use of all land parcels. While this

system was strictly enforced in most white, Indian and coloured areas, only simplified versions were later introduced to urban townships, further complicating the land administration system.

2.1.2.3 Modernist influences

The shaping of town planning in the 1930s corresponded with a wide international acceptance of modernism. Most current norms and standards associated with spatial planning were devised to entrench these ideas. The ideals promoted and fostered in the modernist movement have included the concept of the free-standing building within large private green space as the basic building block of settlements; the separation of land uses; the concept of the inwardly-oriented neighbourhood unit; focusing on embedded social facilities and the dominance of the private motor car. Similarly 'betterment planning', intended to increase efficiency based on the systematic separation of uses, was implemented in rural areas. A prevailing belief underpinning this system was that it was possible and desirable to plan comprehensively – to pre-determine the use of all land parcels in settlements. A number of the precepts of modernism – particularly the emphasis on separation and the idea of self-contained neighbourhoods – accorded neatly with the ideology of apartheid.

2.1.2.4 Some implications

In urban areas influences of apartheid, land market forces and urbanisation have created a pattern of human settlement primarily characterised by racial, socio-economic and land use segregation. The phenomenon of displaced urbanisation led to the rise of large dormitory towns and other settlements, lacking any functional autonomy and designed to serve as holding areas for people who had been removed from areas designated for white occupation, dammed up behind homeland boundaries. This process also saw the extreme overcrowding of areas with a limited agricultural base with dramatic, negative, environmental consequences. In response, the accelerated 'rationalisation' of agriculture through 'betterment' programmes was intensified. In towns and cities large tracts of the urban fabric were destroyed, frequently under the pretence of slums removal or to consolidate the grand apartheid plan for separate ethnic and racial areas. This resulted in the systematic uprooting of settled communities and the creation of large, alienated islands of poverty.

The physical consequences of these processes are settlement patterns in both urban and rural areas that are often grotesquely distorted. Spatial environments are inconvenient and dysfunctional for the majority of citizens as they generate enormous amounts of movement with great costs in terms of time, money, energy and pollution. Settlement patterns make the provision of efficient and viable public transportation almost impossible, making servicing costly to the public fiscus, and constraining affordability. In addition, large tracts of land with agricultural and amenity potential have been destroyed, poverty and inequality have been aggravated and opportunities for individual entrepreneurship have been dissipated.

2.1.3 The spatial planning and institutional context since 1994

Wide-reaching changes, with profound implications for planning, were ushered in from 1994.

2.1.3.1 The legal context since 1994

The legal context since 1994 has been influenced by the Constitution, the DFA, new planning laws passed by some of the provinces and various national pieces of sectoral legislation that have had planning implications.

The Constitution

The Constitution has a bearing on the planning system in that new constitutional requirements such as co-operative governance, procedural and participatory rights to ensure accountability for decision-making, the promotion of social and economic rights and the protection of the environment create imperatives that profoundly affect planning. The new constitutional model redefines the relationships between government, by replacing the system of a vertical hierarchy of tiers with three overlapping planning processes and sets of plans, each relating to a different sphere of government.

The Constitution provides the legal framework in terms of which the national and provincial spheres can exercise law-making powers. Provincial planning is a functional area of exclusive provincial legislative competence as set out in Part A of Schedule 5. This means that the National Assembly may

not pass a law on provincial planning. National legislation can only be passed on provincial planning if the purpose of such legislation is to maintain national security, economic unity, essential national standards or minimum standards required for the rendering of services, or to prevent a province from taking unreasonable and prejudicial action (Section 44(2) of the Constitution). This is referred to as 'intervention legislation' and it prevails if there is a conflict between a provincial and national law on provincial planning.

Municipal planning and the function of regulating land development and managing land, which can be interpreted as urban and rural development and which are included in Part A of Schedule 4, are both areas of concurrent legislative competence. This means that either national or provincial laws can deal with municipal planning and land development management.

Where both national legislation and a provincial law exist concurrently and where there is a conflict between the provisions of the two, the general rule is that the provincial law prevails. The national law can only prevail in the limited circumstances set out in section 146 of the Constitution. Briefly, these include circumstances where:

- the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing (i) norms and standards; (ii) frameworks; or (iii) national policies.
- the national legislation is necessary for the maintenance of economic unity; the promotion of economic activities across provincial boundaries; or the protection of the environment.

Thus the tendency being followed in the provinces, to prepare provincial laws on provincial planning, municipal planning and land development management is broadly appropriate. The implication of the Constitution is that national law can set norms and standards, frameworks and policies in respect of municipal planning and land development management, but cannot regulate the details. As far as provincial planning is concerned, the national power to legislate is very circumscribed.

Normatively based legislation – the Development Facilitation Act

In the planning sphere, legislation has shifted, with the passing of the DFA from being control-orientated towards being normatively-based. This means that the law introduces substantive principles (norms) that must guide land development and decision-making. In addition to principles, the DFA introduces the concept of land development objectives (LDOs). These are plans approved by political decision-makers that set their objectives and targets for development and which inform the spatial and developmental imperatives of an area. These policy plans (which later will be more clearly defined but which can also be referred to as integrated development plans) are also normative in that they set out desired aims. Normative legislation calls for a proactive planning system which places the emphasis on considered judgements and the discretion of decision makers, as opposed to the application of standardised rules and regulations.

Provincial planning and development laws

Many provinces have been reformulating their planning and development laws in an attempt to create legal uniformity and to redress the apartheid legal and administrative chaos. KwaZulu-Natal, the Western Cape and the Northern Cape have passed new laws, and Gauteng is near to passing one as well. In all four cases, the paradigm ushered in by the DFA of normatively-based legislation has been followed with some provincial differences. The other provinces are all intending to follow suit. The problem with the provincially led law reform process is that each province is pursuing its processes independently of the others, and in the absence of national guidelines other than the DFA in its current form and certain gaps and inconsistencies are inevitably creeping in.

Sectoral laws

In addition, a number of new laws with powerful implications for planning such as the Local Government Transition Act, the National Environmental and Management Act, the Housing Act, the Water Services Act, the regulations passed in terms of the Environmental Conservation Act, have been enacted that superimpose a powerful set of procedural obligations on other spheres of government, especially local government.

2.1.3.2 The policy context since 1994

Since 1994 a significant number of policy initiatives, driven by various government departments, with

potential bearing on development and planning have emerged. These include:

The White Paper on Local Government

Whilst existing government policy provides a great range of inputs for planning and development, the White Paper on Local Government is critical as it places municipalities at the centre of planning for better human settlements. The new municipal planning system is founded on the concept of 'developmental local government'. It emphasises integrated development planning as a tool for realising the vision of developmental local government.

The Medium Term Expenditure Framework (MTEF)

The MTEF requires the formulation of departmental budgets on a rolling three year basis. This should permit greater levels of predictability, thereby potentially enhancing the planning system. It also provides an important component of a new planning system which ensures that plans and budgets are linked to one another.

The Urban and Rural Development Frameworks

The Urban Development Framework (1995) published by the Department of Housing, examines the current dilemmas and realities facing South Africa's urban areas. It provides a positive and common vision, albeit at a very general level, of a desired future for South Africa's urban areas in the year 2020. The Rural Development Framework, published by the Department of Land Affairs, describes how government aims to achieve a rapid and sustainable reduction in absolute rural poverty.

Spatial development initiatives (SDIs)

The Department of Trade and Industry's spatial development initiatives (SDIs) and its proposed industrial development zone (IDZ) policy are important national development initiatives, with potentially enormous spatial impacts. However, these are generally poorly co-ordinated with local and provincial plans. Their impact on local and provincial planning is profound, often expressing opposing priorities.

Other sectoral policy frameworks

Other national departments, such as Housing, Water Affairs, Transport and Environmental Affairs have developed policies that have spatial impacts and impact on planning and development. Some of these have been expressed in new regulations and legislation referred to above and have significant impact on provincial, but particularly local-scale planning.

Other policy initiatives of relevance

A variety of other policy initiatives also have relevance in the spatial planning context. For example, policy with respect to land tenure will in the long term greatly affect the security with which land is allocated, occupied and used in large parts of the country. Funding policies for municipal infrastructure and housing have strong impact on settlement planning, and are increasingly being brought into the integrated planning system. Transport subsidy policy has impact on people's choices of residential location, and the Department of Transport aims to alter these policies in order to reduce the costs of transport subsidies to the national treasury. Cabinet has recognised the importance of the spatial implications of various national policies, and has given the Co-ordination and Implementation Unit in the Executive Deputy President's office (CIU) the task of developing guidelines for more effective spatial alignment of public programmes and projects.

The Commission is aware of these initiatives, but has not sought to address their implications in detail in this Draft Green Paper. Instead, it has tried to define the elements of improvement in the planning system more generally, with potential implications for the alignment of national policy in the spatial planning field.

2.1.3.3 The institutional context since 1994

Since 1994 important institutional developments have taken place. These changes have had, and will continue to have, an impact on the manner in which the agents of development and planning are defined, and on the nature and scale of their respective functions.

Local government

While the Constitution allocates powers over planning differentially among the three spheres of government, it also insists on national and provincial action where provincial or municipal spheres cannot discharge their responsibilities respectively. There is some confusion around the level of exclusivity of jurisdiction of municipalities with regard to local planning. A significant problem for local government is the lack of a clear definition of roles and responsibilities of different government actors. This gives rise to uncertainty and poor intergovernmental co-ordination and communication.

The DFA tribunals

The DFA provides for the establishment of development tribunals at the provincial level throughout the country. They have not yet been established in every province. Provincial tribunals currently exist in Gauteng, KwaZulu-Natal, Mpumalanga, and the Northern Province. The DFA tribunal system is only required in the provinces that have adopted the DFA. No tribunals have been set up in the Western Cape which did not adopt any aspects of the DFA. Even in provinces where they exist, developers can choose whether or not to use them over and above any other route for approval of a development application. This means their significance has not been as great as it could have been, given the wide powers they potentially have to fast track development by overriding certain laws.

Co-ordination and Implementation Unit (CIU)

The Co-ordination and Implementation Unit (CIU) in the Office of the Executive Deputy President is a national institution with the potential to influence improved planning through co-ordination and communication. However, it does not necessarily have the capacity in terms of person power to take on more than a minor co-ordination role. This responsibility should probably be delegated to the Department of Land Affairs, with the CIU playing more of a management role.

Traditional and tribal leadership

Although the Constitution gives some recognition to the role of traditional leadership, the lack of specificity about the nature and scale of its involvement remains a problem. This has led to significant uncertainty, confusion and even contest over the decision-making powers of these authorities in development processes.

Leaders in traditional and tribal areas have had powers to allocate resources in rural and informal communities, and have also played an administration role in respect of land use matters. Many of them have real capacity problems and their relationship with local government has been problematic.

The recently published Municipal Structures Act recognises that traditional leaders have a role to play in municipal governance, and provides for their participation in local government affairs.

2.2 A national review of spatial planning procedures and practices since 1994

2.2.1 Introduction

As a starting point for its work, the Commission initiated a widespread review of planning practices in South Africa since 1994. The review covered all three spheres of government (national, provincial and local) and involved the full range of methods identified in Section 1.3. While the pattern which emerged varies (in that there are considerable differences between regions, between spheres of government, between rural and urban authorities and between larger and smaller local authorities), the overall picture is a disturbing one. It is not overstating the case to say that the practice of spatial planning is in considerable disarray and that serious and purposeful revision to the planning system is required for significant improvements to the quality of South African settlements, and to the lives of their inhabitants.

The synthesis of some of the major problems which follows makes no attempt to be comprehensive. It identifies a number of major interrelated problem types which occur across spheres of government, although the form of the problem often varies between spheres.

2.2.2 Lack of a shared vision

A common feature is that there is no evidence of a shared vision of what planning should be trying to

achieve in the 'new' South Africa.

At a national scale, despite the plethora of policy documents impacting on planning matters, national government has yet to successfully promote a strong shared vision and direction for planning. This is largely because policy documents have tended to originate from a particular sector, or geographic area, rather than being concerned with the totality.

The two main exceptions to this are the Urban Development Framework and the Rural Development Strategy. Both are important documents which contain many valid general insights. Both, however, are very general documents. They offer little in the way of how intentions should be achieved and, therefore, of what their implications are for planning. Further, neither has a firm departmental 'home' and therefore a powerful political champion. The main business of the Department of Housing includes only a small part of the broader urban issue, and, in the case of rural development, the disjuncture is even greater. There is little evidence that these documents are actively informing the work of other departments or the national allocation of resources. Indeed, there are inconsistencies. For example, the Urban Development Framework makes a strong case against urban sprawl. Despite this, the Department of Housing frequently awards housing subsidies in outlying areas where the land price is cheaper and the size of the plots is bigger.

Nationally, the clearest direction given to provincial and local authorities is contained within the Chapter 1 principles of the DFA and the policy approach to planning introduced by the concept of land development objectives (LDOs). All evidence received by the Commission, however, indicates that the principles have had a disappointing impact on planning practice to date, although some provinces have taken the opportunity of re-ordering and, in some cases, re-wording the principles to make them clearer. Further, principle-based planning is not being fully embraced everywhere as a preferred system to conventional approaches to planning, land development and land management.

Those provinces that have adopted and set up DFA tribunals have adopted the concept of land development applications having to be compatible with LDOs. However, in many cases, the degree of detail in LDOs, or the lack of clarity on their formulation, has been insufficient to really inform decision-making.

In local government, although the DFA principles and normatively based planning system call for substantively different spatial and procedural outcomes from those of the past, in many cases it is business as usual and historical practices and procedures simply apply. The reasons for this are various but the main ones fall into three classes.

- a. *Lack of knowledge.* In the case of many smaller municipalities, particularly in the rural areas, little is known about the principles, what they are trying to achieve or why they are necessary.
- b. *Interpretation.* A great deal of difficulty is being experienced by officials and political decision-makers alike about the interpretation of the principles and the way in which policy-based planning works. For example, in one case brought to the Commission's attention, there was long and intensive debate within a local authority about whether a township application 13km from the existing urban edge constituted 'sprawl'. A recurring theme in this regard is that many local authorities are trying to apply the principles on a one-by-one basis, without being informed by their overall intention and spirit. They are then having to confront the situation that some principles potentially conflict with one another.
- c. *Wilful recalcitrance.* In some cases, officials are deliberately ignoring or undermining the principles and policies. There appear to be two main reasons for this. The first is ideological – they do not wish to confront change and, sometimes, reject the direction of that change. The second is a rejection of the idea of nationally-standardised principles or politically-approved policy plans.

Coupled with a lack of shared vision about what planning should be trying to achieve, there is no clear, shared, understanding about how the planning system should be working in a reinforcing way to achieve desired results.

2.2.3 Lack of inter-governmental co-ordination

There is evidence of considerable confusion about the roles of different spheres of government and their relationship with each other.

There has been a major attempt at national level to change the dominant planning paradigm from a control-driven one to a more proactive developmental model. This is commendable. However, the

significance and the implications of the shift have not been adequately communicated to other spheres of government and, in many places, the shift is being resisted.

The relationship between national and provincial planning is particularly unclear. The DFA is the one major piece of national planning legislation introduced since 1994. It gives some direction in terms of the Chapter 1 principles. However, in toto, it fails to provide a clear framework within which provinces can draw up legislation which is provincially specific, but still, in principle, nationally unified.

Further, national planning is unco-ordinated. This takes a number of forms. There is no clarity about what appropriately constitutes national spatial decisions (for example, there is evidence about issues having major impacts on world heritage sites being decided on entirely local, parochial perspectives). Operationally, there is no centralised point where the spatial implications of national policies are articulated and passed down. The CIU has been established in the office of the Deputy President, but there is no clarity yet about its role. Frequently, national initiatives are almost entirely uninformed by provincial plans and may ride roughshod over them.

Many of these problems are most severe in the rural areas. Historically, these areas have been fairly strongly controlled by national legislation (for example, the Sub-Division of Agricultural Land Act no. 70 of 1970). This level of control has now been removed and local government structures are now responsible for the management of land, including agricultural land. However, in many cases they are not yet strong, confident or capacitated enough to fulfil their potential role.

In terms of the relationship between provincial and local spheres of government, again there is considerable confusion. This primarily takes two forms.

1. Firstly, there is no clear conception of what the spatial elements of a provincial development plan should include. Many of the provincial growth and development plans are relatively weak in terms of spatial recommendations. Further, those spatial decisions that have been taken have frequently not been the result of consultation and collaboration with affected local authorities. Certain of the new provincial bills and acts, such as the ones coming out of KwaZulu-Natal and Gauteng, make specific requirements for co-ordination with local plans. In other provinces, this is not the case.
2. Secondly, there are concerns in local government about the powers of intervention and approval vesting in to provincial government, via the responsible MECs. For example, certain laws such as the Less Formal Township Establishment Act (LEFTEA) and the ordinances are seen to give too much power to the MEC. LEFTEA empowers the MEC, rather than an independent body such as a tribunal or local council, to make decisions on proposed development. The Townships Board, an institution set up by some of the ordinances, does not have final decision-making powers on new land developments, it must have its decisions confirmed by the MEC. There are feelings in some quarters that new provincial legislation does not go far enough to correct this. For example, the KwaZulu-Natal Planning and Development Act provides for local authorities to undertake their own planning, but gives the MEC the power to intervene if he or she is of the view that a local plan is not in accordance with the principles in the Act, or any provincial policy or any provisions of the Act. Some argue that the intervention powers given to the MEC are so strong as to effectively remove the constitutional right of municipalities to undertake their own planning. Certainly, most local authorities before the Commission have said they favour a facilitative, supportive and co-ordinating role a role for provinces in relation to local government, not a controlling and monitoring one.

At a number of levels, therefore, operationalising the constitutional principle of co-operative governance, which will be vital in establishing a positive, reinforcing spatial planning system, requires reinforcement and support.

2.2.4 Intra-governmental relations

Here too, there are a number of serious problems.

At a national scale, most national government departments (for example, Constitutional Development, Land Affairs, Housing, Transport, Environment and Trade and Industry) have policies which could be described as falling within the spatial planning field. In terms of these, the news is both good and bad. The good news is that there has been enormous enthusiasm, creativity and energy reflected in a rash of legislative and policy programmes, invested in reforming all of these sectoral fields. The bad news is that these efforts have occurred largely in isolation of each other, with each sectoral emphasis understandably placing itself at centre-stage. Worse, there are disturbing tendencies towards turf

competition and protection. This has profoundly negative consequences. In provincial governments, it makes the task of producing a coherent policy framework extremely difficult.

The primary consequence for local government is a plethora of unfunded mandates. Local authorities are required to operate within a variety of laws, reporting procedures and even approval procedures, which impose a workload far beyond their capacity to produce. Worse, it encourages the tendency for sectoral issues to be considered in isolation, outside of any concern for the operation of the settlement as a totality, thereby making sound decision-making almost impossible. In some cases it may well even be counter-productive from a sectoral perspective. The separation between spatial development (in the form of integrated development plans – IDPs – or LDOs), transport, water and environmental issues is particularly worrying. There is a real danger, for example, that if environmental issues are considered independently by an environmental agency (considering the issues on narrow sectoral grounds), environmental issues will no longer be considered a factor when town planning approval is sought.

From the perspective of the private sector, unacceptable time delays and, consequently, land holding costs are being incurred as a result of new requirements for additional approvals, coupled with decreasing capacity within local authorities and the need to deal with a variety of line-function departments, many of which have their own agendas rather than a common corporate culture. The potential outcome of a continuation of this is that developers will increasingly flout the law by not bothering to seek approvals.

In provincial and local governments, the main intra-governmental problem is that of line-function fragmentation. Provincially, each province tends to have a department that deals with spatial planning, but related and integral planning functions often occur elsewhere in the provincial government structure. This creates competition, severe co-ordination problems and duplication.

The preparation of provincial plans requires the co-ordination of many departmental inputs. Often coherent mechanisms for co-ordination have not been found. The problem of one department co-ordinating all of the others causes problems. All departments have equal status which they jealously defend. Consequently, they do not take the process of co-ordination seriously. This has led to an increase in the practice of elevating the co-ordination function to a 'higher' level within provincial government (for example, within the Premier's office). This often results in the conceptual separation of strategic policy functions from the implementation function of line departments, to the detriment of both.

Finally, there are important ways in which the lack of co-ordination between department slows down development. Where there is a need for approval from different departments, but no time limits within which those comments must be made, applications often get stuck in a bureaucratic loop.

In local government, similar problems of line function fragmentation and co-ordination are aggravated by two different institutional forms. Metropolitan and district councils have the same third-sphere status as the structures of which they are comprised. While the Municipal Structures Act sets out the division of powers and functions between local councils and district councils, much work is required to iron out confusion and settle the division of functions more effectively. The Act allows for some degree of negotiation regarding the division of powers.

The problem of inordinately slow decision-making times is also being experienced in many local authorities. The attempt to speed-up decision-making through the DFA's introduction of tribunals has not yet had a wide impact. There are a number of reasons for this:

- despite the ability of tribunals to override historical legislation too few have been established;
- too few applications have been made in terms of the legislation to judge their efficacy properly;
- there have been procedural teething problems which have slowed down implementation;
- there is not yet an efficient administrative integration of the local authority and tribunal routes, once decisions have been taken;
- as they have been an alternative route rather than a mandatory one, the imperative to use them has not been strong.

2.2.5 Issues of capacity

Lack of capacity is one of the most serious issues facing the planning system in South Africa. There are a number of dimensions to the problem. International research has shown that capacity is a key issue in determining the shape of the spatial planning system:

- While being acutely experienced in local and provincial governments, it is by no means confined to them. There are also problems in national government.
- The problem applies to officials and to decision-makers alike. There are a great many decision-makers, particularly in local government, who have had no previous experience in spatial planning-related matters and who are battling to come to terms with the subject matter.
- There are absolute shortages of suitably qualified people in all spheres of government.
- The capacity issue has powerful qualitative and experiential dimensions. The more discretionary normative planning system ushered in by the DFA in 1995, and reinforced by other subsequent normatively-based legislation, requires a different kind of capacity to that required by the previous more rule-based system. Many officials in the field of spatial planning and development and management are finding their original training inadequate to meet these demands.
- The problem of planning demands being made by other spheres of government, particularly in local government, is compounding the problem. Many local authorities are simply unable to meet the demands being made on them and have nowhere to turn for assistance.
- The capacity problem is leading to a serious increase in backlogs of developmental applications in both large and smaller municipalities. In many cases, time delays have reached unacceptable proportions. The Commission has before it evidence of minor non-contentious approvals taking over two years to be granted. The private development sector is understandably extremely worried about the situation, which is being exacerbated by new approvals routes, such as environmental impact assessments (EIAs), being required in a relatively non-discriminating way. A further exacerbating factor is the inability of many local authorities to adequately come to terms with demands for required higher levels of public participation. The inherent tension between the need for inclusive participation and the need for speedy decision-making is very far from resolution in most local authorities.

In the face of their inability to deal with their forward planning and development application assessment duties, many municipalities are adopting fall-back positions. Two of these are common, especially amongst smaller municipalities. The one is to fall back on historical instruments (such as master plans and guide plans) which were drawn up to achieve diametrically opposed intentions to those required by the Chapter 1 principles of the DFA, and to give these new names such as LDOs or IDPs. The other is to place the forward planning affairs of the local authority in the (relatively unsupervised) hands of consultants who make no effort at building local capacity. Many of these consultants, championed by apartheid bureaucrats, are precisely the same ones who thrived on drafting instruments of apartheid, churning out standardised products with little developmental meaning, at considerable cost. This is the classic case of the 'tyranny of the unscrupulous consultant'.

2.2.6 Legal and procedural complexity

The current situation is characterised by a high degree of legal complexity which, in turn, has generated considerable, and confusing, procedural complexity.

Nationally, the coming into being of a new government in 1994 did not wipe the slate clean and usher in a new set of laws for the new democracy. The 1993 interim Constitution and the final 1996 Constitution both provided that all laws would continue to apply in the areas where they were applicable before these constitutions came into effect. Many of the national laws relating to planning are still in existence and the new national sectoral laws referred to in Section 2.1.3.1 also deal with planning matters.

In many provinces the legal complexity is even greater. In each of the pre-1994 provinces (Cape Province, Natal, Orange Free State and Transvaal), a town planning ordinance existed which governed land use management and new land development in the 'white' areas. In the former homelands (known as the 'self-governing territories' and the TBVC states in the case of the four homelands which gained nominal 'independence'), R188 of 1969 and R293 of 1962 regulated land use and ownership. R188 dealt with land allocation and other related matters in the rural areas and R293 was used for planning and land use management in the urban areas of the former homelands. After the independence of the Transkei, Ciskei, Venda and Bophuthatswana (TBVC), application of R293 and R188 became very complex. As each of these territories obtained 'independence', they acquired legislative powers in respect of land and other matters. From the date of 'independence' they were entitled to amend and repeal planning laws inherited from South Africa and to promulgate their own laws. Each of the TBVC states developed their own versions of R293 and R288 while South Africa amended R293, so that a different version of it applied to the self-governing territories. The situations is so complex that in parts of the country it is almost impossible to know what land-related laws take precedence.

The confusion caused by the multiplicity of legislation is also considerable in peripheral areas of the former white South Africa, where the absence of town planning schemes and the applicability of the relevant ordinance resulted in little effective land use planning control. Similarly, different laws applied in areas reserved for 'coloured' people. The system also resulted in considerable administrative and procedural confusion. After 1994, when the boundaries of the new provinces came into effect, the administration of these laws changed. From 1 July 1994 the power to administer the former TBVC states and self-governing territories resided with the President who delegated some of the powers to the Minister of Land Affairs. The Minister, in turn, reassigned some of the powers (the ones that could be assigned in terms of the Constitution) to the provinces. However, historical laws of the former independent states (for example, Proclamation R293) contained aspects relating to planning and local governance which have different ministers in the new dispensation, requiring different ministers to assign parts of laws to lower spheres of government. The process has not been even, resulting in confusion.

Similarly, in local government, there is legal confusion. For example, a number of the major tools of management and control (such as zoning, the removal of title deed restrictions and building regulations) derive their powers from different legislation. Procedurally, many of the complexities created through national and provincial legislation are played out in this sphere. Only a few of these are mentioned here.

Firstly, there are a range of planning instruments created historically (such as guide plans, master plans, structure plans and town planning schemes) which are still in existence and which have a different legal status. The distinction between these has become increasingly blurred. This confusion has been compounded in recent years by the introduction of LDOs in terms of the DFA and IDPs in terms of the Transitional Local Government Act. This has caused great confusion and many local authorities are unsure of the distinction between them.

In addition, transportation plans, environmental plans, and water plans have independent reporting routes and, in the case of environmental legislation, different approval processes from the processes established in terms of the ordinances.

In terms of the DFA, it is no longer necessary for developers to follow the approval route laid down in the ordinances. An alternative route exists in terms of tribunals.

In some of the ex-homelands areas, perhaps the most powerful arena of procedural and approval confusion lies in the (unresolved) relationship between traditional and tribal leaders and the newly-established local authorities.

2.3 Some conclusions

A number of broad conclusions can be drawn from the previous two sections, in the form of a general problem statement:

1. South African settlements in both urban and rural areas are generally inefficient, fragmented, inconvenient and massively wasteful in terms of both publicly- and privately-controlled resources. For many they are hostile places in which to live, offering few economic, social, cultural, environmental or recreational opportunities. In large part, this is the result of the interplay between historical spatial planning policies and practices and the implementation of the ideology of apartheid. Despite this, there are few signs that significant and wide-reaching improvements have been set in place since 1994. To this extent, the planning system must be judged to be ineffective.
2. The spatial planning system in South Africa is currently under severe strain. Some of the problems may be ascribed to teething problems associated with political transition and the establishment of a new political dispensation and developmental direction. Others, however, are structural.

These are :

- there is no strong, relatively standardised planning system in place which is clear but flexible enough to allow for local variation;
- large parts of settlements nationally are largely unaffected in any positive way by the benefits of a spatial planning system. Particularly, they receive little or no protection from the law in land-related matters;
- a reinforcing system of co-operative governance between spheres of government is essential for

effectiveness, but operationally this is not yet in place;

- the legislative and procedural framework of planning is excessively complex;
- severe problems of capacity, relating both to officials and decision-makers, exist at all spheres of government;
- land development approval procedures are excessively slow and cumbersome, to the extent that the economics of land development is being compromised and the private-sector development community is losing faith and patience with the system. In particular, there is no single, simple route for land-related applications.

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