



Province of the  
**EASTERN CAPE**  
COOPERATIVE GOVERNANCE  
& TRADITIONAL AFFAIRS

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# **GREEN PAPER: SPATIAL PLANNING & LAND USE MANAGEMENT IN THE EASTERN CAPE**

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**January 2016**



Province of the  
**EASTERN CAPE**

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COOPERATIVE GOVERNANCE  
& TRADITIONAL AFFAIRS

# PREFACE

The Green Paper in support of the formulation of new Spatial Planning and Land Use Management legislation for the Eastern Cape Province acknowledges the unique history of the Province. In particular, it recognises the social, cultural, economic and spatial consequences of discriminatory governance and the injustices suffered by the majority of its residents in the past. It also recognises that it now needs to respond to these consequences through the drafting of new legislation to complement and extend the national Spatial Planning & Land Use Management Act (Act 16 of 2013), which was brought into operation across South Africa on 1 July 2015.

This Green Paper forms part of the Province's response to the specific challenges and issues facing the crucial activities of spatial planning and land use management in the Eastern Cape by way of commencing the process to formulate a just law that is fit for purpose.

That law will be built on and guided by -

1. The Constitution of RSA;
2. The prevailing national legal and policy frameworks applicable to spatial planning and land use management including, in the first instance, the national Spatial Planning & Land Use Management Act;
3. International best practice and base principles as enshrined in various treaties and protocols that South Africa is a signatory to; and
4. The needs of the end-users in the Province: the people who live in the Eastern Cape across a variety and divergence of circumstances; the wealthy and the poor; the landed and the landless; the powerful and the disempowered.

It is clear that the Department of Cooperative Governance and Traditional Affairs cannot take sole responsibility for the development of policy and law that relates to a complex array of situations where land, development, planning, and rights in and to land and the use thereof are central. Therefore, I trust that the contents of this document will serve as a useful vehicle for sustaining a thorough and meaningful process of consultation and engagement now and through ensuing processes that will lead, ultimately, to a relevant law that is accepted by all stakeholders in the Province.

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MEC for Cooperative Governance & Traditional Affairs

**Date**

# Terms & Abbreviations

|        |  |
|--------|--|
| AA     | <i>Administrative Area, comprised of a number of villages, typically located in the former Ciskei or Transkei regions</i>                          |
| COGTA  | <i>Department of Cooperative Governance &amp; Traditional Affairs, national or provincial, as specified</i>  |
| DM     | <i>District Municipality</i>   |
| EC     | <i>Eastern Cape Province</i>   |
| FPIC   | <i>Free, Prior and Informed Consent</i>  |
| IDP    | <i>Integrated Development Plan, as provided for in the MSA (see below)</i>   |
| IGR    | <i>Intergovernmental relations, concept that is fundamental to the idea of cooperative governance as per Section 41 of the Constitution of RSA</i> |
| IGRFA  | <i>Intergovernmental Relations Framework Act (13 of 2005)</i>  |
| LM     | <i>Local Municipality</i>  |
| LUM    | <i>Land Use Management</i>   |
| LUPO   | <i>Cape Provincial Land Use Planning Ordinance (15 of 1985)</i>  |
| MSA    | <i>Municipal Systems Act (Act 32 of 2000)</i>  |
| NEMA   | <i>National Environmental Management Act (Act 107 of 1998)</i>   |
| OTP    | <i>Office of the Premier of the Eastern Cape Province</i>  |
| PAJA   | <i>Promotion of Administrative Justice Act (3 of 2000)</i>   |
| PTO    | <i>Permission to Occupy certificate in respect of land in a Trust land area</i>  |
| RSA    | <i>Republic of South Africa</i>  |
| SA     | <i>South Africa</i>  |
| SDF    | <i>Spatial Development Framework, as provided for variously in the Municipal Systems Act and SPLUMA</i>  |
| SPLUM  | <i>Spatial Planning &amp; Land Use Management</i>  |
| SPLUMA | <i>Spatial Planning &amp; Land Use Management Act (Act 16 of 2013)</i>   |
| TA     | <i>Traditional Authority area, comprised of a number of Administrative Areas</i>   |
| TC     | <i>Traditional Council or Traditional Council area, being geographically the same as previous TAs, in terms of the TLGFA</i>                       |
| TLGFA  | <i>Traditional Leadership &amp; Governance Framework Act, national or provincial as specified</i>  |

# Executive Summary

*In line with the provisions of the national Spatial Planning & Land Use Management Act (Act 16 of 2013, known as SPLUMA), the Province of the Eastern Cape has embarked on a formal process to develop a provincial law on spatial planning and land use management so as to provide for the specific and sometimes differing planning and developmental requirements of all people residing in the Eastern Cape.*

*The formal process to develop an appropriate law in the Eastern Cape requires a step-by-step approach to be followed with, firstly, a Green Paper being prepared to serve as a policy framing discussion document.*

*Thereafter, a White Paper will be compiled, which will serve to flesh out the policy and technical directives that will guide the drafting of the Eastern Cape's Provincial Spatial Planning & Land Use Management law.*

*This document, the Green Paper on Spatial Planning & Land Use Management in the Eastern Cape, is the outcome of a number of phases of work.*

*The Green Paper states the basic findings of a process of analysis and research undertaken to better understand the current status and performance of planning (Spatial Planning and Land Use Management) in the Eastern Cape.*

*It then moves to set out the key themes and focus areas of policy that the Department of Cooperative Governance & Traditional Affairs wishes to further develop into a White Paper and then into a law fit for purpose to guide and administer spatial planning and land use management in the Eastern Cape.*

# The Need to Reform Spatial Planning & Land Use Management in South Africa

It is today well understood that Spatial Planning and Land Use Management (SPLUM) in South Africa has a complex history that is, to a large extent, intertwined with the country's post-colonial and Apartheid history.

Whilst care must be taken not to demonise the profession and discipline of SPLUM, it must also be acknowledged that SPLUM was used by the post-colonial and Apartheid states as an important tool to manipulate the use of space (land) at national, regional and local scales to assist in achieving the spatial, socio-economic and cultural objectives of a racially segregated society.

In the post-World War II period, SPLUM, as it was done in South Africa at national, regional and local scales was characterised by a number of distinctive features: -

- The discipline of SPLUM was very much embedded in the state and it was undertaken as a top-down, deterministic administrative action;
- SPLUM ("planning") itself was portrayed as an objective, technical action that, when done correctly, could plan future arrangements for settlement development and land use as well as manage land uses in a way that was scientific and would lead to the best outcomes for the greater public and society in general;
- This view of SPLUM, meant that it was easier to conceptualise planning challenges as largely technical problems and underplay (or even overlook) the often significant human consequences of decisions that were made;
- From a legislative point of view, the state's approach to Separate Development also resulted in SPLUM being undertaken in different ways in areas that were racially classified differently, based on different (and differing) laws.
- This resulted in a complex and fragmented legal environment for SPLUM across South Africa and, especially so, in regions such as the Eastern Cape Province, which had complicated divisions of land based on historical processes at the provincial, district and local levels.

The above situation necessitated that the new democratic state, in 1994, needed to embark on a process of rationalising the legal framework for SPLUM as well as reforming the practise of planning in general, so that it could be undertaken in accordance with the evolving constitutional democratic order.

# SPLUMA: A New System for Spatial Planning & Land Use Management

Following a protracted period of policy and legislative development, a new Spatial Planning & Land Use Management Act (Act 16 of 2013 *aka* SPLUMA) was promulgated in 2013 and introduced into application as law on 1 July 2015.

SPLUMA is described as “framework legislation” in that it sets in place the foundation of a new SPLUM system that will apply throughout South Africa but also provides for Provinces to enact their own legislation to refine provincial SPLUM systems to better meet their specific circumstances, within the framework set by SPLUMA.

The **new Spatial Planning System in South Africa** is described in Section 4 of SPLUMA:

4. The spatial planning system in the Republic consists of the following components:
- (a) Spatial development frameworks to be prepared and adopted by national, provincial and municipal spheres of government;
  - (b) development principles, norms and standards that must guide spatial planning, land use management and land development;
  - (c) the management and facilitation of land use contemplated in Chapter 5 through the mechanism of land use schemes; and
  - (d) procedures and processes for the preparation, submission and consideration of land development applications and related processes as provided for in Chapter 6 and provincial legislation.

In this new System, SPLUM is described within the context of **3 categories of planning**:

1. **Municipal Planning**, which is described as comprising of:
  - *The compilation, approval and review of integrated development plans;*
  - *the compilation, approval and review of the components of an integrated development plan prescribed by legislation and falling within the competence of a municipality, including a spatial development framework and a land use scheme; and*
  - *the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest.*

2. **Provincial Planning**, which is described as comprising of:

- *The compilation, approval and review of a provincial spatial development framework;*
- *monitoring compliance by municipalities with this Act and provincial legislation in relation to the preparation, approval, review and implementation of land use management systems;*
- *the planning by a province for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use; and*
- *the making and review of policies and laws necessary to implement provincial planning.*

3. **National Planning**, which is described as comprising of:

- *The compilation, approval and review of spatial development plans and policies or similar instruments, including a national spatial development framework;*
- *the planning by the national sphere for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use; and*
- *the making and review of policies and laws necessary to implement national planning, including the measures designed to monitor and support other spheres in the performance of their spatial planning, land use management and land development functions.*

The following are highlighted as **key provisions of SPLUMA**: -

- SPLUMA legislates **5 Development Principles** that are to be adhered to in the practice of Spatial Planning and Land Use Management in South Africa, in line with a principle-led approach to SPLUM that is now a legally binding feature of the South African system. These 5 Principles are listed in brief as:

- |   |   |
|---|---|
| <ol style="list-style-type: none"> <li>1. The Principle of Spatial Justice</li> <li>2. The Principle of Spatial Sustainability</li> <li>3. The Principle of Efficiency</li> </ol> | <ol style="list-style-type: none"> <li>4. The Principle of Spatial Resilience</li> <li>5. The Principle of Good Administration</li> </ol> |
|---|---|

- **SPLUMA is intended to function at the centre of a range of other legislation and activities that make up the overall processes of SPLUM.** As such, it is aligned with and gives effect to the provisions related to planning and associated activities of the state, as set out or prescribed in a range of core legislation, starting with the Constitution and including the Municipal Systems Act and numerous Acts dealing with cooperative governance, environmental conservation and management etc.
- **The SPLUM process, then, is not subordinate to the dictates of any one Department.** All government Departments have a responsibility to add value to

developmental processes in and across the national, provincial and local government spheres.

- Accordingly, it sets in place processes and institutional structures and provides for Regulations and Municipal By-Laws to:
  - render support and monitoring with regard to the planning function on a cooperative governance basis;
  - prepare SDFs at National as well as Provincial, Regional and Local levels;
  - give effect to land use management processes and the formulation of Land Use Management Schemes;
  - make provision for Land Use Scheme Amendments;
  - carry out the removal of restrictive conditions of title endorsed on individual property title deeds; and
  - deal with appeals against decisions on Land Use Scheme Amendments.
- The SPLUM system thus put in place provides a basis for property valuations and assists the formal property market in its functioning.

## Why the Need for an Eastern Cape Spatial Planning & Land Use Management Act?

In the light of the above new system for SPLUM in South Africa, the question needs to be answered: why develop an Eastern Cape Provincial SPLUM law?

*To begin to answer this question, it must first be established that Spatial Planning & Land Use Management (SPLUM) must today again be recognised as a crucial activity that is vital to assist both the state (government) as well as communities (people) to respond to some of the most pressing challenges facing our society (and the human race as a whole). These include: -*

- **At a global and national scale:**
  - The globally applicable challenge of climate change in the 21<sup>st</sup> century, which will have national, regional and local consequences ranging from:
    - Changes in weather patterns and more severe weather events (disasters) leading to changes in the natural environment, threats to water, energy supplies and safe and healthy human environments;

- Economic impacts, including impacts on agriculture (food supplies);
  - Vulnerability of human settlements, including the threat to coastal settlements of rises in sea levels and surge tides;
  - Large scale migrations of people seeking better (safer and healthier) living environments and access to opportunities.
- The impacts of globalisation and the technological revolution on human economies and associated land use and settlement patterns. Such effects are typified by rapid changes in societies (based on increasingly rapid flows of information and the shifting of resources across the globe) and impacts include an apparently deepening and speeding up in the growth of economic inequality at global, national, regional and local scales.
- **At a national, provincial and local scale: -**
    - The need to continue addressing the core challenges of transformation and the revitalisation of the economy to enable more equitable socio-economic development going forward;
    - The need to transform inequitable urban and rural human settlement formations into more functional, sustainable and productive use patterns (in terms of enabling human development, economic progress and better managed impacts on the natural environment).

**Within the Eastern Cape, specifically, it is the unique history and the socio-cultural and developmental consequences thereof that provide the motivation for taking the new system provided by SPLUMA and working to extend it and make it function more effectively in the varying contexts of different areas (communities) in the cities, towns and rural areas of the Province.**

Simply put, these unique challenges include: -

- The complexities of undertaking SPLUM (an administrative action) in a diverse socio-cultural society with varying norms and standards related to land, its use and development as well as its ownership (and the purpose thereof);
- Dealing with the consequences of impoverished urban and rural communities that have been marginalised due either to historical factors but also, often, due to factors related to poor access to opportunities (in turn, related to aspects such as geographic isolation, poor roads and tele-communication networks, inadequate education and health facilities etc.);
- The reality that the Eastern Cape is socio-culturally and economically marginalised within the national space economy and, consequently, many of its government institutions as well as the majority of its communities are not optimally-resourced and well-capacitated.

# VISION and Goals for Eastern Cape Spatial Planning & Land Use Management

In seeking to respond to the need to develop an Eastern Cape Spatial Planning & Land Use Management System that would assist the government and the communities resident in the Province to respond to the many unique challenges facing them, **the Eastern Cape Government has formulated a VISION that is guided by the Back to Basics Programme** to inform its further steps in this direction, as follows: -

In order to *Put People First, to better Deliver Basic Services, Provide Good Governance, ensure Sound Financial Management and Build Local Government Capabilities*, the system of Spatial Planning & Land Use Management (SPLUM) to be developed in the Eastern Cape Province will include the following functions and characteristics: -

- Over and above the technical aspects of IDP and SDF formulation, Scheme compilation and land use management, planning must be carried out in such a way that it gives material effect to the provisions of Chapter 4 of the Municipal Systems Act in respect of community capacitation (enabling an informed constituency), and citizen involvement in governance activities and developing locally-based inputs (future visions, strategies and proposals) for their communities.
- From the perspective of oversight, this informed constituency shall become a principle driver of and participant in the planning endeavours of the state, and must hold the state accountable for achieving agreed upon outcomes;
- While placing citizen participation (consensus) at its heart, SPLUM in the Eastern Cape shall furthermore be an integrating discipline, bringing together technical aspects of environmental management (wise land use), service delivery (how and where to develop and maintain infrastructure, roads and pedestrian networks, social facilities), economic development and human settlement (how best to facilitate and to manage where or how people live, work and play) and the key linkages between all these aspects.
- This will require SPLUM and integrated planning to take centre stage and play a co-ordinating and integrating role with and between different sectors within government as well as with and between the public and private sectors;
- In all its undertakings, planning in the Province shall be characterised by an approach that is sensitive to the cultural and economic contexts of the area(s) where the planning activity is taking place, as well as the norms, standards and expectations of the communities who are resident in such area(s);
- Plans and Schemes to be formulated in terms of SPLUM activities in the Province must be informed by and take account of the expressed needs of all stakeholders but must also remain realistic about the availability of resources in the public and private sectors (human resources, financial resources and environmental capacities

to support proposed activities) and how this may impact on their ability to achieve the desired outcomes.

- A social compact approach shall underpin the new system of planning in so far as all stakeholders will be enjoined to commit to its ongoing development.

Based on the foregoing, **three clear goals** are held to direct the proposals of the Green Paper on Spatial Planning and Land Use Management:

1. The first overarching goal is to re-establish planning (integrated development planning, spatial planning and land use management) as a crucial administrative action and discipline that is central to the successful achievement of integrated development and developmental local government;
2. The second goal is to achieve the restructuring and revitalisation of the planning profession in such a way that it performs its constitutional mandate and, accordingly, takes its place as a crucial occupation that plays a fundamentally important role in bringing people together to a better understanding of each other's worldviews and, along with this, to a better understanding of the key decisions that need to be taken to ensure that our culturally diverse society endures and prospers in a way that is more equitable, sustainable and resilient.
3. Finally, it is an explicit goal that the spatial planning system, together with applicable standards, shall be maintained as a primary responsibility of local government (municipalities). Should a municipal spatial planning post be vacated and be unable to be filled in good time, the relevant municipality will inform the MEC in order for the MEC to ascertain the level of support required in the given instance, and hence what actions need to be taken.

**It is asserted that a planning system (both the public and private sectors) that is well-supported and resourced would be able to regain its legitimacy as a profession and discipline that is integral to successful societies.**

# Key Focus Areas for Refining an Eastern Cape Spatial Planning & Land Use Management Act

In the light of the above Vision and Goals, the Green Paper proposes several Focus Areas where it is suggested that the Provincial legislation on spatial planning and land use management should provide guidance that is supplementary and/or complementary to the provisions contained in SPLUMA.

## 1. Operationalising the SPLUMA Principles in the EC-SPLUM System

Applying the letter of the law, it is accepted that all planning must be guided by the need to achieve outcomes that are in line with or give effect to the five Development Principles contained in Chapter 2 of SPLUMA.

Taken as a whole, the SPLUMA Principles direct us to a planning system that is grounded in a constitutional democratic, rights-based approach to governance. For this to happen, planning (Spatial Planning and Land Use Management as well as Integrated Development Planning) must be recognised as being a pivotal administrative action of government that is central to the efforts of government to improve its functioning and delivery as well as being central to the critical need to strengthen communication and cooperation between the government and the private sector (civil society).

The SPLUMA Development Principles mean that, in the Eastern Cape, a new planning system must cater for processes and protocols to address a range of issues and functions including Social, Cultural, Economic, Spatial and Environmental processes. Accordingly, recognition must be given substance as follows: -

- Within the overall organisational structures of both Provincial and Local Government (municipalities), the function of planning must be seen to be of central importance and must, therefore, be resourced accordingly.
- A properly resourced Provincial planning function will make it feasible for the Province to engage meaningfully with its core functions of Provincial Planning and rendering support to, and monitoring the planning systems of district, local and metropolitan municipalities.
- A properly resourced Provincial planning function would also play a vital role in liaising with key national departments such as the Department of Rural Development and Land Reform and the national Department of Cooperative Governance and Traditional Affairs to ensure that a correctly functioning

planning system is put in place and sustained in the Province at district, metropolitan and local municipal level.

- Finally, as almost half of the geographic area of the Eastern Cape Province is bound up in a customary cultural ethos, the province in conjunction with the affected municipalities must provide planning support to Traditional Councils in their area of jurisdiction.

From its side, the Province (the EC Department of Cooperative Governance and Traditional Affairs) will need to further the pursuit of achieving the outcomes associated with the SPLUMA Development Principles by: -

- Ensuring that a well-functioning system of support and monitoring is put in place to engage actively with local government bodies with regard to the spatial planning function;
- Where applicable, the Province shall also develop appropriate Provincial Policy, Regulations and Norms and Standards in relation to planning processes that clarify guidance on pursuing the outcomes associated with the SPLUMA Development Principles. This would also include the development over time of Procedural Manuals and Guidelines to assist under-capacitated municipalities in ensuring that sound planning procedures are followed in spatial planning and land use management.

## **2. The Need to Clarify Roles & Functions of the Three Spheres of Government in Relation to Planning**

This Focus Area deals with two important aspects: Firstly, the need to clarify further the operational definition of (and how to manage) the roles and functions included under the terms “Provincial Planning” and “Municipal Planning” and to provide for a better understanding of how to deal with “regional planning”, which may entail planning for an area that is not Province-wide but rather crosses municipal boundaries and is functionally based (e.g. an agricultural region).

Secondly, this Focus Area emphasises the need to clarify how best to organise and manage the relationship between Province and Municipalities in relation to Integrated Development Planning (IDP), Spatial Planning and Land Use Management.

Planning as an administrative activity of the state should be seamless and bound together in a cooperative approach to governance.

### 3. Dealing with Cultural Diversity and Customary Law

This Focus Area highlights the profound aspects of cultural diversity and how central it (diversity) is to enabling any prospects of sustainable development in both urban and rural areas.

Also highlighted are the challenges presented to the planning discipline in dealing with the realities of socio-cultural diversity in urban and rural areas. The need is noted for the Provincial SPLUM legislation to give effect to a more appropriate way of dealing with cultural diversity in planning processes and recognising the importance of customary law, indigenous (or local) cultural norms and standards and local leadership.

The importance of developing appropriate Protocols to inform planning processes is emphasised, as is the need to ensure that forward planning (Spatial Planning) is done in a manner that will ensure that subsequent planning proposals and Land Use Management Schemes are seen to be consensus-based and valid. This is important as space (land) is viewed in culturally unique ways by different cultural communities.

### 4. The Need for Thorough and Sustained Consultation in Planning

This Focus Area highlights the need to revitalise the processes applied to community participation in all planning and governance activities, as provided for in the MSA. Promoting dialogue in a planning process (that is, either an Integrated Development Planning or Spatial Planning process) will contribute to the “humanisation” of an activity that has come to seem distant and peripheral to many.

Such dialogue, however, should not be seen as being limited to being between a planning agency and a community. Rather, in terms of the constitutional imperative of cooperative governance, there is an injunction on all state departments that engage in planning or service delivery to communicate their intentions and wishes and to engage with their governance counterparts toward achieving clarity and alignment in the efforts of the state. The objective, however, remains the same: all agencies are delivering services to a specific area/space in line with one consensual development code, in an integrated and coordinated manner.

In all cases, the fundamental principle of Free, Prior and Informed Consent (FPIC) shall be held to apply but, most especially, in any case where spatial planning or any form of land development affects land that is held or occupied by a community under informal or old order tenure rights (e.g. Permission to Occupy [PTO] certificates).

## 5. Ensuring Administrative Justice (Fair Administrative Processes) in Planning & Land Development Processes

This Focus Area deals with the need to ensure that all stakeholders have access to procedures that ensure administrative justice and access to proper avenues of redress must be open to anyone whose rights have been affected by a planning process or planning decision.

The basis for this is section 33 of the Constitution, which provides for “Just administrative action”, as well as section 34, which also guarantees a right of access to courts of law and also the resolution of disputes in another tribunal or forum, provided that such tribunal or forum is independent and impartial. Administrative action without prejudice is viewed as an inextricable part of Social Justice.

In summary, the Green Paper proposes that conciliation and mediation constitute perfectly legitimate and viable alternative dispute resolution (ADR) measures that should be introduced into provincial legislation to resolve disputes that arise from the interpretation or application of SPLUM legislation. It is considered appropriate that provincial SPLUM legislation provide for a Minister, MEC or a municipal council to consider the desirability of referring a matter to conciliation when a difference or disagreement has arisen, before reaching a decision.

## 6. Ensuring Accessible and Fair Avenues for Appeal

This Focus Area deals with the subject of internal appeals, which is addressed in section 51 of SPLUMA and has been the source of some controversy as to (1) whether an appeal body contemplated in SPLUMA could be seen as an impartial body; and (2) as to whether the right of appeal has been framed too narrowly in SPLUMA.

Based on the fact that section 51(6) of SPLUMA permits a municipality to authorise an outside body or institution to assume the obligations of an appeal authority and indicates that the manner in which this is done may be regulated in terms of provincial legislation (which is reinforced by regulation 20(c) and 28 of the SPLUMA Regulations), it is proposed that this provides a useful opportunity for provincial legislation to deal with concerns about the impartiality of the executive authority of a municipality.

Thus, provincial legislation could provide for the establishment of a single umbrella appellate tribunal. This would have jurisdiction to deal with all appeals against decisions taken by Municipal Planning Tribunals (MPT) in the Eastern Cape, enjoying similar functions and powers as the erstwhile town planning appeal board, provided that the tribunal would fall under the authority and responsibilities of local government.

The last point emphasises that a provincial Appellate Tribunal would only be able to operate in place of the executive authority, where so authorised by the municipality in question, but not as a substitute therefor where no such authorisation existed. In other words, the executive authority would function as a default appeal body in the absence of specific authorisation from the municipality for the tribunal to deal with any appeal against a decision taken by the MPT.

Finally, considering the narrow right of appeal against a decision made by a MPT provided for by SPLUMA, it is submitted that provincial legislation is necessary to address this shortcoming.

In particular, the qualifications attached to the meaning of an interested party under sections 51(4) and (5) of SPLUMA require modification to ensure that the recognition of customary law is given effect and that the principles of Free, Prior and Informed Consent are protected. This also means that provisions need to be considered to include Traditional Councils and duly-legitimated community representatives as having the right to give input on relevant matters as well as having representation on Appeals bodies, where relevant.

## **7. Institutional Development & Appropriate Institutional Configuration**

This Focus Area addresses the contention that, in order to secure the vision of a revitalised and inclusive (more human) planning system in the Eastern Cape that is able to strive for the achievement of social justice, spatial transformation and the SPLUMA Principles, it is crucial to acknowledge the need for a reconfigured institutional arrangement to enable more effective and responsive planning to inform development management and delivery.

In this regard, it is proposed that: -

- A Provincial Planning Board should be established that will advise the MEC of COGTA on a range of matters affecting SPLUM.
- The Provincial Planning Board may also provide research, guidance and advice upon request by any provincial department or the House of Traditional Leaders, or a municipality or a Traditional Council on a range of SPLUM and human settlement issues.
- The provincial mandate to support and monitor spatial planning and land use management must be given “flesh” and a clear institutional home with provision for capacity to be set in place to enable the Province to render the function at an appropriate level to assist the municipal sphere as per the obligations of Province in terms of Section 139 of Constitution and Section 10 of SPLUMA.

- Finally, whilst remaining consistent with the provisions of SPLUMA, it is proposed that Provincial Planning must at least undertake the following activities:
  - The formulation of a Provincial SDF
  - The formulation of Provincial Policy on matters of interest and/or concern for spatial planning and land use management in the Province
  - Representing the Province in different forums on matters of interest to planning in the Eastern Cape
  - Provincial-based research and the development of knowledge databases and GIS data
  - Assisting in conflict-resolution between stakeholders, where so requested
  - Establishing appropriate protocols to guide planning and land use management processes as well as participatory methods need to inform and guide such processes
  - Facilitating and/or participating in Implementation Protocols as provided for in Section 35 of the Intergovernmental Relations Framework Act (Act 13 of 2005)
  - Establishing technical support structures as provided for in Section 30 of the Intergovernmental Relations Framework Act (Act 13 of 2005)
  - Collaborate with and advise on request the Eastern Cape House of Traditional Leaders and/or Traditional Councils
  - Where deemed vital, and following due process, to undertake work for and on behalf of a municipality that is unable to perform its functions.

## **8. Professional Development**

As it is a key submission of the Green Paper that SPLUM and integrated planning are crucial activities, it is considered that the planning profession needs also to be revitalised from an educational standards point of view as well as a professional ethics and standards point of view.

Therefore, it is proposed that measures be provided for in provincial legislation and/or related regulations to set minimum standards in relation to planning education and training, and to identify areas of work that may be carried out by different categories of planners, as provided for in the Planning Profession Act (Act 36 of 2002).

The effort to revitalise the profession of planning should further place great emphasis on: -

- Developing a new ethos and morality of planning in the Province that questions prevailing planning rationalities (schools of thought) in the context of socio-economic and cultural diversity.
- The development of broader and deeper skill sets to deal with the scope of the work that planners are called upon to do, as it concerns not only land (space) but also people, infrastructure, the environment and the economy.
- Putting in place support mechanisms to underpin continuing professional development (CPD) and knowledge development. Such mechanisms could include: -
  - Formalising support of SA Council of Planners (SACPLAN) and SA Planning Institute (SAPI) structures in the Province; and
  - Ensuring clarity around the need of the Province to monitor and support SPLUM in the Province, including monitoring professional standards of work (quality) and communicating with SACPLAN on ensuring due diligence in the maintenance of standards as well as corrective action, if needed.
- Putting in place a Peer Review mechanism that could be accessed on request by any client of a registered professional planner, or by any stakeholder concerned about the quality of work of such a planner.

## **9. Addressing Omissions and Problematic Aspects of SPLUMA**

As SPLUMA is in the process of being implemented in the Eastern Cape Province and it is possible that there may well be provisions made in law by the Act that will prove to be a challenge, either in the context of the Provincial realities or in general application, it is proposed that the EC-SPLUM process must ensure that ways and means are put in place to enable unforeseen legal difficulties to be dealt with in a practical manner that is not out of line with the prescripts of SPLUMA.

## **10. Providing Transitional Measures for the Bridging of the Old and the New Planning System**

In order to ensure a smooth transition from the system existing at the time of implementation of the new Provincial SPLUM Act, there will be a need to provide guidance on measures needed to ensure that the planning system continues to function smoothly as it transitions from the previous system to the new.

- Any relevant Planning Advisory Board, Land Use Planning Board and/or Townships Board will remain functioning until such time as they are disestablished by Notice in the Provincial Gazette
- Actions taken in terms of a previous law that is repealed by the P-SPLUM Act will need to be considered as having been done in terms of the Act and, as such, maintain their legality until such time as an affected action is expressly repealed or withdrawn in terms of the Act or subsequent by-laws.
- Any action taken in terms of an Act or by-law repealed by the new P-SPLUM Act and which has not been finalised at the date of enactment of the new Act may be finalised as determined by the relevant Regulatory Authority of legal standing.

#### **11. Providing for Emergency Measures**

Given the reality that planning will most likely be required to play a central role in assisting the society to deal with the implications and consequences of unforeseen events, including natural and human-made disasters, it is proposed that EC-SPLUM must make provision for emergency measures in spatial planning and land use management matters.

These would foreseeably include needs relating to:

- The need for temporary accommodation of communities as a result of natural disaster;
- The need to seek alternative land for settlement;
- The need for transitional arrangements related to the upgrading of informal settlements.

## **The Way Forward**

This Green Paper sets out the Eastern Cape Department of Cooperative Governance & Traditional Affairs' views on how to move forward in dealing with the issues at hand related to the need for provincial legislation on Spatial Planning & Land Use Management.

As such, whilst the compilation of the Green Paper has been done in a consultative manner, it will not lead to adoption by Legislature but only by the Department itself.

Consequently, once the Green Paper has been endorsed as stating the Department's policy, the next step will be the drafting of a White Paper that shall serve as the

platform for the drafting of legislation, in due course.

As the White Paper is the document that links to the drafting of legislation, it has a more formal route to travel to be adopted by Legislature, as follows: -

1. The White Paper draft goes firstly to the Governance & Administration Cluster (Heads of Departments of COGTA, the Office of the Premier and Treasury) under cover of a Cluster memo;
2. It will then be introduced to the Cabinet Committee for Governance & Administration (MECs of relevant departments) under cover of a Cabinet Committee memo;
3. If it successfully traverses those structures, the White Paper is then taken to the Executive Council for adoption;
4. Once EXCO has adopted the White Paper, the MEC for COGTA shall introduce it into the Legislature who will refer the item to the relevant Portfolio Committee, which will be briefed on the item by a COGTA delegated official;
5. At this point, the Portfolio Committee can refer the White Paper to be subject to Public Hearings;
6. Once those processes are complete, the White Paper is submitted to the Legislature for adoption.
7. The process to draft legislation (draft Bill) can then be proceeded with.
8. In this regard, it is recommended that use be made of the available ways and means to draft a Bill in parallel to the White Paper and reach the end-goal of legislation sooner.

## ***Structure of the Green Paper***

### **Chapter 1: Introduction**

This chapter sketches out the background to the current processes of rolling out SPLUMA and focuses on establishing why planning (spatial planning and land use management as well as integrated development planning) is a crucial activity that contributes to the prospects of success of developmental government.

It also addresses the issues currently affecting the planning system in the Eastern Cape and clarifies why it is important for the Province to proceed with developing its own legislation to guide SPLUM in the Eastern Cape.

### **Chapter 2: Developing a New Eastern Cape Spatial Planning and Land Use Management System**

This chapter focuses on the core of the Green Paper and sets out what SPLUMA has put in place as the basis for the new planning system in South Africa. This is important as SPLUMA sets the framework for the provincial legislation to be developed.

Thereafter, the chapter moves to address the importance of the Development Principles contained in SPLUMA and how these direct a new planning system.

This forms the platform for establishing a vision for a new, revitalised and transformative planning system and planning profession in the Eastern Cape.

Chapter 2 of the Green Paper concludes by detailing the Focus Areas that have been identified to guide the further work to develop a White Paper and a draft Bill on Spatial Planning & Land Use Management in the Eastern Cape.

### **Chapter 3: Outline of Next Steps**

This chapter concludes the Green Paper by pointing the way forward to the next steps to be taken in the drive to develop appropriate legislation to guide and direct Spatial Planning & Land Use Management in the Eastern Cape.

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# 1 INTRODUCTION

## 1.1 A NEW SPATIAL PLANNING & LAND USE MANAGEMENT SYSTEM FOR SOUTH AFRICA

Spatial Planning and Land Use Management<sup>1</sup> in South Africa has a complex history that is, for the most part, intertwined with the country's post-colonial and Apartheid history.

It is, today, well accepted that, from the mid 1930s onward – and particularly after 1948 – several fundamental tenets of modernist spatial planning were directed by the post-colonial and Apartheid states towards achieving the spatial, socio-economic and cultural objectives of a racially segregated society.

Most especially, the defining modernist idea<sup>2</sup> that planners could, in an objective and “scientific” manner, provide for a better functioning society through comprehensive planning that mapped out an ideal spatial development pattern for cities as well as between cities and rural hinterland areas, with associated ideal patterns of land use dictated by – and functionally divided by – legally binding zoning categories, was used to give spatial expression to the policies of race-based separate development.

This was done using planning as an important instrument of state power. The Apartheid state in particular, making use of a specific form of “Planning Rationality” that was rooted in a Eurocentric legal and technocratic worldview, created bureaucratic structures to drive ideologically based planning processes, resourced these structures and, thereby, empowered spatial planning and land use management to become a key tool in the achievement of its racially-based political, cultural and economic objectives.

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<sup>1</sup> *The term “Spatial Planning and Land Use Management” can seem vague to those not familiar with the discipline. This term has come to be used in South Africa to describe the various activities that are often categorised under the description of “Town and Regional Planning”. In the simplest understanding of it, this is planning that is aimed at guiding how human settlements should develop and transform (respond to changing conditions) over time in a way that meets the changing needs of societies best, and also considers the interplay between urban and rural settlements, and urban and rural land uses. Refer to Section 1.2 of this document for more on this.*

<sup>2</sup> *Perhaps the best example of this conception of spatial planning is set out in the so-called Athens Charter, published by Le Corbusier in 1943 but based substantially on the outcomes of the Fourth Congress of International Modern Architecture (CIAM) held in 1933.*

Moreover, because the post-colonial and Apartheid states pursued a separatist vision, they created over time a complicated web of laws (Acts, Ordinances and Regulations) directing the activities of spatial planning, land use management and land administration in different ways – and often applying different qualitative standards – in different racially categorised areas. This legalistic approach to planning was a key feature in maintaining and ensuring social and spatial compliance with the Apartheid social engineering project.

The legacy of the above was the perpetuation of social and spatial injustice, which the democratic South African government has had to contend with since 1994. Over the last 22 years, it has pursued an approach that is intended to lead to a more appropriate and more equitable system of spatial planning and land use management across the country. In this regard, the basic approach has focused on abandoning to a large extent the modernist notion that spatial planning could satisfactorily be comprehensive and determinist in approach.

Acknowledging, instead, that spatial planning and land use management in South Africa must serve a variety of constituencies and be able to be responsive to a dynamic set of circumstances (social, cultural, economic, and environmental), these activities have progressively come to be seen – in a “post-modern” appreciation of diversity – as being normative (in the sense of seeking to achieve broadly defined outcomes based on specific, consensus-based norms or goals) and principle-led, rather than rigid and regulatory by definition.

This conceptual break from determinism was heralded by the implementation in law of the Development Facilitation Act (DFA, Act 67 of 1995), which legislated the new, normative and principle-led approach, as exemplified by the General Principles for Land Development and Conflict Resolution set out in Chapter 1 of the Act.

However, given the complexity of the multiple existing systems in place in 1994, the government has, naturally enough, had to accept an evolutionary approach to achieve the transformation of the spatial planning and land use management system. This is more especially so as all new legislation is now embedded in a constitutional democratic order that, by design, will progressively be defined and elaborated.

This new constitutional order moreover, defines a complex conception of the state that has separate but concurrent spheres of government (national, provincial and local), each sphere of which has administrative jurisdiction over defined geographic areas (space) and assigned roles and responsibilities.

In 2013, accordingly, a new Spatial Planning & Land Use Management Act (Act 16 of 2013 *aka* SPLUMA) was promulgated.

As of 1 July 2015, this Act is being introduced across South Africa and is seen as so-called “framework legislation” in that it sets in place the foundation of a new spatial planning and land use management system in the country.

This foundation is again premised on a principle-led approach, with the aim of achieving a broad uniformity of planning systems and planning tools across the country, within the constitutional democratic governance framework.

The Act further explicitly provides for Provinces to enact their own legislation to refine provincial spatial planning and land use management systems to better meet their specific circumstances, within the framework set by SPLUMA.

**From the perspective, then, of a new system that is being rolled out, this Green Paper seeks to frame the central question: HOW DO WE SEE THE FUTURE SPATIAL PLANNING AND LAND USE MANAGEMENT SYSTEM IN THE EASTERN CAPE?**

**The importance of this question is highlighted by the work set out in this Green Paper, which discusses a number of issues relating to how spatial planning and land use management has been done in the past, and how it is envisaged it should be done in future.**

**In the light of the enormous developmental challenges facing the government and communities in the Eastern Cape, this Green Paper seeks to provide a discussion on proposed policy that will lead to the development of a White Paper on Spatial Planning & Land Use Management and then an Eastern Cape Provincial Spatial Planning & Land Use Management Act.**

**Fundamentally, this Green Paper is founded upon current established government policy and legislation, principally maintaining adherence to the letter and spirit of the Constitution of the Republic of South Africa (Act 108 of 1996) while also accepting the frameworks set by other relevant legislation, including (but not limited to) the Municipal Structures Act (Act 117 of 1998), the Municipal Systems Act (Act 32 of 2000), the national Traditional Leadership & Governance Framework Act (Act 41 of 2003), the Eastern Cape Traditional Leadership & Governance Framework Act (Act 4 of 2005), the Promotion of Administrative Justice Act (Act 3 of 2000), the Intergovernmental Relations Framework Act (Act 13 of 2005) and, of course, the national Spatial Planning and Land Use Management Act (SPLUMA).**

**Finally, it is asserted that the Green Paper seeks to promote a revitalised spatial planning and land use management system in the Eastern Cape Province that will give substance to the government’s Back to Basics Programme by (i) Putting People First; (ii) Facilitating the Delivery of Basic Services; (iii) Promoting Good Governance; (iv) Enabling Sound Financial Management; and (v) Improving Planning Capacity as part of Building Capable Local Government Institutions.**

## 1.2 WHAT IS 'SPATIAL PLANNING & LAND USE MANAGEMENT' AND WHY IS IT IMPORTANT?

### 1.2.1 Why Do Spatial Planning?

It is perhaps a cliché to assert that everyone is a planner because everyone must plan; be they individuals who need to decide how best to approach a homework assignment or how best to get to the shops, or companies that must decide how best to source the raw materials needed to make their product and then how to get this product to market, or governments that must decide how best to carry out their roles and responsibilities and to provide infrastructure, housing etc.

The fact that almost all human activities require space (land) and resources in order to be carried out – and the fact that such space is limited – means that decision-making to direct where and how human activities can best be undertaken and how resources can be best protected and used for optimal and sustainable benefit; and then managing the resulting land uses to ensure that necessary outcomes such as public health, safety, economic sustainability and environmental integrity are achieved is (and has been) a basic discipline to enable human survival.

Such decision-making, when undertaken through a formal process and within a structured legal framework are what we now refer to as spatial planning and land use management.

In South Africa, today, spatial planning and land use management ('Planning') is defined in Section 2 of the Planning Profession Act (Act 36 of 2002) as follows: -

- (a) Planning and the planning profession are areas of expertise which involve the initiation and management of change in the built and natural environment across a spectrum of areas, ranging from urban to rural and delineated at different geographic scales (region, sub-region, city, town, village, neighbourhood), in order to further human development and environmental sustainability in the fields of –
  - (i) The delimitation, regulation and management of land uses;
  - (ii) The organization of service infrastructure, utilities, facilities and housing for human settlements; and
  - (iii) The co-ordination of integration of social, economic and physical sectors which comprise human settlements.
- (b) Planning must pursue and serve the interests of the public to benefit the present and future generations.

To establish generally why it is important, the South African Development and Planning Commission (DPC) set out the reasons for doing spatial planning and land use management as follows: -

- To provide vision and consistent direction, as well as strategic assessment not only of what is desirable but what is possible in various contexts.
- To protect the rights of people. Once people gain access to land, in effect they obtain certain rights and obligations. It is necessary to manage change in such a way that those rights and obligations are respected.
- To protect natural systems. Natural systems have their own operational requirements which must be respected if long-term sustainable human development is to be achieved and if large-scale environment degradation is to be avoided or at least minimised.
- To make efficient use of resources. Resources such as land, water, energy, finance, building materials, skills etc. are in short supply. Those that are available must, in all contexts, be used wisely to ensure that maximum benefit is obtained from them.
- To achieve a higher quality of service delivery by all spheres of government.
- To coordinate actions and investments to ensure maximum positive impact from the investment of resources, it is necessary to coordinate actions and investments in time and space. This coordination is of two kinds: the coordination of different forms of public authority actions and investments, and a greater coordination between public and private actions.
- To set priorities. To enable significant inroads to be made into meeting the developmental needs of the country in a fair way, it is necessary to provide a rational basis for prioritisation, and to manage and direct resources to where they are needed most.
- To avoid duplication of effort by different departments and spheres of government.

*Source: South African Development & Planning Commission, 1999*

**The implications of the above seem clear: spatial planning and land use management is recognised as being a crucial activity that is needed to facilitate critical choices that have to be made on an ongoing basis regarding the wise use of limited resources (land, water, energy, human potential etc.) to ensure human survival.**

Moreover, it must be acknowledged now that these critical choices are rapidly becoming ever more important in order to secure human societies' survival in the face of growing challenges such as: -

- Climate change and the environmental and economic effects thereof, including potentially escalating population migrations and the need to reconfigure economies and human settlement patterns; and
- The effects of globalisation and technological innovation on human economies and associated land use and settlement patterns<sup>3</sup>.

## 1.2.2 Spatial Planning as A Key Activity Involving Government and Communities

Accepting the above, it is a fact that, since the early 20<sup>th</sup> century – and especially post-World War II - planning (spatial planning and land use management) has increasingly been seen as one of the important tasks of the modern state. As such, it is now commonly understood that the carrying out of spatial planning is first and foremost a government activity: that is, it is an activity led by the state and undertaken within legal parameters set by the state.

However, in the face of the enormity of challenges relating to overcoming the many legacies of colonialism and Apartheid as well as dealing with the dynamic consequences of globalisation, climate change and related socio-cultural and economic upheavals; and, whilst affirming that planning (integrated planning as well as spatial planning and land use management) is a crucial function of the state, it becomes *necessary to draw a distinction between planning as a government activity versus planning as an arena for establishing and nurturing a dialogue between the government and communities of people.*

The above distinction is deemed important for the purposes of this Green Paper as it may be strongly argued that all democratic states (governments) have limitations in what it is they can achieve in relation to the provision of social and economic goods and services (usually known as the “limited reach of the state” – reflecting the reality that democratic states cannot ever aspire to be the sole and universal providers of social goods and services).

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<sup>3</sup> *Such effects are typified by rapid changes in societies (based on increasingly rapid flows of information and the shifting of resources across the globe) and impacts include an apparently deepening and speeding up in the growth of economic inequality at global, national, regional and local scales.*

Therefore, in the spirit of the Constitution and the Municipal Systems Act, it may be seen to be desirable that any spatial planning system intended to serve the needs of all communities must also make provision for those same communities to be empowered and engage with the planning system pro-actively, and to assert their norms and values in relation to the array of challenges to be addressed. This is precisely what is envisaged in Chapter 4 of the Municipal Systems Act (MSA, Act 32 of 2000).

### **1.2.3 Conventional Spatial Planning Represents a Particular Way of Thinking About the World**

For the purposes of this Green Paper, it is considered vital to note that spatial planning should not be seen as a neutral and objective activity. Rather, spatial planning in its modern, technocratic form is generally acknowledged to have come about through a process of establishing and refining public administrative actions that became necessary to deal with the sometimes overwhelming negative effects of urbanisation and industrial development, which resulted from the industrial revolution in the late-18<sup>th</sup> and 19<sup>th</sup> centuries. The discipline of spatial planning, as such, can be seen to have its origins in what are sometimes known as the First World societies: United Kingdom, Western Europe and North America.

Because of this, spatial planning as it has been practised in much of the First World as well as Commonwealth countries (including South Africa) has been based on legal systems wherein the institution of private property is assumed to be of central importance. The ideological and philosophical bases of spatial planning, moreover, were largely elaborated within the socio-political, cultural and economic contexts of First World societies. As a result, Williams (2016: 1) cites Sandercock (1998: 1-30) in asserting that “there is much about current planning practice (substance and process) that remains submerged in hidden agendas supported by a historical manipulation of rationalities, power and judgement calls that pursue the itinerary of one culture”

However, this aspect has not often been recognised explicitly by the spatial planning profession. Rather, spatial planning has long attempted to establish itself as a “science”. One of the main consequences of this is that spatial planning, as a discipline, has often tried to assert that it is an objective activity that can make scientifically based value judgements on what types of land development are appropriate in particular places and time, based on evidence that is not influenced by political or any other non-scientific value judgments.

In practise, however, as with all activities that affect how resources are to be allocated and used and by whom, the practise of spatial planning and land use management must be seen as being, ultimately, political in nature.

Moreover, it must also be acknowledged that all human activities result from – and are embedded in – particular (unique) socio-cultural and economic forms of organization evolved over time in particular societies. As such, forms of settlement and land use patterns and the associated use (and conceptualisation) of space is socio-culturally differentiated based on differing historical trajectories as well as differing socio-cultural norms and values (“knowledge”) in relation to social interactions and the use and utility (value) of land.

**Therefore, for the purposes of this Green Paper, it will be asserted that, where spatial planning is practised in multi-cultural, diverse societies such as in the Eastern Cape, there is a great need for planners to take care to be cautious and self-critical in relation to the norms and values they purport to interpret and translate into proposals for settlement and land use development.**

**In short, the profession of planning and planners must always remain alert to the particular worldviews and values that they themselves embody and must continuously question whether these are valid in situations where plans are being prepared for communities who differ in outlook and experience.**

## **1.2.4 Moving Forward: SPLUMA and Revitalising Planning**

In summary, it is asserted that planning (spatial planning and land use management) is an activity that can play a vital role in the overall set of socio-political, economic and environmental processes of society, in order to mediate amongst different role-players’ needs and demands to try to achieve, as far as possible, rational and fair outcomes and secure a sustainable future for that society.

In well-functioning societies, it is a crucial administrative action that facilitates successful service delivery and, conversely, when planning is a marginalised or poor-performing activity, this leads to inadequate service delivery, socio-economic vulnerability and related consequences.

It is within that overall perspective that SPLUMA has now been implemented to set in motion the steps to develop a more coherent and effective – as well as accessible – spatial planning and land use management system in South Africa. This is confirmed in the Act’s Preamble, which concludes that it aims to achieve:

- *a uniform, recognisable and comprehensive system of spatial planning and land use management be established throughout the Republic to maintain economic unity, equal opportunity and equal access to government services;*

- *a system of spatial planning and land use management that promotes social and economic inclusion;*
- *principles, policies, directives and national norms and standards required to achieve important urban, rural, municipal, provincial, regional and national development goals and objectives through spatial planning and land use management; and*
- *procedures and institutions to facilitate and promote cooperative government and intergovernmental relations in respect of spatial development planning and land use management systems.*

**The enactment of SPLUMA must be seen as presenting a clear opportunity to reform how planning is perceived within broader society as well as amongst leaders in the public and private sectors.**

**It further represents an opportunity to reform planning itself and ensure that the discipline and profession of planning becomes less ideologically rooted in Eurocentric legal and philosophical frameworks and more open to the realities it must engage with, in order to assist fruitfully the state and communities to chart positive ways forward in dealing with the myriad of socio-cultural, economic and environmental challenges presenting themselves today in the Eastern Cape and beyond.**

**In so doing, and following the dictates of the Back to Basics Programme of government, it is hoped that planning will ultimately be revitalised and recognised as the important administrative action it is, in order to improve the prospects of achieving development that is more socio-economically equitable, more humane and accommodating of the cultural differences and uniqueness of the various communities in the Province, and more sustainable within the parameters set by the unique resources and endowments of the Eastern Cape.**

## 1.3 WHY THE NEED FOR AN EASTERN CAPE PROVINCIAL SPLUM ACT?

### 1.3.1 A Specific History and its Legacy

The Eastern Cape Province in the early twenty-first century provides numerous challenges for spatial planning and land use management.

While planning is essentially a forward-looking process by definition, in the Eastern Cape it is confronted by the legacy of the Province's particular history. This history is not put forward to excuse the limitations on progress towards building a more egalitarian and just society over the past 22 years but to underline and understand the origins and nature of the immense challenges that planning – and the formulation and implementation of realistic and appropriate plans – must address to be both effective and meaningful across the entire Province.

Most obviously the wars of dispossession of the nineteenth century have left the area with its familiar socio-economic and spatial divide between the so-called “developed” west and “underdeveloped”<sup>4</sup> and poverty-stricken east of the Province.

At the level of planning and related legislation, including that on land tenure and land administration, very different systems still apply inside and outside of the former Bantustan areas of the Province. These differences, in turn, reflect and are the living legacies of very different systems of colonial and Apartheid administrations that developed in these adjacent areas.

In the western half of the Province and, to a degree, in the small administrative centres which became the urban towns of the Reserve and later Bantustan areas, administration was based on imported European values and legal systems, albeit with ever increasing levels of institutionalised racial segregation rendering black residents as right-less sojourners (“squatters”) liable for summary eviction, if not detention.

In the rural areas reserved for Xhosa occupation, local administration developed out of an accommodation or compromise between local leadership (including traditional leadership and modernising elites) and the small class of colonial administrators.

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<sup>4</sup> *Terms such as “developed” or underdeveloped” carry with them implicit (sometimes explicit) value judgements embedded in a particular socio-economic and cultural worldview and are used acknowledging this. Here they refer explicitly to different levels of socio-economic wellbeing.*

Over the course of the twentieth century, as institutionalised segregation hardened into statutory racism and the Apartheid system, central government found common interest with elements of these elites who led the way to “Bantustan independence” – in the Eastern Cape the so-called Republics of Transkei and Ciskei.

During this period, the majority of citizens, whether resident on land now under white ownership as commercial farms; or resident in urban slums or townships; or migrant workers in faraway mine compounds; or locked away by influx control in the Reserves (as were most of the elderly, women and children), were denied the basic political rights of citizenship under a democratic dispensation. This majority were the victims of planning in its broadest sense. Decisions and laws were made which impacted directly on them but very seldom in a positive manner, and never with their consent or informed involvement. Moreover, the deterministic planning paradigms imposed on these people were foreign to the basic assumptions embedded in their culture, which usually sought to ground decisions in consensus. Such imposition was in a real sense disrespectful and dishonourable in the terms of the social norms prevailing, thereby exacerbating a situation effectively of a “clash of world views”.

Thus, for many people still today – because of the history of negative experiences at the hands of “planning” – the planning discipline (the activity of spatial planning and land use management) has a reputational problem. Negative images of the consequences of planning still, in many cases, linger in the minds of many, albeit in different ways and emphases.

However, this fact is not often recognised today by most planners, who still think of planning as something that is technical, objective and even benevolent in that it is intended to assist communities (for example, to make wise decisions about changes in land use; or to make decisions about the best way to design and build a housing development etc.). They do not see it as representing a specific (western or Eurocentric) world view putting forward values that may be alien to many people.

It is imperative, therefore, that the new Provincial approach to spatial planning and land use management legislation must address the numerous legacy issues left by post-colonial and Apartheid planning. These include:

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>• A legacy of mistrust</li> <li>• A legacy of division</li> <li>• A legacy of punitive law</li> <li>• A legacy of domination</li> <li>• A legacy of inequality</li> <li>• A legacy of dispossession</li> </ul> | <ul style="list-style-type: none"> <li>• A legacy of reductionism</li> <li>• A legacy that objectified land and people</li> <li>• A legacy of diminished humanity (disregarding vulnerability of the poor, the young, the old and the frail)</li> <li>• A legacy of denial of basic services</li> </ul> |
|---|---|

In the face of the above, a new planning system must, in a manner that is consistent with the aims and objects of the Constitution, ensure that appropriate legal measures are set in place to assist planning agencies (public and private sectors), planning professionals, and communities to interact and collaborate on developing processes and protocols that lead to consensus regarding the objectives and outcomes of planning and land use management.

Planning must shed its divisive past (which resulted in so many divided outcomes – divided communities; divided resource allocations and so on). Instead, planning must embrace the current opportunities presented by the implementation of a new planning system and must determinedly pursue the development of *inclusive planning protocols and processes* that assist in giving effect to developmental outcomes (implementation of proposals) and the monitoring thereof that are meaningful and helpful to all communities and not just some. This should be seen as an opportunity to rehabilitate and revitalise the discipline of planning and the planning profession.

A clear priority is the development of a planning system that takes account of different cultural norms and standards, differing legal systems (Customary Law and Roman-Dutch Law) and the different ways in which people (and communities) have responded to their circumstances. Such responses have often been negatively labelled by the planning profession as “illegal”, “squatting” or “informal settlement”.

**It is clear that for planning to rebuild legitimacy in the eyes of many people it will need to respond in a more humane manner to the range of lived realities and customs of all people in the Province and not merely seek relevance in so-called formal land areas.**

**It is also likely that the new planning system will need to acknowledge the limitations of the reach of the state (how much the state alone can achieve in bringing development to people) and make better use of the provisions in law set by the Constitution and relevant Acts that promote the state’s active engagement and partnering with civil society (communities and the private sector) in the pursuit of its developmental agenda.**

### 1.3.2 Spatial Planning Challenges in EC

In broad outline, spatial planning in the Eastern Cape is presently carried out within the legal framework set by the Municipal Systems Act (Act 32 of 2000) and applicable Regulations. That is to say, all municipalities in EC currently have Spatial Development Frameworks (SDFs) that either form part of Integrated Development Plans (IDPs) or have been formulated as separate documents. In most cases, the relevant Municipal Council has formally adopted these SDFs.

However, processes of spatial planning are limited by available capacity (experienced professional planners) in municipalities and are further challenged by resource constraints in terms of budgetary provision and time frames that are often fixed to budget cycles rather than the requirements of properly sequenced planning and consultative processes aligned to quality outcomes.

As spatial planning is – as noted in Section 1.2 above – primarily conceived and practised as a public sector activity (that is, it is seen as, essentially, a government activity), these institutional constraints and process-based weaknesses have led to a situation where planning in the Eastern Cape is reliant on out-sourced expertise rather than the state itself. In almost all cases, these systemic weaknesses also result in contracted service providers being constrained by restrictive budgets and unrealistic time frames (to meet the needs and demands of budget-cycle related deadlines).

Consequently, there is an over-emphasis on “product”. That is, most spatial planning processes seek to arrive at a document that has complied with minimum standards (usually a checklist of some sort), often at the expense of thoroughgoing consultative and technical processes taking account of different cultural and socio-economic circumstances (as well as the different planning and implementation activities of government sector departments, parastatals and the private sector).

This situation is counter-productive and undermines the prospects for desirable outcomes as it often leaves an accountability gap between state-employed planners (who essentially become project administrators rather than planning professionals actively engaged in the planning process itself) and the communities they are enjoined to serve.

Some of the main consequences of the above broadly described situation are: -

- Spatial plans often remain too broad / high-level, so they are not relevant to local areas (lack of applicability).
- SDFs often include much information, data and statistics, without interpreting what the implications are for the way future development is likely to happen, and without understanding the cultural, social and economic nuances of different areas/communities over which the SDF will have application.

- Lacking a rigorous consultative process (most often because of resource restrictions, as noted above), most planning has not managed to capture a consensus-based “vision” together with local residents (especially in rural areas) and many SDF proposals and LUM principles are based on entrenched planning concepts and terminology that “speak” to a small community of planning practitioners but often do not make everyday sense to the average person.
- Consequently, spatial plans are often not recognized by affected communities. Plans are not “owned” by communities, as they do not relate to their needs, priorities or lived reality. Decision-making therefore often continues to happen at local level, without the assistance or guidance of technical planning input.<sup>5</sup>
- In effect, many people remain “alienated” from the way that planning is carried out today and thus remain effectively “beyond the reach” of many state plans and programmes.
- Consequently, in the face of the state’s inability to deal with people’s real needs, people often help themselves. This results in so-called informality as well as a common reliance on community-based “rules” in dealing with land matters.
- Moreover, communities’ hard-won experience of the “limited reach of the state” often leads to mistrust or complex cycles of engagement-disengagement with the state.
- Compounding the systemic weaknesses affecting the planning system’s ability to engage meaningfully with communities, deficiencies in the coordination and integration of activities of different spheres of government and different state departments (in both planning and implementation) often lead to a plethora of sector plans that do not “speak to each other”.
- In short, there are too many layers of planning and too many agencies planning in sectoral silos pursuing too many outcomes.

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<sup>5</sup> *This situation has prevailed in rural areas and informal settlements for generations. Often the only technical advice taken by rural communities, for example, as they make decisions about their land areas and settlement patterns has been forthcoming from agricultural extension officers.*

*The fact that this has usually led to acceptable outcomes as well as the fact that sometimes it has not (in the case of poorly located settlement areas on wetlands or floodplains, for example) should – in both cases – lead to some introspection on the part of the planning profession.*

*The challenge remains: how relevant is the profession to marginalized communities and, perhaps more importantly, how can the profession become more relevant to such communities (what value can planners add)?*

- Thus, a crucial deficiency in the current way that planning is practised is the gap between “a Plan” and “Implementation”. Institutional fragility has meant that there is very often no clear process-based or functional linkage between the activities of planners (in various sectors) and line functions that are focused on implementing “hard” projects and programmes. This disconnect is a major systemic weakness and leads to problems with prioritising and sequencing investment and project delivery in key areas such as urban development, rural development and related enabling infrastructure. In turn, this leads to such well-known phenomena as housing developments without access to bulk roads, schools, clinics etc.; water and electricity shortages; environmental risks including flash-flooding and soil degradation etc.
- Given the above, state programmes often lead to unintended consequences and rarely result in a neat solution that fits into the economic and cultural preconceptions of the planning and legal system.
- Finally, weak capacity in commissioning agencies (that is to say, inexperienced officials or planners) often leads to an inability to direct processes and contribute meaningfully to content, or be critical of poor quality or derivative work delivered by service providers.
- This highlights the current absence of support agencies or mechanisms as well as a gap in the way that the planning profession is managed at present (lack of oversight of professional standards and compliance therewith).

**Based on the above, it is concluded that Provincial SPLUM legislation should ideally aim to clarify - and where possible, simplify – the design of planning processes and set in place mechanisms to carry out monitoring of (i) the processes followed (including proper consultation as may be further elaborated in Provincial legislation); (ii) compliance with appropriate qualitative standards of planning; and (iii) the implementation of plans.**

### 1.3.3 Eastern Cape Land Use Management Issues

In line with the differential implementation of spatial planning legislation and forms of planning historically, one of the key challenges in the land use management system today is the continued existence of multiple pieces of legislation that govern processes to effect land development and/or land use change. This complexity has resulted in major challenges to efficient land development and land use management in the Eastern Cape.

To compound this complexity, it is also a current reality that, in the rural land areas of the former Ciskei and Transkei, no formal legislation exists to govern land use management<sup>6</sup>. Moreover, legal provisions to govern the allocation of land use rights are currently not applicable either. Currently, as far as directing use of land outside of formally proclaimed settlements, the only formal measures that are applied to these areas include agricultural resource management processes and environmental legislation (NEMA, Wild Coast Decree, Coastal Management Act and Natural Forest Act).

This complexity, when taken together with the well-known issues relating to planning capacity in the provincial and municipal spheres of government, has resulted in a land use management system that currently has a number of weaknesses<sup>7</sup> spanning both urban and rural environments: -

- **Inconsistency:** The range of Provincial legislation that continues to apply to the Eastern Cape Province, within past administrative demarcation boundaries, results in inconsistent, often confusing processes for administering land use management.
- **Urban bias:** Legislation, regulations and bylaws catering for land use management have been structured to respond mainly to urban land use scenarios within the statutory regulatory environment (focus on urban land use definitions and terminology, surveyed cadastre, freehold title, formal administrative systems etc.),

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<sup>6</sup> It is acknowledged that in many rural areas in the Eastern Cape, land is allocated and used in terms of customary, community-based rules (customary law).

<sup>7</sup> While this section is explicitly intended to highlight problematic issues and weaknesses it is important to record that the land use management system also has some notable positive features in so far as it provides clarity and definition to land use rights within a legal context. This, in turn, provides the basis for the creation of asset value (active land markets), fiscal flows (property rates revenues based on property valuations) and, arguably, is an important component in the institutional and legal framework that underpins much of South Africa's economic resilience.

leaving a large vacuum as far as the reality in informal settlements and rural parts of the Province is concerned, in terms of the following:

- Local community structures and traditional practices (protocols) around how consultation takes place and agreements are reached.
- The way land is administered in terms of occupation rights and use rights (tenure).
- **Failure to recognise the Eastern Cape context:** The reality of the spatial and developmental context of the Eastern Cape is different from the context in which the systems that we apply originated and subsequently evolved. When evaluating the existing range of LUM regulations and procedures, it is clear that these are insufficient in context and content to deal with the varying demands and needs for land use management in the Province, both in urban and rural areas<sup>8</sup>.
- **Concepts and Terminology in Schemes:** Spatial concepts and terminology such as rural, informal, or illegal, often have many different interpretations, which leads to confusion between planners, policy makers, communities and implementers. It is therefore essential that we first understand the range of functional spaces in the Province, before merely applying token categories.
- **Role of LUM in local government fiscus and protection of property values:** Zoning, along with the formal systems of demarcation and registration of properties, is an important part of the property valuation and taxation system of Local Government. Closely linked to this, is the role that LUM plays in protecting property values. However, this role must be recognised as being grounded in a particular understanding of land as “property” (that is, an asset that is principally of economic or financial value). This can be seen as potentially problematic when dealing with different cultural assumptions and worldviews regarding the values attached to land.
- **Land Use Management Does Not Address the Needs of the Poor:** The poor, being heavily dependent on the public sector for access to land, infrastructure and shelter, have little option but to revert to informal systems of delivery if the public sector fails. To date, provision for managing space to accommodate the needs of the poor has been neglected in many of the LUM systems.

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<sup>8</sup> *For example, the Eastern Cape has a distinctive land-form that, when taken with the generally inadequate infrastructure found in remote rural areas, makes travel and communication amongst people living in such areas difficult. This raises questions as to how a functional land use management system could operate there in terms of administrative procedures and emphasises the challenges inherent in the concept of the “limited reach of the state”.*

- **The “Informal” is not recognised:** In the planning and LUM environment “formal” is generally accepted as the best (and only) option for development. This, by implication leads to the concept of anything “informal” being considered as unacceptable and “illegal” and therefore also difficult to bring into the ambit of recognised “formal” processes of management. It needs to be recognised that unless planning and management systems embrace the realities that poor people in the Province are facing, and ways are found to make their land areas and settlements function better in terms of their specific needs, “informality” will continue to exist as a mechanism of coping.
- **Inability of LUM to effectively achieve desired planned spatial outcomes:** With the emphasis of existing LUM systems being on control and restrictions, it has been argued that LUM systems have failed to ensure achievement of planned spatial outcomes (guided by the SDF process). The emphasis of LUMS should therefore be redirected from “what may not be done” to “what should be done” to achieve key objectives such as the SPLUMA Development Principles of Spatial Justice, Sustainability etc. Such an approach needs to consider incentives (either penalty or reward orientated) as a means to encourage development towards desired spatial outcomes that are more equitable and serve to advance the interests of all in society, and not only the propertied few. Here the relationship between Spatial or “Forward” Planning and LUM systems should be reconfigured and closely integrated.
- **Spatial LUM system not synchronised with other areas of resource use or development management:** Land Use Management (inclusive of heritage, cultural, environmental and natural resource utilization/protection) is separated along departmental-functional mandates, often resulting in confusing situations for end-users (communities). Apart from the confusion, processes to obtain authorisation also become complex, slow, overlapping and expensive as a result. Thus, LUM should move towards a system of principles, guidelines and standards that can be applied to mitigate potential negative impacts associated with a particular activity or locality. Similarly, the relationship between the various LUM systems (spatial, natural and heritage resource management and environmental management) should be reconfigured and closely integrated.

**While the implementation of SPLUMA is intended to address some of the issues related to the proliferation and overlapping of multiple sets of spatial planning and land use management legislation, it is understood that this will be a step-by-step process that will likely take some time to achieve. Because of the specificity of conditions in the Eastern Cape (most especially in previously disadvantaged geographic areas), it is suggested that Provincial legislation may provide the tool to better respond to the needs of the situation as these unfold over time and to attempt to put in place a land use management system that is more consensual and recognises the full range of differing needs of different communities.**

### 1.3.4 Eastern Cape Challenges Related to Institutional and Human Resources Capacity

A summary of data taken from survey work done in the period October 2013 to June 2014 by the DRDLR (with the assistance of COGTA-EC and SALGA) on institutional capacity in relation to the spatial planning and land use management responsibilities of municipalities in the EC shows that:

- Most municipalities have council approved SDF's
- No scheme regulations are in place in rural parts of the former Transkei, the entire former Ciskei (both urban and rural, except for Bhisho) and Butterworth Town. Therefore, no formal legal mechanism is available in these areas to manage land use.
- Very few municipalities' Scheme Registers and Maps are up to date
- 50% of the municipalities' heads of planning do not hold any planning qualification, 13% hold technical diplomas in planning and 37% hold degrees in town planning.
- 75% of the municipalities do not employ a registered professional planner.

From the above, it is clear that current capacity at local government level is insufficient to ensure appropriate administration of the planning function throughout the Province.

Moreover, the lack of planning capacity at senior management level may explain the perception of planning being ignored or seen as just another sector activity by some local municipal structures. This can also manifest in a lack of "political" support for planning which leads to inadequate priority being given (and budgets being committed) to the planning function. The resulting underperformance of planning further reinforces negative perceptions of the discipline.

With the lack of reliable and up-to-date records on land use and zoning, it is impossible to expect administration to achieve the desired level of performance. With the reality of an extremely high turnover of planning staff, especially at the smaller municipalities, this situation is further worsened by the lack of institutional memory<sup>9</sup>.

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<sup>9</sup> *It is acknowledged that institutional capacity is never static and is better at some times than at others, depending on a range of circumstances, including the availability of qualified, experienced staff. However, it is also noted that conditions of employment in rural municipalities can sometimes be judged to be unfavourable by professionals and the levels of staff turnover consequently can be relatively high in such situations. This impacts not only on available capacity but also the consistency and robustness of "institutional memory"*

It is therefore unsurprising that the performance of spatial planning and land use management at local government level is often weak and the negative impact of this is compounded by the additional responsibility placed on local government by the constitutional ruling that confirms spatial planning and land use management as forming part of municipal planning and, thus, also a municipal function<sup>10</sup>.

Some of the consequences of the above include:

- **Administration and systems are not technologically innovative:** There is little evidence of municipalities using information technology to maximise the benefits / opportunities that it offers. There appears to be continued dependence on a paper-based system, where all documentation and communication takes place through letter and memoranda whereas information management and communication could be greatly improved and processes sped up.
- **Lack of adherence to procedures, processes and timeframes:** Although legislation, regulations and by-laws may be inclusive of all the necessary provisions, these are often ignored in practice by municipalities in administration of planning matters. This not only applies to the planning sections of municipalities, but also to other sections / departments that need to respond or comment on planning matters and simply do not responding (hamstrung by the broader administrative environment).

With the various court rulings that confirmed planning as a municipal function, the options of recourse to a higher authority such as EC-COGTA as an appeal mechanism has fallen away. Options for recourse (in terms of planning legislation) to poor administrative practice and poor or unfair decision-making is therefore limited and considered to be weak.

Without the required provision in job-descriptions and performance contracts of managers to hold them accountable for performance and service delivery, applicants or objectors alike will have no option but to resort to the courts (at exorbitant costs) to contest decisions or challenge procedural aspects of municipal processes. This puts fair or just planning and administrative processes beyond the reach of most South Africans and can be considered as denying the public the right to fair administration in contravention of the Promotion of Administrative Justice Act (Act No. 3 of 2000) and the Constitution. This is a major shortcoming.

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<sup>10</sup> See *City of Johannesburg Metropolitan Municipality vs Gauteng Development Tribunal and Others (CCT 89/09) [2010] ZACC 11*. However, it should be noted that this ruling also emphasises the central importance of planning within the overall configuration of municipal roles and functions and creates an opportunity now for the profession to be reaffirmed at all levels as a crucial developmental and management function that is necessary to enable improved (developmental) governance and successful service delivery across a range of activities.

- **Lack of integration results in lack of effective delivery:** Whilst effective planning is required to consider the entire developmental environment that impacts on implementation, such as bulk infrastructure, land tenure, social infrastructure and services and economic development, the responsibility and control over such elements do not sit solely within the ambit of spatial planning. For implementation of plans to result in visible development, integration is key.

Although the integrated planning concept has been adopted in all local government development processes, the reality is that integration is often weak to non-existent. Reasons for this include:

- Sector departments do not have a clear understanding of the concept of integrated development planning and the primary planning instruments of the IDP and SDF and under-appreciate the central importance of the local government sphere.
- Some sector departments have different planning cycles and funding timeframes and may also have different priorities and reporting requirements.
- Lack of a common ethos on accountability that is informed by the precepts of constitutional democracy, leading to departments operating in silos and integration not being a priority.
- Integration compliance not being demanded by higher authorities (lack of due diligence).
- Effective planning (integrated development planning as well as spatial planning and land use management) is a systematic and iterative process, whilst decisions around allocations of budgets and prioritisation of project interventions are made by political structures and therefore often being informed by political expediency and/or short-term thinking.

**The particular challenges of dealing with capacity and related administrative challenges in the Eastern Cape highlight the need for the development of Provincial legislation that would better address the specific needs of the Provincial reality and respond to any changes needed over time.**

**In this sense, the present weakness of the planning function across the Province should also be seen as an opportunity in so far as turning around the current situation could have a very strong, positive impact on the overall effectiveness of governance as well as the relationship between government, civil society and all relevant stakeholders. All are responsible for our collective future and spatial planning should not be seen as the domain of a select group of stakeholders only.**

**Key issues that need to be addressed are: -**

- **Ensuring that the constitutional imperative be adhered to by all stakeholders, in line with the precepts of developmental democracy and stakeholder empowerment;**
- **Ensuring that all relevant stakeholders are empowered to participate in planning processes (IDP, SDF etc.);**
- **Ensuring that all stakeholders are accountable**
- **Ensuring that mechanisms, procedures and processes are put in place or, where they already exist, reinforced to ensure monitoring of the above.**

## 2 DEVELOPING A NEW EASTERN CAPE SPATIAL PLANNING & LAND USE MANAGEMENT SYSTEM

### 2.1 A STARTING POINT

The task of drafting and implementing effective provincial legislation for a spatial planning and land use management system in the Eastern Cape is both necessary and fraught with any number of pitfalls. It would be disingenuous to deny that the process is complicated and that it will require the provincial legislature and the executive to strike a balance between the imperatives of recognising and giving effect to localised community practices and customary law under a constitutional dispensation, while simultaneously ensuring that the ensuing legal instrument does not perpetuate the complexity and inefficiency of the Eastern Cape's planning law inheritance.

It is necessary to note that in legal terms 'indigenous culture' and 'traditional leadership' potentially encompass a far wider range of issues than what the term 'customary law' may cover and what provincial legislation may be able to capture as law. Customary law must therefore be understood as stemming from the social values and practices that, based on consensus, are accepted as obligatory by a community and that there are, similarly, additional social practices that may not be viewed as obligatory (or law), but rather as accepted consultative and participative protocols. In effect, the new planning system will need to deal effectively both with substance and process in diverse circumstances.

As a starting point, the drafting and implementation of Provincial legislation for a spatial planning and land use management system in the Eastern Cape must be conducted within the parameters of section 2(2) of SPLUMA:

*'(2) Except as provided for in this Act, no legislation not repealed by this Act may prescribe an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development in a manner inconsistent with the provisions of this Act.'*

Notwithstanding the above, section 10(1) and (2) appear to modify, to a greater or lesser extent the above parameters. The text reads as follows:

*'10. (1) Provincial legislation which is consistent with this Act and the Intergovernmental Relations Framework Act may provide for–*

- (a) matters contained in Schedule 1 to this Act;*
- (b) matters of provincial interest;*
- (c) remedial measures in the event of the inability or failure of a municipality to comply with an obligation in terms of this Act or provincial legislation;*  
*or*
- (d) matters not specifically dealt with in this Act.*

*(2) Provincial legislation not inconsistent with the provisions of this Act may provide for structures and procedures different from those provided for in this Act in respect of a province.'*

**The key conditions attached to the above are that Provincial legislation must be 'consistent' with both SPLUMA as well as the Intergovernmental Relations Framework Act (Act No. 13 of 2005). Invoking these two national Acts is taken as a clear directive that Provincial planning legislation may further explore the potential of cooperative governance within the context of cultural diversity and difference, and the specific developmental needs and context of the Eastern Cape.**

**This is amplified, once again, by reference to sections 30, 31, 211, 212 and 235 of the Constitution, which makes it imperative that all administrative actions respect and support the prescripts of culture. The Province itself has promulgated the EC Traditional Leadership and Governance Framework Act, which further provides that affected municipalities and customary leadership consult on matters of development in their areas of jurisdiction.**

## 2.2 WHAT DOES SPLUMA SET IN PLACE?

The new Spatial Planning System in South Africa is described in Section 4 of SPLUMA as follows:

4. The spatial planning system in the Republic consists of the following components:
- (e) Spatial development frameworks to be prepared and adopted by national, provincial and municipal spheres of government;
  - (f) development principles, norms and standards that must guide spatial planning, land use management and land development;
  - (g) the management and facilitation of land use contemplated in Chapter 5 through the mechanism of land use schemes; and
  - (h) procedures and processes for the preparation, submission and consideration of land development applications and related processes as provided for in Chapter 6 and provincial legislation.

In the above System, for the purposes of SPLUMA, Spatial Planning is described within the context of 3 categories: -

4. Municipal Planning, which is described as comprising of:
- *The compilation, approval and review of integrated development plans;*
  - *the compilation, approval and review of the components of an integrated development plan prescribed by legislation and falling within the competence of a municipality, including a spatial development framework and a land use scheme; and*
  - *the control and regulation of the use of land within the municipal area where the nature, scale and intensity of the land use do not affect the provincial planning mandate of provincial government or the national interest.*
5. Provincial Planning, which is described as comprising of:
- *The compilation, approval and review of a provincial spatial development framework;*
  - *monitoring compliance by municipalities with this Act and provincial legislation in relation to the preparation, approval, review and implementation of land use management systems;*
  - *the planning by a province for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use; and*
  - *the making and review of policies and laws necessary to implement provincial*

*planning.*

6. National Planning, which is described as comprising of:

- *The compilation, approval and review of spatial development plans and policies or similar instruments, including a national spatial development framework;*
- *the planning by the national sphere for the efficient and sustainable execution of its legislative and executive powers insofar as they relate to the development of land and the change of land use; and*
- *the making and review of policies and laws necessary to implement national planning, including the measures designed to monitor and support other spheres in the performance of their spatial planning, land use management and land development functions.*

The following are highlighted as key provisions of SPLUMA: -

- SPLUMA, in the first instance, serves as legislation promulgated at a national level to direct the activities and constituent processes of spatial planning and land use management across the country as a whole.
- As noted above, it is also presented as legislation that may be used to direct further processes and law-making, including Provincial legislation dealing with spatial planning and land use management (as set out in Schedule 1 of the Act).
- Importantly, SPLUMA legislates Development Principles that are to be adhered to in the practice of Spatial Planning and Land Use Management in South Africa, in line with the principle-led approach to spatial planning and land use management that is now a legally bound feature of the South African system.
- SPLUMA is intended to position itself at the centre of a range of other legislation and activities that make up the overall processes of spatial planning and land use management. As such, it is aligned with and gives effect to the provisions related to planning and associated activities of the state, as set out or prescribed in a range of core legislation, starting with the Constitution and including the Municipal Systems Act and numerous Acts dealing with cooperative governance, environmental conservation and management etc. The spatial planning process, then, is not subordinate to the dictates of any one Department. All government Departments have a responsibility to add value to developmental processes in and across the national, provincial and local government spheres.
- Accordingly, it sets in place processes and institutional structures and provides for Regulations and Municipal By-Laws to:
  - render support and monitoring with regard to the planning function on a cooperative governance basis;

- prepare SDFs at National as well as Provincial, Regional and Local levels;
- give effect to land use management processes and the formulation of Land Use Management Schemes;
- make provision for Land Use Scheme Amendments;
- carry out the removal of restrictive conditions of title endorsed on individual property title deeds; and
- deal with appeals against decisions on Land Use Scheme Amendments.

## 2.3 WHAT DO THE SPLUMA PRINCIPLES SAY?

Given the fact that spatial planning in South Africa has been directed to shift from a control-orientated, deterministic approach to a normative, principle-led approach that is dynamic and evolving, a good understanding of the Principles for spatial planning, land development and land use management and the implications thereof is seen to be important in setting a platform for future Provincial legislation on SPLUM.

These are listed below as an excerpt from SPLUMA, with emphasis added to aspects considered crucial for the Eastern Cape context: -

### The SPLUMA Section 7 Principles: -

*7. The following principles apply to spatial planning, land development and land use management:*

*(a) The principle of spatial justice, whereby—*

- (i) past spatial and other development imbalances must be redressed through improved access to and use of land;*
- (ii) spatial development frameworks and policies at all spheres of government must address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation;*
- (iii) spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons;*
- (iv) land use management systems must include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and*

- former homeland areas;*
- (v) *land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas;*
  - (vi) *a Municipal Planning Tribunal considering an application before it, may not be impeded or restricted in the exercise of its discretion solely on the ground that the value of land or property is affected by the outcome of the application;*
- (b) *the principle of spatial sustainability, whereby spatial planning and land use management systems must—*
- (i) *promote land development that is within the fiscal, institutional and administrative means of the Republic;*
  - (ii) *ensure that special consideration is given to the protection of prime and unique agricultural land;*
  - (iii) *uphold consistency of land use measures in accordance with environmental management instruments;*
  - (iv) *promote and stimulate the effective and equitable functioning of land markets;*
  - (v) *consider all current and future costs to all parties for the provision of infrastructure and social services in land developments;*
  - (vi) *promote land development in locations that are sustainable and limit urban sprawl; and*
  - (vii) *result in communities that are viable;*
- (c) *the principle of efficiency, whereby—*
- (i) *land development optimises the use of existing resources and infrastructure;*
  - (ii) *decision-making procedures are designed to minimise negative financial, social, economic or environmental impacts; and*
  - (iii) *development application procedures are efficient and streamlined and timeframes are adhered to by all parties;*
- (d) *the principle of spatial resilience, whereby flexibility in spatial plans, policies and land use management systems are accommodated to ensure sustainable livelihoods in communities most likely to suffer the impacts of economic and environmental shocks; and*
- (e) *the principle of good administration, whereby—*
- (i) *all spheres of government ensure an integrated approach to land use and land development that is guided by the spatial planning and land use management systems as embodied in this Act;*
  - (ii) *all government departments must provide their sector inputs and*

*comply with any other prescribed requirements during the preparation or amendment of spatial development frameworks;*

- (iii) the requirements of any law relating to land development and land use are met timeously;*
- (iv) the preparation and amendment of spatial plans, policies, land use schemes as well as procedures for development applications, include transparent processes of public participation that afford all parties the opportunity to provide inputs on matters affecting them; and*
- (v) policies, legislation and procedures must be clearly set in order to inform and empower members of the public.*

In sum, it can be seen that SPLUMA legislates 5 Principles to guide and direct all spatial planning and land use management processes in South Africa henceforward: -

1. The Principle of Spatial Justice
2. The Principle of Spatial Sustainability
3. The Principle of Efficiency
4. The Principle of Spatial Resilience
5. The Principle of Good Administration

### **2.3.1 Interpretation of the Importance of the SPLUMA Development Principles for EC**

As with the General Principles for Land Development & Conflict Resolution set out in Chapter 1 of the Development Facilitation Act (DFA, Act 67 of 1995), the SPLUMA Principles have statutory status and every person or body that engages in or with the processes of spatial planning, land development and/or land use management is required by law to give effect to them in the formulation of plans and decision-making related to plans, planning and or land use management.

Perhaps of greater significance is the fact that the SPLUMA Principles, whilst broad in nature, introduce important concepts into the disciplines of spatial planning and land use management. The concepts of “Spatial Justice”, “Spatial Sustainability”, “Efficiency” and “Spatial Resilience” as well as “Good Administration” introduce *profound dimensions* to the practice of spatial planning and land use management and it is likely – as with issues of constitutionality – that they will be explored and elaborated further from a practical and legal perspective, to determine their true meaning and application in said practice.

Within the general discourses of the planning discipline reaching back to at least the early 1960s, the SPLUMA Principles link to foundational progressive concepts such as “Social Justice” and “the Right to the City” and raise the critical argument that, in a society and polity that aspires to achieve restorative and transformational human development objectives (as is the case in South Africa), planning (in its wider sense but including at its heart spatial planning and land use management) must be revitalised and empowered to play a critical facilitative role.

In particular, whilst the SPLUMA Principles refer specifically to spatial planning and land use management (and associated activities) it is asserted here that the Provincial SPLUM process needs to emphasise that the application of the SPLUMA Development Principles and the realisation of their intended goals or outcomes cannot solely rely on the spatial planning discipline.

These Principles speak to overarching societal goals. An interpretation of Spatial Justice would immediately link this principle with the goal of achieving Social Justice (an ideal situation where everyone has equal access to economic, political and social rights and opportunities<sup>11</sup>). Similarly, Spatial Sustainability cannot be attained without social, economic and environmental sustainability being addressed. The principles of Resilience and Efficiency, too, rely on an integrated approach towards addressing the key challenges of socio-cultural and economic inequality. And any society’s achievement of progressive objectives cannot be contemplated without the development and sustained practice of Good Administration.

As such, the enactment of the SPLUMA Principles relies on a wider institutional architecture and mindset being put in place to strive to attain not only the spatial elements of the Principles but also the broader socio-economic, cultural and environmental conditions that would make achieving the spatial goals and objectives heralded by the Principles actually possible.

This places an onus on the Provincial SPLUM process to attempt to provide greater clarity on HOW to enable and facilitate broader cooperation across the different spheres of governance as well as between the public and private sectors in not only

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<sup>11</sup> *This embraces such concepts as individual freedom of movement and “the right to the city” (Lefebvre, 1968), which is further described by Harvey as follows: “The right to the city is far more than the individual liberty to access urban resources: it is a right to change ourselves by changing the city. It is, moreover, a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization. The freedom to make and remake our cities and ourselves is, I want to argue, one of the most precious yet most neglected of our human rights.” (Harvey, 2008)*

spatial planning and land use management but also the more far-reaching aspects of strategic planning (the National Development Plan, the Eastern Cape Provincial Development Plan and municipal Integrated Development Plans).

Part of this debate would also hinge on HOW to establish more functional cooperative linkages between the public and private sectors in trying to find a productive balance that lends itself to greater socio-cultural and economic progress (sustainable economic development and related social and cultural progression).

Finally, a crucial part of the HOW-puzzle would be working out how best to design and apply a functional SPLUM system in the Province that caters for the divergence in socio-economic and cultural contexts to be found in different places so that these places are drawn together (or included) in the objectives and outcomes of the planning endeavour (as embodied in the 5 SPLUMA Principles) and are not excluded or discriminated against.

In essence, planning (spatial planning and other forms of strategic planning as well as land use management and management of key resources) should become embedded in an ongoing process of discourse in communities across the Province, which would allow discussion of perspectives (values) and perceived needs and wishes of different sectors of society to be placed on record for consideration in a more open manner. Dialogue (parties engaging in discussions founded on mutual recognition of each other) then becomes a critical activity.

Furthermore, meaningful dialogue between parties requires knowledge and understanding of different perspectives and this then requires of the planning system to enable the pursuit of information and research. Coupled to this is the possibility of linking this to the activities of our institutions of higher learning.

Finally, it also follows that it would be valuable to engage with the experiences of other countries who face similar challenges.

## 2.4 IMPORTANT ISSUES, LESSONS AND OBLIGATIONS DRAWN FROM INTERNATIONAL DISCOURSES

In addition to the local legislative and policy context, when considering drafting new provincial planning legislation, the Green Paper process also needs to reflect on relevant international discourses and what the lessons and/or obligations are for the Province. This is especially pertinent with regard to the importance of recognising the evolving norms and standards (globally) related to acknowledging cultural diversity and its relationship to human rights. An international perspective is also important given due regard to the dynamics of globalisation, climate change, technology advances and flows of information (Big Data).

The relevance of this – the reason why it is important to take account of international lessons, treaties and resolutions – is that South Africa, as a member state of the United Nations, and as a signatory to treaties such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Convention on Biological Diversity and the Nagoya Protocol, has responsibilities and obligations in this regard.

These responsibilities and obligations may, indeed, also be held to be morally desirable and of particular relevance in areas such as the Eastern Cape. This is especially the case in relation to the issue of indigenous knowledge and the protection of indigenous intellectual property (as such unique knowledge is a resource that has much potential value). It should also be noted that the work of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) is of major importance in the context of the protection and realisation of human and cultural rights.

Some of the key elements in the international perspective relating to spatial planning, land use management, and land administration, include the following:

- A shift in recognising what constitutes wellbeing; by looking beyond material/physical elements only and to also reflect on wellbeing in terms of social and cultural elements/drivers in addition to the conventional preoccupation with economic and environmental issues.
- Recognition of the significance of culture and the rights of all cultural groups, including minorities.
- Recognition of the need for appropriate knowledge and learning. This includes a need to gain appropriate knowledge by way of appropriate processes of engagement with people and/or subject communities.
- Recognition of the importance of an ethos embedded in dialogue, acknowledgement of other peoples (and their cultures), dignity and respect, aiming

at empowering existing local- or tradition-based structures to continue with their mandate related to governance and custodianship.

- Specific (acculturated) forms of knowledge and opinion gained from theory (canonical dogma such as modernism) in academic curricula as well as practice in homogenous circumstances must be acknowledged as being inadequate to appropriately inform an approach to planning and management of space in socially or culturally diverse situations.
- Recognition that in many cultures, land may have a significantly different meaning and purpose from what it may have in so-called westernised cultures.
- Recognition that, over time, space (an area of land or property) becomes interwoven and hence *encoded* by the culture of the residents that occupy such space. The notion of ‘terra nullius’ (empty land) must be avoided.
- Recognition of Free, Prior and Informed Consent (FPIC) as an international human right standard. This in turn emphasises the importance of dialogue as the starting point and basic “spine” of any sincere planning endeavour.
- Recognition of the importance of devising and following appropriate engagement protocols to ensure credibility. Protocols should enable communities to articulate their norms and standards in their own voice and language.
- Recognition of the need and value of pursuing alternative development strategies. Examples of this would include promoting endogenous (locally-based) development and livelihood strategies, embracing high levels of innovation, creativity and acceptance of alternative identities/worldviews.
- Recognition of the impact of the limitations of “the reach of the government” as well as limited natural and economic resources.
- Recognition of the need to redefine ideas about interpreting and responding to “unfamiliar” or “unknown” dynamics related to concepts such as “informality”, customs, poverty and “the disadvantaged” and even wealth (how is wealth defined?).
- Recognition of the need to collect and understand information on how people living in distinct cultural communities define space and their relationship to land (e.g. community mapping). This need applies equally to rural areas as well as urban areas where migrant communities seek access to land and opportunities.

## 2.5 KEY ASPECTS GUIDING A POLICY FRAMEWORK

If it is accepted that, today, spatial planning and related activities such as land use management, planning for land development etc. are activities that are embedded in political, cultural and socio-economic processes, then it must also be accepted that all planning should be understood as a process of dialogue that is ongoing, as opposed to an activity that is solely aimed at dictating outcomes based on laws, regulations, or even principles decided on behalf of people and parachuted onto them.

It must further be emphasised that, in using the term “dialogue”, what is meant is that any engagement with people must explicitly give recognition to their unique perspectives (cultural norms and standards, worldviews, practices) and care must be taken not to impose any given set of culturally specific value-based opinions or solutions on them.

Rather, pursuing dialogue in planning means to embark on a journey with relevant stakeholders in an area in an attempt to achieve a common understanding of key goals and objectives rooted in desirable outcomes such as those embodied in the SPLUMA Development Principles (e.g. Spatial Justice, Sustainability etc.).

How these goals and objectives are interpreted within the context of the specific norms and values of a given community should be an outcome of a sound planning process and not a prescribed solution that is “sold” to said community. Moreover, it must be acknowledged in every planning process that development is itself a process comprised of a succession of ends/outcomes. As such, a sound planning process would also seek to achieve consensus not only on an End-Vision but also on the intermediate goals and outcomes that will need to be reached in order to achieve the final objective of a Plan.

Crucially, therefore, the process to draft planning law in the Eastern Cape must give recognition of – and provide for – more robust processes and protocols to enshrine certain key elements into the planning system, such as: -

- Free and prior informed consent<sup>12</sup> – spatial decisions should be the result of a process of dialogue and information sharing leading to mutual comprehension (understanding) of the issues and the consequences of the decisions at hand;
- Recognition of context and culture – spatial planning and land use management schemes must be formulated with as clear as possible an understanding of the identity and belief (value) system(s) of the communities who are resident in the area of application of the plan or scheme (especially with regards to the role land is seen to play and how it is best to be managed and used within the dictates of the prevailing local norm and values) and ensure that no plans impair the dignity or cultural rights of such communities;
- Recognition of the needs and rights of vulnerable groups – spatial planning and land use management schemes must be formulated with a clear understanding of the potential impact that they may have on the life chances, needs and human rights of all potentially affected parties but especially those most vulnerable to impacts that may result from the planning or land use management activity (such as the young, the elderly, the disabled etc.);
- Recognition of special requirements – spatial planning and land use management schemes must be formulated on the basis of understanding the essential socio-economic and cultural dimensions of communities who are resident in a subject area and this may require special procedures and protocols to be undertaken as part of the planning processes, including cultural mapping, resource mapping etc. (which would assist in understanding the meaning of space as described by the people who live in/occupy such space). In effect, this amounts to a recognition of the need for New Knowledge (the development of new and extended knowledge

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<sup>12</sup> It must be understood that, in the context of the discourse on culture and the protection of the rights of cultural communities and indigenous people, the concept of Free, Prior and Informed Consent (FPIC) has a specific meaning. This is most clearly stated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) where Article 10 of the Declaration states that: “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return”.

In more general terms, FPIC may be held to refer to the right of any and all local communities to participate in and give or withhold consent to decisions on issues affecting them, either directly or indirectly.

*bases, including expanding the understanding of Indigenous Knowledge Systems [IKS]);*

- *Interactive engagement – spatial planning and land use management schemes must be formulated in a manner that pays attention to the expressed needs and concerns of communities residing in the subject area and plans should not impose solutions but rather devise solutions by listening (collaboration with the “partner-communities”).*

In addition, as it is the proposition of this Green Paper that spatial planning and land use management cannot be held separate from other planning processes (such as Integrated Development Planning) or the implementation of state-, private sector- or community-led developmental projects and programmes, it is submitted that the Provincial law on Spatial Planning and Land Use Management must provide for: -

- *A better functioning institutional arrangement for spatial planning to operate effectively – spatial planning and land use management should be acknowledged as being central to achieving improved and more efficient outcomes in both the work of the state and civil society, to facilitate and enable socio-cultural and economic development, infrastructure development and environmental sustainability;*
- *Clarity on the roles and functions of the Province in relation to planning – how best to ensure that the Province can effectively support, monitor and enrich planning processes at provincial, regional, local and community level;*
- *A sustainable Spatial Planning System across the Province – ways and means must be provided for in Provincial legislation to give effect to the role of Provincial monitoring to ensure that municipalities fulfil their municipal planning roles and functions and maintain minimum norms and standards in so doing.*

## 2.6 LOOKING FORWARD: A VISION FOR SPATIAL PLANNING & LAND USE MANAGEMENT IN THE EASTERN CAPE

In assessing the place of spatial planning and land use management in the overall planning system as currently conceived and practised in South Africa, it seems clear that a need exists to move beyond sectoral categorisations of plans and to contemplate the possibility and the opportunities in putting in place a broad-based planning system that works together, harmonising inputs and data derived from various studies and consultative processes, and providing cross-sectoral guidance toward an end-goal of co-ordinated and integrated implementation of projects and programmes. This is, indeed, in line with the provisions and intent of the Municipal Systems Act (Act 32 of 2000), in particular Chapters 4, 5 and 6, read with the Intergovernmental Relations Framework Act (Act 13 of 2005).

In addition, it is asserted that the discipline of planning (that is, integrated development planning, spatial planning and land use management) needs to be revitalised and rehabilitated in the eyes of the public and secured as a tool within a collaborative and mutually respectful relationship between the state and said public that is aimed at giving substance to the imperatives of a Constitutional democracy.

**Therefore, the Eastern Cape Government has a vision where the system of spatial planning and land use management (SPLUM) to be developed in the Province will include the following functions and characteristics: -**

- **Over and above the technical aspects of IDP and SDF formulation, Scheme compilation and land use management, planning must be carried out in such a way that it gives material effect to the provisions of the Municipal Systems Act in respect of community capacitation (enabling an informed constituency), and citizen involvement in governance activities and developing locally-based inputs (future visions, strategies and proposals) for their communities.**
- **From the perspective of oversight, this informed constituency shall become a principle driver of and participant in the planning endeavours of the state, and must hold the state accountable for achieving agreed upon outcomes;**
- **While placing citizen participation (consensus) at its heart, spatial planning and land use management in the Eastern Cape shall furthermore be an integrating discipline, bringing together technical aspects of environmental management (wise land use), service delivery (how and where to develop and maintain infrastructure, roads and pedestrian networks, social facilities), economic development and human settlement (how best to facilitate and to manage where or how people live, work and play) and the key linkages between all these aspects.**

- This will require SPLUM and Integrated Development Planning to take centre stage and play a co-ordinating and integrating role with and between different sectors within government as well as with and between the public and private sectors;
- In all its undertakings, planning in the Province shall be characterised by an approach that is sensitive to the cultural and economic contexts of the area(s) where the planning activity is taking place, as well as the norms, standards and expectations of the communities who are resident in such area(s);
- Plans and Schemes to be formulated in terms of spatial planning and land use management activities in the Province must be informed by and take account of the expressed needs of all stakeholders but must also remain realistic about the availability of resources in the public and private sectors (human resources, financial resources and environmental capacities to support proposed activities) and how this may impact on their ability to achieve the desired outcomes.
- A social compact approach shall underpin the new system of planning in so far as all stakeholders will be enjoined to commit to its ongoing development.

The obvious challenge in all of the above, from the perspective of the Eastern Cape government, is the need to reach out to people and convince them that planning is relevant to their lives and worthwhile participating in and contributing to. This will require considerable effort on the part of the Provincial government as well as municipalities and, vitally, the planning profession itself.

From an institutional perspective, there is thus a need to re-examine where and how the Spatial Planning and Land Use Management function is placed within the organisational and operational designs of Provincial government and municipalities.

This is crucial for the reasons asserted above: planning (spatial planning and land use management) is a core, integrating administrative action that, by its nature and design, crosses the boundaries between sectoral activities (which, in themselves, are both inputs as well as outputs of planning actions). For it to succeed, planning cannot be seen as a separate “silo” within government. It is an integral activity of government and not a functionally independent sector activity that operates on the margins of awareness of other sectoral departments.

**In short, the great developmental challenges that confront the Eastern Cape Province can no longer indulge a fragmented governmental approach and planning (spatial planning and land use management) is seen to be crucial in assisting (facilitating) a more collaborative and concerted approach towards achieving a more unified and developmental governance ethos. That also means that a new appreciation and understanding of SPLUM on the part of leaders and managers in government is of fundamental importance.**

## 2.7 FOCUS AREAS TO GUIDE A SPATIAL PLANNING & LAND USE MANAGEMENT SYSTEM FOR THE EASTERN CAPE

Based on the foregoing, three clear goals are held to direct the proposals of the Green Paper on Spatial Planning and Land Use Management:

4. The first overarching goal is to re-establish planning (integrated development planning, spatial planning and land use management) as a crucial administrative action and discipline that is central to the successful achievement of integrated development and developmental local government;
5. The second goal is to achieve the restructuring and revitalisation of the planning profession in such a way that it performs its constitutional mandate and, accordingly, takes its place as a crucial occupation that plays a fundamentally important role in bringing people together to a better understanding of each other's worldviews and, along with this, to a better understanding of the key decisions that need to be taken to ensure that our culturally diverse society endures and prospers in a way that is more equitable, sustainable and resilient.
6. Finally, it is an explicit goal that the spatial planning system, together with applicable standards, shall be maintained as a primary responsibility of local government (municipalities). Should a municipal spatial planning post be vacated and be unable to be filled in good time, the relevant municipality will inform the MEC in order for the MEC to ascertain the level of support required in the given instance, and hence what actions need to be taken.

It is asserted that a planning system (both the public and private sectors) that is well-supported and resourced would be able to regain its legitimacy as a profession and discipline that is integral to successful societies.

**In the light of the foregoing, the sections below set out the key themes and focus areas where it is suggested that the Provincial legislation on spatial planning and land use management should provide guidance that is supplementary and/or complementary to the provisions contained in SPLUMA.**

## 2.7.1 Operationalising the SPLUMA Principles in the EC-SPLUM System

Following the direction of SPLUMA, it is accepted that all planning should be guided by the need to achieve outcomes that are in line with or give effect to the five Development Principles contained in Chapter 2 of said Act.

Taken as a whole, the SPLUMA Principles direct us to a planning system that is grounded in a constitutional democratic, rights-based approach to governance. Moreover, these principles can be held to direct us to a more “humane” way of carrying out planning and land use management that is consistent with the Xhosa customary dictum: “I am because you are.”

As noted in section 2.3.1 above, for this to happen, planning (Spatial Planning and Land Use Management as well as Integrated Development Planning) must be recognised as being a pivotal administrative action of government that is central to the efforts of government to improve its functioning and delivery as well as being central to the critical need to strengthen communication and cooperation between the government and the private sector (civil society).

In short, planning must be recognised as being a critical activity. The SPLUMA Development Principles mean that, in the Eastern Cape, a new planning system must cater for processes and protocols to address a range of issues and functions including Social, Cultural, Economic, Spatial and Environmental processes.

Accordingly, recognition must be given substance as follows: -

- Within the overall organisational structures of both Provincial and Local Government (municipalities), the function of planning must be seen to be of central importance and must, therefore, be resourced accordingly.
- With a properly resourced Provincial planning function in place, it becomes feasible for the Province to engage meaningfully with its core functions of Provincial Planning, and rendering support to, and monitoring the planning systems of district, local and metropolitan municipalities.
- A properly resourced Provincial planning function would also play a vital role in liaising with key national departments such as the Department of Rural Development and Land Reform and the national Department of Cooperative Governance and Traditional Affairs to ensure that a properly functioning planning system is put in place and sustained in the Province at district, metropolitan and local municipal level.
- Finally, as almost half of the geographic area of the Eastern Cape Province is bound up in a customary cultural ethos, the province in conjunction with the affected

municipalities must provide planning support to Traditional Councils in their area of jurisdiction.

From its side, the Province (the EC Department of Cooperative Governance and Traditional Affairs) will need to further the pursuit of achieving the outcomes associated with the SPLUMA Development Principles by: -

- Ensuring that a well-functioning system of support and monitoring is put in place to engage actively with local government bodies with regard to the spatial planning function;
- Where applicable, the Province shall also develop appropriate Provincial Policy, Regulations and Norms and Standards in relation to planning processes that clarify guidance on pursuing the outcomes associated with the SPLUMA Development Principles. This would also include the development over time of Procedural Manuals and Guidelines to assist under-capacitated municipalities in ensuring that sound planning procedures are followed in spatial planning and land use management.

## **2.7.2 The Need to Clarify Roles & Functions of the Three Spheres of Government in Relation to Planning**

### ***2.7.2.1 The Need to Clarify What is Meant by Provincial Planning and Municipal Planning***

With regard to SPLUMA's outline of planning roles and functions, uncertainties remain with regard to the extent of the powers and functions for provincial and local government, respectively. The precise meaning to be attached to the terms, 'regional planning and development', 'provincial planning', and 'municipal planning', as they appear in Schedules 4 and 5 to the Constitution, is still not entirely clear.

Admittedly, section 5 of SPLUMA lists the categories of spatial planning and describes the elements of which each category consists. However, it is arguable that the provisions do not go far enough. For example, under section 5(1), municipal planning consists of three elements: (a.) the compilation, approval and review of integrated development plans (IDPs); (b.) the compilation, approval and review of the components of IDPs, including a spatial development framework (SDF) and a land use scheme; and (c.) the control and regulation of the use of land where the nature, scale and intensity thereof do not affect the provincial planning mandate or the national interest.

Whereas the first and second elements are reasonably specific, the parameters for the third element are indeterminable. At the least, the third element presupposes agreement between local and provincial government on whether or not such land use has an impact on the provincial mandate. By implication, this would have to have been preceded by a process of consultation. Overall, the third element does not lend itself to an easily accessible understanding of where precisely the borders of municipal planning lie.

The above thus makes it imperative that engagements between different spheres of government are mandatory when planning is undertaken by any one of the national, provincial or municipal spheres. Of particular importance in this regard is the engagement of Province when municipal SDFs are in preparation, which will enable the Province to give inputs and better understand in each instance what its support and monitoring focus points are likely to be.

Proposals have been made in relation to the possible components of the definitions required. For municipal planning, the following aspects are suggested:

- adoption of by-laws to deal with all aspects of land use planning and development management, except those aspects that pertain to provincial planning;
- adoption and amendment of forward planning instruments, such as spatial development frameworks;
- preparation and adoption of zoning schemes that are consistent with the approach and rationalities of the applicable SDF;
- receiving and considering development management applications; and
- deciding on development management applications, including deviations from municipal forward planning instruments and conditions of approval.<sup>13</sup>

SPLUMA has added the consideration of appeals to the above list but this is dealt with more fully in Section 2.7.6 below.

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<sup>13</sup> *The proposal was made in terms of a discussion document, prepared by the South African Cities Network, in collaboration with the National Department of Cooperative Governance. See Stephen Berrisford and Jaap de Visser 'Important legal issues for provincial legislation dealing with Spatial Planning and Land Use Management' (South African Cities Network, January 2012), [http://sacitiesnetwork.co.za/wp-content/uploads/2014/06/provincial\\_legislation\\_issues\\_dealing\\_with\\_splum.pdf](http://sacitiesnetwork.co.za/wp-content/uploads/2014/06/provincial_legislation_issues_dealing_with_splum.pdf) (accessed on 3 November 2015).*

The above aspects should be included in provincial legislation along, with, it is proposed, a clear directive being given on giving material effect to the provisions of the Municipal Systems Act with regard to ensuring appropriate and sustained engagement with communities and interested and affected parties in relation to planning.

However, it is important to ensure that any attempt at providing a definition did not conflict with national legislation that addressed the subject.

Similarly, with regard to provincial planning, it has been proposed that the aspects, below, are taken into account:

- preparation and adoption of forward planning frameworks at provincial and regional level;
- development management decision-making with regard to matters that go beyond municipal planning; and
- decision-making in relation to land use applications that do not fall under municipal planning functions and powers.<sup>14</sup>

It would also be an advantage for a definition of ‘regional planning and development’ to be provided. This presupposes that the current definition of ‘region’, in terms of section 1 of SPLUMA, can be used adjectively for such purpose.

### **2.7.2.2 Clarifying Planning in Relation to Cooperative Governance**

Section 3(a) of SPLUMA sets as an explicit objective of the Act “to provide for cooperative government and intergovernmental relations amongst the national, provincial and local spheres of government”. This gives effect to the provisions of Section 41 of the Constitution.

With regard to cooperative governance in planning, the following is proposed:

- There is a need for the P-SPLUM to reaffirm the centrality of municipal IDPs within the overall system of governance so as to, in turn, reaffirm the principle that sound and effective service delivery and sound and effective financial management is contingent on a well-resourced and effective planning system;

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<sup>14</sup> *Op cit*, 11-13.

- Within this approach, it must also be reaffirmed that SDFs cannot be seen as separate from IDPs but are, in fact, core constituent elements of overall IDPs as they inform and influence the parameters that determine how best to achieve developmental outcomes;
- Reflecting on the Monitoring and Support function of Province, it is envisaged that the EC-SPLUM will consider ways and means for Province to work with local government through:
  - Confirming a mutually agreed upon Developmental Agenda in terms of a Provincial or Regional SDF
  - Ensuring that LMs are performing functions in terms of SPLUMA
  - Making sure that a clear planning philosophy derived from the SPLUMA Development Principles is operationalised
  - Developing and applying a system of planning quality control
  - Providing access to knowledge and other databases that empower and inform municipal planning and contribute to integrated development plans
- From their side, it is suggested that the accountability of Municipalities in relation to SPLUM activities must be clarified. What are their responsibilities? LMs must add value to SPLUMA principles and report back on how they are doing this on a regular basis.
- In addition, LMs must report on their planning staffing situation, whilst the annual IDP assessment and SDBIP analysis can reflect on the functioning of LMs and provide data input into ongoing Monitoring activities of Province.
- In addition, the sometimes fraught relationship between Sector Plans (parent departments) and the IDP/SDF process means that departments must be made accountable to engage with planning processes at Provincial and local government levels, and this needs to be monitored as well.

Finally, with regard to the role of the Province in regard to the spatial planning and land use management system, it is proposed that the Provincial legislation provide scope for the following: -

- In instances where this is deemed appropriate, the Province may accede to requests from municipalities to undertake support or work on an agency basis that is either project-specific or, in cases where municipalities experience a system breakdown, on an interim basis addressing a range of planning-related functions;
- As part of its monitoring and support function, Province should be open to receive comments and complaints from the public in relation to municipal issues and/or irregularities and Province should then be empowered to enjoin the concerned municipality to respond appropriately to address any concerns.

## 2.7.3 Cultural Diversity and Customary Law

### 2.7.3.1 *Cultural Diversity: A Key Dimension of Sustainable Development*

The UNESCO World Report, 2009 makes the point that, contrary to widespread assumption there is no prescribed pathway for the development of a society, no single model that can be applied. The conception of development as a linear and essentially economic process (in keeping with the Western model) has tended to disrupt society pursuing different development trajectories or subscribing to different values. A sustainable development strategy cannot be culturally neutral. The idea of profit maximisation and the accumulation of material goods is increasingly being challenged (2009:24).

Following the United Nations Development Programme (UNDP) elaboration of the human development model in the 1990's, increasing emphasis has been placed on integrating the cultural dimensions of development thinking, thereby taking into account the "webs of significance" that people create, the cultural context in which communities and groups exist, local social hierarchies and habitation patterns, livelihoods and local forms of communication and expression (2009:24).

Local solutions can really only be found in conjunction with the communities involved. Holistic approaches that integrate culture and human rights contribute greatly to both empowerment and capacity building. Cultural factors too influence consumption behaviour as well as the values concerning environmental stewardship.

There is a growing concern that the "three pillar" model of sustainability consisting of environmental, economic and social dimensions may be overlooking something of fundamental importance and that is the cultural – aesthetic/religious – spiritual dimensions (Burford et al 2013:3036). Cultural diversity, understood as a sense of "wellbeing, creativity, diversity and innovation" should be treated as one of the basic requirements of a healthy society (Hawkes, 2001:25). The broader definition of culture cannot be confined to arts and heritage, but rather embraces a whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or social group (1982 Mexico City Declaration on Cultural Policies, as cited in Burford, Hoover et al, 2003:3036). A cultural – aesthetic perspective can be found among indigenous communities and their advocates, including the UN Food and Agriculture Organisation (FAO), who frame the missing pillar debate in terms of cultural integrity. This term is used to embrace shared values, beliefs and knowledge as well as more tangible manifestations of culture such as ceremonies and objects. The United Nations Permanent Forum on Indigenous Issues (UNPFII) has also acknowledged the necessity for incorporating cultural indicators of well-being and sustainability that reflect, "true indigenous perspectives such as portraying approaches grounded in wholism (sic) and unique values" (Burford et al, 2013:3037).

A much less known perspective on the missing pillar dimension of sustainability is embraced in the concept of an awakening global ethical and spiritual consciousness that underpins sustainability transitions. In a keynote address at the 2010 Earth Charter conference “An Ethical Framework for a Sustainable World” Steve Rockefeller described this emerging consciousness as “in truth the first pillar of a sustainable way of life” on the premise that ethical vision and moral courage are essential to generating the political will required for transitions to sustainability (Burford et al, 2013:3037).

In its simplest form, the concept of sustainability embraces a desire that future generations will inherit a world as least as bountiful as the one we inhabit: how to get there will always be the subject of constant debate. This debate however hinges around at least the following:

1. *the social production and transmission of identities, meaning knowledge, beliefs, values, aspirations, memories, purposes, attitudes and understandings and*
2. *the way of life as described and constructed by a particular set of humans embracing customs, faiths and conventions, codes of manners, dress, cuisine, language, arts, science, technology, religion and rituals, norms and regulations of behaviour, traditions and institutions. Culture then is both the medium and the message: the inherent values and the means and the results of cultural expression. Culture enfolds every aspect of human intercourse and hence Hawkes postulates that culture is the basic need; it is the bedrock of society (Hawkes, 2001:3).*

A sustainable society depends on a sustainable culture and according to Hawkes (2002:4-14), culture is required in order to lay the groundwork for a sustainable future. Just as biodiversity is an essential component of ecological sustainability, so too is cultural diversity essential to social sustainability. Cultural democracy involves the exercise of rights, not simply the availability of opportunity. “Cultural diversity is integral to social cohesion, human development, peaceful co-existence and the prosperity of societies” (The Santorini Statement, 3<sup>rd</sup> Annual Ministerial Meeting of the International Network on Cultural Policy, cited in Hawkes, 2001:4).

Communities have the right as well as the responsibility to engage with the values that determine the nature of the society of which they are a part. Some communities enjoy considerable influence whilst many others experience significant deficiencies in this regard. This is a cultural problem which requires a cultural solution. Culture is not a closed system, it embraces many influences, many of which are global, but the response to these influences cannot help, but be mediated through our own particular, unique experience (Berry, Poortings, Segall and Dasen 1992, cited in Berry, 1997:6). The concept of distinctiveness and even authenticity emerges in the midst of such interactive processes. Culture is the outcome of the production of social values and culture is the foundation of the development of community. Community

cohesion is critically dependent upon the capacity of members within a community to understand, respect and trust one another. Social capital has hence been referred to as the glue that binds society and also social capital is the lubricant that allows it to operate smoothly (Hawkes 2001:18). Any infringement or imposition (forced enculturation) that undermines the recognition of the uniqueness or distinctiveness of a particular culture enhances the risk of social upheaval. Identity is to rather be celebrated: the promotion of identity is a critical endeavour and hence huge responsibility which if applied respectfully, will bring huge benefits. Distinct and confident identities are an integral basis for wellbeing, social cohesion and economic development (Hawkes 2001:20).

Berry (1997:9), in line with the above, identifies two major issues that are also at play in the dynamics of sustainability, identity and wellbeing, and these are “cultural maintenance” and “contact and participation”. Both are a dialogue embracing choice that takes place within distinct communities as well as between communities. Prejudice and discrimination have a significant impact on wellbeing, and ultimately sustainability. The choices made in turn embrace the notions of “culture learning” and “culture shedding” (Berry, 1997:27): both of which are bound up in the concept of inter-cultural dialogue and its intended sustainable outcome.

There is quite naturally the need to learn as well as the need to unlearn (shedding). This is not however straight forward and the recognition of such, is important in how an inter-cultural dialogue is managed. Mutual accommodation, (Berry 1997:29) too becomes a critical idea. The management of pluralism depends both on its acceptance as a contemporary fact of life and on mutual willingness to change.

*“I have no right to claim on behalf of non-Aboriginal Australia that all the non-Indigenous are now part of Australia’s deep past, nor do I wish to. Belonging ultimately is personal. There are many routers to belonging as there are non-Aboriginal Australians to find them. My sense of the native born has come – is coming. It comes through listening, but with discernment; through thinking, but not asserting; through good times with my Aboriginal friends, but not through wanting to be the same as them; through understanding our own history, but being enriched by the sites of past evil as well as good. It comes from believing that belonging means sharing and that sharing demands equal partnership” (Peter Read (2000) cited in Hawkes 2001:20).*

Hawkes goes further to say that Read is but one of a panoply of voices that points out that until the issue of Indigenous rights is resolved, the question of how non-Indigenous peoples’ sense of connectedness with this country (Australia) will develop authenticity remains problematic, which is to say that a resolution is an imperative for all, not just Indigenous people.

Growth, development and progress are concepts that have informed western philosophies of public action for centuries. The question of “towards what” is only a

more recent development. Prior to this the standard answer would have been centred on achieving “more material prosperity”. Even culture has been transformed into a market driven consumption commodity, all of which is simply put, not sustainable. “To achieve ecological growth we may need to move from an economy of production to an economy of repair – of our damaged society, of our damaged environment, even our used products...”(Gleeson and Low, 2000, cited in Hawkes, 2001:21).

This idea of repair means, inter alia, realigning our ideas concerning culture and its vital role in achieving sustainability. We need a process of nurture and cultivation: culture is a fragile and delicate organism. The manifestation of cultural vitality includes “robust diversity, tolerant cohesiveness, multi-dimensional egalitarianism, compassionate inclusivity, energetic creativity, open minded curiosity, confident independence, rude health. Attributes such as these will help us make a future that our children will thank us for” (Hawkes 2001:23).

Governance methodologies, including spatial planning will need to have a well thought out and clear understanding of the role of culture in society if it wishes to effectively facilitate the flowering of these qualities in our communities.

*“The four pillars of sustainability:*

*Sustainability, as it has become formally adopted around the world, has not one, but three pillars: ecological sustainability, social sustainability and economic sustainability. Some would argue that there should be four pillars and that cultural sustainability should always be included. We agree with this view.” (D. Yencken and D. Wilkinson, 2000:9 cited in Hawkes 2001:25).*

Community wellbeing is built on a shared sense of purpose; values inform action; a healthy society depends, first and foremost on open, lively and influential cultural activity amongst the communities within it; sustainability can only be achieved when it becomes an enthusiastically embraced part of our culture (Hawkes, 2001:25). Culture has to be a separate and distinct reference point embracing and ensuring identity vitality, wellbeing, creativity, diversity and innovation.

### **2.7.3.2 Dealing with Cultural Diversity and Customary Law in SPLUM**

A prohibition exists under section 2(2) of SPLUMA against any legislation that prescribes an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development, in a manner inconsistent with SPLUMA. This raises a major issue: that is, whether or not SPLUMA adequately addresses the unique history and socio-economic factors that inform planning and land use in the Eastern Cape.

The iniquities and confusion created by apartheid planning and land use legislation are well documented. The promulgation of SPLUMA must be interpreted as an attempt by the national legislature to reform South African planning law and to address the gaps that were opened up after the striking down of legislation such as the Development Facilitation Act 67 of 1995 (DFA)<sup>15</sup> and the Communal Land Rights Act 11 of 2004 (CLaRA),<sup>16</sup> either as a whole or in part.

This Green Paper has canvassed, in some detail, the prevalence of customary law in the Eastern Cape and the centrality of indigenous culture and traditional leadership in many of the communities that are and will be affected by the legislation in question. The degree to which SPLUMA has recognised this is contentious. The concern that SPLUMA would merely serve as a blunt instrument to regulate the complexities of planning and land use in the Eastern Cape is a key premise upon which this paper has been developed.

However, the drafting of provincial legislation with the intention of avoiding the denial of the existence of the rights and freedoms that are recognised or conferred by customary law, while avoiding the prohibition created under section 2(2) of SPLUMA, is subject to inherent limitations. This is illustrated by some of the case law that informs South African jurisprudence, as set out in Annexure 1 hereto.

Principally, this Green Paper is concerned with the need to ensure that, in areas where customary practises dictate how space (land) is to be allocated and used, the spatial planning and land use management system does not enter into that realm in an oppositional or hegemonic way and impose a set of rationalities related to another worldview that is contrary to customary/cultural value systems.

This means that ways must be found to embrace those instances where customary law, local cultural traditions and/or organs of civic or traditional leadership have long held sway. In the first instance, this is best done by engaging with community structures and their custodians in a mutually respectful manner.

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<sup>15</sup> *With regard to the DFA, the Constitutional Court confirmed that Chapters V and VI were unconstitutional. The chapters in question authorised provincial development tribunals, established in terms of the DFA, to determine applications for the rezoning of land and the establishment of townships. See **Gauteng Development Tribunal** (n 1).*

<sup>16</sup> *The Constitutional Court declared CLaRA to be unconstitutional and invalid on procedural rather than substantive grounds, for the failure by Parliament to have followed section 76 of the Constitution. See **Tongoane and Others v National Minister for Agriculture and Land Affairs and Others** (CCT 100/09) [2010] ZACC 10.*

In this it is important also to understand clearly the complexities of the situations that may arise to confront planners (and government). Thus, what is termed customary law becomes a key aspect of informing a way forward on EC SPLUM legislation.

In this regard, customary law must be understood as being derived from the social practices that are accepted as obligatory by a community.<sup>17</sup> It is acknowledged that the term is narrower than the subject matter at hand, but it provides a useful example of how the western legal tradition has grappled with the term and how the meaning(s) attached to it, as well as those associated with 'indigenous culture' and 'traditional leadership', are far from fixed.

If there is anything to learn from the treatment of customary law by the courts, then it is that the western legal tradition, based on a written set of values and norms, has difficulty in accommodating an unwritten and evolving legal system. The treatment of customary law, by the courts, incurs the risk of distortion and substitution.<sup>18</sup>

The same lesson must be applied when approaching the question of whether or not SPLUMA adequately deals with customary law in the Eastern Cape, in relation to planning and land use.

The following therefore is held to apply: -

- To the extent that there are shortcomings in SPLUMA, the drafting and implementation of provincial legislation for alternative or parallel spatial planning and land use management systems must not only be cognisant of the prohibition under section 2(2) but should also be accompanied by the recognition of concepts such as customary law, indigenous culture and traditional leadership. These require an acknowledgement of their inherent flexibility and the concomitant limitations imposed on any legislative endeavours.
- In turn, these place a clear directive on EC-SPLUM to ensure that appropriate protocols and processes are put in place for when municipalities are required to

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<sup>17</sup> *This is the meaning ascribed to the term by various legal academics. See TW Bennett Customary Law in South Africa (2004).*

<sup>18</sup> *This is not to say that aspects of customary law are immune from challenge. The supremacy of the Constitution means that any law or conduct that is inconsistent with it is invalid, in terms of section 2, regardless of whether such law or conduct is derived from indigenous culture, customary law or traditional leadership. Similarly, the exercise of language and cultural rights under section 30 and the exercise of cultural, religious and linguistic rights under section 31 are subject to the Bill of Rights.*

plan in areas that are characterised by customary law and/or traditional norms and standards with regard to land use, land allocation and land administration.

- It is proposed, in particular, that in order to ensure a sound platform for drawing such areas into a new spatial planning and land use management system in the Eastern Cape, particular emphasis will need to be placed on sound and sustained engagements during spatial planning (that is, during the process of formulating Spatial Development Frameworks at Municipal and/or local levels).
- Protocols must be developed to avoid undermining the integrity of local cultures and the rights of those affected by the planning venture.
- Planning as an activity needs to become more conversant in cultural rationalities and realities. Thus planning tools such as cultural mapping need to be developed in order to relate to cultural space/land areas.

## 2.7.4 The Need for Thorough and Sustained Consultation in Planning

In the light of the foregoing section, it is clear that one of the key propositions put forward by this Green Paper is the need to revitalise the processes applied to community participation in all planning and governance activities, as provided for in the MSA.

This hinges on the philosophical idea that promoting dialogue in a planning process (that is, either an Integrated Development Planning or Spatial Planning process) will contribute to the “humanisation” of an activity that has come to seem distant and peripheral to many.

Such dialogue, however, should not be seen as being limited to being between a planning agency and a community. Rather, in terms of the constitutional imperative of cooperative governance, there is an injunction on all state departments that engage in planning or service delivery to communicate their intentions and wishes and to engage with their governance counterparts toward achieving clarity and alignment in the efforts of the state. The objective, however, remains the same: all agencies are delivering services to a specific area/space in line with one consensual development code, in an integrated and coordinated manner.

In all cases, the fundamental principle of Free, Prior and Informed Consent (FPIC) shall be held to apply but, most especially, in any case where spatial planning or any form of land development affects land that is held or occupied by a community under informal or old order tenure rights (e.g. Permission to Occupy [PTO] certificates).

### 2.7.4.1 Enabling *Meaningful Consultation: The Challenge to the Planning Profession*

At the outset, when considering the importance of meaningful consultation in ensuring that any planning process results in outcomes that are well-understood and generally supported (thus: legitimate) in the communities such process impacts upon, it must be acknowledged that this no simple endeavour.

Developing a thoroughgoing “culture” of consultation is likely to involve a number of interrelated and iterative steps/stages:

- Within the planning profession itself (that is between planners both in public and private practice)
- Within the state (between state departments)
- Between stakeholders

Oranje (2003) regards the dynamics around trying to ensure better and more effective consultation practices in planning as positive, as this presents an opportunity to develop a planning system that actually has meaning for all people in South Africa.

This is of vital importance as, according to the White Paper on Intercultural Dialogue: Council of Europe (2008) there are key risks involved in not pursuing a dialogue-based consultative process: -

- In the absence of dialogue, it is easy to develop or assume stereotypical perceptions of other people/cultures;
- It may result in a climate of suspicion, tension and anxiety;
- Minorities could be used as scapegoats in times of tension or competition over resources; and
- An absence of dialogue generally fosters intolerance and discrimination.

Suciu, Neagu and Mateeseu (2014:632) make the point that, transforming common multi-cultural co-habitation spaces into an authentic multi-cultural society depends on three variables: -

1. Tolerance and the way that culture is valued and appreciated by the host society;
2. Orientation towards a fully integrated of minorities in the host societies cohabitation spaces or to preserve their cultural specificities; and
3. Effective inter-culturalism is premised on any of the following:
  - a. explicit recognition of the existence of diverse cultures and the right of these cultures to express in a cultural different way;

- b. to identify the various cultural relationships and exchanges between individuals, groups and institutions that form a different culture i.e. creating the relevant knowledge base;
- c. creating and adopting relevant common standards that may be applicable to a different cultural space; and
- d. Facilitate different cultural groups to organise and resist assimilation.

The point must be made that inter-cultural competencies are learned and practical. Inter-cultural education or learning requires the pursuance and adoption of at least the following:

- Start with putting behind our own cultural identity and embrace an open vision of seeing and understanding the world;
- Embrace diversity: inter-cultural dialogue with other cultures allows people to reconsider, rediscover and recover essential components of other cultures;
- Recognise the differences between individuals and encourage the right to behave freely.
- Avoid discrimination by promoting an equalitarian attitude in classes and in our own life;
- Embrace respectfulness between individuals and promote tolerance in interactions with people;
- Encourage inter-cultural collaboration in projects;
- Encourage the liberty to speak freely for all people assuring openness and a positive climate to exchange opinions. Also grant equal importance for opinions of different individuals. (Suciu et al. 2014:635)

The above then, not only impacts on attitudes, but also on how culture is presented in the training of planners. This will not be achieved easily or rapidly.

However, this aspect is considered important to the development of a new planning system in the Eastern Cape as the sustainable agenda – and hence the achievement of the SPLUMA Principles – is infinitely bound up in the capacity to embrace difference.

### **2.7.4.2 Ensuring Appropriate and Specific Consultation for the Purposes of Setting Norms & Standards**

As it is intended as framework legislation for spatial planning and land use management,<sup>19</sup> SPLUMA provides for the prescription of norms and standards in terms of section 8.

To that effect, the Minister is required to consult with organs of state in the provincial and local spheres of government. No mention is made, however, of rural communities in respect of which land use management and land development are affected by the practices of local culture, with the consequence that customary law is not accorded the recognition and space necessary for the formulation of norms and standards under SPLUMA.

The provisions of section 23(2) require a municipality to allow the participation of a traditional council in the performance of municipal duties with regard to land use management. Similar provisions exist in other legislation, whereby traditional authorities are provided with authority to participate in matters of local government.<sup>20</sup>

In this regard, from legal precedent set, it seems clear that the courts are prepared to interpret and apply legislation in a manner that not only gives effect to section 211 of the Constitution<sup>21</sup> but also advances democratic principles.

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<sup>19</sup> See the preamble to SPLUMA:

*'To provide a framework for spatial planning and land use management in the Republic... to provide a framework for the monitoring, coordination and review of the spatial planning and land use management system; to provide a framework for policies, principles, norms and standards for spatial development planning and land use management...'*

<sup>20</sup> Reference is made to section 81 of the Local Government: Municipal Structures Act 117 of 1998, in terms of which traditional authorities are permitted to participate, through their leaders, in the proceedings of a municipal council.

<sup>21</sup> The provisions in question state that:

**'211. Recognition.–** (1) *The institution, status and role or traditional leadership, according to customary law, are recognised, subject to the Constitution.*

(2) *A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.*

(3) *The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*

Mindful of the above, the following is proposed: -

- It is submitted that the consultative process for the prescription of national norms and standards for land use management and land development must be expanded. The Minister must consult with all affected communities, particularly those where customary law applies, and this matter must be addressed in Provincial law;
- Similar requirements must also apply in respect of any legislative provisions made in respect of the prescription of provincial norms and standards, if any;

### **2.7.4.3 Consultation as Part of Spatial Planning and Land Use Management**

At the outset, it is asserted that it is imperative that provincial SPLUM legislation enjoins all organs of state engaged in planning procedures to undertake a more expansive public consultation process than that suggested by the current provisions of SPLUMA. Such a process must include all affected communities, especially those in respect of which spatial planning and land use management are influenced by customary law.

Within the municipal context, the academic writers, Steytler and De Visser, remark that community participation is key to the proper functioning of local government.<sup>22</sup>

In *Doctors for Life* and *Matatiele*,<sup>23</sup> landmark judgments were passed that underscore the centrality of the concept. The benefits of community participation that were outlined by the Constitutional Court bear repeating:

- it provides vitality to the functioning of representative democracy;
- it encourages citizens to be actively involved in public affairs;
- it encourages citizens to identify themselves with the institutions of government;
- it encourages citizens to become familiar with the laws as they are made;

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<sup>22</sup> Nico Steytler and Jaap de Visser *Local Government Law in South Africa* (2014), 6-3.

<sup>23</sup> See *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC).

- it enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of;
- it promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice;
- it strengthens the legitimacy of legislation in the eyes of the people; and
- it acts as a counterweight to secret lobbying and influence peddling.<sup>24</sup>

It is submitted that the same principles are of application in relation to the manner in which organs of state, especially municipalities, exercise and perform powers and functions with regard to spatial planning and land use management.

The comprehensive treatment of public consultation in Chapter 4 of the Local Government: Municipal Systems Act 32 of 2000 (MSA) serves as a useful template for purposes of drafting provincial legislation. The provisions therein place a duty on a municipality to *'develop a culture of municipal governance that complements formal representative government with a system of participatory governance'*<sup>25</sup>

Furthermore, the MSA prescribes the mechanisms, processes and procedures for community participation in the affairs of the municipality, including: the receipt, processing and consideration of petitions and complaints lodged by members of the community; notification and public comment procedures; public meetings and hearings; consultative sessions with locally recognised organisations and traditional authorities; and report-back to the community.<sup>26</sup>

Importantly, the municipality must take into account the special needs of people who cannot read or write, people with disabilities, women, and other disadvantaged groups.<sup>27</sup> The MSA also prescribes the way in which communication must be made when the municipality notifies the public through the media and conveys documents to the public.<sup>28</sup>

In this regard, specific mention must be made of the preparation and content of

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<sup>24</sup> *Matatiele*, at 59. See, too, *Steytler and De Visser*, at 6-4(1) to 6(5).

<sup>25</sup> Section 16(1) of the MSA.

<sup>26</sup> Section 17(2)

<sup>27</sup> Section 17(3)

<sup>28</sup> Section 21 and 21A

municipal SDFs, which is addressed under sections 20 and 21 of SPLUMA as these are seen as being key in establishing a more equitable and relevant planning system in the EC – as well as being seen in SPLUMA and the Municipal Planning and Performance Management regulations as forming the platform for a land use management scheme.

The following thus applies: -

- In terms of section 21(2), a municipal SDF must be prepared as part of the IDP for the municipality in question, in accordance with the provisions of the MSA.
- To that effect, Chapter 5 of the MSA deals with the principles and processes for the adoption of an IDP, stipulating in terms of section 26(e) thereof that the SDF constitutes a core component.
- Under section 29(1)(b) of the MSA, a municipality must allow proper community participation with regard to the drafting of the IDP. This entails: consulting the local community on its development needs and priorities; permitting the local community to participate in the drafting process; and consulting organs of state, including traditional authorities and other role players.
- In addition, the subject receives further attention under the Municipal Planning and Performance Management Regulations.<sup>29</sup> To that effect, regulation 15(1) provides that, in the absence of an appropriate municipal wide structure for community participation, a municipality must establish a forum that will enhance community participation in the drafting and implementation of the IDP.
- Accordingly, it is submitted that the existing requirements for community participation, with regard to the IDP, be amplified through the provincial SPLUM legislation directly in relation to the SDF.
- In order to achieve such amplification, it is proposed the mechanisms, processes and procedures contained in Chapter 4 of the MSA serve as a useful template.

Finally, as alluded to in the introduction of this section, consultation must be made obligatory on the part of all organs of state, so as to ensure that planning is undertaken on a sound basis of understanding. This entails: -

- Mandatory engagement of state departments and parastatals with each other, and with local municipalities in relation to their plans for delivering on their core assigned roles and functions as these may affect or impact on other parties;

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<sup>29</sup> *The Local Government: Municipal Planning and Performance Management Regulations, 2001 were published in terms of GNR 796 of 24 August 2001.*

- In turn, plans generated by any state department or parastatal must take account of approved IDPs and SDFs and must be preceded by engagement with municipality;
- Where such plans and/or intentions on the part of state departments or parastatals may be seen to have an impact on municipalities, they must ratify and accept such plans and take into account their impact on their adopted IDP or SDF either immediately, if warranted, or in the following annual review of said plans.

## 2.7.5 Ensuring Administrative Justice (Fair Administrative Processes) in Planning & Land Development Processes

Administrative justice – which is held to be a fundamental component of Social Justice – and access to proper avenues of redress must be open to anyone whose rights have been affected. The basis for this is section 33 of the Constitution, which provides for “Just administrative action”. Such just administrative action without prejudice is, in turn, viewed as an inextricable part of Social Justice.

The national legislation that gives effect to the above rights is the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The theme of access to redress, in relation to SPLUMA, must also be understood with reference to section 34 of the Constitution:

*'34. Access to courts.– Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'*

In ***Modderklip Boerdery***, the Constitutional Court described the right of access to courts as the corollary of the first aspect of the rule of law, which is the state's obligation to provide mechanisms allowing citizens to resolve their disputes.<sup>30</sup>

Not only access to courts is guaranteed by section 34 but also the resolution of disputes in another tribunal or forum, provided that it is independent and impartial.

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<sup>30</sup> See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC)*, at 21, as discussed in *Cora Hoexter Administrative Law in South Africa (2012)*, 589-591.

The above rights should find expression in accessible, efficient and effective processes that are devised to deal with the failure of a municipality to carry out its duties with regard to spatial planning and land use management processes as well as development applications.

Conversely, such processes, appeal and review procedures, and dispute resolution measures as may be provided, *do not promote or enhance either section 33 or section 34 of the Constitution when members of a community are hampered by socio-economic circumstances, geographical remoteness, complicated bureaucratic processes, or indifference and incompetence.*

Moreover, the above potential issues pose further challenges in the context of municipal areas where a large proportion of the population remains relatively disadvantaged (viz. the poor, the elderly, the unemployed, the disabled) and has inadequate access to means of transport or communication and, therefore, poor access to the municipal sphere.

In this regard, then, the Green Paper proposes the following: -

- The principles outlined in section 3 of PAJA, with regard to procedurally fair administrative action, must be used as the basis for addressing access to redress under provincial legislation.
  - The relevant principles include adequate notice of any right of review or internal appeal and adequate notice of the right to request reasons.<sup>31</sup>
  - Furthermore an opportunity must be given to: obtain assistance and, in serious or complex cases, legal representation; present and dispute information and arguments; and appear in person.<sup>32</sup>
- It is further submitted that conciliation and mediation constitute perfectly legitimate and viable alternative dispute resolution (ADR) measures that should be introduced into provincial legislation to resolve disputes that arise from the interpretation or application of SPLUMA. Such an approach has been adopted under the National Environmental Management Act 107 of 1998 (NEMA) in relation to fair decision-making and conflict management.

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<sup>31</sup> Section 3(2)(b) of PAJA

<sup>32</sup> Section 3(3)

- To summarise, the principles contained in section 3 of PAJA and the ADR processes mentioned in sections 17 to 19 of NEMA appear to provide a suitable basis for the development of procedures and measures to give effect to sections 33 and 34 of the Constitution and to ensure proper access to redress under EC-SPLUM legislation.
- In this regard, in terms of section 17(1) of NEMA, a Minister, MEC or a municipal council may consider the desirability of referring a matter to conciliation when a difference or disagreement has arisen, before reaching a decision. The procedural parameters for conciliation are contained in section 18 of NEMA. Similarly, a difference or disagreement may be referred to arbitration under section 19(1) of NEMA. It is proposed that equivalent provisions be set in the EC-SPLUM.
- The key challenge here is to find ways and means to bridge the communication and access gaps that are a feature of the fragmented socio-cultural and economic realities of different parts of the Province.
- It is thus further proposed that all communications regarding spatial planning and land use management matters must be channelled by all municipalities in terms of robust communication plans as envisaged in Sections 18-21 of the Municipal Systems Act (MSA, Act 32 of 2000).
- It should be considered an ideal in this regard if, as provided for in Section 22 of the MSA, EC-SPLUM could be drafted to allow for Regulations to set minimum standards on communication and participation of communities in municipal areas, as indicated above.

## **2.7.6 Ensuring Accessible and Fair Avenues for Appeal**

### ***2.7.6.1 Providing for an Impartial Appeals Body***

The subject of internal appeals is addressed in terms of section 51 of SPLUMA and have been the source of some controversy as to (1) whether the appeal body contemplated in SPLUMA could be seen as an impartial body; and (2) as to whether the right of appeal have been framed too narrowly in SPLUMA.

As a starting point, it is useful to consider the constitutional principles that underpin the subject. As previously discussed, section 33 of the Constitution deals with just administrative action and guarantees the right to administrative action that is lawful,

reasonable and procedurally fair.<sup>33</sup> National legislation must be enacted to give effect to such right and provide for the review of administrative action by a court or an independent and impartial tribunal.<sup>34</sup>

In this regard, the taking of a decision by a Municipal Planning Tribunal (MPT) must be regarded as an administrative action, meaning that it is capable of judicial review or review by an appropriate tribunal.<sup>35</sup> Furthermore, section 34 of the Constitution deals with access to courts and guarantees the right to have disputes decided in a fair public hearing before a court or another independent and impartial tribunal or forum.

Under section 51(2) of SPLUMA, a municipal manager must submit an appeal to the executive authority of the municipality, which serves as the appeal authority. The executive authority must be understood as the executive committee or the executive mayor of the municipality; alternatively, in the absence of either of the above, then it is a committee of councillors appointed by the municipal council.<sup>36</sup> On the face of it, the concerns about the impartiality of the appeal body appear warranted.

As to the right of appeal: In terms of section 51(1) of SPLUMA, a right of appeal lies only with a person whose rights are affected by a decision taken by an MPT. This is qualified under section 51(4), which describes a person whose rights are affected as follows: a party to a land development application in terms of section 45(1); the municipality where the affected land is located; and an interested person who may reasonably be expected to be affected by the outcome of the land development application proceedings. It does not cover a decision taken by a municipality to adopt or amend a land use scheme; furthermore, it does not extend to an interested person who lacks an adversely affected pecuniary or proprietary interest.<sup>37</sup> Moreover, it could well be argued that section 51(1), read with section 51(4), does not accommodate the wider rights under section 33 of the Constitution, which include the right to the review of administrative action.<sup>38</sup> However, the provisions of regulation 22

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<sup>33</sup> Section 33(1) of the Constitution

<sup>34</sup> The legislation in question is PAJA. See sections 3 and 6, in particular.

<sup>35</sup> *The definition of 'administrative action' appears in section 1 of PAJA. It is a convoluted definition but it is submitted that it is wide enough to encompass a decision taken by an MPT.*

<sup>36</sup> *Section 1 of SPLUMA*

<sup>37</sup> *Sections 51(4) and (5)*

<sup>38</sup> *The distinction between an appeal and a review is important for purposes of the interpretation of section 51(1). There are crucial differences in law, which will be discussed further in the paper.*

of the SPLUMA Regulations must be taken into account, which appear to acknowledge the right to review by including procedurally unfair administrative action, as a ground of appeal, within the ambit of jurisdiction for an appeal authority.

Before proceeding further, it is helpful to consider the differences and potential similarities between an appeal and a review, in law. The leading academic writer, Hoexter, discusses the subject extensively and it is worth repeating an extract from her seminal work, *Administrative Law in South Africa*:

*'Like judicial review, administrative appeals allow for the reconsideration of administrative decisions by a higher authority. Unlike judicial review, such appeals are established specifically to challenge the merits of a particular decision. The person or body to whom the appeal is made will step into the shoes of the original decision-maker, as it were, and decide the matter anew. Judicial review, on the other hand, focuses on the way in which the decision was reached, and not on the justice or correctness of the decision itself. At least in theory, review tests the legality and not the merits of the decision. Another major distinction is that judicial review is an external safeguard against maladministration, whereas administrative appeals constitute an internal or "domestic" check. Govender<sup>39</sup> explains their main advantages as follows:*

*Effective administrative appeal tribunals breed confidence in the administration as they give the assurance to all aggrieved persons that the decision has been considered at least twice and reaffirmed. More importantly, they include a second decision-maker who is able to exercise a "calmer, more objective and reflective judgment" in reconsidering the issue.*

*It should be noted, however, that the term "appeal" is sometimes used in legislation even though what is offered is in substance a review.<sup>40</sup>*

In addition, Hoexter observes that administrative appeal bodies in South Africa vary considerably and differ in their independence, their functions and their methods of operation.<sup>41</sup> They include appeal bodies that deal with internal appeals, e.g. from the decision of a tribunal or official to a superior official or to the MEC or Minister, and appeal bodies that deal with appeals to an administrative tribunal expressly created to hear administrative appeals, e.g. town planning appeal boards.<sup>42</sup>

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<sup>39</sup> The reference is to Karthy Govender 'Administrative Appeals Tribunals' in Bennett et al (eds) *Administrative Law Reform (1993)*, 77, quoting Lawrence Baxter *Administrative Law (1984)* 255.

<sup>40</sup> Hoexter (n 28, above), 65

<sup>41</sup> *Op cit*, 67, quoting Govender (n 55, above) 79.

<sup>42</sup> *Ibid*

From the above, it is submitted that the appeal authority contemplated under section 51 of SPLUMA is fairly typical of the type of administrative appeal body that ordinarily hears internal appeals, as discussed by Hoexter. The decision of an MPT can be taken on appeal to the executive authority of a municipality where it will be considered and decided anew. There is nothing unusual about this in law. Therefore, while concerns about the impartiality of the executive authority are unlikely to disappear, the appeal mechanism appears to be legitimate.

To the extent that an alternative or parallel appeal mechanism may be contemplated under provincial legislation, care must be taken to ensure that the structures and procedures will not be inconsistent with SPLUMA.<sup>43</sup> A provincial appeal body is not an option because it would fall foul of the findings of the Constitutional Court in *Gauteng Development Tribunal*,<sup>44</sup> inasmuch as municipal planning is a responsibility of local government; the functions and powers associated therewith cannot be usurped by provincial government, which would be the effect in the event that a decision taken by an MPT was taken on appeal to a provincial appeal body.

However, importantly, section 51(6) of SPLUMA permits a municipality to authorise an outside body or institution to assume the obligations of an appeal authority and indicates that the manner in which this is done may be regulated in terms of provincial legislation. This is reinforced by regulation 20(c) and 28 of the SPLUMA Regulations.

It is submitted that the above provisions provide a useful opportunity for provincial legislation to deal with concerns about the impartiality of the executive authority of a municipality.

In much the same way that two or more municipalities may agree to establish a joint MPT or a district municipality may, with the agreement of the relevant local municipalities, establish an MPT to deal with applications within the district,<sup>45</sup> a joint appeal authority could be created in the manner determined by provincial legislation, such that it is perceived to be more impartial than the executive authority of a municipality.

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<sup>43</sup> As previously discussed, section 2(2) prohibits the prescription of an alternative or parallel mechanism, measure, institution or system in a manner inconsistent with SPLUMA. Similar provisions are apparent in terms of section 10(2).

<sup>44</sup> See the earlier discussion of the case (n 1, above).

<sup>45</sup> Sections 34(1) and (2) of SPLUMA

By implication, provincial legislation could provide for the establishment of a single umbrella appellate tribunal.<sup>46</sup> This would have jurisdiction to deal with all appeals against decisions taken by MPTs in the Eastern Cape, enjoying similar functions and powers as the erstwhile town planning appeal board, provided that the tribunal would fall under the authority and responsibilities of local government. Essential aspects of the tribunal would include the following:

- It would operate in place of the executive authority, where so authorised by the municipality in question, but not as a substitute therefor where no such authorisation existed. In other words, the executive authority would function as a default appeal body in the absence of specific authorisation from the municipality for the tribunal to deal with any appeal against a decision taken by the MPT.
- In accordance with the distinction drawn by the court in *Tikly v Johannes NO*,<sup>47</sup> the tribunal would enjoy narrow appellate jurisdiction. This is clear from the duty of an appeal authority to 'confirm, vary or revoke' the decision of an MPT, under section 51(3) of SPLUMA. Interestingly, regulation 22(a) of the SPLUMA Regulations appears to grant review powers to an appeal authority in relation to administrative action (e.g. the decision of an MPT) that was not procedurally fair, as contemplated under section 3 of PAJA.
- The appeal procedures for the tribunal should be determined by provincial legislation. The contents thereof would be similar to those contained in regulation 21 of the SPLUMA Regulations.
- Proper access to the tribunal must be given, especially where a party may be hampered by socio-economic circumstances or geographical remoteness. For example, the tribunal should enjoy discretion to select a venue that was situated within close proximity to the land in question and stipulate that oral hearings be conducted in the language of the parties, with the assistance of an approved interpreter where necessary.

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<sup>46</sup> *The concept of an umbrella appellate tribunal has been advanced relatively successfully in Australia where the Australian Administrative Appeals Tribunal (AAT) was established to hear a wide range of administrative appeals. In that regard, the objective was to take over the appeal functions from 'the proliferation of tribunals which [had] been such feature of 20<sup>th</sup> century government in Australia', in such a way that the coherence of the system was enhanced, as discussed in Hoexter (n 28, above) 71.*

<sup>47</sup> *See Tikly v Johannes NO 1963 (2) SA 588 (T), at 590F-591A, where Trollip J distinguished between a wide and narrow appeal. The former is a complete re-hearing of and fresh determination on the merits of a matter, with or without additional evidence or information; the latter is a re-hearing on the merits, but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong.*

- The ambit of actions of the Tribunal should be responsive and should allow for the holding of special hearings, in-situ inspections and the hearing of representations.
- No party to an application, authorised official or member of the MPT that took the decision that forms the subject of an appeal should be permitted to be a member of the tribunal.<sup>48</sup> *Ad hoc* members with appropriate expertise and standing in a community should be appointed for land development matters that are affected by indigenous practices and customary law.

The above aspects would need to be regulated by provincial legislation. It is submitted that there is sufficient provision in SPLUMA for the creation of an appellate tribunal as an alternative or parallel institution.

### **2.7.6.2 Extending the Right of Appeal**

Turning to the nature of the right of appeal, criticism may be levelled against section 51 of SPLUMA: the right of appeal is narrow in that:

- No appeal lies against, *inter alia*, a decision by a municipality to adopt or amend a land use scheme.
- A right of appeal lies only with a person whose rights are affected by a decision taken by a MPT, subject to the qualifications contained in sections 51(4) and (5).
- Of immediate concern is that a right of appeal does not extend to an interested person who lacks an adversely affected pecuniary or proprietary interest, meaning that decisions pertaining to land held under communal ownership would probably entail the exclusion of affected members of the community when taken on appeal. This is untenable.
- Similarly, there could be other land development decisions that directly or indirectly have a bearing on indigenous practices. These could not be taken on appeal in the event that the threshold requirement of an adversely affected pecuniary or proprietary interest could not be met.

It is submitted that provincial legislation is necessary to address the above shortcoming. The qualifications attached to the meaning of an interested party under sections 51(4) and (5) require modification to ensure that the recognition of customary law is given effect and that the principles of Free, Prior and Informed

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<sup>48</sup> The above prohibition is apparent from regulation 27(2) of the SPLUMA Regulations.

Consent are protected.

This means that provisions need to be considered to include Traditional Councils and legitimated community representatives as having the right to give input on relevant matters as well as having representation on Appeals bodies, where relevant.

### **2.7.6.3 *Aligning Access to Administrative Justice (Redress) and Appeals***

The final issue to be considered, within the context of internal appeals, is the extent to which the existing or suggested mechanisms, measures, institutions or systems clash with the submissions made earlier in this paper with regard to access to redress. In other words, the question is whether there is any conflict between the manner in which internal appeals are addressed and the manner in which disputes arising from the interpretation or application of SPLUMA are resolved.

The answer to the above can be stated succinctly as follows: an internal appeal is confined to the decision taken by an MPT; any other dispute, falling outside the ambit of an appeal, should be addressed in terms of the ADR measures suggested previously, i.e. conciliation, mediation or arbitration, in accordance with the approach adopted under NEMA.

## **2.7.7 Institutional Development & Appropriate Institutional Configuration**

In order to secure the vision of a revitalised and inclusive (more human) planning system in the Eastern Cape that is able to strive for the achievement of social justice, spatial transformation and the SPLUMA Principles, it is crucial to acknowledge the need for a reconfigured institutional arrangement to enable more effective and responsive planning to inform development management and delivery.

In this regard, it is considered important – given the relative lack of capacity available to the planning function in the Province – that special arrangements be considered as follows: -

- A Provincial Planning Board should be established that will advise the MEC of COGTA on:
  - Matters affecting the application of the P-SPLUM Act
  - Regulations that may be required to give effect to the P-SPLUM Act

- Should it be established, the Board may also, upon request by any provincial department or the House of Traditional Leaders, or a municipality or a Traditional Council:
  - Conduct research and make recommendations on matters relevant to spatial planning and land use management
  - Guide and advise on the formulation of a SDF or a land use management scheme
  - Guide and advise or provide input on programmes or projects aimed at the upgrading of informal settlements or the development of land held under informal or communal tenure
- The provincial mandate to support and monitor spatial planning and land use management must be given “flesh” and a clear institutional home with provision for capacity to be set in place to enable the Province to render the function at an appropriate level to assist the municipal sphere as per the obligations of Province in terms of Section 139 of Constitution and Section 10 of SPLUMA.
- The function of Support can take on a variety of forms, including: -
  - Local-level technical/professional planning support in a range of capacities such as:
    - Participatory planning support
    - Technical advisory support
    - Research and information provision support
    - Project specific financial support (on application)
  - Intervention support as provided for in law where Local Municipalities do not render the spatial planning and land use management function appropriately, for example:
    - Limits of jurisdiction are exceeded
    - Unreasonable delays in the finalisation of land development applications
    - No policy formulations (e.g. IDP or SDFs) are set in place and approved
- The function of Monitoring, likewise, addresses a number of dimensions where Province would ensure that municipalities’ planning complies with certain requirements, for example:
  - Being aligned and consistent with Provincial interests and programmes
  - Being aligned and consistent with neighbouring municipalities’ interests and programmes

- Being aligned with established norms and standards, including those to be promulgated in terms of Section 8 of SPLUMA
- Each municipality providing Province with an annual report-back on progress concerning spatial planning and land use management processes and outcomes.
- Finally, whilst remaining consistent with the provisions of SPLUMA, it is proposed that Provincial Planning must at least undertake the following activities:
  - The formulation of a Provincial SDF
  - The formulation of Provincial Policy on matters of interest and/or concern for spatial planning and land use management in the Province
  - Representing the Province in different forums on matters of interest to planning in the Eastern Cape
  - Provincial-based research and the development of knowledge databases and GIS data
  - Assisting in conflict-resolution between stakeholders, where so requested
  - Establishing appropriate protocols to guide planning and land use management processes as well as participatory methods need to inform and guide such processes
  - Facilitating and/or participating in Implementation Protocols as provided for in Section 35 of the Intergovernmental Relations Framework Act (Act 13 of 2005)
  - Establishing technical support structures as provided for in Section 30 of the Intergovernmental Relations Framework Act (Act 13 of 2005)
  - Collaborate with and advise on request the Eastern Cape House of Traditional Leaders and/or Traditional Councils
  - Where deemed vital, and following due process, to undertake work for and on behalf of a municipality that is unable to perform its functions.

## 2.7.8 Professional Development

In order to carry through on the theme of revitalising the planning system and its associated profession, it is proposed that measures be provided for in provincial legislation or related regulations to set minimum standards in relation to planning education and training, and to identify areas of work that may be carried out by different categories of planners, as provided for in the Planning Profession Act (Act 36 of 2002).

From the perspective of the Eastern Cape (where no school of planning currently exists) the focus of this effort should be as follows: -

- Developing a new ethos and morality of planning in the Province that questions prevailing planning rationalities (schools of thought) in the context of socio-economic and cultural diversity.
- The development of broader and deeper skill sets to deal with the scope of the work that planners are called upon to do, as it concerns not only land (space) but also people, infrastructure, the environment and the economy.
- Putting in place support mechanisms to underpin continuing professional development (CPD) and knowledge development. Such mechanisms could include:
  - Formalising support of SA Council of Planners (SACPLAN) and SA Planning Institute (SAPI) structures in the Province; and
  - Ensuring clarity around the need of the Province to monitor and support SPLUM in the Province, including monitoring professional standards of work (quality) and communicating with SACPLAN on ensuring due diligence in the maintenance of standards as well as corrective action, if needed.
- Setting and applying minimum standards of excellence in relation to particular categories of planning work and putting in place a Peer Review mechanism that could be accessed on request by any client of a registered professional planner, or by any stakeholder concerned about the quality of work of such a planner

## 2.7.9 Addressing Omissions and Problematic Aspects of SPLUMA

As indicated at the outset, SPLUMA is in the process of being implemented in the Eastern Cape Province and it is possible that there may well be provisions made in law by the Act that will prove to be a challenge, either in the context of the Provincial realities or in general application.

Therefore, it is proposed here that:

- The EC-SPLUM process must ensure that ways and means are put in place to enable unforeseen legal difficulties to be dealt with in a practical manner that is not out of line with the prescripts of SPLUMA.
- In this regard, EC-SPLUM legislation must address issues such as:
  - Possible limitations in the ability to implement all the provisions of SPLUMA due to limited skills, experience and/or resources;
  - Addressing overly restrictive time frames imposed by SPLUMA on giving effect to a land development application; and
  - Setting in place the means to effect the removal of restrictive conditions of title as part of a land development application.

## 2.7.10 Providing Transitional Measures for the Bridging of the Old and the New Planning System

In order to ensure a smooth transition from the system existing at the time of implementation of the new Provincial SPLUM Act, there will be a need to provide guidance on measures needed to ensure that the planning system continues to function smoothly as it transitions from the previous system to the new.

- Any relevant Planning Advisory Board, Land Use Planning Board and/or Townships Board will remain functioning until such time as they are disestablished by Notice in the Provincial Gazette
- Actions taken in terms of a previous law that is repealed by the P-SPLUM Act will need to be considered as having been done in terms of the Act and, as such, maintain their legality until such time as an affected action is expressly repealed or withdrawn in terms of the Act or subsequent by-laws.
- Any action taken in terms of an Act or by-law repealed by the new P-SPLUM Act and which has not been finalised at the date of enactment of the new Act may be finalised as determined by the relevant Regulatory Authority of legal standing.

## 2.7.11 Providing for Emergency Measures

Given the reality that planning will most likely be required to play a central role in assisting the society to deal with the implications and consequences of unforeseen events, including natural and human-made disasters, it is proposed that EC-SPLUM must make provision for emergency measures in spatial planning and land use management matters.

These would foreseeably include needs relating to:

- The need for temporary accommodation of communities as a result of natural disaster;
- The need to seek alternative land for settlement;
- The need for transitional arrangements related to the upgrading of informal settlements.

### 3 THE NEXT STEPS: A WHITE PAPER AND AN EASTERN CAPE SPATIAL PLANNING & LAND USE MANAGEMENT ACT

This Policy document (the Green Paper) sets out the Department of Cooperative Governance & Traditional Affairs' views on how to move forward in dealing with the issues at hand related to the need for provincial legislation on Spatial Planning & Land Use Management.

As such, whilst the compilation of the Green Paper has been done in a consultative manner, it will not lead to adoption by Legislature but only by the Department itself.

Consequently, once the Green Paper has been endorsed as stating the Department's policy, the next step will be the drafting of a White Paper that shall serve as the platform for the drafting of legislation, in due course.

As the White Paper is the document that links to the drafting of legislation, it has a more formal route to travel to be adopted by Legislature, as follows: -

9. The White Paper draft goes firstly to the Governance & Administration Cluster (Heads of Departments of COGTA, the Office of the Premier and Treasury) under cover of a Cluster memo;
10. It will then be introduced to the Cabinet Committee for Governance & Administration (MECs of relevant departments) under cover of a Cabinet Committee memo;
11. If it successfully traverses those structures, the White Paper is then taken to the Executive Council for adoption;
12. Once EXCO has adopted the White Paper, the MEC for COGTA shall introduce it into the Legislature who will refer the item to the relevant Portfolio Committee, which will be briefed on the item by a COGTA delegated official;
13. At this point, the Portfolio Committee can refer the White Paper to be subject to Public Hearings;

14. Once those processes are complete, the White Paper is submitted to the Legislature for adoption.
15. The process to draft legislation (draft Bill) can then be proceeded with.
16. In this regard, it is recommended that use be made of the available ways and means to draft a Bill in parallel to the White Paper and reach the end-goal of legislation sooner.

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**Signed by:** UMHLABA Consulting Group  
(Pty) Ltd

Date: January 2016

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**Signed by:** EC COGTA

Date: January 2016

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