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**LAND MATTERS:
THE NEED FOR PLANNING LAW TO HELP BRING ABOUT
INTEGRATED AND SUSTAINABLE CITIES**

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ISANDLA INSTITUTE / OPEN SOCIETY FOUNDATION

About Development Dialogues

Development Dialogues is a joint initiative of Isandla Institute and the Open Society Foundation – South Africa. The aim of the public dialogue series is to create a space for critical reflection and dialogue among key development stakeholders in South Africa. In doing this, the organisers seek to make a (rather modest) contribution to enhancing the quality of debate in the development sector. Through *Development Dialogues*, Isandla Institute and the Open Society Foundation intend to bring about creative and constructive multi-stakeholder meeting opportunities that push stakeholders to think beyond the confines of their immediate interests and theoretical paradigms.

This monograph captures the speakers' inputs and discussions at the Development Dialogue on 'Land matters: The need for planning law to help bring about integrated and sustainable cities', which took place on 05 November 2009 at the Centre for the Book in Cape Town.

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Isandla Institute
PO Box 12263
Mill Street, Gardens 8010
South Africa
Email: admin@isandla.org.za
Website: www.isandla.org.za



OPEN SOCIETY FOUNDATION FOR SOUTH AFRICA

Open Society Foundation for South Africa
PO Box 23161
Claremont 7735
South Africa
Email: admin@ct.osf.org.za
Website: www.osf.org.za



Constitutional democracies are generally messy in that systems in a democracy are largely dependent on a number of processes. If these processes are not synchronised, it may lead to development trajectories that are not determined by common visions, but are rather informed by the vicissitudes of those who participate in those processes.

South Africa is no different and our democracy is characterised by a particular type of messiness in which our three spheres of government are simultaneously autonomous and saddled with incoherent powers and functions. This often results in institutions working at cross-purposes and, at times, in agreements negotiated between municipalities and their citizens not being met because other spheres (which are central to meeting those commitments) do not share the same objectives. Those working with municipal IDP's, provincial strategic plans, line functions departments' strategic plans and intergovernmental relations in general, know this all too well.

At the same time, we have a large but fractious political party dominating the governing institutions across virtually all spheres. This, expectedly, causes tensions within the state as well as between the state and party. This context makes the Green Paper on National Strategic Planning a welcome introduction to our constitutional democracy. It promises to be developmental because it introduces the notion of research, evidence-based action and policy coherence.

There is nothing of substance with which to find fault or weakness in the Green Paper. What it proposes is simply good planning and an attempt

Criticism levelled at the Green Paper has largely been directed at the personalities of those involved and possibly the proposed structure, rather than the content of strategic national planning.

to provide direction to a complex governing system. The concept has received widespread support across all sectors. Criticism levelled at the Green Paper has largely been directed at the personalities of those involved and possibly the proposed structure, rather than the content of strategic national planning. On the other hand, the failure to reduce spatial and social inequality in post-apartheid South Africa, despite the extensive resources spent on 'development', is well known and documented. The most exciting aspect of the Green Paper is therefore the recognition of this failure and the introduction of the National Planning Commission (NPC) as a mechanism to provide direction so that the same mistakes are not repeated in the future.

The Green Paper clearly states that in order for good development planning outcomes to emerge, the following conditions need to be in place:

- Solid institutions;
- A highly capable state;
- Strong relationships between major social forces; and
- Clear focus on the strategic objective across the board.



In South Africa our planning systems comprise post-apartheid legislation layered on top of apartheid planning legislation.

It is perhaps a weakness of the Green Paper that it does not provide a sense, even at a rudimentary level, of the type of planning systems that might be of value to harness these conditions for good development planning. In South Africa our planning systems comprise post-apartheid legislation layered on top of apartheid planning legislation. It is hard to operate within the complex and frustrating system that this creates. Bad planning systems tend to destroy any initiative aimed at bringing about substantial change. This is clearly demonstrated by the failure to transform from the apartheid space economy over the last decade and a half, despite impressive expenditure in the areas of housing, education, health and utility infrastructure. The warning signs have been there all along. Government's own 10-year review spoke to this failure, yet little was done to induce significant change (other than the questionable ASGISA and failed JIPSA processes). At the same time local government has been consistently identified as the sphere of government closest to the people, 'the face of government', where 'development meets the people', and other characterisations that underline its importance to the concept of developmental local governance. The Green Paper itself recognises the central role that local government plays in the development process.

This is a fact of which the NPC will need to be cognisant.

The question that arises is whether government (or the ruling party) has the appetite for significant change? The implications of National Strategic Planning and the proposed NPC are that government will be expected to implement far-reaching and possibly dramatic changes, which could fundamentally alter the system of governance and the framework within which planning and development decisions are taken. In this regard, there are two factors that we should keep track of in order to measure the extent to which fundamental change will be possible.

In 2007, national government initiated a significant policy review of the powers and functions of sub-national government. It was based on the experience, research and lessons of the previous decade, which showed that the system as it applies to provincial and local government is not working effectively and needs overhauling.

The implications of National Strategic Planning are that government will be expected to implement far reaching and possibly dramatic changes, which could fundamentally alter the system of governance and the framework within which planning and development decisions are taken.



Among other recommendations, it called for a review of municipal and provincial powers and functions as well as the structure and boundaries of municipalities. This fundamental review has never been released for debate. In its stead, a report entitled 'The State of Local Government in South Africa' was hastily commissioned by the Department of Co-operative Governance and Traditional Affairs.

On the basis of this report and the Local Government Indaba held with municipalities in Boksburg, a 'turnaround strategy' for local government is being drafted and is meant to be available by the end of 2009.

Three problems are immediately identifiable with this course of action. Firstly, it ignores the recommendations which some in the ruling party have already accepted as necessary interventions if sub-national government is to be effective. Secondly, it assumes that the problems in the local government sphere are in fact caused by local government rather than by the structural deficiencies of the constitution and the physical structure created through municipal demarcation. Thirdly, turnaround strategy is yet another knee-jerk reaction from the same ministry that gave us the Urban Development Nodes, Rural Development Nodes, Project Consolidate and Siyenza Manje. Instead of dealing with the challenges presented by the policy review and making fundamental changes, there seems to be a penchant for more of the same which will ultimately not lead to much except to entrench the weakness of the existing system. The NPC, when it is established and in whatever form it takes, will most likely reach the same conclusions as that of the policy review,

The turnaround strategy does not address the problems relating to the relative powers of provincial and local government and the demarcation of municipalities.

namely, that in order for a planning system to work and for an effective development state to be achieved, the current system of sub-national government will need to be fundamentally restructured. The recommendations they are likely to make are therefore unlikely to be radically different to those made in the policy review. If they can't be implemented now, how will the conditions have changed to such an extent in 18 months time that they will be implemented then? The response of the ruling party's alliance to the concept of the NPC has been interesting. On one hand, there has been legitimate concern about the power of the unelected body such as the NPC over the rights and responsibilities of bodies such as cabinet. In fact, SALGA has raised the same concern. On the one hand, their response has been vitriolic and full of hyperbole, which fails to deal with the content of the Green Paper that they must have had some hand in pre-approving rather than seeing the Green Paper as the document that introduces the concept of centralised planning, they've personalised it as an attempt to centralise power around personalities. Where the debate has not been personalised, alternative models such as a two-tier cabinet or a variation of different cabinet clusters have been proposed. These do not constitute





a NPC, which, if international models are used as a measure, should by its nature be linked to, but removed from the daily tasks of governing. The cabinet-based approach does not really help the debate in respect of the value or importance of centralised planning in a democratic state with a decentralised executive. This means that the NPC could end being little more than a clearing house for ideas developed elsewhere instead of being a thought leader in the field of development opportunities and identifying the choices the country needs to make.

Centralised planning, especially within our model of democratic governance, is an indispensable component of the developmental state. However, the implications are that a number of changes that will be necessary and which are recommended by the NPC (whichever form it takes), will need to be implemented. In this regard, it will be useful to see how a White Paper on National Strategic Planning addresses:

- Establishing a synchronous national planning system which supports rather than undermines sub-national planning, while also taking into consideration the constitutional principle of subsidiarity;
- Changing development legislation so that apartheid era (and inappropriate post-apartheid) development-related legislation is repealed in favour of performance-based legislation that promises spatial, social and economic restructuring;
- Creating an NPC that simultaneously has political accountability as well as the relative autonomy to set its own research agenda and to have that agenda funded and the outcomes respected;

A NPC must simultaneously have political accountability and the autonomy to set its own research agenda.

- Suggestions on how recommendations that are already in place as a result of the thorough, tested and legitimate research, (which meet the overall objectives of a developmental state) are implemented before the NPC is in place; and
- The timeframes for establishing an NPC, its form and function, as well as what initiatives could be implemented before it is established.

National planning is important; however, on its own, it is insignificant as a development driver – especially where no planning systems exist. In any democracy, the state has no option but to tackle the messy aspects of engagement and the attendant tensions that consequently arise. These are made worse by a fractious ruling party and contradictory powers and functions of governing institutions. In this context a NPC is a very important contributor to a functional planning system. However, the extent to which South Africa is ready for it when other initiatives are being ignored, certainly makes for interesting discussion. This makes the next phase of the discussion on National Strategic Planning, the White Paper, such an anticipated one. ■

(The article was first published in volume 2, issue 5 of the Local Government Bulletin, December 2009)



Every year I come to UCT to give a talk to the students on the state of urban planning law reform. Every time I open up by saying enthusiastically that 'there is currently a window of opportunity for fundamental change' and I realise that I've repeated this for fifteen times and this window is still not opening!

If you look at this in legal terms before 1994, we had the Financial Relations Act (a law which determined what power national and provincial governments could each exercise). It had a schedule of provincial legislative powers and one of them was 'town and regional planning' and everybody was quite clear on what that meant. In the 1996 constitution, we have a number of concepts which are related to that such as municipal planning, provincial planning, regional planning and development and urban and rural development but none of them captures the scope of the professional and regulating activity that all of us would understand as being captured by Town and Regional Planning and that underlies the problems that we're facing now.

In 1995, the Development Facilitation Act was an attempt to provide an interim measure between the 'old fashioned' Town and Regional Planning and the 'new' yet to be defined type of 'development planning' that was expected to emerge. The Act established a planning commission which operated from 1998 until 2001, the Development and Planning Commission. The Commission wrote a Green Paper for the planning law reform. The Green Paper went through a consultative process before it was transformed into a 'White Paper on Land Use Management and Spatial Planning: Wise Land Use'. That gave rise

Is municipal planning the forward planning of government or is it limited to the regulation and control of actual development?

to a number of versions of a national land use management bill each of which has tried to reflect different ideas of how national government might go about reforming planning law. The most recent version that was approved by parliament's portfolio committee of land and agriculture just over a year ago was approved by the committee but rejected by the speaker and not debated in parliament. In the meantime, the Green Paper on National Strategic Planning has emerged from the Presidency.

It is difficult to write planning legislation in South Africa today. There are some fundamental difficulties. The first of these is that of the constitutional legislative competencies. What competency is it that we are invoking to write this legislation? Over the last 10 years, there have been divergent views and different people have been able to come up with quite compelling arguments. A lot of it hinges on what is meant by municipal planning. On the one hand there is the notion that municipal planning is the making of an IDP (the forward planning of government) and then there is something else called Urban and Rural Development (the regulation and control of actual development). That distinction makes it difficult to put together one coherent piece of legislation. The good news is that there is some light at the





Without effective land use management systems at local government level, high-level strategic planning will remain ineffective.

end of the tunnel. Although this province has never had a development tribunal set up under the Development Facilitation Act, in Gauteng there is a development tribunal which has far reaching powers to approve development applications and even to overturn the provisions of an IDP. This has greatly upset local government, particularly the City of Johannesburg, and has culminated in litigation where recently the Supreme Court of Appeal came out with a definition of municipal planning. In many ways what the supreme court of appeal has called municipal planning is 'old fashioned' planning, i.e. it is both forward planning and development control, the two activities are intertwined.

That decision still has to be confirmed by the Constitutional Court. There is some opposition to the position that was adopted by the Supreme Court of Appeal particularly by developers in Northern provinces who have found the tribunal planning to be a handy way of getting development approval that they might not have got from a municipality either because the municipality would have been reluctant to give that approval or in some cases because the local government system is broken down to a point where they are unable to make that type of decision. This has interesting implications for provinces because what this version of municipal

planning is saying is that provinces don't have a role to play in the approval of development. In some provinces that provincial role is restricted to an appeal function whilst in other provinces it involves the endorsement and confirmation of local government decisions which would then fall away if we have this new understanding on municipal planning. Another reason why it is so difficult is that we don't have a widely shared view on what would constitute a good planning law for South Africa.

There isn't a logical sensible home in national government and parliament for the planning function. At the moment it sits inappropriately with the Department of Rural Development and Land Reform. It is clear that the department with such an obvious focus on rural development is not well placed to develop a legal framework to manage the big cities of the biggest economy on the continent. Again the alternative is where would it go? There are a few options such as the Department of Human Settlements, the Department of Environment and Water Affairs, the Planning Ministry as well as Department of Cooperative Governance and Traditional Affairs.

The sort of high level strategic planning envisaged by the recent green paper on National Strategic Planning is largely going to come to nothing if we don't have an effective system for planning at the local scale that can translate the priorities and objectives of higher level planning into the objectives of local government that can then inform the way in which we manage land use. To continue with the fractured and un-integrated system that we have while trying to do high level integrated strategic planning is going to be a waste of time. ■



With respect to the Bill, it is easy to see that the idea of centralised planning is threatening, particularly if parties in power in different spheres of government are at odds with each other.

But, that said, we need to turn to the mundane: there is, inevitably, a tension between the necessity for predictability and the uncertainty arising from change, growth, land reform and discretion in decision-making. In South Africa today, and for much of the past couple of decades, this tension has diverted attention and energy from "proper" planning, the planning necessary for making good settlements.

Rights, some long established, some newly created, are confirmed and protected by the Constitution. Affirming them and making them real is what we must do in ordinary every-day decision-making; rights cannot be abstract and unachievable in the real world.

At the moment, there is no time for 'proper' planning of a good environment, of good settlements. So much energy and tension goes into the current particularly legalistic decision-making; and anxiety about the law means that more and more time is spent on the current laws and not on proper substantive planning.

So, I think we have to think about what good planning law should do.

At the moment, one of the greatest problems is the lack of integration between three pieces of law that manage the environment: land use regulation, environmental regulation and heritage resource regulation. They all want to make decisions about everything; and they do all make decisions about everything; but from different points of view. There is definitely no integration of regulation or of decision-making. We all know that we cannot sensibly talk about land use management without talking about environmental and heritage resource management because they are inseparable. But they are very separate in South Africa today. We must get to a clear statement of the intentions of each of the laws and a clear identification of the things and activities they regulate; and there must be

consistency between those intentions and the strategies adopted to implement each law.

The argument about rights is important; so how does the State go about changing rights? Who gets to be consulted and how many times? At the moment, three regulatory processes are taking place, often each with more than one round of consultation. But, for the most part, the communities or people consulted are not interested enough to comment or, worse to my way of thinking, they do care but the decision-makers cannot take their comments appropriately into account. Expectations are created and then dashed: and the regulatory processes themselves lose credibility. We should probably consult wider and less frequently; but we should, surely limit the rights or opportunities for appeal. The right to be heard cannot mean the right to be heard *ad infinitum*.

We really have to grapple with these issues as they are essentially political and must be discussed in wider arenas than this.

Another essential question regards the appropriate decision-maker? Again, we have a serious problem in our thinking: I am sure, if we had a referendum amongst ourselves that most of you (planners and environmental regulators) would favour a technocratic decision-maker and, accordingly, I am sure that you like this aspect of the land use management Bill. However, some of us do not like this at all because we reason that there should be political accountability in these matters.

How do we answer these essential questions? We are not having these discussions at all.

Most of the decision-making systems that we have are not doing very well. For example, the National Heritage Resources Act creates councils which are, in large part, independent of the State's bureaucracies and, so, decision-making is neither politically accountable nor is it expert.

I have touched unsystematically and briefly on some principles of good law and it is clear that we're not getting it right. And I fear that the Green Paper, which should be addressing these things and setting clear direction in these matters, is not doing so. ■





AFTER THE INPUTS, THE FLOOR WAS OPEN FOR QUESTIONS AND COMMENTS. ISSUES THAT WERE RAISED INCLUDED:

- What is the link between long-term planning and forward planning and who influences these plans?
- How does the land work for the poor so that they can survive in South Africa?
- Is it not the right time to move away from urban and town planning for ecologically sustainable development?
- What determines how legislation gets administered? Are we looking for the perfect form of legislation or do we need to look at why people with good legislation still see things falling apart?

IN RESPONSE THE SPEAKERS MADE SOME CONCLUDING STATEMENTS:

Ashraf Adam

In the context of sustainable development, I agree that planners probably haven't played a role. If you want to look at things differently, it's a lost opportunity. It was the environmental lobby trying to out manoeuvre planners and I think it has succeeded to some extent. I don't think we understand the issue of sustainable development and the reason why I say that is because I worked with the Western Cape government to develop climate change guidelines and was also invited by the United Nations to come up with a similar initiative. The ideas that came out were not different from the kind of principles that currently exist. Can we not move beyond this? Part of the problem is that we stick to what we know and that is how we frame the debate, on our own terms.

Politicians are quite willing to move beyond their own confines and often ask for advice from officials but officials are unable to do that. I think there is a need for a national framework and we don't have that. More and more, people are beginning to realise that we can talk about development, sustainable development and all kinds of frameworks but unless you realise that it's about what municipalities and people do on the day-to-day level, we are really going to miss the play.

Stephen Berrisford

If we say the environmental approvals should be integrated with the planning, heritage and transport approvals, then we have to look at where the planning decisions are taken and where each one of those silos has their decisions taken at different points. It's very difficult to get integrated decision making when you've got decision making at all those different levels.

The reality is that we're in a country where the same political party runs everything and thereby the same dynamics emerge.

This is a market neutral piece of legislation which assumes that if you give everyone an equal chance to participate in re-zoning, or heritage approval, you'll get a fair outcome. The nature of our society is that there is very few of us that can engage with those processes to influence the outcome, and it is certainly not the poor. If the issue is significant enough to them directly, they will explore other channels and you can be sure that's not in the legal system. That is largely because the laws that we have deliberately exclude the poor because they are the old laws. We have got to look at what the law says about the market, property rights, zoning rights and so forth. What we want is the type of control that regulates the operation of the market that benefits the poor.

The old fashioned town planning law of regulating the market has been reserved by environmental law. The question that we need to look at is, is it sensible to continue with these two processes, largely dealing with the same stuff, duplicating the processes? It really doesn't make sense, especially if you've got economic challenges, scarce capacity and resources we do in South Africa. I think that the politicians want to address legislation issues. It's not just about officials being pig-headed, but about the framework that they use. There is a set of vested interest but not a clear legal way out in terms of who should do what in a better way.

Stephen Townsend

The issue is the failure to integrate. You cannot have integrated planning with the current constitution and the green paper should be identifying this. The schedules won't get amended if the professionals don't say what should be happening.

Planning of cities really began some time ago with the industrialisation of cities. One of the big issues that needed to be tackled back then was health. Over time, things have changed and so it should be. What we have come to realise is that quality is really important. The point is there are a whole range of issues about making the environment. I don't think town planning is an old profession that needs to go out the door. It has to respond to why we are not making good settlements. We have to recognise that things are changing and, as they do, so should our criteria for good decision making. I think it's the politicians that are not being served well by the planners.





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CENTRE FOR THE BOOK, CAPE TOWN

ABOUT THE PANEL:

Ashraf Adam is the Country Project Manager on an EU/SIDA funded programme at SALGA which supports 14 municipalities in South Africa with economic development and financial management. He is also president of the South African Planning Institute and a member of the Municipal Demarcation Board. He previously worked for the Western Cape Regional Services Council, Technikon SA and a town planning firm. He was a founding partner at the consulting firm MCA from its inception in 1997 to 2008, until he left to pursue personal interests.

Stephen Berrisford is an independent consultant working in the field of planning law and policy. He is also the Governance Theme Coordinator for Urban LandMark (www.urbanlandmark.org.za). He is trained as both a lawyer and a planner, with degrees from the Universities of Cape Town and Cambridge. Before working as a consultant he worked for the Department of Land Affairs and the town planning departments of the Cities of Johannesburg and Cape Town.

Dr Stephen Townsend is an architect, a professional heritage practitioner, statutory planner and teacher. He worked as an architect for fifteen years and was employed in planning and heritage resource authorities for more than twenty years. His relatively recent PhD considered the efficiency and efficacy of the law in managing the urban townscape. He currently consults and teaches at the University of Cape Town.



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