



Province of the
EASTERN CAPE
COOPERATIVE GOVERNANCE
& TRADITIONAL AFFAIRS

GREEN PAPER ON EC PROVINCIAL SPATIAL PLANNING & LAND USE MANAGEMENT SYSTEM

**REPORT – PHASE 2:
Analysis, Synthesis & Policy Framework**

**May
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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 & Traditional Affairs, national or provincial, as specified</i>
DM	<i>District Municipality</i>
EC	<i>Eastern Cape Province</i>
IDP	<i>Integrated Development Plan as provided for in the MSA</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</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>
SPLUMA	<i>Spatial Planning & 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 & 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 document. Thereafter, a White Paper will be compiled, which will serve to set out the policy and technical directives that will guide the drafting of the Eastern Cape's Provincial Spatial Planning & Land Use Management law.

This report is the outcome of Phase 2 of the overall process to draft a Green Paper on Spatial Planning & Land Use Management in the Eastern Cape.

The report sets out 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. As part of this understanding, the report also summarises some pertinent aspects of the history of the province, to the extent that this has shaped (and continues to shape) the functional context within which spatial planning and land use management takes place in the Eastern Cape.

The key issues and/or information contained in this report are highlighted below in summary form.

What do we mean when we use the term ‘Planning’?

In terms of Section 4 of SPLUMA, the Spatial Planning System in South Africa is described as follows:

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.

Within the above System, for the purposes of SPLUMA, Spatial Planning, as such, is described as being comprised of 3 categories: -

1. Municipal Planning
2. Provincial Planning
3. National Planning

‘Planning’ itself 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, neighborhood), 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 and integration of social, economic and physical sectors which comprise human settlements,

Through the synthesis and integration of information for the preparation of strategic, policy, statutory and other development plans within the South African development context.
- (b) Planning must pursue and serve the interests of the public to benefit the present and future generations.

Historical Context

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, in the Eastern Cape it is confronted by the legacy of our 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 twenty years but to underline and understand the origins and nature of the immense challenges that planning 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 Province with its familiar divide between the “developed” west and “underdeveloped” and poverty-stricken east.

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 segregation and racism rendering black residents as right-less sojourners or “squatters” liable for summary eviction if not detention.

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

Over the course of the twentieth century, as institutionalised segregation hardened into statutory racism and the apartheid system, central government found common interest with some 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 their ancestral 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.

Thus, for many people still today – because of the history of abuse experienced 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, loom in the minds of some.

However, this fact is not often recognised today by most planners, who think of planning as something that is benevolent and is intended to assist communities (make decisions about the best use of resources; make decisions about change in land use; make decisions about the best way to design and build a housing development etc.).

It is imperative, therefore, that the Provincial approach to spatial planning and land use management legislation must address this legacy of mistrust and must, further, ensure that appropriate measures are set in place legally to assist planning agencies (public sector as well as private sector), 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.

Spatial Planning Issues

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 the 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 budgetary cycles rather than the requirements of properly sequenced planning and consultative processes aligned to quality outcomes.

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 (checklist), often at the expense of thoroughgoing consultative and technical processes.

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.
- Much planning has not managed to capture a consensus-based “vision” together with local residents (especially in rural and trust land areas) and this is not appropriately interpreted in terms of SDF proposals and LUM principles.
- Consequently, spatial plans are often not recognized by affected communities. Plans are not “owned” by target communities, as they do not relate to their needs, priorities or lived reality. Decision-making therefore often continues to happen at local / rural level, without the assistance of planning input.
- In effect, many people remain “alienated” from the way that the state practises planning and land administration and thus remain effectively “beyond the reach” of state plans and programmes.
- Consequently, in the face of the state’s inability to deal with people’s real needs, people help themselves. This results in so-called informality as well as the development of community rules in dealing with land matters.
- Communities’ hard-won experience of state inefficiency often leads to mistrust or complex cycles of engagement-disengagement.
- State programmes lead to unintended consequences but rarely result in a neat solution that fits into the preconceptions of the planning and legal system.
- Weak capacity in commissioning agencies (that is to say, inexperienced officials or planners) often leads to an inability to 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 simplify the design of planning processes and set in place mechanisms to carry out monitoring of (i) the processes followed; (ii) compliance with appropriate qualitative standards of planning; and (iii) the implementation of plans.

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 EC province.

To compound this complexity, it is also a current reality that, in the rural land areas of the former Ciskei and Transkei, no legislation exists to govern land use management. Moreover, legal provisions to govern the allocation of land use rights are currently not applicable either. Currently, as far as directing use of space, the only formal measures that are applied to these areas include:

- Agricultural resource management processes
- 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 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.), 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 have 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 the urban and rural context.
- **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.
- **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 informality function better, “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”. Such an approach needs to consider incentives (either penalty or reward orientated) as a means to encourage development towards desired spatial outcomes. Here the relationship between Spatial or “Forward” Planning and LUM systems should be reconfigured and closely integrated.
- **Spatial LUM system not synced with other areas of resource use or development:** 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.

The Challenges Related to Capacity (in Private and Public Sectors)

A summary of 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 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 have a professional registered planner in their employ.

From the above, it is clear that capacity at local government level is insufficient to ensure appropriate administration of the planning function throughout the province. The lack of planning capacity at senior management level may explain the perception of planning being ignored or seen as an unnecessary irritation or by-product 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 such perceptions.

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.

It is therefore not surprising that the administration of planning and land use management at local government level is far from ideal. This negative impact of this situation is further multiplied by the additional responsibility placed on local government by the constitutional ruling that confirms planning as a municipal function.

Some of the consequences of the above include:

- **Administration and systems not innovative:** There is little evidence of municipalities using 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

memo's whereas information management and communication can 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, in the form of an appeal, 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 behind the reach of most South Africans and can be considered as denying the public the right to fair administration.

- **Lack of integration results in lack of 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 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 having different planning cycles and funding timeframes.
 - Departments operating in silos and integration not being a priority.
 - Integration compliance not being demanded by higher authority.
 - Planning being a systematic and technical process, whilst decisions around allocation of budget and prioritisation of project interventions being made by political structures and therefore often being informed by political expediency.

Legal Imperatives and Challenges

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 indigenous 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 being derived from the social practices that 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.

Whilst it is important to establish legal certainty and predictability as cardinal principles of the drafting process, the concern that a Provincial SPLUMA would merely serve as a blunt object to regulate the complexities of planning and land use in the Eastern Cape is a key premise upon which the Green Paper should be developed.

Drafting parameters and issues

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 condition attached to the above is that provincial legislation must be 'consistent' with SPLUMA.

What Does SPLUMA Set in Place?

- SPLUMA, in the first instance, serves as a national Act to direct the activities and constituent processes of spatial planning and land use management across the country as a whole.
- 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).
- It also clearly sets out Development Principles to be adhered to in Spatial Planning and Land Use Management in South Africa.
- It is intended to sit at the centre of a range of 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.
- It sets in place processes to:
 - render support and monitoring on an inter-governmental basis;
 - prepare Spatial Development Frameworks;
 - give effect to land use management and land use scheme amendments; and
 - to deal with appeals against decisions regarding land use scheme amendments

Issues 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 the international discourse and what the obligations are for the province stemming from this.

Some of the key elements in the international perspective include the following:

- Shift in what constitutes wellbeing, by looking beyond the material elements only and to also reflect on wellbeing in terms of social and cultural elements.
- Recognition of the need for appropriate knowledge and learning. This includes a need to gain appropriate knowledge by way of appropriate processes of engagement.
- Recognition of the importance of an ethos embedded in dialogue, recognition, dignity and respect, aiming at empowering existing local- or traditional-based structures to continue with their mandate related to governance and custodianship. Knowledge gained from theory in academic curricula is not always sufficient to appropriately inform their approach to planning and management of space.
- Recognition that in many cultures, land may have a significantly different meaning and purpose from what it may have in some western cultures.
- Recognition that over time, space 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 at all cost.
- Recognition of the significance of culture and the rights of all groups, including minorities.
- 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 to planning.
- Recognition of the importance to devise and follow appropriate protocols to ensure credibility. Protocols should enable communities to articulate their norms and standards in their own voice.

Policy Framework : Key Elements

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, social and 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, principles decided on behalf of people and parachuted onto them.

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

- *Free and prior informed consent* – 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 a clear 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 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;
- *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 resident in the subject area and this may require special processes, procedures and protocols to be undertaken as part of the planning processes, including cultural mapping, resource mapping etc.;
- *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”).

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1 INTRODUCTION

In line with the provisions of the national Spatial Planning & Land Use Management Act (Act 16 of 2013, known as SPLUMA and set to be implemented on 1 July 2015), 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 the full range of communities residing in the Eastern Cape.

The formal process to develop an appropriate law in the Eastern Cape requires that a step-by-step approach be followed with, firstly, a Green Paper being prepared to serve as a discussion and policy framing document. Thereafter, a White Paper will be compiled, which will serve to set out the policy and technical directives that will guide the drafting of the Eastern Cape's Provincial Spatial Planning & Land Use Management law.

Accordingly, and following due process, the Provincial Department of Cooperative Governance & Traditional Affairs appointed a team led by UMHLABA Consulting Group (Pty) Ltd to prepare a Green Paper for adoption by the Department.

1.1 THE TERMS OF REFERENCE

As a starting point, the Terms of Reference guiding the drafting of the Eastern Cape Provincial Green Paper on Spatial Planning & Land Use Management called for the explicit recognition of the history that has shaped socio-economic and spatial development in this Province in order to pay due recognition of the unique socio-political, economic and spatial-developmental circumstances prevailing in the Eastern Cape. This history, it is emphasised, has played a fundamental role in shaping the broader socio-spatial development context within which new legislation for spatial planning and land use management is to be formulated and implemented.

Thus based on an understanding of the present-day dynamics related to that history, it is hoped that the Green Paper may set a consensual platform for the development over time of a workable set of planning and land use management policies, processes and legal provisions that accommodate the needs of all communities in the province.

Throughout, it is affirmed that the Green Paper must work within the framework set by national 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 framework(s) set by other relevant legislation, which would include (but is 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) and, of course, the national Spatial Planning and Land Use Management Act (SPLUMA).

Accordingly, as per the Terms of Reference, and notwithstanding what is contained in the provisions of the SPLUMA, the envisaged Provincial Green Paper document attempts to:

- Identify relevant issues emanating from the specific socio-political and economic history and cultural character of the Eastern Cape Province, in as much as these aspects may substantially impact on the content and outputs of the document.
- Recognise that these issues must be dealt with equitably in providing a framework for new legislation, thereby creating a basis for promoting socio-spatial transformation, social cohesion and social integration in as much as future spatial planning processes may influence these as an overall goal.
- Acknowledge all current land delivery systems with a view to articulating the issues related to these that need to be accommodated, with particular reference to constitutional imperatives, including human rights, human development, human security, access to land and services, maintaining livelihoods and job creation. Specific consideration is to be given to exploring incremental rather than “fix it all right now” solutions.

- Embrace an ethos within the planning endeavour that is founded on respect for human dignity and cultural differences.
- Seek to overcome the shortfalls of the present planning systems by creating a relevant frame of reference that will enable the Province, Municipalities, communities and, where relevant, Traditional Councils to work together to optimise delivery on the spatial planning mandate, whilst at the same being able to effectively and efficiently deal with spatial planning governance issues and challenges.
- Seek to move beyond plan formulation, land and resource management processes and procedures, to also focus on implementation.
- Seek to promote and entrench the principle of shared stakeholder responsibility, using a spatial planning platform as articulated in the Provincial Spatial Development Plan (PSDP) (2010).
- Seek to promote the integrity and quality of information and decision-making in the relevant spheres tasked with spatial planning responsibilities, by encouraging the utilization of registered members of the spatial planning profession.
- Acknowledge and recognize the legitimacy of the role of communities, customary responsibility, traditional councils and indigenous knowledge in the spatial planning regime.
- Embrace the principles of sustainable development and ecological limitations.
- Consider a differentiated approach to spatial planning, not only in terms of limitations in skills and resources at local government, but also in the context of the full spectrum of governance regimes that include systems in different geographic zones that are characterised by differing socio-economic and cultural conditions.
- Identify any perceived limitations, disparities or potential areas of conflict that may occur between all of the above and the new Spatial Planning and Land Use Management Act (16 Of 2013).
- Recommend an appropriate approach to ensure the successful implementation of a new planning system in the Eastern Cape. This is to include consideration of financial implications to implement and maintain this system.

1.2 THIS REPORT

This report is the outcome of Phase 2 (Analysis, Synthesis & Policy Framework) of the overall process to draft a Green Paper on Spatial Planning & Land Use Management in the Eastern Cape.

The report sets out 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. As part of this understanding, the report also summarises some pertinent aspects of the history of the province to the extent that this has shaped (and continues to shape) the functional context within which spatial planning and land use management takes place in the Eastern Cape.

The report is structured as follows: -

To begin with, **Chapter 2** highlights key aspects of the historical context to spatial planning and various aspects of land, specifically, how it is viewed in different ways by different cultural perspectives and how it is managed and administered. This is done in order to attempt to provide an understanding of the range of issues that spatial planning and land use management will need to address and to highlight that some of these issues go beyond the “traditional” notion of what spatial planning and land use management – as fundamentally public sector activities – are to address.

Thereafter, **Chapter 3** provides an overview of the current workings of the spatial planning system in the Eastern Cape in order to highlight some issues and shortcomings in the current functioning of that aspect of the overall planning system from a procedural and “system design” perspective.

Similarly, **Chapter 4** focuses on how land use management is currently undertaken across the Province and again tries to highlight some of the key challenges in this regard.

Chapter 5 then seeks to highlight some of the issues related to local government administration capacity and resources currently available to engage with the spatial planning and land use management spheres of activity

Finally, **Chapter 6** sets out what are deemed to be key informants derived from existing policy and law that direct how spatial planning and land use management are intended to operate, including guidelines and principles drawn from international norms and standards set by various Protocols, Declarations and Resolutions to which the Republic of South Africa is a signatory.

Chapter 7 concludes by highlighting the key themes and elements that need to be dealt with in a comprehensive Policy Framework that will, ultimately, guide the shape and content of a new Provincial law on Spatial Planning & Land Use Management in the Eastern Cape.

1.3 A NOTE REGARDING TERMINOLOGY ON LAND USED IN THIS REPORT

When dealing with a subject like spatial planning and land use management in the Eastern Cape, which inevitably means discussing land in different contexts in the province, it is essential first to set out the meanings of a number of concepts and words that are commonly used but often understood differently by different people.

Perhaps the most fundamental dichotomy in the common understandings of land tenure is that between what are perceived as the absolute ownership under “freehold title” and land holdings in the “communal areas”.

Freehold title is usually used to refer to defined parcels of land, described by a technical diagram which sets out in great detail and with great accuracy the boundaries and location of the land parcel. This diagram must meet the requirements of the 1997 *Land Survey Act* before ownership of the land parcel and subsequent transfers of ownership to be registered in a Deeds Registry according to the provisions of the 1937 *Deeds Registries Act*.

However this ownership is not absolute. Firstly, the state has the constitutional right to expropriate such land on payment of fair compensation, if it is required for public purposes. Secondly, and more important, such a land parcel can only be used for restricted purposes determined by land use zoning (such as residential, business, industrial, agricultural, recreational use etc.). So, while ownership is not restricted, the use of the owned land is restricted by determinations made by the applicable land use management system and managing government body.

On the other hand “communal land” is hardly communal at all. Traditionally, heads of household hold land use rights to residential and arable land parcels *on behalf of* the household or extended family. Grazing lands may be accessed in common but such access is usually determined by local conventions, established over years if not generations. Similarly, the rights to harvest and utilise common resources for building, fuel, medicinal, spiritual and other purposes are usually subject to local conventions.

While land is not owned in the same sense as freehold land is owned and this ownership is not recorded in a deeds register, holders of the relevant rights may be secure or insecure in their holding of these rights depending on the stability of the areas in which they hold such rights and, in particular, the extent to which established conventions and practices with respect to land rights are upheld.

The land acquired by colonial conquest (by force and by dispossessing the prior inhabitants) was annexed to the colonial power, Britain, as “Crown Land” or land under the British monarch as overlord. It should be noted that the British monarch did

not become the owner of the land to the exclusion of the rights of previous occupiers who remained on the land and who were not immediately dispossessed by colonial conquest. The Constitutional Court confirmed this point in 2003 in the case of *Alexkor and the Government of the RSA versus the Richtersveld Community and others*.¹

In cases where the prior inhabitants *were* dispossessed, Crown Land was alienated by the colonial state to immigrant settlers and indigenous allies under forms of tenure generally described as “quitrent” which amounted to perpetual leases as long as certain conditions written into the title were met, including the payment of an annual rental. This later requirement was abolished in the 1930s under the Hertzog government in the segregated white areas outside of the segregated black areas.

From the time of colonial conquest and annexation, Crown Land that was reserved for the occupation and use of prior inhabitants was generally referred to as reserved land and so the term “reserve” came to be a generally used term to describe what later became the Bantustans.

At a national level, Section 1 of the *Natives Land Act No.27 of 1913*² was intended to be one of the most sweeping and fundamental pieces of legislation yet enacted in Southern Africa. It set out explicit racial and racist restrictions on land ownership and the hiring or renting of land, based on the grossly unequal division of South Africa into a “Schedule of Native Areas” amounting to some six or seven percent of the land area of South Africa.

In the Cape Colony, which became the Cape Province on the creation of the Union of South Africa in 1910, the 1913 *Land Act* confirmed the already existing pattern of land occupation and ownership based on the wars of dispossession and colonial annexation. In 1916 the provisions of the 1913 Land Act were struck down by the Appellate Division of the Supreme Court because they potentially undermined the remaining non-racial franchise rights in the Cape. This judgement only applied in the Cape Province. However other Cape legislation such as the 1909 *Private Locations Act* was used to mount an onslaught on black tenants on white-owned farms.

The 1936 *Native Trust and Land Act* added a further 6% of land to that already listed in the schedule to the 1913 *Land Act*. But simultaneous legislation terminated the remaining non-racial franchise rights.

¹ Case CCT 19/03, decided 14 October 2003

² This is the title of the Act when it was promulgated in 1913. Terminology changed over the years, reflecting government ideology, from “Native” to “Bantu” to “Black”. The original term is also used for other legislation referred to below.

Chapter II of the 1936 Act established a corporate body called the South African Native Trust (SANT), later the SA Bantu Trust and, finally, the SA Development Trust (SADT). This Trust was constituted under section 4 which also provided:

- (1) The Trust shall ... be administered for the settlement, support, benefit and material and moral welfare of the natives of the Union.
- (2) The affairs of the Trust shall be administered by the Governor General as Trustee ...

The Act merged a number of previous trusts, including the Natal Native Trust and the Zululand Native Trust in the new trust. The Act also provided:

- (1) There shall be vested in the Trust -
 - (a) all Crown land [later amended to State-owned land] which has been reserved or set aside for the occupation of Blacks;
 - (b) all Crown [later amended to State-owned land] within the scheduled native areas, and all Crown Land [later amended...] within the released areas [the latter set out in the 1936 Act].

Note the different language between the earlier version of the Act and the later, amended version: “Crown land” became “State-owned land”. The crucial point is that all reserved land would thereby have “vested” in the Trust.

The significance of the status of this land as trust land is clear when contrasted with ownership. While the state is the owner of this land it is the owner in the capacity of a trustee. As trustee, the state has a lawful duty to act in terms of the best interests of the beneficiaries of the trust. The state as trustee would under very limited circumstances have lawful reason to alienate or dispose portions of such land, and then only when it could be demonstrated that such alienation is in the best interests of the beneficiaries of the trust.

In other words, with land held by the state in trust, the state is not free to do as the government of the day pleases. Post 1994 legislation such as the 1996 *Interim Protection of Informal land Rights Act* is in accordance with this perspective.³

³ *However there has been an increasing tendency within first the Department of Land Affairs and later the Department of Rural Development and Land Reform to describe trust land as “public land” or even as “state land”. A report of the Chief Surveyor-General in February 2013 was titled*

The term trust land will generally be used in this document to refer to the rural land in the areas referred to as reserves, homelands, Bantustans and former Bantustans, rather than the misleading term “communal land”.

Report on the survey of state land and completeness of the comprehensive state land register, yet it deals with the survey in of the settled trust lands which it refers to as “unsurveyed state land”.

The report included the statement:

“In addition, the exercise would lead to the survey and subdivision of vacant and communal State land for facilitation of security of tenure to millions of existing residents on State Land”. (Emphasis added)

Taken at face value this statement contains a value judgement in favour of a mass titling programme. Quite what land in the trust areas would qualify as “vacant” is not stated but the use of the term suggests a lack of understanding of life in these areas and the exercise of household rights to residential and arable land parcels and the utilisation of common resources.

2 HISTORICAL CONTEXT & RELATED ISSUES

“Without a long running start in history, we shall not have the momentum needed, in our own consciousness, to take a sufficiently bold leap into the future; for a large part of our present plans, not least many that pride themselves on being ‘advanced’ or ‘progressive,’ are dreary mechanical caricatures of the urban and regional forms that are now potentially within our grasp.”

Lewis Mumford

2.1 AN INTRODUCTORY OVERVIEW

There is no doubt that the present settlement and land use patterns that manifest in the Eastern Cape (and, in fact, everywhere across the world) are the outcomes of a complex interplay of factors. These factors include: “relief, climate, vegetation, political, socio-economic, historical and mythical origin. As a result of these factors, the degree of concentration of people, the extent of planning for the people and attainment of the people varies from one region to another”⁴.

Thus the Eastern Cape Province is characterised by a number of stark dichotomies that are pertinent to spatial planning, land use management and the overall distribution of settlement and different levels of human development:

- The physical environment is dominated by two very important climatic shifts – from summer rainfall in the east to winter rainfall in the west, and with sharply declining annual precipitation to the west and northwest.
- The pattern of human settlement to some extent repeats the physical dichotomies, but for very different reasons – the wars of dispossession during the nineteenth century set out the racialised pattern of land occupation and, therefore, long term poverty, even before this pattern was confirmed by the Land Acts of the twentieth century.

⁴ Y.A. Ahmed, *Settlement Patterns and Functional Distribution in Emerging Communities; The Social Sciences Journal*, Volume 4, issue 3, 2009, page 256

- The systems of governance that emerged over the past 200 years were very different in the west and east of the Province.
 - In the west, and also in the towns in the east, these systems reflected European and international models and trends, with particular and specific racial and class determinants.
 - In the east, rural governance for most of the twentieth century was based on exclusion from the national polity, compromises with local popular demands, and the co-option of indigenous systems, backed up by an ever-increasing threat of repression.
- The western half of the Province is generally characterised as “modern” and “developed” while the eastern half as “poor” or “undeveloped”. In fact, many of the trappings of a modern state, such as land use planning, do not exist in conventional form in the east – there is still in 2015 no land use planning legislation for the rural parts of the Transkei region.
- In this regard, colonial rule in the late nineteenth century and early twentieth century, after the wars of dispossession and the formal annexation of the entire territories that today make up the former Bantustan⁵ areas of the Province, was in these areas based as much on compromise as on coercion. The colonial state was weak and this weakness continued into the twentieth century. Rule by magistrates and commissioners in the administrative centres of each district were backed up by very little force and a very limited public administration. Administrative systems, as a matter of compromise, sometimes after significant contestation, came not only to be simplified, but also to adopt elements of local practice and local expedience. Land administration is one particular example, discussed briefly below.

The points above are crucial to an understanding of our inherited legacy for contemporary planning and governance. This requires an appreciation of how history has left us with a province that is characterised by these persistent dichotomies and their implications for development.

5 *The term “Bantustan” is used here to describe the political development of the territorial areas formerly reserved for black occupation and previously referred to as “reserves” along the path to “self-government” and “independence”, in line with government policy that there would be a stage when there would be no black South Africans as they would all be citizens of these independent states. It is used to refer to a particular period in time and particular geographical areas. The legacy of both the former reserves and the Bantustans is very much part of present challenges.*

In this regard, the spatial distribution of poverty reflects the historical and contemporary inequities in spatial and development planning in general in the EC Province. It is no accident that some of the poorest municipal areas in the entire RSA are located in the eastern half of the Province, as illustrated in Figure 1 below.

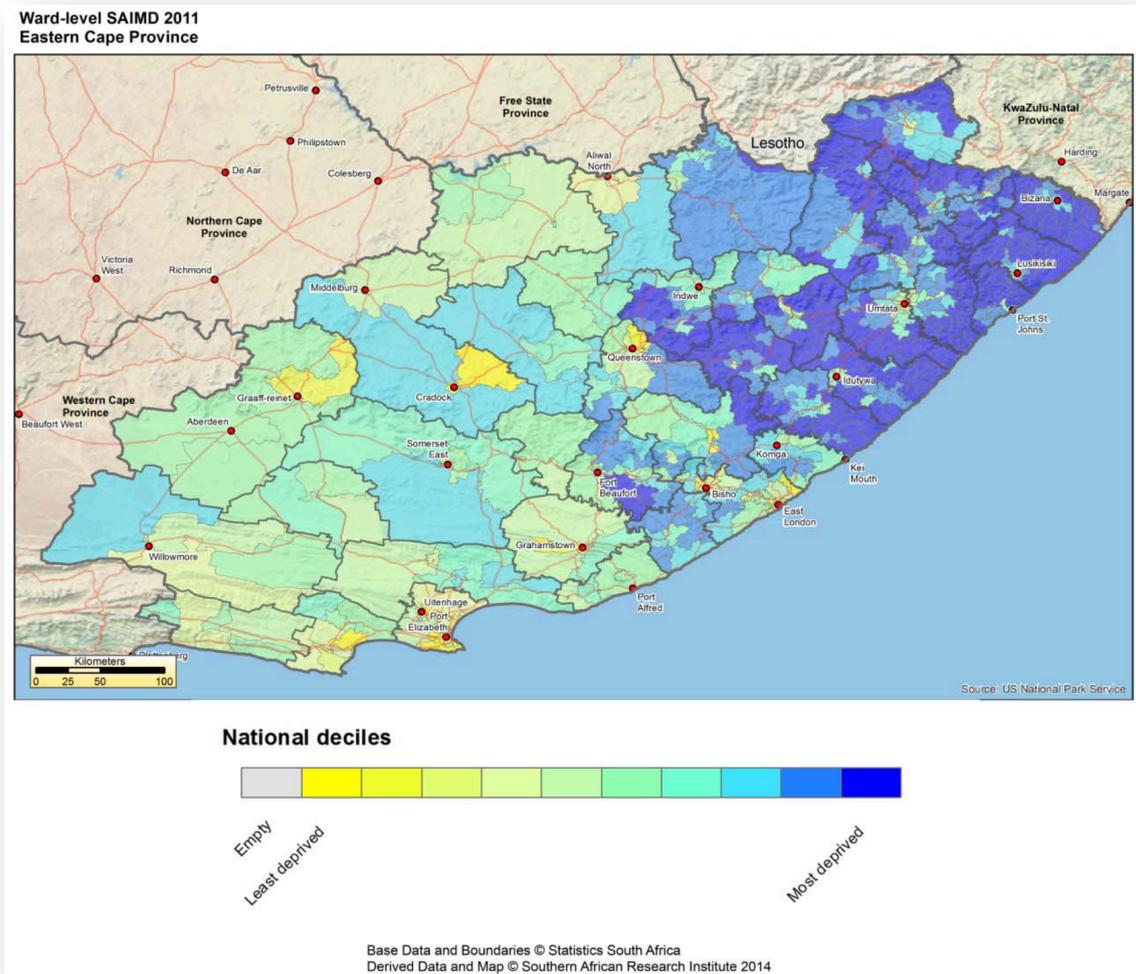


Figure 1: Levels of multiple deprivation in the former Transkei and Ciskei 2011⁶

⁶ Michael Noble, Wanga Zembe & Gemma Wright, *Southern African Social Policy Research Institute (SASPRI) May 2014, page 3*

Moreover, poverty is self-perpetuating:

“...the poverty of the former Bantustans meant that they lacked the resources needed to overcome the backlogs in infrastructure and government services left from apartheid. That, in turn, constrained economic opportunities. Budgeted revenue per person in the metros was around R4300 in 2008, compared to R2300 in the secondary cities, R1700 in the commercial farming regions, and just R400 in the former Bantustans”.⁷

The dichotomies outlined above at provincial level are mirrored at local and municipal levels. Within urban areas the history of forced removal and segregated residential areas, including “slum” clearances and influx control, have created grotesque inequalities within towns and cities. These were accelerated into the apartheid era.

Planning on its own is not the answer to poverty. But the implementation of meaningful planning is critical to reversing poverty and inequality and forms an inextricable part of the full and effective functioning of all spheres of government in the overall drive to achieve progressive socio-economic development that is sustainable.

2.2 WHY LAND IS SO IMPORTANT

Writing in the first half of the 1820s, some ten years before the war of Hints and almost 200 years ago, Cape Town merchant George Thompson (1796-1889), or his ghost writer, Thomas Pringle, wrote of the amaXhosa and their land:

“This tract is about 200 miles in length by sixty or seventy in breadth; and the population of the whole tribe may probably amount to about 100,000 souls. This country is consequently far more densely peopled than any district of the Colony, or even that of the Bechuana country. Having recently been dispossessed of the territory between the Keiskamma and Fish River, their kraals are now crowded upon one another, in such a manner that there is scarcely sufficient pasture for their cattle; and, unless they borrow from the Colony the advantage of an improved mode of agriculture, famine must occasionally prevail, till their numbers are again reduced to the limits which the country can support on their present system. Until some such change takes place, it

⁷ Neva Makgetla, 2010, “Synthesis Paper: South Africa,” paper presented at the Dynamics of Rural Transformation in Emerging Economies conference, April 14-16, 2010 New Delhi, India, page 30

will perhaps scarcely be practicable, even by an improved system of defence, altogether to repress depredations upon the Colony.”⁸

Writing early in the twentieth century Rev. Dr Walter B. Rubusana (1858-1936), who was elected and sat as the Member of the Cape Provincial Council for Thembuland from 1910 – 1914, wrote of the succession of important events (*isiganeko*) of the nineteenth century. Most are best described not as important events but as calamities:

Ingqakaqayama-Ntinde (smallpox)
 Umgcawokuqala (the comet)
 Imfazweya-Manzi (the war of water, or 7th war of dispossession, War of the Axe)
 Inyikima (an earthquake)
 Imfazweka-Mlanjeni (the war of Mlanjeni, or 8th war of dispossession)
 Imofu (cattle of European origin and Lungsickness)
 U-Nogumbe (the deluge)
 U-Nongqause
 Ilanga lika-Qilo (Qilo’s catastrophic drought).⁹

Memories of injustice are not easily forgotten. Xhosa historian Rev. John Henderson Soga (1860-1941), writing in the 1930s, recorded that the murder of the imiDange chief, Jalamba, and his councillors by the Dutch colonial commando under Van Jaarsveld in 1781 in the Bruinjieshoogte west of the Fish River still rankled in the minds 150 years later in the twentieth century.¹⁰

While the above references are to the amaXhosa, this is largely because we are fortunate to have a much larger set of historical references to the amaXhosa. This in turn is because the amaXhosa bore the brunt of dispossession and attrition in the nineteenth century.

In the eighteenth century the Khoikhoi or Khoekhoen met an even worse fate. Without any land reserved for them, they were at best reduced to various forms of servitude. In the eighteenth and nineteenth centuries the San were the victims of perhaps the worst genocide in our history.

⁸ Vernon S. Forbes (editor), 1967, *Travels and Adventures in Southern Africa by George Thompson, Van Riebeeck Society No. 48, pages 168-9*

⁹ Rev. Dr W.B. Rubusana 1911, page 511, cited in Helen Bradford, 2008, “Akukho Ntaka Inokubhabha Ngephiko Elinye (No Bird Can Fly on One Wing): The ‘Cattle-Killing Delusion’ and Black Intellectuals, c1840–1910”, *African Studies Vol.67 No.2*

¹⁰ Rev. J.H. Soga, 1930, *The South-Eastern Bantu, pages 137-8*

The abaThembu, amaPhondo and amaPhondomisse etc were to meet a similar fate to that of the amaXhosa in the nineteenth century as they were absorbed under the colonial order.

In many post-colonial situations, the issues around land have a particular appeal and resonate with histories of dispossession. This is no exception in South Africa (and the Eastern Cape Province in particular) given the one hundred years of wars of dispossession and the legacy of these wars and dispossession today.

However the major dispossessions took place up to two centuries ago and South African society is now vastly different and more complex. Issues of restitution, reparation and reconciliation are very important, but these huge changes in the nature of society do not allow the clock to be simply turned back two centuries. These issues have to be addressed as we look forward to the kind of future we wish to build, taking into account the very real legacies and challenges we inherit from the past.

Spatial planning and land use management are only part of any programme to address this legacy. Spatial planning and land use management address mainly issues of land usage rather than ownership. However where land is a politicised issue, as in South Africa in the present, it is very difficult to separate the two. Nor should they be entirely separated.

“Land, which is a necessity of human existence, which is the original source of all wealth, which is strictly limited in extent, which is fixed in geographical position – land, I say, differs from all other forms of property, and the immemorial customs of nearly every modern state have placed the tenure, transfer and obligations of land, in a wholly different category from other classes of property. Nothing is more amusing than to watch the efforts of [the land] monopolists to prove that other forms of property and increment are similar in all respects to land and the unearned increment on land.”¹¹

These words are extracted from a speech made in the Houses of Commons in Britain in 1909 by Winston Churchill. Churchill was a maverick conservative.

¹¹ Quoted in Aninka Claassens, 1991, *Who Owns South Africa? Can the repeal of the Land Acts de-racialise land ownership in South Africa?*, Centre for Applied Legal Studies, University of the Witwatersrand

Because land is such a fundamental necessity of human existence, control over land is in many instances as important as ownership of land. Through the ages, control and/or ownership over land has been used as a mechanism for control over people dependent on that land. Unless effective public institutions mediate such control, the use of control over land to exercise control over people is open to social, economic and political abuse.

Moreover, precisely because land is so fundamental, any discussion relating to land (as spatial planning and land use management must) usually leads directly to controversies. As this is a Green Paper process, it is not the intention here to avoid potential controversies, which may best be aired. No doubt many such controversies will not be resolved but a better understanding of these may at least guide a further process towards a White Paper and subsequent Provincial legislation, rather than pretending that issues do not exist.

The governance and administration of land related matters are obviously critical to the effective and sustainable utilisation of land. The particular context presented in much of the Province where municipal governance is very weak has major implications for the governance and administration of land matters, including spatial planning and land use management. In the former Bantustan areas particular problems arise and create even bigger challenges for governance. Some of these challenges do not relate immediately to spatial planning and land use management but unless wider issues of governance and land administration are addressed, attempts at more effective land use management are likely to be confounded. For this reason, considerable attention is given to this wider complex situation in the sections that follow.

2.3 LAND DISPOSSESSIONS – FROM RESERVES TO BANTUSTANS

From the 1880s onwards there was a concerted onslaught against black political rights and the qualified Cape franchise in particular. The granting in 1853 of limited representative government in terms of the constitution of the Cape Colony admitted to the franchise males of any race who earned £50 a year or occupied a site and structure together worth £25. In 1886 47% of the voters in five Eastern Cape Constituencies were black men.¹² The 1887 *Parliamentary Voter Registration Act*

¹² Peter Walshe, 1973, *Black Nationalism in South Africa – A short History*, Spro-cas Publications, Ravan Press, page 6. Women were only to get the franchise in the early twentieth century, and then only white women.

extended the franchise over the newly annexed Transkeian Territories but excluded tribal forms of tenure from the property qualification. It was referred to as *tung 'umolomo* or “the shutting or stitching up of the mouth”. As a result 20 000 people were struck off the 1886 voter’s role, the overwhelming majority of whom were black.¹³ The 1892 *Franchise and Ballot Act* raised the property qualification from £25 to £75 and introduced a literacy test. The 1894 *Glen Grey Act* was a racist and paternalist attempt to exclude participation in national politics and instead to permit some participation in local politics. It specifically excluded holders of Glen Grey title from qualifying for the franchise.¹⁴

Annexation of the various territories which came to comprise what became known as the cis-Kei and trans-Kei reserves (literally *on this side* of the Kei River and *on that side* across the Kei River) was completed by 1894. Over the next 30 years, the *Glen Grey Act*, arrogantly intended by its drafters as “a Native Bill for Africa”, was extended by proclamation over the rest of the 26 districts which comprised the Transkei Territories by 1907.¹⁵

The *Glen Grey Act* attempted to increase taxation (by new taxes on top of existing hut taxes), to individualise land holding and limit inheritance to land to the eldest son in order to force younger siblings into wage labour, and to establish new forms of local administration. There was widespread but uneven resistance to all these aspects of the Act. The attempt to increase taxation threefold was abandoned by 1905. Survey and individualisation of land tenure, generally referred to as quitrent tenure, was simplified as it was extended to 7 further magisterial districts, but not beyond. In the remaining districts an even further simplified system of land tenure was applied.

Local administration was the area where the *Glen Grey Act* left its biggest although now distant mark. The imposition of the local administration system was also highly contested, but gradually a range of diverse and modernising local elites made it work:

“The council system (that is, the structure in the Transkei of district councils and a central General Council or Bunga) penetrated deep into the social and political framework of the Transkei. It helped redefine locally dominant elements; it provided the central state with a local adjunct that enjoyed a relatively high level of legitimacy; and

¹³ Andre Odendaal, 1984, *The Founders – The Origins of the ANC and the Struggle for Democracy in South Africa*, Jacana, page 13

¹⁴ Rodney Davenport, 1987, *South Africa – A Modern History*, Macmillan, pages 101, 108; Colin Bundy, “Mr Rhodes and the Poisoned Goods”, in William Beinart and Colin Bundy, 1987, *Hidden Struggles in Rural South Africa*, Ravan Press, page 142

¹⁵ Colin Bundy, *ibid*, pages 78, 139

*historically it provided an important precedent and forerunner to the system of Bantu Authorities introduced in the 1950s and subsequently expanded as the Bantustans/'homelands'/'national states'. The Transkei 'was the logical starting point for this experiment'."*¹⁶

Membership of the district councils was itself an outcome of local contestations and conditions – in surveyed areas, ratepayers (holders of land held under quitrent title) determined the councillors. In un-surveyed areas ward representatives determined the councillors, while in western Pondoland the chiefs retained control of nominations.¹⁷

The effectiveness of the district council system was illustrated by its financial affairs:

*"The Council Revenue for the year 1934-35 amounted to over £181,000, of which £173,000 was derived from Local Tax and Quitrent, and £8,000 from earnings of plantations, earnings of agricultural institutions and miscellaneous sources. The expenditure for the same year amounted to £162,000 the main payments being in respect of agricultural development, the construction and upkeep of roads and bridges, soil reclamation, public health, salaries of Council servants, and the cost of Council sessions."*¹⁸

The revenue of £181 000 in 1934/5 is the equivalent in 2015 of at least £11m or R200m. Given that the population of the region has increased from an estimated 1.1m in 1932 to about 3m in 2015, this represents missing potential local revenue of up to R0.6bn. In comparison, Provincial own receipts in the current financial year (2015/6) are estimated at less than twice this amount or R1.1bn.

But in the absence of a universal franchise, the modernising effects of the district councils were always likely to be limited and temporary. The council system gave way to the designs of grand apartheid in a progression from the provisions of the 1951 *Bantu Authorities Act*, to the 1959 *Promotion of Bantu Self-Government Act*, the 1963 *Transkei Constitution Act*, and finally, the 1976 *Status of Transkei Act* and "independence".

¹⁶ Colin Bundy, *ibid*, page 141

¹⁷ *Ibid* page 156

¹⁸ Frank Brownlee, 1937, "The Administration of the Transkeian Native Territories", *Journal of the Royal African Society*, Vol. 36, No. 1, pages 341-2

Rural governance and administration came to be increasingly centralised and driven from the centre, whether the centre was in Pretoria, Mthatha or Bhisho.

In the trust land areas (excluding the towns and some surrounding farmlands which were set aside for the colonial administrative centres), rural land allocation and land use, at least until the intervention of “betterment” and the 1951 *Bantu Authorities Act*, was conducted with some participation of local leadership and according to local practice or custom, to the extent that custom could still be applied in a situation of a severely constrained supply of land and where local leadership was deposed for opposition to administrative policies.

Subject to these very important qualifications, the system of rural land allocation that persisted officially into the 1990s was a joint effort between local residents, their local forms of leadership, and local district officials of the (Transkei or Ciskei) Departments of Agriculture. Use rights allocated to heads of homesteads were recorded in registers kept by clerks in the office and under the supervision of the district magistrate or commissioner.

This system combined land use planning – the determination by officials of the Departments of Agriculture as to what land was available and suitable to be demarcated for residential and arable purposes – with the allocation and registration of land use rights in one process. This system was also the basis for local taxation.

As a result of this compromise and simplified system, there is still today no land use planning legislation for the rural parts of the Transkei region.

2.4 EXPERIENCES OF “PLANNING”: DIFFERENT THINGS TO DIFFERENT PEOPLE

2.4.1 The Planning Experienced by Most People

From the mid twentieth century onwards, the state became increasingly authoritarian and began to devise new mechanisms of oppression and exploitation in the trust land areas. The 1951 *Bantu Authorities Act* was an attempt to recast vestiges of traditional leadership as instruments of rule from the centre. Bantustan self-government and later “independence” was integral to this trend and was built on the system created by the *Bantu Authorities Act*.

Betterment or “villagisation” in trust land areas was a divisive issue. In some cases it was accepted by rural communities but in other cases it was fiercely resisted, such as in the famous rebellion in Pondoland in 1960. Such resistance was so successful in some areas that betterment was never imposed in these areas of the Transkei.

A consequence of betterment was that the concept of “planning” came in many rural areas to be associated with betterment and the drastic re-organisation of rural life, including attempts to reduce livestock by enforced culling programmes. Where betterment was imposed by coercion, “planning” and betterment were seen as unwanted and unnecessary interventions. This legacy may still linger in the minds of many, especially elderly rural residents.

Across the Province and indeed the RSA, “planning” has a number of other negative connotations such as the myriad of oppressive and racist aspects of spatial planning, forced removals and restrictions on movement created or enforced through the 1913 and 1936 *Land Acts*, the 1950 *Group Areas Act*, and numerous administrative decisions.

Father Cosmos Desmond wrote in 1969 in *The Discarded People*, published by the Christian Institute, which was banned in 1973:

“The first Government plan was to remove all Africans who were living to the west of the ‘Eiselen Line’ (Kimberley/Colesburg/Humansdorp). This includes quite a sizeable portion of the Cape Province, but later the line was drawn much further to the east and so the African inhabitants of Middleburg, Burgersdorp, Cradock and many other towns were doomed. This is known as the ‘Kat-Fish Line; it runs from Aliwal North, through Sterkstroom to the Fish River.”

The immediate consequences of these policies were the resettlement camps that became Ezibeleni, Sada, Dimbaza, Zwelitsha and Mdantsane. People resorted to every means possible to avoid banishment from their homes to barren resettlement camps where there were no services and no employment. Families even changed their names – there are still very few Ndlovu families in these areas, many Olifant families, few Mtimkulu families, but many Grootboom etc.

In the overwhelming area of South Africa reserved for exclusive white ownership, a range of legislation, some predating the 1913 *Land Act*, led to an onslaught on black tenants, occupiers and even black owners of farmland. It was only with the mechanisation of white commercial agriculture in the 1950 and 1960s that the apartheid state was able finally to remove remaining “surplus” people and their labour from white-owned farmland. These evictees faced uncertain futures either in the nearest urban area, in the nearest reserve area or Bantustan, or in a barren and isolated resettlement area.

Residential segregation and influx control – the pass system – under different guises has been part of urban life from the very beginnings of the earliest towns in what is now the Eastern Cape Province, in fact going back to the early nineteenth century.

Long before the 1950 *Group Areas Act*, health and sanitation legislation was used to effect what were often described as “slum clearances” and the establishment of segregated and poorly serviced urban black residential areas with token “advisory boards”. Influx control was hammered into place starting at least with the 1923 *Natives (Urban Areas) Act* which required passes for any black male moving between rural and urban areas. The 1945 *Native (Urban Areas) Consolidation Act* further entrenched the pass laws.

Many if not all of these oppressive measures were announced in the name of “plans” and “planning”. Once such plans had been laid out, they were there to be implemented, no matter what the human cost.

Part of the challenge for this Green Paper is to demonstrate how plans and planning, spatial planning and land use management in particular, is both different from what has gone before and is necessary for effective governance and development, including to provide redress for past wrongs.

2.4.2 Planning for the Minority

In contrast to the heavy hand of state planning felt by the majority of South Africans as described above, the planning system that was developed and applied to be brought to bear in so-called “white” or “European” areas from the late 19th Century onwards was progressively aimed at securing and regulating land rights in formal, surveyed areas by providing administrative processes to do so.

Formalised town planning was gradually introduced into South Africa in the early 20th century and was modelled to a large extent on the British approach to town planning. Thus, in the Cape Province, the Ordinances expressly aimed at taking a systematic approach at prescribing processes for township establishment, land subdivisions and consolidations and land use change management were the Townships Ordinance 13 of 1927 and its successor, the Townships Ordinance 33 of 1934.

The latter still pertains (in amended form) to the urban areas of the Transkei region today. In the rest of what was then (prior to 1994) deemed to be “white” South Africa, the Land Use Planning Ordinance, 15 of 1985 (‘LUPO’) replaced Ordinance 33 of 1934.

In regard to the above, the *Green Paper on Development and Planning* noted that some specific concepts and ideals were promoted through the new approach to town planning adopted in South Africa. Principally, these included the following distinctive elements: -

“... the concept of the free-standing building within large private green

space as the basic building block of settlements; the separation of land uses; the concept of the inwardly-oriented neighbourhood unit; focusing on embedded social facilities and the dominance of the private motor car”.

This notion of the benefits of separating land uses was also applied in the approach taken to so-called betterment planning, as discussed above.

The Green Paper also noted further, in this regard, that:

“A prevailing belief underpinning this system was that it was possible and desirable to plan comprehensively – to pre-determine the use of all land parcels in settlements. A number of the precepts of modernism – particularly the emphasis on separation and the idea of self-contained neighbourhoods – accorded neatly with the ideology of apartheid”.

However, the distinctive difference in approach between a regularised system intended to secure land rights and preserve land values by ensuring that order and “amenity” (that is the quality of the environment as it results from the combination of land uses in an area) of land areas was protected in so-called “white” areas versus the control-oriented and rights limiting approaches applied in “black” areas remains possibly most notable.

2.5 IMPLICATIONS OF PAST PLANNING SYSTEMS

In general, the broad implications of the above aspects of the planning systems adopted and implemented in the Eastern Cape over a period of time are summed up well in this quote from the Green Paper on Development & Planning, 1999: -

“In urban areas influences of apartheid, land market forces and urbanisation have created a pattern of human settlement primarily characterised by racial, socio-economic and land use segregation. The phenomenon of displaced urbanisation led to the rise of large dormitory towns and other settlements, lacking any functional autonomy and designed to serve as holding areas for people who had been removed from areas designated for white occupation, dammed up behind homeland boundaries. This process also saw the extreme overcrowding of areas with a limited agricultural base with dramatic, negative, environmental consequences. In response, the accelerated ‘rationalisation’ of agriculture through ‘betterment’ programmes was intensified. In towns and cities large tracts of the urban fabric were

destroyed, frequently under the pretence of slums removal or to consolidate the grand apartheid plan for separate ethnic and racial areas. This resulted in the systematic uprooting of settled communities and the creation of large, alienated islands of poverty.

The physical consequences of these processes are settlement patterns in both urban and rural areas that are often grotesquely distorted. Spatial environments are inconvenient and dysfunctional for the majority of citizens as they generate enormous amounts of movement with great costs in terms of time, money, energy and pollution. Settlement patterns make the provision of efficient and viable public transportation almost impossible, making servicing costly to the public fiscus, and constraining affordability. In addition, large tracts of land with agricultural and amenity potential have been destroyed, poverty and inequality have been aggravated and opportunities for individual entrepreneurship have been dissipated”.

2.6 1994-2014

The negative history and diversity of planning legislation and systems across the RSA was acknowledged by the 1999 *Green Paper on Development and Planning* and the 2001 *White Paper on Spatial Planning and Land Use Management*. Both these documents acknowledged the multiple systems in existence within each Province and often within a single municipality, describing “an extraordinarily complex and inefficient legal framework”. This complexity accounts in part for the lengthy gestation of the 2013 *Spatial Planning and Land Use Management Act (SPLUMA)*.

The 2001 White Paper also declared optimistically:

“There will no longer be a need for provincial legislation dealing with spatial planning, land use management and land development”.

The 1998 *Municipal Structures Act* and the 2000 *Municipal Systems Act* introduced new local government structures and systems, and a new uniformity across the entire Eastern Cape Province (and RSA as a whole), where no such uniformity had existed before.

Perhaps intentionally, this uniformity was implemented countrywide without taking into account the historic context and continued relevance of diverse administrative institutions.

Whereas, for the rest of RSA, local administration had long been accepted and adhered to in the form of municipal institutions presiding over demarcated wards, the system of co-ordinated if not centralised administration at magisterial district level, which persisted in trust areas for more than a century appeared not to have been clearly taken into account when conceptualising the new system of local governance.

The challenge now is to determine a policy trajectory that will lead to the introduction of a new spatial planning and land use management system in the Eastern Cape that builds on the positive aspects of what has gone before, including past planning processes which were simplified and truncated in the trust areas of the Province.

However before looking forward, it is important to summarise some of the particular problems of jurisdiction and disjunctures that have emerged in the past twenty years in the trust areas and which have not already been discussed above. These pose real challenges not just for spatial planning and land use management but also for wider and related issues of land tenure, land administration and sound public administration in general.

2.7 KEY ISSUES EMANATING FROM PAST PLANNING AND ADMINISTRATIVE PRACTICES

2.7.1 Spatial jurisdiction and non-alignment

In most instances, for over a century, the first level of local administration in trust areas began at village level (or a cluster of homesteads in areas which had not undergone betterment planning and forced removal into villages) under a sub-headman. The next level was that of an Administrative Area (AA), comprised of a number of villages under the jurisdiction of a headman.

The boundaries of these AAs, of which there are 1 207 in the EC, were first proclaimed in the late 19th and early 20th centuries. They were, in turn, combined to make up 241 Tribal Authority areas which, in terms of S28(4) of the *Traditional Leadership & Governance Framework Act No.41 of 2003 (TLGFA)*, were deemed to be Traditional Councils. While these boundaries were not uncontested, they have long become generally accepted.

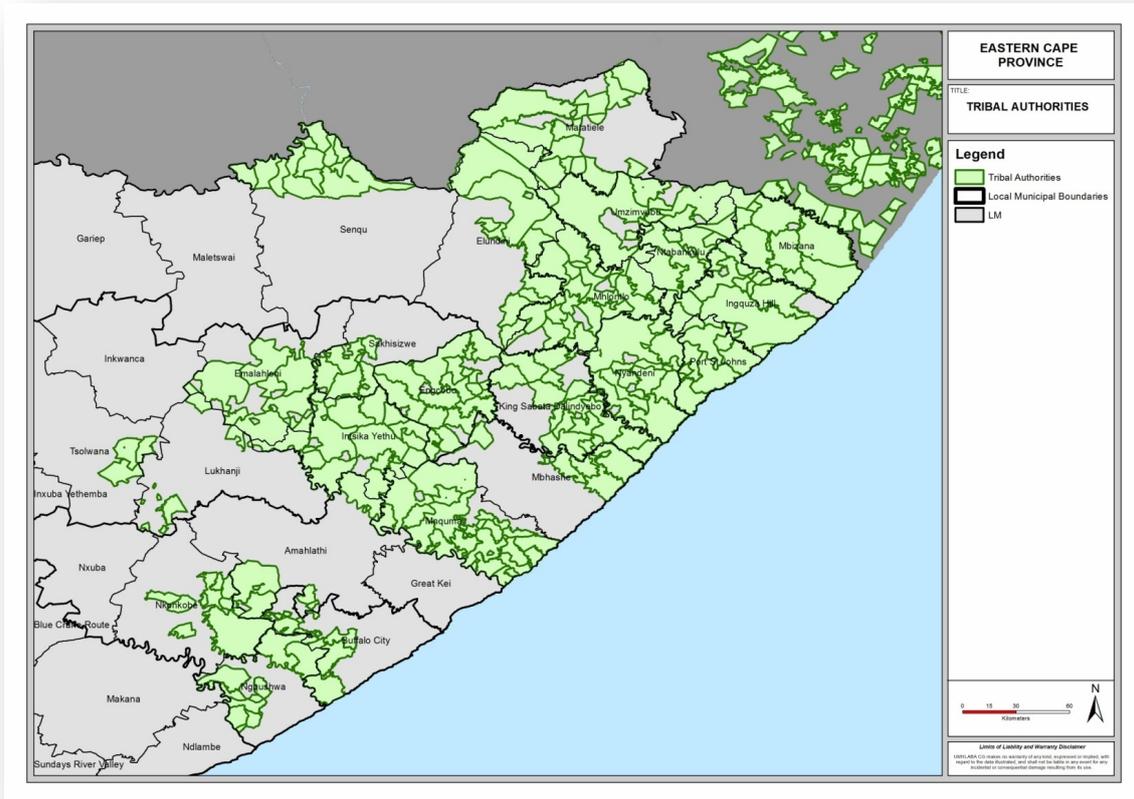


Figure 2: Tribal Authority/Traditional Council Boundaries in EC

Despite the above *status quo*, the demarcation of Municipal Wards appears to have ignored the established boundaries of the AAs. For instance, a single AA may be divided and parts combined with parts of a number of other Administrative Areas into a Municipal Ward. There are numerous examples of this, but, to illustrate the point, an evaluation of six coastal Local Municipalities in the EC, Mbasana, Ingquza Hill, Port St Johns, Nyandeni, King Sabata Dalindyebo (KSD) and Mbashe, indicates that there is no alignment at all between ward boundaries and AA boundaries. Moreover there are 11 instances of AAs being split into two Local Municipalities. Similarly some of the 241 traditional councils in the EC are split between different Local Municipalities.

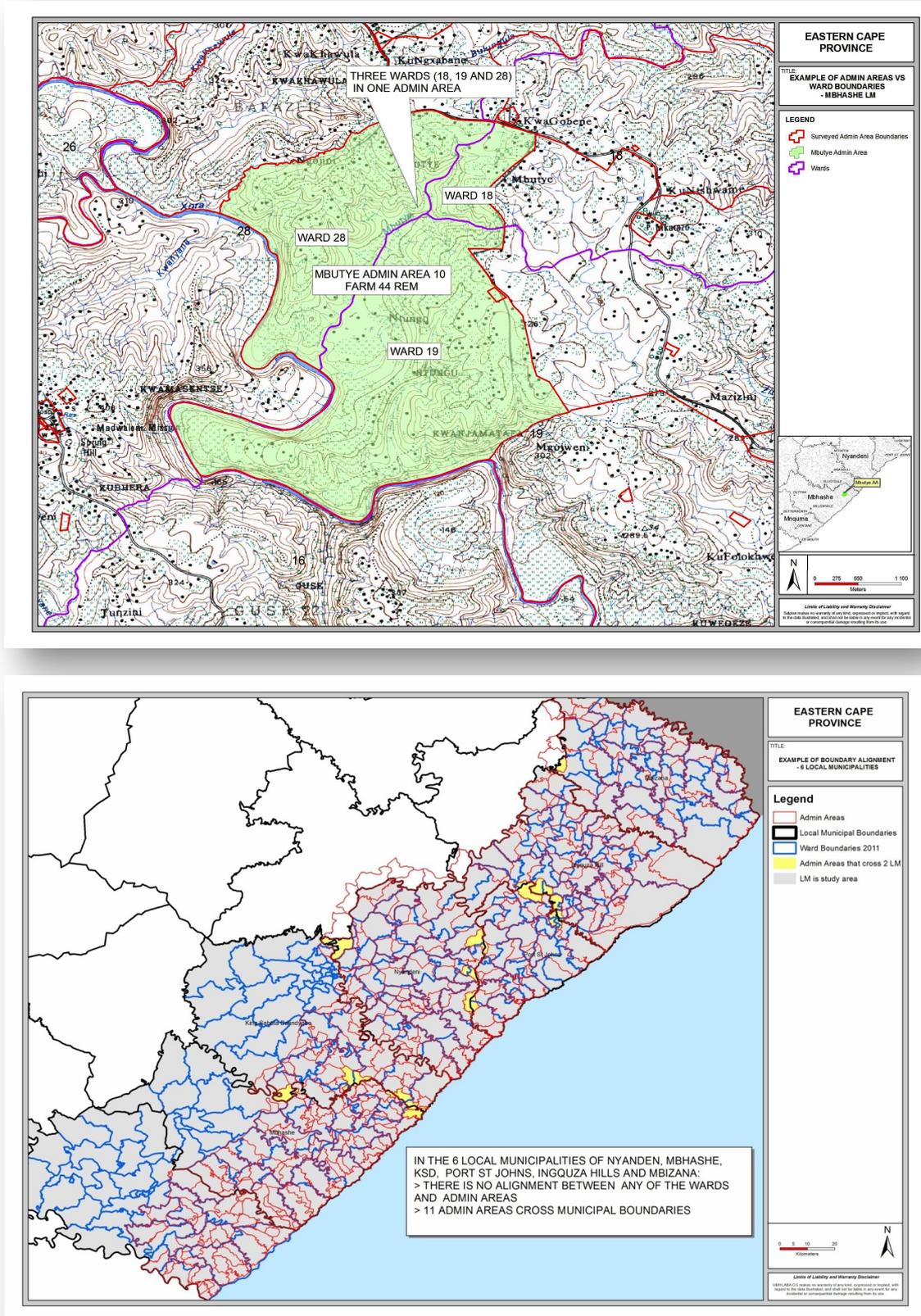


Figure 3: Example of Non-Aligned Ward and AA Boundaries

For residents in the AA, participation in village meetings and subsequent channelling of communication via sub-headmen, headmen and chiefs to government departments has long proven to be efficient and effective. For many of these residents, this system (or code of operation) is something they continue to identify with and adhere to in day-to-day local administrative practises. However, it is not aligned with the municipal ward-based system and, instead, is likely to lead – at best – to difficulty in communication and – at worst – conflict between local traditional or customary systems and leadership, and municipal systems and representatives.

To complete the picture of spatial disjunctures, the boundaries of District Municipalities also ignore as much as follow the boundaries of Magisterial Districts.

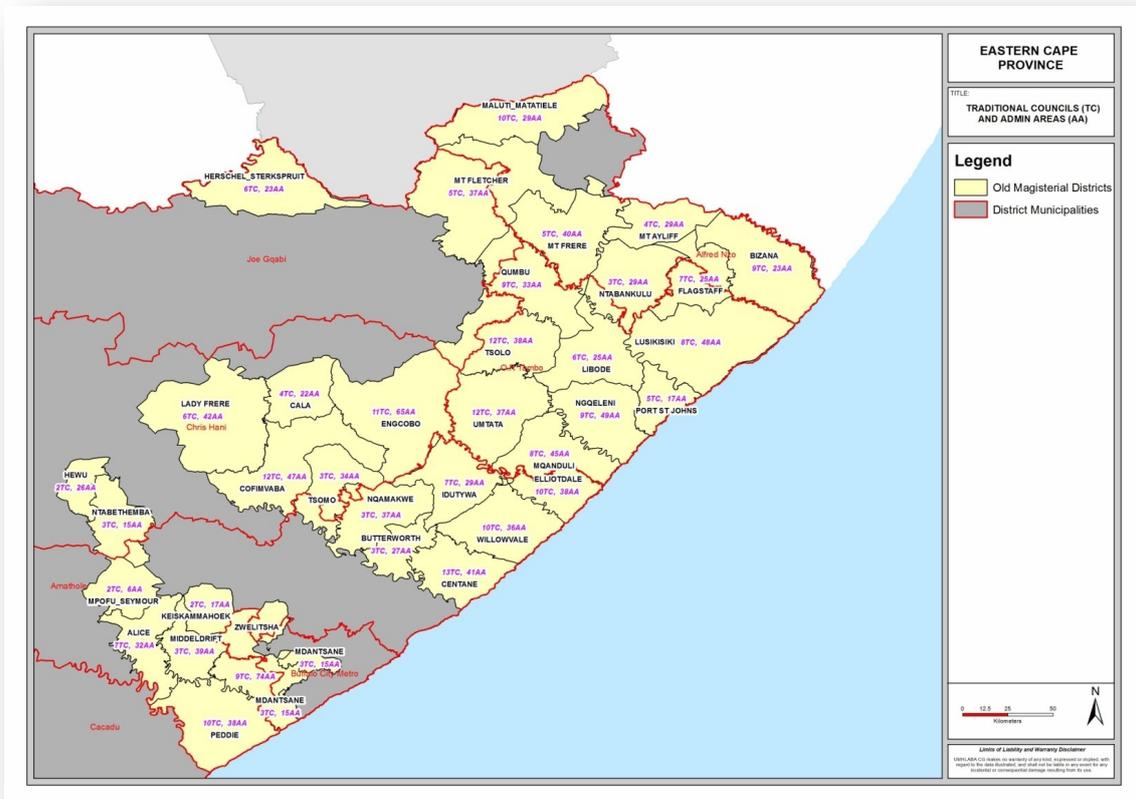


Figure 4: Non-Alignment of District Municipal Boundaries and Magisterial Districts

It is clear that a more functional new spatial planning and land use management system that seeks to interact and work with all communities in the province must be designed so as to engage with systems that are still used by communities.

2.7.2 Administrative discontinuity

Possibly extending the point made above about the non-alignment of (still existing) magisterial districts and newly demarcated municipal boundaries, it is also important to note that, prior to 1996, the magistracy at the centre of each (magisterial) district played a key co-ordinating and administrative function, including dealing with communications and requests from the AAs. This arose out of the practice established in the colonial period of appointing “native commissioners” as executive officers of government in each district.¹⁹

Commencing in about 1996 and in parallel with the restructuring of local government and the extension of uniform institutions and systems of municipal government across the RSA, the Department of Justice determined that judicial officers should no longer perform wider administrative functions. Some of these functions were not transferred to appropriate line functions but simply ceased to exist.

In regions such as the Transkei, this situation led directly to the withdrawal and collapse of essential public administrative functions including rural land administration (the PTO system etc.) and, along with it, rural revenue collection, which was tied to land administration.

To the extent that some land administration functions continued, this was due to the good faith and determination of mostly junior ranking public servants who, despite being declared supernumerary, continued to maintain records for as long as physical and local political conditions allowed.

2.7.3 Institutional jurisdiction and competition

Prior to 1994, the public functions of traditional leaders, largely facilitative rather than administrative or executive, were set out in the respective Ciskei and Transkei *Administrative Authorities Acts* (No.37 of 1984 and No.4 of 1965 respectively) and *Agricultural Development Acts* (No.14 of 1989 and No.10 of 1966 respectively).

Whilst the Administrative Authorities Acts permitted some limited flexibility in the type of local rural traditional structures, the later Agricultural Development Acts made no provision for any land allocation function by traditional authorities, whose role was

¹⁹ In the Ciskei, the offices of magistrate and “native”, later “bantú”, commissioner were combined in the same person. In the Transkei a commissioner was appointed for land administration within each district magistrate’s office.

only to advise, assist, etc. (e.g. S36). Thus, effectively, while authority over land allocation existed in customary law, such customary authority was superseded by statute across the Ciskei, Transkei and RSA. However these Acts have all been repealed since 1994 (the former 2 amended in 1997, the latter 2 repealed in 1999).

Today, S20 of the *TLGFA* provides that national or provincial government, “through legislative or other measures” may provide a role for Traditional Councils and traditional leaders in respect of inter alia land administration.

Importantly, as noted above, in terms of S28(4) of the *TLGFA*, Tribal Authorities established in terms of the 1951 *Bantu Authorities Act* were deemed to be Traditional Councils.

2.7.4 Boundary and “urban edge” conflicts

Nowhere is the collapse of rural governance and land administration more immediate than in the problems confronting Local Municipalities in the former Transkei in particular, who battle to exercise jurisdictional authority over or manage municipal commonage as well as Trust land surrounding their towns, which is often urgently required for purposes of urban expansion and/or infrastructural development. As a direct consequence, this has already resulted in violent protests in towns such as Sterkspruit and Butterworth.²⁰

Unresolved land restitution claims in and around rapidly urbanising towns like Mthatha further complicate the fluid situation with regard to jurisdiction over land areas and the contestation over land itself. Specifically, it seems that where land claims are made (or even rumoured to have been made) there arises a conflation between the claim and actual authority over claimed land - that is: claimed land is often assumed by claimants to be *de facto* “their land”.

This unstable situation is compounded by the reality that most, if not all, Local Municipalities where such complex dynamics around land (and municipal commonage, specifically) play themselves out, lack robust and proficient political and administrative capacity to manage such challenges. Thus, in effect, many of these instances lead to a paralysis on the part of Local Municipalities with regard to taking charge over or managing land that is registered as theirs.

²⁰ *Ironically protests concerning the provision of basic services such as water are often directed towards local municipalities, whilst the actual functions have been removed from Local Municipalities and elevated to District Municipalities.*

These situations point to the urgency of confronting challenges within the local governance sphere in a manner that is specific to the particular legislative and institutional history of the EC, and, most immediately, with regard to developing capacity of local municipalities and allied institutions to engage progressively in planning and land use management to deal with such situations.

2.7.5 Municipal jurisdiction, control over land, and land use management

Within the broad context of a disjuncture between the new conception of local government and ongoing and established approaches to local affairs and land administration, it is noted that a specific challenge is posed to Local Municipalities in the form of what many of them term “mushrooming inadequate housing”. Such housing is most often found in the form of “flats” or rooms built, variously, on formal erven in small towns, on vacant municipal land that has been “captured”, on peri-urban land outside of defined municipal commonages, and on trust land. In almost all cases, local municipalities have found themselves to be incapable of regulating and/or regularising these situations, even where these occur on formal, registered erven within uncontested urban land areas.

In virtually all cases, the land that is so developed is controlled either by a landowner or a rentier landlord who has responded in an “entrepreneurial” fashion to a strong demand for accommodation in a local area. This market for accommodation is robust and dynamic and, quite obviously, is beyond the reach of state housing provision systems. In short, it is a housing need that has been met by the private sector.

However, as noted, these “housing schemes” are most commonly illegal in nature and are operated without the consent and oversight of local municipalities. As a consequence of this, they represent a segment of the economy (property market) that is currently out of reach of the formal sector, as represented by the state or formalised (that is, legally compliant) property developers and administrators.

The value represented by these “housing schemes”, however, is estimated to be significant in terms of the revenues they generate for their rentier owners or landlords.²¹ Needless to say, it may be assumed that the income derived from the

²¹ In the rural town of Willowvale (Mbhashe LM) for example, Census 2011 indicates that some 47% of the population resided in “Flats” and the CSIR GAP Analysis 2009 suggests that the Financial Intermediation, Insurance, Real Estate, and Business Services sector contributed some 68.2% of the total Gross Value Added (GVA) of the town’s economy.

majority of these “schemes” goes undeclared and untaxed. Moreover, in the absence of local municipalities being able to regulate and regularise these “schemes”, any formal properties so developed are unlikely to be classified and rated in accordance with the actual use.

2.7.6 Horizontal and vertical jurisdictions and spheres of government

Schedule 4 of the Constitution lists “functional areas of concurrent national and provincial legislative competence”. Schedule 5 lists “functional areas of exclusive provincial legislative competence”. Neither Schedule refers to a functional area “land” at all. They only refer to land by inference insofar as land is affected by functional areas such as “regional planning and development”, “soil conservation”, “urban and rural development”, “municipal planning” (Schedule 4) and “provincial planning” (Schedule 5). Therefore land matters not integral to the functional areas listed above are exclusively issues of national legislative competence, such as the three programmes of land reform – land redistribution, land tenure reform and land restitution.

To complicate land matters further, administrative or executive functions (as opposed to legislative functions) are assigned by the competent legislatures to various spheres of government and to the institutions set out in Chapter 9 of the Constitution. Because land is fundamental to a wide range of administrative functions, administrative functions involving and affecting land are located across all spheres and institutions of government. The complexity is illustrated by an ongoing problem when assigning or delegating legislation in that many past and present laws contain provisions which should be the functional responsibilities of different spheres.²² To the extent that the national Department of Land Affairs and now the Department of Rural Development and Land Reform (DRDLR) has failed to address issues of rural land administration in former bantustan areas, this has multiple impact on the abilities of both provincial and local government to fulfil their wider mandates of public administration.

While the *Spatial Planning and Land Use Management Act No.16 of 2013 (SPLUMA)* has been drafted by the national Department of Rural Development and Land Reform,

²² “In many instances the unravelling of the functions of the different spheres of government involved in the administration of a single law is only possible after a legal opinion has been obtained.” (Public Services Commission, 2003, *Report on the evaluation of land administration in the Eastern Cape*, page 37)

the implementation of the act is the responsibility of municipalities and oversight of this sphere is by the national Department of Co-operative Governance and Traditional Affairs (CoGTA) and provincial counterparts. Preparations for the implementation of *SPLUMA* have further highlighted a number of the issues raised in the preceding sections.

2.7.7 Traditional Systems under a Democratic Constitution

While the Bill of Rights in the Constitution at sections 30 and 31 guarantees language, cultural and religious rights, these same sections require that the exercise of such rights must not be inconsistent with other provisions of the Bill of Rights. Perhaps most important in this regard is section 9 of the Bill of Rights, which deals with equality, and in particular sub-sections (2) and (3):

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Section 211 of chapter 12 of the Constitution provides explicitly for the recognition of traditional leadership and also recognises that, as with all branches of the law, customary law must be subject to repeal and amendment. Section 212, the only other section in this, the shortest chapter in the Constitution, provides for the role of traditional leaders at local levels and the elaboration of customary law and institutions.

Thus there is enshrined within the Constitution a tension between tradition and equality, gender equality in particular. This tension is not an abstract tension that exists only in the Constitution. Rather it reflects tensions within society and was reflected in struggles over the wording of the Bill of Rights itself.

The Constitution was enacted in 1996 after an open and democratic process, which included contestation between lobbies representing traditional leaders and rural women respectively. The former wanted the right to equality to be subject to customary law. The latter argued that customary law should be subject to the Bill of Rights. The latter position was confirmed.²³

Legislation has also reflected this tension. For example section 6 of the *Recognition of Customary Marriages Act No.120 of 1998* provides:

A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

Such equality would have been contrary to much established custom but is consistent with section 9 of the Constitution. Section 6 of the 1998 *Recognition of Customary Marriages Act* is also a reverse of the situation enshrined by the 1927 *Native Administration Act* whereby all property vested in the husband and all marriages were deemed to be out of community of property unless another marital regime was specified. Married women were stripped of both legal standing and of any legal stake in the marital property.

The Constitutional Court in 2006 determined that male primogeniture in the customary law of succession, and in particular with references to the inheritance of property, discriminated unfairly against women and illegitimate children and accordingly was unconstitutional.²⁴ This case focussed on the provisions of section 23 of the 1927 *Native Administration Act*, which entrenched male primogeniture. The court quoted approvingly an earlier judgement of the Constitutional Court that described this section as:

an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy.²⁵

²³ *Ex parte chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), paragraphs 200-202. For discussion see: Aninka Claassens, 2013, "Recent Changes in Women's Land Rights and Contested Customary Law in South Africa", *Journal of Agrarian Change*, Vol. 13 No.1

²⁴ *Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC)

²⁵ *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC)

In 2006 the Court assessed the dangers inherent in codifying any common or customary law:

What needs to be emphasised is that, because of the dynamic nature of society, official customary law as it exists in the textbooks and in the Act is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes which continually take place ... The official rules of customary law are sometimes contrasted with what is referred to as “living customary law,” which is an acknowledgement of the rules that are adapted to fit in with changed circumstances.²⁶

The Constitutional Court thus clearly contrasted patriarchal and backward-looking concepts of customary law, which reflected pre-colonial, colonial and apartheid representations and manipulations of customary law, with living and therefore changing customary law.

This judgement is not the only judgement of the Constitutional Court to express such views. Earlier, in 2003, the Constitutional Court stated:

It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.²⁷

In 2013 the Constitutional Court expressed these sentiments when it explicitly held that the ongoing evolution of customary law required a specific innovation:

Xitsonga customary law is developed to require the consent of the first wife to a customary marriage for the validity of a subsequent customary marriage entered into by her husband.²⁸

The nature of customary law as flexible and changing has thus been emphasised, especially since 1994.²⁹

²⁶ *Bhe & others*, paragraphs 85, 86

²⁷ *Alexkor Ltd & another v Richtersveld Community & others* 2004 (5) SA 460 (CC), page 15 of 28

²⁸ *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14, paragraph 89

²⁹ Prior to 1994 the late chief Burns-Ncamashe who was widely regarded as a living authority on customary law consistently refused requests to right down his knowledge of customary law on the grounds that this was contrary to customary law as living and ever changing. Over a century earlier when the area later known as the Transkei was annexed to the Cape Colony, the

In particular there have been important changes in customary practices with regard to land allocation and the holding of land rights in trust areas. These are a result both of rural women demanding the equality enshrined in the Constitution and important changes in family structure and power relations, in particular declining rates of marriage and a shift in financial resources in favour of women, as migrant labour to the mines has declined and social grants to women have increased.

Between 2003 and 2010, the number of both civil and customary marriages registered annually with the Department of Home Affairs declined by 8%. More significantly and much more dramatically, the number of customary marriages declined from 17 283 to 9 996, a decline of 42%.³⁰

Prior to 1994 married men were the holders of land rights in trust areas, almost without exception.³¹ The first acknowledgement in legislation that this was changing was the inclusion at various stages into the drafts of what became the *Communal Land Rights Act No.11 of 2004* (CLaRA) of sections 4(2), 4(3), 5(1) and 18(4)(b) to provide for the security of tenure for women and joint ownership of land rights.³²

In 2011 the results of research conducted in three sets of rural villages in trust areas in the North West (Ramatlabana), KwaZulu-Natal (Msinga) and the Eastern Cape (Keiskammahoek) were published. The purpose of the research was:

to investigate the nature of women's land rights in three rural ex-homeland areas of South Africa and, to the extent possible from a cross-sectional survey conducted at one point in time, to explore how the nature of these rights might have changed over time. In particular, the survey aimed to explore how women access land (including different types of land such as residential and fields), their actual use of the different types of land, their decision making capacity in relation to the different categories of land, and the extent of their security or vulnerability to eviction. The survey also aimed to explore the impact of marital status on the nature and content of women's land rights.³³

attorney-general of the Cape declined to codify African civil law for the same reason, unlike in what became the Colony of Natal (J.W. MacQuarrie 1958, *The Reminiscences of Sir Walter Stanford*, Vol.1, Van Riebeeck Society, 99-100).

³⁰ *Fast Facts*, September 2012, South African Institute of Race Relations

³¹ See for example sections 20(4)(c)(i), 37, 49(1)(b), 56(5)(b)(i), 53(2) etc of Proclamation No. R188 of 1969, *Bantu Areas Land Regulations*.

³² Compare for example the earlier version of the Bill published in *Government Gazette No. 25562* of 17 October 2003.

³³ Debbie Budlender, Sibongile Mgweba, Ketleetso Motsepe, Leilanie Williams, February 2011, *Women, Land and Customary Law*, Community Agency for Social Enquiry, especially pages 9, 14-17, 59, 79, 91, 116-7.

In each site in each of the three provinces, 1 000 women in 1 000 homesteads were surveyed, giving a total sample of 3 000 households. The Eastern Cape surveys were conducted in the villages of Upper and Lower Rabula, Cata, and Upper and Lower Ngqumeya, all in the Keiskammahoek area.

In Keiskammahoek 62% of married women were married under civil law. Only 35% were married by customary law. These latter marriages were monogamous yet potentially polygamous. Only 1% of all marriages were polygamous. In 15% of the homesteads, women reported that ownerships of the residential site was theirs. 39% were jointly owned by women with their husband or partner and 29% were owned by their husband or partner.

Prior to 1994 only 8% of female respondents (in Keiskammahoek compared to 3% in Msinga) who had never married had been able to acquire residential land in their own name. This figure leapt to 44% after 1994 (and 11% in Msinga). Similarly while only 9% of widowed women had been able to acquire residential land before 1994 (9% in Msinga), this jumped to 48% after 1994 (and 41% in Msinga). The change in the number of married women acquiring land before and after 1994 was negligible.

While the increase in the number of unmarried or widowed women holding land in their own name is in line with democratisation, women remain vulnerable to losing rights to land. 115 women in the three surveyed areas in all three provinces reported losing their rights to residential land, of which 50 were in Keiskammahoek. 39 reported the loss of a garden lot of whom 34 were in Keiskammahoek. 10 of the 14 women who reported the loss of fields were also in Keiskammahoek. Only 20% of the losses of residential land in Keiskammahoek were voluntary while the figure for all three areas was 28%.

The traditionalist lobby has advocated much contested legislation, mainly since 2003, including the *Traditional Courts Bill*. This Bill was introduced in Parliament in 2008 and withdrawn in 2014 after considerable opposition. The Memorandum to the Bill stated that it was prepared in consultation with the House of Traditional Leaders. In contrast the Bill disregarded most of the recommendations made by the South African Law Reform Commission after wide consultations, including with civil society and representatives of rural women in particular. In general, it was argued that the Bill did not represent a departure from the apartheid and highly centralised provisions of the 1927 *Native Administration Act* and 1951 *Bantu Authorities Act*. In particular, the Bill was criticised for undermining and in fact reversing progress on gender equality.³⁴ It is

³⁴ See for example: Law, Race and Gender Research Unit, UCT, 12 February 2012, *Submission on the Traditional Courts Bill (B1-2012)*, to Parliament.

possible that the Bill will be re-introduced.

More generally, there is concern that a number of current legislative initiatives, including provisions of the *Spatial Planning and Land Use Management Act No.16 of 2013 (SPLUMA)* and the *2013 Traditional Affairs Bill* may contain provisions which may not stand up to scrutiny against the provisions of the Constitution. These are mainly provisions that could be interpreted to elevate Traditional Councils as a 4th tier of governance.

In terms of S28(4) of the *Traditional Leadership & Governance Framework Act No.41 of 2003 (TLGFA)*, Tribal Authorities established in terms of the *Bantu Authorities Act No.68 of 1951* were deemed to be Traditional Councils.

S5 of the *TLGFA* is headed “Partnerships between municipalities and traditional councils”. S5(3) provides:

A traditional council may enter into a service delivery agreement with a municipality in accordance with the Local Government: Municipal Systems Act, 2000(Act No. 32 of 2000), and any other applicable legislation.

S20(1) of the *TLGFA* provides that national or provincial government, “through legislative or other measures” may provide a role for Traditional Councils and traditional leaders in respect of inter alia land administration.

Further sub-sections of S20 provide important qualifications to the exercise of S20(1) and the conditions which must be met before allocating any such roles. This includes at S20(2)(c) that the organ of state allocating such role(s) must:

ensure that the allocation of a role or function is consistent with the Constitution and applicable legislation

S21 of the *Communal Land Rights Act No.11 of 2004 (CLaRA)* set out requirements for the establishment of “land administration committees”. This enabled some local choice, in theory at least, as to the form of local structure that would undertake defined land administration functions, in particular, such functions could be performed by a structure other than a Traditional Council.

CLaRA was declared unconstitutional and has yet to be replaced. With this declaration, the choice of structure to perform land administration functions has been removed, even if such choice was theoretical rather than practical. However while the provisions of S20 of the *TLGFA* are not peremptory, in the absence of an explicit legislative framework and authority, various local individuals, associations and institutions, but mainly traditional leaders and traditional councils have assumed rural

administrative functions, especially in relation to land.

CLaRA was declared unconstitutional on procedural grounds relating to the enactment of the legislation. However substantive arguments were presented to court to the effect that *CLaRA* and other legislation was unconstitutional in that it created a 4th sphere of government.

The application was first made in the North Gauteng High Court in Pretoria.³⁵ According to *Business Day* on 2 November 2009:

The court challenge to the act was launched by public interest law firm the Legal Resources Centre (LRC) and Webber Wentzel on behalf of four communities: Kalkfontein, Makuleke, Makgobiestad and Dixie in Limpopo, Mpumalanga and North West province.

The LRC's Henk Smith, who was involved in the case since 2003, said the ruling would finally force the government to rethink its approach to rural development. "Now the state can't just go ahead with the massive privatisation of communal land in the manner proposed in the act, involving extensive new powers for the minister and traditional councils unheard of anywhere in the area of land administration," he said.

In his ruling, Judge Aubrey Ledwaba declared 14 sections of the act to be unconstitutional in that it gave unelected traditional leaders and the Minister of Rural Development and Land Reform powers to impose decisions that undermined existing property and tenure rights "instead of protecting them, as required by the constitution".

The application sought not only to strike down *CLaRA* but also S5 and S20 of the *TLGFA* on the grounds that these sections created a 4th tier of government. However the court did not find that S5 and S20 of the *TLGFA* were unconstitutional.

In accordance with the provisions of S167(5) of the Constitution, Judge Ledwaba referred his decision with regard to *CLaRA* to the Constitutional Court for confirmation. The Court declared *CLaRA* unconstitutional on procedural grounds and not the substantive grounds raised in the application. However the Court did make a few suggestive comments on the substantive issues:

³⁵ Case No. 11678/2006. Judgement was handed down on 30 October 2009.

[96] To sum up, therefore, CLARA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land. It replaces both the institutions that regulated these matters and their corresponding rules. CLARA also gives traditional councils new wide-ranging powers and functions. They include control over the occupation, use and administration of communal land.

[127] ... This judgment will, however, provide Parliament with the opportunity to take a second look at the substantive objections raised by the applicants in respect of CLARA when it considers the proper way to give effect to section 25(6) of the Constitution. ...³⁶

The reasons for the substantive objections referred to in the judgement of the Constitutional Court, which according to Chief Justice Ngcobo clearly required reconsideration by Parliament, may be repeated in further legislation. *SPLUMA* and *SPLUMA* regulations may still be open to such challenge on specific provisions. S23(2) of *SPLUMA* provides:

... a municipality, in the performance of its duties in terms of this Chapter [headed "Land Use Management"] must allow the participation of a traditional council.

This is poorly drafted as it can be interpreted to mean such participation not only in regard to areas where traditional councils exist but also in areas where they do not exist, such as urban areas and commercial farmland.

S19 of the regulations provides for an elevated status for traditional councils but not for other structures of civil society:

- (1) A traditional council may conclude a service level agreement with the municipality in whose municipal area that traditional council is located, subject to the provisions of any relevant national or provincial legislation, in terms of which the traditional council may perform such functions as agreed to in the service level agreement, provided that the traditional council may not make a land development or land use decision.

³⁶ *Case CCT 100/09 [2010] ZACC 10.S25(6) of the Constitution reads: "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."*

- (2) If a traditional council does not conclude a service level agreement with the municipality as contemplated in subregulation (1), that traditional council is responsible for providing proof of the allocation of land in terms of the customary law applicable in that traditional area to the applicant of a land development and land use application in order for that applicant to submit it in accordance with the provisions of these Regulations.

S25 of the draft *Traditional Affairs Bill (TAB)*, published in 2013 and intending to repeal and replace the *TLGFA*, may be open to similar questions and challenge. SS25(1) provides:

A department within the national or provincial sphere of government, as the case may be, may, through legislative or other measures, provide a role for a kingship or queenship council, principal traditional council, traditional council, Khoi-San council, traditional sub-council and traditional and Khoi-San leaders in respect of any functional area of such department.

Unlike the qualifying and hence restrictive conditions set out in the subsections of S20 of the *TLGFA*, SS 25(2) of the *TAB* only requires the department allocating roles to exercise its own discretion. As the *TAB* proposes to repeal the *TLGFA*, this may be a regressive step.

SS25(1) does not permit the equivalent provision of a role or roles by a municipality. Yet S23(2) of *SPLUMA* requires a municipality to allow the participation of traditional councils in land use management. This could be construed to locate both municipalities and traditional councils as equivalents within the municipal sphere.

A recently published academic article concludes:

... clause 25 unconstitutionally seeks to confer governmental powers on traditional councils and leaders in such a way as to render them an impermissible fourth sphere of government. This is in direct breach of the delicate two-fold constitutional division of power to ensure limited government; namely the horizontal separation of powers (accompanied by checks and balances) – a fundamental, albeit implied, component of our constitutional architecture – and multi-sphere government (national, provincial and local)... clause 25 is not compliant with section 212(1) of the Constitution insofar as the impugned provision contemplates the allocation of *governmental* roles

to traditional councils and leaders at *national and provincial* (rather than local) government level and by measures *other than* via national legislation.³⁷

Citing the certification judgement of the Constitutional Court, the same article also argues that the powers and functions of traditional leadership are restricted to those necessary to maintain their status as guardians of traditional culture (page 10/23).³⁸

2.7.8 Theoretical and Constitutional considerations

Prof. A.J. van der Walt has been a recognised authority on SA property law for many years. He is the author of widely-used university text-books on the subject. In 1999 he published a paper titled “Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa.”³⁹ His analysis is still relevant in 2015.

... a land reform programme that continues to privilege ownership above other property rights will, at least to a certain extent, uphold the existing hierarchical structures that formed the backbone of the apartheid land regime and continue the hierarchies of power that underlie land distribution patterns. Conversely, a land reform programme will theoretically have the biggest structural impact on existing land-distribution patterns and land-related hierarchies of power if (and in so far as) it succeeds in breaking down or undermining the hegemony of land rights that are clustered around the structural and legal supremacy of the traditional ownership paradigm.

Pleas for the ‘fragmentation’ of land rights have to be understood against this background: the land reform programme should break out of (and break down) the traditional, civil-law hierarchy of land rights, and create land rights that are strong and valuable because they suit specific needs and requirements, and not because they assume a privileged position in an abstract hierarchy of stronger and weaker

³⁷ Lauren Kohn, 2014, “The failure of an arranged marriage: the traditional leadership / democracy amalgamation made worse by the draft Traditional Affairs Bill”, *Southern Africa Public Law*, Vol.29:2, Unisa Press

³⁸ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC), paragraph 190

³⁹ Koers - *Bulletin for Christian Scholarship* Vol.64 No.2/3. The quotes are taken from an unpublished version of the article.

rights. This will help to undermine the hegemony of the traditional system of property rights and its privileging of existing, mostly white, land rights. Stated very simply this amounts to saying that land reform should consider the reform and redistribution of land rights and not just (or simply) the redistribution of land. Land reform should amount to more than a merely superficial, mechanical reshuffling of land – if it is to be effective, it has to change the ‘background law’ that formed the basis on which apartheid land law was constructed. (page 4)

The issues and questions posed by Van der Walt have been pursued by The Legal Entity Appraisal Project (LEAP) which “evolved from a focus on communal property institutions set up in land reform projects [initially focussing on KwaZulu-Natal] to a focus on tenure security and the land administration required to manage tenure in both rural and urban contexts”. LEAP expanded on what Van der Walt referred to as use rights and rights which do not neatly fit the dominant legal framework of rights.

... ‘state support to user-rights may ensure that they are given proprietary content and can receive the same protection as ownership rights’. In terms of tenure, this might translate, for example, taking steps to capture internal use rights by describing and defining them rather than leaving them to the discretion of constitution or policy-making either at a local or national level. Recording rights as an exercise in itself may reduce vulnerability and help to eliminate discriminatory tendencies in local practice or national policy. Many practitioners think that a variety of incremental improvements to tenure security through the legal protection of existing rights and the provision of intermediary forms of tenure are seen to be a more sustainable policy approach in the South African context. ‘The South African challenge is to use the law and create institutions to ensure that the land rights of all citizens are safeguarded equally which means giving legal content to the poorly defined [personal] rights [that currently exist]. Poor people in communal areas and beneficiaries in land reform projects need legal institutional support for their land tenure and management arrangements so that both the community as entity and the individual members who use the land may have legally secure tenure to their land’...⁴⁰

⁴⁰ Leap, 2005, “Perspectives on Land Tenure Security in Rural and Urban SA: An analysis of the tenure context and a problem statement for Leap”, pages 1 and 17-18

The report suggests that a deeper understanding of the needs and dynamics within poor households are required, in particular the role of women in regard to tenure and land rights and the inter-generational nature of land rights from a traditional or customary perspective:

Land and housing are essential livelihood assets. Households need to be able to get and hold rights to these in both urban and rural areas, in order to have secure shelter and get access to services, to provide a base for economic activities in urban areas and food production and access to natural resources in rural areas ... Women are discriminated against in terms of gaining and keeping (maintaining) secure property rights and their use and control over land may be restricted, both where statutory and customary law and land administration apply.

Women's land rights operate in heterogeneous, difficult and dynamic contexts, which make it difficult or dangerous to generalize. Different geographical, historical, political and legal realities shape the ways in which land rights within any country have been constructed and are changing; what may work in one country may not necessarily work in another; family and marriage patterns are undergoing uneven processes of social change. 'Land has different meanings for different women and men. It serves many, often competing purposes, including historical redress, social justice, unlocking economic growth, securing livelihoods.' It is also important to differentiate between women, whose land rights are mediated by class, marital status, and the age and gender of their children and whose issues around land rights change at different times in their lives ... The ways in which women can mobilize in defence of their rights varies greatly." (page 22)

While it is possible to assert that ownership in customary systems is socially embedded in ways that are very different from the Roman-Dutch derived tenure system, the precise problems of articulation require a deeper understanding. Leap has argued that customary ownership is firstly inter-generational in the sense that the family, past, present and future, has an active stake in the land and secondly, is linked to a notion of belonging to a particular piece of land that is ritualized through highly gendered practices of ancestral worship. Questions of articulation would need to identify how these notions of ownership contradict, support or elude Roman-Dutch derived notions. (page 26)

None of the above suggests that one should look backwards in time in order to reinforce class and gender relations. The point is that without a thorough understanding of how these relations operate, land tenure reform may unwittingly

reinforce class and gender relations in a manner which does not further the rights of equality enshrined in Chapter 2 and Section 9 on equality in the Constitution. Advancing the rights set out in Section 9 may also require careful balancing with rights enshrined in Sections 30 and 31 which deal with cultural rights.

The final quote from the LEAP document reflects on the experience of formalising land tenure in a manner that seeks “to privilege ownership above other property rights” as per Van der Walt:

Evidence from titling experiments in South Africa over the past century suggest that registration and titling of land in former black rural and informal urban areas has had mixed results. Of particular note is that the formal registers have not been maintained. Informal sales or intra-family transmission, without registration, are the more usual methods of transferring land in this sector. (page 28)

For much of the second half of the twentieth century, institutions such as the World Bank championed such formalisation by registration and land titling programmes. Very often such programmes were included as components of aid and/or loan packages for developing countries. In some instances they were conditional components of the packages. Yet by the late twentieth century even these institutions were questioning the efficacy of registration and titling programmes, especially in sub-Saharan Africa.

The reasons for the failure of these programmes seem to be precisely the same reasons outlined above by Leap – a failure to analyse and understand peoples’ needs and practice of land tenure.

The economic argument for a shift to formal, surveyed and registered title is that it creates an economic asset and leads to an increase in the intensity of land use or increased productivity. Yet in rural areas such as some around Keiskammahoek, there exist a variety of forms of land tenure for arable land within single villages. By simply observing the land use on each land parcel, it is clear that there is no correlation between intensity of land use and form of tenure.

A key term seized upon by advocates of mass-titling programmes is the apparent popular demand for “title” by the majority of people who were previously denied security of land tenure. But a careful examination of what people mean by title reveals a very different set of expectations from the technical requirements of freehold ownership:

In their stories about what it means to have title, people articulate an understanding of property as ‘family property’. No individual has control of the property to the extent of having powers to dispose of it,

or to identify particular heirs to the exclusion of others (except in some limited situations where children born out of wedlock are not recognised, but this is not uniformly the case). Management of the property is consolidated in an identified individual. Here the language of 'management' accords somewhat with the language of executors of deceased estates, Xhosa terminology suggesting 'custodianship'. The word most frequently used is derived from the verb '*ugcina*' meaning 'keeper'. The conventional western approach to identifying heirs *before* an owner dies (in wills) is turned on its head. It is the surviving family members who make decisions about property management when a custodian dies. This construction of division of property rights is far removed from pre-mortem, and/or quantifiable, division of property.

But who constitutes the 'family'? Family members are traced through lines of descent, ancestors continuing to be associated with the property and family. Membership is not just a 'given', it is kept alive and legitimated through active participation in family affairs, events and ceremonies. The entire process is thus an active one, which is different from the notion of an heir who may be completely removed in time and space, and whose role may be passive. It also means that descent can be manipulated to accommodate realities. People can be adopted into the family even if their descent lines are not strictly traceable through 'blood', providing they behave within the repertoire of family norms. This also means that conduct regarded as unacceptable can lead to exclusion.

The descent system follows patrilineal lines, with some flexibility to allow for changing contexts. This translates into male and female descendants who trace their linkages to the family through 'kin' (from 'kind'), rather than marriage. This is not a blueprint, and it is showing signs of change. But the practical examples given by people in their stories attest to the strength of the idea of families identifying their members through the male descent line. The central importance of a common ancestor is, ironically, reinforced in the context of title, because the first member of the family to have been granted the title (always males in this case) is regarded as the common ancestor through whom all subsequent descendants are traced. The patrilineal model, curiously, does *not* exclude the possibility of women being custodians, nor that women have lesser claims to property rights. In Fingo Village there is, in fact, a growing bias in favour of appointing women as the keepers of the property, and women play key roles in property management. Relations associated with the mother's line, however, are regarded as members of another line or 'lineage'.

These practices can easily blur into patriarchal property relations, but they are not synonymous. The system can function without blatantly oppressive implications for property rights by women, though there is a fine line of distinction.

The vertically constructed band of descendants is contrasted with the more compact, nuclear family constructed along horizontal lines - spouse and children. Here relations are traced through both mother and father (bilateral descent) and it is usually the spouse and children who inherit the material property, the approach arising as it did in the market economy, where land developed monetary value. The more dispersed versus concentrated inheritance structure has profound implications for the meaning of ownership.⁴¹

In rural areas, title is used colloquially to refer to any official document that indicates or confirms land rights. This would include a Permission to Occupy (PTO) certificate (see section 4 below for more on PTOs). It is very significant that the dynamics quoted above in Fingo Village in an urban environment, supposedly based on freehold ownership, apply equally in areas with a history of PTOs and in areas with entirely informal or customary tenure arrangements. It is also significant that official registers of PTOs were generally kept up to date whereas the Deeds registers usually reflect registration in the names of long-deceased ancestors. This may reflect at least in part the significant costs and encumbrances associated with the formal administration of deceased estates and the costs of registration of transfer of property.

Unless spatial planning and land use management takes into account these different forms of land tenure and land use, referred to by later draft LEAP documents as “social tenures”, spatial planning and land use management will continue to serve the formal system and reproduce existing patterns of spatial inequality which are underpinned and reinforced by the formal systems.

⁴¹ Rosalie Kingwill, from a condensed summary of the paper “Lost in Translation: Family title in Fingo Village ...”, presented at ‘Development, Pluralism and Resources’ colloquium, University of Cape Town Law Faculty, November 2010, published 2011 in *Acta Juridica*, UCT. Also Kingwill, 2014, “Papering over the Cracks - An Ethnography of Land Title in the Eastern Cape”, *KRONOS Vol.40 No.11*

2.8 CONCLUSION: LOOKING FORWARD BASED ON LESSONS FROM THE PAST

SPATIAL PLANNING & LAND USE MANAGEMENT MUST:

- Contribute to local economic and social development.
- Allow for the incremental introduction of land use management measures in areas not accustomed to such measures.
- Allow for flexibility to accommodate local conditions and customs.
- Allow for the recognition of forms of land tenure and land rights not previously recognised as part of the formal system, as well as appropriate methods of identification of land parcels which are not currently recognised by the formal system of land surveying, the cadastre.
- Ensure that concepts and procedures resonate with established local practices.
- Identify possible unintended and negative consequences of spatial planning and land use management, such as capture by elites, and how these can be limited or mitigated.
- Build administrative simplicity for the benefit of all parties using the system. This includes the alignment of systems for land development applications, which involves not only inter-governmental co-ordination, but also appropriate and aligned delegations of authority.
- Allow for the progressive reintroduction of local fiscal mechanisms for the generation of revenue for local public purposes.

The purpose of preparing this Green Paper is to look forward, taking into account the past that has brought us to the present challenges. The purpose is not to try to take us back to a world that no longer exists and certainly not back to an idealised world, which in fact never existed. Nor is the purpose to consider what might have happened and how different the present might be if it had not been for colonialism, segregation, apartheid, Bantustans etc.

In short, we have to move forward from the very messy present, taking the best from it and doing our best to build on that which already exists within us.

Thus, when moving forward to a White Paper and the preparation of draft legislation, it may also be necessary to clarify the meanings of other concepts and words such as “title”, “register”, “survey” etc., either to broaden their definitions or to develop new terms with wider definitions that have meaning across a broader range of world views.

3 SPATIAL PLANNING IN EC

3.1 THE SPATIAL PLANNING SYSTEM

In terms of Section 4 of SPLUMA, the Spatial Planning System in South Africa is described 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.

Within the above System, for the purposes of SPLUMA, Spatial Planning, as such, is described as being comprised of 3 categories: -

- 4. Municipal Planning
- 5. Provincial Planning
- 6. National Planning

This section will focus on Municipal Planning and Provincial Planning as these activities relate to spatial planning in the Eastern Cape, at present.

3.2 SPATIAL PLANNING CONTEXT

From a spatial planning perspective, 'Provincial Planning' presently takes place in EC within the framework set by Section 5(2) of SPLUMA in so far as the Province's activities have focused on the preparation of a Provincial Spatial Development Plan (the 2010 PSDP – which may be seen as being a precursor to the Provincial SDF contemplated in SPLUMA) as well as monitoring of Municipal Planning and carrying out currently assigned responsibilities in relation to land development and

applications for the change in land uses.

‘Municipal planning’ currently takes place in the context of new Constitutional responsibilities which have sought to transform local government from an agent of central government into a separate sphere of government. The transformation is only partial, leaving local government still seeing itself (and being seen) partly as agent, and partly as an actor in its own right.

In most cases, local government institutions (District and Local Municipalities) are enjoined to act as the developmental arm of government (at “the coalface of delivery”) and to foster economic and social development. However, again in almost all cases, these institutions do not have the required skills, experience, tools and resources to achieve this⁴².

As part of this syndrome of being “out of their depth”, local government institutions are confronted with a confusing plethora of old and new legislation relating to planning and often experience great difficulty in interpreting newer legislation, with a consequent lack of clarity on the scope and objectives of municipal planning being the outcome.

Finally – and crucially – local government institutions in the Eastern Cape often experience increasing demands for greater participation by communities in decision-making but lack sufficient skills and experience to manage consultation processes effectively. As the requirement to progressively engage with communities and interested and affected parties in local governance, planning and project implementation processes is a core part of municipalities’ legal mandate, this shortcoming needs to be addressed.

3.2.1 Provincial-Scale Spatial Planning

The Eastern Cape Province first compiled a “*Provincial Spatial Development Plan*” (PSDP) in the period 1996 – 2000, where the exercise was aimed at drawing on the work of the National Development & Planning Commission (established in terms of the Development Facilitation Act) and the Green Paper on Development & Planning (1999) to provide a set of guiding principles in relation to managing investment in space. The 1st generation PSDP also embraced the notion of using “*spatial structuring elements*” as planning tools to assist in the management of land development. These

⁴² *It is important to note, though, that historically speaking, local government institutions in the main never had such “developmental” capacities and thus the onus has been on the state to expressly develop and extend such capacities, in line with the related roles and functions assigned to local government in terms of the new municipal dispensation. To date, such deliberate and sustained capacitation has not successfully occurred.*

structuring elements included the identification of development corridors, special development areas and development nodes, the latter of which were to be graded in terms of development potential in order to guide the prioritisation of investment and resources.

The PSDP was re-worked and effectively re-written in 2008 – 2010 and is now one of the keystone documents endorsed by the Department of Cooperative Governance & Traditional Affairs. It follows on the aims of the 1st generation PSDP in that it seeks to provide a guiding framework to local government and other bodies that engage in spatial planning.

Specifically, the PSDP has introduced a set of general and overarching core values, which are identified as the following:

- Environmental integrity and sustainability;
- Safeguarding all natural resources;
- Densification;
- Integrated Land Use;
- Economy and efficiency of development;
- Achieving synergy and linkages between urban and rural areas;
- Participatory community based planning as a basis of going forward; and
- Emphasis being placed on “brownfield” development before adopting “greenfield” development.

The EC PSDP takes its strategic approach from the six pillars of the revised Provincial Growth & Development Plan (EC PGDP). These adopted six “pillars” involve:

- Social Protection and Basic Service Delivery;
- Agrarian Reform and Rural Development;
- Human Resource Development and Education,
- Infrastructure,
- Manufacturing Diversification and;
- Public Sector and Institutional Transformation



It is evident that the PSDP (2010) tries to establish “*home-truths*” and a uniquely Eastern Cape approach to certain issues in the Province (management of rural settlement areas, for example). However, it must be noted that the PSDP is not a statutory document and has not, it is understood, been formally adopted by the Provincial Cabinet as formal EC Provincial Government policy, at present. As such, its status should be seen as an advisory document and the principle implication of the PSDP for new provincial SPLUM legislation is the clear “*statement of intent*” that the Eastern Cape Provincial Government sees itself as the principal actor in facilitating the way forward on planning and spatial development issues in the Province, which is in line with its Provincial Planning mandate.

3.2.2 Municipal-Scale Spatial Planning

Commencing in 2001, IDPs were prepared in the newly demarcated municipalities, assisted by Planning, Implementation and Management Support (PIMS) centres at district level, in most cases using the Guidelines for IDPs issued by the then national Department of Provincial & Local Government (now the national Department of Cooperative Governance & Traditional Affairs).

Prevailing interpretations of the Guidelines meant that SDFs were seen – at that stage – as essentially a component of the overall IDP, comprising one of a number of Sector Plans in the so-called Implementation Phase towards the tail-end of the IDP planning process. Consequently, many 1st generation SDFs were sketchy in outline and broad in content. Essentially, they were “*after-thoughts*” to the IDPs, rather than strategic, forward-looking spatial plans that would guide the integrated development of all the initiatives of provincial, local and even national government within a municipality.

Since then, municipalities have reviewed and updated their IDPs annually and most SDFs have been revised and updated periodically. In many cases, however, the functional alignment between SDFs and IDPs remains weaker than would be ideal and comparatively few IDPs use the SDF as a strategic base or foundation plan to direct resources and investment spatially⁴³.

Moreover, as both IDPs and SDFs have become seen as essentially “compliance documents” – that is, documents that need to be formulated and reviewed

⁴³ This may be because of the “*politicization*” of budget processes/allocation of resources, where pragmatic decisions are often made to distribute projects and interventions across municipal wards rather than to prioritise and focus expenditure in key areas of potential and/or need.

periodically (annually, in the case of the IDP) and which are subject to audit and assessment processes – the activities that are followed when they are compiled are very likely to be “outcomes oriented” rather than procedurally sound.

In short, in almost all cases, the priorities of the responsible officials and politicians where IDPs and SDFs are concerned are to have “a product” that complies with checklist requirements. As a consequence, these documents tend to be compiled by rote (have standard formats and contain standard elements and approaches) and do not, in the main, reflect the real needs and visions of communities who form the constituencies that are the subject of these plans⁴⁴.

This problem may be seen to be “systemic” in that planning, by its nature is an on-going and iterative process that needs to engage at length with the people whose lives it seeks to impact upon. Planning is an ongoing conversation between various stakeholders, not a conclusion.

In this regard, then, one of the key shortcomings of the current planning system (in SA, not just in EC) is the fact that the state has effectively out-sourced the planning function to agencies other than itself. Because of the noted capacity constraints referred to throughout this document, the state lacks a cadre of experienced and capable planning practitioners whose job it is to engage in planning. Rather, the planning function within the state has, in most cases, been assigned either to junior town planners or to career administrators who have attended training courses. In general terms, these officials tend to become functionaries: “project administrators” whose job it is to ensure that the IDP or SDF is outsourced and compiled by deadline.

Thus, in all of this, spatial development planning as a definitive public sector activity has lost its essence (that is, once again, planning with people and for people through on-going and iterative engagements with them in pursuit of common visions and solutions to development issues).

This is one of the key causes of a lack of implementation, too, as public sector planners are seen by colleagues in implementing arms of the state as fellow functionaries engaged in their own pursuits, which are seen to be separate from their (the implementers) particular objectives.

⁴⁴ *In the case of IDPs, the SA Local Government Association (SALGA) has embarked on a project aimed at revising guidelines to inform the compilation of IDPs and to encourage local “differentiation” of IDPs: it is intended that each Municipality should produce an IDP that more accurately reflects its circumstances, needs and priorities, rather than adhering to a generic table of contents.*

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 space will develop, which is often the result of the prioritisation of achieving a “credible looking” product by deadline rather than managing planning over reasonable (and reasonably resourced) time spans
- As such, much planning has not managed to capture the prevailing “vision” in the minds of local residents (especially in rural and trust land areas) and this is not appropriately interpreted in terms of SDF proposals and LUM principles.
- Consequently, spatial plans are often not recognized by affected communities. Plans are not “owned” by target communities, as they do not relate to their needs, priorities or lived reality. Decision-making therefore often continues to happen at local / rural level, without the assistance of planning input.
- In effect, many people remain “alienated” from the way that the state practises planning and land administration (where it does still practice that) and thus remain effectively “beyond the reach” of state plans and programmes.
- In the face of the state’s inability to deal with people’s real needs, people help themselves. This relates to informality as well as the development of community rules in dealing with land matters.
- Often the community rules hark back to what was known in the rural land environment and then are transmogrified over time in urban settings to respond to both community needs and – often – to external influences (i.e. state-led attempts to “formalise” or “relocate” settlements)⁴⁵.
- Communities’ hard-won experience of state inefficiency often leads to mistrust or complex cycles of engagement-disengagement.
- Weak capacity in commissioning agencies (that is to say, inexperienced officials or planners) often leads to an inability to 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).

⁴⁵ A good example that is recorded in this regard is Mza’momhle (Gonubie) and how that community responded to opportunities flowing from, at first support of their resistance to removal and then later, to formalisation and subsequent further “informalisation”.

4 Land Use Management in EC

4.1 THE PURPOSE AND FUNCTION OF LAND USE MANAGEMENT

Chapter 5, Section 25 of SPLUMA specifies that:

25. (1) A land use scheme must give effect to and be consistent with the municipal spatial development framework and determine the use and development of land within the municipal area to which it relates in order to promote—
- (a) *economic growth;*
 - (b) *social inclusion;*
 - (c) *efficient land development; and*
 - (d) *minimal impact on public health, the environment and natural resources.*
- (2) A land use scheme must include—
- (a) *scheme regulations setting out the procedures and conditions relating to the use and development of land in any zone;*
 - (b) *a map indicating the zoning of the municipal area into land use zones; and*
 - (c) *a register of all amendments to such land use scheme.*

4.2 HOW LAND USE MANAGEMENT WAS SHAPED IN SOUTH AFRICA

A report titled *The State of Land Use Management in South Africa*, prepared by Sarah Charlton for Urban LandMark in 2008, explains that “*land use management ideas in South Africa, were of course further overlain by apartheid objectives. Mammon notes that ‘between the 1960s and the 1980s, ‘the contents and object’ of local government planning were focused on land use and development control measures that emphasised the separation of land uses in support of modernist planning and at the same time reinforced the intent of the Group Areas Act to separate citizens into racially defined ‘group areas’ (Mammon 2008: 409).*”

The report explains that, “*under apartheid there was a separation of the majority of urban residents from ownership of land for residential or business purposes. This creates an overlay of racially based issues of inclusion and exclusion into the property-ownership picture. A further distinction of South African cities, related to this, was the ring-fencing of tax generating areas for spending and investment purposes. All of this is relevant to the notion of property ownership underpinning the land use system. In sum therefore, not only are land use management systems concerned with controlling amenity, but they also play a fundamental role in the property system which underpins our urban areas. In addition, they have historically been used as*”

instruments of social control.

Similarly Rubin (2008: 12) cites Beavon (2004) in noting that ‘planning and land management tools were sometimes conceptualized and portrayed as essential elements of health and safety, as necessary for creating ‘order out of chaos’ and ensuring that ‘non-white’ populations lived in ‘more hygienic’ locations’. Kihato and Berrisford flag that ‘the ideological underpinnings that shape these (regulatory) systems are based on certain preconceived notions of an ordered city’ (2006:4 in Charlton 2006). The problem is that this may not accord with perspectives of the urban poor on the use and importance of urban land. In his response to their comments De Groot puts it more starkly: ‘the largely unchanged apartheid era laws on urban land clearly and definitely favour the rich and influential segment of the population, that is what they were set up to do and that is what they still do’ (2006:1) (cited in Charlton 2006: 11)’.

In summary, key underlying principles of the apartheid era land use management resulted in:

- **Exclusion** - The presence of non-white people in urban areas was recognised, but seen as temporary in nature for individuals (leaseholds, permit / pass system, dormitory function of townships).
- **Lower standards** - Clear differences in level of infrastructure investment (where income generated in white areas was mainly spent in maintain standards in white suburbs)

4.3 LAND USE MANAGEMENT IN THE BROADER CONTEXT

The Urban LandMark report further states that Land Use Management “*can be seen as a sub-component of the broader concept of land management, which can be conceptualized as having five dimensions:*

- The manner in which land is accessed and acquired
- The process by which individuals, households and communities continue to have and to hold rights to land
- The way in which land use is regulated
- The systems by which land is developed
- How land is traded

(Rubin 2008: 3 with reference to the CUBES - Planact land management study).

It is therefore critical, that when considering the performance of land use management and potential requirements for restructuring of the legislative framework in response to perceived shortcomings, that it be considered within the context of the range of components that it is associated with (i.e. Administrative practice informing manner of acquisition, holding, regulating, developing and trading).

4.4 PERFORMANCE OF LUM IN THE PROVINCE

4.4.1 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.

4.4.2 Urban bias

Legislation, regulations and bylaws catering for land use management have (as explained above) historically 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.), 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).

4.4.3 Failure to recognise the Eastern Cape context

The reality of the spatial and developmental context of the Eastern Cape is vastly different from the context in which the systems that we apply have 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 nature of land use management in the province, both in the urban and rural context. Although it is recognised that national Spatial Planning and Land Use Management legislation has been formulated, land use management systems still require innovative ideas to integrate prevailing thinking and practice around land management with local government systems.

4.4.4 Vacuum in rural parts of the province

As noted above, historically, and up to the point where SPLUMA will be enacted, no clear legal mechanism existed for managing land use within rural parts (former Bantustans) of the Eastern Cape Province or to replace multiple forms of legislation. Control over conferring land use rights existed (and, in many instances, continues to exist) by way of:

- Tenure administration systems (such as PTO and Quitrent)
- Customary and traditional practices in localised areas (by way of self-administration)

Currently, as far as directing use of space, the only formal measures that are applied to the area include:

- Agricultural resource management processes
- Environmental legislation (NEMA, Wild Coast Decree, Coastal Management Act and Natural Forest Act).

4.4.5 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.

When assessing land uses in both urban and rural parts of the province, it becomes clear that the provisions of official land use schemes and zoning regulations are being ignored due to the fact that they do not support the range of activities that are in demand by the residents in these areas.

Scheme categories, concepts and terminology presently still, largely exclude rural land management characteristics and needs. This includes elements of prevailing practice or culture in both urban and rural areas, such as:

- The relationship between the residential function and subsistence agricultural practices (keeping of livestock and cropping).
- Construction of “dwellings” as free standing rooms or huts as opposed to being inter-leading rooms.
- Construction of rental room or tenement room to meet the demand for affordable accommodation in and around urban centres.

4.4.6 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.

4.4.7 Conflict in roles of LUM

The Urban LandMark report quote Berrisford and Kihato noting that

'...land use management systems have certain ideological underpinnings based on preconceived notions of ordered spaces. Acquiring land and property is deemed an investment in an asset, and often the only sizeable asset owned by many households. The role of regulatory systems in protecting and enhancing this investment has long been recognized.... (this powerful ideology) underpinning planning laws...often competes with the public interest ideology and has often gained ascendancy in its conflicts with the latter' (Berrisford and Kihato 2008: 390).

4.4.8 LUM for 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. This is especially relevant in the urban environment. The same applies to the economic sector and the need for opportunities to enter the market.

To date, provision for managing space to accommodate the needs of the poor has been neglected in many of the LUM systems. Again, the lack of ability to pay for services, the requirement for a well-functioning pro-poor environment, comes with a requirement for well-functioning local government.

4.4.8.1 Reality of the “informal”

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.

Informal due to lack of affordability -

In an article titled Rural Planning in South Africa: A Case Study by Khanya – managing rural change (*Environmental Planning Issues No. 22, December 2000*), emergence of the informal is explained as “People decide on their own outcomes and strategies to cope with their lives”. The Urban LandMark Report quotes, ‘for the most part the manner in which informal processes and poor people contribute economically and socially to the life of the city by utilizing their spaces is either ignored or to put it simplistically under-estimated and misunderstood’ (Marx 2006 in Rubin 2008: 4).

Informality, when seen through the eyes of the poor, is a rational response to poverty and key to many a strategy to merely survive. Considering this, 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 informality function better, “informality” will continue to exist as a mechanism of coping.

Informal due to lack of control -

It must also be recognised that not all forms of informal development are survivalist in nature and motive. From recent growth in developments on the outskirts of urban areas in former Ciskei and Transkei, it is clear that informal (self-funded) development is no longer associated with only the poor and the inability to afford housing in urban centres. The fact that uncontrolled developments, especially in close proximity to main road networks, include substantial structures is proof that the vacuum in land use management control is also being exploited by people that do have the means to afford properties in urban areas. Instead people opt for informal development (both rural and urban).

Informal due to absence of enabling legislation –

As described in the section dealing with administration of rural areas, the absence of a formal land and tenure administration system, communities (both traditional and other self-administering types) have continued with the practices of land allocation that they have grown accustomed to over the years. In the absence of any formal system, these types of traditional or self-administration is by default classified as “informal”.

4.4.9 Extending Municipal LUM and Administrative Processes

Efforts to extend municipal administrative systems, including land use management systems, can be expected to be met with suspicion by those that are not convinced that local government can affectively administer and with resistance by those that currently benefit from the lack of administration and management (by avoiding property taxes and service charges) or exploiting the situation for financial gain.

4.4.9.1 *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”. Such an approach needs to consider incentives (either penalty or reward orientated) as a means to encourage development towards desired spatial outcomes. Here the relationship between Spatial or “Forward” Planning and LUM systems should be reconfigured and closely integrated.

4.4.9.2 *Spatial LUM system not synced with other areas of resource use or development*

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.

Similar to the aspect raised in the previous point, LUM should move from its predominantly control/ compliance/ enforcement approach 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.

In the rural context, this approach will strive towards capturing of community perceptions and preferences in spatial planning to an adequate level of detail (vision, expectations and social/cultural manifestations in the use of space) to reduce the need for land use management.

5 OVERVIEW OF EC MUNICIPALITIES' PLANNING FUNCTION

This section of the report aims to provide an overview of the current structure, capacity and performance of Municipal Planning functions in the Province. Information was sourced from a recent assessment by the DRDLR (with the assistance of the COGTA-EC and SALGA) during the period October 2013 to June 2014, on the readiness of Municipalities to implement the new Spatial Planning and Land Use Management Act (Act 16 of 2013). The readiness assessment reported the following:

5.1 SPATIAL PLANNING PROCESSES

Municipalities in the province are compliant in terms of the requirement for preparing and adopting a Spatial Development Framework for their areas of jurisdiction, with all municipalities indicating that council approved SDF's are in place. The DRDLR assessment however did not confirm the credibility of Spatial Development Framework Plans.

5.2 AVAILABILITY AND STATUS OF LAND USE MANAGEMENT SYSTEM COMPONENTS

Land Use Scheme Regulations

- 1 municipality currently does not have a valid scheme in place (Matatiele)
- More than half the municipalities (22) have rural areas for which no land use scheme regulations are available and where no formal land use management is being applied. Most of the rural areas fall under Traditional Authority administrative structures.
- 7 towns that are located within former Ciskei areas (administered in terms of Land Use Regulations Act 15 of 1987) do not have Land Use Scheme Regulations that can be applied and the use-rights of land is still being guided by conditions of title (originating from conditions of township establishment authorization).

- A number of towns still have township extensions that were established in terms of the Black Communities Act, which has its own set of Land Use Scheme Regulations. There is however confusion around the validity of the Scheme Regulations (as the Act has been repealed). In some instances, municipalities are now applying the LUPO Section 8 Scheme Regulations to Act 4 townships.
 - Lukhanji Municipality, as an example, is faced with a situation where one of their towns (Queenstown) has 4 different pieces of planning legislation, each with its own set of Scheme Regulations, that apply to separate parts of the town.

It is clear from the above-described reality that the majority of municipalities in the Eastern Cape face a complex task of converting the variety of scheme categories and provisions to a single future Wall-to-Wall scheme.

Zoning Maps

Although the assessment did not clearly measure status and coverage of zoning registers and maps, the following was concluded:

- Based on the status of Land Use Scheme Regulations, it is clear that large parts of municipalities have no land use data or zoning records.
- This is further complicated by the fact that the majority of rural settlement areas are un-surveyed and that land use management has, to date, exclusively been based on land units (land parcels that are registerable in the Deeds Office).
- A number of municipalities have indicated that their existing scheme maps and registers are not up to date.
- The ability to implement new Wall-to-Wall Schemes will be seriously hampered by the lack of reliable baseline information on existing scheme maps, making it impossible to convert existing zoning rights to zoning categories of a new wall-to-wall scheme (once adopted).
- It is critical that, prior to conversion of existing zonation categories to a new uniform set of zoning categories, the legal status of each land unit be clear.

5.3 TECHNICAL CAPACITY AND LAND USE MANAGEMENT ACTIVITY

The tables below summarise planning capacity and development application processes in the 39 Municipalities, grouped in the 6 District Municipalities.

Table 1: O.R. Tambo DM

O.R. TAMBO DISTRICT: CAPACITY/APPLICATIONS				
#	Municipality	Planners	Applications (2008– 2012)	Applications (Per Annum)
1	OR Tambo District Municipality	1	N/A	N/A
2	Ingquza Hill Local Municipality	1	41	8
3	King Sabata Dalindyebo (KSD) Local Municipality	3	51	10
4	Mhlontlo Local Municipality	1	29	6
5	Nyandeni Local Municipality	1	10	2
6	Port St Johns Local Municipality	1	21	4
TOTAL		8	152	30

The most urbanized municipality in this District (KSD – Towns of Mthatha and Mqanduli) with the most development pressure only receives an average of 10 applications per year.

Table 2: Chris Hani DM

CHRIS HANI DISTRICT: CAPACITY/APPLICATIONS				
#	Municipality	Planners	Applications (2008– 2012)	Applications (Per Annum)
1	Chris Hani District Municipality	2	N/A	N/A
2	Lukhanji Local Municipality	1	110	22
3	Sakhisizwe Local Municipality	1	No info	No info
4	Emalahleni Local Municipality	1	8	2
5	InxubaYethemba Local Municipality	2	114	23
6	Tsolwana Local Municipality	0	19	4

CHRIS HANI DISTRICT: CAPACITY/APPLICATIONS				
#	Municipality	Planners	Applications (2008– 2012)	Applications (Per Annum)
7	Inkwanca Local Municipality	0	14	3
8	Engcobo Local Municipality	1	No info	No info
9	IntsikaYethu	3	38	8
TOTAL		11	303	50

Two of the municipalities do not have town planners. The more urbanized municipalities of Lukhanji and Inxuba Yethemba each received an average number of applications of 22 and 23 respectively.

Table 3: Alfred Nzo DM

ALFRED NZO DISTRICT: CAPACITY/APPLICATIONS				
#	Municipality	Planners	Applications (2008– 2012)	Applications (Per Annum)
1	Alfred Nzo District Municipality	1	N/A	N/A
2	Matatiele Local Municipality	2	No info	No info
3	Mbizana Local Municipality	2	44	9
4	Ntabankulu Local Municipality	1	9	2
5	Umzimvumbu Local Municipality	1	33	7
TOTAL		7	86	18

The highest number of applications was received by Mbizana Municipality, with an average of 9 applications per annum.

Table 4: Joe Gqabi DM

JOE GQABI DISTRICT: CAPACITY/APPLICATIONS				
#	Municipality	Planners	Applications (2008– 2012)	Applications (Per Annum)
1	Joe Gqabi District Municipality	2	N/A	N/A
2	Gariiep LM	0	19	4
3	Maletswai LM	1	97	19

JOE GQABI DISTRICT: CAPACITY/APPLICATIONS				
#	Municipality	Planners	Applications (2008– 2012)	Applications (Per Annum)
4	Senqu LM	1	No info	No info
5	Elundini LM	2	179	39
TOTAL		6	313	62

Gariep Municipality currently does not have a Town Planner in their employ. The highest number of applications was received by Elundini Municipality, with an average of 39 applications per annum.

Table 5: Amathole DM

AMATHOLE DISTRICT: CAPACITY/APPLICATIONS				
#	Municipality	Planners	Applications (2008– 2012)	Applications (Per Annum)
1	Amathole District Municipality	3	N/A	N/A
2	AmahlathiLocal Municipality	1	3	1
3	Mbhashe Local Municipality	1	No info	No info
4	MnqumaLocal Municipality	1	20	4
5	NgqushwaLocal Municipality	1	2	1
6	NxubaLocal Municipality	1	5	1
7	NkonkobeLocal Municipality	1	No info	No info
8	Great Kei Local Municipality	0	87	18
TOTAL		9	119	25

The highest number of applications was received by Great Kei Municipality (who do not have a Town Planner in their employ), with an average of 18 applications per annum. Ngqushwa, Amahlathi and Nxuba only received an average of 1 application each per annum.

Table 8: Sarah Baartman DM

CACADU DISTRICT: CAPACITY/APPLICATIONS				
#	Municipality	Planners	Applications (2008– 2012)	Applications (Per Annum)
1	Sarah Baartman District Municipality	2	N/A	N/A
2	Koukamma Local Municipality	0	No info	No info
3	Kouga Local Municipality	1	736	147
4	Baviaans Local Municipality	1	No info	No info
5	Blue Crane Local Municipality	0	65	13
6	Makana Local Municipality	2	36	7
7	Ikwezi Local Municipality	0	No info	No info
8	Camdeboo Local Municipality	1	95	19
9	Ndlambe Local Municipality	1	102	20
10	Sundays's River Local Municipality	0	34	7
TOTAL		9	1 068	213

The highest number of applications was received by Kouga Municipality, at 736 in total and 147 average per annum. Other municipalities such as Camdeboo and Ndlambe also reflect a higher than average number of applications.

Table 6: Buffalo City Metro

BCM: CAPACITY/APPLICATIONS				
#	Municipality	Planners	Applications (2008– 2012)	Applications (Per Annum)
1	Buffalo City MM	18	759	152
TOTAL		18	759	152

Table 6 shows that Buffalo City Metropolitan Municipality has a total of 18 Town Planners in its employ. The Metro has received a total of 759 applications from 2008 to 2012, which translates into an average of 152 applications per annum.

A similar scenario is expected to apply to the Nelson Mandela Metropolitan Municipality. The exact details of the number of applications received and the institutional capacity that exists was not available.

With the exception of the 2 Metropolitan Municipalities that have well-staffed Spatial Planning and Land Use Management offices and that receive higher numbers of land development applications, the average level of capacity and land development activity in balance of municipalities in the province appear to be low.

28% of funded posts for Town Planners at municipalities were reported to be vacant at the time of the assessment.

5.4 SUMMARY: INSTITUTIONAL CAPACITY

The following points are highlighted in relation to the above:

- 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 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 have a professional registered planner in their employ.

From the above, it is clear that capacity at local government level is insufficient to ensure appropriate administration of the planning function throughout the province. The lack of planning capacity at senior management level may explain the perception of planning being ignored or seen as an unnecessary irritation or by-product 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 merits such perceptions.

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.

It is therefore not surprising that the administration of planning and land use management at local government level is far from acceptable. This negative impact of this situation is further multiplied by the additional responsibility placed on local government by the constitutional ruling that confirms planning as a municipal function.

5.4.1 Unstable / dysfunctional local government

In addition to the above description of institutional challenges, political instability and power struggles at local government level is an on-going challenge in many a local municipality (and metro) in the province. It is unavoidable that an unstable political environment will impact on local government administration, with senior level managers often being regarded as “deployees” of political structures and therefore perceived to be directly aligned to one (or more) of the factions that may be at odds with each other at a particular time.

It can be concluded that in a dysfunctional institution, planning has little to no affect and will in all likelihood merely remain a paper exercise with no relevance.

5.4.2 Leadership and administration

The relationships between elected ward councillors, predominantly as members of political parties, and traditional and community leaders within traditional authority and communal areas, is often dysfunctional or strained due to lack of alignment and integration between traditional and local government systems. Failure by government to set in place systems, procedures and guidelines for the integration of local government and community or traditional leadership and administrative systems results in this situation continuing, leading to municipal decisions being challenged and an inability of local government structures to administer areas outside of towns’ commonage boundaries.

5.4.3 Focus on compliance

As a minimum legal requirement in terms of the Municipal Systems Act (Act 32 of 2000), all municipalities are required to formulate a Spatial Development Framework (SDF) Plan as part of their Integrated Development Planning (IDP) process. When considering the information in the section of this report that is dealing with Spatial Planning, it is clear that municipalities focus on compliance by producing SDF’s, but not necessarily on the adequacy of such documents to play a positive role in guiding spatial development. Hence, Planning is often theoretical and impractical (removed from reality), whilst basics issues are being ignored.

5.4.4 Administration and systems not innovative

Technological innovation - There is little evidence of municipalities using technology to maximising 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.

Information management and communication can be greatly improved and processes sped up.

Organisational innovation - With the reported scarcity of well qualified, experience technical staff and the resulting high turn-over of staff at smaller municipalities, the need exists for municipalities to look at innovative ways to overcome these challenges. This may include establishing combined administrative support capacity to improve the execution of functions allocated to them in terms of the constitution. Efforts at District Municipal level to establish support capacity is an indication of a move in this direction, but does not have the direct control a shared services centre may afford member municipalities.

5.4.5 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, in the form of an appeal, 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 behind the reach of most South Africans and can be considered as denying the public the right to fair administration.

5.4.6 Lack of integration results in lack of delivery

Whilst effective planning is required to consider the entire developmental environment that impact 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 within the ambit of 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 having different planning cycles and funding timeframes.
- Departments operating in silos and integration not being a priority.
- Integration compliance not being demanded by higher authority.
- Planning being a systematic and technical process, whilst decisions around allocation of budget and prioritisation of project interventions being made by political structures and therefore often being informed by political expediency.

6 THE CURRENT LEGAL AND POLICY CONTEXT

In seeking to respond with policy and/or legislation to address issues arising from the foregoing discussions, it is crucial that prevailing legal and policy frameworks and related issues and principles that apply in South Africa today inform the Province.

It is emphasised, too, that these legal and policy frameworks do not just emanate locally, however, and should also take into account international best practice and trends in relation to some of the key issues flagged above.

6.1 LEGAL ISSUES & PRINCIPLES

6.1.1 Introduction

‘While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to the common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution

“... does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights].”

It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.’

Chaskalson CJ⁴⁶

⁴⁶ Chaskalson CJ, in *Alexkor Limited and Another v Richtersveld Community and Others (CCT 19/03) [2003] ZACC 18, at [51]*.

'A key piece of work produced by the Commission was a study of the planning laws in place in each province, including laws inherited from pre- 1994 provinces and homelands as well as those designed purely for application in black urban areas. This revealed an extraordinarily complex and inefficient legal framework, with planning officials in all spheres of government having to deal with numerous different systems within the jurisdiction of each province, and indeed within most municipalities. The difficulty of dealing with this legal inheritance compounds the already difficult task of planning for sustainable, integrated and equitable land use and development in South Africa.'

White Paper on Spatial Planning and Land Use Management, 2001⁴⁷

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 indigenous 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, as illustrated by the above quotations.

Whatever the route that is followed in the drafting and implementation process, it will need to be delineated by the relevant provisions of the Constitution.⁴⁸ The underlying democratic values of human dignity, equality and freedom are of primary importance.⁴⁹

6.1.2 Legislative context and principles

The iniquities and confusion created by apartheid planning and land use legislation are well documented in this report and will not be repeated. The promulgation of SPLUMA must be interpreted as an attempt by the national legislature to reform

⁴⁷ Ministry of Agriculture and Land Affairs, 'White Paper on Spatial Planning and Land Use Management- Wise Land Use' (July 2001), <http://www.gov.za/documents/spatial-planning-and-land-use-management-white-paper> (accessed on 11 June 2015).

⁴⁸ It bears repeating that section 2 provides that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

⁴⁹ See section 7(1) of the Constitution, which places the Bill of Rights as the cornerstone of democracy in South Africa and states that it affirms the above democratic values.

South African planning law and to address the lacunae that were opened up after the striking down of legislation such as the Development Facilitation Act 67 of 1995 (DFA)⁵⁰ and the Communal Land Rights Act 11 of 2004 (CLaRA),⁵¹ either as a whole or in part.

Similarly, this report has canvassed, in some detail, the prevalence of customary law in the Eastern Cape and the centrality of indigenous culture and traditional leadership in 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 object to regulate the complexities of planning and land use in the Eastern Cape is a key premise upon which the Green Paper will be 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 is subject to inherent limitations. This is illustrated by some of the case law that informs South African jurisprudence.

It is necessary to note that the terminology, here, will be confined to references to ‘customary law’, which is the term most frequently used by the courts. Whereas the terms, ‘indigenous culture’ and ‘traditional leadership’ potentially encompass a far wider range of issues that could or should be covered by provincial legislation, customary law must be understood as being derived from the social practices that are accepted as obligatory by a community.⁵² 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.

In *Alexkor*, Chaskalson CJ made the observation that

‘... indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. As this court has pointed out in the Ex Parte Chairperson of the Constitutional Assembly: In re

⁵⁰ 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 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (CCT 89/09) [2010] ZACC 11*.

⁵¹ 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*.

⁵² This is the meaning ascribed to the term by various legal academics. See TW Bennett *Customary Law in South Africa (2004)*.

Certification of the Constitution of the Republic of South Africa, 1996:

“[t]he [Constitutional Assembly] cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how... customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.”

In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution.⁵³

The term has often been qualified as *living* customary law, to signify a system that is neither static nor capable of being restricted to any defined set of principles. There is an internal flexibility to the system.

The majority judgment delivered by Langa DCJ in ***Bhe*** describes the contrast between the ‘official’ rules of customary law and the ‘living’ customary law.⁵⁴ The latter is an acknowledgement of the rules that are adapted to fit in with changed circumstances.⁵⁵ The court went on to observe that

‘[t]he difficulty lies not so much in the acceptance of the notion of “living” customary law, as distinct from official customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights.’

The fluidity and evolutionary nature of an unwritten set of values and norms was further emphasised in the treatment of CLaRA by the Constitutional Court in ***Tongoane***. Here, Ngcobo CJ warned of the consequences of attempting to contain customary law within the ambit of legislation and remarked that

‘[t]he argument by Parliament that communities are entitled to incorporate the indigenous rules of land tenure into the rules to be made under CLaRA misses the point. Were this to happen, it would amount to the codification of indigenous law. Therefore, whether the community rules adopted under the provisions of CLaRA replicate, record or codify indigenous law or represent an entirely new set of rules which replace the indigenous law –based system of land administration, the result is the same: a substantial impact on the indigenous law that regulates communal land in a particular community.’

⁵³ ***Alexkor***, at paragraphs [52] and [53].

⁵⁴ See ***Bhe and Others v Magistrate, Khayelitsha and Others (CCT 49/03) [2004] ZACC 17***, at [87].

⁵⁵ *Ibid.*

Ncobo CJ held that

'... CLaRA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land. It replaces both the institutions that regulated these matters and their corresponding rules.'

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.⁵⁶

The same lesson must be applied when approaching the drafting and implementation of provincial legislation for a spatial planning and land use management system in the Eastern Cape. Concepts such as customary law, indigenous culture and traditional leadership require an acknowledgement of their inherent flexibility and the concomitant limitations imposed on any legislative endeavours.

It would be remiss not to draw attention to the importance of establishing legal certainty and predictability as cardinal principles of the drafting process. Mindful of the potential impact of planning law reform not only on the public administration but also, more significantly, the socio-economic well-being of communities located in the Eastern Cape, the development of further legislation that merely has the effect of exacerbating the complexities and inefficiencies of the planning law inheritance would be untenable. The dangers of this have been highlighted in several forums. Prior to the promulgation of SPLUMA, the South African Cities Network observed that

*'[t]he combined effect of the apartheid fixation with separate legal systems for areas allocated to different races, the re-demarcation of local and provincial boundaries and the absence of meaningful post-1994 law reform, creates a situation in which there are simply too many laws applicable in any one municipality or province regulating the same activities, i.e. land use and development. Some provinces are worse off than others, but the fundamental commonality is that there are too many laws to be managed effectively, especially in a context of weak and stretched professional and administrative capacity.'*⁵⁷

⁵⁶ 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.

⁵⁷ See G Abrahams and S Berrisford, 'Addressing the Crisis of Planning Law Reform in South Africa' (South African Cities Network, January 2012), at 12.

At the time, it was pointed out that there were no less than 13 town planning and related laws that were actively administered by the Eastern Cape provincial administration.⁵⁸

The Department of Rural Development and Land Reform has expressed the same anxieties. To that effect, it indicated unequivocally at an Urban LandMark conference held in April 2012 that amongst the desired outcomes that accompanied the drafting of SPLUMB, prior to its enactment, were

'[a] coherent regulatory framework on land use management, land development and [the] planning system... [and a] predictable and transparent regulatory system'.⁵⁹

It would be a disservice to both administrator and community alike to ignore or delegitimise the above concerns for purposes of the current process.

6.1.3 Drafting parameters and issues

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.'

In other words, SPLUMA has been enacted as the framework for all planning law in South Africa. Any legislation that has survived the promulgation of SPLUMA must be measured against the provisions of SPLUMA for such legislation to be capable of application and enforcement.

The extent to which section 2(2) will be applicable to future planning law, e.g. provincial legislation for a spatial planning and land use management system, will quite possibly form the subject of litigation. The wording of the text in section 2(2) creates some ambiguity inasmuch as the drafters added the qualifier, *'no legislation not repealed by this Act'* (emphasis added). This could be interpreted narrowly as a

⁵⁸ *Op cit*, 13.

⁵⁹ See the presentation prepared by the Department of Land Affairs for the Urban LandMark conference, 'Investing in Land and Strengthening Property Rights', April 2012. The document is available at http://www.urbanlandmark.org.za/conference/2012_presentations/sunday.pdf (accessed on 12 June 2015).

reference only to such legislation as was in operation on the date upon which SPLUMA came into effect; alternatively, a wider interpretation would result in a reference to *all* legislation. The surest way to test the boundaries of the meaning to be ascribed to the text in question will be in the High Court, as is likely to happen. For immediate purposes, a prudent approach would be to accept that section 2(2) was intended to refer to all legislation, including provincial legislation.

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–

- (e) matters contained in Schedule 1 to this Act;*
- (f) matters of provincial interest;*
- (g) 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*
- (h) 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 wording of the above text suggests that a certain amount of leeway has indeed been given for the drafting of provincial legislation to address issues that are pertinent to the province concerned. The key condition attached to the above authority is that any such provincial legislation must be '*consistent*' or '*not inconsistent*' with SPLUMA. The parameters are there; precisely where they lie will only be determined in due course by the courts.

With regard to Schedule 1, the wording of the text reveals additional subtleties. At first glance, the language content appears to be directory (permissive), rather than mandatory:

'SCHEDULE 1

MATTERS TO BE ADDRESSED IN PROVINCIAL LEGISLATION

Provincial legislation regulating land development, land use management, township establishment, spatial planning, subdivision of land, consolidation of land, the removal of restrictions and other matters related to provincial planning and municipal planning may–'

The drafters' insertion of the word, '*may*', read with the provisions of section 10(1), suggest a directory provision. However, the title of the schedule, '*Matters to be*

addressed...' (emphasis added), suggests a mandatory requirement. As a general guide, 'may' does not signify a mandatory requirement, but the courts frequently interpret words such as 'may' as 'must'.⁶⁰ Again, this is an issue that cannot be decided immediately; clarity will only emerge in time.

The above provisions provide the broad drafting parameters. The task of identifying the gaps in SPLUMA for purposes of provincial legislation for a spatial planning and land use management system is an exacting and meticulous exercise that requires a great deal of care. It has been observed that

*'[a]ny legislative intervention that will inevitably be systematically and consistently challenged on grounds of constitutional and legal validity needs to be very carefully analysed before it is enacted. Not to do that risks the entire enterprise collapsing, as has been the case with the DFA...'*⁶¹

During the legislative process, an amended version of the Bill was published in April 2012.⁶² Nevertheless, considerable criticism was levelled at SPLUMB. Much of this is still relevant. Comments received from various stakeholders included the following:⁶³

- SPLUMB promoted the fragmentation of planning legislation.
 - It did not repeal the overlapping provisions of the Local Government: Municipal Systems Act 32 of 2000 (MSA) and the Regulations published in terms thereof in relation to municipal spatial development frameworks.
 - It ignored provincial planning legislation and assumed that all provincial planning laws would be repealed and that provinces would adopt new planning laws to address matters that were not addressed in SPLUMB because of a lack of time.

⁶⁰ See *Veriava v President, SA Medical and Dental Council 1985 (2) SA 293 (T)*. Also see the discussion to this effect in *C Hoexter Administrative Law in South Africa (2nd Edition, JUTA 2012)*, at 49.

⁶¹ S Berrisford 'Unravelling Apartheid Spatial Planning Legislation in South Africa- A Case Study' (African Centre for Cities; School of Architecture, Planning and Geomatics; University of Cape Town, June 2011), available at <http://urbandevlopment.yolasite.com/resources/Unravelling%20Apartheid%20Spatial%20Planning%20Legislation.pdf> (accessed on 12 June 2015), at 260.

⁶² SPLUMB was published in terms of GN No. 357 on 26 April 2012.

⁶³ The comments that follow were made by the Legal Services Division of the KwaZulu-Natal Department of Co-operative Governance and Traditional Affairs. They are available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/120821kzncogta_0.pdf (accessed on 12 June 2015).

- The empowerment of municipalities to prescribe procedures with regard to applications for consent in terms of a scheme or for the variation of land use conditions meant that an applicant would also need to be familiar with the procedures in national and provincial legislation.
- SPLUMB diminished the role of municipal councillors.
 - Municipal councillors would have no involvement in the approval of major developments like low income housing developments, gated estates, shopping centres, office blocks, industrial developments and airports.
- The tribunal system was impractical, inefficient and unaffordable.
 - A single development could require the approval of three different sources of authority: the municipality, the tribunal and the authorised person.
 - The running costs of a tribunal could be prohibitive because it required the services of persons who were not in the full-time employment of a municipality.
 - The system could unduly delay development because of having to take into consideration the existing backlog of applications that were lodged previously.
- The executive committee of a municipality was not an impartial appeal body.
 - Whether the executive committee or the executive mayor had sufficient impartiality to hear an appeal was questionable. This was because an application for a development may involve municipal land; furthermore, a municipal council will usually have prior knowledge of major developments.
- The right of appeal was unnecessarily narrow.
 - No right of appeal was available against a decision by a municipality to adopt or amend a scheme.
 - An interested person whose rights were affected by the decision of a tribunal could appeal, but he or she must be a person having a pecuniary or proprietary interest which was adversely affected or that he or she would be adversely affected. Such a person could not appeal on the basis of planning grounds, e.g. the adverse effect on cultural heritage, traffic, engineering services, community facilities, the environment, agricultural resources, etc.

- The right to appeal in terms of SPLUMB appeared to ignore the wider rights afforded under section 33 of the Constitution.
- There was a possibility of unintended consequences.
 - SPLUMB required the alignment of decisions taken by a municipality on the adoption or amendment of a scheme with other organs of state. However, it did not require the alignment of decisions taken by a tribunal with the decisions of other organs of state.
- SPLUMB failed to address other matters.
 - It did not rationalise national planning legislation. Whereas it repealed some planning laws, it did not deal with legislation such as the Upgrading of Land Tenure Rights Act 112 of 1991 or the Provision of Land and Assistance Act 126 of 1993, which both contained constitutionally invalid planning provisions.
 - SPLUMB did not cater for low income development; it should have allowed for the deletion of redundant conditions of title; etc.

Further comments are listed below:⁶⁴

- SPLUMB failed to include space for alternative development paradigms.
 - It did not address, adequately, the complex reality of the South African rural landscape. There was a need for planning law to provide effective mechanisms to facilitate the participation of communities in their own development and on their own terms. Any legislation that dealt with land use management and planning had to prioritise rural communities who were and continued to be the most marginalised and vulnerable.
 - No effect had been given to section 25(6) of the Constitution with regard to ensuring security of tenure for people on communal land.
 - Rural communities who shared land and resources but who fell outside traditional leadership structures were ignored when traditional councils started speaking on behalf of rural South Africa. Giving a traditional council authority to participate in the development, preparation and adoption or amendment of a land use scheme by a municipality,

⁶⁴ The further comments were submitted by the Legal Resources Centre (LRC) and are available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/120724lrc_0.pdf (accessed on 12 June 2015).

- allowed for an undemocratically elected body to participate in an administrative decision that should vest exclusively in a municipality.
- There was a need to facilitate the participation and meaningful involvement of the communities themselves in decision making about development and the direct participation in development projects that would have an impact on them.
 -
 - SPLUMB failed to recognise and promote customary forms of tenure.
 - Communal tenure was excluded from the ambit of SPLUMB. A development framework that pretended that there was no separation between the status of customary or communal tenure and the common law property system would only entrench the undermining of the former.
 -
 - It failed to take into account the principles of administrative justice.
 - SPLUMB did not incorporate the principles of lawfulness, reasonableness and procedural fairness. No indication was given that the conduct of tribunals was subject to the above principles, which lie at the heart of administrative justice.

It would need to be determined in time to what extent the final version of SPLUMA has dealt adequately with the above concerns.

However, the comments made by the LRC, immediately above, are particularly pertinent for the purposes of this report. The concern that SPLUMA does not fully recognise the relevance of indigenous culture, customary law and traditional leadership in relation to spatial planning and land use management underpins the rationale for the anticipated Green Paper.

6.2 SPLUMA: WHAT DOES IT SET IN PLACE?

The objects and purpose of SPLUMA are set out as follows: -

ACT

To provide a framework for spatial planning and land use management in the Republic; to specify the relationship between the spatial planning and the land use management system and other kinds of planning; to provide for the inclusive, developmental, equitable and efficient spatial planning at the different spheres of government; 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; to address past spatial and regulatory imbalances; to promote greater consistency and uniformity in the application procedures and decision-making by authorities responsible for land use decisions and development applications; to provide for the establishment, functions and operations of Municipal Planning Tribunals; to provide for the facilitation and enforcement of land use and development measures; and to provide for matters connected therewith.

As is clear from the wording used, SPLUMA is conceived of and presented as a “Framework Act”; that is, legislation that may be used to direct further processes and law-making in due course, including Provincial legislation dealing with spatial planning and land use management (as set out in Schedule 1 of the Act).

However, it is also clear that SPLUMA is to be implemented, in the first instance, as a national Act to direct the activities and constituent processes of spatial planning and land use management across the country as a whole. As such, it needs to be taken account of and the implications of its implementation need to be understood as these apply to the Eastern Cape.

In the first instance, SPLUMA seeks to set in place a “Spatial Planning System” that shall apply across South Africa. This system comprises of the following elements: -

1. Spatial Development Frameworks to be prepared and adopted by National, Provincial and Municipal spheres of government;
2. Development Principles and Norms & Standards that must be taken as guides to all spatial planning, land use management and land development activities undertaken;

3. The management and facilitation of land use through the mechanism of Land Use Schemes; and
4. Procedures and processes for the preparation, submission, and consideration of land development applications (amendments of Land Use Schemes) and related processes.

Furthermore, of importance is the continuation of the precedent set by the Development Facilitation Act (Act 67 of 1995) that planning should be principle-based and normative rather than prescriptive and deterministic. In this regard, SPLUMA sets out the following Development Principles: -

(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; and
- (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.

Then, in seeking to apply practically the provisions of SPLUMA generally, Section 8 of the Act requires the Minister of Rural Development & Land Reform, after consultation with the provincial and municipal spheres of government, to prescribe Norms & Standards as follows:

- They must reflect national policy and related national policy priorities and programmes applicable to land use management and land development
- They must promote social inclusion, spatial equity, desirable settlement patterns, rural revitalisation, urban regeneration and sustainable development

- They must ensure that land use management and land development processes (including applications, procedures and timeframes related thereto) are efficient and effective
- In addition, the Norms & Standards to be prescribed by the Minister must, in terms of Section 8(2)(d), include the following:
 - A report on, and an analysis of, existing land use patterns
 - A framework for desired land use patterns
 - Existing and future land use plans, programmes and projects relative to key sectors of the economy; and
 - Mechanisms for identifying strategically located vacant or under-utilised land and for providing access to and use of such land.
- The Norms & Standards must also set in place a standardised symbology to be used in the compilation of maps and diagrams at varying scales
- They must differentiate between different geographic areas, types of land uses and development needs
- Finally, they must provide for the effective monitoring and evaluation of compliance and enforcement of SPLUMA.

It may be noted in regard to Sections 8(1) – (2) of SPLUMA that these enjoin the Minister (that is, there is no choice and the actions MUST be done in terms of the law) to provide a high level of input and direction in regard to certain critical issues, which may prove challenging at the scale of operation of the national Act.

6.2.1 SPLUMA in Relation to Legislation Relevant to Spatial Planning and LUM Processes

SPLUMA is intended to sit at the centre of a range of activities that make up the overall processes of spatial planning and land use management. As such, SPLUMA must align with and give effect to the provisions related to planning and associated activities of the state as provided for, set out or prescribed in the following core legislation (and applicable Regulations stemming from some of these laws): -

- The Constitution of the Republic of South Africa (Act 108 of 1996)
- The Environment Conservation Act (Act 73 of 1989)
- The National Environmental Management Act (Act 107 of 1998)
- The Municipal Structures Act (Act 117 of 1998)
- The Promotion of Administrative Justice Act (Act 3 of 2000)
- 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 Intergovernmental Relations Framework Act (Act 13 of 2005)

In essence, in making provision for the establishment of a unitary spatial planning and land use management system to operate across South Africa, SPLUMA provides the basis for engaging in relevant processes to formulate the following: -

- A National Spatial Development Framework
- Provincial Spatial Development Frameworks
- Regional Spatial Development Frameworks
- Municipal Spatial Development Frameworks
- Municipal Land Use Schemes

SPLUMA also sets in place (or harnesses the provisions of other legislation as listed above) the following: -

- Processes to render support and monitoring on an inter-governmental basis
- Processes to prepare Spatial Development Frameworks

- Institutional arrangements and procedures to give effect to land use management and land use scheme amendments
- Institutional arrangements and procedures to deal with appeals against decisions regarding land use scheme amendments

A potentially crucial element of SPLUMA in the context of the Eastern Cape is the provision made therein at Section 23(2) for harnessing relevant sections of the Municipal Structures Act and the Traditional Leadership & Governance Framework Act to require municipalities to allow the participation of traditional councils in their areas of jurisdiction in the land use management function⁶⁵.

6.2.2 SPLUMA and Existing Provincial Planning Legislation

At the outset, it should be noted that SPLUMA (Act No. 16 of 2013) does not repeal any of the existing Provincial Acts and Ordinances applicable in the Province.

⁶⁵

Local Government Municipal Structures Act, Act 117 of 1998

In terms of Section 81(3) of the Municipal Structures Act 117 of 1998: "Before a municipal council takes a decision on any matter directly affecting the area of a Traditional Authority, the council must give the leader of that authority the opportunity to express a view on the matter".

Section 81(4) of the MSA 117 of 1998—"The MEC for local government in a province, after consultation with the provincial House of Traditional Leaders, may by notice in the Provincial Gazette –

*Regulate the participation of traditional leaders in the proceedings of a municipal council;
Prescribe a role for traditional leaders in the affairs of a municipality"*

Traditional Leadership and Governance Act 2005, (Eastern Cape) (Act No.4 of 2005)

Section 5- A traditional community.....must submit to the Premier the names of members of its traditional council, and the Premier must, by notice in the Gazette, recognised such traditional council....

Withdrawal of recognition of traditional communities

*Section 13 (1) The Premier may consider the withdrawal of the recognition of a community as a traditional community as provided for in section 5, only where-
The community concerned requests that its recognition as a traditional community be withdrawn;*

Chapter 3, Section 15(3) A traditional council may enter into a service delivery agreement with a municipality in accordance with the Local Government Municipal Systems Act, 2000 (32 of 2000), and any other applicable legislation.

Given the fact (as noted in sections above) that there is a complex array of legislation that applies to spatial planning and land use management in the Eastern Cape at present, it will be necessary to establish that SPLUMA takes precedence over the prevailing Acts and Ordinances and that it, therefore, legally will become the single applicable instrument for carrying out spatial planning and land use management functions once it (SPLUMA) is implemented.

In this regard, the first draft of the Spatial Planning and Land Use Management Regulations that was published in July 2014 provided for a comprehensive land use management system which would have enabled municipalities to use it as enabling legislation to bring uniformity in the varying (and confusing) range of procedures prescribed by existing Acts and Ordinances. However, in October 2014, the National Coordinating Forum decided that only framework regulations should be published and as a result of the last-mentioned decision, the published Spatial Planning and Land Use Management Regulations contain no detailed decision-making mechanisms pertaining to spatial planning and land use management and development.

The adopted approach instead now requires municipalities to formulate spatial planning land use management by-laws and to develop processes in support thereof. This process is presently (April/May 2015) underway in the province, in anticipation of the implementation of SPLUMA in due course.

6.2.3 SPLUMA and Future Provincial Legislation on Spatial Planning and LUM

Refer to Section 6.1.3 above.

6.3 ISSUES OF NOTE DRAWN FROM INTERNATIONAL DISCOURSES ON ISSUES RELEVANT TO SPATIAL PLANNING & LAND USE MANAGEMENT IN EC

As already noted above, new planning legislation for the Province is guided by – and influenced by – a variety of relevant legislation; in particular the South African Constitution, the Traditional Leaders and Governance Framework Acts of 2003 (national) and 2005 (provincial)(TL&GFA) and the Spatial Planning and Land Use Management Act (SPLUMA), 2013 to name but a few.

However, in addition to the local legislative and policy context, the Green Paper process also needs to reflect on the international discourse and what the obligations are for the province stemming from this, when considering drafting new provincial planning legislation.

Sections 231 - 234 of the Constitution sets out the obligation to adhere to international agreements and International law, as follows:

- An international agreement of a technical, administrative or executive nature entered into by the national executive, must be tabled in the National Assembly and National Council of Provinces within a reasonable time and binds the Republic.
- Any other international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.
- Any international agreement becomes law in the Republic when it is enacted into law by national legislation.
- A self-executing provision of an international agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- The Republic is bound by international agreements which were binding on the Republic prior to 18 December 1996.
- Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

6.3.1 Changing Perspective On What Constitutes The Well-Being Of People

As a start, one of the key shifts in international perspective is an emphasis on, when considering well-being, to look beyond the material elements only and to also reflect on wellbeing in terms of social and cultural elements.

As already acknowledged in the analysis, past spatial development strategies that impacted on the spatial development of the province included concepts such as betterment, Group Areas (separate development) and other forms of imposed restructuring of space, often coinciding with legalised dispossession (through restrictions to own or access land, restrictions on the use of land, reductions in size of land, etc.). These spatial policies were largely devoid of recognition or respect for cultural or human sentiment, which led to a loss of identity, dignity and respect and an understandable mistrust of planning interventions, in general, among a sizable number of communities in the province.

6.3.2 Recognition Of The Need For Appropriate Knowledge And Learning

By acknowledging this past, we are now required to ensure that new provincial legal planning framework will place people (including their economic, social and cultural dimensions) at the centre of any deliberation involving planning and land administrative action.

In order to achieve this effectively, we need to gain appropriate knowledge stemming from an appropriate process of engagement. This requires an ethos embedded in dialogue, recognition, dignity and respect, aiming at empowering existing communal structures to continue with their mandate of both governance and custodianship. We can no longer assume that the knowledge gained from theory in academic curricula is sufficient to appropriately inform our approach to planning and management of space.

6.3.3 Paradigm Shift

A departure from what might be expected from a typical planning perspective is the recognition that in many traditional cultures, land may have a significantly different meaning and purpose from what it may have in more modernised western cultures. Over time, space becomes interwoven and hence encoded by the culture of the residents that occupy such space (be it modern cultures, mixtures of cultures or a more traditional homogeneous cultural make-up). The colonial notion of 'terra nullius'

(empty land) must be avoided at all cost.

This acknowledgment is a significant shift from the way land is perceived in what can be described as “the western model of land”, where it is being viewed as purely economic commodity that can be bought and sold.

Hence, moving forward towards preparing new planning legislation, it is necessary to recognise that land and access to land may be viewed in a wide variety of ways, from being considered as a birth right and in its strictest sense, something that may not or cannot be bought or sold, to being considered as something you only have a right to as a recognised member of a community, to it being a purely commercial commodity. In each case, the situation requires knowledge of distinct cultural practices and lifeways. Such knowledge, along with scientific knowledge is critical to enable successful management of any space and to enhance the quality of life of those within such space.

6.3.4 Recognition Of The Significance Of Culture And The Rights Of Indigenous Peoples And Minority Groups

It is culture, self-awareness and thoughtfulness that enable us to rise above our most primitive instincts to view other ethnicities and religions without stereotyping. Mike Berger

The South African Constitution mandates the protection of cultural rights together with the spatial manifestations thereto.

At the Mondiacult Conference held in Mexico in 1982, culture was described as: *‘the whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs’.*

The UNESCO World Report No.2 (2009) stresses that the subject of cultural diversity has emerged as a key concern for the 21st Century. As a complete opposite to the concept of homogeneity and cultural assimilation, the idea of difference and the acceptance thereof has in recent years gained prominence in the global debate.

Structuring of space is also recognised as being a social construct, requiring the recognition of rights (including cultural rights). This by implication demands due consultation and agreement in order to enable culture to manifest itself in space.

Ideas that flowed from the 2001 UNESCO Universal Declaration on Cultural Diversity (DCD) that support this realisation include:

- To channel diversity towards constructive pluralism.

- To promote harmonious interaction between cultures.
- To promote equality and inclusiveness.
- Allowing individuals to enjoy the security of individual and plural identities within an acceptable social and democratic framework.

In order to allow for communities or groups (including minorities) to express themselves by contributing to the structuring of the space within which they exist, it is critical to ensure that future Spatial Planning and Land Use Management legislation in the province must:

- Recognise the multiple cultures and associated identities present in the Province.
- Acknowledge the right of each to subscribe to a future that realises their own vision.

The United Nations Declaration of the Rights Of Indigenous Peoples (UNDRIP) has a total of 46 Articles which seeks to address all legitimate issues concerning culture, its specific norms and standards, worldviews and spatial dimensions and related considerations. The Preamble found in the Annex of UNDRIP reads inter alia:

1. That indigenous peoples are equal to all other peoples, while recognising the right of all people to be different, to consider themselves to be different and to be respected as such;
2. That all peoples contribute to the diversity and richness of civilisations and culture which constitute the common heritage of humankind
3. That all doctrines, policies and practices based on, or advocating superiority of peoples or individuals on the basis of natural origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust;
4. That indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their needs and interests;
5. The urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their right to land, territories and resources;
6. Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions and to promote their development in accordance with their aspirations and needs; and

7. Recognising that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.

Similar to UNDRIP (Article 3), Section 235 of the South African Constitution recognises the notion of the right of self-determination of any community sharing a common cultural and language heritage.

6.3.5 Free, Prior And Informed Consent (FPIC) As An International Human Right Standard

The concept of 'free, prior and informed consent' (FPIC) was first mooted in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the Vienna Declaration and Programme of Action. It is regarded as an international human right standard that derives from the collective rights of indigenous peoples to freely make their own decisions through their freely chosen representatives and customary values and institutions.

Consent is therefore a critical element of the decision making process and by implications far more than a procedural mechanism for consultation. The benefits that FPIC holds include, inter alia:

- Minimise risk of disputes that can escalate into conflict, loss of investment opportunities, infrastructure and property
- Increase the prospects of project success, and protecting community livelihoods
- Strengthening and protecting financial viability and investment prospects, communal governance structures, the prospects of sustainability and social cohesion, individual and community identity and collective attachment to the geographic area
- Create an appropriate platform for learning (recording and retaining indigenous knowledge and skills), planning, implementation and feedback
- Respect and co-operation and To create a stable region that contributes to both the nation and provincial state

6.3.6 Inter-Cultural Dialogue And Endogenous Development

Logically then, an important starting point to planning and land use management and key element to ensure sustainable development is to engage in a process of inter-cultural dialogue. The UNESCO World Report (2009) suggests that the ability to engage in meaningful inter-cultural dialogue is dependent on inter-cultural competencies such as the ability to listen, cognitive flexibility, empathy, humility and hospitality. The Report also makes the point that contrary to widespread assumption, there is no prescribed pathway for the development of a society (and hence no single development model that must be applied). Similarly, profit maximisation and the accumulation of material goods are no longer regarded as the only measures of success.

The concept of endogenous development is closely related to the above described inter-cultural dialogue. It entails a development approach based on local people's criteria for development that embraces their material, social and spiritual wellbeing. Likewise, it seeks to engage in participatory approaches that integrates local knowledge.

6.3.7 Protocols And Cultural Mapping

For both inter-cultural dialogue and endogenous development, it becomes critical to devise and follow appropriate protocols to ensure credibility. Protocols can essentially be described as statements of self-determination that confirm that target communities are more than "stakeholders whose views may or may not be taken into account" and that their rights are recognised in law. Protocols should therefore enable communities to articulate their norms and standards in their own voice.

In terms of prevailing planning practice, mapping generally follows the prescripts of modern cartographic rules and standards, with set information categories that relate mainly to physical and cadastral elements. As noted under the heading of "*Paradigm Shift*", over time, space becomes interwoven and hence encoded by the culture of the residents that occupy such space. It is critical to ensure that the cultural landscape (derived from inter-cultural dialogue or endogenous development processes that enables norms and standards to be expressed in the voice of a local community) can be spatially represented and articulated. As stated before land and its use is embedded in culture.

A number of important lessons concerning cultural mapping were documented during a workshop to assist UNESCO staff and indigenous trainers in 2006. These include:

1. Cultural and participatory mapping help to strengthen indigenous and local peoples' capacities to express and defend their points of view, cultural practices, rights and aspirations. This is particularly critical in the context of globalisation where diverse ways are under threat.
2. The making of the map legend for cultural participatory maps creates opportunities for mutually beneficial inter-cultural dialogue as well as the recognition of local and indigenous voices
3. Cultural maps are valuable tools for the mapping of protected areas and cultural heritage sites (in both the community's and official perspective)
4. Cultural mapping practices create the prospect for better understanding and negotiation between stakeholders
5. Cultural mapping furthers the aims and objectives of Free Prior Informed Consent
6. Cultural and participatory mapping are unique tools for making intangible heritage visible in its territorial and resource context
7. The processes of conducting these mapping exercises brings to the fore issues of ethics, the safety and wellbeing of communities and the protection of intellectual property rights.
8. The cultural mapping process is a critical space where indigenous or local people and the state can come to know each other and redefine relationships that benefit all.

7 Synthesis of Issues

The debate around spatial planning and land use management – what these activities *are for* – is a dynamic one that continues to play itself out in different ways across the globe.

It is clear that, in the South Africa context, spatial planning and land use management was historically used in fairly narrow ways, mainly to achieve outcomes that may have fairly been said to be integral to the original, early 20th century conception of planning. That is to say, spatial planning in South Africa was used mainly to exert control in enforcing the separation of land uses into generic land use conglomerations (collections of land uses) that are “harmonious” and in keeping with each other; that do not detract from neighbouring land values (both use values/amenity and economic value); and that are so arranged so as to further the objectives of a future “blueprint” vision for an area. These basic concepts were also tailor-made for use in engineering (socially and spatially) the separation of races and classes in post-colonial and Apartheid-era South Africa.

Today, spatial planning and land use management are acknowledged to be crucial public sector activities that are central to most endeavours to secure socio-economic and environmental sustainability. A modern, functional planning system must, accordingly, provide a platform for people (societies, communities and individuals) to deal with significant challenges such as increasing socio-economic globalisation and connectivity; technology-driven economic development processes that are rapidly changing the face of work and the needs of societies for spaces to do different activities in; climate change and related dynamics and impacts; and population movements (migration) in response to changes in climate, political economy, war, famine etc. As such, planning needs to be seen in far broader and more flexible terms than merely an activity that tries to create order (orderly patterns of land uses).

Planning, in fact, needs to be acknowledged as an ongoing, iterative activity that is, fundamentally, a social one: that is planning, to be effective, needs to be sustained as a set of activities that continually engages with people in trying to assist them in dealing with the social, economic and environmental challenges each community encounters.

Therefore, the challenge for legislation to set in place new ways of doing spatial planning and land use management in the Eastern Cape is to respond to the specific needs of communities living in this province. The legislation must, in effect, provide for a planning system that is able to deal in a more sensitive and responsive manner with a large range of different circumstances and people with diverging worldviews.

In this regard, the following issues and informants are drawn from the preceding discussions and are flagged as being crucial to address and/or resolve in the process to create a new Eastern Cape law on spatial planning and land use management that meets the needs of all communities resident in the province.

7.1 CREATING A RESPONSIVE AND FUNCTIONAL PLANNING SYSTEM

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, social and 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, principles decided on behalf of people and parachuted onto them.

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

- *Free and prior informed consent* – 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 a clear 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 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;
- *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 resident in the subject area and

this may require special processes, procedures and protocols to be undertaken as part of the planning processes, including cultural mapping, resource mapping etc.;

- *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”).*

7.2 LEGAL DRAFTING ISSUES AND PRINCIPLES

The following are highlighted as some issues that need to be addressed from a technical/legal standpoint: -

- The need to provide for processes of incremental introduction of spatial planning and development of land use management schemes and allied procedures in different contexts;
- The need to provide for flexibility and alternative operational designs for both institutions as well as the form and provisions of plans and schemes (as well as other matters related to land administration in general, including standards for land surveying, land tenure arrangements, ownership and use right registrations etc.;
- Thus, definitions need to be very carefully constructed in relation to existing legislation (e.g. Deeds Registries Act, Land Survey Act, Interim Protection of Informal Land Rights Act etc.) including the meaning in law of terms such as:
 - Rights (and rights holder, rights user etc.)
 - Record
 - Demarcate
 - Survey
- Dealing with the potential issues raised by SPLUMA’s provisions for appeal in land development matters

As a whole, it will be critical for a careful analysis of SPLUMA to be undertaken so that the full extent of the gaps and issues to which it gives rise are properly identified and acknowledged, prior to embarking upon the legislative process for the Eastern Cape. To that effect, it is also helpful to call to mind some of the insights that have been contributed recently by practitioners in the face of planning law reform:

*'... it is worth reflecting that one of the hallmarks of much colonial-era legislation was that it was heavy on procedural detail attempting to provide for any eventuality, no matter how improbable. This provides a legal minefield. Even where a provision has not been fully implemented or indeed implemented at all if it remains on the law book it can trip up subsequent efforts to, in this case, effect law reform. No matter how compelling a positive vision might be a process of law reform has to tackle the minutiae of inherited legislation, go through it in detail and determine whether it is appropriate that it remain, that it be changed or that it be repealed. In each of these cases, though, careful thought has to be given to the implications of that choice.'*⁶⁶

There is a real need to strike a balance between recognising and giving effect to indigenous practices and customary law, on the one hand, and avoiding the perpetuation of the complexity and inefficiency of the Eastern Cape's planning law inheritance, on the other. This ought to form the overriding objective of the drafting exercise for the provincial legislation required.

⁶⁶ S Berrisford (n 16), 262.