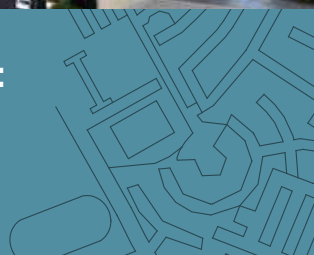




# LOCAL LAW MAKING IN CAPE TOWN: A CASE STUDY OF THE MUNICIPAL PLANNING BY-LAW PROCESS

URBAN LEGAL CASE STUDIES | VOLUME 4



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# LOCAL LAW MAKING IN CAPE TOWN: A CASE STUDY OF THE MUNICIPAL PLANNING BY-LAW PROCESS

URBAN LEGAL CASE STUDIES | VOLUME 4

## **Local Law Making in Cape Town: A Case Study of the Municipal Planning By-Law Process**

First published in Nairobi in 2015 by UN-Habitat

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United Nations Human Settlements Programme (UN-Habitat)

P.O. Box 30030, GPO Nairobi 00100 Kenya

Telephone number : +254 20 762 5518

Email: [infohabitat@unhabitat.org](mailto:infohabitat@unhabitat.org)

HS Number: HS/066/15E

ISBN Number (Series): 978-92-1-133365-7

ISBN Number (Volume): 978-92-1-132678-9

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### **Acknowledgements:**

Principal author: Prof. Jaap de Visser

Team Leader: Robert Lewis-Lettington

Design and Layout: Peter Cheseret

Editor: Robert Lewis-Lettington

Jaap de Visser

[jdevisser@uwc.ac.za](mailto:jdevisser@uwc.ac.za)

“I started this process with such big ideas. I was going to come up with all these innovative procedures to reduce red tape, it was going to be plain English, it was not going to be another Ordinance. One by one, these bright, enthusiastic ideas got squashed...”

“The scope to be radically different, is simply not there...”

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# 01 INTRODUCTION

This report examines municipal law making surrounding land use planning in the City of Cape Town. It investigates the extent to which the City of Cape Town has powers to make by-laws on land use planning and how much of that power is circumscribed by other state organs and levels. It also examines the institutional and practical context in which municipal law making takes place in order to assess the actual relevance of the city's power to make law.

The assumption, underlying the interest in city law making in planning is that cities are best placed to design local legal frameworks to address urban infrastructure challenges. The research question in the report thus becomes: *What is the legal and practical space for the City of Cape Town to use municipal law making in land use planning to realise policy ambitions such as the acceleration of housing development, progressive tenure rights and dealing with climate change?*

The Report commences with an overview of the legal and policy framework for law making after which an assessment of the City's institutional and practical context is conducted.

It concludes that municipal law making in land use planning is uncharted territory, not only in South Africa but even internationally. The reality that emerges from the research is that the space for city innovation in planning has been gradually closed down by recently adopted national and provincial legislation. Despite this, the City of Cape Town's municipal planning by-law critically deals with matters left open by national and provincial planning laws and will fulfil an important role in improving the City's ability to administer land use management.





# 02

## METHODOLOGY

The methodology used to arrive at this paper has been a combination of desktop study and interviews with key informants. The author conducted extensive research on the legal and policy framework for land use planning, an area that is subject to rapid change in South Africa. Furthermore, the author conducted four in-depth interviews with representatives of the City of Cape Town and the Western Cape Department of Environmental Affairs and Development Planning.

It must be pointed out that, at the time of the writing of this study, the City of Cape Town's municipal planning by-law had not yet been adopted and that this case study therefore relates to an incomplete process. However, as will be explained below, the experience with the drafting process and the engagement with national and provincial law making process that impact on the drafting has been extensive and spans more than two years. This ensures that there is more than enough relevant material and experience to make for a very instructive case study on city law making.



# 03 LEGAL AND POLICY FRAMEWORK FOR LOCAL GOVERNMENT

## INTRODUCTION

This overview starts with a brief examination of the powers of South Africa's three spheres of government in order to understand how the intergovernmental context shapes the City of Cape Town's law making efforts. This is followed by a few comments on the current institutional framework for local government. Finally, it will deal with the legal framework for planning with an emphasis on the emerging role for cities to make planning law.

## NATIONAL GOVERNMENT, PROVINCES AND THEIR POWERS

South Africa has nine provinces with constitutionally protected powers and democratically elected provincial legislatures. The origin and extent of their powers is important for the discussion on municipal local law making. The Constitution includes a list of functional areas, where both the national and provincial governments may make and administer laws.<sup>1</sup> Disputes over these concurrent matters fall to be decided by the Constitutional Court.<sup>2</sup> The Constitution also includes a list of areas that may only be legislated on and administered by provinces<sup>3</sup> (except in specific, restricted circumstances when national government may intervene into the exclusive provincial powers). Residual powers, i.e. powers over matters not listed in either of those lists belong to national government.<sup>4</sup>

## MUNICIPALITIES

The provinces have been demarcated into 278 municipalities. Eight of those municipalities are 'stand-alone' metropolitan municipalities. These large, single metropolitan local authorities, headed by strong visible executives, perform all local government functions in their jurisdictions. The City of Cape Town is one of those eight metropolitan municipalities.

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1 Ss 44(1)(a)(ii) and 104(1)(b)(i) Constitution.

2 S 146 Constitution.

3 Ss 44(1)(a)(ii) and 104(1)(b)(ii) Constitution

4 Ss 44(1)(a)(ii) Constitution.

The remainder of the country comprises of 44 district municipalities who are in turn made up of 226 local municipalities. Outside of the eight metropolitan municipalities, the local government system is thus a 'two-tiered' system where district and local municipalities share municipal functions.

## **HISTORY AND TRANSFORMATION OF LOCAL GOVERNMENT**

The history and transformation of local government in South Africa is important in order to understand the context within which local law making takes place. Before 1994, local government was designed to implement apartheid. Local government institutions were racially structured and the black majority was denied democratic rights. White municipalities existed to serve the white minority and contribute to the systematic exploitation of the black majority. They were given exclusive power to tax properties in well-resourced and viable commercial centres without any obligation to use the revenue to improve the lives of township dwellers. Black municipalities were undemocratic and starved of income and authority. They became the subject of large scale service boycotts in the 1980's.

The 1993 Constitution introduced major reforms when local government was given constitutional recognition and the racially determined local government institutions were merged. Further change came with the 1996 Constitution which further entrenched the role of local government. The new system was put into operation in 2000. It now comprises democratically elected political leadership:<sup>5</sup> municipalities are led by democratically elected municipal councils. It furthermore comprises constitutionally guaranteed powers.<sup>6</sup> The Constitution also secures local government's authority with regard to certain important financial matters. It empowers municipalities to impose surcharges on fees for services provided and to impose property rates.<sup>7</sup> Furthermore, it entitles local government to an equitable share of nationally generated revenue.<sup>8</sup>

As an unequivocal response to the destructive role played by local government in the past, the Constitution posits local government as a sphere of government that is responsible for important developmental matters. The constitutional 'objects of local government' are to:

---

5 S 157 Constitution.

6 S 156(1)-(2) Constitution.

7 S 229(1) Constitution.

8 S 214 Constitution.

- provide democratic and accountable government for local communities;
- ensure provision of services to communities in a sustainable manner;
- promote social and economic development;
- promote a safe and healthy environment; and
- encourage the involvement of communities and community organisations in the matters of local government.<sup>9</sup>

Municipalities must give priority to the basic needs of the community.<sup>10</sup> This developmental mandate was given further content in the 1998 *White Paper on Local Government*. It defined the developmental mandate as “local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives”.<sup>11</sup> According to the White Paper, the main characteristics of developmental local government are:

- maximising social development and economic growth (stimulating local economies and job creation);
- integrating and coordinating the efforts of all developmental actors - mainly through integrated development planning;
- democratising development (harnessing the input and energy of local citizens); and
- leading and learning (building social capital at the local level to enable local solutions to development problems).<sup>12</sup>

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9 S 152(1) Constitution.

10 S 153(a) Constitution.

11 Department of Provincial and Local Government 1998.

12 Department of Provincial and Local Government 1998.

The key outcomes that the White Paper envisages developmental local government to achieve are:

- provision of household infrastructure and services;
- creation of liveable, integrated cities, towns and rural areas;
- local economic development; and
- community empowerment and redistribution.

### **LEGAL AND CONSTITUTIONAL SPACE FOR MUNICIPALITIES TO MAKE LAW**

During the previous constitutional order, municipalities were not empowered to make law. They exercised law making powers in terms of delegated power and their laws were subject to administrative review. The Interim Constitution changed this and the final Constitution firmly establishes local law making as a legal and constitutional reality. In realising the outcomes of the White Paper, municipalities and cities were to transform from being retailers of service delivery into fully fledged governments, responsible for not only implementing but also designing and adopting laws and policies.

To take this further, a description follows of a number of factors that combine into significant legal and constitutional space for municipalities to make law. They relate to the entrenchment of local government, the fact that local powers are specifically listed in the Constitution, financial self-sufficiency as well as the status of the by-law.

#### **Constitutional entrenchment of local government**

The Constitution recognises local government as the third order of government.<sup>13</sup> There are a number of provisions in the Constitution that protect local government's institutional integrity. For example, the Constitution provides that national or a provincial government may not compromise or impede a municipality's ability or its right to exercise its functions or perform its powers.<sup>14</sup> This has generally boosted the 'confidence' of municipalities and cities in particular, as they feel strengthened by a constitutional framework that recognises local government as a third order of government.

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<sup>13</sup> S 40(1) Constitution.

<sup>14</sup> S 151(4) Constitution.

### Constitutionally protected powers over listed functional areas

Local government powers are guaranteed and listed in the Constitution. The Constitution contains two lists of functional areas that are “local government matters”. National and provincial governments may make framework legislation and oversee municipal performance in these functional areas but may not usurp the executive power of municipalities or regulate the detail of these functional areas. The list of local government powers includes significant powers such as “municipal planning”, “electricity reticulation” and “water and sanitation”.<sup>15</sup> The fact that local government powers, which include powers to make by-laws are specified in the Constitution further emboldens cities as they can claim specific substantive areas as ‘their own’ as opposed to relying on broad interpretation.

### Financial Independence

As explained above, municipalities enjoy constitutionally recognised revenue raising powers. Municipalities, particularly cities are largely self-financing which enhances their status in interactions with other levels of government. While provinces raise only 3 percent of their income, with the rest provided by national transfers, local government is largely self-sufficient. For example, local governments raised 73 percent of the revenue in 2009/10 for their operating budgets.<sup>16</sup>

### Constitutional powers to make law

The constitutional powers of municipalities include law making powers. The Constitution provides that municipalities may make and administer by-laws.<sup>17</sup> In addition, this power to make by-laws is not just a power to make rules to facilitate administration. The Constitutional Court, in one of its earliest decisions on local government dismissed the idea that municipal by-laws are administrative acts. The Court made it clear that “local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself”.<sup>18</sup> Thus, the Court concluded that the enactment of legislation by an elected local council acting in accordance with the Constitution is a legislative and not an administrative act, and is therefore not subject to challenge by “every person” affected by it on the grounds of administrative justice.

<sup>15</sup> S 156, read with Schedules 4B and 5B Constitution.

<sup>16</sup> S 229(1) Constitution. National Treasury, 2011, *Explanatory Memorandum to the Division of Revenue Bill* National Treasury: Pretoria.

<sup>17</sup> S 156(2) Constitution.

<sup>18</sup> *Fedsure*, at para 26.

## GENERAL LIMITATIONS ON LOCAL LAW MAKING

While the institutional framework thus seems to provide ample opportunity for local law making and the policy framework for local government expects municipalities to be agents of development and innovation, this has not resulted in much law being produced. Between 2006 and 2013 the three largest cities in South Africa, namely eThekweni (Durban), Johannesburg and Cape Town, respectively passed five, six and 22 by-laws. A number of general constraints, applying to the local government sphere in general, can be identified. These apply, in varying degrees, to the City of Cape Town.

### Constitutional limitations

The abovementioned constitutional space for law making is by no means unbounded. Cities may make law but within the parameters determined by the Constitution. These parameters manifest themselves in two ways.

First, as indicated earlier, national and provincial governments may also make laws on those 'local government matters.' This is a 'framework' power, which means that the national or provincial law may not extend to the detail of the administration of the issue but must leave policy discretion for municipalities. For example, while the Constitution allocates "municipal planning" to local government as a constitutional power (see below), national and provincial government may also make laws on "municipal planning" as long as they limit themselves to framework legislation.

Secondly, local government's constitutional powers are not found in hermetically sealed compartments. There is significant overlap between the constitutional powers of national government, provincial government and local government. For example, while the Constitution allocates "municipal planning" to local government, the cut-off points with provincial and national constitutional powers with respect to "provincial planning" and "urban and rural development" are not easy to identify.

### Contextual limitations

Aside from the legal limitations, there are significant contextual factors that impact local law making in South Africa. Local government and cities in particular are experiencing social protest at a scale that is unprecedented since the fall of apartheid. Communities regularly protest against service delivery backlogs, maladministration and corruption. Recent research indicates that in the period 2007-2011, there was an average of 11.61 protests per month.<sup>19</sup> A number of reasons can be advanced that resonate throughout the sector.

<sup>19</sup> Service Delivery Protest Barometer (with D Powell) [www.mlg.org.za](http://www.mlg.org.za) (2012)



First, local government is a sphere of government that is still undergoing transformation. The suite of laws governing local government institutions was completed only a few years ago. Furthermore, the amalgamation of multiple local authorities into single municipalities, both in terms of inclusion of rural hinterlands into local authorities as well as the integration of multiple municipal administrations took a tremendous toll on municipalities. Dealing with amalgamation and institutional reform has prevented many local governments from exploring their legislative potential.

Secondly, local government is operating under severe resource constraints. Persistently high unemployment rates and the economic downturn have put enormous pressure on local government's ability to raise revenue through property rates and service fees. At the same time, there is pressure to deliver basic services, such as water, sanitation and electricity to previously underserved areas. Local government battles huge service delivery and backlog challenges.

Thirdly, municipal performance is thwarted by maladministration and corruption. In the report on the latest audit findings, the Auditor-General identified unfilled vacancies, inadequate recruitment, impunity and the absence of political leadership as root causes for the poor performance of local government in financial management.<sup>20</sup> Communication and accountability relationships with communities are often poor and many municipalities experience internal governance problems and sometimes even corruption and fraud.<sup>21</sup> Poor financial management, resulting in negative audit opinions are the order of the day.<sup>22</sup>

Fourthly, a lack of scarce skills such as engineering, financial management and planning seriously frustrates the ability of municipalities to implement their developmental mandate.<sup>23</sup>

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20 Auditor-General South Africa (2013) *Consolidated General Report on the Local Government Audit Outcomes* Pretoria: Auditor-General at p 9.

21 Department of Cooperative Governance and Traditional Affairs (2009) *State of Local Government in South Africa National State of Local Government Assessments*, Department of Cooperative Governance and Traditional Affairs, Pretoria.

22 Department of Cooperative Governance and Traditional Affairs (2009) *State of Local Government in South Africa*, Department of Cooperative Governance and Traditional Affairs, Pretoria.

23 Department of Cooperative Governance and Traditional Affairs (2009) *State of Local Government in South Africa* Department of Cooperative Governance and Traditional Affairs, Pretoria.



# 04 THE EMERGING LAW MAKING POWER FOR CITIES IN PLANNING

## INTRODUCTION

After broadly sketching the terrain within which the City operates, the case study now proceeds with a description of the legal framework for land use planning as this is the sector within which the municipal planning by-law is located.

As will become clear throughout the discussion of the planning by-law process, the scope for the City to determine the content of its by-law is determined by the constitutional position on how planning powers are divided between national, provincial and municipal governments. For a long period, there was uncertainty as to how the land use planning system was going to adjust to this new constitutional position. For a variety of reasons that are not traversed here,<sup>24</sup> the national government was unable to change planning legislation until 2013. In 2007, a Bill had been submitted to Parliament but later withdrawn. One of the key reasons underlying these difficulties was the uncertainty with regard to the division of authority between national, provincial and local government.

The Constitutional Court played an important role in unlocking the debate. The continued fragmentation of planning legislation prompted the Constitutional Court to remark that “[t]his situation cries out for legislative reform” in its judgment on the Development Facilitation Act (see below).<sup>25</sup> When the Constitutional Court indeed struck down parts of the Development Facilitation Act and gave national government a deadline to change the law, this provided the necessary impetus to see the law reform through, resulting in the passing of the Spatial Planning and Land Use Management Act of 2013.

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24 See, for example, Berrisford S “Unravelling Apartheid Spatial Planning Legislation in South Africa - A Case Study” *Urban Forum* (2011) 22:247–263.

25 *City of Johannesburg Metropolitan Municipality v Development Facilitation Tribunal* [2010] ZACC 11 at para 33.

In the meantime, the Western Cape Government also pursued legislative initiatives to reform the planning system. In 1999, the Western Cape Government passed and signed into law a Western Cape Planning and Development Act. However, this law was never implemented. On the back of the momentum of the abovementioned Constitutional Court judgment and a renewed effort started in 2009 to draft a provincial planning law. This law has been submitted to the Provincial Parliament and is likely to be passed in 2014.

In summary, the period 2009-2013 saw a series of court judgments combined with legislative efforts at national and provincial levels. All of this combined ensured that the uncertainty with regard to 'who does what' made way for greater clarity, albeit still leaving many a question unanswered.

## CONSTITUTIONAL POSITION

Central to the debate about local law making on land use planning is the fact that the Constitution mentions four functional areas that refer directly to land use and that it distributes power over those four areas over three spheres government, including local government. Those functional areas, some of which have already been mentioned above, are listed below.

- "Municipal Planning" is listed in Schedule 4B of the Constitution and is therefore an area of original municipal competency. National and provincial governments both have authority to oversee this through framework legislation, without depriving municipalities of executive decision making authority.
- "Provincial Planning" is an exclusive provincial competency, listed in Schedule 5A. Only provincial governments may legislate and administer provincial planning (barring exceptions).
- "Urban and rural development" is a Schedule 4A competency: both national and provincial governments may legislate and administer urban and rural development. Should national and provincial laws contradict, the criteria of section 146 of the Constitution will be used by a court to determine which law prevails.
- "Regional planning and development" is also Schedule 4A competency: both national and provincial governments may legislate and administer regional planning and development and disputes are resolved.

The adequate implementation of the above division of authority by the Constitution is further complicated by the fact that the Constitution distributes authority in areas such as housing, water, transport, heritage and the environment, areas that intersect with land use planning.

This complicated constitutional scheme was imposed by the 1996 Constitution on a land use planning sector that still operated in terms of a legal framework that was seriously fragmented, comprising of old order provincial and national laws and post-1994 legislation.<sup>26</sup> It goes beyond the scope of this paper to detail the complexities that emanate from this but it is safe to say that the debate revolves around four questions.

### Who decides land use applications?

Currently, the granting of land use rights (through the adoption of zoning schemes or decisions with regard to specific applications) is often done by provincial government. In many parts of the country (including most major cities), local authorities grant land use rights but they do so on the basis of delegated authority and subject to appeals to the provincial government.

With the 1996 Constitution allocating “municipal planning” to local government, the question arose as to whether municipalities (and therefore cities) have not become constitutionally empowered to decide on land use applications? After a long period of uncertainty and simmering disputes, this matter was resolved in favour of local government. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,<sup>27</sup> the City of Johannesburg took issue with the provisions in the Development Facilitation Act<sup>28</sup> that permitted provincial development tribunals to determine applications for the rezoning of land and the establishment of townships. It based its argument primarily on its constitutional authority over the Schedule 4B competency “municipal planning”. The Constitutional Court agreed with the City and struck down parts of the DFA. This judgment is widely seen as an assertion of local government’s decision making power over land use control. The judgment made it clear that cities are constitutionally empowered to decide on land use applications.

26 See Stephen Berrisford “Unravelling Apartheid Spatial Planning Legislation in South Africa - A Case Study” *Urban Forum* (2011) 22:247–263; Jeannie van Wyk “Planning in all its (dis)guises: spheres of government, functional areas and authority” *Potchefstroom Electronic Law Journal* 2012(15) 5.

27 2010 (9) BCLR 859 (CC) (referred to as *DFA* (CC)).

28 Act 67 of 1995, in particular section 33.

However, this does not necessarily mean that they are the only decision makers. The national Spatial Planning and Land Use Management Act 16 of 2013 envisages that the national government will decide development projects that trigger the national interest while some draft provincial laws (including the Western Cape Land Use Planning Bill, 2013) envisage the provincial government deciding on development projects that trigger the provincial interest.

This thus makes for a complicated scenario where a single development may trigger three planning decision making processes (apart from environmental and other processes).

### **Are municipal decisions reviewed by the provincial government?**

Given the history of cities exercising planning authority in terms of delegated power, their decisions were always subject to administrative appeals: citizens could take municipal decisions on appeal to the provincial government. Most provinces are intent on maintaining this system in a watered-down version even though it is doubtful whether the provincial decision making, on appeal, over municipal planning issues is constitutional.

### **Can national and provincial governments dictate spatial plans?**

Municipalities, including cities, are empowered by new local government legislation to adopt spatial development plans. These plans express the forward planning ambitions of the city. They are important policy instruments but ultimately not legally binding. In the development of the new planning framework, attempts were made by national and provincial governments to enable the adoption of national and provincial spatial development plans that would legally bind municipalities and therefore reduce their discretion.

**Who makes rules for the administration of land use planning?**

In terms of the new framework, national government adopts legislation to regulate land use planning, including municipal planning. Provincial governments adopt provincial laws on a range of issues that are too detailed and province-specific to be captured in a national framework law. In all of this, the question is: who should regulate the detailed rules regarding the administration of land use planning? Who should regulate application procedures, timelines, participation by third parties, validity of land use approvals etc.? Some argue that this is best regulated by provinces with no further regulation at local level. However, others, including the City of Cape Town assert that the regulation of detailed rules regarding the administration of land use planning is best regulated at local level in municipal by-laws.





# 05 CITY OF CAPE TOWN AND THE WESTERN CAPE GOVERNMENT

## **CITY OF CAPE TOWN**

The City of Cape Town is located in the Western Cape Province. It spans 2,461 km<sup>2</sup> and has a population of 3.7 Million living in just over a Million households. The City of Cape Town combines wealthy suburbs and coastal splendour with a growing number of high density informal settlements, flood-prone areas, more than 294 kms of coastline, mountains, nature reserves but also heavy industry, various tourism hubs and multiple business districts. It thus represents a microcosm of city planning challenges and opportunities, requiring innovation and responsiveness in policy making.

It is also the only one of eight metropolitan cities in South Africa that is governed by a political party that is in opposition to the ruling party at national level. It is thus less inclined than the other metropolitan cities to defer to national government policy and generally more interested in pushing the envelope of its powers. It is the most active municipality in the country when it comes to local law making (see above).

## **WESTERN CAPE PROVINCIAL GOVERNMENT**

The laws, policies and attitudes of the provincial government of the Western Cape strongly influence the ability of the City of Cape Town to make municipal planning law. The Western Cape government has always played a very strong role in land use planning. The legal regime for the control and regulation of land use in the Province remained unchanged for a very long time after the fall of apartheid. The principal law, used throughout the province is the Land Use Planning Ordinance 15 of 1985, a remnant of the apartheid era. The Ordinance provides for a very strong provincial role in land use planning. For example, zoning schemes and zoning scheme regulations, which are the primary instruments for municipalities to grant rights to develop land, are approved by the provincial government. In addition, the provincial government has the authority to overturn municipal decisions on appeal. Lastly, the Ordinance permits the Provincial Government to control the delegation of land use control powers to municipalities. This strong provincial role in land use planning

is changing rapidly. The national government has adopted a Spatial Planning and Land Use Management Act,<sup>29</sup> which devolves significant powers to local authorities. In addition, the provincial government adopted the Western Cape Land Use Planning Act,<sup>30</sup> which adds further detail to the devolution of planning functions to local government and envisage large scale devolution of authority to local governments in the province.

If the Bill is examined on the basis of the four questions discussed above, it is clear that the Western Cape Land Use Planning Act ("LUPA") is premised on devolution of planning authority to local government whilst retaining a limited oversight and decision making role for the provincial government. The Department is preparing for major reorientation of its work, away from administering planning laws to supporting the administration of planning laws by municipalities. Throughout this process of legislative design and reorientation on the part of the provincial government, it has consistently viewed the City of Cape Town as its most important stakeholder, being the home to 65% of the province's population<sup>31</sup> and the site of the overwhelming majority of land use planning decision making (30 000 building plans per year<sup>32</sup>) in the province.

LUPA follows the approach set out in the *Gauteng Development Tribunal* judgment by leaving the decision making in municipal planning matters to municipalities, thereby ending the era where municipalities acted in terms of delegated authority. However, with regard to matters that trigger the provincial interest because of a region-wide impact, it insists that provincial decision making is required. It abolishes the appeal to the provincial government and requires internal mechanisms within the city to fulfil the appeal function. With regard to forward planning, it envisages spatial plans at provincial and municipal level. It regulates a system of 'alignment by firm persuasion' rather than by legal force. Importantly, municipalities will be permitted to take decisions contrary to their own spatial development frameworks. Finally, an important feature of the draft provincial legislation is its reliance on municipal by-laws. In terms of the fourth question above, the provincial law takes the position that municipalities must develop their own legislation to complement the national and provincial laws.

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29 Spatial Planning and Land Use Management Act 16 of 2013.

30 Western Cape Land Use Planning Act 3 of 2013.

31 Western Cape Provincial Treasury *City of Cape Town Regional Development Profile* 2012, p 2.

32 Interview City Official 10 October 2013.

On the whole, in the process of drafting this provincial legislation and consulting municipalities on it, the provincial government has consistently reduced the regulatory density of the provincial law, in favour of local government. As one official put it:



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***LUPA is getting thinner and thinner. We have filtered our Bill and tried to get the municipal stuff out.***





# 06 THE MUNICIPAL BY-LAW

In 2010, the City of Cape Town initiated the drafting of a by-law on municipal planning. The City's Planning and Building Development Management Department (resorting under the Directorate: Strategy and Planning) is the main driver of the by-law.

The City has set up a Technical Task Team to develop the by-law. This Task Team is comprised of representatives from various branches in the City, including:

- housing (including informal settlement upgrading);
- engineering services (roads, transport, stormwater);
- legal services;
- environment;
- spatial planning; and
- security.

Broadly the process of the development of the by-law is as follows.

1. the task team develops a draft law;
2. the draft is subjected to legal vetting and a compliance sign off by a dedicated legislative unit in the City;
3. the Portfolio Committee approves the draft by-law to be published for public participation;

4. the City's Public Participation Unit facilitates a public participation process;
5. the draft is referred back to the Task Team for further amendments;
6. the draft is referred to the Executive Mayor and her Mayoral Committee; and
7. finally, submitted to Council for approval.

At the time of writing, a final draft of the by-law was almost ready to be vetted and prepared for public participation.







# 07

## OPPORTUNITIES AND CONSTRAINTS

### INTRODUCTION

The initial objective of the City was to adopt the by-law so that it would occupy the lion's share of the policy space surrounding land use planning. One of the primary objectives of the by-law was always to streamline and accelerate the processing of land use applications. As one of the officials pointed out:



***I started this process with such big ideas. I was going to come up with all these innovative procedures to reduce red tape, it was going to be plain English, it was not going to be another Ordinance.***



Over time, other laws entered the terrain and circumscribed the City's legislative authority. During the engagement with city officials, it became clear that the room to manoeuvre in designing and drafting a municipal planning by-law is limited. Municipal planning is not only subject to a national law on planning and a provincial law on planning. There is also a plethora of sectoral laws (on environment, agriculture, heritage etc.) that further close down the space for innovation, prompting the same official to make the following remark:



***One by one, these bright, enthusiastic ideas got squashed...***



As a result, the municipal planning by-law now deals primarily with procedural aspects of land use applications. However, there are still areas where the City may use the by-law to design local solutions. One such area relates to the tribunal system, which is outlined below.

## OPPORTUNITY: LOCALLY DESIGNED TRIBUNAL SYSTEM

It was suggested that the City can use the by-law to craft a local solution to the regulation of city structures that deal with land use applications. This relates in particular to the so-called 'municipal planning tribunals' operate.

The background to this is as follows: in an effort to remove decision making from the political realm, SPLUMA requires the City to establish a 'tribunal' that receives and considers land use applications. Details for the operation of these tribunals can be regulated in by-laws. Elsewhere in the country, planning practitioners are used to this tribunal system. They process land use applications in procedures that are tightly regulated and that in a court-like manner, as one official explained:



***They basically ran as court cases and were run by legal practitioners. The tribunal was set up as a hearing. You could request to speak to the tribunal. You would have the right to address the other parties and cross-examine them or their witnesses etc.***



In the provinces where this method gained traction and practitioners have grown used to this system, it may thus be carried forward into the way in which the new style tribunals will be regulated by either provinces or municipalities.

However, the history in the City of Cape Town is different. Until SPLUMA, the concept of 'independent' tribunals never gained traction in the City of Cape Town or in the Western Cape for that matter. Land use decisions were taken through administrative or political procedures, designed locally and characterised by flexible procedures:



***It was just a normal council committee and the chairman would say "jay" or "nay" if somebody wants to make a presentation, give fifteen minutes and that's it....***



While SPLUMA now forces the City to adopt a tribunal system, it does not prescribe the tribunals' operating procedures. The result of this is that, in giving further content to the tribunals system, the City thus has the freedom to create a tribunal system, tailored to its own history and context:



***There is quite a bit of leeway in how the tribunals will be run. The proposal for Gauteng and the proposal for the Western Cape are two completely different systems because they come from different pasts.***



### **IS LOCAL LEGISLATION APPROPRIATE?**

A very important dimension to the constraints on local law making is the fact that it is not at all a given that municipalities should, in the first place, adopt by-laws to regulate municipal planning. In fact, at the time of writing, the City of Cape Town was the only municipality in South Africa that was actively pursuing the drafting and adoption of a municipal by-law on planning.

SPLUMA legislation is virtually silent on the need for municipal legislation. Furthermore, of all the nine provinces the Western Cape is the only province that envisages its municipalities adopting planning by-laws. In fact, the Western Cape approach has triggered a debate among planners and lawyers throughout the country, puzzled as they are with this insistence on a third layer of law.



***The first time we mentioned this to them, they were completely stunned. The Free State guys told us that they are still trying to explain to their municipalities that there will be a national AND a provincial law. The municipalities were still flabbergasted about how that's going to work. To go and tell them that they need to adopt a by-law, they told us: let's not do that for the first five years. Gauteng and KwaZulu-Natal were very upset when we first mentioned this, basically because they would have to revisit their legislative approach entirely. They don't agree with the Western Cape and feel that what we want in the by-law could be in the provincial law.***



The above statements indicate that differentiation among provinces will be a reality. In some provinces, municipal by-laws will be indispensable and in other provinces, there will be no space for municipal by-laws as provincial governments will close the space down with provincial laws.

One of the consequences of the disagreement as to whether local legislation is appropriate is that the City stands alone in exploring its authority. It is unable to draw on the momentum of a broader group of assertive municipalities, actively engaging with the same policy process.

Furthermore, within the City's own administration, the clamour for municipal law on planning is not necessarily unanimous as evidenced by this statement of one of the city officials:



***As a rule we seldom had by-laws. For the last 20 odd years we have made use of the provincial law. I am 100% ok with LUPO and I can't see that the new by-law will change it significantly.***



City officials made it clear that there was hardly any learning taking place from other cities as their understanding of the role and function of by-laws differed substantially from the City of Cape Town's. In addition, South Africa's rather unique constitutional framework, providing for original listed municipal powers, challenges the ability of the City to look elsewhere for inspiration. As one city official remarked:



***"There is no municipal legislation, just provincial laws. I have looked at the KwaZulu-Natal legislation, the draft Gauteng laws, the draft legislation but didn't see much that I could use in our by-law. When I look at other jurisdictions, there isn't that much overseas either. You can look at Australian or New Zealand legislation but because their constitutional frameworks are so different, it doesn't really help to look at those."***



### Uncertainty about whether to adopt by-law or policies

There is no strict separation of powers in the City. This is the result of the Constitution not separating legislative and executive structures. As a result, the City council is the legislature but often also takes executive and even administrative decisions.

One of the many consequences of the conflation of legislative and executive roles in the City Council is that the difference between policies and by-laws is not as stark as it is in a system of strict separation between the legislature and the executive. The municipal legislature adopts laws but it also adopts policies, an activity that would be reserved for a separate executive, had there been a separation of powers.

A policy, adopted by council resolution then often assumes the same status as a by-law, adopted by the council. At times, this has left officials unclear about whether certain rules should be contained in by-laws or in policies. City officials explained:



***The line between what goes in a policy and what goes in the by-law is often blurred. The same thing happened with this one.***

***We often come across policies that have by-law provisions in them or vice versa. For example, there would be policies that prescribe offences and penalties. Another example is a recent draft by-law that set out standard-operating procedures for staff members.***



This issue also resonates in the debate about the relationship between councillors and officials which is already a sensitive area.



***I had this argument with a councillor. She argued that policies are not worth the paper they're written on. She said that policies are written by officials just to keep themselves busy. My view was that policies can be enforced through the by-law but she seemed to suggest that officials must stop drafting policies and just make laws.***



The view that emerges within the City's administration on this issue is to seek clearer separation between the two but also to insist that by-laws are not adopted without a prior policy.



***The general view that we have is that, if it regulates the working of officials or staff members then that should be contained in a policy. Anything that impacts on an outside person, must be contained in a by-law.***

***The rule, established by the Mayor's Strategic Policy Unit, is now that no by-law should be passed unless there is a policy.***



## LIMITATIONS IN THE REGULATORY FRAMEWORK

Quite often, national or provincial legislation contains rules that limit the City's space to design local solutions. This has been the major contributor to the current version of the by-law perhaps being less valiant than was originally intended.

Four manifestations of this are discussed below. They relate to the limited scope of the by-law, the liability for bulk services, the period of validity of land use approvals and the discretion to reduce the intensity of public participation.

### Limited scope of the by-law

An important constraint to the scope for innovation in the municipal planning by-law is the fact that the land use planning process, as regulated in the municipal planning by-law will not be the only approval process that applies to a particular development project. As explained earlier, a substantial number of additional decision making processes, usually dealing with environmental, agricultural and heritage aspects may apply. As the City has no regulatory competence here, the content of the by-law will not affect these processes.



***At this level of government, you can make small interventions, you can tweak here and there but you can't do anything significant. With this by-law, you can ensure that the internal processes run smoothly but the major stumbling blocks, such as the environmental approvals, we can't change.***



### Liability for bulk services

Interviewees explained how the City is prevented by national law to legislate policy decisions around 'bulk' or 'linking' services. The general principle around liability for services is clearly set out in the national legislation: external (bulk) services are paid for by the City while internal services are paid for by the developer. However, what about services that link a development to the bulk services?



***The question as to what is bulk and what isn't has always been a bone of contention. This is a result of ambiguity in the law. The provisions in the legislation are generally the way planners would describe. An engineer would describe it differently so it is not always easy for us [engineers] to implement it. The by-law should be able to provide more clarity for us.***



National legislation makes the City responsible for these services. However, the City is of the view that this is the developer's liability as these services will become private as the development intensifies and it thus intends to recuperate these costs through development contributions. Legal certainty on this issue is critical, as one of the officials explained:



***The biggest challenge for a developer is always cost. Now here we come and we add more costs or conditions that lead to cost. The argument will always be that we are not allowed to do it and we are often challenged on that. This is why this by-law is so important.***



The way forward in the end will not only have major budgetary consequences for the City but will also determine the extent of its exposure to litigation and delays.

### Period of validity of land use approvals

Another example relates to how long development approvals remain valid. The City's strategy is informed by evidence that developments often follow a seven-year cycle: a developer applies when he or she is confident and things are going well. By the time the developer has obtained the necessary government approvals, the downward trend has set in, however. This means that the funds are often no longer there and so the developer has to wait for the next upswing. The City took this evidence on board and decided to extend the time period for which approvals are valid so as to allow the developer time to regain access to finance.

SPLUMA threw a spanner in the works, however. It provides that developers must comply with all conditions to the approval within five years. Given that virtually every approval is given with conditions attached, it boils down to a five year 'lapsing clause' years.

Viewed through the prism of City's policy, the consequence of this rule is that, by the time the developer has access to the funds to develop his rights may very well have lapsed. The City expressed frustration at seeing their efforts at simplifying the law thwarted:



***It was just a small little thing to cut the red tape, not fantastic, not particularly innovative but just extending the time periods. Now we can't.***



Other interviewees indicated however, that national government has indicated a willingness to ensure that this provision will not be implemented as it will cause serious difficulties.



***There is no way that that provision will survive as it is. Virtually no substantial development will comply. They [national government] have acknowledged that***



### **Reducing time periods for public participation**

A further area where the municipal by-law could have made a difference, particularly in terms of simplifying land use application processes is in reducing time periods for public participation where that is appropriate. However, the recently adopted national legislation appears to have closed down a significant amount of policy space in this respect. Furthermore, the City must remain within the parameters set by the laws regulating the constitutional right to administrative justice, which also close down the space for shortened public participation procedures. As one official explained:





***In the past we could differentiate between applications with a wider impact, where you would advertise and notify affected persons individually and those that could be dealt with fairly easily such as a building line between two neighbours where you just get the two neighbours involved. Now, PAJA and SPLUMA force us to open up appeals even to third parties who were not involved in the initial objections phase. They can come in at a fairly late stage and start objecting. Advertising was one of the areas where we had discretion in the past and this has now also been taken away.***



Whenever the City encounters such limitations, it inevitably brings up the question as to how far the City is willing to take the disagreement.



***The question is: what do you do when you actually don't agree with the national framework? ... It's all about ... whether we are prepared to take it on.***



The fact that the City's planning powers are listed and protected in the Constitution (see above) has made a substantial difference in the City's ability to assert its authority. The City may assert such disagreements and base its argument on the Constitution. It is thus not dependent on national legislation which is subject to amendment by the same national government. The example of the City of Johannesburg successfully challenging national legislation in defending its authority to take land use planning decisions is testimony to this.

## **EVER-CHANGING GOAL POSTS**

The complexity that this situation brings about has been compounded by prolonged uncertainty on the question as to what role cities play in land use planning (see above). Perhaps one of the greatest challenges for the City in deciding how to approach the content of the municipal by-law on planning has been the seemingly never-ending uncertainty with regard to its

constitutional role in planning and the constant ‘changing of the goal posts’. The following quote is clear on how the municipal planning by-law needs to fit into a legislative framework, emanating from two senior levels of government:



***When you draft, you have to draft with at least two or three other national and provincial laws in front of you. You plug the gaps.***



Another official articulated the same sentiment:



***One of my initial comments was: how can we draft this by-law when we don't know the parameters that we have to fit into?***



As explained earlier, both the national government and the Western Cape provincial government have contemplated, discussed, consulted on, and promulgated drafts of new planning laws for the last four years. In this constant ebb and flow of legislative efforts that would critically define the City's role, the City was forced to continuously adjust its strategies to the positions as they seemed to evolve in the successive drafts of national and provincial legislation. Aside from advocating around the City's right to make its own law, the City has consistently raised concerns surrounding its ability and capacity to implement the requirements imposed by law. A simple rule in the provincial legislation, such as the requirement to notify neighbours of a proposed development in person, brings enormous cost and complexity to the City. Another example is the rule in national legislation that a third party may enter appeal proceedings, despite not having objected to the proposed development. Rules such as those were often introduced rather flippantly without consideration for the tremendous cost and complexity they bring unto the City. Generally, the City's strategy would be to argue for flexibility and insist that it be allowed space to develop its own protocols.

The next part of the paper examines challenges and opportunities related to the City as an institution. It discusses, amongst other things, the capacity and orientation of the City and its officials to produce a complicated law such as the municipal planning by-law.





# 08

## INSTITUTIONAL CONSTRAINTS

### INTRODUCTION

As indicated earlier, the City appointed a Technical Task Team to prepare the draft by-law. This Task Team seems to be working as a consultation forum where the successive drafts of the by-law are discussed.

The Planning and Building Development Management Department is responsible for preparing drafts and considering comments and seems to be shouldering most of the work, with the remaining members of the team providing inputs. Inasmuch as this is a natural work process for policy design, it does appear that not all members of the Task Team are equally invested in the project. As one official remarked:



***People are busy. You have to fight to get them to meetings.***



There is a Legislative Unit in the City Administration. It resides under Legal Services and is essentially dedicated to assist departments with drafting by-laws. Generally, it becomes involved with the by-law process shortly before the by-law is approved for public participation. They continue to play that role afterwards until the by-law is adopted. Their expertise and contribution centres around:

- ensuring a consistent and appropriate drafting style;
- assessing the consequences of the by-law for the city's administration;
- alignment with other City by-laws; and
- conducting an overall legal check, including consistency with national and provincial legislation.

In many cases, however, the absence of capacity to draft legislation in the line departments has caused the Unit to become involved much earlier.



***In an ideal world, we only become involved when the draft is ready by the Department. However, in about 10 recent by-laws we actually drafted it from scratch because there was no drafting capability in the respective departments.***



The planning by-law does not follow this trajectory. The Legislative Unit is not part of the Technical Task Team that develops the by-law. Because there is significant legal capacity in the Planning directorate, the by-law is developed from within the department with relatively little assistance from the Legislative Unit in the initial phase.



***With regard to planning, it is different. They do all the drafting and we just do the legal check.***



This was corroborated by the officials in the Task Team:



***We include them but their input is very technical. They really come in from a legal point of view.***



None of the interviewees argued that the City does not have the capacity to develop a municipal planning by-law but they all underscored the challenge of finding capacity within a City context to develop a planning by-law, a by-law that is particularly complex.



***You basically need ex-officials to draft this. The level of detail that is required is difficult for an outsider.***



## PRE-OCCUPATION WITH IMPLEMENTATION

A closer examination of the capacity and orientation of city officials lead to a number of observations that will also resonate with other municipal law making initiatives. Many of them have to do with the city official's pre-occupation with implementation as opposed to policy design.

The study brought out that a key constraint to the City's local law making is that, by its very nature, local government's attention is not focused on formulating policy and drafting laws but rather on implementation and administration. This has a number of consequences. First, city officials have to overcome their ambivalence to municipal law and policy making. As one official put it:



***Before, practitioners knew how to deal with the day-to-day workload. Now we need more and more political approval. Now you have a professional dealing with a political body and there may be a conflict of opinion. And if you have 10 professionals, you may get 10 different opinions. So we needed more rules and guidelines and started writing more and more policies and by-laws.***



Secondly, the practical consequence of the City's pre-occupation with implementation is that its officials are not often available to participate in policy design as they have pressing implementation issues to attend to. In this case study, the officials tasked with formulating policy and drafting legislative provisions were the very same officials tasked with administering various national and provincial laws surrounding planning. The fact that the city official's primary mandate is to implement, combined with the performance management culture that measures predetermined outputs, results in policy and law making often not being prioritised. The performance management culture plays a significant role in this respect. For most of the officials, involved in the development of the planning by-law, the by-law is not an output that they are measured on. One city official explained that, when the meetings about the planning by-law collide with due dates for reports to council, it is very difficult to keep the momentum going:



***What is more important: ensuring that I get a decision on the council agenda and securing an output that will be measured? Or giving input into another official's policy that is not really my priority, that's not one of my Key Performance Indicators and where I'm actually doing you a favour? Your by-law is not immediate, you don't have a closing date. I have a closing date and a developer breathing down my neck.***



This may be symptomatic: while national government can dedicate large components of its bureaucracy to the task of developing policy and drafting legal provisions, municipalities often need their administration for the administration of existing laws.

The downside of this implementation focus may be that such a pragmatic inclination can also become conservative as illustrated by the following remarks:



***Because the people work in the services departments there is no new way of doing things. They are better at outlining problems and usually call for more law.***

***We work at the level where the rubber hits the road so we're interested in pragmatic solutions rather than...stepping back and looking at issues afresh. For example, the spatial planning colleagues have just completed a brand new spatial plan so they obviously want to make sure that the by-law that we create protects their product.***



Another possible consequence of the focus on implementation that was identified was that it may result in the quality of the product being compromised. One official involved in by-law processes in the City commented in general:



***The tendency is that they are so focused on implementing and doing things, there is very little time left to develop new laws. On the last minute, there is a push to get the thing done and we end up with a sloppy product. The result is then that later amendments are necessary.***





## CONTEXT OF MUNICIPAL CAPACITY

The abovementioned argument surrounding the capacity and orientation of municipal officials is important in assessing the inclination in the overall legal system. This legal system seems to deprive cities of much of their authority to make planning by-laws. This emanates from a very real concern, though. The reality is that local government is not ready to prepare and adopt planning by-laws.

When confronted with the scenario of the City of Cape Town's challenges in deploying human resources to prepare the by-law, the response from provincial officials was telling:



***If that is the problem in the City, who has dedicated legal teams, imagine for the rest of the country. You will probably find some officials for this kind of thing in Tshwane, Johannesburg, Cape Town, KwaZulu-Natal and that's it. And then it will not even be in their job description. In the other 270 or so municipalities, there is going to be absolutely zero, nothing. ... The Constitution gives them the right to make by-laws, but it is not going to happen. ... They are so snowed under, so undercapacitated and so underskilled. There is just no way.***



The Western Cape provincial government has recognised that there is not one single municipality in its jurisdiction, except the City of Cape Town, that has the appetite and the capacity to produce a municipal planning by-law. It is thus preparing a model by-law that each municipality can adopt as its own, after making whatever changes necessary.

Apart from responding to the capacity problem, this initiative is also aimed at reducing the fragmentation that may result from different municipalities adopting different by-laws:



***The big thing for us in the Western Cape is to try to get as many municipalities as possible to work on the same set and not to deviate too much from each other. For the sector, it would be very bad if municipality A and municipality B have completely different systems for the same thing.***



## WHETHER OR NOT TO CHALLENGE NATIONAL LAW

The pre-occupation with implementation also affects the cost-benefit analysis surrounding the decision to challenge national government or not. When the City is faced with a choice between implementing or challenging an intrusive national law it is likely to choose the first, if that 'offensive' national law is workable. In other words, the City is unlikely to challenge a national law that usurps its power if it can work with the content.



***Many officials are technically oriented: as long as it works, they don't really care about the legal issues.***



The concern that the City gives up authority is thus not widely shared even though one official commented:



***If you don't assert your authority, eventually you become more and more constrained.***



In general, it appears that the Western Cape provincial government was more responsive to the City than the national government. This was to be expected, given the close proximity between the province and the City. However, it also related to the fact that the national legislative process faced a much more varied context, particularly in terms of capability to implement and request for detail. National government was forced to weigh the City's concerns regarding its autonomy up against a general desire expressed also by local government for a detailed law. Ultimately, the City's persistent and considered comments and engagements with both national and provincial law making efforts drastically reduced the number of provisions on which they did not see eye to eye.

The next part of the paper examines to what extent the by-law offers opportunities for the City to deal differently with three urban challenges many African cities struggle with.

The first is the challenge of designing a planning solution to the rise in informal settlements. The second has to do with planning systems responding to issues of tradition and custom and the third deals with climate change.





# 09

## INFORMALITY, CUSTOM AND CLIMATE CHANGE

### DEALING WITH INFORMALITY

According to the City's own calculations, there are currently 204 informal settlements of varying sizes and densities in the City of Cape Town. They accommodate approximately 145 000 households.<sup>33</sup>

A commonly held view is that the legal framework for land use planning and development management is unduly rigid and hampering the roll-out of innovative approaches to issues such as providing municipal services, introducing new forms of tenure and generally improving the liveability of informal settlements. This was corroborated by one of the interviewees in the following remark:



***We have this fixation on full title and the entire planning system is directed at that. We always thought that if you give full title, he owns it, can borrow money and can improve himself. But what we've learned is shack dwellers are not really interested in that. They are quite happy if they recognise the number on the shack with the number on the plan. There are even suggestions that, when you give full title, registered with the Surveyor-General, it actually limits the shack dweller, because he can't move his house when the river changes course.***

***The guys who work with these emergency housing situations every day will tell you: it's no use surveying and handing out title deeds. Those title deeds will be gone in a week and then nobody remembers who owns what.***



The question then arises whether the municipal by-law has the potential to create space for the City to develop new approaches to dealing with informal settlements. The envisaged by-law's potential to make a difference in the legal

<sup>33</sup> City of Cape Town *Proactive Re-blocking of Informal Settlements Policy* (30 October 2013) p 1.

framework pertaining to informal settlements and other marginalised areas appears to be threefold.

First, the by-law could be used, in theory at least, to achieve more differentiation in the substantive rules pertaining to land use rights in order to facilitate the upgrading of informal settlements into liveable and safe areas. Secondly, the by-law could be used to regulate more innovative ways of communicating with and involving residents of informal settlements and other marginalised areas when it comes to planning decision making.

When it comes to differentiation in substantive rules pertaining to land use rights, the research suggests that the prospects of the by-law itself achieving this are limited.




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***We have tried but there is not much you can do. There is no new philosophy that can be applied.***



For example, the response to the notion of using the by-law to amend engineering standards and be 'softer on development contributions' so as to accelerate the upgrading of informal settlements was ambivalent:




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***It's very difficult if a lawmaker tries to write in a law how to minimise cost - it becomes so difficult. The circumstances are individualised. These are rather dealt with in your engineering services policies and standards. Take the minimum road width. In informal settlements you may want to allow for narrower roads but that is based on a user pattern, rather than on the mere fact of informality.***



The interviewees seemed to suggest that, when it comes to facilitating the upgrading of informal settlements, the problem is not necessarily located in the planning legislation.



***There are much better ways to do this. However, should you want to go all the way and give the shack dwellers proper ownership, which you and I understand as full title, then there is very little that the by-law can do to make that easier...The planning system has been written in such a way that we get the first world answer. But that doesn't mean we always have to do that.***



A further reason that was mentioned to explain the reluctance of the City to use alternative approaches is the fact that housing subsidies are allocated by the national department of Housing to cadastral unit. And there are good reasons for that, mainly to prevent corruption and 'double dipping' into the housing subsidy system. Again, the argument was made that the planning law itself does not have to stand in the way of facilitating alternative tenure arrangements.



***If you have a large tract of land with alternative tenure arrangements with the people on there, you can easily have a general zoning "informal residential."***

***Remember, the City can always make up a zoning that is tailor-made to that situation and then people are there legally. You then engage with them on the tenure arrangements: If you want four pegs, a diagram and a title deed, unfortunately, this is the process. But if you're happy with a registered number that corresponds with a database that the City holds, then that can be done quite easily. The system allows for that but doesn't spell it out.***



The City's Policy on the Re-blocking of Informal Settlements was cited in particular. This Policy outlines the City's approach in 're-blocking', which is a "community-led process of reconfiguring the current layout of informal settlements by grouping shacks into clusters and reorganising the ground plane in such a manner as to optimally utilise space to promote the health, safety, well-being of households, with a particular focus on promoting

accelerated service delivery to informal settlements<sup>34</sup>. In its very essence, the policy aims at de-densifying the organically grown informal settlements in order to set the scene for municipal services to be rendered.

The policy envisages the City, through its various departments and in partnership with at least one local NGO to identify informal settlements and introduce programmes that:

- introduce tenure arrangements; ;
- ensure access to the informal settlement for municipal utility services as well as emergency services;
- improve security in the informal settlement;
- facilitate job opportunities for residents of the informal settlement;
- ensure open spaces;

‘Re-blocking’ does not constitute the upgrading of an informal settlement but the policy does suggest that it could be the precursor to a later upgrading process. It points out that the various departments responsible for planning related issues “shall provide spatial and design guidance and logistical support to ensure that all applicable land use approvals, zoning and environmental authorisations are obtained”. However, the Policy does not suggest any specific planning standards or planning processes.



***I’m not sure if they will have a dedicated by-law on this but I’m sure they can work something into the planning by-law to give effect to the policy.***



The interviewees saw greater prospect in the by-law when it comes to the second area of specific attention to informal settlements and other marginalised areas, namely facilitating communication around land use planning matters. The background to this is the concern that involving marginalised communities in planning matters is difficult as one official pointed out:

<sup>34</sup> City of Cape Town *Proactive Re-blocking of Informal Settlements Policy* (30 October 2013) p 4.





***Often you organise a public meeting and only three people arrive. They want to know why their sewerage is not working so they come because they have a problem with the municipality, not to discuss the policy. The concept of applying for use rights is often foreign to these communities as they are preoccupied with survival. Then again, if I go to Constantia or Camps Bay [Ed: wealthy areas] it will be full and it will go on for three hours.***



In addition, for a variety of reasons, traditional forms of communication often do not work



***Letters [calling for input or comment on proposals] are often ignored. This is because in poor areas these letters are associated with letters of demand – where the council wants money. So they are ignored.***



The by-law could facilitate improved communication with marginalised communities around land use planning decisions that affect them by providing for additional communication mechanisms such as community broadcasts, card board notices on the affected site and community radio broadcasts. However, the City will not replace any of the formal means of communication, though as one official remarked:



***It's an add-on. It can never replace the official communication.***



Another official explained the same constraint differently by emphasising that



***...the by-law can only exempt the City from its own rules. The national and provincial rules still apply.***



## TRADITION AND CUSTOM

The intersection between the municipal planning by-law and issues of tradition and custom seems to revolve mainly around the issue of initiation sites. Close to a third of the City's population is Xhosa speaking. Xhosa boys are expected to undergo initiation as a rite of passage into manhood. The ritual involves a prolonged stay in an initiation camp, away from built up areas. While these rituals were traditionally conducted in the rural Transkei, urbanisation has resulted in more and more initiation rituals taking place in urban areas. It has thus become important to find appropriate spaces in the City that are sufficiently remote and suitable to perform the required rituals. The City officials indicated that the City's 'Community Facility' zoning allows for sites to be used for initiation. It was also suggested that municipal commonages (i.e. owned by the municipality), usually zoned for 'agriculture', can be used.

They suggested that the content of the by-law itself will not have a significant impact on the issue of finding locations suitable for initiation rituals. It is rather in the city's decision making surrounding the zoning scheme and rezoning where these issues can be appropriately addressed.



***The issue is more the availability of land, rather than the rights or zoning. For someone in Khayelitsha: where is he going to go to?***



As the by-law deals predominantly with procedural aspects, the question arises whether custom and tradition can be accommodated in those procedural rules. For example, can the by-law accommodate customary rules about community leaders or structures speaking on behalf of households or neighbourhoods?



***I don't see the impact of custom on procedures. If I'm going to have to accommodate custom I'm not sure that I'll get a uniform procedure. There are various structures and community organisations in different areas and then you'll get into arguments about who is representing whom.***



Instead of crafting specific, tailor-made procedures for specific customary settings, the by-law is rather creating greater flexibility when it comes to the methods of communication (see below).

## CLIMATE CHANGE

On the question as to whether this particular by-law presents specific opportunities for the City to pursue its own strategic objectives pertaining to climate change adaptation and mitigation, the response of the officials was somewhat muted.



***I can link one or two things in the draft by-law to climate change but generally I would say no. This is a law on how you deal with processes and planning. Of course, you must consider climate change, when it comes to urban sprawl, zoning schemes and spatial planning.***



Indeed, officials are acutely aware of the importance of factoring various climate change considerations into planning decision making. For example, in terms of the upcoming legislation, the City will be able to impose conditions specifically related to climate change. The City is already duty bound to adhere to national legislation with regard to coastal zones, which are included in the zoning scheme as overlay zones. Generally, in assessing the desirability of specific developments, climate change considerations may very well be included.

However, it seems that most of the substantive climate change related legal issues are entering the City's land use planning activities on the back of national and provincial legislation as opposed to finding their origin in the City's by-law.



***It's not that climate change is not accommodated. It's just that this by-law, which is mainly about procedures, doesn't need to have such strong regard to it.***



This is not necessarily due to legal uncertainty but rather as a result of reluctance to impose further constraints to development in addition to an already dense national and provincial legal framework.



# 10 PUBLIC PARTICIPATION AND EVALUATION

## **PUBLIC PARTICIPATION**

The City has a standardised public participation procedure that applies to the preparation of by-laws. In writing the product, city officials include internal stakeholders. At times, these may be experts, commissioned to review the product. For example, as part of the public participation process, the planning fraternity will be specifically requested to provide a technical comment before the by-law is made available for public comment.

Subsequent to that and after the Portfolio Committee has authorised the Bill to be put out for public participation, a public participation procedure will be initiated. This procedure centres around consultation on a draft by-law and the City's subcouncils will play a critical role in this process. This process is managed by the City's Public Participation Unit which is dedicated to managing these types of public interface issues. The Public Participation Unit will compile inputs and forward them to the responsible Department. The substantive issues will have to be managed by the Technical Task Team.

The City is divided up into 24 subcouncil areas. For each subcouncil area, a subcouncil exists, comprising of the ward councillors of that area and an additional number of proportionally elected councillors. The key objective of these subcouncils is to facilitate public participation. They will thus play a critical role in facilitating consultations with regard to the draft by-law. The involvement of politicians in the public participation process at an early stage will enhance the legitimacy of the project. The city officials envisage, though, that the politicians will need to be equipped with the necessary knowledge of the draft by-law in order to effectively conduct public participation. The content for the public participation events (slides, documentation) will be prepared by the officials, the councillors will be trained by officials on the by-law and the idea was mooted to provide the councillors with a list of Frequently Asked Questions (FAQs) together with answers as part of the preparation.

There was little if any indication that the property development lobby, which is a strong and powerful constituency, has been allowed to directly influence the content of the by-law other than through normal participatory engagement. It seems that the by-law is drafted within a fairly confined legal space with limited room to manoeuvre. Concerns of the property development lobby seem to relate mostly to issues related to the calculation of development contributions, the reduction of red tape and the consideration of appeals.

The City is unlikely to make dedicated effort to specifically engage other organs of state, such as national and provincial government departments and parastatals on the draft by-law. They will rather be treated as interested parties that may comment on the published drafts. The only exception is the engagement with the provincial department, responsible for planning.



***We will interact very closely with the provincial government to make sure that the by-law and the provincial legislation align. They already received my original draft which they then started using to prepare a model for other municipalities.***



## EVALUATION

This section of the report examines the measures that are planned to assess the **impact** of the municipal planning by-law. Before discussing the responses of the interviewees in this respect, it is important to highlight an advantage to local law making that often does not apply to law making at a senior level of government.

### Incentive to produce a workable by-law

The fact that city officials must combine policy design with implementation makes for an ideal platform to create a workable law. While national and provincial officials often design laws for other organs of state to implement, city officials are now designing a law that they themselves will have to implement. There is therefore a very real incentive to produce a workable law.



***It would be very frustrating for the City if they immediately picked up problems for example if the timeframes are too tight. Now they can't amend it because it's not their own. If they themselves are the users of the thing, they can improve it quite quickly because it will make their own life better.***



The planning by-law has not yet been finalised and the first priority is to settle the content of the by-law, before much thought can be put into conducting an impact evaluation. However, the respondents did have views on how the by-law should be evaluated.

There seem to be two broad indicators in terms of which the by-law will be evaluated. The first relates to the efficiency of the by-law: in other words, can it be properly implemented or does it need amendment to iron out implementation difficulties? The second relates to the efficacy of the by-law: is the City achieving the objectives that it wanted to achieve with this by-law?

### Efficiency

The discussions about the evaluation of the efficiency of the by-law brought up a further advantage to local law making. The fact that the City is adopting a law that it will administer as opposed to adopting a law that other agencies will administer has clear advantages in terms of evaluation. The respondents were not too concerned with the need to establish advanced evaluation systems to measure the efficiency of the by-law. As one official explained:



***Once we start working with the by-law, the work will indicate where there's something wrong and we can make amendments.***



### Are the objectives being achieved?

In terms of measuring whether the objectives of the by-law will be achieved, respondents envisaged two avenues for evaluation.

First, the by-law will require a register of land use applications. This means that the City will register each application that has been approved. This register will assist citizens in obtaining access to their application and it will also assist the City in monitoring what has been approved. A tracking system will be used to provide information on how long it takes to finalise an application. Improvement of the City's land use planning administration is one of the key objectives of the by-law, which can thus be measured with the assistance of this system.

In addition, there are a number of statutory reviews that pertain to other land use planning instruments, such as the zoning scheme and the spatial development framework. The Spatial Planning and Land Use Management Act

will require the City to review its spatial development framework at least once every 5 years. The Western Cape Land Use Planning Bill prescribes a review every 10 years. Similar rules will apply to the Zoning Scheme, which must also be reviewed regularly. As the planning by-law will operate together with the Spatial Development Framework and the Zoning Scheme, these reviews are likely to be used as reviews of the Planning By-law as well.

For example, the review of the Spatial Development Framework will indicate how often the City needed to amend the Spatial Development Framework and it will indicate how often the City issued deviations from its Zoning Scheme.







# 11 CONCLUSION

This paper examines the following question: what is the legal and practical space for the City of Cape Town to use municipal law making in land use planning and how does it help the City to realise policy ambitions such as the acceleration of housing development, progressive tenure rights and dealing with climate change?

It commences with a brief examination of the powers of South Africa's three spheres of government, the history and transformation of local government in South Africa and how the Constitution places local government at the epicentre of government's developmental effort. The Constitution firmly establishes local law making as a legal and constitutional reality. Municipalities and cities have been transformed from being retailers of services into fully fledged governments, responsible for not only implementing but also designing and adopting laws and policies. They enjoy protected powers over listed functional areas, are relatively independent financially and have powers to make law. South African cities, like anywhere else on the continent operate under severe resource constraints and are tasked with managing complex urban environments.

The complexity that this situation brings about has been compounded by prolonged uncertainty on the legal and constitutional question as to what role cities play in land use planning. In terms of unlocking this debate, the Constitutional Court played a critical role, handing down a number of judgments, all of which celebrated city power over planning.

However, the space for city law making is by no means unbounded. National government has recently adopted the Spatial Planning and Land Use Management Act and the Western Cape provincial government, in which the City of Cape Town is located, has adopted the Western Cape Land Use Planning Act. These Acts, together with a number of other laws have significantly reduced the City's space to make law. An important constraint to the scope for innovation in the municipal planning by-law is the fact that the land use planning process, as regulated in the municipal planning by-law will not be the only approval process

that applies to a particular development project. As a result, the municipal planning by-law now deals primarily with the procedural aspects of land use applications. However, there are still areas where the City may use the by-law to design local solutions. For example, the City is likely to operate a tribunal system that differs from the system envisaged in the national framework.

There are other, institutional and capacity constraints too. For example, municipal law making on planning is an entirely new phenomenon. In fact, the Western Cape approach has triggered a debate among planners and lawyers throughout the country, puzzled as they are with the City's insistence on a third layer of law. Even in the City administration itself opinions differ as to whether the drafting of a by-law was necessary. This has resulted in the City conducting this exercise without the benefit of comparative examples or assistance from its peers. A closer examination of the capacity and orientation of city officials lead to the observation that the city official's pre-occupation with implementation as opposed to policy design constrained the city and perhaps prevented it from exploring creative ways to meet current needs.

The paper then proceeded to look at three specific policy ambitions, namely the acceleration of housing development, the consideration of customs and rituals and the addressing climate change. In general, it concludes that the direct effect of the municipal by-law on the city's ability to make strides in these areas should not be overstated.

It is often said that the legal framework for land use planning and development management is unduly rigid and hampering the roll-out of innovative approaches to issues such as introducing new forms of tenure and generally improving the liveability of informal settlements. Interviewees pointed out that the problem is not necessarily located in the planning legislation. It would appear that the planning legislation itself does not have to stand in the way of the acceleration of housing development. Instead, factors such as the dictates of housing policies, the availability of land, a fixation on full title, financing arrangements but also the orientation of officials seem to be of greater import. The intersection between the municipal planning by-law and issues of tradition and custom seems to revolve mainly around the issue of initiation sites. Again, the content of the by-law itself will not have a significant impact on the issue of finding locations suitable for initiation rituals and solutions can be found within the parameters of the law. According to the interviewees, most of the substantive climate change related legal issues enter the City's land use planning activities on the back of national and provincial legislation as opposed to finding their origin in the City's by-law.



## LOCAL LAW MAKING IN CAPE TOWN: A CASE STUDY OF THE MUNICIPAL PLANNING BY-LAW PROCESS

Local law making, whether provincial or municipal, affects the life of the residents of urban areas in all countries on a daily basis. Local urban law may involve relatively detailed day to day issues such as parking, waste collection or urban maintenance. It may also touch on important development and planning issues such as real property rights, urban design, infrastructure planning, safety and mechanisms to manage population diversity, i.e. issues that fundamentally impact the biggest assets, basic needs and fundamental rights that many citizens have. Despite this pervasive influence, 'local urban law' is rarely accorded the priority or attention that is given to national law.

At the national level, governments usually have fairly discretionary access to resources for law making (drafters, analysts, statistics, time etc), even if they often do not make full use of them. The same is often not the case for local governments. Municipal governments are more likely to be dependent upon locally generated resources (which are particularly lacking in developing countries) or on the goodwill of central government (which is often in short supply or spread very thin). National law is also regularly studied for its drafting quality and, in an increasing number of cases, for the effectiveness of pre- and post-legislative consultation, scrutiny and impact assessment processes and how these relate to implementation. With the exception of a few countries with well-developed devolved structures of governance, the same cannot be said for local urban law.

This case study provides an accessible description of the process by which one of Africa's best known cities absorbed, and adapted itself to, changes in national and provincial law on physical planning. It emphasises the practical approach of city officials but, also, the challenges that can arise from the distance between law making at the national level and implementation on the ground.

HS Number: HS/066/15E

ISBN Number (Series): 978-92-1-133365-7

ISBN Number (Volume): 978-92-1-132678-9

**UN**  **HABITAT**

UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME

P.O. Box 30030, GPO Nairobi 00100 Kenya

Telephone number : +254 20 762 5518

Email: [infohabitat@unhabitat.org](mailto:infohabitat@unhabitat.org)

[www.unhabitat.org](http://www.unhabitat.org)