

# REPORT ON A ROUNDTABLE ON LAW REFORM IN PLANNING

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## BACKGROUND AND PURPOSE OF THE ROUNDTABLE

The year 2012 is likely to become the year of planning. A number of crucial legislative and reform processes pertaining to the planning sector are underway. These processes entail the drafting of law and reviewing of planning practice to determine how best to harmonise the planning roles of local, provincial and national government. The key legislative development underpinning this is the Spatial Planning Land Use Management Bill (SPLUMB).<sup>1</sup> If enacted into law, the Bill will replace, amongst other laws, the Development Facilitation Act (DFA)<sup>2</sup>, a key instrument used to regulate spatial planning and land use management in South Africa. In a landmark judgment of the Constitutional Court, key provisions of the DFA were declared unconstitutional on the grounds that provincial development tribunals (established and operating within the framework of the DFA) were exercising powers that encroached on the municipal planning function which the Constitution assigns to municipalities.<sup>3</sup> While the Court declared the DFA to be unconstitutional, it suspended the declaration of unconstitutionality for eighteen months to allow Parliament time to enact legislation that is consistent with the Constitution. The product is seen in SPLUMB, currently before Parliament.

While SPLUMB is a crucial component of the land use management framework, it cannot solve all of the challenges encountered in practice. The broad constitutional competency of planning is shared by all three spheres of government. For this reason (and in the absence of national legislation strictly defining the parameters of the competence of planning for each sphere) various provinces are concurrently preparing or amending their own planning legislation. The harmonisation of these national and provincial efforts is thus a key challenge. The goal is to avoid overlaps, conflict, and costly processes for all role-players, including the public who are the consumers of these planning services. Key questions that need to be answered therefore relate to how each sphere is to execute its planning mandate without infringing upon the interests of the other spheres. Moreover, how can development potential be unlocked while facilitating coordination between government and other agents?

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<sup>1</sup>Spatial Planning Land Use Management Bill [B 14—2012 (Re-introduced)]. Accessible at: <[http://www.parliament.gov.za/live/commonrepository/Processed/20120620/438008\\_1.pdf](http://www.parliament.gov.za/live/commonrepository/Processed/20120620/438008_1.pdf)>

<sup>2</sup> Development Facilitation Act 67 of 1995.

<sup>3</sup>*City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* (CCT89/09) [2010] ZACC 11.

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As a contribution to fostering debate around these key developments, the Community Law Centre (UWC)<sup>4</sup>, South African Cities Network, Urban Landmark and the Department for Rural Development and Land Reform organised a Roundtable session. The Roundtable brought together officials and planners from various provinces and municipalities, representatives of the Portfolio Committee on of Parliament, and the Department of Rural Development and Land Reform to exchange ideas and build some common understanding of the issues. The Roundtable was held on the 22nd and 23rd of August, 2012 at the Protea Hotel in Sea Point. This report captures some of the key themes emanating from the discussions.



The discussions were structured around five issues, namely:

1. conceptualising the role of local government in land use planning;
2. securing national and provincial interests in the course of the execution of municipal planning by the municipalities;
3. providing affected parties with an effective remedy against municipal decisions;
4. the impact of reform on professional and administrative capacity; and
5. harmonising development management across sectors as the three spheres of government execute their respective planning and development functions.

## CONCEPTUALISATION OF THE ROLE OF LOCAL GOVERNMENT IN LAND USE PLANNING

### Background

The constitutional role of local government in planning was affirmed when the Constitutional Court declared parts of the DFA to be unconstitutional. The autonomy of local government as a distinct sphere of government was also emphasised in the *Maccsand*<sup>5</sup> and

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<sup>4</sup> The Community Law Centre is supported by the Ford Foundation and the Charles Stewart Mott Foundation.

<sup>5</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* (CCT 103/11) [2012] ZACC 7; 2012 (4) SA 181 (CC) (12 April 2012).



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*Wary Holdings* judgments.<sup>6</sup> Local government has strong, constitutionally assigned functions, including the municipal planning function.

Against this conceptual background it must be appreciated that the Constitution has assigned each of the three spheres of government a certain measure of the planning function and competence. Firstly, sections 155(6) (a) and 155(7) of the Constitution assign both the national and provincial spheres of government authority to broadly regulate municipal planning, whereas Schedule 4B assigns local government the municipal planning function. As clarified in the *Maccsand* case, the role of the national and provincial governments in municipal planning is limited to regulatory legislation, setting the broad parameters within which local government must operate and does not extend to administration. Indeed, *Maccsand* made it clear that national and provincial governments may not use legislation to take away or diminish the administrative responsibilities of planning that have been assigned to municipalities in the Constitution. Secondly, national government may intervene and legislate for provincial planning in the circumstances identified by section 44(2) of the Constitution, whereas the provincial sphere has been assigned both legislative and administrative competence over provincial planning. Thirdly, the national and provincial spheres of government are assigned the legislative and administrative urban and rural development function by Schedule 4A of the Constitution. Any conflicts between national and provincial legislation in this respect are to be resolved in terms of section 146 of the Constitution.

Finally, both the national and provincial spheres of government are also assigned the legislative and administrative regional planning and development functions by Schedule 4A. The planning function cuts across all three spheres of government, precipitating serious harmonisation and coordination problems.

The major challenge is that the three spheres of government share one space in which to execute their assigned planning functions. Land planning and use is the shared platform upon which the three must execute their planning and development functions.

Because of this constitutional reality, all spheres of government need to embrace a cooperative approach. The implications of cooperative governance as a mechanism must be fully internalised. Through cooperative government, solutions should be sought in the

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<sup>6</sup>*Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* (CCT78/07) [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) (25 July 2008).



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development of integrated decision-making processes which bring together various sectors and spheres of government.

Two prominent speakers addressed this issue and thereby set the tone for the discussions, namely the honourable Deputy Minister of Rural Development and Land Reform, Lechesa Tsenoli, MP and Adv. Geoff Budlender SC.

### **Deputy Minister, Lechesa Tsenoli, MP**

Deputy Minister Tsenoli reminded participants that, while planning is comprised of technical processes, it should not be denuded of its underlying transformative potential. He observed that the timing of SPLUMB is crucial as it coincides with the National Development Plan which amongst others addresses issues of spatial justice and spatial equality for vulnerable communities. For example, the National Development Plan identifies human settlements as an area where the efforts of government have consistently failed to make inroads and have in certain instances even exacerbated the fragmented spatial framework inherited from apartheid. Planning must therefore also interface with other initiatives such as the Presidential Infrastructure Bill aimed at facilitating development in key areas. Spatial planning must for example, also speak to the reality that development projects are geographically based in spaces around the country. Infrastructure must not only extend to areas where resources are located but it must also correlate to areas of greatest need and poverty. Spatial planning therefore has the potential to unlock development, to have a 'catalytic' impact for certain areas. Planning legislation must therefore change the behaviour of actors in the field, the manner in which things are currently done. Planning can provide creative solutions for complex problems. However, going forward, this can only be achieved if during the consultation processes around SPLUMB and the various other processes underway, 'learning' and insights are drawn from across the board, to accommodate the views of planners, engineers, lawyers, developers and most importantly, the public.





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### **Adv Budlender SC**

Adv. Budlender pointed out that the three spheres of government have to confront the constitutional position that their roles are distinct and that the relationships are no longer determined by hierarchy. The municipal sphere is not a junior partner: it has its own competences delineated in the Constitution. In reflecting on the changing legal environment, Advocate Budlender identified three “dangerous situations” that this legislative suite has created:

1. Municipalities have been given powers that they often are not able to manage;
2. The current accountability system is flawed in that it inhibits efficient decision-making and risk-taking;
3. The law is a blunt instrument for solving planning problems. It provides only one form of recourse, judicial review, which focuses on procedural shortcomings rather than substantive issues. ,Current appeals processes allows planning initiatives to be scrapped over legal technicalities instead of evaluating the merits of the plan and creating suitable remedies.

The first issue, that many municipalities are unable to manage their new responsibilities, is a result of the Constitution making asymmetry difficult to implement. Many municipalities have shown themselves to be unable to manage a diversity of competences and skills. It was argued that in crafting legislation we have fallen victim to our own ambitions and hopes without taking into account the existing capacity to implement it on the ground. New laws have set high standards which many municipalities do not have the capacity to meet, especially in rural areas. As a result, there has been a systemic failure to comply with laws which Advocate Budlender identifies as a fundamental problem. New laws should be more cognisant of the time and resources required for compliance.

Furthermore, these high expectations coupled with rigid accountability systems create paralysis within systems for fear of being penalised for doing things wrong. This is despite the fact that efficient decision making is a priority for good administration and progress. In many instances a ‘wrong’ decision is better than no decision at all. The legislative processes that are unfolding should therefore be cognisant of the need to encourage appropriate risk-taking. For example, how can we make speedy decisions while allowing all spheres appropriate input? Advocate Geoff Budlender suggested that, in this respect the current accountability system is flawed. Many officials are hesitant to make decisions, due in part to the accountability provisions of the Promotion of Administrative Justice Act (PAJA). The





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above effect of administrative review is that officials shy away from making quick decisions, thereby impeding development and job creation. The reliance on administrative review has the unfortunate consequence that when a matter is taken on review because someone disagrees with the merits, the case turns on issues of legal compliance and the merits are not actually dealt with.

The 'over-writing' of legislation creates more judicial 'tripwires' which allow planning decisions to easily be struck down through judicial review. The temptation to over-write legislation is a risk that has to be mitigated by focusing on the merits of the legislation instead of the legal trivia. He mentioned, in this respect, the example of the complex procurement systems in local government that appeared to have stopped honest people from doing their jobs while failing to enable government to deal with corrupt officials.

Although there may be grounds to strike down a planning decision under review strictly on technical grounds, this is not the intention of PAJA. Rather, the goal is that the court's decision should lead to a just and equitable remedy. In many cases this is about letting 'life go on', which will often demand the court to craft substantive remedies that are best suited to the context. The courts should therefore be innovative in structuring remedies instead of scrapping entire planning schemes over legal technicalities.

Adv. Budlender pointed out that planning law is now at the forefront of the determination of new legal and constitutional developments in South Africa. He suggested that new planning law focus on:

1. making constitutional arrangement of powers work;
2. setting realisable goals; and
3. providing nuanced remedies for when things go wrong.

The new planning legislation discussed at the roundtable is therefore critical in that it extends beyond the planning and land development sector. It is imperative to exercise caution as the country legislates for planning so as to avoid 'overwriting' which can lead to the situation where the law itself, becomes the source of lawlessness.



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## SECURING NATIONAL AND PROVINCIAL INTERESTS WHILE DEVOLVING TO LOCAL GOVERNMENT

The two questions that formed the background to this section are:

1. What are the mechanisms for aligning forward planning across spheres of government?
2. How can national and provincial interests be secured in land use management by municipalities?

Because municipalities have been constitutionally assigned the municipal planning function, it is imperative that the interests of the national and provincial governments be protected with regard to the execution of these functions. As noted, the execution of the municipal planning function by the municipalities impacts provincial planning (an exclusively provincial competency), urban and rural development (a national and provincial function), and regional planning and development (national and provincial competences). This is a result of all three branches being obligated to execute their functions in a shared physical space. Should each be allowed to go their own way, possibly creating conflicting planning decisions? Or, should there be a co-ordinated approach among the three? These concerns must be taken into account in both the national SPLUMB and the various provincial SPLUMBs.

Participants expressed varying views on this matter as all appreciated the need to address the problem. Some advocated for co-decision making between municipalities and the other two



spheres of government while others favoured a more strict separation of functions.

The **Western Cape** Provincial Government admitted that it finds it difficult to align a planning system comprised of national, provincial, regional and municipal spatial development frameworks. In trying to move away from a 'hierarchical' system, the provincial legislation contains provisions that encourage 'alignment of provincial and municipal planning'. The current problems faced in practice relate to the fragmented nature





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of the legislation and the difficulty of drafting plans within frameworks that have 'competing' directives.

One of the key questions that has been addressed relates to the binding nature of Spatial Development Frameworks (SDFs). In the past, the **Western Cape** system was dominated by inflexible, 'law-type' 'Guide Plans'. If a development application fell outside of the ambit of the 'Guide Plan', the SDF had to be formally amended before the development could be approved. It meant that the approval process took longer. With the new provincial legislation, this is no longer the case and the SDF is not considered to be as binding in nature. However, the argument could be made that a more flexible SDF has made planners 'lazy' and that other provinces have reported success in managing a more rigid framework. It is therefore necessary to ensure that the status of SDFs are clarified and uniformly applied throughout the country.



The latest draft of the **Western Cape** legislation provides for provincial decision making, in the first instance, with regard to land use applications that affect the provincial interest. This decision making occurs in addition to the municipal decision making. The **Western Cape** provincial government indicated that as far as possible, it makes use of the '*Maccsand approach*' when dealing with municipalities. This approach, in keeping with the key Constitutional judgments, is based on the principle that the municipality is always the primary decision-maker. This is a departure from planning practices of the past where if national or provincial interests are impacted by an application it was almost assumed that affected municipalities automatically 'lose' 'their authority. In the new suggested system, the necessary consent of other provincial departments is sought once the municipality has made its decision.

In respect of decisions that impact provincial decisions, provincial government takes a decision in addition to the municipal decision. The flaw in the system is that it is not always easy to identify when a land use decision impacts 'provincial interests'. Provincial interests therefore have to be defined to create predictability in the system.



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However, a key lesson from the **Western Cape** is that good provincial administration and strong provincial systems bring stability. At provincial level, generally, there is consensus that good planning decisions have been made. While there may be exceptions, even the private sector has expressed the view that the role of the provincial government is a positive one. Furthermore, if a questionable decision is made at the municipal level, there is recourse in terms of a review process.

Others emphasised that the Constitution assigns the administrative decision-making in municipal planning matters exclusively to local government. As such, a solution can only be found, they suggested, in aligning the national and provincial Integrated Development Plans (IDPs) into the municipal Spatial Development Frameworks (SDFs). The national and provincial interests should be built into the municipal SDFs and therefore be incorporated into the municipal planning decisions. It was noted that the establishment of the firm principle that the municipality is the primary decision maker in land use management matters, should also provide the appropriate incentive for national and provincial departments to seriously engage with IDP processes.

It was suggested that, when it comes to land use applications, national and provincial governments should raise their concerns at the public hearings organised by the municipalities rather than insist on parallel procedures. National and provincial governments should focus on persuading municipalities to take into account their concerns in the decision-making process rather than imposing decisions on them. Proponents of this approach emphasised that the principle that the municipality is the decision maker must be firmly protected.

Those who proposed an integrated approach clarified that a distinction must be drawn between integrated decision-making and integrated planning. Whereas decision-making should strictly be left to the municipalities, planning should be integrated. The planning legislation should account for national and provincial interests in the municipal decision-making process.

## PROVIDING AFFECTED PARTIES WITH AN EFFECTIVE REMEDY AGAINST MUNICIPAL DECISIONS

The central theme of this session was the question as to how affected parties can be given an effective remedy without unduly delaying decision making and without compromising the status of local government?

The session was opened with the observation that appeal systems could actually fulfil two functions. The first is the provision of a remedy to disaffected parties who are unhappy with municipal land use decisions. The second function could be to provide an avenue to deal with land use decision -making that affects provincial interests.

Some participants suggested an Appeals Tribunal System in terms of which the decisions of municipalities are appealed to a Tribunal. However, concerns were expressed about the nature and composition of the Appeals Tribunal. It was observed that if the Tribunal is perceived to be a 'national' or 'provincial' body it may contribute



to perpetuating a hierarchical status quo, again undermining municipal decision-making power and possibly opening a floodgate of appeals to such a tribunal. If an appeal system is going to work, then it should be a system in which the authority of municipalities is not undermined. An appeal tribunal must therefore reflect municipal interests both in its composition and operation. Importantly, participants cautioned that appeal tribunals should not be enabled to make decisions on behalf of municipalities or become decision-making bodies of 'first instance'.

Participants had different views on the nature and composition of such an appeals system and it became clear that various systems are being suggested in the different provinces.

The system proposed for the **Free State**, for example, makes provision for an Appeals Tribunal. The Appeal Tribunal is not a decision-making body. Rather, it upholds decisions or refers it back to the municipality with recommendations. This is different only when the matter before the Tribunal affects the provincial interest: then the Tribunal takes a final



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decision. The Appeal Tribunal is comprised of experts (planners, engineers, lawyers, etc) and provincial officials together with administrative staff on the basis of a 50/50 representation.

The **Free State** Bill has also introduced the concept of “undue delay”. It is based on the principle that there is no point in delaying strategic decisions due to incapacity. Applications are therefore divided into different categories to which specific time periods are allocated. For example, Category 1 would comprise of ‘complicated decisions’ that must be decided within 180 days. Category 2 decisions must be decided with 120 days. If a municipality is unable to finalise the decision within the time-frame prescribed by the category, it may refer the decision to the province. However, as a precautionary measure to ensure that the system is not abused by applicants, if it is found that the delay is caused by a failure of an applicant, the applicant may be penalised for using the delay to prejudice municipalities.

It was also suggested that an alternate model could take the form of a “District Tribunal.’ A district tribunal could operate at the district level and be comprised of experts as well as community members. The tribunal would then provide advice or make recommendations in respect of municipal planning decisions.

**Gauteng** has adopted a model where there is a single appeal tribunal for the entire province. Importantly, it is populated by representatives of the municipalities and not of representatives of the provincial government in order to avoid the perception that it will impede on municipal planning. However there is still some debate about the composition of such a tribunal. Some advocate that it should be comprised of officials only, while others have argued that it should be comprised of people with ‘mixed capacities and knowledge’, inclusive of ‘outside persons.’

Some of the practicalities of operating such a tribunal revolve around finding enough people to run tribunal hearings as there is a risk of conflicts of interest arising when the pool of individuals from whom to nominate tribunal members is small. Membership of these tribunals may also be very time-consuming with the relevant municipal officials being pre-occupied with appeal matters at the cost of their own municipality’s matters.

The proposal in the **Western Cape** is based on the premise that the provincial government may never assume executive authority over municipal planning matters, also not on appeal. It thus provides for an appeal against municipal decisions, made to the MEC. For the duration of the appeal period or the appeal procedure, the decision by the municipality is suspended. The MEC refers the matter back to the municipality, together with his or her recommendation. In this scheme, the municipality remains the final decision-maker.

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The practicalities of the approach, taken in SPLUMB, which insists that municipal tribunals take decision in the first instance, were also discussed. It was noted that conflicts of interest could arise because most of the professionals likely to be appointed to such tribunals would be persons otherwise involved in the same matter. In other cases, the municipal planners would likely sit in such tribunals, possibly becoming too involved in the tribunal and neglecting other essential duties.

It was generally agreed that various provinces are considering and experimenting with different models and approaches to the issue of appeals. Ultimately, the innovation and experience will suggest solutions to this problem.

### THE IMPACT OF REFORM ON PROFESSIONAL AND ADMINISTRATIVE CAPACITY

The main question in this session was twofold. First, will municipalities be able to implement the draft reforms? Secondly, how can the gaps in municipal capability to perform planning functions be addressed?

There is a disjuncture between the planning functions assigned by the Constitution to municipalities and their capacity to fulfill these functions. There was overall agreement that ways must be found to manage the interim period as efforts are made to build capacity. The more 'urban' provinces such as **Gauteng** and **Western Cape** expressed



confidence in their municipal capacity. The majority however, acknowledged that it is a central problem. Participants from the provinces shared various approaches and initiatives.

The **Free State**, for instance, noted that its municipalities do not have capacity to perform planning functions. The approach in the **Free State** has been crafted around the need to capacitate municipalities as the province has a particular history of centralised planning at the provincial level. There is therefore a concern that, when the new legislation comes into force, the majority of municipalities will be unable to fulfil their planning mandate. The province is suggesting that this problem be addressed with an intervention under sections 139 and 154 of the Constitution. Under these sections, provincial government may





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intervene in the affairs of municipalities and take appropriate measures to support the municipalities and assist them with capacity building. The province prescribes five to six main criteria which municipalities should comply with in order to fulfill their planning function. The MEC discusses the criteria with the municipalities and prescribes standards for how planning functions will be dealt with. It is suggested in the Free State Bill that municipalities annually submit a report on 'Development and Land Use Planning' to the provinces who are monitoring municipal performance in terms of the Constitution and the criteria prescribed by the MEC. The MEC also consults with the municipality. If the MEC is of the opinion, on the basis of the report and consultations that a municipality needs assistance with any of its planning functions, he/she has the right to prescribe by notice in the *Provincial Gazette* that certain functions will be performed by the province until such time as the municipality has developed capacity to fulfill those functions. If it is thus established that the municipality has no capacity, the MEC is empowered to assume responsibility for the function. For example, if the MEC determines that the municipality has no planners, he may prescribe that applications submitted to the municipality be forwarded to the provincial government for decision making. In extreme circumstances, the MEC may determine that all applications be submitted directly to the province. The province has an intermediate 'Planning and Land Use Tribunal' (PLUT) to assist municipalities that cannot yet handle land use applications. This is not an appeals tribunal but has been established with the sole purpose of assisting municipalities.

The constitutional distribution of the planning functions, as well as the obligation of municipalities to employ persons who meet certain professional and administrative standards, has major implications for the three spheres of government.

In **KwaZulu-Natal**, for example, every municipality must have access to a registered planner who makes a recommendation to the municipality which is always the first to receive applications. Inasmuch as there may not be technical capacity in rural communities, they do have knowledge that is valuable as planning input. However, there is a need to capacitate extreme rural municipalities with 'registered planners' as required by the **KwaZulu-Natal** planning legislation. It may thus be advisable to consider the establishment of a provincial planning commission where local municipalities could seek advice on planning decisions. It was noted that this system was used successfully in **KwaZulu-Natal** some 30 years ago. Such a commission could conduct research and prepare planning maps for the entire province for use by the municipalities. Municipalities may then apply to such a Commission for advice and assistance when reviewing applications.



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Municipalities would then have three options:

1. they may employ their own registered planners;
2. they may make use of shared services with neighbouring municipalities; or
3. they may make use of a provincial planning commission to assist with research, surveys, etc.

Because of its vastness and sparse population, the **Northern Cape** receives very few applications. There are thus fears that municipal planning by municipalities is not a viable



option. A 'district model' is suggested, where local municipalities delegate their decision-making authority to the district municipality, where planning capacity is situated. The **Northern Cape** also reported that municipalities do not necessarily 'want' this function: they consider it an 'unfunded mandate'. This introduces a new dimension

to the capacity question: capacity problems are not limited to human resource issues but also extend into the financing of the function. It was agreed that this is a dimension that must be addressed through intergovernmental financing and revenue sharing mechanisms.

Other participants reported the practice of agreements between local municipalities and their district municipality to assist in the preparation of spatial development plans. A practice of municipalities sharing services already exists in places. For example, it was reported that in **Mpumalanga**, local municipalities have voluntarily signed memorandums of understanding delegating their planning functions to the District Municipality.

The capacity deficits in both provincial and municipal governments, especially in the planning area, require urgent action. Participants agreed that capacity is a problem in most municipalities in various manifestations. While in some municipalities it is a basic 'numbers' problem where there are simply insufficient planners employed, other municipalities face issues related to the level of skills and/or past specialisation, making it difficult for some



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professionals in the planning field to be multi-skilled. Still others lack funds to employ qualified people.

Participants also held the view that a solution to the problem will draw from a variety of strategies. Training through graduate placements was emphasised, as was the use of shared services and skills. It was suggested that planners could be employed in a pool from which municipalities could draw. It was proposed that the finance problem could be addressed by directing more funds into municipal development, targeted at programmes for capacity building. The problem of capacity could also be addressed through distinguishing decision makers from advisers. A team of advisers could be made available to advise decision makers in many municipalities. Decision-making councils could draw from a small group of advisers to make more informed decisions.

### **HARMONISING DEVELOPMENT MANAGEMENT ACROSS SECTORS**

This session examined the issue of addressing the harmonisation of sectoral instruments (environment, agriculture, heritage, mining etc.) in the current legislative reform. What has been tried in that respect?

It was generally agreed that, while the constitutional allocation of powers leads inevitably to sequential decision-making, the costs of sequential, parallel and complex decision-making processes are too high for all involved.

It was added that the problems in the planning sector are not restricted to the harmony required among the three spheres of government. Sectors within each separate sphere also experience planning problems. Different sectors and departments of the same sphere deal with different aspects of planning. For example, the department of environment approaches land use from an environmental perspective, the department of agriculture will have an agricultural approach, and the housing department interacts with land from the dimension of housing. All these require co-ordination within a single sphere of government.

The participants agreed that there is an urgent need for the different departments to work together and that this requires the interaction of experts within a province.

The **Western Cape**, in acknowledging the difficulty of harmonising development management across various sectors and against a fragmented legislative framework, presented an innovative system of procedural integration that they have adopted to mediate some of the complexity in the system.



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As a starting point, the functions of 'environment' and 'planning' are not dealt with in separate departments but are amalgamated under one MEC. The result is more consistency in decision-making. An extended integrated law reform project which sought to rationalise decision-making processes by integrating the law dealing with 'heritage', 'environment' 'planning' and other functions such as 'agriculture' was stopped because of concerns about the constitutionality of such legislation. It was argued that provincial law can only deal with provincial competencies and the project broke down on the provincial government's lack of authority to amend existing national legislation dealing with, for example, agriculture.

However, the principle underpinning the project was that government has become very good at creating laws without paying due attention to the complexity it raises in practice. Legislation is duplicated which is time-consuming and confusing. Technocrats often have to rewrite and patch together agreements and procedures to enable a cross-over arrangement. How does one do that between two spheres? Ultimately, the principal issue in the context of fragmented legislation is: *who can make the decision?*

The Promotion of Administrative Justice Act (PAJA) stipulates that a decision-maker must be authorised to make decisions by an 'empowering provision'. At the provincial level, the province may only make 'provincial decisions'.

The **Western Cape** provincial government has come a long way, though in utilizing the opportunities, offered by NEMA to integrated decision making. On the basis of S24L of NEMA which allows for 'integrated environmental authorisations', the province has implemented one integrated process when dealing with applications to province. For example, the intersection of heritage and environmental approvals has been addressed by the NEMA process usurping the heritage authority. Furthermore, section 24K of NEMA provides that:

'The MEC, may after consultation with the organ of state contemplated in subsection (1) enter into a **written agreement** with the organ of state in order to **avoid duplication** in the submission of information **or the carrying out of a process** relating to any aspect of an activity that also requires environmental authorisation.

On this basis the 'package of plans' approach was adopted in the **Western Cape**, whereby municipalities surrender their power via an 'upward delegation' to the province which would act as a delegated authority. This could also be used considered in other provinces. At the very least, it could be used to ensure that the advertising processes involved in planning are done concurrently. The question remains, how does one do this between spheres? An



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innovation of SPLUM is that it follows S24K of NEMA. Section 29 and 30 of SPLUM make provision for agreements between municipalities and 'other authorities'

It was also observed that the private and investment sectors of the community need to be active in development and implementation. Thus far, the legislation has failed to incentivise this engagement. To resolve this disconnect, some provinces proposed a spatial planning forum where professionals from different sectors (mining, agriculture, etc.) would form a creative think-tank and make recommendations to local governments.

It was agreed that, ideally, the principle must be that there is one decision on each land use application. The issue with the current legislation is that too many players have the option to veto a decision. These players often have incentive to use their veto, especially when many planning initiatives present conflicting dynamics, for example the decision to conserve or exploit resources. A suggested solution was



that of a special vehicle at regional level to which all relevant organs of state would delegate decision-making power around specific projects or programmes. Others proposed a planning package with decision-making being done at one point with a simultaneous decision, for example a joint forum coordinated by the Premier. Both options would limit in-fighting between governmental spheres.

In some respects, SPLUMB has addressed this barrier by empowering various organs of state to come together and issue joint authorisations. However, much of the legislation currently underway runs the risk of creating more, rather than fewer applications procedures. It was urged that the administrative machinery on planning must be consolidated to avoid the high costs of running parallel processes. A cohesive planning code must be written instead of relying on technocrats to patch together various agreements and procedures.

### CONCLUSIONS AND WAY FORWARD

The participants expressed the view that they had benefited from the Roundtable discussion. Since the gathering was convened independently of the different legislative processes, it provided a more neutral space in which to discuss contentious issues. All



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parties were able to appreciate, together, the complexity of the legal issues facing national, provincial, and local law-making processes in this sector. Although the Roundtable was expressly about the evolution of planning law in general and not the SPLUMB specifically, it was widely agreed that the SPLUMB needs to lead the law-reform process. Accordingly, there was extensive discussion on how the issues and consensus emerging from the Roundtable could feed into the final amendments to the SPLUMB. It was agreed that the SPLUMB process is so far advanced that it is unrealistic to seek far-reaching or comprehensive change to the Bill. Rather, it was felt that the final efforts on revising the SPLUMB should be focused on two key aspects of the regulatory framework:

1. 'first level' application process for land use and land development (i.e. which applications get submitted to which authorities when, and how they will be decided); and
2. appeal processes.

The view expressed by the representatives of the Department of Rural Development and Land Reform, and broadly supported by the meeting, was that the improvement of these two aspects would have a substantially positive impact on the final version of the legislation. Further refinement of the overall legal framework could then be achieved either via provincial and local laws or through on-going revision to the national legislative framework.

When exploring the two key aspects of 'first level application processes' and 'appeal processes', it is clear that the crisp legal problems that have to be resolved relates to the constitutional powers of local government vis-à-vis those of the provincial and national governments. Yet, on the basis of discussions at the meeting and examples from practice, the three spheres of government are perhaps closer to a shared understanding of how various constitutional provisions might be aligned with each other. The provisions most crucial to this alignment include:

- Section 44, which deals with the national government's legislative authority,
- Section 139 which deals with the provincial government's intervention powers into the affairs of municipalities,
- Section 146 which provides for how to resolve conflicts between provincial and national legislation,
- Section 147 which provides for the resolution of other conflicts between the two spheres of government,





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- Section 151 which provides for the constitutional status of municipalities, and]
- Section 156 which provides for the powers and functions of municipalities.

The principle of protecting municipal autonomy and defining provincial and national competences in a manner that does not denude the municipal competence of planning as confirmed by the Constitutional Court in *City of Johannesburg v Gauteng Development Tribunal* and other more recent cases is now widely understood. Although the implications of this principle are more difficult to put into practical terms, for all three spheres of government, the discussion at the Roundtable confirmed that there are many, integrally linked dimensions to the legal framework for planning. The respective powers and functions of local government cannot be examined in isolation from appeal processes or questions of capacity. Similarly, the integration of sectoral or multi-sphere decision-making must be grounded in the constitutional allocations of powers and functions. This is easier said than done as pointed out by a participant who observed that the implications of the judgments are in fact so far-reaching that it is equivalent to having to learn to 'walk on your hands'. It requires radical change in respect of how we think and approach the practice of planning.

Going forward, it was proposed that the outcome of the Roundtable be communicated directly to the Portfolio Committee, and that a smaller group be drawn from the Roundtable participants to work together on final revisions to the SPLUMB that address the two key aspects identified above. The Department of Rural Development and Land Reform representatives indicated that they would make further submissions to the Portfolio Committee. The Portfolio Committee's research support staff at the roundtable confirmed that the committee members would welcome this feedback. It was thus recommended that a meeting be convened with a select group of participants from the Roundtable, together with the DRDLR and the Portfolio Committee to agree on the specific provisions that should be amended or inserted into the SPLUMB in relation to the aspects mentioned above.