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Provincial Land Use Legislative Reform
Western Cape Province: Status Report
September 2011

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1.0 Introduction

The Western Cape Province came into existence in 1994 and consists of a portion of the old Cape Province. The remainder of the Cape Province was split into the Eastern Cape, Northern Cape and the western portion of the North West Province. The Western Cape Province comprises 1 metropolitan area (Cape Town), 5 district municipalities and 24 local municipalities (refer to Figure 1).

The purpose of this report is to investigate the status of land use legislation in the Western Cape provincial planning region in South Africa. The report reviews the state of the provincial legislative framework in the Western Cape Province, provides an understanding of land use laws and procedures in practice and comments on law reform processes where applicable. The report also outlines institutional responsibilities, decision making structures and processes; then draws implications on the status of current land use legislation and conclusions on the laws as applied in the province and how these might inform new provincial legislation.

1.1. Study approach

The research material used in the report is based on secondary sources, a desktop understanding of the status of land use legislation, the collection of empirical information and qualitative interviews conducted primarily with the Western Cape provincial Department of Environmental Affairs and Development Planning (DEA&DP) and local municipal officials in the Strategy and Planning department of the City of Cape Town (CoCT) Municipality's Land Use and Building Management Branch. To understand the way the provincial legislation is implemented in practice, the quantitative and qualitative research examined the performance of the legislation in practice according to the experience of the officials who engage the legislation on a day to day basis. The aim was, therefore, to identify, among others, what works well in the application of the relevant laws; what does not work well; what needs to change to make it work better; what innovations there are in practice; what the demands are on officials - all with a view to understand what officials, at both municipal and provincial sphere of government, consider appropriate in new provincial planning legislation.

The focus of this investigation is on understanding the practical issues with implementation. The report therefore focuses on and analyses the following main aspects of the provincial legislative framework:

- A description of existing land use legislation and a brief analysis thereof;

- The implementation of the law(s) and reflecting on the qualitative information obtained from official and other role-players to inform what works well in the current application of the law and what does not work so well;
- The findings in respect of empirical information collected from provincial and municipal officials who were interviewed;
- Recording the findings on institutional and administrative issues that go along with implementation (structure of departments, where decision making responsibility lies, the capacity within the institution studied, administrative systems and so on); and
- Drawing conclusions that can begin to inform a framework for new provincial legislation.

2.0. Provincial Legislative Status Quo

2.1. History of the planning laws reform

According to Van Wyk (1999), the first comprehensive ordinance regulating the establishment of townships in the Cape Province was the Townships Ordinance No.13 of 1927. This ordinance was repealed by the Townships Ordinance No.33 of 1934. Since then the Western Cape has experienced a progressive introduction of land use planning legislation, with the amendment of Townships Ordinance No.33 of 1934 in 1991 and the promulgation of the national Less Formal Township Establishment Act No. 113 of 1991, imposed either by national or provincial statute.

2.2. Description of the Current Applicable Planning Legislation

This section contains all laws that are applicable to the Western Cape even the old ones. All these laws still apply today in one form or another and did not come about with the express intent of reforming planning law holistically. The fact of their existence as a set of regulatory instruments has made planning law and indeed planning law reform a lot more complex when applied in practice.

It is important to point out that planning procedures are revised from time to time in which case the provincial government addresses these revisions through the issue of circulars addressed to the Municipal Managers of the 24 local municipalities and 1 metropolitan municipality and which are published in the government gazette and circulated to the municipalities for implementation.

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a) The Physical Planning Act No. 125 of 1991

National land use legislation in the form of the Physical Planning Act 125 of 1991 (PPA) requires that provincial authorities prepare Structure Plans for the area under their Authority. These are expected to promote and give guidance in respect of the physical development of land. Old structure plans (known as Guide Plans) in the Western Cape, for example the Cape Peninsula Guide Plan (1988) therefore still have legal validity in terms of the provisions of the Physical Planning Act and LUPO. While Structure Plans cannot confer or take away rights in respect of land they may be used to authorize land use changes provided that there is consistency between the proposed land use and the existing Guide Plans which have legal applicability in terms of the Land Use Planning Ordinance (15 of 1985). Where there is inconsistency, an application for amendment to the Guide Plan is required. It should be noted that zoning schemes administered at municipal level should also not be inconsistent with Guide Plans.

b) Municipal Ordinance No. 20 of 1974

It is intended to be used by local municipalities in matters including closure of public open spaces, public places and streets.

c) The Black Communities Development Act No. 4 of 1984

This Act made provision for the establishment of Black Development Areas. In terms of the regulations, provision was made for township establishment, subdivision and rezoning. Provision was also made for the establishment of town planning schemes for these areas. After the Act was repealed, regulations in respect of Blacks having access to land in urban areas through a leasehold form of tenure were retained.

While the Black Communities Development Act was repealed in 1991 by section 72(1) of the Abolition of Racially Based Land Measures Act, Act No. 108 of 1991, section 72(2) of this Act stipulated that Chapters VI and VIA of Act No. 4 of 1984, and any regulation made thereunder, will remain in full force until further repealed. These chapters and regulations made provision for the granting of leaseholds in Black Development Areas (Department of Land Affairs, 1999). Such provisions had to be retained while township registers were being opened to phase out leaseholds in favour of full ownership which was denied Blacks in urban areas prior to 1991. Chapters VI and VIA of Act No.4 of 1984 remain in force as an interim measure to enable the holder of an existing leasehold right to perform certain dealings until upgraded to ownership i.e. until a township register is opened in the Deeds Office to demonstrate legal title to a cadastrally defined property (Mammon, 2008).

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d) The Land Use Planning Ordinance 15 of 1985 (LUPO)

Must be read with 1934: Townships Ordinances No. 33 where applicable. Its purpose is to make provision for the rezoning, subdivision and departures in respect of land use as well as to provide for structure plans and zoning schemes. The Ordinance also makes provision for the protection of the impact of development on property rights and requires the demonstration of the desirability of land use in an area.

In terms of the current regulatory framework that the Western Cape largely works within, the Land Use Planning Ordinance No. 15 of 1985 (LUPO) is the law within which urban and rural development and land use on public and private land may be permitted and is also the legal mechanism through which all land use change applications (rezoning, subdivision, departures, consent uses and other minor land use matters) are adjudicated notwithstanding the applicability of other land use legislation (refer to Figure 2). In terms of section 7(1) of LUPO, 'any town-planning scheme in terms of the Township Ordinance, 1934 (Ordinance 33 of 1934), which in the opinion of the Administrator is in force immediately prior to the commencement of this Ordinance, shall be deemed to be a zoning scheme which is in force in terms of this Ordinance.' This implies that all zoning schemes that predated LUPO are deemed schemes in terms of LUPO. In parts of the Western Cape and particularly the old Divisional Council Zoning Scheme area, the town planning schemes enacted in terms of the Townships Ordinance of 1934 are still in operation. Although the Townships Ordinance No. 33 of 1934 was repealed by the LUPO, when areas which were established in terms of this Ordinance are planned or re-planned, LUPO makes provision in terms of Section 48 (2) for these areas to be further dealt with under its own provisions.

In terms of section 36 of LUPO, an application shall be refused solely on the basis of a lack of desirability of the contemplated use of land concerned, including the guideline proposals included in a relevant structure plan insofar as it relates to desirability, or on the basis of its effect on existing rights concerned. The use of 'desirability' is a distinctive criterion for decision-making and an important feature of LUPO in motivating the reasons for the change of land use in a planning application. Where an application is not refused by virtue of the desirability referred to above, regard shall be made in considering particulars relating to the safety and welfare of the members of the community concerned, the preservation of the natural and developed communities concerned or the effect of the application on existing rights, with the exception of any alleged right to protection against trade competition.

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e) The Less Formal Township Establishment Act No. 113 of 1991

The Less Formal Township Establishment Act, Act 113 of 1991, which was seen as an interim measure, is still frequently used in the province to establish urban development for informal/emergency/Breaking New Ground (BNG) human settlement purposes. The Less Formal Township Establishment Act (LeFTEA) provides for a faster but lesser form of settlement for poorer urban households. This provision was probably founded on the expectation that when transformation to democracy occurred, the need to cater reasonably quickly for those who would be flocking to the urban areas could be satisfied by site and service (Mammon, 2008). In 1992 the LUPO was amended by the addition of the paragraph after paragraph 5 of '*Informal Residential Zone'* in which provision was made (notwithstanding the provisions of the Scheme Regulations of any local authority) that this zone be deemed to be part of the Zoning Scheme of the relevant authority (Government Notice No. 382, 1992). This addition of '*Informal Residential Zone'* implied that although a township may be established in terms of LeFTEA, the land use and zoning of the township, once established, would be determined in terms of this provision of LUPO.

f) Advertising on Roads and Ribbon Development Act No. 21 of 1940

The Advertising on Roads and Ribbon Development Act No. 21 of 1940 largely governs advertising, public access and construction close to major roads such as national roads. The act has major implications for development when considered at existing economic generators such as airports that require upgrading and further development to respond to growth in the metropolitan areas and large towns of the provinces under consideration. The Act is administered by the Provincial Department of Transport and Public Works, not the Department of Environmental Affairs and Development Planning who wait for a comment and/or decision in terms of this Act before contemplating a decision on a land use application.

g) Removal of Restrictions Act No. 84 of 1967

Where submission of a land use application is made to a Local Municipality, the application to remove a restrictive title condition is made simultaneously to both the municipality and Provincial Government. On approval and publication in the government gazette by Provincial Government: Department of Environmental Affairs & Development Planning, the decision is submitted to a Deeds Registry Office.

According to Van Wyk (1999) the Removal of Restrictions Act (RoRA) is a discretionary piece of legislation where the relevant provincial government official has the discretion to consider all matters that pertain to the relevant application based on whether the interests of the public would be upheld should the restrictive condition of title be removed. It is obligatory that no land use

application be granted which was considered to breach the terms of that restrictive condition until such a restrictive condition of title is removed. The RoRA procedure which is assigned and administered by the PG: Western Cape works in sequence in that the land use application decision is contingent upon the successful removal of a restrictive condition of title. It is often the case in the Western Cape that where a Structure Plan requires amendment and there is also a removal of restrictive condition of title associated with the same application, that the PG: WC Department of Environmental Affairs and Development Planning has the final decision-making authority in terms of LUPO. Thus the structure and time frames of LUPO are impeded by the applications in terms of RoRA and other similar national legislation. For example, the RoRA advertising procedures [clause 3(6)] are very restrictive. The RoRA procedures can also be amended by provinces as and when required.

Provisions are made for the Department of Environmental Affairs and Development Planning: Western Cape, acting in terms of the powers contemplated by section 2(1) of the Removal of Restrictions Act delegated to the MEC or his departmental representatives in terms of section 1 of the Western Cape Delegation of Powers of 1994 and on application by a land owner, to remove restrictive conditions of title. However, these powers are exercised conditionally and can be delegated either to the State Attorney under certain circumstances or officials of the Western Cape Department of Environmental Affairs and Development Planning where they can remove restrictive conditions of title on the proof of building plan approval and no objections received from neighbouring properties. However, in this instance all development rights are already in place and there is no need for further land use applications.

h) Subdivision of Agricultural Land Act No. 70 of 1970

The Subdivision of Agricultural Land Act No. 70 of 1970 only applies when land use applications are made in respect of changing to or from agriculturally zoned land or at the discretion of the local municipality. In these instances, the Western Cape Provincial Government: Department of Agriculture is a commenting sphere only but ultimately the decision whether to support such a change of land use is made by the National Department of Agriculture. The final decision on whether to grant / refuse a land use application, once the National Department of Agriculture has approved the overall change of use, lies with the Department of Environmental Affairs and Development Planning on recommendation from the local municipality.

This Act was repealed by Act 64 of 1998. However, the repeal Act has not been signed by the President, so the 1970 Act remains in force.

i) Provision of Land Assistance Act No. 126 of 1993

Its purpose is to provide for the designation of certain land; to regulate the subdivision of such land and the settlement of persons thereon; to provide for the rendering of financial assistance for the acquisition of land and to secure tenure rights; and to provide for matters connected herewith.

Section 2(4) of the Act which says that "[t]he laws governing the subdivision of agricultural land and the establishment of townships, shall not apply" to land governed by Act 126, which includes all land delivered as part of the rural land redistribution programme. This Act therefore provides an additional or alternative route to township establishment, outside of current planning legislation such as LUPO or LeFTEA. This section is an example of a provision that is, post-2010, unconstitutional.

j) National Environmental Management Act No. 107 of 1998

Western Cape Provincial Government: Department of Environmental Affairs and Development Planning is responsible for the assessment of environmental impacts and issues a record of decision (RoD) in connection herewith. However, where State or Parastatal land is the subject of a land use application, the provincial sphere is a commenting authority only and the National Department of Environmental Affairs is the ultimate decision making authority and issues the RoD directly.

k) Heritage Resources Ac No. 25 of 1999

The Provincial Government: Heritage Department makes decisions on heritage impact assessments that accompany land use applications but in the case of sites declared national heritage sites, the South African Heritage Resources Agency (SAHRA) makes decisions. The Provincial Heritage Western Cape has a dedicated department located within the Ministry of Cultural Affairs and Sport responsible for assessing heritage impacts where required.

l) Municipal Systems Act No. 32 of 2000

Strategic and/ or integrated spatial plans take the form of Spatial Development Frameworks (SDFs) that are indicative land use planning instruments to guide a city's urban development and/or a region's forward planning. An SDF is the spatial representation of an Integrated Development Plan (IDP) which, according to section 25, of the Municipal Systems Act No. 32 of 2000 (MSA) is a strategic plan for the development of a municipality and its municipal area of jurisdiction (Berrisford and Kihato, 2008). These plans are required in terms of the MSA and related legislation to be updated regularly. SDFs are typically planning policies related to issues

such as definition of the Urban Edge, Densification, Gated Development etc. and are expected to give guidance to decision makers within the respective metropolitan areas whose officials are delegated to deal with land use applications.

However, it is apparent that SDFs do not necessarily shape urban spatial development through effective land use management control. While SDFs are the spatial planning instruments endorsed and approved by relevant local municipal councils with participation from provincial government, there are desirability criteria in terms of LUPO that have a different (and often conflicting) legal effect. This fuels tension between local and provincial government and even inter-departmental tension among different municipal departments. For example, the Draft SDF for Cape Town (2009) earmarked ecologically sensitive land for protection in its larger scale biodiversity network adjacent to Cape Town International Airport. Yet there is consistent pressure on this land to establish a township for low income housing.

Furthermore, the MSA should ideally prevail over outdated Structure Plans when SDFs conflict with the intent of old Structure Plans. However, confusion arises as to whether the MSA administered by local municipalities can have an overriding effect over a Structure Plan established in terms of Section 4(6) of LUPO. It is for this reason that that the PG: WC advised the City of Cape Town to submit its SDF for approval by the MEC in terms of this provision of LUPO.

Furthermore, Chapter 5 of the MSA requires local authorities to adopt an integrated development plan (IDP) that aligns resources and the capacity of the local authority with the implementation of the plan and policy framework (in other words, the SDF) and general basis on which annual budgets are to be based. This includes the improvement of the quality of life of society in general and in particular the poor and other disadvantaged groups. Expenditure on infrastructure in terms of this legal framework therefore focuses primarily but not only on the provision of basic services, which derives benefits for a large majority of households through public investment. Forward planning documents and policies are however, generally inadequately co-ordinated with infrastructure planning strategies. While the IDPs are expected to bring spatial, economic and infrastructural aspects into alignment, they do not in reality do this equitably across areas of jurisdiction in municipal areas and particularly in the City of Cape Town.

m) Mineral and Petroleum Resources Development Act, No. 28 of 2002

The lack of clear alignment and thus ambiguity between and among various laws is evident. For example, with regards to the application of the Mineral and Petroleum Resources Development

Act No. 28 of 2002 (MPRDA), a land owner can be granted a mining right/ permit in terms of this act without being aware that compliance with a provincial ordinance (LUPO) and authorisation in terms of NEMA would be required before mining activity can commence. Evidence can be seen in matter between City of Cape Town (Applicant) and Maccsand (Pty) Limited (First respondent) where the judgement held that the first respondent is interdicted from commencing or continuing with mining operations on the properties until and unless (1) authorization has been granted in terms of LUPO for the land in question to be used for mining; (2) and environmental authorization has been granted in terms of NEMA for the carrying out of the activity identified (see Case No. 4217/2009; 5932/2009). This demonstrates a provincially specific example of a problem that arises directly from national legislation overlapping with planning activities and where clear coordination between national and provincial / local competence should be emphasized.

Applications for mining rights are submitted to the office of the regional manager but final decisions on the granting of rights vest with the National Minister and his/her Department of Mineral Resources. However, mining rights cannot be exercised without environmental and land use approvals being granted.

n) Legal Succession to the South African Transport Services Act, No. 9 of 1989

At the interview held with the provincial Department of Environmental Affairs and Development Planning the interviewee pointed out that consideration should also be given to the use of legislation such as the Legal Succession to the South African Transport Services Act, No. 9 of 1989 which was used by the Victoria & Alfred Waterfront (V&AW) Company for the redevelopment of Cape Town's waterfront. A package of plans approach was used and a heads of agreement set in place between the V&AW Company and the City of Cape Town whereby a basket of mixed use development rights were approved in terms of this legislation rather than following the procedures in terms of NEMA and LUPO.

While it is useful to be mindful of this Act in a legislative reform process, it is argued that there is no need to consider it seriously for the following reasons. The V&AW case is quite particular from two points of view. Firstly, the Legal Succession to the South African Transport Services Act applies only to land owned by parastatals such as the Passenger Rail Agency of South Africa (PRASA) who administer rail transport related land. Secondly, the heads of agreement was set up in the late 1980s, which meant that the provisions of laws such as NEMA would not have applied and the case predates other legislation such as the 1999 Heritage Resources Act.

Lastly and importantly, the Legal Succession to the South African Transport Services Act was amended in 1995 (post the V&AW agreements being established) to permit the integration of all parastatal land into conventional land use control systems (http://wwwsaflii.org/za/legis/num_act/lsttsatsaa1995660/). This amendment apparently only applies to land exploited for commercial purposes and does not include land used for the parastatal's core business.

2.3. Description of the new Provincial Legislation

At the time of writing none of the reform legislation discussed below has been implemented.

a) The Western Cape Planning and Development Act No. 7 1999 (PDA)

The Western Cape Province opted to introduce this act with the intention of replacing the LUPO. The purpose of the act, among others, was clearly to replace racially based planning and development legislation and consolidate planning in the province at various scales into a single piece of legislation. According to Van Wyk (1999), the Act also provides for 'a hierarchy of integrated development frameworks which include sectoral plans and spatial plans, as well as zoning schemes'.

Regulations were not gazetted at the time of the PDA's promulgation and thus the Act was never implemented in the Western Cape. At the same time, aside from frequent (party) political changes within provincial (and local) government in the Western Cape between 1995 and 2006, it was questionable as to whether some parts of the content of the act fell entirely within the legislative ambit of provincial government (Berrisford, 2000).

b) The Law Reform Project

About 2004, Minister Tasneem Essop (Western Cape: Provincial MEC for Environmental Affairs and Development Planning) embarked on a significant process to integrate land use management. Known as the *Law Reform Project*, the project was 'concerned with the way land is used, and so must be framed within a sustainable development approach' (Provincial Government of the Western Cape: Department of Environmental Affairs and Development Planning 2005:2-6). It emphasized the concept of *'wise use'* of land in terms of a set of criteria that begin to address concerns relating to ecology and integration of communities and space; recognizing the role of land and land use in urban transformation. The purpose of the new legislation was 'to promote ecologically sustainable development and the conservation of land, environment and cultural

heritage of the Province of the Western Cape by: establishing long-term planning and decision-making systems based on cooperative government principles that are integrated, holistic, efficient and that promote ecologically sustainable, economically efficient, and socially just uses of land; repealing outdated land use planning and development legislation; integrating environmental and heritage impact assessment processes and other decision-making processes affecting the use of land; and providing for incidental matters.

Chapter 8 of the project document specifically deals with land use regulation, albeit in a different manner to the comprehensive planning approach promoted by current land use regulations in, for example, LUPO. The provincial scale spatial framework is put forward as the guideline for municipal scale spatial frameworks. At the same time, the roles and responsibilities pertinent to different spheres of government and private sector role-players are outlined in Table 1.

Table 1: Public Sector Roles and Responsibilities as per the Integrated Law Reform Project

Party	**Roles and responsibilities**
Provincial government	• Subject to the provisions of this Act, implement national legislation dealing with land; • Make and implement laws dealing with provincial planning and regional planning; • Maintain, and see to the implementation by municipalities of, essential national and provincial standards and requirements established in relation to land; • Undertake strategic planning at a provincial level in relation to land; • Deal with all land use planning, including municipal planning issues, that cannot adequately be dealt with by a municipality, due either to the nature of the issue or a lack of capacity within the municipality; • Ensure that the Provincial Growth and Development Strategy takes sustainable development into account; • See to the implementation by municipalities of national, provincial and local laws dealing with land.
Provincial Heritage Resources Agency	• Prepare a register of all provincial heritage resources within the province which must include all provincial heritage resources (Grade II) identified by Heritage Western Cape and all municipal heritage resources (Grade III) identified by municipalities;

	• Assist it in compiling a municipal heritage resource plan, at the request of a municipality; • Participate in the decisions as required in terms of applications that require heritage input; • List in the heritage register those heritage resources which fulfil the assessment criteria of grade ii and iii heritage resources.
Department	• Initiate and update the Provincial Spatial Development Framework and ensure that it includes designated heritage areas as appropriate, and meets the requirements of the Biodiversity Act; • Approve regional plans; • Provide staff, accommodation and administrative support for, and overseeing the Sustainable Development Centre; • Establish and maintain a Provincial information system to support decision making and planning in relation to the sustainable use of land.
Municipalities	• Implement national, provincial and municipal legislation dealing with land; • Maintain standards and requirements in relation to land; • Perform functions assigned or delegated to it (note: delegation is subject to consent and capacity of the party to whom delegation is made); • Compile an inventory of the heritage resources that fall within its area of jurisdiction and submit the inventory to heritage western cape when developing or revising a spatial development plan or a zoning scheme; • Designate heritage areas in the SDFS.

Source: Provincial Government of the Western Cape: Department of Environmental Affairs and Development Planning, 2005

In an interview with two consultants (2011), who were instrumental in conceptualizing the Law Reform Project, it was stated that the project was largely attempting to integrate and streamline processes and procedures to obtain an integrated approach to land and land use management. At the same time it was attempting to define - and in some instances limit - the role of certain bodies such as local authorities; yet land use planning is clearly a municipal competency that cuts across other spheres of government.

In essence, the project was focused on procedures to administer and ensure the wise use of land and land use with sustainable development as an end-state. MEC Essop was last reported in the local media (The Cape Argus, 10 July 2007) acknowledging that the project faced complex legal arrangements as it relied on exemptions and amendments to national legislation which would have taken a long time to be established and could well have been rejected. Notwithstanding these complexities, there were innovations in the attempt to establish an integrated law to govern land use planning, environment and heritage.

- The first innovation is that the integrated law as a whole attempted to integrate environment, heritage and land use planning with a single application and a single decision-making process;
- Secondly, the Law Reform project attempted to rationalize activities within NEMA and questioned whether very straightforward activities (regular land uses that are known entities) even required NEMA authorization at all thereby streamlining environmental scoping while also streamlining ploughing permits in terms of the Conservation of Agricultural Resources Act, 43 of 1983;
- Thirdly, the project attempted to give better meaning to the idea of integrated and cooperative governance in having the three spheres of government working together (where necessary), hierarchically in law and departmentally across and within government institutions;
- Fourthly, the intention was that a one stop shop application 'desk' was to be established by local authorities where statutory sustainability plans would be made available for applicants to check (pre-application) compliance with such a plan which could take the form of a Spatial Development Framework thereby also working in sync with the Municipal Systems Act (See Table 1 above);
- Fifthly, the project attempted to deal with current issues such as climate change adaptation and mitigation procedures which the existing land use legislation does not cover by any means; and
- Sixthly, an interactive process between the public and an applicant was allowed to prevent applicants from going too far down the line with applications that the public are not likely to support.

In sum, the integrated Law Reform project attempted to overhaul and integrate legislation that shifted to a completely different paradigm based on the principles of sustainable development and wise use of land. The project was not completed and never tested in the public domain.

c) The impending Western Cape: Land Use Planning Act (LUPA)

Premier Zille has indicated (Western Cape Provincial Government, 2010) that plans are afoot to resume the consolidation of the LUPO and other Western Cape provincial spatial planning laws

into one simplified Act presumably in acknowledgement of the inappropriateness and complexity of the current legislation for present day land use management. In interviews with provincial planning officials (2011), the Premier's statement was confirmed but no further information could be divulged as the draft legislation has, as yet, not been released publicly. It was, however, revealed that the legislation is likely to reflect the 1999 PDA discussed above but with substantive revision to accommodate current day planning complexities and imperatives.

2.4. Description of Implementation of Provincial Planning Laws

2.4.1. Institutional Responsibilities

Local Government is delegated by the provincial government to administer all applications in terms of LUPO subject to conditions and qualifications which may differ in the case of each municipality's circumstances and depending on what associated planning legislation applies.

When a land use application is submitted and/or a township is established in terms of LUPO and the provisions of the Ordinance 33, Physical Planning Act in terms of Structure Plan amendments, BCDA, LeFTEA and/or RoRA apply to the area that the application falls within, the Western Cape Provincial Department of Environmental Affairs and Development Planning have the final decision-making authority on the application. There are also other circumstances in which Provincial Government takes ultimate responsibility for land use decisions and granting development rights on the basis of recommendations from the relevant Local Municipality including: a) when a government department objects to a land use application but the Local Municipality recommends approval of an application; and b) on submission of appeals against a local authority's decision in terms of LUPO.

2.4.2. Implementation Aspects

a) Pre-application Requirements

The Western Cape legislation does not provide for any pre-application requirements. Regardless of this, both the provincial government and municipalities are open to discuss application requirements and the level/nature of applications with the applicants before the submission of a formal application.

b) Application submission, processing, decision-making and appeals

In cases where a land use application is submitted to the PG: WC DEA&DP for decision on the recommendation of a local authority for example, the submission of a rezoning application in terms of LUPO or a township establishment application in terms of LeFTEA, the following process is typically followed from the time the application and recommendation are received from the municipality. It must be noted, however, that the application submission and decision making

process in terms of LeFTEA is slightly different but once in the system follows typically the same process as outlined below.

Firstly, the notification to submit in terms of LeFTEA must be lodged with the Department of Environmental Affairs and Development Planning and not the local municipality although the applications may be submitted simultaneously. The Applicant forwards the application to the provincial department and advises that he/she intends applying in terms of LEFTEA. The provincial department then instructs the local municipality to advertise the application which constitutes the public participation process. The Local Municipality is then obliged to consider the comments and submit the application to the provincial department for consideration and recommendation to the Minister of Human Settlements who takes the final decision on the application. Should it be approved the provincial department (Environmental Affairs and Development Planning) will advertise the approval in the provincial government gazette.

- Receipt of application by the Department's Records/ Registry
- Town Planner assesses application
- Comment obtained from Spatial Planning
- Chief Town Planner assesses application
- Land Use Regulator assesses application
- Chief Land Use Regulator checks application
- Director checks application
- Head of Department checks and signs application
- Minister (MEC) gives final sign off
- Depending on whether an application is granted / refused, an appeal process may follow in terms of Section 44 of LUPO which grants an applicant / appellant the right of appeal to the MEC
- Where an application is successful in terms of LUPO and the provisions of the LeFTEA and RoRA are also applied, the decision is published in the government gazette after which a final notification letter is issued to the applicant/LM.

c) Appointment of a Planning Advisory Board

In the Western Cape, a Planning Advisory Board (PAB) has been established in terms of Section 43 of LUPO to advise the MEC on appeals. In all cases the MEC has the final decision on an appeal. The provincial Department has the choice whether or not to send appeals directly to the MEC or first to the PAB for its advice. The three exceptions are: a) in the case of RoRA appeals which are all referred to the PAB; b) where there is a difference between the LM and DEA&DP on whether to support an appeal or not in which case again all appeals go via the PAB; and c) all

applications for the amendment of Structure Plans. The PAB is independent and comprises a number of professionals such as planners, attorneys and environmentalists. Typically the process involves the appeal against a LM's decision being submitted. The municipality requests the applicant to respond if he/she so wishes with an assessment of the appeal and may present its case to the PAB. The PAB may require both the municipality and appellant to attend a hearing. A recommendation is made by the PAB to the MEC who may confer with his/her senior legal advisors/planning staff on the matter. The Department officials will furnish the MEC with a recommendation as to how he or she should proceed with the recommendation of the PAB. The advice of the PAB does not have to be taken by the MEC who may decide differently from the PAB recommendation on the basis of internal departmental advice received. The appellant is notified and has recourse to the High Court for judicial review if the outcome is not in his/her favour. Where the Department does not refer an appeal to the PAB, it makes a recommendation directly to the MEC.

d) Enforcement

The Western Cape Province does not enforce any land use decisions taken and expects the municipalities to take responsibility for enforcement as they are legally obliged to do so in terms of section 39(1) of LUPO.

2.4.3. Implementation and other related legislation

National legislation associated with land use management is powerful in terms of its impact on land use decisions when relevant and applied through various triggers. Decision making in terms of these laws not only precedes land use regulatory decisions (the granting or refusal of land use applications and/or development rights) by local or provincial government. It also sets the conditions within which land use and/or development rights may be exercised. Moreover, the decisions are largely taken by either national government departments as in the case of the Subdivision of Agricultural Land Act or provincial departments that are separate from the Provincial Competent Authority (the Western Cape DEA&DP) as is the case in the Roads and Ribbon Development Act (administered by the Provincial Transport and Public Works Department) or Heritage Resources Act (administered by the Provincial Department of Cultural Affairs and Sport) which have major implications for potential inconsistencies in decision making and for the time it takes to consider an application.

The structure and time frames of a LUPO application are further impeded by the applications in terms of RoRA and other similar national legislation. For example, the RoRA advertising procedures [clause 3(6)] are very restrictive in that it stops appropriate development from

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happening efficiently especially in informal areas where advertising to a large number of abutting erven is required yet occupants' addresses are not necessarily known or clear for correspondence to reach them.

RoRA can be dealt with in three different ways: a) through an application to the Local Municipality and simultaneous submission to the Western Cape Provincial Department of Environmental Affairs and Development Planning; b) through delegation in terms of section 1 of the Western Cape Delegation of Powers Law, 1994; and c) through an application to the State Attorney. There should ideally be one uncomplicated and efficient way of applying the provisions of RoRA.

There is no doubt legal confusion as to whether the MSA's IDPS (and SDFs) should prevail over outdated Guide Plans, the former being a municipal planning instrument and the latter a provincial one. In practice this means that applicants apply to the province for amendments to the old Guide Plans. These amendments often conflict with the spatial intent of SDFs formulated in terms of the MSA. While the IDPs are expected to bring spatial, economic and infrastructural aspects into alignment, they do not in reality always do this equitably across areas of jurisdiction in municipal areas thus there is an important oversight role for a different sphere of government to monitor the fair distribution of public resources. In theory the province should fulfill this role, but because the legal basis for doing so are outdated plans of uncertain constitutionality the province's legitimacy is compromised in practice.

Case No. 4217/2009; 5932/2009: in the matter between City of Cape Town (Applicant) and Maccsand (Pty) Limited (First respondent) not only illustrates the power of NEMA as coordinating legislation but also how land use as a surface or sub-surface based activity is not considered by, in this case, the national Department of Mineral Resources, and land use is relegated to low importance. Yet the actual land use (exercising mining rights) could potentially have significant implications for desirability of the contemplated use of the land in terms of section 36 of LUPO. At the same time, the NEMA is taken more and more seriously by the PG: WC DEA&DP, which holds both planning and environmental competencies in the Western Cape. This is further illustrated by the recent announcement by the Western Cape DEA&DP that as a policy no RoDs in terms of NEMA will be issued until such time that an application for Structure Plan amendment in terms of LUPO has been approved (in terms of Circular No. 3 of 2008). The implications for time frames, among other matters, for the approval of land use applications are enormous.

It is noteworthy that in the Western Cape Province, where the planning and environmental functions are located under the same MEC and in the same Department, there is no discernible improvement in the integration of the two functions and their associated legal processes. The officials representing the two sectors continue to function separately.

3.0. Performance of Provincial Legislation

3.1. Number and type of applications

The Department of Environmental Affairs and Development Planning (DEA&DP) deals with the following planning applications[1]:

- Removal of Restrictions Act (full applications and relaxations);
- Appeals in terms of LUPO:
- Non-delegated and out-of-time appeals i.t.o. LUPO
- Structure Plan amendments in terms of LUPO and the Physical Planning Act
- Less Formal Township Establishment (LeFTEA)
- Black Communities Development Act Regulations

Table 2: DEA&DP land use applications submitted versus finalised

	2007/8	2008/9	2009/10	2010/11
Submitted	1708	1569	1159	1210
Finalized	1605	1446	1109	1258

3.2. Average time taken from submission to getting a decision/hearing

The time taken from submission to getting a hearing/decision varies; the average time is between 4 and 15 months. There appears to be a steady improvement in approval periods over the past four years, although the total number of applications per annum has dropped, presumably because of the economic slump.

3.3. Main reasons for delays in decisions on land use applications

There are many influencing factors, for example:

- Structure plans need to be amended first; thus the application is placed on hold
- Environmental authorization is required first as per Circular 3 of 2008 and therefore the application is placed on hold until an environmental Record of Decision is in place

[1] It is important to remember that the Department is also responsible for all NEMA applications and issuing of RoDs.

- Appeals in terms of the Municipal Systems Act need to dealt with before LUPO appeals can commence
- The time taken for a Municipality to comment
- Time taken for public participation especially in the case of appeals (i.e. right of objectors to lodge comments on the appeal)
- Staff issues
- Poorly prepared applications

3.4. Number of applications approved, declined or withdrawn before decision

Table 2 above indicates the number of applications finalized. There is difficulty in answering this question as the following needs to be considered:

- Does approval mean the development can go ahead?
- Does decline mean the development cannot go ahead?
- The Competent Authority dealing with this matter deals with appeals on the application and therefore either upholds or dismisses the appeal which can mean either of the above.
- In terms of the RoRA, the Competent Authority can accede to or refuse the removal of the RoRA application. This does not mean the development can go ahead because the LUPO application then follows which can either be granted or refused at municipal level.

3.5. How long after decision to notification

Decisions are communicated as soon as possible after the decision of the Competent Authority, usually within two weeks. If longer than two weeks, it may mean that the decision requires to be published in the Government Gazette.

3.6. Number of appeals received

This varies per annum but on average, it is estimated at 40 % of the totals provided in Table 2

3.7. Main kinds of applications that are appealed

Rezoning applications

3.8. How long it takes for appeal body to make a decision

The Competent Authority for decisions in respect of Appeals in the Western Cape is the MEC (Minister) for Local Government Environmental Affairs & Development Planning. The decision is not taker by an Appeal body. In the Western Cape the Panning Advisory Board advises the Minister on certain applications which could take on average 12 months depending on the nature and scale of the application under appeal.

3.9. Number of staff undertaking the planning function

There are 48 professional staff including Town and Regional planners and Land Use Regulators in the Department (excluding Departmental Senior Management)

3.10. Budget to undertake function

Not indicated

3.11. No. of members on board/decision making structures (including appeal structures) and compositions (all officials/experts, etc)

There are seven members on the Planning Advisory Board comprising:

- 2 x Town Planners
- 1 x Architect
- 2 x Civil Engineer
- 1 x Environmental Professional
- 1 x Legal Professional.

3.12. How often decision making structures convene, how many applications heard per setting, etc?

There are 12 monthly meetings per annum and although the number of applications varies, there are 25 applications per sitting.

3.13. Other relevant empirical information that they may have (e.g. value of applications, location of applications, etc).

The majority of appeals emanate from decisions taken by the City of Cape Town on land use applications.

4.0. Stakeholder Views of Provincial Planning Legislation

4.1. Qualitative inputs by the City of Cape Town

a) What works well?

Local Government administers all applications submitted to it in terms of LUPO in the City of Cape Town municipal area. When an application is submitted and / or a township is established in terms of LUPO the provisions of the 1934 Ordinance and 1984 BCDA may also apply depending on whether these pieces of legislation are applicable to the area that the application falls within. Similarly, a township establishment in terms of LeFTEA may be applied for but as stated earlier, the provisions of LUPO also apply in terms of 'Informal Residential Zone' and associated public

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and other facilities zoning as required by the relevant zoning scheme. Typically LeFTEA is used for the establishment of a township when informal settlements are upgraded and/or where site and service schemes are established on Greenfield sites. LUPO applies where the township being established has an existing approved zoning scheme.

The land use application process is typically as follows.

- Pre-application discussions happen in principle only
- Submission of an application in terms of relevant legislation to the LM and where LeFTEA applies, a simultaneous submission is made to the PG: WC DEA&DP for proclamation by the Competent Authority i.e. Provincial MEC: Human Settlements, in the Government Gazette
- Advertisements are subsequently placed in local media by the municipality calling for objections/comments from the public
- Circulation is arranged to external government departments where required e.g. Department of Agriculture or Provincial Roads and Storm Water where a provincial road abuts the land that is the subject of the application
- Circulation is done internally to all relevant departments of the City of Cape Town and comments are received and assimilated by the Department of Strategy and Planning: Land Use Management and Building Development Branch who are also the overall coordinators and drivers of the application from submission to decision
- If no objections are received and no traffic impact, environmental impact and heritage impact studies were required to accompany the land use application then the application can be decided by delegated authority to sub-council or a senior official after which it is reported to the Committee on Spatial Planning, Environment and Land Use Management for information
- The Department of Strategy and Planning: Land Use Management and Building Development Branch prepares a report to Committee: Spatial Planning, Environment and Land Use Management (SPELUM) and makes a considered recommendation to grant / refuse a land use application on the basis of internal departmental comments received and objections from the public, if any
- The SPELUM Committee considers the recommendation made in the report and accepts / rejects the recommendation which then goes to the Portfolio Committee on Planning and Environment (PEPCO) for final decision making
- The PEPCO decision is submitted to the Mayoral Committee for ratification
- The Mayoral Committee decision is submitted to full Council for information
- The applicant is notified of the decision of Council and granted the right of appeal firstly in terms of section 62 of the MSA where if taken through, an Appeal Authority known as the

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Planning and General Appeals Committee (PLANAP) presides over the appeal and both appellant and the LM are represented at the appeal hearing

- Thereafter (section 62 of MSA) appeals are granted in terms of section 44(1) of LUPO within which both applicant and objectors are granted rights of appeal; and
- Should there be an appeal from the applicant or an aggrieved objector against the LM's decision, the MEC (Western Cape Government: Local Government, Environmental Affairs & Development Planning) handles the appeal.

According to the CoCT the structure and procedure of LUPO work well in that they are both easy to understand, familiar and generally fair. The procedural steps from submission to decision and appeals processes are clear in the Ordinance although appeals can be submitted for any reason and by any aggrieved party even if the merits of the applications have been carefully considered by the municipality.

b) What does not work well?

Even though LUPO's structure and procedures are sound, the LUPO procedure has been impeded by laws such as the RoRA, NEMA, Subdivision of Agricultural Land Act, as their different procedures work in sequence not in parallel which is something that a national spatial and land use policy/law should deal with so that planning can remain the overarching coordinating legal driver. One questions whether NEMA's reference to need and desirability is unconstitutional if its mandate was originally to consider the triple bottom line of ensuring environmental, economic and socially balanced outcomes from development? Is NEMA not interfering with a local competency in respect of spatial planning and land use regulation in focusing on need and desirability? This is the kind of clarity that a national framework or policy should be providing to avoid confusion in roles and competencies for different spheres of government. In addition, different rights of appeal are available under different legislation (NEMA, SAHRA and LUPO). So three different departments are involved who run their procedures in sequence; resulting in more than one decision which is not healthy for planning. Then there are also MSA/LUPO mechanisms for appeal, extending planning decisions even further in terms of time and resources.

The Removal of Restrictions Act advertising procedures [clause 3(6)] are very restrictive in that they stop appropriate development from happening efficiently especially in informal areas. However, one cannot just wish the RoRA away so this dilemma needs to be resolved in new legislation in a systematic manner.

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Township establishment occurs in terms of Chapters 1 or 2 of LeFTEA and zoning takes place in terms of LUPO *paragraph 5* 'Informal Residential Zone'. If LUPO was the only law used in establishing a township for informal settlements, the LM would be the final decision making authority unless there are appeals. Because of the duplication of the law and because a single point consideration of applications would be desirable, the power to approve a township establishment application should therefore ideally reside with LMs.

The calculations for the amount which the creditor (LM) is entitled to impose on the debtor (applicant/developer) in terms of section 42 of the Land Use Planning Ordinance Act No. 15 of 1985, are not defined/prescribed. This potentially implies that sufficient funds are not earned as revenue to support the development of municipal bulk infrastructure. While the City of Cape Town has a policy in place that assists in determining formulae to calculate appropriate contribution levies relative to the scale of the project (City of Cape Town, 2004), many other LMs have not advanced to this level.

It is obvious that the 27 different schemes in the case of Cape Town municipality and numerous schemes in the other municipalities in the province do not work very well and exacerbate the problem of fragmented land use management. It is therefore important that law reform at local and provincial level addresses this issue. In Cape Town an Integrated Zoning Scheme (IZS) process has already been completed and progressed considerably. The IZS process is in its final draft stage. It has been submitted to the PG: WC DEA&DP for comment and ultimate approval in terms of LUPO in the absence of a new provincial Act. The primary intention of the IZS is to consolidate the 27 different zoning schemes through a number of mechanisms including the introduction of more flexible and mixed use zoning categories, performance zoning techniques and overlay zones. In the light of the Constitutional Court's ruling in the *City of Johannesburg* case last year it could be argued that the LUPO requirement that a new zoning scheme be approved by the province is unconstitutional and that the municipality is entitled to approve it itself. Nevertheless, the CoCT has submitted the draft IZS to the province.

While the Municipal Systems Act (MSA) suggests a stronger link between spatial plans (forward planning) and the regulatory environment, it does not prescribe procedures or requirements in this regard or provide any direction on how this should be achieved. In the development of the draft IZS for Cape Town, the municipality recognised this shortcoming and developed the Overlay Zoning provisions as the mechanism to provide such link between the policy environment and the regulatory environment. The procedures for the introduction and approval of overlay zones are set out in the IZS regulations and make it clear that new overlay zones must be informed by policy

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plans thereby bridging the gap between forward planning and regulatory planning. New zoning categories included in the IZS are as follows.

SINGLE RESIDENTIAL ZONES
Single Residential Zone 1: Conventional Housing (SR1)
Single Residential Zone 2: Incremental Housing (SR2)
GENERAL RESIDENTIAL ZONES
General Residential Sub Zone 1: Group Housing (GR1)
General Residential Sub Zones (GR2 – GR6)
COMMUNITY ZONES
Community Zone 1: Local (CO1)
Community Zone 2: Regional (CO2)
LOCAL BUSINESS ZONES
Local Business Zone 1: Intermediate Business (LB1)
Local Business Zone 2: Local Business (LB2)
GENERAL BUSINESS AND MIXED USE ZONES
General Business Sub Zones: (GB1 – GB7)
Mixed Use Zones: Sub Zones (MU1 – MU2)
INDUSTRIAL ZONES
General Industry Zones (GI1 – GI2)
Risk Industry Zone (RI)
UTILITY, TRANSPORT AND PORT ZONES
Utility Zone (UT)
Transport Zone 1: Transport Use (TR1)
Transport Zone 2: Road and Parking (TR2)
National Port Zone (NPZ)
OPEN SPACE ZONES
Open Space Zone 1: Environmental Conservation (OS1)
Open Space Zone 2: Public Open Space (OS2)
Open Space Zone 3: Special Open Space (OS3)
AGRICULTURAL AND RURAL ZONES
Agricultural Zone (AG)
Rural Zone (RU)
Limited Use Zone (LU)
OVERLAY ZONE CATEGORIES
Subdivisional Area Overlay Zone (SAO)

Incentive Overlay Zone (ICO)
Density Overlay Zone (DO)
Heritage Protection Overlay Zone (HPO)
Environmental Management Overlay Zone (EMO)
Urban Edge Overlay Zone (UEO)
Scenic Drive Overlay Zone (SDO)
Local Area Overlay Zone (LAO)

c) What needs to be changed?

The PG: WC formulated a technical draft of their new proposed planning law in 2010. Participation in provincial planning law reform processes has generally been limited as was also the case in the 1997 draft bill. The new PDA/LUM Act spoken about in 2010 appears to have focused on getting rid of red tape rather than substantive matters of land use and spatial planning. Matters of principle were apparently ignored, such as defining clearly the competencies that are assigned by the Constitution to the different spheres of government. Instead of one sphere of government defining these competencies, there should be an open debate on this matter. It would be helpful for national government to formulate a policy position on law reform in the provinces in respect of the conflicts and confusion that exist among the different pieces of land use planning legislation as well as the roles, powers and competencies assigned to different levels of government.

Land use planning is a municipal executive competence in the day to day administration of the law (e.g. consideration of land use applications). The role of a province should therefore be to support and strengthen municipalities in applying the law successfully. A new Act should not just be about replacing current legislation but understand to what end such legislation should work effectively on the ground. Thus issues of how to capacitate provincial authorities to support LMs should be addressed rather than just focusing on replacing the old law with a new one without resourcing and capacitating relevant provincial institutions to perform a more positive support role to municipalities. It would therefore be in the interest of the public at large for national and provincial government to clarify in terms of policy, norms and standards: i) competencies; ii) urban rural planning guidance; iii) who does what in terms of the powers related to land use and spatial planning so that a meaningful by-law can emerge at local municipal level. A national law such as the current draft SPLUMB should thus rather be a policy framework that gives guidance to these matters, among others, than a comprehensive and prescriptive law tackling the day to day business of land use management.

Furthermore, the relationship between forward planning (e.g. the MSA) and land use planning (LUPO) must be sorted out. As stated earlier, the City of Cape Town is presently seeking approval for its SDF in terms of LUPO in the absence of a new provincial act and the shortcomings of the MSA. Approvals for the Cape Town SDF and district plans are being sought as a section 4(6) LUPO structure plan in order to replace the old Guide Plans. Why should an SDF not be legal in terms of the MSA alone?

In respect of appeals, it would help for a new provincial law to circumscribe grounds for appeal as anyone can appeal for any reason whatsoever if they seek to delay the final decisions on land use applications. This cannot be procedurally fair.

Enforcement on how rights are exercised requires a radical overhaul before reaching courts. The current alternative is to go to the High Court. Is this an efficient way of creating rights? New provincial legislation should rethink this.

As large informal settlements are predominantly local and emergency / urgent in nature, there should be minimum regulation at national and provincial level. The principle of the law should be that the LM prepares an overlay zone as proposed in the new IZS for Cape Town that is participated at government and public level and that begins to address the informal settlements' land use regulation over time. This principle could potentially be extended to economically depressed areas and areas where second dwellings are to be encouraged.

4.2. Quantitative inputs by the City of Cape Town

a) How many applications of each type

Approximately 700 to 800 applications are received by the City of Cape Town (CoCT) each month. As can clearly be seen by Table 3 below, Permanent Departure applications are the largest number of applications received.

Table 3: Approximate number of land use applications submitted monthly

Type of Application	**No.**
Consent use	15
Extension of validity	10
Multiple	100

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Permanent departure	470
Removal of restrictions	10-15
Rezoning	3-10
Site development plan	10-30
Subdivision	50
Temporary departure	30

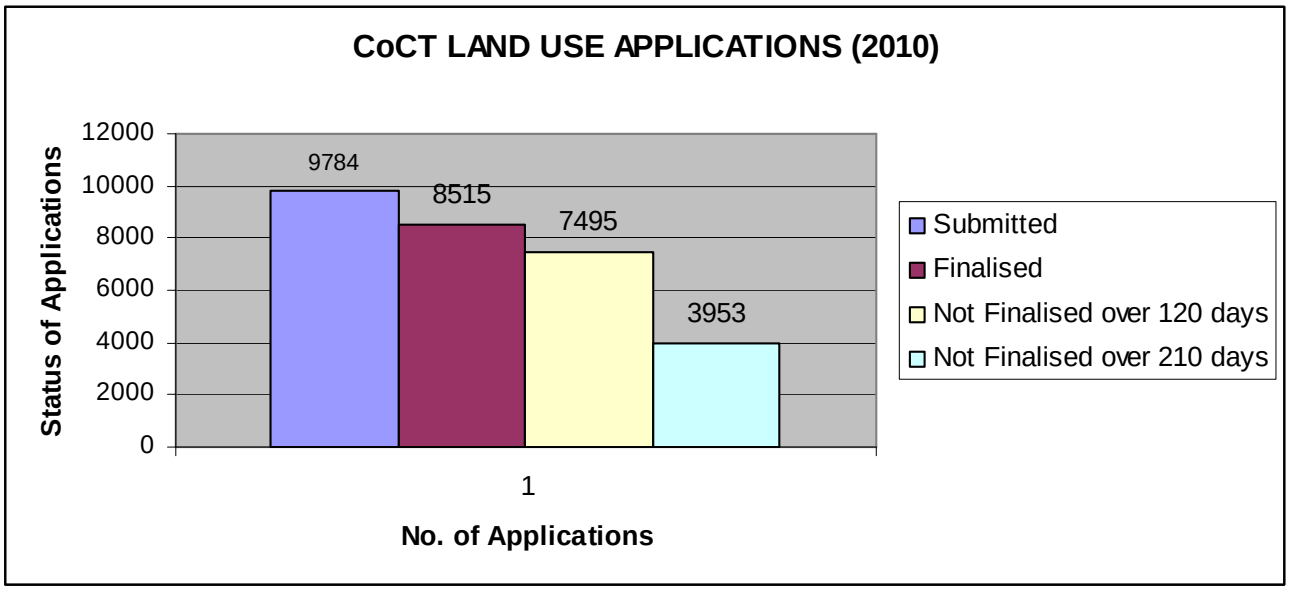
b) How long does it take from submission to getting a hearing/decision, on average?

The graph below indicates the number of land use applications received and finalized by the CoCT during 2010. The table and chart below indicate the number of applications received and finalized during 2010.

Table 4: CoCT land use applications submitted vs. finalised (2010)

	Jan - Mar	**Apr-Jun**	**Jul**	**Aug**	**Sep**	**Oct**	**Nov**	**Dec**	**Total**
Submitted	2280	2369	733	760	824	966	1066	786	**9784**
Finalised	2205	2197	578	644	664	733	749	745	**8515**
Not Finalised over 120 days	170	173	1053	1134	1157	1224	1261	1323	**7495**
Not Finalised over 210 days	125	114	644	625	623	609	599	614	**3953**

Chart 1: CoCT Land Use Applications (2010)



In preparing its statistics, the City of Cape Town (CoCT) categorizes the applications received into 2 kinds:

- 4 months
- 7 months

The difference between the 2 types is that 4-month applications are only circulated internally within the CoCT, whereas the 7-month applications are circulated to external bodies (e.g. provincial departments) as well. These external bodies are given a 60-day comment period whereas the CoCT departments have 30 days to comment, hence the longer duration of the application.

The tables and charts below provide an indication of the length of time it takes for an application to be finalized. The data reflected is for December 2010.

Table 5: Type of 4 month application – finalisation period (December 2010)

Type of Application	**<120 days**	**>120 days**	**Total**
Amendments	62	4	66
Conditional use	1	1	2
Consent use	37	2	39
Extension of validity	6	1	7
Multiple	62	12	74
Permanent departure	438	12	450

Type of Application	<120 days	>120 days	Total
Removal of restrictions	4	0	4
Rezoning	0	1	1
Site development plan	5	2	7
Subdivision	9	6	15
Erection of building structure	2	0	2
Temporary departure	9	8	17
TOTAL	**635**	**49**	**684**

Chart 2: Type of 4 month application – finalisation period (December 2010)

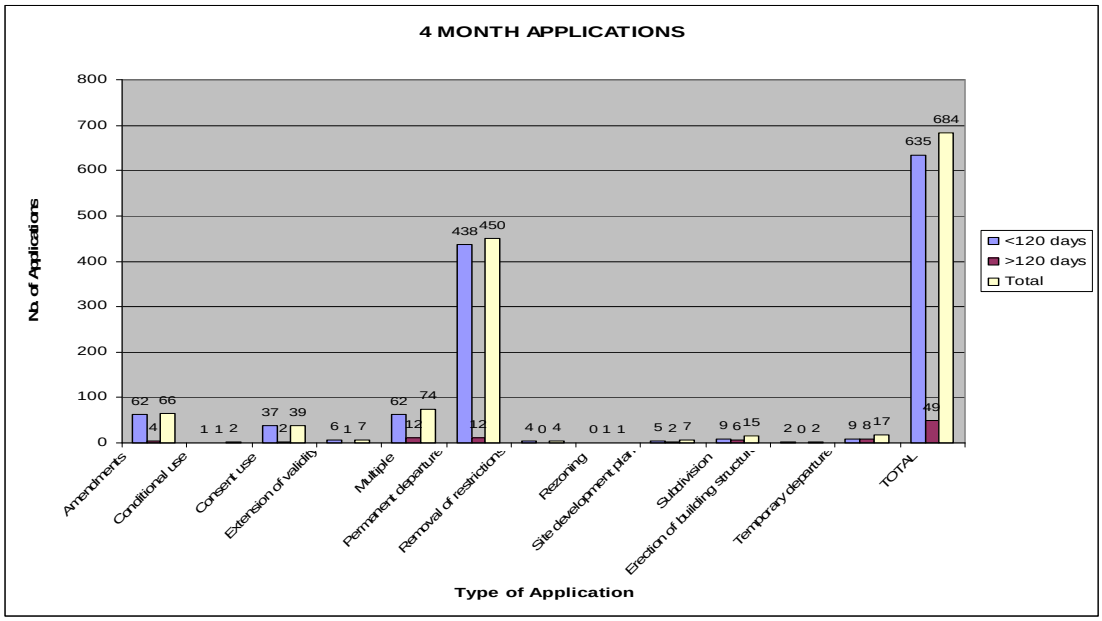
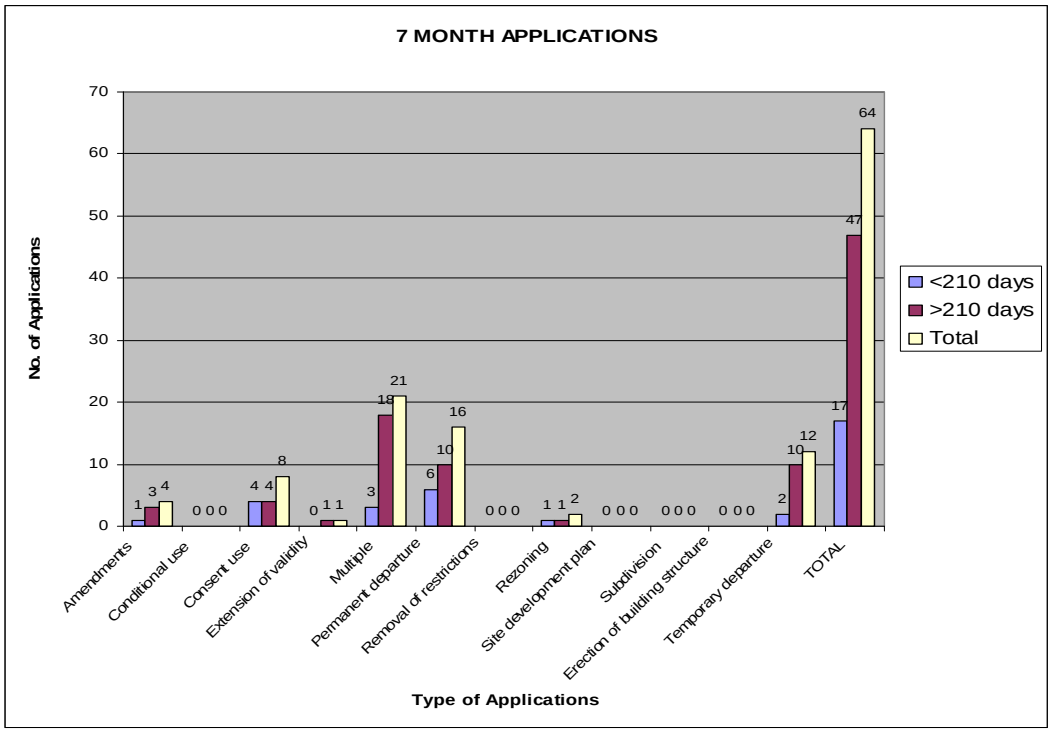


Table 6: Type of 7 month application – finalisation period (December 2010)

Type of Application	<210 days	>210 days	Total
Amendments	1	3	4
Conditional use	0	0	0
Consent use	4	4	8
Extension of validity	0	1	1
Multiple	3	18	21
Permanent departure	6	10	16
Removal of restrictions	0	0	0
Rezoning	1	1	2
Site development plan	0	0	0
Subdivision	0	0	0
Erection of building structure	0	0	0
Temporary departure	2	10	12
TOTAL	**17**	**47**	**64**

Chart 3: Type of 7 month application – finalization period (December 2010)



c) Main reasons for any delays

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- Incomplete applications
- Administrative lag
- Appeals lodged on applications
- Lack of alignment between various policies

d) How many applications are approved, how many declined, how many withdrawn before decision

This was not indicated as it is difficult to monitor and may well be declined or approved but then appealed in which case it takes a long time to get back from the provincial government.

e) How long after decision to notification

- 2 weeks

f) No. of appeals received per month

- There were 70 appeals in terms of Municipal Systems Act

i. There were 80 appeals in terms of Land Use Planning Ordinance

g) Main kinds of applications that are appealed

- Temporary Departures

h) How long it takes for appeal body to make a decision

The Planning and General Appeals Committee (PLANAP) takes between 6-7 months to consider appeals in terms of section 62 of the MSA.

i) No. of staff undertaking the planning function

- 70 town planners
- ± 150 administrative staff

j) Budget to undertake function

- R157 million in 2010

k) No. of members on board/decision making structures (including appeal structures) and compositions (all officials/experts, etc)

- Sub-structures (15)
- Sub-Councils with delegated powers;

SPELUM (8)
PEPCO (16)
PLANAP (9)

l) How often it convenes, how many applications heard per setting, etc

- Meet once a month.

m) Other relevant empirical information that LMs may have (e.g. value of applications? location of applications? etc).

- Officials can make delegated decisions if the application does not include a TIA/HIA/EIA and there are no objections from the public
- Sub-council to make decision if the application includes a TIA/HIA/EIA but has no objections from the public

5.0. Overview of key issues that have implications for Provincial Planning Legislation

- Existing provincial planning legislation is structurally unable to address the planning regulatory environment in a coherent and rational fashion given the numerous and varied planning laws for example, there are a number of laws to establish a township as discussed above. The demands on the planning regulatory environment by other associated legislation such as NEMA, RoRA etc. as discussed above, exacerbate the practice and implementation of the planning laws even further which results in confusion and fragmentation both spatially and institutionally.
- Existing provincial planning legislation is also structurally unable to address the legacy of apartheid planning and land use regulation which has no doubt remained in cities, towns and rural contexts in the Western Cape largely as a result of confused planning regulation. It is critical for new provincial legislation to address this legacy and the implications for geographical fragmentation, separation and the nature of planning as a local level exercise. In view of this as well as the DFA Constitutional Court 2010 judgment, one could potentially question the constitutionality of current planning legislation in the Western Cape and particularly LUPO.
- Outdated legislation appears to be entrenched to the degree that it is difficult to simply repeal old legislation and have one single piece of land use planning legislation which calls for a systematic repeal process of old legislation such as RoRA and carefully planned transitional arrangements that can begin to manage the change to a unified planning law and system.

- The law reform processes in the Western Cape attempted since 1997 have not come to fruition for a number of reasons; the most important of which is the lack of democratic debate among spheres of government and the complexities in respect of planning, environment and heritage competencies as defined in different pieces of legislation at different levels of government to design and implement a single point application and decision making system for development to take place and rights to be assigned.
- A new and unified provincial planning law would clearly have implications for institutional structures, planning officials and practitioners and not only calls for the reorientation and definition of the role of planners but also the debate as to whether planning should be the coordinating driver of determining land use change and development rights.
- Appeal processes are generally long, cumbersome, expensive and too open-ended for land use decisions to be meaningfully and timeously taken and implemented.

6.0. Preliminary Conclusions and Recommendations

6.1. Preliminary Conclusions

In conclusion, the existing planning laws in the Western Cape are numerous and varied. In addition there is a host of other associated legislation each with its own provisions that begin to dictate how and when land use management should occur. The implications for land use and spatial planning are far-reaching in that ultimately planning is a less considered and more myopic exercise focused more and more on controlling development at a micro level rather than facilitating development at a macro scale. Ideally there needs to be far better integration between planning laws and those that impact on planning; as well as flexibility to make better and well performing environments in space.

The research conducted revealed that interviewees felt that LUPO generally works well in terms of its structure and procedures and that a consolidated law should be modelled on the structure and procedure of LUPO for the Western Cape. The key directions for planning law reform lie in the following areas.

- Planning legislation is best placed as the coordinating and legal driver of spatial planning and land use matters and must reclaim this position.
- All old planning legislation should be repealed and attempts made to have a unified planning law that is unambiguous in terms of its structure, procedures, appeal processes, roles and responsibilities assigned to governmental spheres and departments. The RoRA in particular should be streamlined; however with the full acknowledgment that the removal of restrictive conditions of title is important and cannot be circumvented.

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- At national level, spatial planning and land use legislation should be policy / framework based rather than legislation in its own right. In this regard, competencies and responsibilities for different spheres should be clarified, agreed and assigned to avoid unconstitutionality of different levels of government in the practice of planning and land use law.
- Provincial Government should set norms and standards and begin to capacitate themselves to strengthen and support Local Municipalities, where needed.
- Limiting rights of appeal should happen at both local / provincial level and should be based on human, technical and environmental concerns.
- Local level tribunals without political influence as promoted by the current SPLUMB would facilitate land use planning and development control processes.
- The lapsing of rights time frames should be reviewed and made longer than the two years on rezoning approvals granted.
- Consideration of minimum regulation in certain instances such as emergency settlements and the creation of overlay zones on the part of municipalities in new legislation would be useful.
- A mechanism to deal with development contribution levies that is clear and unambiguous should be considered in new legislation.
- Enforcement and capacity to enforce should be the job of the local municipalities who should be resourced to perform this role.

6.1 Preliminary Recommendations

- The Western Cape Provincial Government may be well resourced to undertake and maintain the provincial planning function but it became apparent from the research conducted that many of the department's officials are inexperienced and its decision-making processes are long and cumbersome as a result.
- While not all Local Municipalities are as well resourced as the City of Cape Town, it is clear that the City of Cape Town is very well resourced from a human and financial perspective as well as upper management having a depth of experience to implement planning laws. This City is therefore well placed to have the delegated authority to implement new planning legislation as an autonomous and independent Competent Authority.
- Provincial government should ideally reinforce the work of local municipalities in terms of a monitoring and evaluation role rather than doing local level planning on behalf of municipalities.
- Provincial legislation should attempt to set norms and standards for planning but the detail of planning should be in the administration of integrated zoning schemes. There are a number of innovations contained in the Cape Town IZS in respect of bridging and transitional

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mechanisms that can begin to inform new ways of approaching the implementation of planning.

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1940: Advertising on Roads and Ribbon Development Act, No.21

1967: Removal of Restrictions Act, No. 84

1970: Subdivision of Agricultural Land Act, No. 70

1983: Conservation of Agricultural Resources Act, No. 43

1984: Black Communities Development Act, No.4

1989: Legal Succession to the South African Transport Services Act, No. 9

1991: Physical Planning Act, No.125

1991: Less Formal Township Establishment Act, No. 113

1993: Provision of Land Assistance Act, No. 126

1998: National Environmental Management Act, No. 107

1999: Heritage Resources Act, No. 25

2000: Municipal Systems Act, No. 32

2002: Mineral and Petroleum Resources Development Act, No. 28

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Manager: Development Management: Land Use Management and Building Development, Department of Strategy and Planning, City of Cape Town – Interview conducted on 24 May 2011

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Figure 1: The Western Cape Province Municipalities (source: Municipal Demarcation Board, 2011 (http://www.demarcation.org.za/pages/default_new.html)

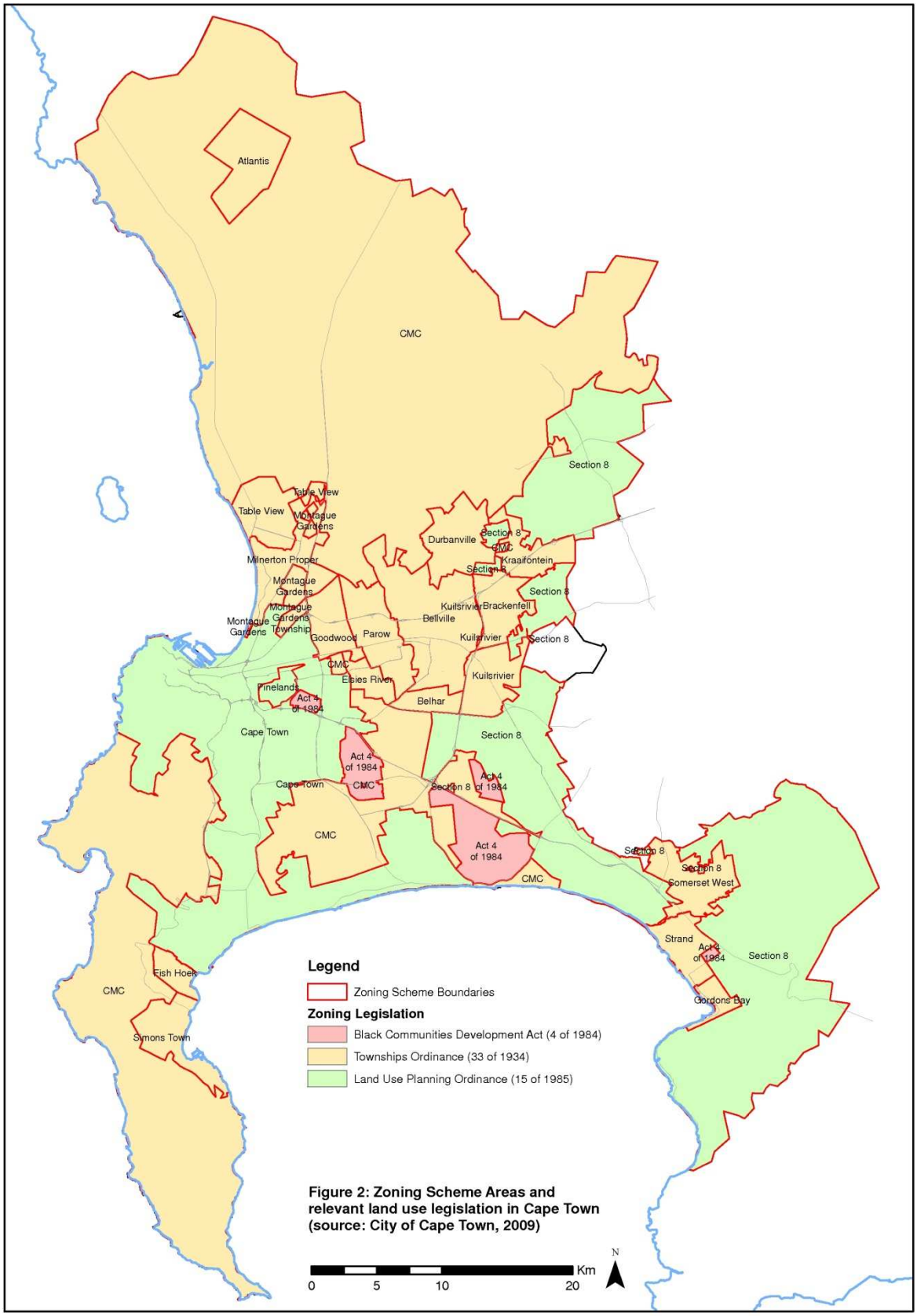

Figure 2: Zoning Scheme Areas and relevant land use legislation in Cape Town (source: City of Cape Town 2009)