# Integrating planning and environmental issues through the law in South Africa: learning from international experience

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## DECLARATION

I declare that 'Integrating planning and environmental issues through the law in South Africa: learning from international experience' is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete reference.

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## ABSTRACT

South African law treats planning and the environment separately, causing considerable problems when developing land. Concerns in this regard are worldwide and various approaches have been adopted to solve them. This research seeks to explore what legal solutions can be provided using some international examples, fitting them within the unique governance, historical and legal context of South Africa.



**Key word**s: spatial planning law, environmental law, integration, intergovernmental cooperation

## LIST OF ABBREVIATIONS

| | |
|---|---|
| AEE | Assessment of environmental effects |
| ANC | African National Congress |
| ASGISA | Accelerated and Shared Growth Initiative |
| CoGTA | Department of Cooperative Governance and Traditional Affairs |
| DCO | Development Consent Order |
| DEAT | Department of Environmental Affairs and Tourism |
| DFA | Development Facilitation Act 67 of 1995 |
| DPC | National Development Planning Commission |
| DRDLR | National Department of Rural Development and Land Reform |
| ECA | Environmental Conservation Act 73 of 1989 |
| EIA | Environmental impact assessment |
| EIP | Environmental implementation plan |
| EMF | Environmental management frameworks |
| EMP | Environmental management plan |
| HIA | Heritage impact assessment |
| ICMA | National Environmental Management Integrated Coastal Management Act 24 of 2008 |
| IDP | Integrated development plan |
| IEM | Integrated environmental management |
| IPC | Infrastructure Planning Commission |
| IRFA | Intergovernmental Relations Framework Act 13 of 2005 |
| KZNPDA | KwaZulu-Natal Planning and Development Act 6 of 2008 |
| LDO | Land development objectives |
| LFTEA | Less Formal Township Establishment Act 113 of 1991 |
| LUPO | Cape Land Use Planning Ordinance 15 of 1985 |
| MDG | Millennium Development Goal |
| MEC | Member of Executive Council |
| NCPDA | Northern Cape Planning and Development Act 7 of 1998 |
| NDPC | National Development and Planning Commission |
| NEMA | National Environmental Management Act 107 of 1998 |
| NEPA | National Environmental Policy Act, America |
| NHRA | National Heritage Resources Act 25 of 1999 |
| NGO | Non-governmental organisation |
| NIMBY | Not in my backyard |
| NPC | National Planning Commission |
| PEIS | Programmatic environmental impact statements |
| RDP | Reconstruction and Development Programme |
| RMA | Resource Management Act 1991 |

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|---|---|
| S&EIR | Scoping and environmental impact reporting |
| *SAJELP* | South African Journal of Environmental Law and Policy |
| *SAPL* | South African Public Law |
| SDF | Spatial development framework |
| SEA | Strategic environmental assessment |
| SPLUMB | Spatial Planning and Land Use Management Bill Proc. R 280 *Government Gazette 34270* of 6 May 2011 |
| TBVC | Transkei, Bophuthatswana, Venda and Ciskei |
| TCPA | Town and Country Planning Act 1990 |
| TCPA EIA | Town and Country Planning (Environmental Impact Assessment) Regulations 1824 of 2011 |
| *TSAR* | Tydskrif vir die Suid-Afrikaanse Reg |
| WCED | World Commission on Environment and Development |

**TABLE OF CONTENTS**

# CHAPTER I: INTRODUCTORY CHAPTER

## 1.1 SUMMARY OF THE PROBLEM

There is a fine mesh of regulations that governs the development of land in South Africa. These relate to different sectors, are administered by different institutions and operate within different spheres of government. Two key sectors are planning[1] and the environment. Laws in these two areas regulate the land development process in a number of ways: First, through various plans, and secondly through permissions or authorisations, obtained from decision-making bodies that have a mandate to receive, consider and rule on the merits of the land development applications. Traditionally, both planning and the environment have operated in parallel to each other with few effective attempts at integration.

The current state of affairs creates a number of problems. Briefly, plans are created and implemented in silos. There is also no streamlining of decision-making in land development, and there is enormous potential for legal conflict. This is because of the different ways of interpreting laws under both areas. The varied permissions may also be confusing for all concerned. Public participants, for example, often find the documentation associated with two different development proposals confusing, overwhelming and duplicitous. Often this duplication can be abused by objectors to stall socially driven development. In addition, parallel systems impact negatively on the efficiency of the system by increasing the time and expense of land development.

## 1.2 PURPOSE OF STUDY

There is a definite need to address some of the problems that emerge from the treatment of planning and environmental processes as two separate and distinct areas of legal regulation. This is a worldwide concern and various approaches have been adopted to solve it. This research explores what solutions can be provided within the unique governance, historical and legal set-up in South Africa. It determines what legal interventions can be made to create useful forms of integration between these two processes. It also highlights some recommendations outside the legal realm, but equally relevant to resolving the problem. A survey is made of some

[1] "Planning" here is used to signify the sector activity of land use development and land planning. "Planning" and the making of "plans" is however also done in other sectors of government. The environment is one of them. Transport planning and economic planning are other areas.

examples across the world where this issue has been tackled, primarily New Zealand and Britain.[2]

## 1.3 POINTS OF DEPARTURE AND HYPOTHESIS

### 1.3.1 Points of departure

South African planning as well as environmental laws are treated as discrete and separate areas. They are thus contained in different laws and institutionally implemented in separate structures at national, provincial and municipal level.[3] This work departs from this premise, and argues that they are intricately entwined, based on common origins and dealing with the common cause of sustainable development. There is compelling rationale, therefore, to have them better integrated into law and practice.

Integration is "making whole or combining into one."[4] This dissertation seeks to find practical ways and means of making the planning and environmental systems "whole" or function "as one". The specific area or point of integration chosen by this work is integrating the planning[5] as well as decision-making systems of both these areas of law and practice. The research highlights areas of useful intervention to achieve this. Integration is examined including at what level – national, provincial and local. The emphasis is on practical recommendations using legal mechanisms already available in South Africa. This dissertation considers the unique governance structures,

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[2] There are examples derived from other countries, albeit in less detail to these primary ones. Among the reasons for the choice of these countries, apart from a number of useful practices they provide is the common planning heritage they have with South Africa, with Britain being the common source. This planning heritage is provided in greater detail in this work.

[3] One other area of separation that there is, but is not dealt with in this study is the separation of the professions and academia. The parallel processes of evolution of spatial planning and environment have invariably been reflected in the development of professional training and the way the members of each interact with each other. Planning professional organisations generally have an older pedigree, and it is only more recently that environmental organisations and professional organisations have emerged, largely based on areas of environmental speciality (such as biodiversity, air quality and so on). See for example, for the situation in South Africa, Todes A, Berrisford S and Kihato M *"Relationship between environment and planning: Phase 2"* (Report prepared for the KwaZulu-Natal Provincial Planning and Development Commission 2007) 62. In the Netherlands the two professions are considered to "barely speak each others language". See Van den Berg M "Towards urban environmental quality in the Netherlands" in Miller D and De Roo G (eds) *Integrating city planning and environmental improvement: practicable strategies for sustainable urban development* (Ashgate England 2004) 1.

[4] Erling MU "Approaches to integrated pollution control in the Unites States and the European Union" 2001 (15:1) *Tulane Environmental Law Journal* 1-42, 4.

[5] Both the planning and environmental systems are involved in some form of planning activity. See also (n 1).

legislative competencies and mandates across spheres of government, as well as the environmental, social and economic needs of the country.

### 1.3.2 Hypothesis

The main hypothesis of this research is that “there is a need to reform the manner in which planning and environmental legislation is conceptualised, created and implemented to create greater integration”. It thus makes recommendations on how future legislation and government action should be underpinned by, among others, the principle of sustainable development in achieving the objective of integration.

From this main hypothesis, it can be further postulated that such a reform will lead to:

1. Better developmental outcomes, leading to sustainable development.
2. Greater ability of government and the private sector to develop land, infrastructure, housing and other necessary developmental outcomes. This is because processes of development should be simpler, faster, cheaper and more efficient if integrated.
3. Better intergovernmental coordination.
4. Planning and environmental practitioners who are better at thinking and acting in a sustainable way.

### 1.3.3 Framework of the dissertation

This work has six chapters. Chapter 1 is the introductory chapter. This chapter describes the broad approach to the research. Chapter 2 outlines the historical development of the planning and environmental divide. This looks at the origins, philosophical underpinnings and evolutionary trajectories of both areas of law, explaining commonalities and differences that have led to the current state of affairs. Special attention is paid to the South African situation given its unique historical context. Importantly from this historical analysis, an insight is obtained on whether integration, given the background of both areas of law is possible. Chapter 3 explains how the planning and environmental legal systems function in South Africa. This chapter is largely descriptive of the legal procedures and systems of planning and the environment. A detailed study of laws that govern these areas and literature that interpret these procedures and processes is provided.

Chapter 4 dwells on what problems the lack of integration creates. This section is a detailed account of the challenges encountered by the lack of adequate integration. It details cost implications, the effects on time and also the practical inconveniences of engaging separate institutions and structures dealing with these two processes.

Special attention is paid to public sector land development and the implications of the current systems on this.

Chapter 5 deals with some international lessons on how the problem has been dealt with.

Finally, Chapter 6 contains conclusions and recommendations. Here, special attention is given to describing possible solutions within the current legal framework, emphasising practicality, workability and current priorities.

### 1.3.4 Terminology

A note must be made on what has been, until recently, the lack of broad consensus with regard to terminology related to planning in South Africa.[6] There has been no commonly understood meaning on what "spatial planning", "development planning", "land use planning", "physical planning" and so on are.

For the purpose of uniformity in this work, the term "spatial planning" will be used when referring to the planning system in South Africa. The *Green paper on development and planning* broadly calls this the "the organization of space".[7] According to it, this is,

> a public sector activity which creates a public investment and regulatory framework within which private sector decision-making and investment occurs. The public sector activity of spatial planning has two broad dimensions: proactive planning, which defines desirable directions, actions and outcomes; and land development and management, which is concerned essentially with regulating land use change … and with protecting individual and group rights in relation to land.[8]

Thus the broad concept of spatial planning, as can be discerned from the quote, consists of two layers of instruments. Firstly, there is what the quote refers to as

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[6] According to one author, the problem may be because the meanings, given to different terms, have tended not to depend as much on their dictionary definitions, as on meanings that have accrued to them in specific contexts, at specific times. See Berrisford S *Rationalising and modernising the planning regulatory environment: an evaluation of the status quo and a way forward* (Report for the National Treasury 2004).

[7] National Development and Planning Commission *Green paper on development and planning Government Gazette* 20071 of 21 May 1999, 20

[8] *Green paper on development and planning* (n 7). The 2001 White paper that developed from this Green paper however held that the term spatial planning should be used sparingly, only to describe a high level planning process that is inherently integrative and strategic, that takes into account a wide range of factors and concerns and addresses the uniquely spatial aspects of those concerns.

proactive planning.[9] This is geared towards shaping development over a period of time. According to Jeannie van Wyk,[10] these can be divided into policy plans (including integrated development plans, structure plans and spatial development frameworks) and regulatory plans (including zoning schemes also known as land use management schemes or town planning schemes). The second layer consists of both land use management and land development. Land use management is about effecting changes to land and includes the removal of restrictions, the removal or amendment of conditions of title and the granting of so called consent uses. Land development on the other hand is about the foundation and development of new townships (subdivision of land) and consolidation of land.[11] These instruments of land use management and development implement the more strategic proactive plans on a day to day basis, and are at the heart of decision-making.

Thus, three terms will be used to refer to the planning system in South Africa across this work; spatial planning, which consists of two elements. Proactive spatial planning[12] (consisting of policy and regulatory plans) and land use management and development (consisting of land use management and land development activities).

## 1.4 METHODOLOGY

A number of methods are used in this study.

### 1.4.1 Legal history[13]

It has been considered useful to examine the historical evolution of the problem for better understanding.[14] The factor of time and the manner the two areas of law have evolved within different contexts in South Africa and other areas provide useful pointers in appreciating the current situation and formulating solutions.

### 1.4.2 Case studies

A number of international case studies have been chosen to give insights into how this problem has been dealt with around the world.

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[9] Other terms include strategic planning or forward planning.

[10] Van Wyk J "Parallel planning mechanisms as a recipe for disaster" (2010) (13:1) *Potchefstroom Electronic Law Journal* 214-234.

[11] Van Wyk J (n 10) 222.

[12] Proactive planning is also used to refer to strategic or forward looking plans for the environmental system as well.

[13] For the importance of a legal historical approach in South African legal studies see for example Farlam I "Some reflections on the study of South African legal history" 2003 (9) *Fundamina: A Journal of Legal History* 1-10.

[14] See Chapter 2.

*a. New Zealand*

New Zealand's Resource Management Act (RMA) is considered a pioneering piece of legislation around the world with regard to the integration of planning and environmental issues.[15] The RMA brought under one law a diverse number of laws relating to town and country planning, water and soil protection, air quality and so on.

*b. Great Britain*

Great Britain has also incorporated Environmental Impact Assessments (EIA) as part of the process of spatial planning permissions, rather than keeping them as a separate process. This has been through the Town and Country Planning (Environmental Impact Assessment) Regulations.[16] The concept of sustainable development has also attracted a lot of attention in legal reform around the spatial planning and environmental systems in Britain. Its history of application provides some useful lessons on how the tensions around environmental, social and economic issues have been dealt with to promote greater integration.[17]

## 1.5 LITERATURE REVIEW

The literature broadly follows the chapter structure of the research. First, for chapter two the literature deals with the manner in which planning and environmental law have generally related to each other in history.[18] This seeks to explain why the

[15] Lessons from this Act have also been drawn on by South African writers. See for example Peart R "A new generation of environmental law: the New Zealand reform and lessons for South Africa" 1996 (3) *SAJELP* 127-153.

[16] 1824 of 2011.

[17] See for instance Bruff EG and Wood PA "Local sustainable development: land-use planning's contribution to modern local government" 2000 (43:4) *Journal of Environmental Planning and Management* 519-539; HM Treasury "Barker review of land use planning" INTERNET http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/media/3/A/barker_finalreport051206.pdf [Date of use 14 December 2011].

[18] See for example; Pontin B "Integrated pollution control in Victorian Britain: rethinking progress within the history of environmental law" 2007 (19:2) *Journal of Environmental Law* 173-199; Coyle S and Morrow K *The philosophical foundations of environmental law: property, rights and nature* (Hart Publishing Oxford 2004); Wood K *The law and practice with regard to housing in England and Wales* (London 1921); Cherry GE "The town planning movement and the late Victorian city" 1979 (4:2) *Transactions of the Institute of British Geographers* New Series 306-319.

current state of affairs exists. It also determines how influential South Africa's unique history has been in shaping the relationship of these two areas of law.[19]

The second part of the literature dealing with the third and fourth chapters focuses on the problem. It seeks various authors' impressions of the problem of integration, through a broad multidisciplinary sweep of writings by planners, environmentalists and lawyers.[20] Further, useful project reports on actual case studies where problems have been observed are referred to;[21] literature by government practitioners that deal with the issue and display their appreciation of the problem;[22] court cases that highlight this issue;[23] court interpretations on the distribution of roles and competencies for the various spheres of government to better understand how integration can be achieved[24] and literature that describes planning and environmental processes.[25]

The final set of literature covering the content of the fifth chapter examines writings that dwell on various approaches to the problem in other jurisdictions.[26]

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[19] For example Van Wyk J *Planning law: principles and procedures of land-use management* (Juta CapeTown 1999); Milton JRL "Property and planning" 1985 *Acta Juridica* 267 - 288; Glazewski J *Environmental law in South Africa* 2nd ed (LexisNexis Butterworths Cape Town 2005).

[20] See for example Van Wyk J "Parallel planning mechanisms as a recipe for disaster" (2010) (13:1) *Potchefstroom Electronic Law Journal* 214-234; Sowman M "Integrating environmental sustainability issues into local government decision-making processes" in Parnell S *et al* (eds) *Democratising local Government: the South African experiment* (UCT Press Cape Town 2002 181-219, 189.

[21] See for example, South African Cities Network *Provincial land use legislative reform: Gauteng, Free State, Mpumalanga, Limpopo, North West, KwaZulu-Natal, Eastern Cape, Western Cape and Northern Cape* (South African Cities Network Johannesburg 2011); Todes A *et al Relationship between environment and planning* (Report for the Kwazulu-Natal Planning and Development Commission 2005).

[22] See for example Western Cape Department of Environmental Affairs and Development Planning *Discussion document law reform project integrated planning, environmental & heritage resources legislation* (Cape Town 2004).

[23] See for example *Fuel Retailers Association of South Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] JDR 0445 (CC); *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] JDR 0704 (CC).

[24] For example see *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government and Environmental Affairs and Development Planning of the Western Cape and Others* [2011] Case No 10751/2011.

[25] For example Van Wyk J *Planning law: principles and procedures of land-use management* (Juta CapeTown 1999).

[26] See for example Anker T H "Integrated resource management: lessons from Europe" 2002 (11) *European Environmental Law Review* 199-209; Carlman I "The Resource Management Act 1991 through external eyes" 2007 (11) *New Zealand Journal of Environmental Law* 181-210; Jiricka A and Probstil U "SEA in local land use planning – first experience in the Alpine States" (28) 2008 *Environmental Impact Assessment Review* 328-337.

# CHAPTER 2: THE HISTORICAL DEVELOPMENT OF THE PLANNING AND ENVIRONMENTAL DIVIDE

## 2.1 INTRODUCTION

The purpose of this chapter is to trace the origins of planning and environmental law as they currently apply in South Africa. Through this, the reason they have both evolved into the separate and distinct areas of practice seen today will become clearer. The chapter begins by looking at the historical development of both areas of law in Britain, a source of South Africa's legal heritage. This historical survey points out to their initial common origins and explains their subsequent different evolutionary paths. It also compares their later development in Britain with what happened locally. On this point, it is noted that their evolution and development in South Africa has had many similarities as well as some major differences.

## 2.2 THE HISTORY OF PLANNING AND ENVIRONMENTAL LAW

The emergence of planning and environmental law into the forms recognisable today is generally attributed to developments of the late nineteenth and early twentieth centuries.[1] Technological and scientific advances during this period meant that man could more usefully and with greater efficiency exploit the natural environment. There was a rapid expansion of modern industry leading to massive urbanisation in Europe and elsewhere. During this period, there is little to distinguish between writings in both areas of law. Indeed most legal historians trace both as originating from this defining event.

Britain is a typical example of a country that experienced this phenomenon. This fact, as well as its significant contribution to the legal heritage of South Africa and other Anglophone African and Asian jurisdictions makes it a compelling site for historical analysis.[2] Notes one British writer,

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[1] Many writers note, however, that there were much earlier signs of ideas related to planning and environmental law around the world. For example, early environmentalism has been attributed to among others Malthus in the late eighteenth century, with his theory on the relationship between population growth and food supply. See Clapp BW *An environmental history of Britain* (Longman London 1994) 7. Meanwhile planning law can be said to have developed when individual land holding in medieval European cities – a natural progression of society from feudalism - became a tool used to protect new found property rights. See Grant M *Urban planning law* (Sweet and Maxwell London 1982).

[2] For writing that explains South Africa's British legal heritage see Chanock M "Writing South African legal history: a prospectus" 1989 (30:2) *The Journal of African History* 265-288, 269. Planning law has also been fundamentally

> As the 'workshop of the world', Britain was the earliest jurisdiction to encounter systematic industrial environmental threats with growth in chemical and other industries, and urbanisation, inspiring arrestingly grim contemporary depictions of 'monster nuisance' and unparalleled pollution of air, rivers and land.[3]

Thus the reason for environmental law was the need for controls to keep the public realm habitable and healthy, and to deal with problems such as slums and polluted urban environments. These laws regulated how private property rights should be exercised.[4] This was based on a two-fold enquiry: what are the effects of the use on first, other land users, and secondly, the general public or the public interest. Legal remedies used to deal with infringements included private nuisance intended to protect land users from annoyances emerging from neighbors. Public nuisance and statute were the other available remedies, intended to protect the public interest.[5] Writers of planning law likewise attribute its development to rapid urbanisation in industrialising societies. Likewise, the need to maintain a healthy public environment was its key concern. In Britain, the Public Health Act of 1875 was one of the earliest sources of planning law.[6] At the heart of these controls are concerns similar to those in environmental law. These are the manner in which private property rights are exercised and the inevitable tension this creates with the public interest. Planning law also sought recourse to remedies such as private nuisance, public nuisances and legislation.

Both areas of law were thus in reality a single corpus of law that had not yet been distinguished as planning or environmental law. Further, as noted in this formative period, they were both instrumental and utilitarian, geared primarily at preserving, and mediating individual rights and public interests. Decisions were *ad hoc* responses to a variety of environmental and social problems brought about by rapid

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influenced by British planning law. See for instance Van Wyk J *Planning law: principles and procedures of land-use management* (Juta Cape Town 1999) 6. Planning practice was also heavily influenced by the importation of British skills and ideas. See for example Mabin A and Smit D "Reconstructing South African cities? The making of urban planning 1900-2000" 1997 (12) *Planning Perspectives* 193-223, 195. These British legal influences also went beyond South Africa, and had significant influences in Anglophone Africa and Asia. See McAuslan P "The best laid schemes o' mice and men: the diaspora of town and country planning law in Africa and Asia" in *Bringing the law back in: essays in land law and developm*ent (Ashgate Aldershot 2003). Environmental legislation likewise was imported by Britain into its colonies in South Africa, although it had only developed to a limited extent at that time.

[3] Pontin B "Integrated pollution control in Victorian Britain: rethinking progress within the history of environmental law" 2007 (19:2) *Journal of Environmental Law* 173-199, 176.

[4] Coyle S and Morrow K *The philosophical foundations of environmental law: property, rights and nature* (Hart Publishing Oxford 2004) 157.

[5] Coyle S *et al* (n 4) 157.

[6] Grant M (n 1) 250.

industrialisation, with no clear and ideological underpinnings.[7] Both areas of law were spontaneous legal responses, directed at specific short term effects, often in the vicinity of industries. Another similarity is on a balance in relation to private property interests versus the public interest, the focus of these laws was primarily the protection of property rights.[8]

However, with time this single area of law began to split into planning and environmental law, each with distinct areas of application.

### 2.3 DEVELOPMENT AND CREATION OF DISTINCT AREA OF PLANNING LAW

Planning law quickly developed unique tools and language. The term "town planning" was first used in Britain in the Housing Town Planning, etc (sic) Act 1909. It gave local authorities planning powers to prepare "schemes" [9] for land ready for development.[10] These were early forms of zoning maps. They were intended to ensure that proper sanitary conditions and convenience could be achieved in the laying out of uses of land. Their contents, including maps, were similar to what typical zoning schemes contain today. Their adoption likewise included an opportunity for land owners to air any objections.[11] Planning language also adopted what is now familiar terminology where concepts such as "amenity"[12] required consideration in decision-making. In this Act, it was with reference to a "park, garden or pleasure ground … required for the amenity or convenience of any dwelling house".[13] Facilities for compulsory purchase of land for this reason were even provided.

The Town Planning Act of 1909 was also used to influence land taxation regimes. In this period, the high cost of land made it difficult to acquire land to house the poor. Taxes were used to help fund land acquisition and capture some of the value obtained by land owners from appreciating land prices.[14]

Planning law also began to deal with specific problems that confronted urban local authorities. The post First World War period in Europe presented a number of

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[7] Pontin B (n 3) 178.

[8] See for example Coyle S *et al* (n 4) 131-132. See also generally McAuslan P *The ideologies of planning law* (Pergamon Oxford 1980).

[9] The concept of schemes was borrowed from Germany where it originated in the late nineteenth century.

[10] Barlow H *The law relating to town planning in England and Wales: a handbook for local authorities, the legal profession, landowners, &c* (Eyre & Spottiswoode London 1913?) 1-10.

[11] Barlow H (n 10) 16.

[12] Amenity refers to the benefits available to the use and ownership of land, be they tangible or intangible.

[13] Barlow H (n 10) 73.

[14] Cherry GE "The town planning movement and the late Victorian city" 1979 (4:2) *Transactions of the Institute of British Geographers* New Series 306-319, 312.

challenges, one of which was a major shortage of housing. In Britain for example, the machinery necessary to address this shortage saw the enactment of laws specifically dealing with housing, including the Housing, Town Planning Act 1919.[15] This Act acknowledged the importance of town planning in providing sufficient housing for the "working classes" and alleviating their poor and unhealthy living conditions. Local authorities were now required to plan ahead and ascertain how many houses were needed in their areas, and submit a housing scheme to this effect. The scheme specified among others the approximate number and nature of houses, the area they occupied, the locality of the land to be acquired, the average number of houses per acre and the estimated time of completion.[16]

Restrictive covenants,[17] having been used in conveyances as early as the fourteenth century, also began to be used as a tool for planning in this period. The Housing, Town Planning Act 1919 allowed for the inclusion of restrictive covenants in conveyances and leases by local authorities.[18] Houses sold and leased by the local authority could be done subject to restrictive conditions with regard to the maintenance of the houses as "houses for the working classes" and restrictions as to their use.[19] It further allowed for imposition of conditions on persons sold or leased land to develop by the local authority. Such conditions dictated how houses were to be erected, the layout and construction of streets, and the development of the land.[20]

Though planning law made these advances, at its core remained drawing the fluid line between private and public interest. This was also true around the world, as planning of towns and cities became a more common practice. Land use management through zoning in United States of America for instance was enthusiastically adopted from the late 1920s. It is noted that this was for the "sordid reason of self interest" where "public welfare served by zoning was the enhancement of the community's property values."[21] To date, defining this relationship is a major pre-occupation of legislative and policy makers in planning.[22]

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[15] Wood K *The law and practice with regard to housing in England and Wales* (London 1921) 88. See also Cherry GE (n 14) 307 - 308.

[16] Wood K (n 15) 18.

[17] A provision in a deed limiting the use of the property and prohibiting certain uses.

[18] Wood K (n 15) 402.

[19] Wood K (n 15) 402.

[20] Wood K (n 15) 404.

[21] Hall P *Cities of tomorrow: an intellectual history of urban planning and design in the twentieth century* (Basil Blackwell Oxford 1988) 60.

[22] More writing on the relationship between planning law and property can be found in McAuslan P (n 8).

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Generally in this era, ecological concerns were minimal and developments in regulations specifically targeting the environment lagged behind. Instead, regulations touching on the environment were still primarily based on how best resources could be exploited, while causing minimum harm to people in the vicinity. These early regulations had little to do with concern about air, water, plants and animals themselves. Instead, they were largely concerned with the general hazards of disease and harm to property. They also had a useful role to play in social control.[23]

## 2.4 THE REALISATION OF A SPECIFIC NEED TO PROTECT THE ENVIRONMENT

Industrial production and exploitation of resources was only limited by laws and regulations that sought to create healthy living environments and protect property.[24] This proved insufficient however and cities became more polluted, rivers dirtier and waste increasingly unmanageable.[25] Outside urban areas, overexploitation of animals caused species to die out. Greater regulation became necessary, and it began in the 1960s, reaching its peak during the 1970s.[26] These laws developed separately, distinct from planning legislation. They generally targeted specific aspects of the environment for instance air pollution, water, waste, and outside urban areas, fauna and flora. They were strongly interventionist utilising prohibitions, permits, taxes, subsidies and so on. They also involved the introduction of dedicated administrative resources to implement the new standards and ensure conformity.[27]

A good example is air pollution. In Britain as greater research and scientific advancement became available, the need for clean air - while it had been a concern since the turn of the century - became the subject of systematic government inquiry.[28] The creation of the Clean Air Act in 1956 resulted, and from then on there was a rapid evolution in understanding of matters related to air pollution. This included the effects of invisible pollutants such as sulphur dioxide,[29] the cross boundary and

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[23] For example, a clear concern expressed by the makers of these laws was the effects of pollution on the moral and social order. Pollution was often seen as linked to moral depravity especially, among the poor often seen as major polluters. See for example Rome AW "Coming to terms with pollution: the language of environmental reform 1865-1915" 1996 (1:3) *Environmental History* 6-28.

[24] Winter G "Perspectives for environmental law – entering the fourth phase" 1989 (38) *Journal of Environmental Law* 38-47, 41-42.

[25] Winter G (n 24) 41-42.

[26] Winter G (n 24) 41-42.

[27] Winter G (n 26) 41-42.

[28] The Beaver Commission of Inquiry. See Clapp (n 1) 25.

[29] For instance acid rain first came to attention in Sweden in 1968.

dispersed nature of pollutants and their effects, ozone layer depletion and global warming.[30]

The laws in these early years showed a greater appreciation for the ecological qualities of the environment, a critical stage in the evolution of environmental law. Nevertheless they were still a reaction to the destructive effects of industrial development and its negative influences on the habitability of the living environment. They were ultimately intended to provide land owners the opportunity to exploit their land as much as possible with limited concession to the public interest.[31] Thus, despite a new found need to protect elements of the environment, its rationale still remained similar to that of planning law and thus failed to clearly distinguish itself. But it is within this period that norms were in formation, and these would underlie environmental regulation in future.

## 2.5 THE DEVELOPMENT OF ENVIRONMENTAL NORMS

From the earliest origins of these laws a distinct norm was in formation. One writer on the early laws at the turn of the twentieth century notes,[32]

> The evolution of legal responses to environmental problems … reveals a body of thought of increasing sophistication: the impact of human activity upon the natural environment is seen as constituting, not merely as a conflict between individual rights and collective interest, but a complex moral problem invoking notions of value and responsibility which cannot be fully articulated within a framework of interpersonal rights and duties.

Writings such as these that acknowledge these very early signs of norms are seen as a "counter current in the historical literature".[33] They challenge the view that norms underlying environmental law, and indeed environmental law itself, only came in much later. Instead, they show that the Victorian era in Britain for example had some of the earliest green movements, showed "overtones of sustainable development" and suggested "a more complex environmentally attuned ideological picture".[34]

Nevertheless these norms were only widely accepted as forming the basis for environmental law more than five decades later. This is when it begun a process of clearly distinguishing itself from the common roots it had with planning. Beyond laws

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[30] Clapp BW (n 1) 27.

[31] Clapp BW (n 1) 27.

[32] Coyle S *et al* (n 4) 109.

[33] Pontin B (n 3) 179.

[34] Pontin B (n 3) 179-180.

principally geared at regulating how landowners use their land, there was recognition of a wider norm that went beyond identifying and mediating disputes between individuals *inter se* or individuals and collective interests.[35]

### 2.5.1 Environmental law and the influences of international human rights law

One important normative principle that developed within environmental law was the recognition of an environmental right. This emerged from the internationalisation of human rights. The foundations were laid by the 1946 *UN Charter* and the 1948 UN *Universal Declaration of Human Rights*, as well as the subsequent conventions dealing with civic and political rights[36] as well as economic, social and cultural rights.[37] To some, the environmental right is both a civil and political right as well as an economic, social and cultural right.[38] It is also referred to as a third generation or people's right as it is deemed to vest in groups rather than individuals.[39]

The 1972 *Stockholm Declaration on the Human Environment* (Stockholm Declaration) was the first formal recognition of this right.[40] The declaration acknowledged that the environment is essential to the enjoyment of basic human rights.[41] Substantiation of this right came much later. The 1981 *African Charter on Human and Peoples' Rights* made reference to environmental rights providing "all peoples shall have the right to generally satisfactory environment favourable to their development."[42] Following this was the report of the World Commission on Environmental Development, *Our Common Future* in 1987[43] (Brundtland Report).[44] The World Commission on Environment and Development, and the Earth Summit held in Rio de Janeiro in 1992 also made links between human rights and the environment (Rio Declaration).[45] The follow up to this conference, the United Nations World Summit on Sustainable

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[35] Coyle S *et al* (n 4) 170.

[36] United Nations *International covenant on civil and political rights* 1966.

[37] United Nations *International covenant on economic, social and cultural rights* 1966.

[38] Glazewski J *Environmental law in South Africa* 2 ed (LexisNexis Butterworths Cape Town 2005) 70.

[39] Also included in this class of rights is the right to development. See Glazewski J (n 38) 70.

[40] United Nations Conference on the Human Environment *Stockholm declaration* of June 1972. See generally Kidd M *Environmental law* (Juta Cape Town 2 ed 2011) 52-53.

[41] Preamble.

[42] Organisation of African Unity African *Charter on human and peoples' rights* (Organisation of African Unity 1982) Art 24.

[43] World Commission on Environment and Development (WCED) *Our Common Future* (Oxford University Press Oxford 1987). See generally Kidd M (n 40) 54-55.

[44] After its Chair Gro Harlem Brundtland.

[45] United Nations Conference on Environment and Development *Rio declaration on environment and development* Report of the United Nations Conference on Environment and Development A/CONF.151/26 (Vol1) (Rio de Janeiro 3-14 June 1992).

Development in 2002 in Johannesburg further built upon this theme. Two documents to emerge from this conference, the Johannesburg *Declaration on Sustainable Development* and the *Plan of Implementation* not only committed states to the right, but also created targets to achieving it.[46]

An environmental right gives environmental law a quality that goes beyond simply recognising a general public interest. It creates an enforceable right available to individual members of the public. As critics to public interest have consistently argued, it is limited as it "provides no standard against which decisions or policies can be judged or evaluated."[47] Planning law especially suffers from its heavy reliance on public interest. An individual and enforceable right however removes the interest from the vagueness and relativism of a general population, to a specific and individual justiciable concern.

### 2.5.2 Principle based justifications for environmental law

Environmental law encompasses a number of principles as part of its normative grounding. One important principle is sustainable development. Sustainable development includes in it the principle of sustainable use,[48] the principle of equitable use or intragenerational equity[49], the principle of intergenerational equity, and importantly, the principle of integration. The principle of intergenerational equity points to a value and social good which society should aim at based on the common heritage and destiny of mankind. Says one writer,

> The reliance on forms of inter-generational justice suggest a concern not merely with the uncontroversial idea that the welfare of future generations of human beings is dependant upon their inheritance of a healthy environment; it rather points to a deeper set of assumptions according to which question of property rights, are intrinsically tied to an account of justice and moral value.[50]

The principle of integration, principle 4 of the Rio Declaration, calls for environmental protection to constitute an integral part of the development process and not to be

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[46] World Commission on the Environmental and Development *Report of the world summit on sustainable development* Johannesburg, South Africa, 26 August – 4 September 2002 UN Doc. A/Conf. 199/20 (United Nations 2002).

[47] Campbell H and Marshall R "Utilitarianism's bad breath? A re-evaluation of the public interest justification for planning" 2002 (1) *Planning Theory* 163-187, 164.

[48] Defined as exploiting natural resources in a manner which is "sustainable", "prudent", "rational", "wise" or "appropriate."

[49] This implies the use by one state must take into account the needs of other states.

[50] Coyle S *et al* (n 4) 207. See also Kidd M (n 40) 17.

isolated from it. It can likewise be defined as the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects and that developmental needs are taken into account when applying environmental objectives.[51]

Another principle includes that of the common heritage of mankind implicit in the Brundtland Report's mantra of "our common future." Its development can be traced back to the late fifties with the Antarctic Treaty of 1959. It changed previous thinking that resources (in this case the Antarctic) could be exploited by whomever with little regard to a shared global responsibility.[52] Today under international law, this shared responsibility in governing our common heritage such as land, air, water beyond national jurisdictions, fisheries, plant genetic resources, indigenous knowledge is widely recognised. Some examples include the Stockholm Declaration[53] and conventions specifically targeting resources in global commons such as the sea[54] and outer space.[55]

Other recognised principles are that of inter-societal justice. Linked with the concept of environmental justice, it requires that the distribution of environmental goods should be fair. It also demands that environmental undesirables should not be borne unproportionally by certain sections and classes of society.[56] The "polluter pays principle" was first used in 1972 in the Organisation for Economic Cooperation and Development, *Guiding Principles Concerning International Economic Aspects of Environmental Policies*. The idea behind this principle is that the costs of pollution should be borne by the generator of the pollution rather than society at large.[57] The "precautionary principle" was first introduced at the International Conference on the Protection of the North Sea in 1984, and later incorporated into the Rio Declaration.[58] The principle provides guidance in the development and application of environmental law where there is scientific uncertainity.[59] The "co-operation principle" calls for state cooperation in achieving sustainable development.[60]

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[51] Sands P *Principles of international environmental law* 2nd ed (Cambridge University Press Cambridge 2003) 253. See further Kidd M (n 40) 16-17.

[52] Rosencranz A "The origin and emergence of international environmental norms" 2002-2003 (26) *Hastings International and Comparative Law Review* 309-320, 311.

[53] Principles 21 and 22.

[54] See for instance United Nations *Convention on the law of the sea* of 10 December 1982.

[55] See for instance United Nations *Treaty on principles governing the activities of states in the exploration and use of outer space, including the moon and other celestial bodies* of 19 December 1966

[56] Glazewski J "Environmental justice and the new South African democratic legal order" 1999 (1) *Acta Juridica* 1-35.

[57] Glazewski J (n 38) 19. See also Kidd M (n 40) 7-8.

[58] Rosencranz A (n 52) 316. See also Kidd M (n 40) 9-10.

[59] Glazewski J (n 38) 18.

[60] WCED (n 43) principle 8.

From the above, it is clear many of these principles have found a home in international law, that is in international treaties, customs as well as codes of behaviour. Environmental law has also gone a step further in defining the traditional relationship between individual property interests and the public interest. Decision-making has greater normative weighting and guidance. Where two interests are balanced, they provide greater help in dealing with situations where rules may be unclear or ambiguous.[61] They create greater consistency in decision-making over time because of uniform interpretation of rules. The principles also provide guidelines for self-regulation among practitioners.[62] Importantly, these principles stimulate integration of environmental concerns with other policy fields. This is because a normative basis for decision-making ensures wider acceptance in other decision-making processes.[63]

Planning law has been slower in being associated with rights-based approaches and principled decision-making. This is not to say that this has not been a topical issue among planning lawyers. One critique of planning law is based on socio-legal urban scholarship that examines urban problems of the poor in developing countries.[64] It postulates that the role of planning law is severely constrained by its limited ability to allow state intervention based on greater socially oriented action. To remedy this, there have been calls for greater normative grounding. This includes adopting a "social function of property" and the recognition of collective rights such as "rights to the city".[65] It is this adoption by environmental law of internationally accepted and legislated principles contained in the various treaties, customs and codes of behaviour that fundamentally distinguishes it from planning law.

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[61] Verschuuren J "Sustainable development and the nature of environmental legal principles" 2006 (1) *Potchefstroom Electronic Law Journal* 1-57, 14.

[62] Verschuuren J (n 61) 30.

[63] Verschuuren J (n 61) 31.

[64] See for example Fernandes E "Illegal housing: law, property rights and the urban space" in Harrison P Huchzermeyer M and Mayekiso M (eds) *Confronting fragmentation: housing, and urban development in a democratising society* (University of Cape Town Press Cape Town 2003) 228-243.

[65] Fernandes E (n 64) 231.

## 2.6 THE DEVELOPMENT OF SPATIAL PLANNING AND ENVIRONMENTAL LAW IN SOUTH AFRICA: THE TURN OF THE TWENTIETH CENTURY TO THE EARLY 1920S

### 2.6.1 Spatial planning

Spatial planning in South Africa emerged as early as 1657 through a rudimentary land registration system.[66] Then, the government retained control over land uses through title restrictions on grants of surveyed and mapped plots near Cape Town. Through the use of the deeds registration system, it created some of the earliest forms of spatial planning control.[67]

It was later in the late nineteenth and early twentieth centuries that the embryonic practices of statutorily driven town planning were created. These had a mixed heritage, with strong British influences. This is because of South Africa's legal and especially planning heritage, as well as the contribution of planners who were trained and had practiced in Britain.[68] Later with the enactment of provincial spatial planning legislation, American influences would become apparent with the adoption and use of zoning schemes.[69]

It was the discovery of gold in the Transvaal that led to the Gold Law 8 of 1885. It made provision for orderly settlement among the rapidly increasing population of miners seeking housing and essential services.[70] Mining towns including Johannesburg were laid out to conform to this law. Additionally, sub-division and surveying of land were enabled in the early settler communities through other laws such as the Crown Lands Disposal Ordinance.[71] This law allowed the Lieutenant-Governor of the then pre-union Transvaal to make regulations for the establishment and proclamation of townships. The Proclamation of Townships Ordinance[72] was promulgated in the Transvaal to coordinate and control development. This was done

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[66] Page D and Rabie MA "Land use planning and control" in Fuggle RF and Rabie MA (eds) *Environmental concerns in South Africa: technical and legal perspectives* (Juta Cape Town 1983) 445-482, 447; Van Wyk J (n 2) 85.

[67] Van Wyk J (n 2) 85.

[68] Van Wyk J (n 2).

[69] Milton JRL "Property and planning" 1985 *Acta Juridica* 267 – 288, 270.

[70] Van Wyk J (n 2) 87.

[71] 57 of 1903.

[72] 19 of 1905.

through the provision of a township board to handle applications for township establishment.[73]

Other provinces in South Africa had similar developments.[74] The layout of developing townships was also a matter of concern in the Orange Free State. This led to the Township Act[75] being passed. It required that farm portions could only be developed as townships upon approval of the layout.[76] In Natal, early urban agglomerations such as Durban were bases of colonial administration, sites of thriving port trade and they served as sources for security for the frontier. Orderly development became a concern and laws such as the Townships Law[77] amended by the Local Boards Law[78] and another Townships Law[79] were all geared towards controlling the development of townships.[80]

South African cities in these early days had exclusive areas and compounds for black people, often insufficient in size, with restrictions that were rarely enforced. This created a sizeable black as well as Indian and coloured population living in central locations in the city outside these designated compounds. These locations were densely populated, with no municipal services and poorly enforced by-laws which often created health problems. This led to outbreaks of epidemics such as small pox and influenza. As they were in close proximity to white suburbs, an image of infected and diseased urban non-white populations developed.[81] Spatial planning formally responded through omnibus legislation like the Public Health Act of 1919 that allowed for controls on land sub-divisions and use, layout of land for building, the width and number of streets, the limitation of dwellings on building sites, and zoning controls inside and outside municipalities.[82] However, importantly, a racist ideology of spatial planning was inspired and planted in this period. Restrictive covenants, for instance, began to be used as some of the earliest instruments to impose race zoning.[83]

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[73] Page and Rabie (n 66) 450; Van Wyk J (n 2) 87.

[74] With the exception of Cape Town which did not develop this type of legislation early on.

[75] 15 of 1909.

[76] Van Wyk J (n 2) 88.

[77] 11 of 1881.

[78] 39 of 1884.

[79] 17 of 1893.

[80] Van Wyk J (n 2) 88.

[81] Vividly captured by authors writing of this period. See for example Swanson MW "The sanitation syndrome: bubonic plague and urban native policy in the Cape Colony 1900-1909" 1977 (18) *Journal of African History* 387-410; and Swanson MW "The Asiatic menace: creating segregation in Durban, 1870-1900" 1983 (16) *International Journal of African Historical Studies* 401-420.

[82] Van Wyk J (n 2) 90.

[83] See for example Van Wyk J (n 2) 85 writing of the mining town of Kimberley in the 1880s.

### 2.6.2 The environment

It is often recognised that pre-colonial societies in South Africa had a very strong environmental ethic and that they were acutely aware of the effects of their activities on natural resources. Nevertheless like spatial planning law, the first formal legal expression emerged with European settlement, as early as 1654 with the first settlements at the Cape of Good Hope. Here *Placcaaten*[84] were made regulating the consumption of penguins on Robben and Dassen Islands. Similar regulations were made in 1655 prohibiting the pollution of drinking water supplied to passing ships.[85] Hunting was also a favourite subject for regulatory control. Upon the Cape becoming a colony of Britain in 1806 for instance, wildlife legislation was brought in line with similar British legislation.[86]

Early environmental issues in urban areas were legislated through the enactment of the Public Health Act.[87] It dealt with air pollution, classifying it a statutory nuisance to be dealt with by local authorities. As noted before, this law also had provisions dealing with urban planning, emphasising the common origins of the two areas of law.[88] As with likeminded legislation created in industrialising Britain a decade earlier, it encountered enforcement problems. For example, proving causes and effects of air pollution was exceedingly difficult.[89]

The foundations of conservation-based legislation were also enacted in this period. For example, the Native Land Act[90] was passed. It was instrumental in allowing for the creation of conservancy areas and national parks by legally dispossessing blacks of land. According to some it profoundly shaped the "negative view" of black people towards the environment.[91]

### 2.6.3 Conclusions

The rationale behind spatial planning and environmental law in South Africa was broadly similar to Britain and elsewhere. Budding urban agglomerations in South

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[84] Legislation.

[85] Steyn P and Wessels A "The roots of contemporary governmental and non-governmental environmental activities in South Africa 1654-1972" 1999 *New Contree* (45) 61-81, 63.

[86] Steyn P and Wessels A (n 85) 64.

[87] 36 of 1919.

[88] Van Wyk J (n 2) 90.

[89] Fuggle RF and Rabie MA "Air pollution" in Fuggle RF and Rabie MA (eds) *Environmental concerns in South Africa: technical and legal perspectives* (Juta Cape Town 1983) 289.

[90] 27 of 1913.

[91] Steyn P and Wessels A (n 85) 70.

Africa faced challenges with regard to the living conditions of inhabitants. Laws and regulations, later to emerge as planning and environmental laws, were deemed necessary to ensure habitable and healthy settlements. Under planning law the early development of tools and a language of town planning occurred. Thus, for instance the deeds registration system was used to impose restrictive conditions for planning purposes. The term “township” and the practice of controlling the process of land sub-divisions also became part of the language and emerging practice of town planning. In this respect, planning law’s development in South Africa matches development in countries such as Britain by creating a unique body of knowledge and practice distinct from environmental law. This includes a separate area of application, distinct from environmental law. Environmental law meanwhile, apart from the role of enabling habitable environments, was also concerned with conservation and preservation of fauna and flora.

The evolution of South African spatial planning and environmental legislation nevertheless had a unique quality. The foundations for deliberate exclusion by race were laid in this era. In spatial planning law, this was through the creation of laws to reserve areas intended to house African workers in urban areas. With environmental law, it was through legislation aimed at curtailing access to natural resources and enable dispossession of land.

## 2.7 THE DEVELOPMENT OF SPATIAL PLANNING AND ENVIRONMENTAL LEGISLATION IN SOUTH AFRICA AFTER THE 1920S TO THE ADVENT OF DEMOCRACY

### 2.7.1 Spatial planning

Regional politics after the 1910 union of colonies and the creation of the South African Republic saw the Union government ceding both spatial planning and environmental conservation powers to the provinces. However, according to the report of the Transvaal Town-Planning Commission in 1929, this did not spur on any significant legislative action.[92] The Commission consequently recommended urgent creation, by local authorities, of town-planning legislation, including town-planning schemes. These recommendations created a flurry of legislative efforts in the provinces, with the Townships and Town Planning Ordinance[93] being enacted in the

[92] Milton JRL (n 69) 270.

[93] 11 of 1931.

Transvaal.[94] This law required among others, preparation by municipalities of schemes controlling land use, density, building size and position. This was closely followed by similar laws in the Cape[95] and Natal[96] in 1934 and the Orange Free State[97] in 1947. These laws were modelled according to the British Town Planning Act 1925 which had replaced the earlier 1909, 1919 and 1923 Housing and Town Planning Acts.[98] Planning adopted tools and language, such as "schemes," "betterment" and "worsenment."[99] There were also striking similarities with standard city planning legislation in the United States of America. This was especially so with regard to what the objects and purpose of spatial planning were, and the manner in which land use zoning law was conceptualised.[100] Planning law in South Africa also began to reflect popular ideas such as regional planning. This emerged from recommendations in its favour by the Social and Economic Planning Council in 1944, borrowing heavily from British planning.[101] Later, through the Natural Resources Development Act,[102] a council with a similar name was established to control land use planning, first in controlled areas[103] and later in the entire South Africa. This initiative was the precursor to regional planning authorities and the introduction of the Physical Planning Act.[104] This law created regions, regional development plans and regional structure plans.[105]

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[94] Repealed and replaced by the Transvaal Townships and Town-planning Ordinance 25 of 1965 and later the Transvaal Town Planning and Townships Ordinance 15 of 1986, today still applicable in Gauteng, Limpopo and Mpumalanga.

[95] Township Ordinance 33 of 1934 later replaced by the Land Use Planning Ordinance 15 of 1986 still applicable in the Northern, Eastern and Western Cape.

[96] Private Townships and Town Planning Ordinance 10 of 1939 re-enacted by the Town Planning Ordinance 27 of 1949 , now mostly repealed.

[97] Township Ordinance 20 of 1947, replaced by the Townships Ordinance 9 of 1969, and still applicable in the Free State.

[98] Major innovations in this law included among others provision for Development Plans providing strategic vision of land uses and the transfer of rights of all land owners to develop to the state, dispensing with the need for zoning schemes Milton JRL (n 69) 279-280.

[99] British law was traditionally particularly concerned with the possibility that the introduction of schemes will negatively affect the value of private property (worsenment) or create a windfall increase in value (betterment). As a balancing act, the value accruing from betterment could be extracted to compensate those who lost value to their properties. The provincial ordinances in South Africa retain this provision. Milton JRL (n 69) 285.

[100] Milton JRL (n 69) 270.

[101] Page D and Rabie MA (n 66) 453.

[102] 51 of 1947.

[103] These were north-western Free State Goldfields, the Pretoria-Witwatersrand-Vereeniging region, the Klerksdorp-Potchefstroom-Fochville area and the Western and Eastern Transvaal Goldfields.

[104] 88 of 1967.

[105] Van Wyk J (n 2) 93.

### 2.7.2 The environment

Legislation on environmental issues, on the other hand, became quite prolific. Various laws were enacted for conserving, the soil,[106] indigenous plants,[107] wild animals,[108] freshwater systems,[109] marine resources,[110] clean water;[111] controlling and preventing radiation,[112] noise,[113] and others. Later, clean air legislation introduced included the Atmospheric Pollution Prevention Act[114] based on both the British Alkali etc Works Regulation Act of 1906 and Clean Air Act of 1956. These were intended to deal with industrial pollution and smoke control respectively.

The main features of these environmental laws point to a number of issues. First, the governance and implementation of these laws was traditionally fragmented, enforced by a host of government institutions across different sectors and levels of government.[115] Further, this fragmentation meant there were no systemic influences on national policy, with the result that a broader environmental ethic did not exist in South Africa. Notes one writer,[116]

> Rather than advocating sustainability and an integrated approach to environmental management and governance, past practices, legislation, and policies were

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[106] Forest and Veld Conservation Act of 1941 and Soil Conservation Acts of 1946 and 1969.

[107] National Parks Act 57 of 1976, Forests Act 72 of 1968, Mountain Catchment Areas Act 63 of 1970, Lake Areas Development Act 39 of 1975, War Graves and National Monuments Act 28 of 1969, Soil Conservation Act 76 of 1969, Physical Planning Act 88 of 1967, and the Sea Fisheries Act 58 of 1973.

[108] Over 100 statutes including the National Parks Act 57 of 1976, Sea Birds and Seals Protection Act 46 of 1973 and Physical Planning Act 88 of 1967, the provincial nature conservation ordinances of the then provinces of the Transvaal, Orange Free State, Natal and the Cape and certain municipal by-laws.

[109] Water Act 54 of 1956, Soil Conservation Act 76 of 1969, Mountain Catchment Areas Act 63 of 1970, Lake Areas Development Act 39 of 1975 and Forest Act 72 of 1968.

[110] Fishing Industry Development Act 86 of 1978, Sea Fisheries Act 58 of 1973, Sea Shore Act 21 of 1935, Sea Birds and Seals Protection Act 46 of 1973 and Lake Areas Development Act 39 of 1975.

[111] Water Act 54 of 1956.

[112] The Nuclear Energy Act 92 of 1982 and the Hazardous Substance Act 15 of 1973.

[113] Factories, Machinery and Building Works Act 22 of 1941 and Aviation Act 74 of 1962.

[114] 45 of 1965.

[115] See Loots C "Distribution of responsibility for environmental protection" 1996 (3:1) *SAJELP* 81-97, 82; Nel J and Du Plessis A "Unpacking integrated environmental management – a step closer to effective co-operative governance" 2004 (19:1) *SAPL* 181-190, 183; Sowman M "Integrating environmental sustainability issues into local government planning and decision making processes" in Parnell S, Pieterse E, Swilling M and Wooldridge D (eds) *Democratising local government: the South Africa experiment* (University of Cape Town Press Cape Town 2002) 181-203, 191; Kotze LJ "Improving unsustainable environmental governance in South Africa: the case for holistic governance" 2006 (1) *Potchefstroom Electronic Law Journal* 1-44,15. This legacy has also made integration of environmental laws currently a difficult task. See Du Plessis W "Integration of existing environmental legislation in the provinces" 1995 (2) *SAJELP* 23-32.

[116] Kotze LJ (n 115) 15.

essentially concerned with the facilitation of resource allocation and resource exploitation.

This failure also caused a lack of a broader environmental management system that emphasised integration and sustainable development approaches.[117] Attempts were made to remedy this problem. The enactment of the Environment Conservation Act[118] is an example. Its primary stated purpose was "to make provision for the co-ordinating of all actions directed at or liable to have an influence on the environment."[119] It was also the first real law to attempt to address environmental protection in an integrated manner. However, it was far from adequate as it, for example, did not initially have provisions for environmental impact assessments (EIA).[120] There was substantial revision to it in 1989, leading to the emergence of another law of the same name, the Environment Conservation Act (ECA)[121] which contained many improvements including provisions for EIAs, only operationalised in 1997. Nevertheless by 1994, the environmental system inherited by the incoming government still had a fragmented system of implementation.[122]

Secondly, South Africa also had little in terms of grass-roots political activism and legal rules around public interest litigation such as *locus standi* were restrictive. Further, the link between environment and politics already established elsewhere in the world was non-existent.[123]

### 2.7.3 Racialisation of planning and environmental law

Environmental legislation from the 1930s to the advent of democracy often constituted “authoritarian conservation” and focused on protecting the environment

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[117] Glazewski J (n 38) 107 notes that that environmental management functions are much more recent addition to environmental law as the traditional approach was nature conservation.

[118] 100 of 1982.

[119] Long title.

[120] South Africa nevertheless had a history of voluntary EIAs dating from the 1970s. From then, a slow process of evolution ensued which had a number of milestones. One was the proposal for methods and procedures for environmental assessment in South Africa in 1976. After that was the 1979 Symposium - *Shaping the Environment* – that emphasised the value of EIAs, and then the *White Paper on a National Policy Regarding Environmental Conservation*. See Kidd M and Retief F “Environmental assessment” in Strydom HA and King ND (eds) *Fuggle and Rabie’s environmental management in South Africa* (Juta 2009) 974; Wood C “Pastiche or postiche’ environmental impacts assessment in South Africa” 1999 (81) *South African Geographical Journal* 52-59; Sowman M, Fuggle R and Preston GZ “A review of the evolution of environmental evaluation procedures in South Africa” 1995 (15) *Environmental Impact Assessment Review* 45-67, 2.

[121] 73 of 1989.

[122] Nel J and Du Plessis W (n 115) 183.

[123] Steyn P “Popular environmental struggles in South Africa, 1972-1992” 2002 (47:1) *Historia* 125-158, 127.

from people, especially to the detriment of black people.[124] This often confined environmental questions to a narrow focus on conservation of wildlife and nature to the "white middle class." It failed to deal with questions of industrial pollution, waste management, environmental health, land degradation and other similar issues. Finally, the outcomes of these laws were unjust and unequal, with the black majority bearing the worst of polluted and unhealthy environments.[125]

Racialisation of law was not confined to the environment however. It was also in this period that a jarring break from traditions elsewhere was made, when planning became integrated within the broader scheme of apartheid. It became a sub-set of laws that included native administration, urban influx control, black labour, housing, land tenure and ownership, liquor licensing and family laws. These laws were all geared towards apartheid social engineering. Thus this period saw the creation of rural black settlements divided into South African Development Trust areas, self-governing territories[126] and the TBVC states[127] governed by the Native Land Act[128] and Development Trust and Land Act.[129] In these areas, numerous laws, many still applicable today, were enacted to deal with planning issues such as township establishment and development of urban areas. Further, urban areas outside these areas which had black populations confined them to "native locations". They likewise saw a raft of town planning legislation applicable to them, such as the Black (Urban Areas) Act.[130] It is not lost to many writers that the logic of racial segregation often conveniently dovetailed with other interests. These included protecting private property, white working class jobs, white businesses from competition and securing industry by guaranteeing black labour.[131]

### 2.7.4 The domination of spatial planning

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[124] Peart R and Wilson J "Environmental policy making in the new South Africa" *SAJELP* 1998 (5:2) 237-267, 238.

[125] For extensive coverage on the issue of environmental justice see generally McDonald D (ed) *Environmental justice in South Africa* (University of Cape Town Press Cape Town 2002). See also Cock J and Koch E (eds) *Going green: people, politics and the environment in South Africa* (Oxford University Press Cape Town 1991); Glazewski J (n 56).

[126] KwaZulu, Qwa-Qwa, KaNgwane, KwaNdebele, Lebowa and Gazunkulu.

[127] Transkei, Bophuthatswana, Venda and Ciskei.

[128] 27 of 1913.

[129] 18 of 1936.

[130] 21 of 1923. See Van Wyk J (n 2) 102-104.

[131] See variously, Parnell S "Sanitation, segregation and the Natives (Urban) Area Act: African's exclusion from the Johannesburg's Malay location, 1897-1925" 1991 (17:3) *Journal of Historical Geography* 271-288; Nel EL "Racial segregation in East London 1836-1948" 1993 (73:2) *The South African Geographical Journal* 60-68; and Mabin A "Labour, capital, class struggle, and the origins of racial segregation in Kimberley" 1986 (12:1) *Journal of Historical Geography* 4-26.

In the development of planning and environmental law in South Africa, planning took on and dominated the broader mandate of "resource management" which included ecological concerns. The Natural Resources Development Act[132] had been enacted with the intention to better and more effectively co-ordinate the exploitation of natural resources in South Africa. The law also saw the nationalisation of matters of resource management.[133] Additionally, the all-encompassing tag of "natural resources" became a broad umbrella containing spatial planning, aspects of the environment and social control. Thus, while the governance of different elements of environmental conservation was fragmented and appointed to different sectors at national and provincial levels, the ultimate political authority and power rested with the national government. Further, spatial planning (then known as physical planning) dominated and relegated environmental issues to the periphery.[134] Consequently, by the early 1970s, the department of planning and the environment was "concentrating mainly on physical planning and dividing up the country's empty spaces for future mining and industrial purposes".[135]

### 2.7.5 Conclusions

In conclusion, the new democracy inherited spatial planning law that was a distinct area of practice. It had acquired tools, processes and a language with particular concerns that gave it the character that we are familiar with today. The environment meanwhile had a narrow focus of resource conservation and preservation. Major decisions were done at national level, largely dwelling on resource allocation through the spatial planning system. Environmental law was also characterised by numerous fragmented pieces of conservation legislation devoid of political and social considerations. It had therefore failed to develop the matrix of principles and norms developed elsewhere in the world. Meanwhile the racialisiation of both areas of law had been achieved. Both became part of the dense network of laws enforcing the policies of apartheid. This presented itself as a major task for legislative reform for the new incoming government.

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[132] 51 of 1947.

[133] Van Wyk J (n 2) 96.

[134] In fact with time, greater consolidation within planning occurred. The Department of Planning took over from the Natural Resources Development Council in 1964, later it was itself also replaced by the Planning Advisory Council. By 1967, the Council had become advisory to the Prime Minister and was no longer under the Minister of Planning. This increased centralisation at national level is linked to greater consolidation by the apartheid government of areas that gave it social control, such as resource allocation.

[135] Steyn P (n 123) 126.

## 2.8 THE TRANSITION AND EARLY DEMOCRACY

### 2.8.1 The acknowledgement of environmental priorities

The late eighties saw a surge in political activity around environmental issues through non-governmental organisations. The run up to 1994 also saw a government in waiting, the African National Congress (ANC), acknowledging that the goals of socio-economic development should have at their core the environment.[136] Some of its key priorities such as land distribution, it was recommended, "should include consideration of the environmental quality and sustainable use of land, and that systems of tenure for redistributed land should include incentives for good land management."[137] The meaning of the term "environment" was expanded because it was argued that it belonged to the same class of rights as the "right to development". It therefore needed to include matters loosely referred to as "brown issues"[138] with suggestions that the two were "inextricably linked."[139] Environmental problems could also now be seen in the light of the country's history. Urbanisation, pollution in the former homelands, racial discrimination, land dispossession, restrictions on movement and poor provision of social services became legitimate areas of environmental inquiry for the first time. Questions were also raised on whether to introduce a form of environmental right into the new constitutional dispensation. In its draft bill of rights, the ANC proposed the introduction of a right to a "healthy and ecologically balanced environment."[140]

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[136] Le Quesne T "The divorce of environmental and economic policy under the first ANC government 1994-1999" 2000 (7:1) *SAJELP* 1-20, 6.

[137] International Mission on Environmental Policy *Environment, reconstruction, and development* (International Development Research Center Canada 1995). See Executive Summary of the report. The International Mission on Environmental Policy Report was produced in conjunction with the Canada International Development Research Centre and all members of the tri-partite alliance, civic organisation and non-governmental organisations. The report displayed remarkable consensus on the critical place of sustainable development in economic and social policy.

[138] The term 'brown' issue refers to socio-economic concerns that have been introduced by the sustainable development concept. These are often urban and located in developing countries. Thus the environment is now looked at in the context of its relationship with issues such as poverty and shelter. It is not clear what the origins of this term are. It does seem that it was after the Earth Summit of 1992 in Rio de Janeiro and the adoption of *Local Agenda 21* that the term "brown agenda" gained prominence. Another way this term is used is in contradistinction to 'green' issues. Green issues are solely concerned with nature and conservation, a general characteristic of early environmentalism.

[139] Glazewski J "The environment, human rights and a new South African Constitution" 1991 (7) *African Journal on Human Rights* 167-184, 172.

[140] Burns Y "Green rights: theory and development" in *South Africa in transition* (University of South Africa Verloren van Themaat Centre Pretoria 1993) 6-22, 16.

Moreover, there were pointed references to recognition of the need to integrate planning and this new found environmentalism. As early as 1989, during the formulation of the first legally binding EIA procedures under the ECA, there was a call for integrated environmental management (IEM) aimed at integrating all stages of planning and development. The ANC proposed in its Bill of Rights that to secure the environmental right, the state should have regard to "local, regional and national planning to the maintenance or creation of balanced ecological and biological areas and to the prevention or minimising of harmful effect on the environment."[141]

On the advent of democracy, the Development Planning Commission (DPC) created by the enactment of the Development Facilitation Act[142] (DFA) in 1995, had as one of its mandates "the integration of environmental conservation with planning at different levels of government".[143] One of its key outputs, the *Green paper on development and planning* stated that:

> a single law which incorporated dimensions of spatial planning, the environment and transportation remains first prize … a single approval route incorporating planning, environmental, transport and all other permissions should be pursued in the long term.[144]

Others writing of the transition period equally recognised the need to integrate environmental and planning issues. According to one writer, environmental problems in South Africa were about three issues, one of which was "land-use planning" and "the concern to ensure that environmental and ecological criteria are incorporated into decisions affecting land-use, land development and land redistribution".[145] It was also recommended that physical planning integrate environmental impact assessments in its procedures.[146]

These developments at the transition were an opportune moment for the traditionally separate practices of planning and the environment to be seen as part of a greater whole. This however did not happen because of a number of issues explained below.

### 2.8.2 The environment loses ground

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[141] Viljoen H "Green rights and the Interim Constitution" in *South Africa in transition* (University of South Africa Verloren van Themaat Centre Pretoria 1993) 22-31, 28.

[142] 67 of 1995.

[143] Section 14(a)(viii).

[144] National Development and Planning Commission "Green paper on development and planning" *Government Gazette* 20071 of 21 May 1999, 29 and 63.

[145] Glazewski J (n 139) 172.

[146] Cameron C "Environmental management options for South Africa" in *South Africa in transition* (University of South Africa Verloren van Themaat Centre Pretoria 1993) 54-69, 68.

There is no doubt that since 1994 substantial progress in environmental law has been made by successive ANC governments. This began with the entrenchment of an environmental right in the Constitution. Section 24 provides that everyone has the right to an environment that is not harmful to their health or well-being. It also requires that the environment be protected for the benefit of present and future generations, through reasonable legislative and other measures. In addition to this, there was the relatively rapid enactment of a series of progressive laws. These include the National Environmental Management Act [147] (NEMA) and the environmental impact assessment rules and lists of activities promulgated under it, as well as its related suite of laws.[148]

There have nevertheless been arguments that the post-1994 government left environmental issues in the background to deal with "more urgent" socio-economic issues.[149] Additionally, post 1994 economic policy saw the erosion of the urgency to integrate environmental issues with what were increasingly becoming more mainstream, social and economic issues. The *White paper on reconstruction and development* (RDP)*[150]* and the *Growth, employment and redistribution strategy*[151] made only perfunctory references to the environment. This was despite firm support for the environmental agenda by the ANC government in the lead up to the 1994 elections.[152] Tellingly, the environmental agenda was removed from the core of social and economic policy-making and headed off onto its own policy making path.[153]

The final revised *White paper on environmental management policy*[154] and ultimately the draft National Environmental Management Bill had initially intended to make National Department of Environmental Affairs and Tourism (DEAT)[155] the lead agent

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[147] 107 of 1998.

[148] These include the National Environmental Management Biodiversity Act 10 of 2004, Air Quality Management Act 39 of 2004, Protected Areas Act 57 of 2003 and more recently the National Environmental Management Integrated Coastal Management Act. Other laws include the Marine Living Resources Act 18 of 1998, National Water Act 36 of 1998, National Forests Act 84 0f 1998, and the National Veld and Forest Fire Act 101 of 1998.

[149] See generally Le Quesne T (n 136).

[150] *"White paper on reconstruction and development (RDP)* Notice 1954 *Government Gazette* 16085 23 November 1994.

[151] National Department of Finance *Growth, employment and redistribution: a macroeconomic strategy* (National Department of Finance Pretoria 1996).

[152] International Mission on Environmental Policy (n 137).

[153] According to Le Quesne T (n 136) this parting of ways is represented by the launch of the Consultative National Environment Policy Process (CONNEPP) in 1995 under the leadership of the deputy Minister of Environmental Affairs and Tourism.

[154] *Government Gazette* 1864 of 28 July 1997.

[155] The name of DEAT has since then changed to the national Department of Water Affairs and the Environment. This is because the national executive has the power to change the names of national departments as well as shuffle functions within them. Thus the previously named Department of Minerals and Energy is now two

for environmental management. It was to be vested with the powers of, among others, co-ordinating and supervising environmental management.[156] This was not to be however. These roles were seen as too domineering in shaping development policy, which was considered by the ministries of Finance and Trade and Industry as their proper mandate.[157] It was also perceived as a threat to sectoral environmental interests such as those of the Water Affairs, and Forestry and Minerals and Energy ministries. Thus the resulting NEMA settled for weaker powers for DEAT. Two bodies created by NEMA, the National Environmental Advisory Forum and the Committee for Environmental Coordination, in contrast to a proposed powerful Environmental Protection Agency, had limited and vague mandates and few powers.[158]

This shift saw jobs, the economy, poverty, health, infrastructure backlogs and so on being seen as the priority concern. This meant that the intended holistic approach was discarded. The environment from then on, rather than being part of addressing these issues, was seen as at best of lower priority, and at worst, opposed to addressing these problems.[159] This manner of thinking has consistently cropped up in development debates since then as the environment is wrongly pitted against socio-economic issues. EIAs for instance have been blamed for "holding up development" and "holding development hostage"[160] and have been progressively restricted to the sole concern of environmental authorities.[161] The "economic cluster" of government departments displayed hostility to the first round of NEMA EIA regulations when they sought to delay them.[162] Meanwhile fragmentation within environmental governance has persisted.[163] An example is the sectoral rivalry epitomised by the struggle for control over EIAs between DEAT and the national Department of Minerals and

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departments; Mineral Resources and Energy. Previously, there was a Department of Water Affairs and Forestry, now the Department of Agriculture Forestry and Fisheries. The department of Housing is now referred to as Human Settlements. In this work, the name of the department used is the one correct at the point in time it is being referred to.

156 This was to include enforcing compliance with national policies on environmental management, reviewing the environmental impacts of all national policies, strategies and plans, and enacting legislation to enforce national norms and standards.

157 Le Quesne T (n 136) 9-10.

158 Le Quesne T (n 136) 9-10.

159 Le Quesne T (n 136) 9-10.

160 Le Quesne T (n 136). See also Macleod F "Ministries aim to trash green laws" *Mail and Guardian* 20 March 2007 INTERNET http://www.mg.co.za/article/2006-03-20-ministries-aim-to-trash-green-laws [Date of use 19 September 2008].

161 Field TL "Sustainable development versus environmentalism: competing paradigms for the South African EIA regime" *SALJ* 2006 409-436, 429.

162 Field TL (n 161) 423.

163 See also (n 115).

Energy Ministry, with the latter insisting that DEAT should not exercise jurisdiction over mining EIAs.[164]

### 2.8.3 Urgency for rapid land development and the Development Facilitation Act[165] (DFA)

The DFA was seen as pivotal to the new government's economic policy of reconstruction and development.[166] It was passed to achieve three key objectives. Provide a coherent policy framework for land development and planning; speed up and facilitate the approval of land development applications; and provide for the overhaul of the existing planning and land development framework.[167]

The need to speed up land development, largely for the black population, was due to massive housing backlogs, the new government inherited from the apartheid state. The statute was thus a creature of its time, and its overall tenor was to assist and hasten processes of land development to ensure rapid delivery of housing to the poor. This was evident in some of its provisions. For instance it provided that among others, a development tribunal may consider the question of whether the provisions of any law which "may have a dilatory or adverse effect on the proposed land development" shall apply.[168] This gave it wide powers to suspend the application of laws, including environmental laws, in pursuit of rapid land development. This created the potential for unsustainable one-sided development that overlooked environmental concerns.[169] Further, while the DFA proved a useful tool for the relatively successful scaled

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[164] To resolve this, Proc. R 660 *Government Gazette* 8904 of 13 June 2008 was promulgated. It required that EIA applications for mining and related activities be assessed and permission granted or refused by the Minister of Minerals and Energy as the competent authority. Today, in terms of section 24(2A), the Minister of Minerals and Energy must be identified as the competent authority where the activity constitutes prospecting and mining, exploration, production or a related activity occurring within a prospecting, mining, exploration or production area. According to some ideally, environmental assessments should not be done by the same department that is tasked with promoting mining in the country. This is because it presents a conflict of interest, with the potential for the environment playing second fiddle. See Kidd M and Retief F (n 120) 1020. See further the following cases: *City of Cape Town v Maccsand (Pty) Ltd and Others* 2010 (6) SA 63 (WCC); *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 (6) SA 633 (SCA); *Swartland Municipality v Louw NO and Others* 2010 (5) SA 314 (WCC); *Louw NO v Swartland Municipality* [2011] ZASCA 142 (23 September 2011). During February 2012 these cases were argued in the Constitutional Court.

[165] 67 of 1995.

[166] White paper on reconstruction and development (n 150).

[167] White paper on reconstruction and development (n 150).

[168] Section 51(2)(d)(iv).

[169] Tribunals presiding under the DFA however rarely used this power.

delivery of low cost housing to South Africa's poor, it produced mixed results with regard to its attention to environmental issues.[170]

These and other provisions within the DFA were eventually declared unconstitutional by the Constitutional Court in the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal (City of Joburg* case).[171] Nevertheless in retrospect, it is easy to see that in many ways the DFA straddled a difficult divide. One the one hand was the imperative of rapid land development it was meant to facilitate. On the other was pre-existing legislative frameworks in both spatial planning and the environment that were not yet in line with these priorities. The makers of the DFA recognised this inadequacy and it was crafted as a transitional measure, pending a more extensive review of planning legislation. It created the DPC to perform this review.[172] Presumably, this would go hand in hand with reforms under environmental law driven by DEAT. The DPC, with a limited budget, made a good start in performing a review of planning legislation and mapping the way forward with regard to planning law reform.[173] The findings of these works were never implemented however.

### 2.8.4 Retention of pre-1994 land use planning legislation

The need and urgency for law reform was widely accepted because of the racialised nature of apartheid legislation. This process of law reform provided an ideal opportunity to not only break with the past, but also forge a new approach where environmental issues could be better integrated. However, this did not happen. Law reform has been slow - meaning planning legislation and laws used for land use management in the pre-democratic dispensation have persisted to date. The land use ordinances of the former provinces of the Transvaal, Cape, and Orange Free State[174] and their related zoning schemes are still applicable and widely used around the country. Planning legislation used in the former "black areas" still persists in the statute books.[175]

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[170] See Rigby S and Diab R "Environmental sustainability and the Development Facilitation Act" 2003 (15:1) *SAJELP* 27-38.

[171] [2010] JDR 0704 (CC).

[172] Chapter II.

[173] See for example Oranje M *et al A report on planning laws applicable in the nine provinces of the Republic of South Africa: status quo and recommendations for change* (Report for the National Development Planning Commission Pretoria 1999).

[174] These are the Transvaal Town Planning and Townships Ordinance 15 of 1985, the Cape Land Use Planning Ordinance 15 of 1985, and the Orange Free State Townships Ordinance 1969. See also (n 94- 97).

[175] (n 126 and 127).

One consequence of this is that the fragmentation of planning legislation inherited from the previous regime has persisted.[176] This difficult situation was adequately conveyed in the case of *Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration (Western Cape) and Others*.[177] In this case, the presiding judge noted the following of the Western Cape province's planning legislation. Despite being *obiter*, his remarks are worth quoting in *extenso*.

> The present application illustrates that the statutory framework regulating town planning and building regulations in its present form is fragmented and cumbersome in the extreme. It is contained in at least three major separate yet inter-related pieces of legislation, viz the present Act (No 84 of 1967), the National Building Regulations and Building Standards Act, No 103 of 1977 and the Land Use Planning Ordinance (LUPO) No 15 of 1985, together with the zoning schemes promulgated in terms of the latter. It requires a vast bureaucratic machine to administer all these provisions. This inevitably leads to certain 'practices' which develop in the course of time in the administration of these pieces of legislation, which may or may not necessarily correspond with the legislative regime which underpins the process. The system also frequently - as in the present case - gives rise to conflicting and inconsistent decisions taken by different functionaries, officials and organs at different levels of local and provincial government. It would be of great, assistance to everyone involved in the process, from ordinary ratepayers to developers to officials, if the administrative machinery required to regulate these matters could be consolidated, simplified and streamlined by the legislature with a view to ensuring a fair and transparent procedure, allowing for maximum participation by all 'stakeholders' at the relevant stages of the process.[178]

Recently, there has been renewed impetus to change this state of affairs, especially after the *City of Joburg* case. This resulted in the publication of draft national framework legislation, the draft Spatial Planning and Land Use Management Bill, 2011.[179] Nevertheless this does not take away from a history of disappointing failure by the department of Agriculture and Land Affairs (now the Department of Rural Development and Land Reform, DRDLR) to pursue and finalise the enactment of

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[176] There have been some attempts by provinces to reform their planning legislation in the face of this problem, with varied degrees of success. These include in KwaZulu-Natal (through the KwaZulu-Natal Planning and Development Act 5 of 1998 which was never implemented, and through the current KwaZulu-Natal Planning and Development Act 6 of 2008); the Western Cape (through the Western Cape Planning and Development Act 7 of 1999 which was never implemented); in Gauteng (through the Gauteng Planning and Development Act 3 of 2003 also never implemented) and the Northern Cape (through the Northern Cape Planning and Development Act 7 of 1998 which has been operational since 1 June 2000).

[177] [1999] JDR 0399 (C).

[178] at 61.

[179] Draft Spatial Planning and Land Use Management Bill Proc. R 280 *Government Gazette 34270* of 6 May 2011.

this necessary law.[180] This has in many ways contributed to the current lack of integration between planning and environmental legal systems.[181]

Meanwhile the then national Department of Provincial and Local Government (now Department of Cooperative Governance and Traditional Affairs, CoGTA) enacted the Local Government: Municipal Systems Act.[182] This law was prompted by local government reform, necessary to enable local government to fulfil its new constitutionally prescribed developmental roles. Its contribution to planning was the requirement for the creation by municipal integrated development plans[183] which has arguably caused further fragmentation and confusion in the planning arena. This is because, at national level, there are now effectively two departments legislating for planning; DRDLR and CoGTA.

### 2.8.5 The growing gap between planning and environmental legislation

The lack of a national planning law is in sharp contrast to the legislative activity by DEAT. This has meant that the inherited gap between the two areas of law has progressively widened since 1994. NEMA, its suite of laws and other numerous environmental laws have developed.[184] This is despite the slow pace of development in planning law. In these legislative developments, the duplicitous, expensive and time consuming procedures for land development have also been reinforced rather than changed. Long established parallel procedures for EIAs under the formerly

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[180] The first draft of the Land Use Management Bill (LUMB) was published in 2001 (Proc. R 1658 *Government Gazette* 22473 of 20 July 2001). Its purpose according to its long title was to among others, "guide spatial planning, land use management and land development in the Republic and to regulate land use management uniformly in the Republic." By 2008, yet another draft of the same law was soundly rejected by parliament because of little support from a cross section of stakeholders. According to them, it failed to among others: provide guidance on the allocation of planning powers and competencies across the three spheres; allow proper consultation during the process of its drafting; provide guidance on how to deal with informal settlements; integrate a role for traditional leaders. Importantly, one ground of opposition to it was its failure to integrate environmental with planning issues. See Parliamentary Monitoring Group "Land Use Management Bill hearings" INTERNET http://www.pmg.org.za/report/20080731-land-use-management-bill-public-hearings [Date of use 23 September 2008].

[181] It has been posited that this failure is a result of it prioritising the broader land reform agenda within DRDLR over spatial planning legislative reform; the widespread lack of capacity in the planning profession both in and out of government; the unclear legal mandates among different spheres of government; and the ability of the old laws to protect urban property ownership. Berrisford S and Kihato M "Local government planning legal frameworks and regulatory tools: vital signs?" in Parnell S *et al* (eds) *The developmental local state: lessons from theory and practice* (UCT Press Cape Town 2008) 377-404, 390-393.

[182] 32 of 2000.

[183] Section 25.

[184] (n 148).

applicable ECA[185] and now the new EIA regulations under NEMA and planning authorisations under the provincial planning ordinances have been reinforced.

Thus with time, the gap between planning and environmental laws has widened. A legislative regime devoid of integrated thinking has been entrenched. In retrospect, had there been a more even and equal development of legislation in planning and the environment, integration between the two areas would have been a greater possibility.

## 2.9 CONCLUSIONS

This chapter has made a brief foray into the historical origins of the now commonly recognised division between planning and environmental law. Surprisingly, it was noted that the origins of the two areas of law are common: urbanising and industrialising cities at the turn of the twentieth century. It is here that public health acts with traces of planning and environmental concerns were used to ensure healthy and habitable environments. Further, remedies such as private and public nuisances served the role of dealing with concerns that cut across both areas. Hand in hand with this need to protect the general public was protection of private property, an important and to some, the most important common rationale of these laws and remedies.

However, from these common origins, distinct areas of practice and what we now label planning and the environment law emerged. The former was the first to distinguish an area of application with tools and language addressing unique concerns such as housing and amenity for urban inhabitants. This happened from the early 1900s as urban areas developed the need for distinctive interventions. Only more than five decades later however did the need to protect aspects of the environment such as air and water necessitate the creation of dedicated environmental laws.

It was also determined that South Africa developed a similar evolutionary path for both areas of law. Growing urban areas after the discovery of gold in the Transvaal for instance necessitated public health legislation. This also served as the common basis for specialist spatial planning legislation to deal with amenity, housing and the establishment of ‘townships’, and much later environmental law. However, two matters differentiate the South African legal evolution from elsewhere. One is the racialisation of these laws, where they served the purpose of implementing the discriminatory practices of apartheid. Secondly, the consolidation of all matters

[185] 73 of 1989.

environmental under the broader political umbrella of national planning, which served as the centralised authority for all natural resources.

On the eve of democracy, planning and environmental law were separate areas of practice, with the added need for urgent reform in the face of their tainted past. Environmental law had additionally suffered from a legacy of subordination to planning matters, and had missed the international development of a normative grounding. Its implementation was also fragmented across sectoral departments and government levels. Nevertheless after the 1994 transition the division between the two continued. The failure to reform planning law and the continued use of planning legislation such as the DFA, as well as the provincial planning Ordinances was entrenched. Environmental law withdrew into its own area of practice. Law after law created after 1994 isolated environmental issues and failed to enable integration across the legislative divide.

The next chapter looks at what the legacy of this historical development is, by examining the current legal framework between spatial planning and the environment.

# CHAPTER 3: HOW THE SPATIAL PLANNING AND ENVIRONMENTAL LEGAL SYSTEMS FUNCTION IN SOUTH AFRICA

## 3.1 INTRODUCTION

This chapter describes the legal systems that frame spatial planning and the environment in South Africa. By understanding this, a case can be made for better integration. To this end, it is divided into four parts. As a point of departure the constitutional basis for the divide of legislative and executive powers of the three spheres of government is indicated. The next two parts describe the planning and environmental systems in South Africa respectively. Thereafter some of the legislative provisions that currently exist that facilitate and enable the integration of these two areas of law are described. Finally, the chapter draws some conclusions.

## 3.2 THE BROAD CONSTITUTIONAL ARCHITECTURE OF POWERS, FUNCTIONS AND COOPERATIVE GOVERNANCE

### 3.2.1 Legislative and executive competence of government

The South African Constitution[1] creates a government consisting of the national, provincial and local spheres of government, and allocates powers to each of these spheres of government.[2] National legislative authority is vested by virtue of section 44 of the Constitution. This section confers on the National Assembly the power to amend the Constitution, and to pass a law with regard to any matter, including a matter within a functional area listed in Schedule 4.[3] Further, national government may assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government[4]. The Constitution divides the republic into nine provinces[5] and provincial legislative authority is vested in them by virtue of section 104 of the Constitution. Under this section, the legislative authority of a province is vested in its provincial legislature. It is conferred the power to pass a constitution for its province or to amend any constitution passed by it. Additionally, the provincial legislature may pass legislation for its province with regard

[1] Constitution of the Republic of South Africa, 1996.

[2] Section 40(1).

[3] Section 44(1)(a)(i and ii). This section also provides that this power excludes, subject to certain conditions, a matter within a functional area listed in Schedule 5. See (n 8) below for the conditions.

[4] Section 44(1)(iii).

[5] Section 103.

to any matter within a functional area listed in Schedule 4 and Schedule 5. It may also legislate for functional areas expressly assigned to it by national legislation, and any matter for which a provision of the Constitution envisages the enactment of provincial legislation.

From the above, it is clear that both national as well as provincial departments share legislative competence to pass laws with regard to functional areas listed under Schedule 4. This specific schedule is titled "Functional areas of concurrent national and provincial legislative competence" and contains a list over forty-five areas associated with government activity. In this list, the "environment", "regional planning and development" and "urban and rural development" appear.[6] Schedule 5 on the other hand is titled "Functional areas of exclusive provincial legislative competence". Part A of this schedule contains a list of functional areas, one of which is "provincial planning."[7] Being an exclusive area of provincial legislative competence means that national laws can only be made under limited circumstances.[8]

National executive authority is vested in the President and is exercised together with other members of the cabinet by implementing national legislation, developing and implementing national policy, co-ordinating the functions of state departments and administrations, preparing and initiating legislation, and performing any other executive function provided for in the Constitution or in national legislation.[9] Provincial executive authority on the other hand vests in the Premier, and is exercised together with the other members of the executive council. This is by implementing provincial legislation in the province, implementing all national

[6] Other areas listed which also have a relation to the environment and spatial planning are in Part A, administration of indigenous forests, agriculture, housing, pollution control, public transport, road traffic regulation. In Part B the include, air pollution, building regulations, municipal public transport, stormwater management systems in built-up areas, and water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.

[7] Others related to spatial planning and the environment include in Part A, provincial roads and traffic and in Part B municipal parks and recreation and municipal roads.

[8] Section 44(2) provides that such legislation can only be enacted when it is necessary to: maintain national security; maintain economic unity; maintain essential national standards; establish minimum standards required for the rendering of services; or prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole. Also, section 146(2) provides for national legislative override when conflicts between national and provincial legislation emerge. This is when among others, the national legislation deals with a matter that cannot be regulated effectively by provincial legislation; the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation and the national legislation provides that uniformity by establishing norms and standards, frameworks, or national policies.

[9] Section 85(1-2).

legislation[10] within the functional areas listed in Schedule 4 or 5, as well as administering legislation outside these functional area lists, where such a power has been assigned to the provincial executive in terms of an Act of Parliament.[11]

The executive and legislative authority of a municipality is vested in its municipal council.[12] A municipality has executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.[13] Listed under Part B of Schedule 4 is "municipal planning".

The Constitution provides that a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.[14] The question of the extent of the legislative powers conferred by this section to municipalities has been the subject of debate. It is for certain that municipalities in the new Constitutional order have gained original and thus greater legislative powers to make by-laws as well as impose rates, in their capacity as deliberative legislative bodies.[15] They do not, as previously, do this through delegated powers.[16] Nevertheless it has been suggested that rather than providing a municipality with extensive legislative powers, this section only confers legislative power as an adjunct in order to carry out its executive authority.[17] This opinion further posits that the legislative role of municipalities is in some way subservient to its administrative role.[18] Whichever way you look at it, what is clear is that legislative power is exercised and

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[10] Except where the Constitution or an Act of Parliament provides otherwise. Further, a province has executive authority in terms of this subsection only to the extent that the province has the administrative capacity to assume effective responsibility. See section 125(3).

[11] Other areas of executive authority include developing and implementing provincial policy; co-ordinating the functions of the provincial administration and its departments; preparing and initiating provincial legislation; and performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament. See section 125(1 and 2).

[12] Section 151(2).

[13] Section 156(1)(a). See also *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] JDR 0704 (CC) para 47.

[14] Section 156(2).

[15] *Fedsure v Greater Johannesburg Metropolitan Council and Others* [1999] SA 374 (CC).

[16] In line with this expansive interpretation of municipal legislative powers, if there is no national or provincial law on a local government matter, there is no limit to a municipality's scope to determine the content of a by-law other than those imposed by the Constitution itself. See Steytler N and de Visser J *Local Government Law of South Africa* (LexisNexis Durban 2011) 5-13.

[17] According to this line of argument, the use of the term "administer" in phrasing its right to create by-laws conveys executive as distinct from legislative powers. See Kriel R *Legal opinion on establishing a land use management system through municipal by-laws in Mbombela Municipality* (Report prepared by Ashira Consulting 2005) 16-17.

[18] Murray C "The Constitutional context of intergovernmental relations in South Africa" in *Intergovernmental relations in South Africa: the challenges of cooperative government* (IDASA School of Government Cape Town) 66-83, 71.

can be exercised by municipalities with regard to municipal planning. Notable on how this has been happening already is establishment of townships, wherein conditions of township establishment are regarded as quasi-legislative.[19] Legislative authority in terms of Part B of Schedule 4 and 5 is exercised more extensively by national and provincial government.[20]

Municipalities however, can have legislative powers belonging to provinces assigned to them,[21] and executive powers assigned to them by both national[22] and provincial government.[23]

National and provincial government have a role to play in functions earmarked as municipal matters in terms of Part B of schedules 4 and 5, including "municipal planning". This role is however considerably circumscribed by the Constitution, the broad principle being that the three spheres of government that is, national, provincial and municipal are distinctive, interdependent and interrelated.[24] The Constitution also provides that national and provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.[25]

It is in this light that both national and provincial government have the legislative and executive authority to see to the effective performance by municipalities of their functions. This is by regulating how municipalities exercise their executive authority to administer matters in Part B of Schedule 4 and 5, as well as any other matters assigned to them by national or provincial legislation.[26] Further, in addition to the fact that a province must establish municipalities in its province, it must by legislative or other measures, provide for their monitoring and support, as well as promote their

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[19] Devenish GE, Govender K and Hulme DH *Administrative law and justice in South Africa* (Butterworths Durban 2001) 45.

[20] This is through their powers under section 155(7), to see to the effective performance of municipalities by regulating how municipalities exercise their executive authority to administer these matters.

[21] Section 104(1)(c). According to section 156(4).

[22] Section 44(1)(a)(iii). See also section 99.

[23] Section 126. See also section 156(4) which provides that national and provincial governments *must* assign to a municipality by agreement and subject to any conditions the administration of a matter listed in Part A of schedule 4 or part A of schedule 5 which necessarily relates to local government if it will most effectively be administered locally and that the municipality has the capacity to administer it.

[24] Section 40(1). Their powers should be exercised according to the principles of co-operative government and intergovernmental relations which entails among others, not assuming any power or function except those conferred on them in terms of the Constitution, and exercising powers and performing functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere (section 41(1)(f and g)). They must also co-operate with one another in mutual trust and good faith by co-ordinating their actions and legislation with one another (section 41(1)(h)(iv)).

[25] Section 151(4).

[26] Section 155(7).

development in the province.[27] Provinces additionally have the power to intervene in a municipality. However, again this is considerably circumscribed.[28]

### 3.2.2 Implications for planning and the environment

National and provincial government have concurrent legislative powers over the environment. This means both can legislate with regard to it. National legislation, such as the National Environmental Management Act[29] (NEMA) and its related suite of laws were enacted in terms of the procedure created under section 76(3) of the Constitution that deals with legislating for areas of concurrent legislative competence between national and provincial government.

Executive powers over the environment can be exercised by both national and provincial government. NEMA allocates executive powers to both national and provincial government on various issues on the environment. Thus for example, in the case of EIAs, the Act sets up criteria where either national or provincial government are the competent authorities to decide on applications.[30] Municipal executive and legislative powers with regard to the environment are limited. Part B of schedule 4 for example lists "air pollution", the closest related issue.[31] It must however be emphasised that there has been considerable assignment of functions to local government in terms of environmental legislation that goes beyond this mandate.[32]

Spatial planning is much more complex, largely because the Constitution allocates some form of this function to all three spheres of government. Legislative competence for spatial planning is thus allocated to national and provincial government (as a concurrent competence under "regional planning and development" and "urban and rural development") provincial government (as an exclusive competence under "provincial planning") and municipal government (as "municipal planning").

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[27] Section 156(6)(a) and (b).

[28] According to section 139(1), (4) and (5), this should only be when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation; fails to fulfil an obligation to approve a budget or any revenue-raising measures; is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments; or admits that it is unable to meet such obligations or financial commitments.

[29] 107 of 1998.

[30] See NEMA section 24(c)(2).

[31] Others are waste water and sewage disposal systems, solid waste disposal and noise pollution.

[32] Writing on this state of affairs, see for example Du Plessis A "Some comments on the sweet and bitter of the national environmental law framework for 'Local Environmental Governance'" 2009 (24:1) *South African Public Law* 56-96, 88-89.

The legal parameters of "municipal planning" have been established in the case of the *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*[33] (*City of Joburg* case). The Constitutional Court stated that "it has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships" and "includes the control and regulation of the use of land".[34] The exercise of executive functions related to these are thus confined to municipalities, subject to national and provincial government seeing to its "effective performance" as well as provincial government providing "monitoring and support".[35] By this definition, the Court declared Chapters V and VI of the Development Facilitation Act (DFA) unconstitutional,[36] which gave provincial tribunals these functions. The courts have further affirmed that municipalities have jurisdiction over land development initiated by other legislation such as the Mineral and Petroleum Resources Development Act [37] even when these laws grant their own permissions. This is because they cannot displace the exercise of its role in municipal planning.[38]

However, functional areas as defined by the Constitution cannot be regarded as existing in "hermetically sealed compartments".[39] Planning entails land use and this is "inextricably connected to every functional area that concerns the use of land".[40] This means there are land-based functions which would overlap with municipal planning, such as housing, agriculture and the environment, and here province can exercise executive authority.[41] In the case of *Lagoon Bay Lifestyle Estate (Pty) Ltd v The*

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[33] [2010] JDR 0704 (CC).

[34] Para 57. See also the dissenting judgement of Yacoob J in *Wary Holdings (Pty) Ltd V Stalwo (Pty) Ltd and another* [2008] (1) SA 337 (CC) para 131 (Wary Holdings). Here, he stated that the zoning of land and the question whether subdivision should be allowed in relation to land is essentially a planning function in terms of Schedule 4 and Schedule 5. It should therefore not be accorded to the national Minister of Agriculture and Land Affairs (as per the Subdivision of Agricultural Land Act 70 of 1970) as this would be at odds with the Constitution in that it would negate the municipal planning function conferred upon all municipalities and possibly trespass into the sphere of the exclusive provincial competence of provincial planning.

[35] (n 26 and 27).

[36] 67 of 1995.

[37] 28 of 2002.

[38] *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 (6) SA 633 (SCA). See also *City of Cape Town v Maccsand (Pty) Ltd and Others* 2010 (6) SA 63 (WCC); *Swartland Municipality v Louw NO and Others* 2010 (5) SA 314 (WCC); *Louw NO v Swartland Municipality* [2011] ZASCA 142 (23 September 2011). During February 2012 these cases were argued in the Constitutional Court.

[39] *Wary Holdings* case (n 34) para 131.

[40] *Wary Holdings* case (n 34) para 128.

[41] Housing, agriculture and the environment are all listed as areas of concurrent national and provincial legislative competence in terms of Schedule 4 of the Constitution. See also South African Cities Network (SACNb) *Important legal issues for provincial legislation dealing with spatial planning and land use - a discussion document* (South African Cities Network 2011) INTERNET http://www.sacities.net/images/stories/2012/pdfs/provinicial-legislative-issues.pdf [Date of use 09 November 2011].

*Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape and Others* (*Lagoon Bay judgement),*[42] it was held that that the judgment in the *City of Joburg* case does not mean that all questions involving zoning of land and the establishment of townships invariably, regardless of the circumstances, fall exclusively under the rubric of municipal planning, or that all such questions must be determined exclusively by municipalities.[43] Instead, provincial government can exercise executive authority under matters akin to municipal planning in various instances. The court agreed with the argument that such areas constitute "a category of planning decisions which will have an impact beyond the area of a single municipality and will have effects across a larger region"[44] and fall into such a category because of among others "size and scale". Such "extra municipal" issues exceed the bounds of municipal planning and fall within the ambit of regional planning and development and provincial planning".[45] Thus applications for a zoning of land for example can be regarded as provincial planning, if they meet criteria for provincial interests, based on size and necessarily beyond the jurisdiction of a single municipality. Finally, the national sphere of government is exercising its role of legislating for "regional planning and development" as well as "urban and rural development" through the draft Spatial Planning and Land Use Management Bill.[46] Both national and provincial governments have executive powers to implement the bill.[47]

### 3.3 SPATIAL PLANNING IN SOUTH AFRICA

There is an elaborate system of spatial planning in South Africa. This is both a legacy of the pre-democratic dispensation as well as a creation of relatively more recent legislation. Generally however, South Africa's spatial planning system is very fragmented and long overdue for reform.[48] The next section will describe the system according to its proactive spatial planning and land use management and development planning elements.

#### 3.3.1 Proactive spatial planning

[42] [2011] ZAWCHC 327 (31 August 2011).

[43] Para 14.

[44] Para 10.

[45] Para 10.

[46] Proc. R 280 *Government Gazette* 34270 of 6 May 2011.

[47] See (n 9 and 10).

[48] See 2.8.4.

South Africa's planning legacy derives from English law.[49] One of the earliest statutorily prescribed proactive spatial planning functions can be traced to guide plans, introduced by the Physical Planning and Utilization of Resources Act.[50] These were created due to the uncoordinated developments that created a state of confusion within the spatial planning arena. They were intended as broad-scale, statutory organisational frameworks with a coordinative function for policies for land use, transportation and infrastructure of regions or sub-regions for a period of up to twenty five years.[51]

Today, legislation providing for proactive spatial planning includes the Local Government: Municipal Systems Act (Systems Act),[52] which provides for integrated development plans (IDPs) and spatial development frameworks (SDF) and the Development Facilitation Act[53] which prescribes Land Development Objectives (LDOs).[54] The Physical Planning Act,[55] which still remains in the statute books, provides for urban structure plans that serve as guidelines for the future physical development of urban areas.[56] These plans, created before the current local government dispensation, are still applicable and remnants are used in many parts of the country, including the Western Cape and the Free State.[57] Provincial planning Ordinances[58] on the other hand provide for zoning schemes. KwaZulu-Natal and the Northern Cape are exceptions where there is more recent provincial legislation rather than the old Ordinances. These are the KwaZulu-Natal Planning and Development Act (KZNPDA)[59] and the Northern Cape Planning and Development Act (NCPDA).[60]

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[49] See 2.6.1.

[50] 88 of 1967.

[51] Van Wyk J *Planning law, principles and procedures of land-use management* (Juta Cape Town 1999) 97.

[52] 32 of 2000.

[53] 67 of 1995. Chapters V and VI have been declared constitutionally invalid (see n 33).

[54] There was an initial lack of clarity on what the role of LDOs were in relation to newly created IDPs. While both have statutory force, the *de facto* situation is that IDPs have effectively taken over the proactive planning role at local government level, and LDOs have consequently largely fallen into disuse.

[55] 125 of 1991.

[56] Section 24(1).

[57] For example the Vaal River Complex Regional Structure Plan which affects the Vaal River to the Barrage and the Vaal Dam area. It determines land uses, minimum waterfronts and densities in the Free State and Gauteng sides of the river.

[58] In the Western, Eastern, Northern Cape and parts of North West the Cape Land Use Planning Ordinance 15 of 1985 (LUPO) applies; in the Free State the Townships Ordinance 9 of 1969 (OFS Ordinance) applies; and in Gauteng, Mpumalanga, Limpopo and parts of North West the Town-planning and Townships Ordinance 15 of 1986 (Transvaal Ordinance) applies.

[59] 6 of 2008.

[60] 7 of 1998.

The draft Spatial Planning and Land Use Management Bill, 2011[61] (SPLUMB), intended as the national framework legislation for spatial planning, entrenches the role of these proactive spatial planning instruments. If enacted, the bill will provide for standards for SDFs at national, provincial, regional, and municipal level,[62] as well as land use schemes[63] at municipal level.[64]

*(i) Integrated development plans (IDPs)*

Chapter 5 of the Systems Act requires that each municipal council must, within a prescribed period after the start of its elected term, adopt a single, inclusive and strategic plan for the development of the municipality, the IDP.[65] IDPs are required to link, integrate and co-ordinate plans and take into account proposals for the development of the municipality; align the resources and capacity of the municipality with the implementation of the plan; form the policy framework and general basis on which annual budgets are based; and be compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.[66]

The IDP contains a SDF which sets out objectives that reflect the desired spatial form of the municipality.[67] It is a visual representation of the desired patterns of land use within the municipality, addresses spatial re-construction of the municipality, sets out basic guidelines for land use management as well as provides strategic guidance on location and nature of development. Importantly, it must contain a strategic assessment of the environmental impact of the spatial development framework[68] and may also delineate the urban edge.[69]

IDPs have been widely adopted as the principle proactive spatial planning instrument at local government level across South Africa. There has been profuse commentary on the practice of IDPs generally as successive plans were created by municipal

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[61] Proc. R 280 *Government Gazette* 34270 of 6 May 2011.

[62] Chapter 4.

[63] Land use schemes are similar to zoning schemes.

[64] Chapter 5.

[65] Section 25.

[66] Section 25(1).

[67] Local Government Municipal Systems Act 32 of 2000 "Local Government Municipal Planning and Performance Management Regulations 2001" section 2(4) GN R796 in *Government Gazette* 22605 of 24 August 2001.

[68] See (n 67) section 2(4)(f).

[69] Section 27(i)(ii-iii). Urban edges are spatial boundaries intended to remedy urban sprawl and the creeping invasion of urban land use into agricultural land. They have been widely delineated in many municipalities around the country.

governments,[70] hearings on their effectiveness[71] as well as more specific comment on their relationship with the environment.[72] In this respect, integration with the environmental matters is generally regarded as poor. This will be explored in the next chapter.

*(ii) Zoning schemes[73]*

Zoning schemes are regulatory plans and forms of land use classification that shape decisions on land by exercising statutory control. They have a long history of development in countries such as the United States and Britain[74] and similar laws were replicated in South Africa.[75] The intention was to create urban environments in which the differing land uses could be arranged to provide minimum conflict and maximum harmony, through the creation of a suitable pattern of use zones.[76] Any changes from one land use to another requires a substantive application known as a rezoning application.

Today, zoning schemes are prescribed by the provincial planning ordinances[77] as well as former "black areas" laws.[78] In KwaZulu-Natal as well as the Northern Cape, new provincial spatial planning legislation, provides for the creation of zoning schemes.[79] In both these provinces, this is yet to be completed and the old schemes

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[70] See for example Harrison P "Integrated development plans and third way politics" in Pillay U, Tomlinson R and du Toit J (eds) *Democracy and delivery: urban policy in South Africa* (HSRC Press Cape Town 2006) 186-207; Harrison P *Towards integrated intergovernmental planning in South Africa: the IDP as a building block* (Report to the Department of Provincial and Local Government and Municipal Demarcation Board 2002); Meiklejohn C and Coetzee M "Development planning: current approaches achievements, gaps and future directions" 2003 (8) *Hologram* 3.

[71] See for example Western Cape Department of Local Government and Housing *The Western Cape IDP hearings – reports* (2005).

[72] Todes A "Regional planning and sustainability: limits and potentials of South Africa's Integrated Development Plan" 2004 (47:6) *Journal of Environmental Planning and Management* 843-861; Todes A *et al Relationship between environment and planning* (Report for the KwaZulu-Natal Planning and Development Commission 2005); Sowman M "Integrating environmental sustainability issues into local government planning and decision making processes" in Parnell S *et al* (eds) *Democratising local government: the South Africa experiment* (University of Cape Town Press Cape Town 2002) 181-203; Todes A, Berrisford S and Kihato M *Relationship between environment and planning: phase 2* (Report prepared for the KwaZulu-Natal Provincial Planning and Development Commission 2007).

[73] Also known as town planning schemes or land use management schemes.

[74] See 2.3.

[75] See 2.7.

[76] Van Wyk J (n 51) 30.

[77] See (n 58).

[78] For example town-planning schemes in Venda in terms of the Venda Land Affairs Proclamation 45 of 1990. Venda was a so-called independent state under apartheid. See 2.7.

[79] Chapter 2 of the KZNPDA and chapter 5 of the NCPDA.

are still applicable.[80] There have also been attempts at reforming the zoning schemes in other provinces. These have been hampered by delays in enacting new provincial spatial planning acts, similar to those in KwaZulu-Natal and the Northern Cape provinces.[81]

Generally, zoning schemes have little in the form of integration with environmental concerns as will be seen in greater detail in the next chapter.

*(iii) Other proactive spatial planning instruments*

Beyond statutorily required IDPs and LDOs created at municipal level, there are other proactive spatial planning initiatives. While they are not required by legislation, they have, by way of custom, become part and parcel of the spatial planning landscape. These include national and provincial spatial development frameworks and perspectives. These are proactive spatial plans at national and provincial scale, the latter replicated in the country's provinces.[82] These plans represent national and provincial government's spatial planning for the development within their areas. A major challenge has been effective alignment and integration of these national and provincial proactive plans with municipal plans such as IDPs, in order to guide appropriate provision of infrastructure, housing, services and various welfare programmes.[83] Further, there has been little integration with environmental concerns.[84.]

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[80] In Sol Plaatje Municipality for example, the Kimberley Town Planning Scheme was approved in the 1950s in terms of the Townships Ordinance 33 of 1934, while the Galeshewe and Ritchie Town Planning Schemes were approved in terms of the Land Use Planning Ordinance 15 of 1986. The Sol Plaatje Municipality is in the process of finalising the land use management scheme under the provisions of Chapter 5 of the NCPDA.

[81] For example, the draft City of Johannesburg Town Planning Scheme of 2007 which consolidates Johannesburg's thirteen different town planning schemes is to be enabled by the Gauteng Planning and Development Act 3 of 2003 which is yet to be put into operation. Provincial legislation is vital for legislative entrenchment of the schemes though there are arguments that municipal legislative powers are extensive enough under section 156(2), to allow them to authorise schemes using their powers to legislate through by-laws (see n 17).

[82] The draft SPLUMB proposes to entrench these in legislation, should it be enacted. Some examples include the National Spatial Development Perspective. Others in provinces include the Gauteng Spatial Development Perspective launched in 2007, and the Western Cape Provincial Spatial Development Framework of 2009.

[83] Harrison P (n 70) 202.

[84] Presidency *Accelerated and shared growth initiative for South Africa (ASGISA)* (Pretoria 2006). One of the roles of the National Planning Commission is to provide an overarching spatial framework and guidelines spelling out government's spatial priorities, as well as provide the platform for alignment and coordination of these plans. See Presidency *Green paper on national strategic planning* (Pretoria 2009).

### 3.3.2 Land use management and development

Land use management (removal of restrictions, the removal or amendment of conditions of title and the granting of so called consent uses) and land development (foundation and development of new townships also called subdivision of land, and consolidation of land) are the elements of spatial planning that deal with the actual development of land and the decisions made in regulating this development. This section dwells on one, the subdivision of land.

*(i) Subdivision of land*[85]

Subdivision regulations are a common form of land use management. They have their origins in the early urban settlements of South Africa.[86] Like zoning schemes, subdivision of land is regulated by the provincial planning ordinances of the Transvaal, Cape, and Free State.[87] KwaZulu-Natal and the Northern Cape employ the KZNPDA and the NCPDA. Former "black areas" legislation and more recently, enacted laws such as the Less Formal Township Establishment Act (LFTEA)[88] are likewise currently used but will not be examined here. Another important law not delved into in detail is the Sub-Division of Agricultural Land Act.[89] This law requires that subdivision of agricultural land outside the former boundaries of urban areas be approved by the national department of Rural Development and Land Reform.[90]

Among the ordinances, the procedures are similar in many ways, although the procedure in terms of LUPO is often treated as more unique.[91] The following section examines the procedures for subdivision of land in the ordinances and the provincial legislation.

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[85] Also known as township establishment.

[86] For more detail see 2.6.

[87] (n 58).

[88] 113 of 1991. For example in KwaZulu-Natal, the provincial government was assigned this power in terms of Proc. R 159 of 31 October 1994. It is used for township establishment for low cost housing including in the former KwaZulu area. Most provisions that deal with suspension of laws as well as registration of title however have still not been assigned. The official decision-making body is the one charged with housing (currently Human Settlements and Public Works) in consultation with the relevant local authority. The use of this legislation is probably unconstitutional because it is province that exercises executive powers in the sub-division process and there is no provincial interest within the meaning of the *Lagoon Bay* case.

[89] 64 of 1998.

[90] The boundaries referred to here are those of Transitional Local Councils set up by the Local Government Transition Act 97 of 1996, when there was still a distinction between agricultural rural land and urban land. This distinction has fallen with the establishment of wall-to wall municipalities under the Systems Act. The national department has consequently produced a series of maps which indicate areas that are reserved or exempt from the requirements of the Act.

[91] Van Wyk J (n 51) 184.

*(ii) Application for subdivision of land*

The process of subdivision of land is initiated by an application through the provincial ordinances and the KZNPDA and NCPDA. Under the ordinances, the owner of land who wishes to apply for subdivision of land applies in writing to the requisite authority.[92] This may be an authorised[93] local municipality, or in some instances, the application is directed to a provincial secretary[94] or the administrator (now the premier).[95] The majority of municipalities in South Africa are authorised, meaning that the bulk of sub-division applications are dealt with by municipalities.[96] The Transvaal and the Orange Free State Ordinances also require that a townships board or similar body is created.[97] This body gets involved in the process of township establishment when it considers applications which are forwarded to it after they have been received.[98] Other instances include when the applications have elicited objections or the requisite authority has recommended the application be refused or accepted with amendments.[99]

From the time the application is made, it must meet a host of requirements.[100] A process of notifying interested and affected parties to the application may also be

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[92] Transvaal Ordinance, section 96. LUPO, section 24(1) requires that the owner of land may apply in writing for the granting of a subdivision under section to the town clerk of a council**.**

[93] In Gauteng, Limpopo, and the North West, most municipalities are authorised in terms of the Transvaal Ordinance. All but two municipalities are authorised in Mpumalanga in terms of the same Ordinance. In terms of LUPO, all municipalities in the former Cape Province have been authorised to consider, approve, or refuse land use applications. In the Free State, municipalities, including the City of Mangaung are not authorised in terms of the OFS Ordinance. See South African Cities Network *Provincial land use legislative reform: status reports for Gauteng, Free State, Mpumalanga, Limpopo, North West, KwaZulu Natal, Eastern Cape, Western Cape and Northern Cape* (South African Cities Network Johannesburg 2011) INTERNET. http://www.sacities.net/what/programmes-areas/inclusive/spatial/projects/765-provincial-land-use-management-laws [Date of use 27 February 2012].

[94] OFS Ordinance under section 8(1) which requires that the application is directed to the provincial secretary, who then directs it to the townships board.

[95] According to Schedule 6 of the Constitution, reference in the old order legislation to an administrator must be construed as reference to a Premier. Also LUPO under section 23(1) which requires that the application should be directed to the premier.

[96] See (n 93).

[97] Transvaal Ordinance, section 3; OFS Ordinance, section 2. In the latter, it is also known as the Land Use Advisory Board.

[98] For example, the OFS Ordinance requires that the provincial secretary upon receiving applications forwards them to the Township Board. See section 8(4).

[99] Transvaal Ordinance, section 69(15).

[100] For example it is to be accompanied by plans, diagrams or other documents as prescribed. See Transvaal Ordinance, section 96(2). See also Reg. 18 of R859 of 1987 "Town-planning and Townships Regulations"; OFS Ordinance, section 8(1). See also Reg. 2(a) of R87 of 1970 "Township Regulations"; Cape Ordinance section 24(2)(d)(i).

initiated. This entails forwarding a copy of the application to adjoining municipalities, roads departments at provincial and local level, all local authorities and entities providing engineering services, and any other person who may be deemed to have an interest.[101] In some instances the notification is posted in the *Provincial Gazette* and locally circulating newspapers.[102] Upon receipt of any objections and or comments, these are then forwarded to the applicant[103] and the applicant may then reply to them.[104]

After the authority collects all objections, recommendations and comments to the application, it may approve the application, either wholly or in part, refuse it or postpone it.[105] The applicant is then notified of this decision, and may be required to reply to the decision within a given period.[106] Approval of application can be accompanied by conditions that should be fulfilled by the applicant.[107]

It is illustrative that environmental issues are not explicitly mentioned as needing to be considered before coming to a decision. Instead, reliance can be made on the principles of NEMA. In terms of section 2, these require that actions of organs of state that may significantly affect the environment are socially, economically and environmentally sustainable. Such a principle can be invoked by municipal officials dealing with these applications to require environmental issues are considered.[108] However, this does not allow for proper integration as shall be seen in the next chapter.[109]

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[101] Transvaal Ordinance, section 69(6)(b); OFS Ordinance, section 9(1 and 2 ); LUPO section 24(2)(a-c). Also in reg. 10 of Government Notice No. R1050 of 1988 titled "Land Use Planning Regulations" require that the applicant is the one notified to whom a copy of the application needs to be forwarded to, and subsequently takes on the task of doing so.

[102] Transvaal Ordinance, section 69(6)(a), where it should be published for once a week for 2 consecutive weeks. Reg. 21 of R859 of 1987 "Town-planning and Townships Regulations", the notice format is prescribed in Schedule 11; OFS Ordinance section 9(1, 2 and 3); LUPO section 24(2) the town clerk or secretary shall cause the said application to be advertised if in his/her opinion any person may be adversely affected.

[103] Transvaal Ordinance, section 69(8); OFS, section 9(3); LUPO section 24(2)(b).

[104] Transvaal Ordinance, section 69(9) which gives the applicant 28 days to reply to the comments.

[105] Transvaal Ordinance, section 98(1); OFS Ordinance, section 9(4).

[106] Transvaal Ordinance, section 69(14); LUPO, reg. 19 Government Notice 1050 of 1988 "Land Use Planning Regulations." In terms of the Transvaal Ordinance, notification happens when there has been a recommendation that the application should not be allowed or that it be allowed subject to amendments. In such cases, another process of decision-making is initiated with the application forwarded to the Townships Board for further consideration.

[107] Transvaal Ordinance, section 98(2).

[108] Kidd M and Retief F "Environmental assessment" in Strydom HA and King ND (eds) *Fuggle and Rabie's environmental management in South Africa* (Juta 2009) 1026.

[109] Indeed, some authors are quick to point out that this is a statement of general intent and does not ensure that the rigors of environmental law are fully brought to bear. See Todes A *et al* (n 72) 38.

In KwaZulu-Natal, township establishment is initiated using the KZNPDA.[110] The Act has replaced the Natal Town Planning Ordinance,[111] except section 67(*bis*) dealing with special consent applications, which has been retained. The Act has a chapter on subdivision and consolidation of land. It states that the approval of a municipality is necessary for subdivision or consolidation of land, aimed at among others township establishment and consolidation.[112] In coming to its decision, the municipality will consider a wide range of factors. These include among others comments from the public, the opinion of a registered planner,[113] the potential impact of the proposal on environmental, socio-economic and cultural issues, the impact of the proposal on resources available, and the municipalities IDP.[114]

In the Northern Cape, the NCPDA[115] provides for applications for township development to be submitted to municipalities and conducted in terms of interim procedures published in Schedule A of the Act.[116] Within two weeks, the municipality can request additional information, upon which is advertised.[117] The applicant is then given 90 days to respond to the comments after receipt of the comments.[118] The procedures do not give details of what is taken into consideration in coming to a decision, and whether any environmental considerations are included. However, the Schedule requires that documentation regarding any environmental impact assessments be included in the application.[119]

Information on the practice within the two provincial Acts indicates that the approach has not fundamentally changed from that in the ordinances. The express mention of the need to consider environmental issues does not achieve adequate integration as

[110] Act 6 of 2008. This is not applicable across the entire province however. Areas of the province where there is traditional land have the KwaZulu-Natal Ingonyama Trust Amendment Act 9 of 1997 as applicable.

[111] 27 of 1949.

[112] Section 21(1)(d and e).

[113] The Act in what is a break from previous procedures requires that a professional evaluation and recommendation is required in any scheme changes, and there should be an accompanying certificate signed by a registered planner confirming the proposal complies with the Act.

[114] Sections 11 and 12 KZNPDA.

[115] In terms of section 82(1) of the Act, any application for the planning, development or utilisation of land in the province shall be made in terms of either the provisions of this Act or the provisions of the DFA, unless the MEC consents to the application being made in terms of another law.

[116] These are interim, pending the publishing of regulations for township development to be applied across the province. There are such draft regulations awaiting approval by the MEC.

[117] Schedule A sections 2 and 3.

[118] Schedule A section 4(2).

[119] Annex A.

the two separate processes are still largely retained.[120] These problems in practice are examined in greater detail in the next chapter.

## 3.4 THE ENVIRONMENTAL SYSTEM IN SOUTH AFRICA

There are a number of statutorily required proactive planning instruments under NEMA. These include environmental implementation plans and environmental management plans. A second set of proactive tools are those confined to specific areas of environmental concern such as biodiversity, protected areas, air quality or coastal management areas. As a day to day tool for environmental decision-making, the EIA represents the rough environmental equivalent of spatial planning decision-making processes under land use management and development. The section also briefly deals with another assessment tool, the strategic environmental assessment (SEA).

### 3.4.1 Proactive planning in environmental legislation

At a proactive planning level, there are various plans associated with environmental legislation. These are numerous, often a creation of environmental planning processes linked to specific environmental elements (for example land, soil, water, air) and sectoral environmental concerns such as biodiversity, coastal management zones, air quality and so on. They are generally carried out right across all spheres of government, at national, provincial and municipal level.

*(i) Environmental implementation plans and environmental management plans*

NEMA requires that national departments, when exercising functions that affect the environment[121] and exercising functions involving the management of the environment[122] prepare environmental implementation plans and environmental management plans respectively (EIP and EMP). Departments exercising both functions may prepare a consolidated environmental implementation and management plan. Further, they must in preparing them, take into consideration every other environmental implementation plan and environmental management plan

[120] South African Cities Network (n 93).

[121] These are among others the Departments of Environmental Affairs and Tourism, Land Affairs, Agriculture, Housing.

[122] These are the Department of Environmental Affairs and Tourism, Water Affairs and Forestry, Minerals and Energy, Land Affairs, Health and Labour.

already adopted with a view to achieving consistency among such plans.[123] The purpose and objects of EIPs and EMPs include to co-ordinate and harmonise the environmental policies, plans, programmes and decisions of the various national departments that exercise functions that may affect the environment, including at provincial and local spheres of government.[124] Contents of both plans include *inter alia* a description of the manner in which the relevant national department or province will ensure that the policies, plans and programmes will comply with the principles set out in NEMA,[125] and proposals for the promotion of the objectives and plans for the integrated environmental management.[126] Section 16(4) provides that each provincial government must ensure that each municipality within its province complies with the relevant provincial environmental implementation plan.

*(ii) Biodiversity plans*

The National Environmental Management: Biodiversity Act[127] has a series of planning prescriptions for various authorities, all geared towards the management and conservation of biodiversity. Chapter 3, titled Biodiversity Planning and Monitoring requires that a National Biodiversity Framework is created by the national minister.[128] Contents of the framework among others include that it must provide for an integrated, co-coordinated and uniform approach to biodiversity management by organs of state in all spheres of government, non–governmental organisations, the private sector, local communities, other stakeholders and the public. It should also identify priority areas for conservation action and establishment of protected areas as well as determine norms and standards for provincial and municipal environmental conservation plans.[129] Further, the minister or the MEC for environmental affairs in a province may determine a geographic region as a bioregion. This is a region that contains one whole or various ecosystems and is characterised by its landforms, vegetation cover, human culture and history. A plan may then be published for the management of biodiversity and the components of biodiversity in such region.

There has been a draft National Biodiversity Framework for South Africa for the better part of three years, and it is yet to be completed.[130] Guidelines for the declaration of bioregions and the preparation of bioregional plans have also been

[123] Section 11(1)-(4).

[124] Section 12(a).

[125] Section 13(b).

[126] Section 14(g).

[127] Act 10 of 2004.

[128] Section 38. This would ordinarily be the minister in charge of the environment at the time.

[129] Section 39.

[130] GN 801 in Government *Gazette* 30027 of 29 June 2007.

produced.[131] There have also been a number of bioregional plans prepared to date.[132]

*(iii) Air Quality Plans*

The National Environmental Management: Air Quality Act (Air Quality Act)[133] requires that each national department or province[134] responsible for preparing an environmental implementation plan or environmental management plan must include in that plan an air quality management plan. Further, each municipality must include in its integrated development plan an air quality management plan.[135] The Act also provides for the declaration of priority areas by the minister of MEC in charge of environmental affairs, upon which among other things, a priority area air quality management plan must be prepared for the area.[136]

*(iv) Coastal management programmes and coastal planning schemes*

The National Environmental Management: Integrated Coastal Management Act (ICMA)[137] contains provisions for national, provincial and municipal coastal management programmes[138] as well as coastal management schemes.[139] A coastal management scheme is a scheme that reserves defined areas within the coastal zone to be used for specified purposes and prohibits or restricts any use of these areas in conflict with the terms of the scheme.[140]

The ICMA is particularly cognisant of integrating its plans internally and with other proactive spatial planning initiatives. It was enacted especially with this in mind given the history of poorly aligned and integrated interventions in coastal areas.[141] National coastal management schemes take precedence over provincial ones and those of

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131 GN 291 in *Government Gazette* 32006 of 16 March 2009.

132 These include the City of Cape Town, Nelson Mandela Metro, Namqua District Municipality in the Northern Cape, and Gert Sibande Municipality in Mpumalanga.

133 Act 39 2004.

134 See for example North West and Western Cape Air Quality Management Plans.

135 Section 15.

136 Section 18 and 19. A number of priority areas have been declared including the Vaal Triangle Priority Area, the Vaal Triangle Airshed Priority Area and the Highveld Priority Area, with accompanying plans.

137 24 of 2008.

138 Section 44-50.

139 Section 56 and 57. These are created by national and provincial departments in consultation with each other, as well as by municipalities.

140 Section 56(1)(a&b).

141 See for example Sowman M "The status of coastal zone management in South Africa" 1993 (21) *Coastal Management* 163-184.

province over municipal ones.[142] IDPs and EMPs must be aligned and give effect to both the national and provincial coastal management programmes.[143] A provincial or municipal IDP may also have as part of it, the coastal management programme.[144] Further, a municipality may not adopt a land use scheme that is inconsistent with a coastal planning scheme.[145]

*(vi) Other plans*

Section 24(3) of NEMA provides for a provincial role in identifying geographical areas for environmental authorisation. Here, an MEC with concurrence of the national minister may compile information and maps that specify the attributes of the environment in particular geographical areas, including the sensitivity, extent, interrelationship and significance of such attributes. In Gauteng, this information is contained in a series of mapped documents known as C-Plans or Conservation Plans.

### 3.4.2 Environmental assessments

Environmental assessment is a critical component of modern environmental law and encompasses EIAs.[146] It also includes related processes of appraisal of policies, plans and programmes such as SEA.[147] In all these, the purposes of the assessments are to identify, predict, evaluate and mitigate the potential negative environmental impacts of land development projects.[148] They also serve to ensure that such negative environmental impacts are taken into account in project selection, siting, planning and design, and the final authorisation of the development.[149]

*(i) The legal foundations for environmental impact assessments EIAs - NEMA*

The principles set out in NEMA provide that development must be socially, environmentally and economically sustainable.[150] Sustainable development requires among others, the consideration assessment and evaluation of social, economic and environmental impacts of activities, and the determination of their disadvantages and

[142] Section 56(4)(a & c).

[143] Section 51.

[144] Section 46(4).

[145] Section 57(2)(a).

[146] Kidd M and Retief F (n 108) 971.

[147] Others are environmental risk assessment which includes legal compliance audits.

[148] Section 23(2)(b) NEMA.

[149] (n 148).

[150] Section 2(3).

benefits.[151] Chapter 5 titled "Integrated Environmental Management" (IEM) also deals with environmental authorisations. One of the objectives of IEM is to identify, predict and evaluate the actual and potential impact of activities on the environment, socio-economic conditions and cultural heritage.[152]

Section 24(2) of NEMA is the legal basis for EIAs through a series of procedures and listing notices. These list the activities requiring environmental authorisation from competent authorities. The section provides that the minister,[153] or an MEC with the concurrence of the minister, may identify activities which may not commence without environmental authorisation from the competent authority.[154] NEMA defines a competent authority as the organ of state charged with evaluating the environmental impact of the activity.[155] In the majority of them, the competent authority is the environmental authority in the province with some exceptions, where the national minister is the competent authority.[156] This means that in the most cases, provincial authorities are involved in decision-making.[157]

NEMA also contains a framework setting out the procedural requirements that should be met when performing environmental authorisations.[158] Among others, environmental authorisations should enable coordination and cooperation between

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[151] Section 2(4)(i).

[152] Section 23(2)(b). It is also intended to evaluate the risks and consequences these activities pose and provide alternatives and options for mitigation of the effects of the activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management.

[153] In charge of environmental affairs.

[154] The same provisions also allows for the identification of geographical areas based on environmental attributes in which specified activities may not commence without environmental authorisation.

[155] Section 1(1).

[156] Section 24C(2) sets criteria when the national minister must be the competent authority. This is when firstly, the activity has implications for international environmental commitments or relations; secondly, it will take place within an area protected by means of an international environmental instrument; thirdly, has a development footprint that falls within the boundaries of more than one province or traverses international boundaries; fourthly is undertaken, or is to be undertaken, by a national department, a provincial department responsible for environmental affairs or any other organ of state performing a regulatory function and reporting to the MEC, or a statutory body, excluding any municipality, performing an exclusive competence of the national sphere of government; and fifthly, it will take place within a national proclaimed protected area or other conservation area under control of a national authority. Further, in terms of section 24 (2A), the Minister of Minerals and Energy must be identified as the competent authority where the activity constitutes prospecting, mining, exploration, production or a related activity occurring within a prospecting, mining, exploration or production area.

[157] For detailed explanation on how the exercise of executive powers in terms of the environment is divided among the different spheres of government, see also 3.2.1.

[158] Section 24(4).

organs of state.[159] NEMA provides that the minister or a MEC may grant an exemption from any provision of NEMA, except this section.[160]

*(ii) The legal foundations for EIAs - Other laws*

Outside NEMA, there are a number of laws where EIAs or similar processes are required. These include the Mineral and Petroleum Resources Development Act.[161] The Act provides that the holder of a reconnaissance permission, prospecting right, mining right, mining permit or retention permit must consider, investigate, assess and communicate the impacts of these activities.[162] Another act is the Genetically Modified Organisms Act[163] where the Executive Council of Genetically Modified Organisms may require applications for certain permits undergo risk assessments and where required, an assessment of environmental impact.[164] The National Water Act[165] requires that an applicant for a licence regarding certain activities identified first undertake an impact assessment.[166] The minister, as well must, before constructing a water work, prepare an environmental impact assessment.[167] Others such as the Air Quality Act provides for risk assessments.[168] Further, it provides for the production of atmospheric impact reports.[169] Under the ICMA, no organ of state may authorise land within the coastal protection zone be used for any activity that may have an adverse effect on the coastal environment without first considering an environmental impact

[159] Section 24(4)(a)(i-v). Other things they should ensure include: that findings and recommendations flowing from an investigation ensure the general objectives of integrated environmental management and the principles of environmental management are taken into account; that a description of the environment likely to be significantly affected by the proposed activity is contained; that an investigation of the potential consequences to the environment of the activity is done; and that public information and participation procedures, that allow all interested and affected parties, including all organs of state in all spheres of government, a reasonable opportunity to participate are performed.

[160] Section 24M(1).

[161] 28 of 2002.

[162] Section 38(1)(b).

[163] 15 of 1997.

[164] Section 5.

[165] 36 of 1998.

[166] Section 41(2).

[167] Section 140 (c) (2).

[168] Section 23(1).

[169] Section 30, Air Quality Act. This may be required of any person during licensing reviews for atmospheric emission licence or much more generally, when it is suspected that the person may have contravened the Act or the conditions of a licence. The regulations governing Atmospheric Impact Reports are in draft form and out for comment. See GN 619 *Government Gazette* 31107 of 6 June 2008.

assessment report.[170] Finally, the National Heritage Resources Act (NHRA)[171] provides for heritage impact assessments (HIA).[172]

There is provision for integration between the various EIAs. Thus for example the NHRA has made provision that if an EIA is required, then the HIA is treated as a specialist study within the EIA.[173] Further, there is some cooperation between the different national sectoral authorities dealing with the various permissions, and NEMA EIAs, as will be seen in the next chapter. Nevertheless even among environmental sectors themselves, the existence of these numerous permission regimes points to considerable fragmentation.[174] This means the historical fragmentation in environmental law has been largely retained.[175]

*(iii) The EIA procedures*

As noted, NEMA provides for identification of activities which may not commence without environmental assessment from a competent authority. In essence this means that for the identified activities to take place, an EIA is necessary, and this must result in a positive decision. To this end, two sets of lists were promulgated by the national minister. These are Listing Notices 1[176] and 2.[177] The listing notices differ in that the first deals with activities requiring a basic assessment process, and the second with those requiring a scoping and environmental impact report (S&EIR).[178] A basic assessment falls short of the full S&EIR process, and is a less demanding route through which lesser damaging activities can be assessed. The idea is that upon considering a basic assessment, the authority assessing the application can require that the application proceed to the "full blown" S&EIR. Alternatively, the authority can come to a decision based on the basic assessment report alone, and grant or refuse the application.[179]

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170 Section 62(2).

171 25 of 1999.

172 Section 38.

173 Section 38 (8). This is provided the relevant heritage authority ensures the evaluation fulfils the requirements of the relevant heritage resources authority and any comments and recommendations by the authority to such development have been taken into account prior to the granting of the consent.

174 Kotze LJ "Improving unsustainable environmental governance in South Africa: the case for holistic governance" 2006 (1) *Potchefstroom Electronic Law Journal* 1-44.

175 See 2.7.2.

176 GN R544 in *Government Gazette* 33306 of 18 June 2010.

177 GN R545 in *Government Gazette* 33306 of 18 June 2010.

178 The regulations define the EIA process as essentially consisting two components: a basic assessment and S&EIR. Unless referring to either one specifically, this work will use the more general term EIA.

179 Regulation 25(1)(b), GN R543 in *Government Gazette* 33306 of 18 June 2010.

Besides listing notices that indicate activities that trigger EIAs, there is in addition, a third listing notice or Listing Notice 3 that triggers an EIA. This is if certain activities occurring within certain pre-determined geographical areas in various provinces are proposed.[180]

Once the EIA process is triggered by an activity identified in the three lists, certain procedural steps are required to guide the process of doing the assessment. These procedural requirements are contained in the Environmental Impact Assessment Regulations of 2010 (EIA Procedural Regulations).[181] Among the contents of these regulations are procedures and requirements for basic assessments and that for S&EIR.

There have been a number of studies that have reviewed the general practice of EIAs in South Africa.[182] The general consensus is that there has been little effort and success in integrating this area of practice with other areas of practice, including spatial planning and more specifically land use management and development planning. This will be examined in greater detail in the next chapter.

### 3.4.3 Strategic environmental assessment (SEA)

SEA is defined as,[183]

> A systematic process for evaluating the environmental consequences of proposed policy, plan or programme initiatives in order to ensure they are fully included and appropriately addressed at the earliest appropriate stage of decision making on par with economic and social conditions.[184]

The usefulness of SEAs centres around its ability to help policy, plan and programmes achieve sustainable development.[185] This is because, as the quote above states, it is intended to infuse environmental issues into economic and social

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[180] GN R546 in *Government Gazette* 33306 of 18 June 2010. See also (n 154).

[181] GN R543 in *Government Gazette* 33306 of 18 June 2010.

[182] See for example Mosakong Management CC, Environomics CC Savannah Pty and Environmental Counsel CC *Review of the effectiveness and efficiency of the Environmental Impact Assessment (EIA) system in South Africa* (Report for the National Department of Environmental Affairs and Tourism Pretoria 2008) INTERNET http://www.environment.gov.za/Services/documents/General/Review%20of%20the%20EIA%20system%20in%20SA.pdf [Date of use 27 February 2012].

[183] Sadler B and Verheem R *Strategic environmental assessment: key issues emerging from recent practice*. (Ministry of Housing, Spatial Planning and the Environment Hague 1996) 23.

[184] My emphasis.

[185] Jones C *et al* "SEA: An overview" in Jones C *et al* (eds) *Strategic environmental assessment and land use planning: an international evaluation* (Earthscan London 2005) 6.

policies plans and programs. Due to their strategic application at the point of formulation, SEAs have great potential as an instrument of integration, especially when applied to proactive spatial plans. The use of SEAs has increased especially in the developed world. In South Africa, SEAs are required of all SDFs in terms of law.[186] Further, the DFA provides that a local government body or the MEC may require environmental evaluations in order to assess the likely impact of any LDO upon the environment.[187] This however still means that statutory compulsion to carry out SEAs is only for a limited number of spatial proactive plans (zoning schemes are not included in this requirement for example) and the practice of SEAs outside these requirements is largely based on voluntary compliance as it is with other sectoral areas besides spatial planning.[188] The next chapter will briefly discuss the practice of SEAs on proactive spatial plans in South Africa, which is not exemplary.

### 3.5 SOME LEGISLATIVE GAINS IN THE INTEGRATIVE EFFORT

There are a number of potential areas where environmental laws provide for integration.

#### 3.5.1 Integrated environmental management (IEM)

IEM is often used as the legal basis for integrating environmental concerns into processes outside the environment, including spatial planning.[189] IEM is provided for under NEMA in the chapter titled "Integrated Environmental Management".[190] Its objectives in terms of the Act are,[191]

> (*a*) promote the integration of the principles of environmental management set out in section 2 into the making of all decisions which may have a significant effect on the environment;
> (*b*) identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and

[186] Reg. 2(4)(f) Local Government Municipal Systems Act "Municipal planning and performance management regulations" GN R796 in *Government Gazette* 22605 of 24 August 2001.

[187] Section 28(2).

[188] While there is no legislative compulsion, IEM as contained in NEMA has often been seen to broadly constitute the requirement for SEA. The most famous case study on this broad interpretation of the IEM process is the EIA undertaken for the eastern shores of St Lucia. See Kidd M and Retief F (n 108) 977.

[189] See for example Retief FP and Sandham LA "Implementation of Integrated Environmental Management (IEM) as part of Integrated Development Planning (IDP)" 2001 (8) *SAJELP* 77-94; Sowman M (n 72).

[190] Found in Chapter 5 of NEMA.

[191] Section 23, NEMA.

> alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management…
> (*c*) ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;
> (*d*) ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;
> (*e*) ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and
> ( *f* ) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management …

The term IEM has been defined as,[192]

> a philosophy prescribing a code of practice for ensuring that environmental considerations are fully integrated into all stages of development process in order to achieve a desirable balance between conservation and development.

In line with the broad definition in NEMA and its conceptualisation as a "code of practice", it encompasses a number of other things.[193] IEM is thus a fairly wide all-encompassing concept, operationalised by a range of mechanisms. It is the basis for diffusing environmental issues into all other sectors.

### 3.5.2 Intergovernmental cooperation under NEMA

At a principle level, NEMA provides that there must be intergovernmental coordination and harmonisation of polices, legislation and actions relating to the environment.[194] In this respect it provides that compliance with its procedures for environmental authorisations does not absolve a person from complying with any other statutory requirement to obtain authorisation from any organ of state charged with authorising, permitting or allowing the activity in question.[195] In a similar vein, authorisations obtained under any other law for an activity listed or specified in terms

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[192] Department of Environmental Affairs *Integrated environmental management procedure: guideline document Part 1 of the IEM Series* (1992) 5.

[193] For example, it has been defined to encompass EIAs including the adoption of these by other organs of state; EIPs and EMPs; the adoption of NEMA principles by other government line functions; co-operation agreements and so on. See Nel J and Du Plessis W (n 115) 181-190.

[194] Section 2(4)(l).

[195] Section 24(7).

of NEMA do not absolve the applicant from obtaining authorisations.[196] The Act does allow for exceptions however.

First, a competent authority may consider an authorisation that is not a NEMA regulated one, including an exemption granted under another act as sufficient for a listed activity.[197] This in effect does away with the need for a separate assessment under NEMA. This provision was introduced with the amendments to NEMA under the Amendment Act of 2008.[198]

Secondly, the Act allows for consultation between competent authorities and consideration of legislative compliance requirements of other organs of state having jurisdiction.[199] Here, the minister or an MEC may consult with any organ of state responsible for administering the legislation relating to any aspect of an activity that also requires environmental authorisation under this Act. This is in order to coordinate the respective requirements of such legislation and to avoid duplication in the submission of information. Upon such a consultation taking place, both parties may enter into a written agreement to effect this.[200] On doing this, when an application for environmental authorisation also requires authorisation in terms of another piece of legislation, the minister or MEC may consider the requirements of that legislative process as fulfilling the requirements of authorisations under NEMA.[201] Similar provisions under the EIA Procedural Regulations compel the minister or MEC to enter into an agreement with other authorities to avoid duplicate procedures.[202] This allows them to consolidate procedures where appropriate.

Thirdly, NEMA allows for some alignment of environmental authorisations. In this case, if the carrying out of a listed activity is also regulated in terms of another law or a specific environmental management act, the authority empowered under that other law and the competent authority under NEMA may exercise their respective powers jointly by issuing an integrated environmental authorisation.[203] An integrated environmental authorisation may only be issued if the relevant provisions of NEMA and the other law or specific environmental management act have been complied with.[204] Further, a requirement for an environmental authorisation under NEMA may

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196 Section 24(8).

197 Section 24(8)(b).

198 National Environmental Management Amendment Act 62 of 2008, with effect from 1 May 2009.

199 Section 24K.

200 Section 24K(1) and (2).

201 Section 24K(3)(b).

202 Section 6(1).

203 Section 24L(1).

204 The environmental authorisation needs to specify the provisions in terms of which it has been issued and the relevant authority or authorities that have issued it. Section 24L(2).

be regarded as met by the integrated environmental authorisation, in as far as it meets all the requirements.[205]

There are some encouraging signs that these provisions are increasingly being used by the relevant authorities to allow better and more integrated decision-making, especially at national level. However, the practices are far from being commonplace as will be seen from the next chapter.

### 3.5.3 Integration of proactive spatial planning systems and EIAs under NEMA

There is now some recognition and reliance on other environmentally informed plans and policies to facilitate environmental protection. NEMA provides that geographical areas based on environmental attributes and specified in spatial development tools adopted by the environmental authority, may have specified activities excluded from authorisation.[206] Proactive spatial plans such as SDFs or zoning schemes arguably fall under this definition.[207] Additionally, tools such as environmental management frameworks, provided by NEMA can be integrative, providing for biophysical environment, built environment and "planned" environment where the desired state of environment is defined. All this, in effect, is an attempt at integrating spatial proactive plans with environmental processes, specifically the EIA.

### 3.5.4 Integration under the Intergovernmental Relations Framework Act

The Intergovernmental Relations Framework Act (IRFA) [208] provides the substantive legislative framework for cooperative governance as required under section 41(2) of the Constitution. It provides for the creation of a series of intergovernmental relations structures and institutions to promote and facilitate intergovernmental cooperation, as well as providing mechanisms for dispute resolution.[209] Its stated purpose is to facilitate coordination in the implementation of policy and legislation through coherent

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[205] Section 24L(4).

[206] Section 24(2)(c).

[207] A spatial development tool according to NEMA means a spatial description of environmental attributes, developmental activities and developmental patterns and their relation to each other. A SDF can easily provide for all these attributes. Further Listing Notice 3 lists activities occurring within certain pre-determined geographical areas in various provinces that trigger an EIA. For billboard erection, it provides in the North West province that any area designated for conservation use and adopted in a SDF or zoned for conservation purposes will trigger an EIA (See Appendix A).

[208] 13 of 2005.

[209] Preamble.

government, effective provision of services, monitoring and implementation of policy and legislation and the realisation of national priorities.[210] The Act further provides that in conducting their affairs, national, provincial and local governments must seek to achieve the objects of the Act, including by co-ordinating their actions when implementing policy or legislation affecting the material interests of other governments, and avoiding unnecessary and wasteful duplication or jurisdictional contests.[211]

One of the structures contained in IRFA is the provincial intergovernmental forum. The premier of a province may establish it for any specific functional area to promote and facilitate effective and efficient intergovernmental relations between the province and local governments in that area.[212] Such a forum could be conceived to bring together municipal spatial planning departments and provincial environmental departments, to integrate the proactive planning and decision-making functions.

### 3.5.5 The draft Spatial Planning and Land Use Management Bill

The draft SPLUMB, under sections 28 and 29, provides a voluntary approach to integration. It empowers the municipality or the MEC to consult with other organs of state and enter into agreements with other organs of state to avoid duplication.[213] The Bill provides that the relevant planning tribunal may consider an authorisation in terms of that agreement as adequate for meeting the requirements of SPLUMB. The Bill also provides for the possibility of two or more organs of state issuing integrated authorisations.[214] While a pragmatic approach towards integration, largely in line with NEMA, it has also been seen as a missed opportunity by the drafters of the Bill to create more robust forms of integration using the law.[215]

## 3.6 CONCLUSIONS

Emerging from this legislative review is clarity that there is poor alignment between the spatial planning and the environmental systems. They have developed, and largely operate in separate silos. Ultimately the approach prescribed reinforces the

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[210] Section 4.

[211] Section 5(c and d).

[212] Section 21(1)(a).

[213] Section 28(1).

[214] Section 29.

[215] South African Cities Network (SACNa) *A response to the SPLUMB* (South African Cities Network 2011) INTERNET http://www.sacities.net/images/stories/2011/Presentations/SACN-response-to-SPLUMB.pdf [Date of use 20 August 2011].

separate processes and procedures of spatial planning and environmental law. The constitutional allocation and delineation of legislative and executive powers regarding both systems has also contributed towards this. Thus for example municipalities have little power with regard to the environment given the current allocation of powers in terms of the Constitution. Yet they are the primary decision-makers for spatial planning.

New environmental laws, including the EIAs, with their pre-defined sets of listed activities and procedural prescriptions to frame the process of EIAs, are very similar to the previous approach under the ECA.[216] The new approach towards EIAs did not see any fundamental philosophical shift in the manner in which the environment is understood. The new regulations were instead a reaction to a number of practical lessons that had been accumulated with the practice of EIAs in the previous law.[217] Thus the broad similarity between the old and new processes means that the problem of integration between spatial planning and environment has continued. Meanwhile, the lack of reform to spatial planning laws has meant that there has never been an opportunity to change the narrow manner in which spatial planning is understood and practiced.

The next chapter will examine how these laws are applied in practice and what effect this has on development in South Africa.

[216] Under this law which oversaw the first generation of EIAs in South Africa, there was likewise a pre-determined list of activities with a detrimental effect on the environment and a set of procedures that guided the manner in which the resulting EIA was carried out. See Environmental Conservation Act 73 of 1989 "Regulations regarding activities identified under section 21(1)" Government Notice R1183 of 5 September 1997.

[217] These are for example the lack of clarity of the old regulations, which often led to inconsistent application of the laws, especially in different provinces; the need to streamline the process to reduce time and monetary costs; especially necessary in the light of the urgent development needs of programmes such as ASGISA; creating greater independence of EIA processes and reports; tightening regulations around the public participation process which were often abused; and eliminating the number of relatively minor activities captured by the full EIA process.

# CHAPTER 4: THE PROBLEM OF LACK OF INTEGRATION

## 4.1 INTRODUCTION

This chapter sets out the problems encountered because of the lack of adequate integration between the spatial planning and environmental systems. The broad areas of examination are again proactive planning and decision-making. Within these two, the chapter shows that the lack of adequate integration has implications for costs and time, and the practical inconvenience of engaging separate institutions and structures dealing with them. The chapter will also include case law illustrating how the courts have grappled with this state of affairs. The third part of the chapter will briefly examine the practice regarding the innovative provisions that the National Environmental Management Act[1] (NEMA) among other laws provides for integration. Finally, the chapter will draw some conclusions.

## 4.2 INTEGRATION OF PROACTIVE PLANS IN SPATIAL PLANNING AND THE ENVIRONMENT

There is substantial overlap between proactive spatial planning and environmental planning. Both have a series of proactive plans. The former are reflected in, primarily the integrated development plan (IDP) with its spatial development framework (SDF) and zoning schemes.[2] Proactive spatial plans also contain many elements, such as urban edges[3] and open space zoning, which have a strong environmental rationale. Environmental planning, on the other hand, has environmental implementation plans (EIP) and environmental management plans (EMP) as well as plans dealing with specific elements and sectors. These latter plans, such as biodiversity, air quality and coastal management plans are likewise often spatial.[4]

These close relationships are, however, not always managed well in practice. Proactive spatial and as well as environmental plans operate in isolated silos despite the inherent links between them, as is seen below.

### 4.2.1 Integration in proactive spatial plans

[1] 107 of 1998.

[2] See 3.3.1.

[3] See 3.3.1.

[4] See 3.4.1.

According to the Local Government: Municipal Systems Act[5] (Systems Act), IDPs are required to, among others, link, integrate and co-ordinate plans for development in a municipality.[6] They are therefore intended to be the coordinative centre of spatial, environmental and other concerns. In this respect, it is noteworthy that many proactive environmental plans require that they are included as part of the IDP.[7] SDFs are the spatial representation of the development objectives in the IDP. It is through SDFs that the plan is subjected to strategic environmental assessment (SEA). Currently, there are proposed draft guidelines to assist in the creation of SDFs across the country. These also emphasise the importance of integrating environmental concerns.[8]

*(i) IDPs and SDFs*

The practice of IDPs has not elicited much favourable comment with regard to integration with environmental issues. One major concern is that the IDP itself often fails to adequately influence the shape of development at local level.[9] It has failed by for example allowing the building of considerable numbers of government subsidised houses in spatially distant and unsustainable locations.[10] Many critiques of the practice of IDP formulation also point out that they are generally poor at integrating environmental concerns because the environment is often restricted to a sectoral concern.[11] Environmental input is also often only solicited and received at the end of the IDP process, after a draft is circulated for comment, rather than being integrated within the entire process.[12] IDPs also treat the environment as less important than "more pressing issues" such as housing and economic development.[13]

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[5] 32 of 2000.

[6] Section 25(1).

[7] See 3.4.1.

[8] These national draft SDF guidelines call for integration with the biophysical environment. See Department of Rural Development and Land Reform Affairs *Guidelines for the formulation of spatial development frameworks* (Department of Rural Development and Land Reform Pretoria September 2010).

[9] Sim V, Oelofse C and Todes A *Ethekwini Municipality: assessment of the municipality's environmental and planning processes* (Report to the Ethekwini Municipality 2004).

[10] Irurah D and Boshoff B "An interpretation of sustainable development and urban sustainability in low-cost housing and settlements in South Africa" in Harrison P, Huchzmeyer M and Mayekiso M *Confronting fragmentation: housing and urban development in a democratising society* (Juta Cape Town 2003) 244-261, 254.

[11] The practice in KwaZulu-Natal for example has IDPs treating the environment as a sectoral plan, often also referred to as an Environmental Management Plan. See Sim *et al* (n 9) 45. See also Sowman M "Integrating environmental sustainability issues into local government decision-making processes" in Parnell S *et al* (eds) *Democratising local Government: the South African experiment* (UCT Press Cape Town 2002) 181-219 189.

[12] Todes A *et al Relationship between environment and planning* (Report for the Kwazulu-Natal Planning and Development Commission 2005) 51.

[13] Todes A "Regional planning and sustainability: limits and potentials of South Africa's Integrated Development Plan" 2004 (47:6) *Journal of Environmental Planning and Management* 843-861, 850.

The reason why this state of affairs exists has been linked to the fact that post-apartheid planning instruments such as the IDP were in part a shift from "planning control" to "planning as development facilitation". This is associated with redressing the ills of apartheid through delivery of development to the poor, pitting the "brown agenda" in opposition to more "greener" concerns.[14] This philosophical difference also often plays itself out in relationships between spatial planning and environmental departments.

*(ii) Zoning schemes*

The majority of zoning schemes in operation in the country have little in the way of integration with environmental concerns. They are generally old and dated, typically concerned with zonal definitions, layout design, building restrictions and so on.[15] NEMA provides a point of entry to require integration of environmental issues for these zoning schemes in terms of its environmental principles.[16] However, most of the schemes are existing schemes, promulgated through the old ordinances, well before NEMA was legislated.

There have been some positive developments with regard to integration of environmental concerns in zoning schemes. In KwaZulu-Natal for example, guidelines for developing zoning schemes in the province recommend for inclusion, among others, environmental management (service) zones, environmental management areas, environmental overlays such as protected areas under biodiversity laws, the provincial list of threatened ecosystems and species, areas of agricultural potential and water plans.[17] Special attention is also given to all proclaimed environmental areas and world heritage sites.[18] One key challenge in implementing these requirements has been the lack of easily available strategic environmental information, as well as the limited capacity to interpret the little there is, especially within less capacitated municipalities.[19]

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[14] For more on this distinction between "brown" and "green" agendas see 2.8 The transition and early democracy

[15] For more on this See 3.3.1.

[16] Under section 2. See also 3.3.2.

[17] KwaZulu-Natal Provincial Planning and Development Commission *KwaZulu-Natal land use management system, update 2004 – guidelines for the preparation and implementation of schemes: section 1 context for the preparation of schemes* (KwaZulu Natal Provincial Planning Commission 2004).

[18] *KwaZulu-Natal land use management system, update 2004 – guidelines for the preparation and implementation of schemes: section 1 context for the preparation of schemes* (n 17).

[19] Todes A *et al* (n 12 ) 50.

### 4.2.2 The practice of SEAs on proactive spatial plans

SEAs have great potential as instruments of integration when applied to spatial plans.[20] Nevertheless SEAs are not always done on SDFs as is legally required.[21] Further, capacity for doing SEAs has been raised as a particular problem, even in relatively large municipalities.[22] Finally, while national SEA guidelines are available, they do not have a user-friendly format appropriate to most municipalities. Guidelines have not been developed specifically for the SEAs required to assess SDFs.[23]

Current zoning schemes have not had SEAs or similar assessments performed on them.[24] This creates problems as alternative arrangements of juxtaposed land uses and ensuing environmental impacts were not assessed. Further, an environmental impact assessment (EIA) which is applied at project level will not pick up these impacts. The application of SEA avoids such a situation as it allows any possible synergistic and cumulative impacts to be picked up. [25]

This problem was illustrated in the case of *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others.*[26] The case showed that often it is only when the development rights for the permitted uses are implemented that the true environmental costs become apparent. In the case, a dispute arose because a zoning scheme granted an industrial use, and the subsequent exercise of this right created pollution problems. Upon the use being challenged, the defendant pointed out that the zoning scheme allowed for the use. The court stated that while it is material that activities are correctly taking place in an area zoned for that purpose, an environmental investigation under section 28 of NEMA is still required.[27] SEAs are intended to avoid such problems by proactively identifying such environmental implications early on when the zoning scheme is proposed.

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[20] See 3.4.3.

[21] For the practice in KwaZulu-Natal see for example Todes A, Sim V and Sutherland C "The relationship between planning and environmental management in South Africa: the case of KwaZulu-Natal" 2009 (24:4) *Planning, Practice and Research* 411-433, 426.

[22] Todes A *et al* (n 12) 66.

[23] Todes A *et al* (n 12) 51.

[24] Unlike for SDFs, this is not a legal requirement. See 3.4.3.

[25] Jones C *et al* "SEA: an overview" in Jones C *et al* (eds) *Strategic environmental assessment and land use planning: an international evaluation* (Earthscan London 2005) 21.

[26] 2004 (2) SA 393 (E).

[27] This provision provides for an investigation to determine the duty of care of a person who has caused degradation of the environment. It is intended to ensure that such are found liable.

### 4.2.3 Integration in proactive environmental plans

Generally, proactive environmental planning is largely fragmented.[28] Further, integration with spatial planning at municipalities is not considered as good. Often the reason is that the plans themselves are poor. EIMPs for example have had problems with implementation, and the system has been described as "dysfunctional" as a tool for ensuring coherent environmental policy.[29] This precludes them from being the useful integrative tool they are supposed to be.

Many of the plans currently required were only recently introduced, and there is little in the form of practice to determine their integrative qualities, for example air quality plans. Experts in the field are also quick to point out that a major problem in implementing the new National Environmental Management: Air Quality Act [30] has been the lack of experience and qualified staff.[31] The same can be said of the National Environmental Management: Integrated Coastal Management Act (ICMA).[32] It has fairly comprehensive mechanisms for integration with spatial planning, particularly IDPs.[33] However, under the Act, municipalities have fairly onerous tasks. A coastal municipality must for example, within four years of the commencement of the Act, prepare and adopt a municipal coastal management programme, and must review it at least once every five years.[34] The ability of municipalities, especially less capacitated coastal municipalities to do this has always been an issue of concern.[35]

The challenges of integrating spatial planning with biodiversity plans in terms of the National Environmental Management: Biodiversity Act[36] also include the problem of

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[28] Kotze L J "Improving unsustainable environmental *governance in South Africa: the case for holistic governance" 2006 (1) Potchefstroom Electronic Law Journal* 1-44, 10-12. For more information see also the discussion with regard to decision-making under the environmental system, Chapter 3 (ii).

[29] Kidd M *Environmental law* (Juta 2 ed 2011) 41.

[30] 39 of 2004.

[31] Du Plessis A "Some comments on the sweet and bitter of the national environmental law framework for 'Local Environmental Governance'" 2009 (24:1) *South African Public Law* 56-96, 90; Engelbrecht JC and Van der Walt IJ "A generic air quality management plan for municipalities" 2007 (16:1) *Clean Air Journal* 5-15; National Department of Environmental Affairs and Tourism *Implementation of the Air Quality Act: progress report* presentation to the Parliamentary Committee on Environmental Affairs and Tourism (Department of Environmental Affairs and Tourism 2008).

[32] 24 of 2008.

[33] See 3.4.1.

[34] Section 48(1)(a)-(b).

[35] Palmer BJ *et al* "A spatial assessment of coastal development and land use change in the Eastern Cape South Africa" 2010 (92:2) *South African Geographical Journal* 117-128.

[36] Act 10 of 2004.

capacity at local government level.[37] While the creation of biodiversity plans is primarily the responsibility of national and provincial structures, municipalities are key to implementing them. This is especially so when creating IDPs and SDFs. In some areas, where there has been a tradition of biodiversity planning before the Act, integration into municipal SDFs has been noted as adequate.[38] Recently there have also been encouraging results in other parts of the country, where various biodiversity conservation plans and maps have been adequately reflected in SDFs. The key is implementation of the plans and whether they will have an influence in conservation, given the general background of poor implementation of plans in general.[39]

At a provincial level, proactive environmental planning has also suffered from a lack of capacity, with the problem often attributed to the concentration of resources in EIA work streams rather than proactive planning.[40] The ability of provincial departments to collect sufficient environmental data to create such proactive plans as well as provide any support to municipal government as is legally required is also questionable.

### 4.2.4 The link between proactive plans and decision-making

Proactive plans are instrumental at decision-making level. This is because they serve as a guide to both spatial planning and environmental decision-making processes. Thus for example, SDFs and zoning schemes are the basis of day to day decision-making regarding development at a local level. They therefore fundamentally influence not only spatial planning outcomes but environmental ones as well. Land use decision-making based on instruments such as IDPs are explicitly recognised as critical to biodiversity conservation.[41] The same can be said of the influence proactive environmental plans used in EIAs have on environmental outcomes.

In summary, in practice, the lack of integration of proactive plans as seen above has a detrimental effect on integrated decision-making. Further, the poor quality of many

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[37] Pierce SM *et al* "Systematic conservation planning products for land-use planning: interpretation for implementation" 2005 (125) *Biological Conservation* 441-458, 444.

[38] See for example the case of conservation plans by the Ezemvelo KwaZulu-Natal Wildlife. Todes A *et al* (n 12) 49.

[39] Pierce SM *et al* (n 37) 453. In Todes *et al* (n 12) it is noted that conservation plans by the Ezemvelo KwaZulu-Natal Wildlife were often reflected by the municipal spatial plans but implementation was a problem.

[40] See for example with regard to in KwaZulu-Natal in Todes *et al* (n 12 ) 46. The problem is being resolved through increasing staffing.

[41] Pierce SM *et al* (n 37) 453.

proactive plans means they are not "sufficiently grounded" to assist in site level decision-making.[42]

## 4.3 INTEGRATION OF DECISION-MAKING: EIAS AND LAND USE MANAGEMENT AND DEVELOPMENT

The legal framework for decision-making for spatial planning and the environment was described in the previous chapter. Simply put, municipalities exercise executive authority over land use management and land development processes such as subdivision of land through the provincial planning ordinances, and in KwaZulu-Natal and the Northern Cape, through the KwaZulu-Natal Planning and Development Act[43] (KZNPDA) and the Northern Cape Planning and Development Act[44] (NCPDA) respectively. On the other hand, NEMA allocates executive powers to both national and provincial government, including evaluating and making decisions on EIA applications. This state of affairs presents a number of problems illustrated below, using a land subdivision application as an example.

### 4.3.1 An illustration: subdivision of land

When an application is made for a subdivision of land (or the establishment of a township), it is referred to the municipality in terms of the relevant spatial planning legislation. Meanwhile in terms of NEMA[45] Listing Notice 1,[46] the transformation of land zoned open space, conservation or another equivalent zoning, bigger than 1000 square metres to residential, retail, commercial, industrial or institutional use requires a basic assessment.[47] A subdivision often requires a change in land use from less intensive uses (such as open space, conservation and agricultural) to more intensive, such as housing, retail, industrial and so on. This change in a zoning scheme or rezoning is incorporated into the subdivision application and represents the most frequent area of overlap between the two processes.

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[42] Todes A *et al* (n 12) ix.

[43] 6 of 2008.

[44] 7 of 1998.

[45] As was noted in the previous chapter, NEMA is not the only legal basis for impact assessments. However, this analysis will confine itself to the NEMA EIA process.

[46] National Environmental Management: Environmental Impact Assessment Regulations Listing Notice 1 GN R544 in *Government Gazette* 33306 of 18 June 2010.

[47] Activity 24, appendix 1.

Due to the division of powers and functions for spatial planning and the environment, the two processes in effect run in separately. This means that the same application has to be made to multiple authorities under these different sets of laws.[48] In Gauteng, EIAs run parallel to spatial planning procedures, with the final environmental decision made by the province incorporated as a condition by the municipality on how the land development should be done.[49] This means that the spatial planning decision must wait for the completion of the EIA. This also raises the spectre of conflicting conditions imposed by the environmental department and the municipality. The practice in Gauteng is generally mirrored in Limpopo and Mpumalanga.[50]

EIA applications are submitted to and approvals are granted by the provincial Department of Environmental Affairs and Nature Conservation in the Northern Cape. Applications for subdivision in this province also run in parallel, and the planning approval will not be granted unless a positive environmental authorisation is issued. This same rule applies in the Eastern Cape Province.[51]

There are some exceptions to the general procedures outlined above, although this is largely about sequencing, and the applications are still dealt with separately. In KwaZulu-Natal, under the new KZNPDA, a decision from an environmental authority is required in the preparation of a subdivision application. In other words, it is required before the subdivision application is submitted to the municipality.[52] What often happens in the Free State is that the EIA application is submitted simultaneously with the land use application. The spatial planning application is however not referred to the Land Use Advisory Board[53] prior to receipt of the final environmental decision. In the Western Cape, the provincial Department of Environmental Affairs and Development Planning issues a circular requiring that applications such as subdivision applications are placed on hold until an environmental decision is in place.[54] This is the practice of some municipalities in the province as well; spatial planning applications to the Cape Town Metropolitan Council

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[48] Details of practice obtained from South African Cities Network *Provincial land use legislative reform: status reports for Gauteng, Free State, Mpumalanga, Limpopo, North West, KwaZulu-Natal, Eastern Cape, Western Cape and Northern Cape* (South African Cities Network 2011) INTERNET http://www.sacities.net/what/programmes-areas/inclusive/spatial/projects/765-provincial-land-use-management-laws [Date of use 27 February 2012].

[49] Known as conditions of establishment. See also chapter 3 on the legislative status of these.

[50] *Provincial land use legislative reform: status reports* (n 48).

[51] *Provincial land use legislative reform: status reports* (n 48).

[52] The KZNPDA require that "the potential impact of the proposal on the environment, socio-economic conditions and cultural heritage" must be taken into account. See section 25(d).

[53] This is the statutory townships board. See also chapter 3.

[54] Western Cape Provincial Department of Environmental Affairs and Development Planning *Government circular 3 of 2008* (2008 Cape Town).

for example, are stalled until the provincial department considers the same EIA application.[55]

In all these cases, including the exceptions, both spatial planning and environmental assessments are done independently of one another, undermining an integrated decision-making process. The processes are of a very similar nature, consider similar issues and have duplicitous processes of participation. This creates greater costs and time spent, greater opportunity for abuse of public participation, confusion among all involved, greater complexity in the processes and a high potential for legal conflict when decisions are leveraged against one another. These issues will each be examined.

### 4.3.2 Greater costs and time spent

Extra costs to the taxpayer are incurred because of duplication of separate government structures, for both spatial planning as well as environmental authorisations at municipal and provincial level. Additionally, more time is spent by applicants having to deal with the two processes. This is often because common processes are carried out separately. A good example is public participation. As was noted, in terms of the ordinances, as well as the KZNPDA and NCPDA, a process of notifying interested and affected parties to the application may be required.[56] The Environmental Impact Assessment Regulations of 2010, (EIA Procedural Regulations)[57] also contains an entire chapter that prescribes the requirements for public participation.[58]

In the recent past, other government departments have likewise weighed in on the matter. The *Accelerated and shared growth initiative* (ASGISA), was a government programme driven by the Presidency and adopted in 2006. Its aim was to accelerate and create greater equity in economic growth in South Africa.[59] The ASGISA policy

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[55] Todes *et al* (n 12) 91.

[56] See 3.3.2.

[57] GN R543 in *Government Gazette* 33306 of 18 June 2010.

[58] This is provided by chapter 6 of the National Environmental Management Act "Environmental Impact Assessment Regulations of 2010" Government Notice R543 in *Government Gazette* 33306 of 18 June 2010. This is in line with NEMA which requires procedures for environmental authorisation must ensure public information and participation procedures. According to the Act, this provides all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, a reasonable opportunity to participate in those information and participation procedures. See section 24(4)(a)(v).

[59] It proposed to do this through among others infrastructure programmes; sector investment (or industrial) strategies; skills and education initiatives; second economy interventions; macro-economic issues; and public administration issues.

notes that institutional reform is required of the "framework of planning and land use" because many investment projects are unnecessarily held up by the weakness of local or provincial planning and zoning systems and the cumbersome EIA system.[60]

There has also been opinion expressed on this state of affairs by the private sector. Research commissioned for the Banking Association, for example, examines the commercial, statutory and technical risks of new affordable housing development.[61] The findings were that among others, the statutory risks[62] associated with both spatial planning and environmental processes are substantial. This causes serious delays because of inadequate capacity as well as a lack of coordination between departments.

The costs and long period of duplicated processes are also especially onerous to poorer communities. In a detailed recorded case study of a housing development for a poor community in Gauteng for example, the costs of running two parallel processes proved too much for a well organised, but poor community.[63] To resolve this issue, the study calls for among others unifying and integrating these processes.[64]

### 4.3.3 Greater opportunity for the abuse of public participation

Despite its many advantages, the practice of public participation is not always useful or constructive. According to one report,[65]

> It is very difficult to maintain the right balance between having meaningful participation on the one hand and avoiding projects becoming bogged down on the other.

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[60] Presidency *Accelerated and shared growth initiative – South Africa*" *(ASGISA)* (Pretoria 2006) 19.

[61] Mathew Nell and Associates and Settlement Dynamics Project Shop *Research into housing supply and functioning markets: resource report 5: township development and the homebuilding process* (Banking Association of South Africa 2005) INTERNET http://www.banking.org.za/search/searchdocs.aspx [Date of use 12 August 2011].

[62] According to the research, statutory risk "relates to the time and costs of securing necessary approvals and clearance certificates and fulfilment of the public sector of its obligations".

[63] Berrisford S *et al In search of land and housing in new South Africa: the case of Ethembalethu* (World Bank Washington DC 2008) 24 INTERNET http://siteresources.worldbank.org/INTSOUTHAFRICA/Resources/Ethembalethu_Final.pdf [Date of use 13 July 2011].

[64] Berrisford S *et al* (n 63) 11.

[65] Western Cape Provincial Department of Environmental Affairs and Development Planning *Discussion document law reform project integrated planning, environmental & heritage resources legislation* (Cape Town 2004) 8.

While public participation should aim to strike consensus or shared understanding, this may be difficult to achieve in a society with very wide gaps between the rich and the poor, where the needs and concerns of different population groups are not homogeneous.[66] Such socio-economic rifts in public participation often play themselves out in the form of what is commonly referred to as NIMBYism.[67]

While the abuse of public participation is something very difficult to legislate against, two separate processes dealing with public participation make the development even more prone to frivolous public objection. According to one case study, by taking advantage of the two processes running concurrently, a local NIMBY community virulently opposed to low cost housing development was given "two bites at the cherry" to delay the development process. This was through them using frivolous and disruptive tactics in both the spatial planning and EIA public participation processes.[68]

### 4.3.4 The two processes create confusion

Two different applications are often confusing to applicants, interested and affected parties as well as the authorities considering the applications. According to a report from the Western Cape, [69]

> The fact that permission to develop involves more than one regulatory authority is confusing for developers and for the interested and affected parties. In addition, this makes the development application process complicated and has a negative effect on the efficiency in processing applications and decision-making – there are long delays in the process.

Often, it is because the two decision-making processes deal with such substantively similar issues that their distinctiveness is lost to many. The reality is that it is not clear cut what the unique and distinguishable substances of spatial planning and the environment applications are especially to the general public. Further many of the processes are similar, for example public participation.

Applicants often get confused by the terminology and processes, which to them look very similar. For example, rezoning of land is ordinarily associated with spatial

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[66] Murombo T "Beyond public Participation: the disjuncture between South Africa's Environmental Impacts Assessment (EIA) law and sustainable development" 2008 (3) *Potchefstroom Electronic Law Journal* 1-32, 4.

[67] NIMBY, an acronym for Not in My Back Yard, is a term used to describe opposition by residents to proposals for a new development close to them, especially socially necessary development like low cost housing.

[68] Berrisford S *et al* (n 79) 34.

[69] *Discussion document law reform project integrated planning, environmental & heritage resources legislation* (n 65) 11.

planning legislation and is often part of the process of subdivision. Under environmental legislation, EIAs can be triggered for certain types of "rezoning".[70] A problem often occurs when a rezoning permission is granted under spatial planning legislation, and then an EIA is required for a rezoning in the same development. The natural tendency, with some justification, is for applicants to believe that they have to do substantially the same thing twice. Such was the case of *Hentru Developers and Contractors v Hanekom and Another* (*Hentru Developers* case).[71] Here, a property zoned agricultural required to be changed to "residential and general". The relevant spatial planning authorities granted the rezoning, but an approval required from the environmental authorities[72] was turned down. These two conflicting decisions led to a court challenge, with applicants wrongly but understandably feeling that the decisions were contradictory, even though they were given by two different bodies. This, among other reasons, led to the decision of the environmental authority being successfully challenged.

Authorities considering either application may fail to perform duties, in the mistaken belief that a certain matter is not its area of competence.[73] In the case of the *Fuel Retailers Association of South Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province (Fuel Retailers case)*[74] the court rejected the notion put forth by the environmental authorities, that because a spatial planning decision has been made under the ordinance, they are discharged of their obligation to assess the socio-economic need and desirability of development.[75] In this respect, the judges emphasised that it is critical for environmental authorities to examine socio-economic issues as part of their obligation of assessing the environmental impacts of development.[76]

Finally, processes can be confusing to the public when called upon to participate. They will not always "understand the often arcane differences between the two

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[70] See (n 47) for this provision in the current Listing Notices. This is from what can be considered less built up environments such as open space, conservation and agricultural, to more intensive built environments. In this case, as is most often the case, the rezoning is preceded a subdivision. The formerly applicable Environment Conservation Act 73 of 1989 also provided that the change of land use from agricultural or zoned undetermined use or an equivalent zoning, to any other land use, is an activity with a detrimental effect requiring environmental authorisation. See Item 2(c) Environmental Conservation Act 73 of 1989 "The identification under section 21 of activities which may have a detrimental effect on the environment Government" Notice R1182 of 5 September 1997.

[71] [2005] JOL 15650 (T).

[72] In this case the Gauteng Department of Environmental Affairs and Tourism (GDACE).

[73] Berrisford *et al* (n 63) 34.

[74] [2007] JDR 0445 (CC).

[75] See also chapter 2 discussion on this case.

[76] at 48.

processes".[77] The public responds to the development itself, and is not necessarily concerned with the different sectoral concerns.

### 4.3.5 Duplication adds to complexity

The substance being dealt with in the applications is complicated. As one author notes, the issues that EIAs must identify, evaluate and assess are extremely complex and may require the input of specialists who might not be readily available.[78] The unreformed state of spatial planning law on the other hand is widely acknowledged to be a complex and confusing morass of laws with numerous parallel laws and regulations at provincial and local government.[79] The two combined processes therefore create an even more potent mix of difficulty and uncertainty to be dealt with by all concerned.

Notes one report,[80]

> The dual systems for granting planning and environmental approvals have bedevilled planning and development for more than a decade in South Africa, ever since the first requirements for EIAs were introduced. …[T]he complexity of two parallel processes remains an apparently unnecessary, expensive and often absurd obstacle to efficient and effective management of development.

This complexity is avoidable to the extent that it arises from the need to manage two different but similar processes.

### 4.3.6 One decision can be used to challenge the other

Applicants often use one decision to leverage approval of another, despite specific concerns required to be addressed in each. This often leads to legal problems.

*(i) Post facto authorisation*

When uses in zoning schemes are overtaken by *de facto* land uses, the authorities may permit these to be legalised after the fact, when an application is presented.[81]

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[77] Berrisford S *et al* (n 63) 34.

[78] Ridl J and Couzens E "Misplacing NEMA? A consideration of some problematic aspects of South Africa's new EIA regulations" 2010 (13:5) *Potchefstroom Electronic Law Journal* 80-120.

[79] Berrisford S and Kihato M "Local government planning legal frameworks and regulatory tools: vital signs?" in Parnell S, *et al* (eds) *The Developmental local state: lessons from theory and practice* (UCT Press Cape Town 2008) 377-404.

[80] Berrisford S *Planning law principles for KwaZulu-Natal* Report for the Planning Commission of KwaZulu-Natal (KwaZulu-Natal Planning Commission 2003) 12.

This does not happen with environmental authorisations, which is much stricter and less forgiving of such wrongful uses. A person who undertakes a listed activity without authorisation may be prosecuted and be liable to a fine of up to five million rand and or to imprisonment for a period not exceeding ten years.[82]

This creates a potential area of conflict, and incentivises the decision made by one system, particularly spatial planning, to be used to challenge the other. In the *Hentru Developers* case[83] it was argued that land, which was zoned for agricultural use by the municipality, does not in fact remotely resemble this use.[84] This was used as a basis to give the go ahead by the spatial planning authority. The development was however, turned down by the environmental authority on this same issue. The positive decision of the municipality then became a useful and successful tool to challenge the environmental decision refusing development of the land.

The case of *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality And Others (Myburgh case)*[85] also represents a situation where *de facto* uses are provided as a basis to motivate a spatial planning decision. This same reason was not sufficiently persuasive for environmental decision-making. The applicant then requested a declaratory order that the requirements of the Environment Conservation Act [86](ECA) were not necessary and an order of *mandamus* requiring the authorities consider the application in terms of Land Use Planning Ordinance (LUPO).[87] It was argued by the applicant that granting a subdivision by the municipality and the installation of infrastructure by the applicant made the land no longer "nature conservation" or "zoned open space" and thus in reality not requiring an EIA under the ECA. The court held that these *de facto* uses were legal, the subdivision authorisation by the municipality was correct and that the applicant had acted *bona fide* in developing the area. This *inter alia* caused the court to issue a declaratory order that among others the "issuing to the applicant of written authorisation in terms of section 22(1) of the Environmental Conservation Act, No. 73 of 1989" was not a prerequisite for the development.[88]

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[81] Many municipalities, because of the high rates of informality, will often request owners of properties to submit *ex post facto* applications. See for example in KwaZulu-Natal as reported in Todes *et al* (n 12) 79.

[82] Section 24G. People who have undertaken an activity without authorisation were given an opportunity to apply for rectification before the introduction of this provision in 2005. Further, even then the consideration of these applications was subject to an administrative fine of up to one million rand, which fine is separate from any criminal penalty.

[83] (n 71).

[84] The municipality relied on the fact that the sense of place of a predominantly agricultural and rural/residential area has been lost to allow a rezoning to "residential and general".

[85] [2001] JDR 0492 (C).

[86] 73 of 1989.

[87] 5 of 1986.

[88] page 31.

*(ii) Different zonings for the same land*

Often the municipal spatial planning authorities classify an area differently from provincial environmental authorities. This means that they may have a different understanding of the characteristics and properties of the land in question. This difference in interpretation and approach for largely the same issue can set up the systems for challenge, one against the other.

In the case of *HTF Developers (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others,*[89] the developer proceeded with development on a property zoned "special residential" in a proclaimed township.[90] An objection was raised to this by the provincial environmental authorities, who argued that the land in question was in fact "virgin ground", which according to the then applicable ECA, required authorisation. The developer in turn argued that the land was in a proclaimed township, and thus could not conceivably be "virgin ground."[91] This argument of the developer was upheld.

In Gauteng, a lot of land historically zoned for residential development has acquired unique environmental value over time and is thus zoned for its environmental value at provincial level.[92] As it comes under the threat of rapid environment, a clash between spatial planners and the environmental authorities results.[93]

There are some plausible explanations as to why there are such differing attitudes between the authorities. One argument is that municipalities are much more inclined to be permissive towards such infringements, as there is direct financial benefit obtained from greater development, largely in terms of municipal rates and taxes.[94] The same cannot be said of provincial environmental authorities. Also, the spatial planning system with its multiple classification of uses tends to allow creeping uses over time.[95] This is different from environmental permissions which work through

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[89] [2007] JOL 19542 (SCA).

[90] A proclaimed township is the end result of a subdivision application, after approval of the application and the lodging of all the plans and maps with the Surveyor General.

[91] The decision in this case hinged upon a different argument.

[92] Todes A *et al* (n 12) 40.

[93]This is of special concern to the Grasslands Program of South African National Biodiversity Institute. See also Mail and Guardian *Gauteng boom leaves goggas homeless* INTERNET http://mg.co.za/article/2010-07-30-gauteng-boom-leaves-goggas-homeless [Date of use 3 October 2011].

[94] See Berrisford S *et al* (n 63) on the tendency of municipalities to be reluctant to forego "high end uses" for this reason.

[95] Zoning schemes typically have a multiple classifications of residential, business and industrial uses. For example it is fairly easy to obtain changes from one residential use to another, depending on what the current one

triggers to major once off changes. Whatever the reasons, the separation of the two systems breeds these different approaches and creates legal conflict situations.

*(iii) Pre-existing and inappropriate zonings*

Most of the current zoning schemes were created in a different constitutional dispensation, and may not be in compliance with the more recently developed and legally enshrined environmental norms and sustainable development. In the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[96] the general plan for a township development had been approved in 1961 during the apartheid regime in terms of the Townships Ordinance.[97] A number of graves and *kramats* existed on a portion of the property and these had religious significance for the Muslim community. According to the court, upholding of township rights on the land would undermine cultural, religious and ethnic diversity currently recognised by law.

## 4.4 THE PRACTICE OF LEGISLATIVE PROVISIONS FOR INTEGRATION

### 4.4.1 Introduction

NEMA has provisions to facilitate integration, primarily through institutional and intergovernmental cooperation.[98] There is the option, for example, for agreements to be entered into between EIA decision-making authorities and other authorities, to avoid duplication of procedures. This was introduced in the recent EIA Procedural Regulations.[99] Under another recent amendment to NEMA through section 24K(3), an environmental authority can also accept procedures for other processes contained in other laws, as sufficient for environmental authorisations. This is through, among others, entering into agreements and issuing joint integrated environmental authorisations.[100] The Intergovernmental Relations Framework Act (IRFA)[101] on the other hand provides for the creation of a provincial intergovernmental forum for any specific functional area to promote and facilitate effective and efficient

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is. This multiple levels of classification allow, over time for a step by step approach towards greater and more intense uses.

[96] [2002] 3 All SA 450 (C).

[97] 33 of 1934.

[98] For greater detail see 3.5.2.

[99] (n 57).

[100] See 3.5.2.

[101] 13 of 2005.

intergovernmental relations between the province and local governments.[102] Finally, NEMA allows for integration of proactive spatial planning systems and EIAs.[103]

### 4.4.2 Implementation of legislative provisions for integration

It must be noted that many of these provisions are fairly recent and sufficient practice has not emerged. Nevertheless even before the inclusion of the recent NEMA provisions under the EIA Procedural Regulations and section 24K(3), agreements were made between competent authorities. These largely dealt with assessment and authorisation processes in other laws dealing with issues such as integrated waste management licensing and water licensing.[104] Memorandum of Understanding agreements equating part or whole of the decision-making processes and permissions to each another, and thus avoiding duplication were used. The agreements were largely within the national and provincial spheres of government for large projects.[105] Agreements dealing with spatial planning have however not been included in these practices, although the proviso is wide enough to allow for this.

There have also been intergovernmental structures dealing with spatial planning and environmental issues, before the operation of IRFA. In the Western Cape for example, formal meetings between the Cape Town Metropolitan council and the provincial department of environmental affairs happened on a regular basis although this initiative died down because of among others the shifting political leadership within the metropolitan.[106] In KwaZulu-Natal, there has been a history of functioning provincial coastal management committees staffed from the provincial environment department and the various municipalities dealing with issues of coastal management.[107]

There have been other *ad hoc* attempts at integration around the country. One is to integrate decision-making where both the spatial planning and the environmental assessment are being carried out at provincial level. In the Western Cape, this happens because the spatial planning application is administered through legislation such as the Less Formal Township Establishment Act (LFTEA).[108] Here, the Western

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[102] Section 21(1)(a).

[103] See 3.5.3.

[104] Ms Elizabeth McCourt, Presentation on proposed Amendments to NEMA, EIA regulations ad Listing Notices, St Georges Hotel, Johannesburg 7 December 2007.

[105] See chapter 3, (ii).

[106] Todes A, Berrisford S and Kihato M *Relationship between environment and planning: phase 2* (Report prepared for the KwaZulu-Natal Provincial Planning and Development Commission (2007) 91.

[107] Todes A *et al* (n 12) 48.

[108] 113 of 1991.

Cape provincial departments of Human Settlements, and that of Environmental Affairs and Development Planning[109] require that the applicant need only make a single application. As was noted, the continued use of LFTEA by provincial governments is on shaky legal grounds.[110]

In 1998, authorities in KwaZulu-Natal, namely the former Department of Local Government and Housing entered into an agreement with the provincial environmental authority (then the Department of Traditional and Environmental Affairs). This was intended to streamline procedures for activities requiring authorisations by both departments.[111] The latter department was tasked with administering subdivision applications in terms of the ordinance[112] as well as the LFTEA process. The ensuing system required only one application form. The applicant was also only required to fulfill overlapping requirements once, and other government departments were no longer requested to comment twice on the same activity. Apart from shared advertising and consultation, the combined process provided one entry and exit point for the applicant.[113] Although a good idea in principle, the streamlined process did not work in practice. This was largely because the initial coordination and communication between the processes broke down over time.[114]

Finally, reports on the practice of integration and adoption of spatial planning instruments for the purposes of EIAs are difficult to come by. However, it is noteworthy that provincial environmental departments rely mostly on their own spatial plans to arrive at EIA decisions, and rarely rely on those from other authorities.

As seen from the above practices, integration is proving to be difficult. The practice of competent authorities issuing joint permissions occurs largely among authorities dealing with similar environmental concerns, at provincial and national level. It does not incorporate spatial planning, and when it did, the efforts failed (with the exception of the coastal management committees in KwaZulu-Natal). When spatial planning is included in these integrative efforts, it is always when the same sphere of government, in this case province, is involved in both permissions that is spatial planning (through LFTEA) and EIA. It does not happen when the municipality is the decision-maker for spatial planning. Given the majority of applications are to the

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[109] The former administers LFTEA and the latter the NEMA EIA process.

[110] See 3.3.2.

[111] Todes A *et al* (n 12) 56-57.

[112] That is the Natal Town Planning Ordinance 27 of 1949 now largely repealed. Many provinces deal with applications in terms of the ordinances when the municipality is not an authorised one. See 3.3.2.

[113] Todes A *et al* (n 12 ) 56-57.

[114] Todes A *et al* (n 12) 56-57.

municipality and the uncertain legal status of LFTEA, this form of integration has only limited potential.

## 4.5 CONCLUSIONS

This chapter has illustrated that there are prominent areas of overlap between spatial planning and environmental processes. These occur at proactive planning levels as well as at decision-making levels. Nevertheless, despite these areas of commonality, the interaction between the two processes is poor in practice, and they function largely independently of one another. This causes problems such as greater costs and time spent, provides greater opportunity for abuse of public participation, creates confusion among all involved making the processes even more complex and finally creates an environment with a high potential for legal conflict. In this regard, many of these problems have created legal problems requiring resolution by the courts. There are facilities for some level of integration, largely through intergovernmental systems of cooperation. This is a step in the right direction but current practices have been *ad hoc* and largely unsuccessful. Recently legislated forums for intergovernmental have not gained sufficient practice, especially within the spatial planning and environmental arenas.

By investigating some lessons from international practice, the next chapter will make some broad recommendations on how to change the current state of affairs.

# CHAPTER 5: INTERNATIONAL EXAMPLES ON DEALING WITH THE PROBLEM OF POOR INTEGRATION

## 5.1 INTRODUCTION

This chapter examines practices in a number of jurisdictions across the world, seeking lessons for South Africa on how to deal with the problem of poor integration between spatial planning and environmental systems. It offers a brief historical analysis of the origins of the concept of sustainable development. This concept, now well established as a norm in environmental law, is the basis for integration between the two areas of law in many countries across the world. The approaches to integration specifically in two countries, Britain and New Zealand are then analysed. This is done through an examination of laws and diverse writing on the way their systems operate. Finally, a brief survey of the practice of strategic environmental assessment (SEA) across a number of countries is done, and lessons identified.

## 5.2 THE PRACTICE OF INTEGRATION IN SOME SELECTED COUNTRIES

### 5.2.1 Introduction

Internationally, the concept of integration within the environment is not new. As early as 1972 for example, the United Nations Conference on the Human Environment passed the *Stockholm declaration on the human environment*[1] that called for "… an integrated and coordinated approach to development planning".[2] Subsequent declarations such as the *Rio Declaration on environment and development* in 1992[3] (Rio Declaration) also reflected the principle. The emerging conference document titled *Local Agenda 21*,[4] had the overall objective of "the integration of environment and development policies through appropriate legal and regulatory policies, instruments and enforcement mechanisms".[5] The Millennium Development Goals

[1] United Nations Conference on the Human Environment *Stockholm declaration* of June 1972.

[2] Principle 19.

[3] United Nations Conference on Environment and Development *Rio declaration on environment and development* Report of the United Nations Conference on Environment and Development A/CONF.151/26 (Vol1) (Rio de Janeiro 3-14 June 1992).

[4] United Nations Conference on Environment and Development *Local Agenda 21* of the United Nations Conference on Environment and Development (Rio de Janeiro 3-14 June 1992).

[5] Para 8.16.

(MDGs) have at their core sustainable development.[6] For development to be effective it must have a long term vision for addressing social, economic and environmental issues in their entirety. Under MDG-7 on environmental sustainability, one of the key targets is to "integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources."

These policies emphasise the need for sustainable development, which has integration of the environment with developmental needs at its core.[7] Under European environmental law, the integration principle (EU integration principle) is associated with calls for the integration of the environment with all community policies and activities, with a view to promoting sustainable development.[8] This has subsequently developed into the integrated pollution prevention and control directive[9] and the directive on community action in the field of water policy.[10] In the United States, pollution control has also served as strong motivator for arguments for integrated regulation of different environmental elements.[11] In all these initiatives, it is striking how sustainable development lies at their core.

### 5.2.2 Development of the concept of sustainable development in international law

Sustainable development is intricately tied to the adoption of principles and rights based approaches in environmental law.[12] It has been referred to as the "contemporary international norm which underpins environmental law generally".[13]

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[6] United Nations World Summit on Sustainable Development resolution adopted by the General assembly UN GAOR 57th Sess. Supp. No 49 UN Doc A/RES/57/253 (2003) para 3.

[7] See for example Principle 4 Rio declaration provides that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".

[8] Article 6 Treaty establishing the European Economic Community.

[9] Council Directive of 24 September 1996 *Concerning integrated pollution prevention and control* Directive 96/61/EC. A "directive" is a legislative act of the European Union which requires member states achieve a particular result without dictating the means of achieving that result. It is legally binding.

[10] Council Directive of 23 October 2000 on *Community action in the field of water policy* 2000/60/EC. See Anker TH "Integrated resource management: lessons from Europe" 2002 (11) *European Environmental Law Review* 199-209, 200.

[11] Erling MU "Approaches to integrated pollution control in the Unites States and the European Union" 2001 (15:1) *Tulane Environmental Law Journal* 1-42.

[12] See 2.5.2.

[13] Glazewski J *Environmental law in South Africa* (LexisNexis Butterworths Cape Town 2 ed 2005) 12.

The Brundtland Report in1987[14] created a close association between sustainable development and principles such as intergenerational equity. Further, the report provided that "all human beings have a fundamental right to an environment adequate for their health and well being".[15] This emphasised the connection of environmental rights with the broader concept of sustainable development.

Despite this, sustainable development is a notoriously difficult concept to pin down. Its multi-dimensional objectives render any legislative attempts at concretising it ambitious.[16] Further, the common definition - development that meets the needs of the present without compromising the ability of future generations to meet their needs - has been challenged, accused of being anthropocentric and focussing on human needs alone.[17] It is also challenged for assuming that human needs will be met irrespective of population growth and that technical advances to sustain future growth will predictably occur.[18] Another challenge is the assumption that man can fairly accurately foresee future events.[19]

Among environmentalists, there is definitely no consensus on its acceptance as an ideal to underlie development. Ethical theories of environmentalism are critical of it, emphasising that the decision to preserve natural heritage and pass it on the future generations is not about justice or fairness to future generations.[20] Instead this decision is ethical because "our obligation to provide future individuals with an environment consistent with ideals we know to be good is an obligation not necessarily to those individuals but to the ideals themselves".[21] Other ethical theories such as the deep ecology movement are founded on the notion of the uniqueness, interconnectedness and equality of all living beings as the basis for legal

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[14] World Commission on Environment and Development (WCED) *Our Common Future* (Oxford University Press Oxford 1987).

[15] WCED (n 43) See Principles.

[16] There have been a number of attempts at defining what exactly sustainable development means in terms of legislative frameworks where this complexity quickly becomes apparent. See for example Ruhl JB "Sustainable development: a five dimensional algorithm for environmental law" 1999 (18) *Stanford Environmental Law Journal* 31-64.

[17] McLoskey M "The emperor has no clothes: the conundrum of sustainable development" 1999 (9) *Duke Environmental Law Journal* 153-160, 154.

[18] McLoskey M (n 17) 155.

[19] Mcloskey M (n 17) 155. For more critiques see Stallworthy M *Sustainability, land use and environment: a legal analysis* (Cavendish Publishing Limited London 2002) 1-5; Lipschutz RD "Wasn't the future wonderful - resources, environment, and the emerging myth of global sustainable development" 1991 (2) *Colorado Journal of International Environmental Law and Policy* 35-55.

[20] Sagoff M *The economy of the earth: philosophy, law and the environment* (Cambridge University Press Cambridge 1988) 63.

[21] Sagoff M (n 20) 63.

intervention.[22] They postulate that humans are ordinary citizens of the world and not over and apart from it. Development is therefore not appropriate, simply because it can consistently cater for their needs. Instead, humans should act with the knowledge that there is wisdom and inherent desirability in nature's stability, diversity and interdependence, and all organisms are teleological centres of life as unique individuals.[23]

### 5.2.3 Sustainable development as an integrator

One writer points out that integration "serves as the very backbone of the concept of sustainable development."[24] This underlying integrative principle in sustainable development makes the connections between spatial planning and environmental law increasingly apparent. Notes one writer, [25]

> undoubtedly, the most significant example of the demise of the land use-enviro distinction is the global move towards sustainable development … it is clear that the concept of sustainability is changing the regulatory landscape in ways that will further erode the land use-enviro distinction.

In fact, it is argued that integration of decision-making is a useful way of operationalising the elusive concept sustainable development.[26] It is seen as the principle most easily translated into law and policy tools, and one which the other principles are reliant on for implementation.[27] As a consequence, many countries have used integration as the basis of law reform.

### 5.2.4 Framing methods of integrating spatial planning and environmental systems

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[22] Devall B "The deep ecology movement" 1980 (20) *Natural Resources Journal* 299-311, 310.

[23] Devall B (n 22) 310-313.

[24] International Law Association *Legal aspects of sustainable development fifth and final report from the New Delhi Conference: searching for the contours of international law in the field of sustainable development* INTERNET http://www.ila-hq.org/download.cfm/docid/533FC580-57AE-4139-AD5793B9A1C5AEEE [Date of use 05 January 2012] 7.

[25] Spyke NP "The land use-environmental law distinction: a geo-feminist critique" 2002-2003 (13) *Duke Environmental Law and Policy Journal* 55-98, 75-76.

[26] Dernbach JC "Achieving sustainable development: the centrality and multiple facets of integrated decision-making" 2003 (10) *Indiana Journal of Global Legal Studies* 247-285, 248-249.

[27] Dernbach JC (n 26) 248-249.

There is considerable commentary on how to do integration. At a basic level there is external and internal integration.[28] External integration is infusing environmental issues into other areas of development such as the social and economic arenas. This is the basis for many provisions in the Rio Declaration, *Local Agenda 21*, the EU integration principle, and the application of tools such as environmental impact assessment (EIA) and SEA.[29] It is also at the heart of the concept of integrated environmental management in the National Environmental Management Act[30] (NEMA) in South Africa.[31] In this method, other sectors of government integrate environmental issues into their plans and programmes.

Internal integration, on the other hand, focuses on integration using the entire range of organisational, legislative and programmatic efforts within the systems themselves.[32] Here, rather than using external tools for the purpose of integration, the entire system is itself reconfigured using various methods, to ensure that it is integrated. Thus internal integration includes among others, cross media integration. Here, different elements (or media) of the environmental system, for example land, soil, water, air and so on are integrated. Cross agency integration[33] on the other hand integrates and ensures coordination between agencies, horizontally across sectors (or policy areas for instance transport, energy, agriculture departments), as well as vertically among levels of government (national, provincial, local) through the requirement for alignment. Public participation is also considered part of vertical integration.[34] Cross media and agency forms of integration are closely interlinked, largely because government agencies are often aligned with environmental elements. A third form of integration is instrumental integration. This leverages off various instruments to influence positive behaviour for integration and discourage fragmented practices and is of particular relevance to legal instruments.[35] Instruments utilised (or combinations of these) include property law, economic instruments (financial such as taxes), the disclosure of information and so on.[36]

Finally, there is the most radical form of integration which is integration through resource management. Resource management entails focusing on the environmental

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[28] Erling MU (n 11) 4-7.

[29] Erling MU (n 11) 4-7.

[30] 107 of 1998.

[31] Section 23.

[32] Erling MU (n 11).

[33] Also known as process integration.

[34] Anker TH (n 10) 201.

[35] For an in depth analysis of the how South African law is fragmented along these lines, see Kotze LJ "Improving unsustainable environmental governance in South Africa: the case for holistic governance" 2006 (1) *Potchefstroom Electronic Law Journal* 1-44, 10-12.

[36] One author refers to instrumental integration as "integration of available legal policy and tools". Dernbach JC (n 26) 276.

resource as a whole, and structuring all planning, decisions, and institutions to deal with it in this holistic manner, often through a single statute.[37] It covers the previous three forms of integration.

Thus the dimensions, terminology[38] and approaches dealing with integration are varied, dictated to by the legal systems and circumstances. This chapter picks up on the various methods and how they can be used to resolve a very specific aspect of fragmentation in South Africa, that of the spatial planning and environmental legal systems. Based on writing both local and international, there is no doubt that there can be many other dimensions and approaches to tackling integration in South Africa.[39]

### 5.2.5 The choice of international integration practices

This section explores the practice in two countries, Britain and New Zealand. Britain has a long and well-documented history of attempting to better integrate its spatial planning and environmental systems. It examines how a single statute is used to integrate spatial planning and environmental decision-making, achieving cross media and cross agency integration. New Zealand, on the other hand, undertook a much more radical approach by adopting integration through resource management. The analysis looks at how this is used to integrate spatial planning and environmental systems through their proactive plans and decision-making. Finally, the utility of SEA in integration in a number of countries across the world is examined. The analysis of integration in these countries is by no means exhaustive, necessarily confined to learning for a very specific problem in South Africa.

Using practices of other countries, especially more developed countries, should always be done with caution.[40] Both Britain and New Zealand for example are considered developed, not on par with South Africa. Due to South Africa's unique history reflected in its current socio-economic conditions, as well as its legal system,

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[37] Anker TH (n 10).

[38] Erling MU (n 11) divides them into substantive, procedural, organisational and product oriented; Kotze LJ (n 35) has institutional and legislative (vertical, horizontal, framework/sectoral and inter-sectoral); Klein U writes of substantive (across assets, sectors and time) and process integration. He also includes another form of integration, integration over time or temporal integration, usually covered by the inclusion of long range plans. See Klein U "Integrated Resource Management in New Zealand – A juridical analysis of policy, plan and rule making under the RMA 2001 (5) *New Zealand Journal of Environmental Law* 1-54, 12. See also Dernbach (n 26) 272.

[39] See Kotze LJ (n 35) on some possible dimensions for broader integration.

[40] Andrews M "The logical limits of best practice administrative solutions in developing countries" 2011 *Public Administration and Development* 1-17.

the portability of many of these practices should be carefully considered.[41] Further, as will be shown, the systems in these countries have many strident critics. Nevertheless these countries have a common spatial planning heritage, with Britain being the early source of formal spatial planning practices in both New Zealand and South Africa. [42] It is thus useful to see how the systems have evolved from their common origins. Further New Zealand, isolated in the Pacific Ocean and of unique character being small, narrow and topographically dominated by mountain ranges and hillsides is particularly environmentally sensitive.[43] This has spurred on what is largely considered one of the most advanced environmental legal systems in the world.

## 5.3 BRITAIN

### 5.3.1 Introduction

At the heart of the move towards greater integration between the spatial planning and environmental systems was sustainable development. The Rio Declaration and *Local Agenda 21*, were a major catalyst in putting it at the centre of British development thinking.[44] It also gained prominence from among others, opposition by suburban and rural communities to housing developments in rural and green areas, especially in the south of England.[45] Obligations imposed by membership of the European Community and the implementation of council directives were likewise important in catalysing sustainable development thinking.[46] For instance in June 1985, the European Council of Ministers unanimously approved Directive 85/337/EEC (EU EIA Directive)[47] which spurred on development of the EIA system.[48] In Britain, the EU EIA

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[41] See for example similar sentiments on South Africa learning from international practices of SEA in Clayton-Dalal B and Sadler B *Strategic environmental assessment* (Earthscan London 2005) 242-247, 243.

[42] For details on South Africa's British planning heritage see 2.2.

[43] Nischalke T and Schollann A "Regional development and regional innovation policy in New Zealand: issues and tensions in a small remote country" 2005 (13:4) *European Planning Studies* 559-579.

[44] Bruff EG and Wood PA "Local sustainable development: land-use planning's contribution to modern local government" 2000 (43:4) *Journal of Environmental Planning and Management* 519-539, 520.

[45] Todes A, Berrisford S and Kihato M *Relationship between environment and planning: phase 2* (Report prepared for the KwaZulu-Natal Provincial Planning and Development Commission 2007).

[46] On directives the purpose and binding nature of directives, see (n 9).

[47] Council Directive of 27 June 1985 on *The assessment of the effects of certain public and private projects on the environment* Directive 85/337/EEC. Article 2(1) of the directive requires that "member states shall adopt all measures necessary to ensure that before permission is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to a requirement for development permission and an assessment with regard to their effects.

Directive was implemented through the spatial planning system which expanded in scope and importance.[49] The majority of the activities in the EU EIA Directive are thus also classified as development for which spatial planning permission is required under the Town and Country Planning Act 1990 (TCPA).[50] This law, the basis for the planning system, also encompasses the legal framework for environmental permissions, through a set of regulations, the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (TCPA EIA). While recent, they retain the underlying approach established in regulations of a similar name promulgated in 1999.[51]

### 5.3.2 Integration of spatial planning and environmental decision-making

The British system incorporates a single statute, the TCPA, as the basis for decision-making for both spatial planning and the environment. Spatial planning permission is required to carry out any development of land[52] and may be granted by a development order (also known as local development order).[53] Local planning authorities, in essence municipalities,[54] receive applications. Meanwhile, the TCPA EIA lists in two different schedules, Schedule 1 and Schedule 2, activities requiring EIAs. If the development application is a trigger in terms of the activities (an EIA development), it requires an EIA. The Act explicitly provides that the relevant planning authority or the Secretary of State[55] shall not grant planning permission unless environmental information is taken into consideration, and this must be stated

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[48] Barker A and Wood C "Environmental assessment in the European Union: perspectives, past, present and strategic" 2001 (9:2) *European Planning Studies* 243-254, 244.

[49] The "primacy of planning" and the importance of the planning application decision in providing the right to develop has long had proponents in Britain, and was influential in this respect. See Penfold A "The relationship between planning permission and non-planning permission: unfinished business?" 2010 (13) *Journal of Planning and Environment Law* 27-42, 30. See also Bruff EG *et al* (n 44); Rydin Y "Land use planning and environmental capacity: reassessing the use of regulatory policy tools to achieve sustainable development" 1998 (41:6) *Journal of Environmental Planning and Management* 749-765, 749.

[50] According to the TCPA Section 55(1), development means the carrying out of building, engineering, mining or other operations in, on over or under land or the making of any material change in the use of any building or other land.

[51] These were the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 now repealed.

[52] Section 57(1), TCPA. See (n 50) on meaning of "development".

[53] Section 58(1)(a),TCPA.

[54] Section 1(1)(a and b) of the TCPA defines a local planning authority as a non metropolitan county, a council of a county for the county and council of district for the district.

[55] A Secretary of State is a cabinet minister in charge of a national department. In this case, it is the Sectary of State for Communities and Local Government.

in the decision.[56] Despite municipalities being tasked with the majority of planning permissions, the national government, through the Secretary of State, wields enormous powers. Among others, the office may provide planning permission[57] and also give directions regulating the manner in which applications for planning permission are to be dealt with, including restricting,[58] revoking or modifying permission if deemed expedient.[59] Under the TCPA[60] and TCPA EIA,[61] the Secretary of State hears the appeals against decisions.

### 5.3.3 Effectiveness of integration under the TCPA

The British system achieves a degree of integration of decision-making. Integration is enabled at municipal level, where an amalgamation of the spatial planning and EIA decision-making happens. The legal set up of the country enables this, as local planning authorities are competent to deal with matters related to both. Importantly, spatial planning law is also home to both decision-making systems through the TCPA.

The system has had problems and been the subject of many reviews. One prominent criticism has been that the integrative qualities of the law have promoted exclusivity and NIMBY.[62] Another general observation is that integration does not go far enough. The system, for example, retains an Environmental Agency for certain environmental permits, such as pollution control permits. The level of integration of TCPA permissions with these other permits has been criticised as poor.[63] In 2006, the *Barker review of land use planning* (Barker Review) was set up with terms of reference that recognized, *inter alia*, the speed and efficiency of the existing system was inadequate.[64] The review recommended, among others, the creation of an Infrastructure Planning Commission (IPC) for large infrastructure projects, that would "determine the range of permissions (including Transport and Works Act, Planning

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[56] Section 3, TCPA EIA.

[57] Section 58(1)(b), TCPA.

[58] Section 71(1)(a), TCPA.

[59] Section 100, TCPA.

[60] Section 77, TCPA.

[61] Section 18, TCPA EIA.

[62] Rydin Y (n 49); Rydin Y "Planning and a modernised environmental agenda" 2000 (69) *Town and Country Planning* 42-43.

[63] Royal Commission for Environmental Pollution *Twenty third report: environmental planning* INTERNET http://www.rcep.org.uk/reports/23-planning/documents/2002-23planning.pdf [Date of use 14 December 2011] para12.

[64] HM Treasury "Barker review of land use planning" INTERNET http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/media/3/A/barker_finalreport051206.pdf [Date of use 14 December 2011] 3.

Permission, Harbour Order, Listed Building consents, etc.), in place of current procedures that result in multiple decision-makers, which adds to uncertainty and delay".[65] The resulting legislation, the Planning Act of 2008, was enacted to create a unified system of development permission for such nationally significant infrastructure projects.[66] While the IPC was abolished by the incoming conservative government in June 2010,[67] the planning permission it had jurisdiction over, the Development Consent Order (DCO), [68] was retained and is currently implemented by the Secretary of State.[69] The DCO is generally considered a step in the right direction and many of its criticisms relate to the fact that it did not take integration far enough. Examples are that it confined itself to large infrastructure projects administered at national level,[70] and that it did not entirely remove the number of permission regimes it was initially intended to.[71]

## 5.4 NEW ZEALAND

### 5.4.1 Introduction

Like in Britain, the push to integrate spatial planning and the environment was driven by sustainable development.[72] The green lobby, borrowing considerably from international prominence given to the Brundtland Report[73] influenced the direction of reform to the Town and Country Planning Act 1977. This was by requiring that any

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[65] Barker Review (n 64) 79.

[66] National Archives "Planning Act 2008 explanatory notes" INTERNET http://www.legislation.gov.uk/ukpga/2008/29/notes/division/2 [Date of use 21 December 2011].

[67] There were various reasons that motivated this political move to remove the IPC. Primary among these was that it was deemed an undemocratic and unelected structure. Owen R and Anwar S "The major infrastructure regime under the Planning Act 2008 – yet fit for purpose?" 2011 (7) *Journal of Planning and Environment Law* 849-859, 849.

[68] In terms of section 31 of the Planning Act of 2008.

[69] Shipman T "Labour's planning quango which spent £16 million of public money and achieved nothing is abolished" 30 June 2010 *Mail Online* INTERNET http://mg.co.za/printformat/single/2006-03-20-ministries-aim-to-trash-green-laws [Date of use 10 February 2012].

[70] Penfold A (n 49) 36.

[71] Penfold A (n 49) 36.

[72] See Bruff EG *et al* (n 44). It will however be noted that there was clear bias towards the ecological aspects of sustainable development in the law and subsequent practice.

[73] (n 14).

new law explicitly incorporates the inclusion of ecological values and provides greater opportunity for public participation.[74]

The law that emerged from the reform process, based on the concept of integrated resource management was aptly named the Resource Management Act (RMA).[75] Section 5(1) states that its purpose is to "promote sustainable management of natural and physical resources". Section 5(2) provides that "sustainable management is managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety".

The RMA brings together under a single law, previous laws relating to town and country planning and other laws, in all more than fifty statutes.[76] It integrates across different environmental elements (land, water, air, soil and so on);[77] across government agencies horizontally across sectors (such as agriculture, energy and transport) and across various levels of government, through coordination of plans at national, regional and territorial level, as well as public participation.[78]

From the traditional focus on rules and permissions, it emphasises the management, protection and enhancement of the entire environmental stock. In this way, it is not "activity based planning", premised on the occurrence of different development activities, but "effects-based planning", premised rather on the setting of critical environmental thresholds and basing decision-making on this.[79] This means that there are fewer planning authorities with much wider jurisdictions.[80] The planning authorities, known as consent authorities consist of regional councils[81] and territorial authorities,[82] or a local authority that is both a regional council and a territorial

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[74] Early literature and commentary on the RMA often makes explicit reference to the Brundtland Report for example Kerkin S "Sustainability and the Resource Management Act 1991" 1993 (7) *Auckland University Law Review* 291-304, 295. According to this article, the RMA is nevertheless more restricted in its definition of sustainable development when compared to the Brundtland report.

[75] 69 of 1991.

[76] Klein U (n 38) 12.

[77] For example, section 2(1) defines "natural and physical resources" as "land, water, air, soil, minerals and energy all forms of plants and animals (whether native to New Zealand or introduced) and all structures."

[78] Klein U (n 38) 11-15.

[79] Klein U "Assessment of New Zealand's environmental planning model" 2005 (9) *New Zealand Journal of Environmental Law* 287-306, 292. Other countries where effects, also known as outcomes based systems have been implemented include Australia (Queensland through its Desired Environmental Outcomes approach in the Integrated Planning Act of 1997) and the Netherlands. See Todes A *et al* (n 45) 27.

[80] Klein U (n 79) 293.

[81] In charge of 12 regions.

[82] In charge of 66 territorial authorities.

authority.[83] Territorial authorities are divided into district and city councils.[84] The third authority is the Ministry of the Environment which largely oversees the implementation of the RMA Act as a whole.[85] The limited decision-making powers at national level are provided through the Environmental Protection Authority (EPA), which confines itself to assessing proposals of national significance.[86]

The RMA was heralded as pioneering, advanced and state of the art in terms of integrating various aspects of the environment.[87] This a far cry from previous laws considered bureaucratic and inflexible,[88] little more than a "hotch potch" of different rules, procedures and institutional arrangements.[89]

### 5.4.2 Integration of proactive plans

The entire proactive planning system has singular holistic plans at three tiers - national, regional and territorial (or municipal level).

*(i) National planning*

At national level, national environmental standards and national policy statements are made. National environmental standards prescribe restriction standards for among others, use of land; subdivision of land; use of coastal marine areas; use of beds, lakes and rivers as well as water and any discharge of contaminants into the

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[83] Section 2(1) RMA.

[84] Environmental Defense Society (EDS) "Resource Management Act" INTERNET http://www.rmaguide.org.nz/rma/introduction.cfm [Date of use 14 December 2011].

[85] There is, in addition, a Department of Conservation that deals with New Zealand's natural and historic heritage, including national forest and maritime parks, marine reserves, nearly 4000 reserves, river margins, some coastline, several hundred wetlands, and many offshore islands. Most of the land under its control is protected for either scenic, scientific, historic or cultural reasons, or set aside for recreation.

[86] Under section 142 of the Act for example, the minister has the power to call in a proposal that is a matter or part of a proposal of national significance. These include matters that among others: have aroused widespread public concern or interest regarding the effect on the environment (including the global environment); involve significant use of natural and physical resources; affect structure, feature, place, or area of national significance; affect New Zealand's international obligations to the global environment; or results or contributes to significant or irreversible changes to the environment (including the global environment) and so on.

[87] Klein U (n 38) 2. Carlman I "The Resource Management Act 1991 through external eyes" 2007 (11) *New Zealand Journal of Environmental Law* 181-210, 1.

[88] Gleeson BJ and Grundy KJ "New Zealand's planning revolution five years on: a preliminary assessment" 1997 (40:3) *Journal of Environmental Planning and Management* 293-313.

[89] Klein U (n 38) 2.

environment.[90] These standards may prohibit an activity, allow an activity, restrict or grant a resource consent.[91]

The purpose of national policy statements, on the other hand, is to state objectives and policies for matters of national significance, relevant to achieving the purpose of the RMA.[92] These may include *inter alia*, New Zealand's interests and obligations in maintaining or enhancing aspects of the national or global environment, anything which affects or potentially affects any structure, feature, place or area of national significance, and anything that cuts across regions.[93]

Besides these documents, the national Minister for the Environment has some overarching powers over plan making at other tiers of government. A regional council or territorial authority may be directed for instance to change its plan within a specified reasonable period.[94] A review may also be requested of a regional plan.[95]

*(ii) Regional planning*

At regional level, the proactive planning instruments are regional policy statements and regional plans (including coastal plans). Regional policy statements provide an overview of the resource management issues of the region, as well as provide policies and methods to achieve integrated management of the natural and physical resources of the whole region.[96] Each regional council creates one regional policy statement for its area.[97] A regional plan must give effect to any national policy statement, coastal policy statement and any regional policy statement.[98]

*(iii) Territorial planning*

RMA reforms were accompanied by the redesign of local authority boundaries including the abolition of a host of special purpose authorities.[99] Instead, current territorial authorities (district and city councils) have the role of controlling among others: the effects of the use of land and associated natural and physical resources, natural hazards, hazardous substances, contaminated sites and biodiversity conservation to the extent affected by land use; land subdivision; noise; and activities

[90] Section 43B, RMA.

[91] Section 43A(1), RMA.

[92] Section 45(1), RMA.

[93] For the full list see section 45(2)(b-g), RMA.

[94] Section 25A, RMA.

[95] Section 25B, RMA.

[96] Section 59, RMA.

[97] Section 60, RMA.

[98] Section 67(3), RMA.

[99] Klein U (n 79) 293.

on the surfaces of rivers and lakes.[100] Territorial authorities are tasked with creating district plans to assist them in carrying out these functions. These plans are far more than land use plans and encompass the territories' resources, as resource management plans.[101] These plans must *inter alia* contain the objectives of the district and the policies to implement these, as well as establish any rules to implement these policies.[102] Importantly and in line with the alignment of the different plans at different tiers, the preparation of district plans must give effect to national policy, coastal policy statements and regional policy statements.[103]

Through the creation of common plans across different environmental elements at different tiers of government, the RMA proactively plans for all resources, rather than isolated components. All the above plans and policy statements, that is national policy statements and standards, regional policy statements and district plans, form the basis for decision-making at different governmental levels.

### 5.4.3 Integration of spatial planning and environmental decision-making

The decision-making system makes use of the same institutional structures used for proactive planning at national, regional and territorial level. Decisions are further guided by the same proactive plans and policy statements. This is because in terms of the RMA, while a policy statement or plan is operative, the regional council or territorial authority concerned and every consent authority must observe and enforce its observance.[104] Importantly, in line with effects-based planning, consents are based on an assessment of the effects of the activity rather than the activity itself.[105] Decision-making revolves around the resource consent, provided by consent authorities, that is the regional councils and territorial authorities.[106]

Determining whether a resource consent must, may or may not be granted, and what requirements must be considered is guided by the proactive plans and policy statements. These may classify activities as permitted, controlled, restricted discretionary, non-complying or prohibited.[107] Thus for example, permitted activities require no resource consent, while controlled activities need resource consent with or

[100] Section 31, RMA.

[101] Section 72, RMA.

[102] Section 75(1), RMA. For the full list, see section 75 (1) and (2).

[103] Section 75(3), RMA.

[104] Section 84(1), RMA.

[105] See Klein U (n 79).

[106](n 83).

[107] Section 77A(2), RMA.

without conditions.[108] Rules in the plans determine which category an activity falls under. Further, a resource consent embraces five broad categories: land use consent, a subdivision consent, a coastal permit, water permit, and discharge permit.[109] Regional councils provide coastal water and discharge permits[110] while all the others, including land subdivision consents, are provided at territorial level.[111] At national level, the EPA confines itself to the proposals of national significance. To develop land therefore, it is only necessary to find the appropriate planning authority, which is either at local, regional or occasionally at national level to obtain the consent. An Environmental Court[112] deals with appeals from authorities.[113] In making an application for resource consent, an assessment of environmental effects (AEE), a form of EIA, is required at the same time.[114] The extent and depth of the AEE largely depends on the activity, that is its classification either as, permitted, controlled, restricted discretionary, non-complying or prohibited.[115]

### 5.4.4 Effectiveness of integration under the RMA

The RMA was set up to achieve integration across the entire resource base. Proactive spatial and environmental planning are combined and subsumed under the broad umbrella of resource planning. Further, a single decision-making body is involved at national, regional and territorial (municipal) level depending on the type of application, providing permission for development including EIAs, and basing its decision on the proactive plans. All this is done using an effects-based system.

The RMA is not without its critics. Disapproval has been expressed for what is perceived as excessive focus on ecological issues, de-emphasising the social causes of these.[116] It also, according to some, largely ignores issues related to the built environment.[117] This in part resulted in the introduction of community plans

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[108] Carlman L (n 87) 196.

[109] Section 87, RMA.

[110] Section 30.

[111] (n 100).

[112] Formerly a Planning tribunal under the Town and Country Planning Act 1977.

[113] Section 120.

[114] Section 88(2)(b).

[115] EDS (n 84).

[116] Klein U (n 38) 20. According to Kerkin S (n 74) 304, from the onset, the RMA was only concerned with sustainable management (as opposed to sustainable development), and this connoted a focus solely on the environmental aspects of sustainable development and the use of resources.

[117] Freeman C "Sustainable development from rhetoric to practice? A New Zealand perspective" 2004 (9:4) *International Planning Studies* 307-326, 311.

under a different law, the Local Government Act 2002.[118] Despite being an amalgamation of numerous bureaucracies into one, after more than ten years of its life, the Act is was still accused of being overly bureaucratic.[119] The quality of plans produced by the various authorities has also been questioned.[120] Other recurring problems have been among others: insufficient financial and human resource capacity to implement the larger and more complex mandate created by the Act especially among smaller and rural municipalities; insufficient intergovernmental coordination as well support from national government, and poor planning linkages at national regional and district levels.[121]

It is also noteworthy that minerals are partly excluded from the RMA[122] and planning for this resource is not entirely under the jurisdiction of the consent authorities. Others such as fisheries conservation and hazardous materials are also outside its remit.[123] This means that the RMA does not necessarily cover all environmental resources.

## 5.5 INTEGRATION THROUGH STRATEGIC ENVIRONMENTAL ASSESSMENT (SEA): PRACTICES AROUND THE WORLD

When applied to proactive spatial plans, SEAs are an important element in external integration of environmental issues and the promotion of sustainable development.[124] There is profuse writing on what is a largely emerging practice of SEAs around the world,[125] although most of it relates to developed countries.[126] The following section

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[118] The community plan is a 10 year strategic plan that must be prepared at least every three years. It provides a strategic vision for the council and community and states key council policies. Memon A and Thomas G "New Zealand's new Local Government Act: a paradigm for participatory planning or business as usual?" 2006 (24:1) *Urban Policy and Research* 135-144.

[119] Daya-Winterbotham T "RMA déjà vu: reviewing the Resource Management Act 1991" 2004 (8) *New Zealand Journal of Environmental Law* 209-242, 211 and 226-228.

[120] Borrie N *et al Planning and governance under the LGA: lessons from the RMA experience* (Lincoln University and the University of Waikato 2004) INTERNET http://researchcommons.waikato.ac.nz/handle/10289/914 [Date of use 14 December 2011] 23.

[121] See generally Freeman C (n 117) and Memon A *et al* (n 118).

[122] Section 5(2)(a), RMA. Further, the Crown Minerals Act 1991 which regulates the allocation of minerals does not contain a sustainability provision. See Klein U (n 38) 19.

[123] (n 86).

[124] See 3.4.3.

[125] A good text that deals specifically with the application of SEA to land use planning is Jones C *et al* (eds) *Strategic environmental assessment and land use planning: an international evaluation* (Earthscan London 2005).

[126] Retief F, Jones C and Jay S "The emperor's new clothes – reflections on strategic environmental assessment (SEA) practice in South Africa" 2007 (28:7) *Environmental Impact Assessment Review* 504-514, 504.

extracts some commentary on their usefulness in ensuring spatial plans are well integrated with environmental issues.

### 5.5.1 SEA in developing countries

There is limited practice of SEA in developing countries.[127] When it happens, much of it is driven by international organisations and multilateral donors, usually associated with large projects and national plans and policies, rather than the routine use on spatial plans at local level.[128] Nevertheless commentary on the limited practice points to some important lessons. These include the importance of methodological pluralism and the need to eschew hard and fast prescriptions of methods in law. This is necessary in order to adapt SEA around economic and political realities.[129] There is also a critical need for institutional capacity and political will for implementation of recommendations.[130]

### 5.5.2 Europe

In Europe, Directive 2001/42/EU[131] (EU SEA Directive) was the factor that drove the adoption of SEA related legislation and policies within the union territory. Spatial planning is a key concern of the EU SEA Directive.[132] A large number of countries subsequently enacted legislation and policy as required by the EU SEA Directive including in Britain through the Planning and Compulsory Purchase Act 2004, where it was subsumed under the system of sustainability appraisal.[133] In Germany, SEA practices predated the EU SEA directive, but it was formally made law as required through the "Act to Accommodate EU Requirements in the Federal Construction Act".[134] This came into force in June 2005. In that country, all formal spatial and land

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[127] Retief F (n 126).

[128] Clayton-Dalal B and Sadler B *Strategic environmental assessment* (Earthscan London 2005) 280.

[129] Clayton-Dalal B *et al* (n 128) 237.

[130] Clayton-Dalal B *et al* (n 128) 237-352.

[131] Council Directive of 27 June 2001 on *The assessment of the effects of certain plans and programmes on the environment* Directive 2001/42/EC.

[132] Article 2(2)(a) provides that "town and country planning or land use" requires SEA.

[133] Sections 5(4)(a), 19(5)(a) 62(6)(a) of the Act call for the appraisal of the sustainability of various spatial and development plans.

[134] *Gesetz zur Einführung einer Strategischen Umweltprüfung und zur Umsetzung der Richtlinie* 2001/42/EG — SUPG. See Fischer TB *et al* "Learning through EC directive based SEA in spatial planning? Evidence from the Brunswick region in Germany" 2009 (29) *Environmental Impact Assessment Review* 421-428, 423.

use plans normally require SEA.[135] In Austria, the requirements of the EU SEA Directive were implemented in the individual spatial planning laws in the nine Bundesländer.[136] In France, requirements the EU SEA Directive were transposed into the national environmental codex (*Code de l'environnement*) as into the national codex for urban planning (*Code de l'urbanisme*). As far as spatial planning is concerned, SEA is regulated in accordance with this amendment of the *Code de l'urbanisme*.[137]

In all these and many other cases, SEA is carried out by the authority creating and implementing the spatial plans themselves.[138] The rules of application of SEA on these plans vary among these countries (type, scale, level of spatial plan, as well as frequency). Nevertheless, SEA is seen as useful in ensuring that environmental issues and reasonable planning alternatives are considered, especially when regularly applied.[139] Planning authorities also see them as worthwhile because of the additional knowledge about sustainable development and the environment gained.[140] SEAs are also emerging as useful in ensuring matters on climate change are addressed within spatial plans.[141] These benefits outweigh concerns regarding substantial time and resources necessary to carry them out.[142]

### 5.5.3 The United States and Canada

In the United States, the use of SEA pre-dated similar mandates around the world, driven by the National Environmental Policy Act (NEPA) through its programmatic environmental impact statements (PEIS).[143] NEPA applies to all agencies of federal government and requires that a PEIS is prepared for major federal actions that significantly affect the environment. This includes land use planning, although only

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[135] Fischer TB *et al* (n 134) 423.

[136] Jiricka A and Probstil U "SEA in local land use planning – first experience in the Alpine States" (28) 2008 *Environmental Impact Assessment Review* 328-337, 330. Bundesländer are roughly the equivalent of provinces.

[137] Jiricka A *et al* (136) 330.

[138] This often raises problems of "friendly" SEA reports being done for plans especially when the SEA is not fully integrated into the plan making process. See Jiricka A *et al* (n 136).

[139] Jiricka A *et al* (n 136) 336.

[140] Jones C *et al* "United Kingdom" in Jones C *et al* (eds) *Strategic environmental assessment and land use planning: an international evaluation* (Earthscan London 2005) 223-241, 236.

[141] Posas P "Climate change in SEA: learning from English local spatial planning experience" 2011 (29:4) *Impact Assessment and Project Appraisal* 289-302.

[142] Jiricka A *et al* (n 136) 336. Also Therivel R and Welsh F "The Strategic Environmental Assessment Directive in the UK: 1 year onwards" 2006 (26) *Environmental Impact Assessment Review* 663–75, 672.

[143] Bass R "United States" in Jones C *et al (*eds) *Strategic environmental assessment and land use planning: an international evaluation* (Earthscan London 2005) 242-260.

some federal agencies for example, the Forestry Service, the Fish and Wildlife Service and the Parks service are involved in it. PEIS concentrates on cumulative impacts. It also uses a multilevel approach where the agency assesses more general matters at a broader scale through the PEIS, at a first tier.[144] These assessments are then incorporated in the general discussions in subsequent issue specific proposals at program and project level.

In Canada, a Cabinet directive in 1999 and supplemented in 2004 provides for SEA. It requires environmental assessment of policy, plans and programme proposals. The process operates outside the Canadian environmental assessment legislation. The practice in Canada has been characterised by problems with weak accountability, poor compliance and transparency problems, which has prompted calls for the development of either mandatory legislated framework for SEA[145] or including SEA within an oversight role for the country's environmental agency.[146]

## 5.6 CONCLUSIONS

The chapter has briefly examined methods of integration in selected countries around the world. Means, methods and concepts of integration vary considerably, driven by the specific context in which they are implemented. This should be borne in mind when using any lessons from the examples for the South African context. A prominent issue that stands out is the pivotal role sustainable development has played in driving policy and legal reform towards integrated practices. Illustratively, in the examples studied, sustainable development formed the rationale for law reform towards more integrated systems. Further, integration is clearly work in progress in all the examined countries, even in those that have adopted the most radical reform measures. This means ambitions for integration should be realistic, especially within resource constraints, with the knowledge it is a long term process.

The next and final chapter extracts in greater detail, lessons emerging from these international practices and within the context of South Africa's legal system, draws on some important lessons and makes recommendations on the way forward.

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144 Bass R (n 143) 250.

145 Gibson RB *et al* "Strengthening strategic environmental assessment in Canada: an evaluation of three basic options" 2010 (20) *Journal of Environmental Law and Practice* 175-211.

146 Sadler B "Canada" in Jones C *et al* (eds) *Strategic environmental assessment and land use planning: an international evaluation* (Earthscan London 2005) 44-58, 59.

# CHAPTER 6: IMPORTANT CONCLUDING POINTS AND RECOMMENDATIONS

## 6.1 INTRODUCTION

This chapter makes recommendations on how South Africa can better integrate spatial planning and environmental systems. It first makes a general commentary on some important issues to take into consideration whenever implementing integrated systems. The next section delves into some general as well as specific recommendations on methods of integration for South Africa. Finally a concluding summary of the work is made.

## 6.2 FACTORS TO CONSIDER WHEN PURSUING INTEGRATION

The implementation of integration should always be circumspect and consider a number of important realities.

### 6.2.1 The value of integration is contested

Many writers note that the theory of integration is appealing, but practical implementation can be very difficult to achieve. According to one writer, integrated approaches to administration "assume intellectual and information capacities" not possessed by men, and are especially not worth it given the time and resource constraints most administrations face.[1] To some, the concept cannot be implemented as it ignores the modern nature of expertise which is by its very nature narrow, specialised and disciplinary.[2]

Practically, integrated systems are criticised for among others, frontloading costs of applicants who have to provide all manner of detail to the decision-maker very early in the process; making excessive demands on a single decision-making authority, often a municipality and running the risk that the slowest of the combined permissions will determine the pace of the whole.[3] Doubts have also been raised on

[1] Erling MU "Approaches to integrated pollution control in the Unites Stated and the European Union" 2001 (15:1) *Tulane Environmental Law Journal* 1-42, 8 quoting Charles Lindblom.

[2] Klein U "Integrated Resource Management in New Zealand – a juridical analysis of policy, plan and rule making under the RMA 2001 (5) *New Zealand Journal of Environmental Law* 1-54, 14.

[3] Penfold A "The relationship between planning permission and non-planning permission: unfinished business?" 2010 (13) *Journal of Planning and Environmental Law* 27-42, 37. These are not insurmountable problems however.

whether the trouble and cost of integration is worth it for smaller developments, arguing that its benefits accrue best to larger projects.[4] The trend towards increasingly adding on various matters and issues onto planning permissions especially in the name of integration has also been seen as complicating such applications excessively.[5]

Generally, integration can run the risk of being an all-consuming exercise of limited benefit. It is therefore necessary to be clear on what is achievable through integration, what the core of the problem being solved is, and to be especially cognisant of limited resources and capacity constraints when implementing it. The specific context for which integration is sought is likewise key.[6] Further, experience from other countries has shown that even upon extensive institutional integration, fragmentation can still easily be manifested internally through the same fragmented statutes or ways of working.[7] Integration also involves the merging of two often very fundamentally different ways of thinking, as the evolutionary history of both spatial planning and the environment has shown.[8] These issues should be borne in mind and inform any action aimed at integration

### 6.2.2 Good intergovernmental cooperation is not easy to achieve

A key component of integration is cooperation among different levels and departments of government, based on practices of intergovernmental assistance and dialogue. It is at the heart of any successful integration, as there will always be multiple agencies and levels or spheres of government wielding different forms of

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Frontloading of detailed information can be resolved by a process of scoping for example. Information requirements are thus phased proportionally depending on the stage of the application. See also HM Treasury "Barker review of land use planning" INTERNET http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/media/3/A/barker_finalreport051206.pdf [Date of use 14 December 2011] 165 (Barker Review).

[4] Penfold A (n 3) 37. See also the British approach to integrating decision-making for large infrastructure projects using the Development Consent Order. See 5.3.2.

[5] Again for example in Britain, climate change issues, specifically those dealing with energy consumption, traditionally building regulation matters, have become part and parcel of planning permissions creating what is considered excessive complexity in the applications. See Penfold A (n 3) 36. See also Barker Review (n 3 ) 27.

[6] Anker TH "Integrated resource management: lessons from Europe" 2002 (11) *European Environmental Law Review* 199-209, 201.

[7] Erling (n 1) 16.

[8] Van den Berg M "Towards urban environmental quality in The Netherlands" Miller D and de Roo G (eds) *Integrating city planning and environmental improvement: practicable strategies for sustainable urban development* (England Ashgate 2004) 41-48, 1. See also 2.2.

legislative and executive power. This is so even for the most extensive and radical forms of integration.[9]

Yet this is never easy to achieve. In New Zealand for example, the different levels of planning, at national, regional and territorial levels have been criticised for being poorly aligned and thus affecting the successful implementation of the Resource Management Act (RMA).[10] This law has further shown that despite statutory prescriptions requiring essential alignment of proactive plans at the different levels of government, this does not necessarily happen.[11] In Britain, the practice of strategic environmental assessment (SEA) has been hampered by the fact that it is not part of a coherent and holistic system that is integrated with strategic targets and objectives, filtering across the tiered government divide.[12] In other countries, for example the Netherlands, more favourable comment is elicited. It does not have specific legislation requiring vertical coordination between the three different planning tiers, national, provincial and local, but still has a well-functioning system of cooperation. This is instead based on a culture of extensive intergovernmental negotiations and consultations.[13]

The South African *National development plan: vision for 2030* echoes the findings from these diverse examples. When commenting on South Africa's experience on this issue, it states that "no written document can layout every feature of the intergovernmental system".[14] Establishing useful intergovernmental relations in South Africa has just begun in what is a relatively new system of governance, with its three distinctive, interdependent and interrelated spheres of government.[15] Apart from the

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[9] Often, these agencies deal with issues that extend beyond the functional and geographical bounds of ordinary planning and environment authorities, for instance geographical expansive resources including coastal resources rivers and navigational bodies. In Britain for example, it has been recognised that even where there is clear overlap between regimes, there is a role to be played by a different decision-makers in considering much the same issues. See Penfold (n 3). The reality of different decision-making organs is also true in highly integrated systems such as New Zealand, which has a department of conservation outside the Resource Management Act structures.

[10] See 5.4.3.

[11] Borrie N *et al Planning and governance under the LGA: lessons from the RMA experience* (Lincoln University and the University of Waikato 2004) INTERNET http://researchcommons.waikato.ac.nz/handle/10289/914 [Date of use 14 December 2011] 14.

[12] Barker A and Fischer T "English regionalisation and sustainability: towards the development of an integrated approach to Strategic Environmental Assessment" (11:6) 2003 *European Planning Studies* 697-716. For the same point made for other jurisdictions see Jones C *et al* "SEA: an overview" in Jones C *et al* (eds) *Strategic environmental assessment and land use planning: an international evaluation* (Earthscan London 2005) 14-23, 24.

[13] See for example Zonneveld W "In search of conceptual modernisation: the new Dutch 'national spatial strategy'" 2005 (20) *Journal of Housing and the Built Environment* 425-443, 427.

[14] National Planning Commission *National development plan: vision for 2030* (The Presidency Pretoria 2011) 386.

[15] Section 40(1) Constitution.

constitutional provisions relating to cooperative government in Chapter 3, the Intergovernmental Relations Framework Act[16] (IRFA) enacted in 2005 is recent (and to many much delayed[17]) legislation intended to govern these relations. Many other laws not specifically dealing with intergovernmental relations also contain provisions providing for it. The National Environmental Management Act[18] (NEMA), environmental implementation plans (EIP) and environmental managements plans (EMP) for example have, as their main purpose, coordination and harmonisation of plans.[19]

Yet even with this fairly extensive legal framework, the system of intergovernmental relations has not worked well. Proactive spatial plans are generally characterised by poor alignment of plans at national, provincial and municipal level largely brought about by poor practices of intergovernmental cooperation.[20] Further, the Constitution requires that to promote co-operative government and intergovernmental relations, all spheres of government must cooperate with one another in mutual trust and good faith by avoiding legal proceedings against one another.[21] Despite this, court action is not unusual. The case of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*[22] emerged from the failure to amicably resolve the question of how to delineate executive power with regard to spatial planning between provinces and municipalities.[23] Spatial planning is by no means the only area where this is happening, and court intervention has been sought in a number of other functional areas.[24]

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[16] 13 of 2005.

[17] Woolman S "L'etat, C'st Moi: why provincial intra-governmental disputes in South Africa remain ungoverned by the final Constitution and the Intergovernmental Relations Framework Act – and how we can best resolve them" 2009 (13:1) *Law Democracy and Development* 62-75,63.

[18] 107 of 1998.

[19] For more see 3.4.1.

[20] For example alignment of national, provincial proactive plans with local IDPs. See 3.3.1.

[21] Section 41(1)(h).

[22] [2010] JDR 0704 (CC). See 3.2.1.

[23] Other cases where court interpretation was necessary in order to delineate spatial planning competencies among the various spheres of government include *Maccsand (Pty) Ltd and Another v City of Cape Town and Others* 2011 (6) SA 633 (SCA) and *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government and Environmental Affairs and Development Planning of the Western cape and Others* [2011] ZAWCHC 327 (31 August 2011).

[24] These have emerged from inter-sphere disputes ending up in court, as well and certification judgments for various pieces of legislation. See for example: weighing the constitutional roles and responsibilities of provincial government under section 155(6) in terms of its authority to establish municipalities and their internal structures in all provinces, against a similar authority exercised by the national government under provisions of the Local Government Municipal Structures Act 117 of 1998 in *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa; Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* 1999 (12) BCLR 1360 (CC); adjudicating on national

South Africa's intergovernmental system emerged from a political compromise.[25] There has been a lot of debate focusing on its structures especially that questioning the relevance of provincial government. This has been to some, to the detriment of making sure the existing structures work effectively.[26] Accordingly, it will take some time to realise the intentions of these laws, and establish long term methods of practice and collaboration to create well-functioning systems of intergovernmental cooperation.[27] Recommendations for integration that are reliant on these intergovernmental forums and structures need to have this in mind.

### 6.2.3 Political will is essential for integration

The examples examined in the previous chapter emphasised the need for political buy-in to enable integration. In the implementation of SEA for example, this is essential, especially if it is to be applied systematically and comprehensively[28] and a major stumbling block to its effectiveness is the lack of political support.[29] This has been equally noted in the limited SEA practice in South Africa.[30] Further, integration inevitably creates resistance based on turf wars and the need for self-preservation. For example, approaches based on effects based-planning similar to the RMA cede control of activities previously wielded under traditional forms of control-led town planning. This allows for greater flexibility and contestation, not always seen as a positive thing by authorities.[31]

The political dimension is much more intractable than means and methods of integration. This means that practically, lobbying and obtaining political buy-in is always essential to implementing integrated systems, and success often hinges upon it.

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and provincial government concurrent powers with regard to education in *Re: The National Education Policy Bill No 83 of 1995* 1996 (4) BCLR 518 (CC); adjudicating on exclusive provincial legislative powers over liquor licensing, versus section 44(2) national government powers of intervention in *Ex parte President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) and many more.

[25] *National development plan: vision for 2030* (n 14) 385.

[26] *National development plan: vision for 2030* (n14) 385.

[27] It is noteworthy that there have been attempts at creating informal intergovernmental forums, specifically those dealing with integrating spatial planning and the environment. For example in the Western Cape, see 4.4.2.

[28] See 5.5.

[29] Jones C *et al* (n 12) 23.

[30] Retief F, Jones C and Jay S "The emperor's new clothes – reflections on strategic environmental assessment (SEA) practice in South Africa" 2007 (28:7) *Environmental Impact Assessment Review* 504-514, 509.

[31] Perkins H and Thorns D "A decade on: reflections on the Resource Management Act 1991 and the practice of urban planning in New Zealand" 2001 (28) *Environment and Planning B: Planning and Design* 639-654, 648.

### 6.2.4 Spatial planning or the environment may dominate each other in integrated systems

Sustainable development is a balancing act and one that is not always weighted effectively among all facets - environmental, social and economic. Depending on the socio-economic context as well as political imperatives, the voice of one may be effectively muted by another. In New Zealand, the RMA clearly prioritised environmental issues from the onset and subordinated human needs to the environmental bottom line.[32] This is because of the country's particular context, its history of individualistic and environmentally profligate settlement which the society was trying to move away from and the influences of the new right that opposed the concept of sustainability.[33] Thus, how a country perceives issues around sustainable development, including the environment, is driven by context as one author notes.[34]

> In particular national cultures, environmental issues and more generally political agendas about the environment are not simply "given" to be found existing objectively in nature as, so to speak, a set of instantly recognizable physical issues. To be sure, they tend to be manifested in particular physical problems, but the issue of *which* issues emerge as environmentally significant in particular cultural contexts, *why,* and in *what* forms is not explicable only in terms of objective physical observation. Rather, such questions are social and cultural.

It is not unrealistic to suggest that in South Africa socio-economic matters would predominate if there was greater integration between the planning and environmental systems.[35] This is because in the recent past, there has been considerable hostility at political level directed at the environmental system, including EIAs. It is often seen as a barrier to much urgently needed social and economic development, especially among previously disadvantaged individuals.[36] In reality, this argument is tenuous as social and economic development is not viable if it harms the environment. Nevertheless, to some this means that a degree of separation may be healthy, to ensure less "popular" facets are not overwhelmed by another. Sustainable development is about balancing diverse interests - environmental, social and economic - and any integrative efforts should be aware of the inherent tensions that exist and make deliberate efforts to retain all the merged voices.

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[32] Anker T H (n 6) 203.

[32] For more detail, see 5.4.3.

[33] Todes A, Berrisford S and Kihato M *Relationship between environment and planning: phase 2* (Report prepared for the KwaZulu-Natal Provincial Planning and Development Commission 2007) 48.

[34] Grove-White R "Land use law and the environment" 1991 (18:32) *Journal of Law and Society* 32-47, 32.

[35] Todes A, Sim V and Sutherland C "The relationship between planning and environmental management in South Africa: the case of KwaZulu-Natal" 2009 (24:4) *Planning, Practice and Research* 411-433, 430.

[36] For a more detailed discussion on how environmental issues lost ground in the early days of democracy see 2.8.1.

### 6.2.5 Sufficient data and information is necessary for integrated systems

It is clear from the examples examined that integrated systems are data intensive, and the lack of this can be an important hindrance to success.[37] New Zealand's RMA, with the outcomes based planning system, requires decisions be made based on complex data rich systems, requiring considerable capacity to collect, assess and create meaningful plans.[38] These requirements go beyond the commonly encountered scientific uncertainty that challenges all decision-making dealing with spatial planning and the environment. Instead, this is data necessary to deal with the complexity associated with integrated systems, which heightens need for the quantity and quality of data. The Environmental Protection Agency in America for example recognised as formidable the challenge of acquiring sufficient data to support integrated pollutions systems.[39] Going forward, this issue will definitely impact on the ability of South Africa to implement such integrated systems, given its limitations on resources both spatial and environmental.[40]

## 6.3 GENERAL RECOMMENDATIONS

A number of general recommendations are made on how to improve integration. These, rather than targeting specific actions discuss two much broader issues. One is the adoption of sustainable development as the principle underpinning all government action, and two, allied to the first, that the legislative reform agenda currently being implemented in spatial planning and the environmental systems must have integration as a priority. It is only if this is prioritised that integration can become a reality.

### 6.3.1 Sustainable development should underpin government action in South Africa

What has emerged is the crucial role that the concept of sustainable development needs to play in driving government in South Africa. As an underlying principle, it invariably leads to greater integrated thinking. It creates a normative framework through which competing interests from social, economic and environmental needs can be negotiated and reconciled.

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[37] See also Clarke D "Chasing rainbows: is an integrated statute the pot of gold for environmental policy?" 1992 (22) *Environmental Law* 281-300, 292.

[38] Anker TH (n 6) 207.

[39] Clarke D (n 37) 298.

[40] On capacity constraints in South Africa, see generally chapter 4.

*(i) Sustainable development in South African law*

After 1994, there was general consensus that sustainable development needs to be the underlying theme to drive reconstruction and development in post-apartheid South Africa.[41] The environmental right as well as sustainable development became entrenched in the Constitution. The Bill of Rights Section 24 provides that:

> Everyone has the right—
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[42]

The first post-apartheid piece of planning legislation, the Development Facilitation Act[43] (DFA) had normative planning principles. At the heart of these were two sets of values. One was people centred development and the other "environmental sustainability" and the need to ensure that "natural and human ecosystems co-exist harmoniously".[44] NEMA enacted later also adopted a sustainable development approach. Chapter 1 of NEMA is dedicated to principles that serve as a framework and guideline for the exercise of functions under the Act, including proactive planning and decision-making through environmental impact assessments (EIA). Among these are "that development must be socially, environmentally and economically sustainable" and that "environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated.[45]

The integrative qualities of sustainable development have also received *imprimatur* from the Constitutional Court in the case of the *Fuel Retailers Association of South Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*.[46] This case was the culmination of a series of related cases where, among others, the concept of

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[41] See for example International Mission on Environmental Policy *Environment, reconstruction, and development* (International Development Research Centre Canada 1995); National Development and Planning Commission *Resource document on the Chapter 1 principles of the Development Facilitation Act 1995* (Department of Land Affairs Pretoria 1999).

[42] My emphasis.

[43] 67 of 1995.

[44] *Resource document on the Chapter 1 principles of the Development Facilitation Act 1995* (n 41) 5-6.

[45] Section 2.

[46] [2007] JDR 0445 (CC).

sustainable development was considered.[47] In this respect, the judges emphasised that it is critical for environmental institutions to examine socio-economic issues as part of their obligation of assessing the environmental impacts of development.[48] The court therefore rejected the notion that spatial planning authorities should consider socio-economic concerns, and environmental authorities deal separately with environmental ones. It noted that the existence of town planning decisions under the ordinance[49] does not discharge environmental authorities from their obligations to assess the socio-economic need and desirability of development. The court further held that underlying the concept of sustainable development is the "principle of integration".[50] This decision displayed how the concept of sustainable development is practically useful in highlighting the artificial barriers between the spatial planning and environmental systems.

There is nevertheless a lot of work to be done with regard to translating sustainable development into action in South Africa. Its expansiveness as a concept, the in-built competing claims it encompasses and the lack of consensus on what it actually means makes this is particularly challenging.[51] Notes one author,

> Despite the overwhelming support for sustainable development as a policy goal, there is evidence to suggest that South Africa's experience with sustainable development over the past decade, has not met the expectations that lead to its adoption. It is increasingly evident that South Africa's approach is based on the assumption that it can address a wide range of development objectives within one framework, despite the inadequate capacity of institutions to support this approach … the different interpretations of sustainable development are a result of absence of a clear agreement as to what it means to have sustainable development as a policy goal.[52]

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[47] This case on appeal, overturned the earlier decision of the High Court in the *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management, Department of Agriculture, Conservation & Environment, Mpumalanga Province & others* [2006] JOL 17954 (T). See also previous judgements adopting this approach: *Turnstone Trading v The Director General Environment Management, Department of Agriculture Conservation and Development and Others* [2005] JDR 0270 (T); *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* [2004] JDR 0244 (W); and *MEC for Agriculture Conservation, Environmental and Land Affairs v Sasol Oil (Pty) Ltd and another* [2006] 2 All SA 17 (SCA). Writing on these cases includes Paterson A "Fuelling the sustainable development debate in South Africa" 2006 (123:1) *South African Law Journal* 53-62 and Du Plessis W and Britz L "The filling station saga: environmental or economic concerns" 2007 (2) *TSAR* 263-276.

[48] Para 48.

[49] In this case the Transvaal Town-Planning and Townships Ordinance 15 of 1986.

[50] Para 31.

[51] For more on this see 5.2.2.

[52] Patel Z "Environmental values and the building of sustainable communities" in Pieterse E and Meintjies F (eds) *Voices of the transition: perspectives on the politics, poetics and practices of development* (Heinemann Publishers Johannesburg 2004) 282-292, 286.

As the above quote suggests, over the years, while the rhetoric of sustainable development is prominent, the loss of voice of the environment in practice for instance proves that there is no consensus on the shape it should take.[53] Integration with regard to planning and the environment provides potential for resolving this issue.[54]

### 6.3.2 Put integration back onto the law reform agenda

The problem of fragmented systems of spatial planning and the environment is one that has long been recognised.[55] Attempts at comprehensive integration have nevertheless been largely absent from the law reform agenda as successive laws, particularly environmental laws were enacted.[56] This fragmented development of laws at national level has spurred on some attempts at integration at provincial level, specifically in the Western Cape province through an integrated law. [57] The then Western Cape Department of Environmental Affairs and Development Planning in 2005 embarked on an Integrated Law Reform Project. Its intent was to integrate among others, spatial planning and environmental decision-making systems through a single permit.[58] A draft bill was produced but never published. This was because of among others, the vexing question of the constitutional division of powers and functions with regard to spatial planning and the environment, which became one of its biggest stumbling blocks.[59]

Sustainable development and integration need to be reprioritised in the spatial planning and environmental law reform agenda, with national, provincial and local government working together (unlike provinces going at it alone). With time, and concerted effort it can be resolved.

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[53] See 2.8.1.

[54] There are other ways suggested for furthering sustainable development. One according to the current *National development plan: vision 2030* is requiring all new developments to be consistent with a set of sustainability criteria, to be developed urgently and collaboratively across government. The ramifications on intergovernmental ways of working from such a recommendation are instructive. See (n 14) 255.

[55] See 2.8.

[56] See 2.8.4.

[57] There are reports that the North West had a similar bill that was also not published.

[58] The law reform project was much wide ranging and ambitious than this. See Western Cape Provincial Department of Environmental Affairs and Development Planning *Discussion document law reform project integrated planning, environmental & heritage resources legislation* (Cape Town 2004).

[59] Yeld J "Bid to simplify law encounters snag; constitutional problems have to be solved" 4 July 2007 *Cape Argus.*

## 6.4 SPECIFIC RECOMMENDATIONS

### 6.4.1 Introduction

The ambitions of this dissertation are limited to making recommendations for integration between the spatial planning and environmental systems. It must however be emphasised that there is much wider scope for integration.[60] Many of the examples studied such as New Zealand, had this extensive integration in mind. In the long run, such comprehensive processes of integration are a worthy goal towards achieving sustainable development.[61] The *National development plan: vision for 2030* hints at this. It provides a 2016 timeline for resolution of the current fragmentation which divides broad ranging sectors such as land use management, environmental management, transportation planning and heritage.[62]

The recommendations cover a mix of various types of integration; external integration (greater use of SEAs); cross agency and cross media integration (better use of proactive plans to guide development, holistic decision-making through assignment of powers, intergovernmental cooperation in decision-making and integration of decision-making for large and important infrastructure projects). There are others that do not fall into these categories, for example a recommendation for creating greater proactive spatial planning capacity. There are no specific recommendations made on the use of instrumental integration.[63]

### 6.4.2 Integrating proactive planning

Proactive planning presents a relatively simpler area to integrate, especially in the short term. One primary reason for this is that all spheres of government, at national, provincial or municipal level do some kind of proactive planning within the spatial

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[60] Kotze LJ "Improving unsustainable environmental governance in South Africa: the case for holistic governance" 2006 (1) *Potchefstroom Electronic Law Journal* 1-44.

[61] Ultimately, most countries work towards greater integration. Thus for example in Britain, where integration of decision-making is still only partial, the Barker Review required that the government formally commit to the gradual unification of the various consent regimes related to planning over time. Barker Review (n 3) 165.

[62] *National development plan: Vision for 2030* (n 14) 253.

[63] While this work has not delved into the possibility of using these, this does not discount there potential in the South Africa context.

planning as well as environmental systems. It also does not have the rigid legal rules emerging from the exercise of executive power, similar to decision-making.[64]

Integration in proactive planning first requires that there are sufficiently good quality plans to deal with. Secondly, it involves external integration that is, infusing and mainstreaming environmental issues into proactive spatial plans. Finally, good quality proactive plans are necessary for better decision-making.

*(i) Get the basics right: improve the quality of proactive plans*

Proactive planning influences decision-making (spatial planning and EIA) and therefore, how integration is implemented in day to day decision-making.[65] Their quality is thus of paramount importance. For example, in New Zealand, implementation of the RMA has been partly hampered by the poor quality of some proactive plans.[66] In South Africa, problems in planning quality have been identified with regard to integrated development plans (IDP) and their related spatial development frameworks (SDF). Environmental plans such as EIPs and EMPs, biodiversity plans, air quality plans and coastal management plans suffer from similar problems. Of particular concern with regard to proactive environmental planning has been the lack of human resource capacity to deal with this complex largely scientific area of work.[67]

One of the solutions to capacity problems for proactive spatial planning at municipal level has been intergovernmental support. National government has a history of support to municipal spatial planning, and this will need to continue in the short term.[68] The Local Government: Municipal Systems Act (Systems Act)[69] also requires province to assist municipalities in the creation of IDPs and SDFs.[70] This has happened in various provinces. For example the former KwaZulu-Natal Department of Traditional Affairs and Local Government provided comprehensive assistance including guideline manuals and training for municipalities across the province.[71] There has also been assistance from the environmental department at national level,

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[64] See 3.2.

[65] For more on the relationship of proactive plans and decision-making see 4.2.4.

[66] See 5.3.3.

[67] For more details on the quality of proactive planning see 4.2.

[68] Goss H and Coetzee M "Capacity building for integrated development: considerations from practice in South Africa" 2007 (51) *Town and Regional Planning* 46-59.

[69] 32 of 2000.

[70] Section 31(b).

[71] Todes A *et al Relationship between environment and planning* (Report for the Kwazulu-Natal Planning and Development Commission 2005) 45.

creating guidelines for environmental plans including air quality planning[72] and bioregional plans.[73] There are likewise national guidelines for incorporating environmental sustainability into IDPs as well as provincial tool kits. Provincial environment departments with sufficient capacity, for example regional offices in the Western Cape, also assist municipalities with regard to proactive environmental planning.[74]

Harnessing shared capacities at municipal and provincial level to create better quality proactive spatial and environmental plans is another option.[75] This can be through formal structures such as those mooted in the Intergovernmental Relations Framework Act (IRFA)[76] - provincial intergovernmental forums.[77] Such forums can be created specifically for this purpose or additionally, can form the institutional platform around which other actions aimed at integrating spatial planning and the environment at provincial and municipal level can be based. Inter-municipality forums, also provided by the IRFA, can likewise be useful to share practices and capacity building within the municipalities themselves.[78] It is noteworthy that the draft Spatial Planning and Land Use Management Bill (SPLUMB)[79] also provides for the creation of joint municipal planning tribunals between two or more municipalities.[80]

Ultimately, capacity building is a problem beyond the pure realms of the law. The experience of the RMA showed for example that staff retraining was necessary to create a "paradigm shift" from traditional ways of thinking, such as those associated with "town and country planning" to resource management.[81] Concerted long-term action is required amongst all stakeholders; educators, the government, professional organisations and the private sector to create both the quality and quantity of professionals necessary.[82] This especially so given that capacity problems are not

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[72] Engelbrecht JC and Van der Walt IJ "A generic air quality management plan for municipalities" 2007 (16:1) *Clean Air Journal* 5-15.

[73] National Environmental Management Biodiversity Act 10 of 2004 "Guidelines regarding the determination of bioregions and the preparation of and publication of bioregional plans" Government Notice 291 in *Government Gazette* 32006 of 16 March 2009.

[74] See also Todes A *et al* (n 33) 86 and 90.

[75] The concept of shared services is not unique to South Africa. In Britain, in an effort to enhance the quality of services provided by local planning departments, it was recommended that shared services are introduced by local planning departments to enable economies of scale and scope. See Barker Review (n 3) 167.

[76] 13 of 2005.

[77] Section 21(1)(a). For more detail on these forums see 3.5.4.

[78] Section 29(a).

[79] "Spatial Planning and Land Use Management Bill" Proc. R 280 *Government Gazette* 34270 of 6 May 2011.

[80] Section 37(1).

[81] Borrie N *et al* (n 11) 43.

[82] In Britain for example, to deal with a similar problem, the Barker Review recommended among others the government work with planning professional organisations such as the Royal Town planning Institute and other

only confined to municipalities, but likewise to provinces and even national government.

*(ii) Encourage the use of SEAs for proactive spatial plans*

A common approach to integration is external integration that is infusing environmental issues into processes outside the environment, including spatial planning.[83] It allows for a simpler form of integration, achievable relatively quickly.[84] In South Africa, it forms the basis of integrated environmental management (IEM).[85] One writer notes that integration between planning and the environment would entail implementing prescriptions of IEM into the IDP creation process.[86] IEM encompasses all processes that "identify, predict and evaluate the actual and potential impact on the environment"[87] including SEAs.

Application of SEAs is particularly useful in South Africa as it is recognised that often, environmental aspects of strategic plans are poorly developed.[88] Currently, South Africa is considered a relatively advanced country in terms of legislating for SEA,[89] and there is a legal framework to ensure the implementation of SEAs on proactive spatial plans (specifically SDFs) at municipal level.[90] Nevertheless major challenges lie with the practice and implementation of SEAs. Monitoring and evaluating of the quality and outcomes of SEA, rarely done locally, has been identified in other countries as a critical element to the proper functioning of SEA.[91] This should be also made part and parcel of the practice in South Africa.[92] Further, the capacity to do

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bodies to ensure a continued focus on getting new entrants into the profession. It also recommended postgraduate bursaries funded by national government, tied to a number of years of public sector service. See Barker Review (n 3) 167.

[83] See 3.5.1 and 5.2.3.

[84] See for example Todes A Sim V and Sutherland C "The relationship between planning and environmental management in South Africa: the case of KwaZulu-Natal" 2009 (24:4) *Planning, Practice and Research* 411-433, 430.

[85] See 3.5.1.

[86] Retief FP and Sandham LA "Implementation of Integrated Environmental Management (IEM) as part of Integrated Development Planning (IDP)" 2001 (8) *SAJELP* 77-94, 80.

[87] Section 23(b) NEMA.

[88] Todes A *et al* (84) 425.

[89] Retief F *et al* (n 30) 504.

[90] See 3.4.3. There are suggestions that a much more comprehensive legal framework is needed to ensure greater reach of SEAs into other areas besides spatial planning. See for instance Retief F *et al* (n 30) 504.

[91] Jones C *et al* (n 12) 8-9.

[92] Such assessments on the utility of SEAs can be done for example, by province (as part of their involvement in IDP oversight under section 32(1) of the Systems Act) or by the municipalities themselves (as part of their

SEAs is also a challenge in South Africa.[93] The lessons from elsewhere point out that substantial financial and resource requirements are ordinarily associated with SEA implementation and smaller municipalities have significant challenges in implementing this.[94] Capacity problems again can utilise IRFA forums such as provincial intergovernmental forums and inter-municipality forums to assist less capacitated municipalities and share experiences.[95] Further, the prescribed requirement in the Systems Act for assistance to municipalities by province to create IDPs[96] can be extended to assistance in applying SEAs on SDFs.

There is no legal compulsion to perform SEA on zoning schemes, beyond a general requirement that they should comply with environmental legislation. Further, even new spatial planning legislation including the draft SPLUMB does not require it.[97] This has created problems, for example, the failure to pick up possible synergistic and cumulative impacts from the implementation of zoning schemes.[98] In general, countries with advanced SEA practices require it be applied to zoning schemes[99] entrenched in law, be it a general SEA law, or integrated within spatial planning laws. This is so particularly in Europe with the requirements of Directive 2001/42/EU.[100]

The question is thus whether SEAs should be required of zoning schemes in South Africa. In the near future, there will likely be a flurry of new zoning schemes as the old ordinances are repealed and new provincial legislation is enacted.[101] This is an opportunity currently being missed by new legislation such as the SPLUMB. It is thus recommended that this requirement is inserted into the bill, to ensure the practice into the future. Such a requirement should again be weighed against the relatively low capacity and extra resource burden it would place on municipal spatial planning departments. Similar recommendations with regard to the use of IRFA forums of

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performance management) in terms of chapter 3 of the Local Government Municipal Systems Act "Municipal Planning and Performance Management Regulations" GN R796 in *Government Gazette* 22605 of 24 August 2001.

[93] Retief F *et al* (n 30) 509.

[94] For more information see 3.4.3.

[95] (n 77 and 78).

[96] (n 70).

[97] Section 22(2)(b).

[98] See 4.2.2.

[99] Jiricka A and Probstil U "SEA in local land use planning – first experience in the Alpine States" 2008 (28) *Environmental Impact Assessment Review* 328-337, 330. See also 5.5.

[100] Council Directive of 27 June 2001 on *the assessment of the effects of certain plans and programmes on the environment* Directive 2001/42/EC.

[101] This is already happening in KwaZulu-Natal and the Northern Cape See chapter 3, (ii) Zoning schemes.

intergovernmental governance,[102] as well as longer term multi-stakeholder engagement on issues of capacity apply here.[103]

*(iii) Better use of proactive plans to guide development*

Proactive planning for both spatial and environmental systems is carried out at national, provincial and local government level.[104] Proactive planning is intended to guide decision-making and thus has a critical role to play in integration across the spatial planning and environmental divide.[105] To do this, municipalities should make full use of environmental plans from provincial and other authorities in their spatial planning decisions, and provincial environmental departments likewise do the same with regard to proactive spatial plans, such as SDFs in assessing EIAs.

In this respect, NEMA provides for adoption by an environmental authority for use in EIAs, spatial development tools describing geographical areas based on environmental attributes.[106] These tools can conceivably include SDFs and even zoning schemes.[107] This means that provincial environmental authorities can ultimately adapt and use SDFs for decision-making in EIAs. IRFA provincial intergovernmental forums specifically created for integrating matters of spatial planning and the environment can serve as the platform for getting the provincial authorities more involved in contributing to the content of SDFs that they may be willing to use them for their own decision-making. This involvement should not however infringe on the municipalities' powers to do municipal planning.[108] There is no equivalent provision for the use of proactive environmental plans to make decisions at municipal level. It is recommended that the SPLUMB provides such a provision.

### 6.4.2 Integrating decision-making

The pursuit of integrated decision-making is common internationally. It is however potentially much more complex in South Africa given the constitutional allocation of

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[102] In this respect, SPLUMB provides for provincial support for the creation of land use schemes, and this can include support for performing SEAs on them. See section 10(2)(a).

[103] (n 82).

[104] See 3.3.1 and 3.4.1.

[105] See 4.2.4.

[106] Section 24(2)(c).

[107] See 3.5.3.

[108] The legislative rules prescribing provincial municipal relationships have been canvassed in detail under 3.2.

competencies to different spheres of government. There are a number of legal options nevertheless.

*(i) Holistic decision-making in South Africa through assignment of powers and functions*

Legislation that encompasses spatial planning and environmental systems and provides for a single decision-making process cutting across both is ideal. In New Zealand a single system of permission - the resource consent - is used to authorise development driven by the effects-based approach, effectively cutting across different government agencies. It has its critics, but there is a general feeling that this form of extensive integration is ideal.[109] The British decision-making system is also integrated, but not through a singular resource management type of law. Instead, the EIA system has been sub-assumed under spatial planning decision-making through the Town and Country Planning Act of 1990 (TCPA).

South Africa presents a challenge with regard to integrating decision-making because of the constitutional distribution of powers and functions between the three spheres of government. Executive powers over the environment can be exercised by both national and provincial government. Spatial planning executive powers on the other hand are largely exercised by municipalities, with a more limited role for national and provincial government.[110] Contrast this with the examples seen in other parts of the world where not only spatial planning but environmental decision-making has been devolved to the local level. In New Zealand the integrated resource consent is issued by territorial authorities (equivalent of municipalities) and in Britain a routine spatial planning permission[111] (which includes an EIA) is primarily exercised at municipal level. South Africa is thus restricted in any ambitions of having a law that deals with all environmental resources in a single application and decision-making process.

There are a number of legal options around this problem. Municipalities can have both national[112] and provincial[113] executive powers assigned to them. The Constitution has crafted a number of principles for such assignment. Section 156(4) provides that national and provincial governments must assign a matter[114] to a

[109] Anker T (n 6) 199-209.

[110] For a detailed exploration of these, see 3.2.

[111] Outside permissions for large infrastructure projects through the Development Consent Order (DCO). Penfold (n 4).

[112] Section 44(1)(a)(iii). See also section 99.

[113] Section 126.

[114] These are matters listed in Part A of schedule 4 or part A of schedule 5.

municipality by agreement and subject to any conditions when its necessary for the administration of such if the matter necessarily relates to local government; if it will most effectively be administered locally; and if the municipality has the capacity to administer it. The Systems Act further provides that when seeking to initiate the assignment of a function or power through legislation by national or provincial departments, a number of things need to be done.[115] First, the Financial and Fiscal Commission must assess the financial and fiscal implications of such legislation.[116] Secondly, consultation must be done with organised local government, the minister in charge of local government[117] and the Minister of Finance.[118]

These provisions provide useful mechanisms to potentially ensure alignment of both decision-making powers into a single level of government (that is at municipal level), through assignment of EIAs from province.[119] Further, and importantly, it ensures that such an assignment is done considering the capacities of the municipality. As the example of New Zealand has shown, many smaller and rural municipalities battled in administering the RMA due to their lack of capacity.[120] Such assessment of capacity is critical as often in South Africa, despite the law, local government has had powers and functions assigned to it without the commensurate revenue resources, especially when new legislation is enacted.[121] In this regard it is noted that,[122]

> The number of environmental functions at the door of local government keeps on growing every time Parliament proclaims a new environmental statute. This may have serious impacts in terms of government structures, planning processes and local government capacity.

Indeed environmental roles for local government are but one in what is seen as a "barrage of legislation and regulations" emanating largely from national government.

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[115] Section 9 (1) and (2).

[116] This assessment is based on issues such as the future division of revenues of the spheres of government in terms of section 216 of the Constitution; the fiscal power and efficiency of the municipality; and the transfer, if any of employees, assets and liabilities.

[117] If the assignment is by province, consultation is with the equivalent MEC.

[118] If the assignment is by province consultation is with MEC for Finance.

[119] It must be stated that provinces, as a rule are unwilling to assign powers to municipalities, often seen as undermining their relevance. This is a political dimension related to turf contests.

[120] See 5.4.3.

[121] Concerns have been raised on the considerable financial implications the implementation of the local government obligations under laws such as the National Environmental Management: Air Quality Act 39 of 2004 has. See also National Treasury *Local government budgets and expenditure review 2006/07-2012/13* (National Treasury Pretoria 2011) 27.

[122] See Du Plessis A "Some comments on the sweet and bitter of the national environmental law framework for 'Local Environmental Governance'" 2009 (24:1) *South African Public Law* 56-96, 88.

These are geared at enabling local government fulfil its developmental mandate, but are instead impeding this very same goal.[123]

The case for greater involvement of local government in environmental law is reinforced by the principle of subsidiarity.[124] The principle requires that governance take place as close as possible to the citizens. A more central authority (such as national or provincial government) should perform only those tasks which cannot be performed effectively at a more immediate or local level.[125] Arguments for the assignment of the broader environmental function based on this principle have been made.[126] It is also increasingly becoming evident that a greater role for larger, more urbanised and capacitated municipalities is envisaged in government policy.[127] The national Treasury for example currently envisages large urban municipalities as being at the heart of managing "built environment functions".[128] Spatial planning is included as such a function.[129] Similarly, the *National development plan vision for 2030* provides that if cities are to deal with the fragmented spatial legacy of cities, they need to deal with matters such as spatial planning, housing and transport holistically.[130] Arguably, in both these policy shifts, the environment and its related systems are so interlinked with the spatial planning system that it should be included.

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[123] Steytler N "The strangulation of local government" 2008 (3) *TSAR* 518-535, 518.

[124] De Visser J "Institutional subsidiarity in the South Africa Constitution" 2010 (21:1) *Stellenbosch Law Review* 90-115; Vischer RK "Subsidiarity as a principle of governance: beyond devolution" 2002 (35) *Indiana Law Review* 103-142.

[125] De Visser J (n 124) 114 and Vischer RK (n 124) 106. De Visser argues that section 156(4) is not a manifestation of the principle in the classical case as it does not compel that powers should devolve to local level unless they are better performed at national level. Instead, the section provides that such powers are allocated as a "preference and not automatic bias for local government".

[126] Du Plessis (n 122) 83.

[127] These "larger urbanised more capacitated municipalities" can be determined by the process set out in section 9(1) and (2) of the Systems Act among others. See (n 115).

[128] National Treasury (n 121) 213 and 218. There is no clear definition of what a built environment function is. Generally however functions constitutionally prescribed under Parts B of schedule 4 and 5 are core to this. These are such as provision of basic services such as water and sanitation services, electricity reticulation, refuse removal and others such as cemeteries, fire fighting, municipal roads, building regulations and municipal planning. More and more, housing and public transport are increasingly featuring.

[129] There is no clear definition of what a built environment function is. Generally however aside from core functions constitutionally prescribed under Parts B of schedule 4 and 5, associated with local government (such as provision of basic services such as water and sanitation services, electricity reticulation, refuse removal and others such as cemeteries, fire fighting, municipal roads, building regulations and municipal planning), housing, and public transport are increasingly featuring.

[130] *National development plan vision for 2030* (n 14) 391.

The Treasury envisages creating greater capacity to handle these additional tasks through greater national government financial transfers.[131] The importance of accompanying finances to obtain acceptance for any extra role is key. Accordingly it is noted that,[132]

> Where a function entails expenditure, there are often keen attempts by governments to define their functions narrowly in order to escape the financial responsibility that a more generous definition would bring about … On the other hand, where the assertion of power with regard to a functional area may raise revenue, then, of course, there may be a healthy scramble to claim sole entitlement to that source.

The ongoing process of assignment of the public transport and housing functions to municipalities should thus also encompass assignment of the environmental decision-making function.[133] This should be selective, preceded by a differentiated approach that assesses the capacity of the municipality and ability of the municipalities to deal with the additional tasks, as provided for by the Systems Act.[134]

The assignment of powers and functions from national and provincial government, to local government is also dependent on political will. This is not necessarily always forthcoming, even if the requisite resources can be provided.[135] Given inevitable turf wars and opposition by provincial government,[136] it will not necessarily be an easy task. Nevertheless the ongoing process of selective assignment of housing and public transport roles to municipalities suggests this is feasible.

*(ii) Intergovernmental cooperation to enable integrated decision-making*

Through NEMA provisions, integrating decision-making between spatial planning and environmental systems can be practiced in a number of ways.[137] Firstly, allowing a competent environmental authority to consider an authorisation that is not a NEMA regulated one, including a spatial planning one, as sufficient for an EIA. Secondly, providing for the consultation and coordination of common requirements emerging

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[131] The Intergovernmental Fiscal Relations Act 97 of 1997 sets out the process for the division of nationally raised revenues between the three spheres of government.

[132] Steytler N and Fesha TY "Defining local government powers and functions" 2007 (124:2) *South African Law Journal* 320-338, 322.

[133] Both public transport and housing are a concurrent competence of both national and provincial government according to Schedule 4 Part A of the Constitution.

[134] (n 115).

[135] Steytler N and Fesha TY (n 132) 323.

[136] See NPC *National development plan: Vision for 2030* (n 14) 392. The NPC opines that this is caused by among others the insecurity of provincial government brought about by the constant debate about its role and relevance.

[137] For detail on the specific legislative provisions see 3.5.2.

from the two decision-making processes, and allowing the requirements of spatial planning to fulfil the requirements of an EIA. This provision is also contained in the Environmental Impact Assessment Regulations of 2010.[138] Thirdly, joint decision-making by issuing integrated environmental authorisations. Here, a planning authority and the competent environmental authority under NEMA may exercise their respective powers jointly by issuing an integrated environmental authorisation.[139]

To operationalise these provisions, close liaison is necessary between the two authorities. Again, such close interaction can be initiated through an IRFA provincial intergovernmental forum specifically dealing with the issue of integrating spatial planning and environmental functions.[140] For the first option, there will also need to be sufficient trust by environmental authorities of planning decisions made at municipal level before they can accept them in place of EIAs, particularly that they sufficiently consider environmental concerns. A process that has sufficiently assessed the municipality's abilities and provides enough confidence on the quality of the decision may be necessary to ensure this. The second option, the coordination of common requirements, can be pursued in the short term while building up to greater integration. It can include for example coordinating public participation, assessments and reviews, single points of contact for the applicants and integrated data systems allowing various departments to consolidate data concerning the permissions into a single system.[141] The third form, the issuance of a single permit commonly referred to as a "one stop shop", would require close liaison between the authorities in a complex integrated institutional arrangement. This has been attempted through legislation without much success. The unpublished bill for the failed integrated system in the Western Cape provided for a "Co-operative Governance Committee" to issue a single permit. It proposed that members from both province and the municipality sit on the committee and take decisions depending on what the matter relates to. It further proposed a single merged institutional structure through which all applications were to be channelled to.[142] Without functioning intergovernmental relations especially among municipal and provincial authorities or the assignment of environmental powers to municipal authorities, this experience from the Western Cape shows a one stop shop is a difficult prospect. It essentially seeks to merge two decision-making bureaucracies at different spheres of government with different political heads, operational cultures and ways of thinking. It is thus recommended that this is pursued only if well-

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[138] Section 6(1) of the National Environmental Management Act Environmental Impact Assessment Regulations *Environmental Impact Assessment Regulations* of 2010 GN R543 in *Government Gazette* 33306 of 18 June 2010.

[139] Section 24L(1).

[140] (n 77).

[141] See for example Erling (n 1) 29-30.

[142] Personal communication with Cormack Cullinan of Winstanley and Cullinan drafters of the Integrated Law Reform Project bill for the Western Cape, on 22 February 2007.

functioning intergovernmental relationships have been built. The first two options should in any event precede a one stop shop, to ensure cumulative practice of integration is achieved. Assignment, after meeting all the legal criteria is also suggested as a precursor to a one stop shop scenario.

*(iii) Seek ad hoc opportunities for integrated decision-making based on certain industry and projects types*

Attempts at integration should seek innovation and two examples feature in experiences around the world, based on the industry as well as the type of project. In the United States of America, government has partnered closely with private industry through multi-stakeholder panels that identify opportunities for innovation on various environmental issues regarding their industry. Such innovations include for example negotiating specialised decision-making channels which are better integrated.[143] It may not be practical to do this with every single industry and it also presumes a high level of intergovernmental cooperation across decision-making authorities as well as close partnerships with the private sector. Nevertheless, in South Africa there are compelling reasons for doing this in critical areas of development such as low and affordable income housing[144] or the development of critical national infrastructure.

Similarly, an important lesson has emerged, pointing to the potential for integrated decision-making for large, nationally strategic development projects. The British Infrastructure Planning Commission and its associated integrated permission at national level, the DCO[145] is a case in point.[146] In South Africa, there is considerable evidence that infrastructure development especially that relates to large economic infrastructure is urgently needed. The country's investment spending fell from an average of 30 per cent of gross domestic product in the early 1980s to about 16 per cent in the early 2000s. This means that the country has "missed a generation of capital investment in roads, rail, ports, electricity, water sanitation, public transportation and housing."[147] There is compelling rationale to streamline decision-making around building such infrastructure, especially given the ambitious targets

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[143] For example, the printing industry where a Printers Simplified Total Environmental Partnership was created and an alternative regulatory model consolidating and simplifying the permitting process for it created. Erling (n 1) 19.

[144] The impact of lack of integrated decision-making on housing for the poor has been examined in Berrisford S *et al In search of land and housing in new South Africa: the case of Ethembalethu* (World Bank Washington DC 2008) INTERNET http://siteresources.worldbank.org/INTSOUTHAFRICA/Resources/Ethembalethu_Final.pdf [Date of use 13 July 2011]. See also 4.3.2.

[145] (n 111).

[146] For details on how this functions see 5.3.2.

[147] *National development plan: vision for 2030* (n 14) 13.

necessary to close these gaps in the near future.[148] So far, and in line with these ambitions, a Presidential Infrastructure Coordinating Commission has been established, although the specific details of its mandate are not clear.[149] It is instructive that the commission has a management committee with membership from national, provincial and municipal government, which can provide a useful platform to integrate decision-making.[150] This can build on the already existing cooperation with regard to large infrastructure projects in terms of permission and consents at national level.[151] This membership from a cross section of government is critical, given that, unlike Britain, national government does not wield enormous powers over planning or environmental decisions.

## 6.5 CONCLUSIONS

This entire work has sought to prove that the spatial and environmental systems in South Africa are fragmented, and that they need to be integrated. This was done across six chapters.

The first chapter is largely a brief statement of the problem and methodology followed in the entire work. Chapter two traces the history of spatial planning and the environment in order to answer the question why there is such a fragmented system. It notes the earliest origins of spatial planning and environmental law are in essence the same, that is the urbanising and industrialising cities at the turn of the twentieth century. From these common origins two distinct areas of law evolved. Planning preceded environmental law by curving out a niche based on unique tools and a

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[148] The *National development plan: vision for 2030* elaborates on some of these targets. By 2030, it calls for new build of 40,000MW of additional electricity capacity and that the proportion of people with access to electricity should increase from the current 70 percent to 95 per cent. It also calls for an increase of the Durban Port capacity from 3 to 20 million containers and so on. See (n 14) 32.

[149] While the existence of the commission is only based on press reports and there is little official documentation, the State of the Nation address 2012 gave some detail on what it intends to do. It has for example identified a number of projects for implementation in five major geographically-focussed programmes, as well as projects focusing on health and basic education infrastructure, information and communication technologies and regional integration. See for example Creamer T "Can Zuma's commission close SA's infrastructure delivery gap?" 23 September 2011 *Engineering News* INTERNET http://www.polity.org.za/article/can-zumas-commission-close-sas-infrastructure-delivery-gap-2011-09-23-1 [Date of use 8 February 2012] and Presidency *State of the Nation address 2012* INTERNET http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=24980&tid=55960 [Date of use 11 February 2012].

[150] (n 149).

[151] Large infrastructure projects tend to have the EIA handled by national government. This provides facility for greater cooperation with other permission granting authorities also at national level. Indeed Memorandums of Understanding that allowed for integrated decision-making were the motivation behind the newly introduced integrative provisions under NEMA. See 3.5.2.

language that addressed concerns such as housing and amenity for urban inhabitants. It is only five decades later that environmental law emerged based on the need to protect aspects of the environment such as air and water. This trajectory replayed across the world including South Africa. In understanding these common origins, making the case for integration is not difficult. What is needed is an underlying precept that has been shaped by modern realities, with which to integrate these two areas of law.

The third chapter shows the effects of this legacy in South African law. The current spatial planning and environmental legal systems clearly illustrate this fragmentation. The chapter shows that this separation is entrenched in the Constitution, through its division of powers and functions, and numerous other laws that operate within the exclusive realms of spatial planning or the environment. The chapter concluded by showing that despite this entrenched legal separation, there are a number of legal provisions that provide opportunity for workable forms of integration.

Chapter four assesses how this legislative reality of separation plays itself out in the practice of development in South Africa. Legislative separation has created poorly integrated systems at the proactive planning and decision-making levels. This makes development more costly in terms of time, financial and other resources. It also creates a system that is vulnerable to abuse during public participation processes, confuses stakeholders involved and creates unnecessary complexity. The operation of two parallel decision-making systems also makes the decisions of one body vulnerable to challenge using the decisions of another, particularly when they differ significantly. This status quo, according to the chapter needs to be changed.

Chapter five explores practice around the world, deriving lessons on how the problem can be dealt with in South Africa. These primarily centered around two countries. In New Zealand through the RMA, a major integrative effort of all proactive planning and decision-making systems into a single statute and encompassing the majority of environmental elements was undertaken. Secondly Britain has a more modest form of integrating decision-making through the TCPA. In the chapter, the importance of SEA in integration also led to a brief examination of SEA practice in a number of diverse countries across the world. Apart from highlighting the importance of context when learning from all these examples, it emphasised that integration is a long term process requiring a substantial amount of time to ensure the systems put into place achieve their goals. It also pointed to the centrality of the concept of sustainable development in driving integration in all these countries.

This final chapter does two things. It sounds a note of caution with regard to the practice of integration. The integration process is complex, and the outcomes (such as an integrated law) can be even more so. It should therefore always be judged

against practical realities such as the availability of resources as well as political buy-in. Further, the integrative principle is in itself contested and is not always considered an ideal to be pursued. It was also emphasised in the chapter that at the heart of integration is getting intergovernmental relations right. The creation of a provincial intergovernmental forum under IRFA tasked specifically with integrating spatial planning and environmental functions emerged as critical. Perhaps unsurprisingly, as the examples examined across the world show it is at the level above the local level, (that is at regional or provincial) where integration is best achieved.[152] The RMA for example was a marked shift towards a regional way of thinking.[153] In Britain, regional thinking spurred on efforts towards higher-level integration of localised policy and action, as well as a meditative role between central government demands and local government concerns.[154] But as this chapter has shown, it goes beyond municipal and provincial intergovernmental dialogue, to the functioning of the entire intergovernmental system, between all levels including the national sphere, as well horizontally across sectors. Getting this entire system right means it will be easier to spur on change to the different and separate departmental structures. It also means that when future laws are contemplated, integration across these divides will be a reasonable expectation, and consensus on the content of such a law will not be a far-fetched ambition.

Another key issue raised in the practice of intergovernmental cooperation is that the law is a limited tool in ensuring good intergovernmental relations.[155] People in the different departments and levels of government need to be willing to positively use the legislated forums to foster these good relations. Other writers emphasise the need for well-functioning institutions as well as political good will.[156] Indeed, political will is one of three other key ingredients highlighted as necessary to ensure successful integration. The others are the need to retain the priorities of all the previous systems in the merged system, and finally, the need for large amounts of specialised supportive data to use in the integrated practices, something which our current systems are particularly deficient of.

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[152] Todes A *et al* (n 33) 42-43.

[153] Nischalke T and Schollman A "Regional development and regional innovation policy in New Zealand: issues and tensions in a small remote country" 2005 (13:4) *European Planning Studies* 559-579.

[154] In this respect, regions in Britain mediated between national government delivery figures for housing at versus competing concerns local government had over the environment. See for example Murdoch J and Abram S *Rationalities of planning: development versus environment in planning for housing* (Ashgate Hampshire 2002). It is noteworthy that the regional role for planning authorities in Britain has nevertheless been increasingly challenged by the new conservative government, considering it "undemocratic and bureaucratic". See Bowes A "Revocation of regional strategies: a state frontier rolled back too soon? Cala Homes (South) Ltd v Secretary of State for Communities and Local Government" 2011 (2) *Journal of Planning and Environmental Law* 137-141, 138.

[155] *National development plan: vision for 2030* (n 14).

[156] Steytler N (n 123) 532.

The general recommendations emphasise that sustainable development and its related principle of integration should be at the core of formulating and implementing law. This provides the necessary modern principle to merge these two disparate but historically very similar areas of law. At a more specific level, the recommendations are that integration be achieved using the proactive planning system. This first by improving the quality of proactive spatial and environmental planning. Secondly, plans should be developed through much closer collaboration, and further, better utilised in decision-making across the spatial planning and environmental divide. To ensure this, and like a similar proviso in NEMA, it is also recommended that the SPLUMB has a requirement for the use of proactive environmental plans to make decisions at municipal level. A further recommendation was that proactive spatial plans undergo better quality, consistent and more rigorous SEAs that are monitored and evaluated. In this respect, it is also recommended that the current legal exclusion of zoning schemes from SEAs is remedied, preferably through the current draft SPLUMB.

Central to recommendations on integrating decision-making is assignment of greater powers for environmental decision-making to the local level. A prominent caveat is drawn however; there is need to ensure that the provisions of the Constitution and the Systems Act are followed to ensure the assignment is appropriate for the particular municipality. Besides assignment of powers, there are provisions for intergovernmental cooperation specifically under NEMA that require integrated decision-making. It is recommended these are operationalised at provincial level, again using an IRFA provincial forum specifically tasked with integrating spatial planning and environmental functions. Finally, a case is made for innovative thinking around integration, for example setting up specialised channels to fast track decision-making around certain developmental activities, including low and affordable income housing. South Africa is also faced with key economic infrastructure backlogs. The urgency to reduce these has spurred on the creation of a multi-stakeholder commission at the Presidency, which can equally serve as a platform for integrated decision-making.

Successful integration takes place over a long period of time. All-encompassing and comprehensive integration to include all environmental elements, and include areas such as heritage and transportation for example, may require much more comprehensive legal reform than is recommended in this work. This will necessarily entail longer timelines. This work is however limited to recommending integration between the spatial planning and the environment systems. Further, the methods of integration recommended have been especially cognisant of simplicity and using tools already provided within the legal regime. This all means that time lines are much shorter. Thus recommendations with regard to proactive planning can be achieved in the shortest time, between one and three years with sufficient

commitment. Only issues such as capacity building where the solution lies with producing more people with the necessary skills require a longer time horizon. IRFA forums to assist in the creation of better quality plans as well as the implementation of SEAs can also be operationalised at relatively short notice. Recommendations with regard to decision-making are equally based on the ease of implementation within a short time. The assignment of executive decision-making powers under the environment to municipal government, while much more intricate than establishing intergovernmental forums can still be done relatively quickly. This is especially true given assessments for the purpose of assigning housing and transport functions is already ongoing. Implementing the NEMA provisions on intergovernmental cooperation can also be done within a one to three year time frame. *Ad hoc* processes on merging decision-making are also by their very nature intended to be stop gap measures, as greater more formal integration is achieved.

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