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PROPOSED

Provincial planning laws compared

The legal framework for land use planning is changing rapidly, and provincial governments are addressing this by engaging in law reform. Their efforts take place in the aftermath of the 2009 Constitutional Court DFA judgment (*City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11), which condemned the Development Facilitation Act for encroaching on municipal authority, and in anticipation of national legislation due by June this year.



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This article compares the Western Cape Land Use Planning Bill with the equally new Gauteng Planning and Development Bill, both published in 2012. They both deal with the same problem, namely regulating municipal and provincial roles in planning, but often suggest different approaches in dealing with it.

Premier or MEC?

A general difference between the two Bills is that the Western Cape Bill places provincial authority regarding planning with an MEC, while the Gauteng Bill 'centralises' these functions in the premier's office.

Forward planning

Both Bills contain rules for forward planning, but differ quite significantly in their approaches. The Gauteng Bill instructs the provincial government to adopt a provincial integrated development plan (IDP) and a provincial spatial development framework (PSDF). Both must be reviewed every five years.

The Western Cape Bill does not formalise the adoption of a broader strategic plan such as a provincial IDP, but does

provide for the adoption of a PSDF which must be reviewed every ten years. The Western Cape Bill also provides that the MEC may adopt a regional spatial development framework for any area covering more than one municipality, if circumstances demand a specific regional response.

Spatial development frameworks binding?

A key difference between the two provinces is that the Gauteng Bill presents spatial development frameworks (SDFs) as guidelines and not as binding documents. The Bill makes it clear that a municipal SDF does not limit the discretion of the municipality in determining an application. (See page 19.)

The Western Cape Bill, on the other hand, requires development to be in accordance with SDFs. It includes principles for determining how an application can be justified in terms of a provincial or municipal SDF.

If an application cannot be reconciled with a provincial or municipal SDF, it cannot be approved without an amendment to that SDF.

When there is inconsistency between the PSDF and a municipal SDF in Gauteng, the PSDF exists for 'reference

purposes' only, while the Western Cape instructs the two spheres of government to ensure that their SDFs align.

Land use and zoning schemes

The Gauteng Bill gives municipalities five years to adopt integrated land use schemes, while the Western Cape provides for a three-year transition in which integrated zoning schemes must be adopted. The Gauteng Bill wants its land use scheme reviewed every five years, while the Western Cape Bill refers to a review every ten years. The Gauteng Bill provides that if a municipality in Gauteng is unable to prepare a land use scheme, the provincial government may step in, subject to section 139 of the Constitution.

Both Bills provide for provincial participation in the drafting of municipal land use or zoning schemes. However, the Western Cape Bill is more detailed on the mechanisms. It permits the MEC to call in the advice of its land use planning board and requires municipalities to explicitly consider and report on how they address the provincial input.

The Western Cape Bill presents the zoning scheme as consisting of a scheme by-law, a map and a register. The Western Cape thus regards the rules surrounding the zoning scheme as a municipal by-law. This has consequences for the status of these documents and the procedure that they follow. By-laws are adopted according to a specific procedure and have the status of law.

This is different from the Gauteng Bill, which states that the municipality must adopt, with the land use scheme, a document containing written provisions, procedures and conditions. Such a document will carry less weight than the Western Cape's scheme by-law.

Districts managing developments?

The Western Cape Bill excludes district municipalities from managing development and limits their role to forward planning. The Gauteng Bill leaves the door open by providing that district municipalities may prepare land use schemes with the agreement of the local municipalities.

Regulating land use procedures

The two provinces have different approaches to the regulation of procedures to deal with land use applications. The Gauteng Bill prescribes, in detail, the procedures for

receiving, considering and approving land use applications. It distinguishes between development applications and land use applications. The premier determines application fees.

The Western Cape envisages a stronger regulatory role for municipalities. It expects municipalities to adopt by-laws to deal with the criteria and procedures for deciding land use applications. However, these by-laws must stay within the minimum requirements determined in the Bill. These criteria deal with issues such as public participation, maximum decision time (130 days to take a first decision) and professionalisation (certain decisions requiring the report of a registered planner). Municipalities in the Western Cape will determine application fees, subject to minimum requirements.

The Western Cape Bill acknowledges that not all municipalities will be ready to prepare, or be interested in preparing, by-laws on municipal planning. In the absence of a municipal by-law, provincial regulations automatically apply to the land use application.

Provinces deciding on applications?

In terms of the Gauteng Bill, municipalities are the only decision-makers when it comes to land use management. Municipalities in Gauteng will receive, consider and decide on all land use and development applications. The Western Cape Bill works the same way, except that it envisages that a specific category of land use applications will require the approval of both the municipality and the provincial government. This applies to developments that affect an entire region (eg a regional mall) or developments that directly affect provincial functions (such as a development having a material impact on agriculture or tourism). The 'second' provincial decision is necessary only when the municipality approves the development and the development was not envisaged in the municipality's SDF.

Appeals and objections

The two provinces suggest different ways of dealing with the difficult matter of appeals against municipal land use decisions.

Gauteng

The Gauteng Bill provides for an appeal against municipal land use decisions and establishes an inter-municipal appeal tribunal for this purpose. The tribunal is appointed by the premier, but the names of the members are provided by the

municipalities, who may submit 12 names each. The tribunal is not completely 'municipal', however, as the premier may add names to the municipalities' submissions. Half of the tribunal's members must be employees of the provincial government or municipalities in the province. The members serve renewable five-year terms. The premier appoints the secretary and funds the tribunal.

Western Cape

The Western Cape suggests a provincial land use planning board in its Bill. The board is appointed by the MEC from nominations received from the planning sector. It must be representative of the district municipalities and the City of Cape Town. Persons aggrieved by a land use decision may lodge an objection with it. The key difference between the provinces is that the Western Cape board does not take final decisions on these objections. Instead, it refers the matter, together with a recommendation, back to the original decision-maker.

Planning for subsidised housing

The Gauteng Bill suggests a specific regime for 'settlement areas', which may be declared by the municipality for the specific and sole purpose of subsidised housing. Regular land use procedures do not apply here, and the law requires basic engineering services only. Nobody may transfer land or engage in development activity in a settlement area without the municipality's approval.

Engineering services and development contributions

The Gauteng Bill provides that 'internal engineering services' are the responsibility of the applicant and

that 'external engineering services' are the responsibility of the municipality. It also provides a framework for development contributions. Municipalities may levy development contributions related to the installation of external engineering services or for the provision of land for refuse sites. The premier will prescribe how these contributions may be calculated. The Bill specifically provides that the installation of engineering services by the applicant will not be subject to the Municipal Finance Management Act.

The Western Cape Bill provides a basic, enabling framework for development contributions, envisaging a broader set of purposes for such contributions, including not only the provision of engineering infrastructure and cession of land, but also aspects such as the provision of social facilities, conservation, energy efficiency, and agricultural and heritage preservation. It does not provide any detail and expects municipalities (or the MEC) to make decisions within the broader framework.

Conclusion

What is clear from this comparison is that some provincial governments are fast occupying the space for regulating land use planning that has been left open by national government.

It is also clear that the approaches will differ from one province to another. This may be a perturbing reality for developers that operate on a national or regional scale, as they will have to come to grips with differences between provinces, and even between municipalities. However, these differences are a direct result of the space that the Constitution affords to provinces and municipalities.



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The following articles are available for downloading from our website at <http://www.ldphs.org.za/local-government-bulletin>:

Bosire, C. (2011) "Municipal planning" and "regional planning and development": Where does municipal planning end and provincial planning begin?, *LGB* 13(4): 19.

Christian-Aimé, C C (2011) 'Municipal approval required even with a mining permit', *LGB* 13(4): 20.

Cohen, L (2008) 'Land Use Management Bill: A first step towards ending spatial fragmentation?', *LGB* 10(3): 12-13.

De Visser, J and Singiza, D (2010) 'Undermining local planning? High court confirms that mining companies require land use approval', *LGB* 12(1): 5-6.

De Visser, J (2010) 'Constitutional Court shows DFA the door', *LGB* 12(2): 13.