A REVIEW OF PROVINCIAL LAND-USE PLANNING IN THE WESTERN CAPE

(A research paper submitted in partial fulfillment of the requirements of the LLM degree in the Faculty of Law, University of the Western Cape)

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TOPIC:

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3. **Environmental Legislation**
4. **Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985)**
5. **Planning & Environmental Case Law**
6. **Environmental Conservation Act, 1989 (Act No. 73 of 1989)**
7. **National Environmental Management Act, 1998 (Act No. 107 of 1998)**
8. **Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)**
9. **Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)**
10. **Politics, Policy and Planning**

ABSTRACT

A Review of Provincial Land-Use Planning in the Western Cape.
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ABSTRACT:

Planning administration in the Western Cape is at a critical juncture. It is faced with having to address planning issues and housing needs whilst at the same time demonstrating through its practices the promotion of environmentally sustainable development. This paper will discuss planning and environmental legislation and the impact that the application of the legislation has on development proposals. Current legislation addresses issues of spacial development in developed areas and new development proposals but lacks the ability to address issues within informal settlements. Although socio-economic factors are not currently considered when assessing the viability of applications, the courts seem to consider these factors. Since new housing settlements are often developed for the poor and industrial developments in close proximity to these areas have direct impact on these individuals, planning could only gain if these factors are taken into consideration.

If planning administration in the Western Cape is to continue successfully and without endless litigation against the Department of Environmental Affairs and Development Planning administrators will have to find a balance between promoting development and protecting the environment. To promote environmentally sustainable developments will require closer cooperation between the land use planning and environmental management components. The loopholes, which permit incremental development in the present legislation, have to be identified and addressed. Guidelines, which will standardize the conditions under which applications can be approved or refused, will have to be drafted to ensure decision-making that is consistent and defensible. If having a liquor store within an affluent environment is not considered desirable such applications should not be considered within lower income areas. The same should apply when dealing with

applications to establish factories or industry which will have an impact on the living conditions of communities in close proximity. The MEC will have to ensure that all decision taken are within the legal framework and that such decisions benefit entire communities and protect the rights of the poorest communities as well as that of the wealthy and influential.

Environmental legislation and the growing importance of environmental protection is also having an impact on the way in which new settlements are planned and on the rights of property owners. Although, we are responsible for the preservation of the environment for the next generation, socio-economic conditions, HIV and a myriad of other considerations may have to take precedence over environmental concerns.

DECLARATION

I declare that '*A Review of Provincial Land-Use Planning in the Western Cape'* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Farah Abrahams ___________2005

Signature: ______________________

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Chapter 1

1.1 Introduction

Development Planning is a process to facilitate economic growth, create employment and determine the spatial development within a given area. It is concerned with the allocation of resources – natural resources (land, water, mineral wealth, etc), human resources, capital resources (roads, buildings and equipment) and finances.[1] A legislative framework needs to be in place to ensure control of land-use for cadastral reasons (ensuring land use units are of a proper size and location to achieve proper usage); to promote health, welfare and amenities for people living in a specific area by means of town planning schemes; to prevent nuisance; to promote the proper and efficient exploitation of land (agricultural, industrial, residential resources) and in order to protect and conserve the natural environment.[2] For a number of decades, urban planning and housing policy has been dominated by the view that residential and business land-uses required spatial separation, residential areas being seen to need protection from commercial and manufacturing activities and from heavier traffic movement.[3] Present day thinking in the field does make allowances for mixed uses, but to a limited extent only.

The actual planning process requires that much thought is put into the quality of the areas that are being establishes/planned, how things are to be arranged within these areas as well as pre-emptive strategies to accommodate future expansion. In order to execute these plans one needs to develop strategies, policies and a legal framework to provide guidance to decision makers and the public alike and to regulate and ensure order in the sphere of land-use/spatial planning and development.

South African bureaucracy, before 1994, had the function of furthering the previous government's racial segregation policy. This policy permeated all sectors and resulted in a country where development - spatially, socially and economically- took on a racist character. The apartheid city had four components: a spatial system that allocated population in urban space according to their

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[1] Conyers D & Hills P, An introduction to Development in the Third World, 1996:4
[2] Kidd M, Environmental Law: A South African Guide, 1997:154
[3] Dewar. D, *Urban Planning, Sheleter Strategies and Economic Development in* Urban Development Planning – Lessons for the Economic Reconstruction of South Africa's Cities, 1994: 237

colour; an urban management system predicated on the notion that towns and cities could be compartmentalized into separate units presided over by separate local governments, with their own fiscal, legal and representative systems; a system of urban service provision that provided land, infra-structural services, transport and community facilities in a way that severely disadvantages the urban poor; and a housing delivery system that subsidized the white ruling class and relegated the black majority to homelessness or rental status with no security of tenure.[4] Since the priority had been to promote the interest of one group above that of another, present day development planners now have the additional responsibility of trying to somehow employ corrective measures. South Africa has enjoyed ten years of democracy, and although all legislation promoting racial segregation has been removed in terms of the law, not much has changed in terms of planning legislation or spatial allocation of land.

Planning law has been described as "that area of the law which provides for the creation, implementation and management of a sustainable planning process to regulate land-use, with the purpose of ensuring the health, safety and welfare of society as a whole and taking into account environmental factors."[5] The applicable planning legislation has not changed after 1994, but a law reform process is currently underway to ensure that new legislation may be drafted that will eradicate duplication and is to be less cumbersome to users. As the supreme law of the country the Constitution of the Republic of South Africa (Act 108 of 1996) assigns the functions and obligations of the various spheres of government and stipulates that all laws, policies and procedures have to be consistent with it. Any future legislation will thus have to meet the requirements as set out in the Constitution.

The Department of environmental Affairs and Development Planning is responsible for, inter alia, administering the planning and environmental legislation in the Western Cape as well as applications submitted in terms of the relevant legislation, which will now be discussed. It should be noted that although the environmental and development planning components have been merged and one of the strategic objectives for the department is to integrate the functions through restructuring and the establishment of managements systems, the environmental and planning

[4] Tomlinson. R, Urban Development Planning – Lessons for the Economic Reconstruction of South Africa's Cities, 1994: 5
[5] Van Wyk, J, Planning Law – Principles and Procedures of Land Use Management, 1999:5

functions still operate as separate entities and will therefore be dealt with individually. For the purpose of this paper the right to environment,[6] access to information,[7] and just administrative action[8] are of importance and will be discussed below.

As mentioned earlier every piece of land is assigned a specific use, be it residential, business or undetermined use. The purpose of assigning these use rights is to make it easier for planning officials at both provincial and municipal level to consider planning applications and manage the way land is utilized in a specific area and for land owners or prospective buyers to decide whether that land will suit the purpose they wish to utilize it for. Land-use does however have to be managed to ensure that new structures are in keeping with the surrounding area and that activities for which the land was not intended are not engaged in. This is done through the use of structure plans, zoning schemes, town planning schemes, title deed restrictions and restrictive covenants.

The Western Cape is known for the beauty and extent of its natural resources. In the past, little consideration was however given to the environment and the impact activities could have on the environment when considering proposals for new housing developments, golf estates, shopping malls and the like. The Constitutions states that:

> "[e]veryone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable and use of the natural resources while promoting justifiable economic and social development".[9]

All rights are however subject to a limitations clause which in the current climate of high unemployment and the shrinking amount of land available for new housing developments makes having consideration for the environment and the impact of certain developments or activities on the environment a luxury that many cannot afford. A healthy natural environment can provide the

[6] Section 24(b), Everyone has the right 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

[7] Section 32(1)(a)-(b) Everyone has the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights

[8] Section 33(1) and (2) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

[9] The Constitution of the Republic of South Africa, Act 108 of 1996, Section 24(a) and (b)

socio-economic and cultural needs of individuals if development within the area is sustainable. The pressing need for food, housing and services however tends to overshadow environmental concerns.[10]

Chapter 2

2.1 Land-Use Planning

In order to regulate land-use planning, control mechanisms and legislation have to be in place. These mechanisms are discussed below as they play an integral role in the land use planning process or have done so in the past. 'Current' legislation has for the most part been inherited from the 1970's and early 1980's and in some instances the legislation is unable to deal with current spatial issues like informal settlements, as legislators had operated under the premise that South Africa was a first world country and never envisioned such a situation arising.

(i) **Structure plans**

These plans lay out guidelines for the future spatial development of an area (including urban renewal, urban design or the preparation of development plans) so as to effectively promote the order of the area as well as the welfare of the community concerned. These plans do not confer or take away any right in respect of land.[11]

(ii) **Zoning schemes**

A zoning scheme regulates the way in which land is used. They confer use rights and are used to provide control over such use rights or over the utilization of land in an area. Zoning schemes are made up of scheme regulations, a register and in some instances a zoning map.[12]

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[10] Retief, FP and Sandham, LA, Implementation of Integrated Environmental Management as part of Integrated Development Planning, SAJELP, Volume 8(1), June 2001:77

[11] Section 5(3) of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985)

[12] Section 11 of LUPO

(iii) **Town planning schemes**

A town planning scheme consists of regulations, which are applicable to a certain area and binds all who live within the area. In terms of LUPO, the provisions of a town planning scheme take precedence over the by-laws of a local authority.[13] A town planning scheme creates a specific character for an area: erven may for example all be of a specific minimum size or the neighbourhood may have a Cape Dutch character and additions or renovations to property in the area would be required to be in keeping with that character.

(iv) **Restrictive covenants**

Restrictive covenants are a remnant of the past and are not commonly used any longer. It is an agreed-to limitation on the exercise of ownership between the buyer and seller. These restrictions are of a non-statutory nature as the limitations are usually in favour of the seller in order that he (his offspring) may control certain aspects of what the new owner can do with the property. An example of this would be the old practice of inserting clauses to prevent ownership or occupation of people of colour in areas. Special conditions of sale of the erven in the "Mossel River" Township on the Mossel River Estate in the Division of Caledon used to include as condition the following:

> (g)"*That no Coolie or Indian nor Asiatic nor Native nor any other coloured person may be located on the Lots herein mentioned unless he or she is in the bona fide employ of any lessee or owner of ground for domestic, menial or agricultural purposes, nor may the Lot or Lots mentioned herein be sold, transferred or leased either directly or indirectly to any Arab, Malay, Chinaman, Indian, Coolie, Kaffir or any other coloured person*".

Thankfully, this practice no longer occurs as township establishment is now regulated in terms of provincial ordinances and other relevant legislation.

[13] Van Wyk, J, op. cit. fn.6: 29

(v) **Title Restrictions**

These are statutory restrictions imposed on a landowner in pursuance of township establishment procedures and inserted into the title deeds of the land.[14] These conditions also help to maintain the specific character of a neighbourhood and will be discussed in greater detail under the removal of title deed restrictions legislation.

Whereas the structure plans, zoning schemes, town planning schemes and restrictive conditions determine the purpose and extent to which land can be used, legislation is in place to ensure compliance with these land-use management tools; to protect the rights of individual property owners and to amend or remove restrictions where applicable. The perceptions surrounding the legislation are often based on whether the decision taken by the Department was favourable.

Lower land prices on the city edge and housing policy that provides primarily serviced sites has meant that new settlement are far removed from the main industrial and commercial sites[15] resulting in increased transport cost to get to places of employment and putting pressure on already stretched transport infrastructure. As a result there has been an increase in the number of people residing in informal settlements. The migration of individuals in search of employment opportunities has exacerbated the problem. Current legislation fails to address the spatial needs of individuals who find themselves in informal settlements, whilst current planning and spatial practices have failed to bring these individuals closer to their places of employment, further burdening the poor with excessive transport costs.

2.2.2 **Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985)**

Most planning applications received by the department are in terms of the Land Use Planning Ordinance, 1985 (LUPO). These applications include applications for departure, rezoning or

[14] Van Wyk, J, op. cit. fn.6: 18
[15] Watson V (1998): "Planning Under Political Transition – lessons from Cape Town's Metropolitan Planning Forum", in International Planning Studies, Vol 3 (3).

subdivision and appeals[16]against planning decisions taken by a municipality. All of these will be discussed separately.

1. Departures[17]

LUPO makes provision for property owners to apply for an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned[18] or to utilize land on a temporary basis for a purpose for which provision had not been made in the said regulations in respect of the zone in which the property is situated[19]. This is known as a departure. In order for an application to be considered and authorized or declined the application has to be made in writing and the procedure stipulated in section 15(2) of LUPO has to be followed. Section 15(2)(a) gives the town clerk/secretary discretionary power to decide whether or not to advertise an application in that it states "…shall advertise the application if in his opinion any person may be adversely affected thereby". It is however the general practice to advertise all applications to ensure transparency and prevent legal action against the municipality; this has not always been the case though. If a municipality has delegated authority[20] to take a decision, the executive council of that municipality will consider the application and all objections if there are any and then convey such decision to the applicant. Alternatively, if the municipality is not authorized to make a decision as it pertains to an application, the application together with all relevant documents and the municipality's recommendation has to be forwarded to the department in order that the MEC[21] may take a decision.[22] A departure will lapse if not exercised within a period of two years or as per

[16] In terms of section 44 of LUPO
[17] Section 15 of LUPO
[18] Section 15(1)(a)(i) "An owner of land may apply in writing to the town clerk or secretary concerned as the case may be – for an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned"
[19] [19] Section 15(1)(a)(ii) "An owner of land may apply in writing to the town clerk or secretary concerned as the case may be –to utilise land on a temporary basis for a purpose for which no provision has been made in the said regulations in respect of a particular zone."
[20] The General Structure Plan for an area authorizes municipalities to take a decision on certain applications failing which the municipality will make a recommendation and the matter is then referred to the Provincial Department of Environmental Affairs and Development Planning for a decision.
[21] The legislation refers to the Administrator (The Premier of the Province) but the decision making power is delegated to the MEC of the Provincial Department of Environmental Affairs and Development Planning. The Head of Department has delegated authority to approve applications when there are no objections and the community, municipality and other commenting bodies support the application.
[22] Section 15(2)(b)-(e) of LUPO

an agreed upon (by the MEC or municipality) extended period.[23] Departures can seriously impact on the rights of property owners, as applications for departure are often approved as they are considered temporary and usually involve a consent use. An individual wishing to operate a day-care, guesthouse, or even use a portion of the property for house-shop purposes would usually apply for a departure. As a result of the high rate of unemployment these applications are often considered favourably. If considered from the point of view of surrounding property owners these activities often are not necessarily considered favourable. This is the case with guesthouse applications in the Wilderness area. An applicant in Wilderness for example had applied to use an existing structure, with a few 'minor alterations, on the roof of his double storey residential dwelling as a shed.[24] Surrounding property owners had objected but the municipality granted him permission. The applicant then subsequently converted the 'shed' into a gym and guestroom and applied to the Department to use the property for guesthouse purposes. A number of property owners in the Wilderness area had purchased their properties in order to have a quiet place to retire or as a holiday house to escape the city life. Unfortunately for these property owners there is a great demand for accommodation along the Garden Route and many property owners, willing to convert their residential dwellings to guesthouses, has resulted in year-round tourism, an increase in traffic flow in the area and often a disturbance of the peace and tranquility for which surrounding property owners may have purchased land in that area. Property owners further manipulate the system by first applying for a granny flat as a consent use in order to accommodate an old aunt or parent and then lodge an application to use the dwelling unit for guesthouse purposes as soon as they are granted approval for the granny flat. The applicants are aware of the fact that they are less likely to be granted approval to extend on their premises for guesthouse purposes, as surrounding property owners are more likely to object. The applicant then opts to embark on a process of incremental development. To ensure that this type of incremental development does not occur or is at least limited it would be advisable to introduce legislation that would prevent applicants from applying for guesthouse approval for a period of 2-5 years if the original application did not stipulate a guesthouse as the stated purpose.

[23] Section 15(5) of LUPO
[24] File reference 24/1/7/2/K8/R3 Erf 977 Wilderness

All zoned land has a primary use and consent uses.[25] The zoning scheme makes provision for consent uses for the various zones. Residential zone I for example permits a dwelling house as a primary use and an additional dwelling as a consent use. Residential zone III permits a townhouse as primary use and a dwelling house, group house or a retirement village as a consent use.[26] Should a landowner wish to undertake an activity listed as a consent use, if it is the council's opinion that any landowner may have an interest in the matter, the application concerned must first be advertised.[27] Unlike with departures, consent uses confer permanent rights.

2. Rezoning

As mentioned earlier, zoning schemes allocate a specific use for property, be it residential, business or otherwise and the scheme regulations will specify exactly what the primary use and consent use(s) if any will be. A property zoned Single Residential I allows the owner dwelling house and an additional dwelling unit (usually a granny flat) as a consent use.[28] In order for a land owner to use his residential property for business purposes he would have to apply to have said property rezoned.

Because zonings confer rights, an application for rezoning does not allow any discretion to be exercised with regard to the advertising of the application.[29] There is a further stipulation that relevant comments should be obtained from any person who in the opinion of the town clerk or secretary has an interest in the application.[30] As with departures, a municipality may approve a rezoning if such authority has been conferred in terms of the General Structure Plan. Alternatively, such approval has to come from the Administrator.

The General Structure Plan for the Province of the Cape of Good Hope[31] stipulates that, municipalities are not authorized to approve any rezoning which is inconsistent with another

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[25] See Section 8 Scheme Regulations- The primary use for land zoned Residential Zone I is a dwelling house and the consent use is an additional dwelling unit (granny flat), Resort Zone I has Holiday accommodation as its primary use and consent uses include a resort shop and tourist facilities.

[26] See Table B in the Section 8 Scheme Regulations, Official Gazette Extraordinary 4563 of 5 December 1998

[27] Section 8 Scheme Regulations – 4.6 (Applications for consent uses) and 4.7(Advertisement of intended application for consent use)

[28] See Scheme Regulations in terms of Section 8 of LUPO

[29] Section 17(2)(a) of LUPO "… the said town clerk or secretary shall – cause such application to be advertised"

[30] Section 17(2)(c) LUPO

[31] Approved by the Administrator in terms of section 4(6) of LUPO, read together with section 5(2) and 42(1) of the same Ordinance

structure plan[32] applicable to the area concerned; the rezoning of any area outside a municipal or local area to a resort zone;[33] any rezoning for which a permit is required in terms of regulations made in terms of the Environmental Conservation Act; public open space;[34] a rezoning below the 1-in-50 year floodline; or if a state institution is not in favour of it. If approved, a rezoning will lapse if not utilized within two years of the granting of said approval.[35]

3. Subdivisions

Applications for subdivision are made in terms of section 24(1) of LUPO and as the name suggests the purpose of the application is to subdivide a property into two or more portions. As in the case of departures, the town clerk or secretary has discretionary power with regard to the advertising of the application.[36] A number of subdivisional applications are accompanied by an application for rezoning. An applicant may for example apply to have a portion of land designated subdivisional area for the purpose of establishing a new township in which case the land will have to be rezoned and then subdivided. In this regard the legislation clearly stipulates that "no application for subdivision involving a change of zoning shall be considered…..unless and until the land concerned has been zoned in a manner permitting of subdivision."[37] Provision is however made for the rezoning and subdivision application to be considered simultaneously. *Corium (Pty) Ltd and Others v Myburg Park Langebaan (Pty) Ltd and Others*[38] involved such an application. The flawed public participation process and misinterpretation of legislation however resulted in the matter being referred to the courts. In 1988 the Administrator, acting in terms of LUPO, granted an application by Myburgh Park Langebaan (Pty) Ltd (a property developing company) for the rezoning of the land to permit subdivision thereof for development purposes. A subsequent application for a permit to extend the area upon which township development could take place, which included an area within a protected nature area was lodged with the Langebaan Municipality and was referred to the Administrator and the Minister of Local Government and Housing for

[32] Approved in terms of section 4(6) of LUPO
[33] As defined in the Section 8 Scheme Regulations or a similar zone in terms of the Section 7 Zoning Scheme
[34] A portion of open, often grassed area, for the benefit an enjoyment of the public.
[35] Section 16(2)(a)(i) of LUPO
[36] Section 24(2)(a) The said town clerk or secretary shall cause the said application to be advertised if in his opinion any person may be adversely affected thereby.
[37] Section 22(1)(a) of LUPO
[38] Citation: 1995 (3) SA 51 (C)

consideration and a decision. The application was circulated to various departments but was not advertised to allow interested members of the public to comment on the proposal. The permit was granted on 3 September 1990 and resulted in an application to the courts for the setting aside of a permit issued by the provincial administrator in terms of section 8(1)(a) allowing cluster housing on land previously reserved as 'nature area' and later becoming 'protected natural environment'.[39]

The court found that the decision of the Minister to amend zoning conditions demonstrated a failure to apply his mind and that the approval by the Langebaan Municipality and the Administrator of a subdivision application, without advertising such application and giving interested and affected parties the opportunity to comment, rendered the decision *ultra vires* as statutory procedures had not been complied with.

The court found that the Administrator who purported to act in terms of sections 1 and 13B of the Physical Planning Act when granting the permit did not have the power, duty or function entrusted to him by the Minister. It held that the building of a residential township and the installation of all its attendant services was fundamentally incompatible with the purpose for which a nature area was created and that a residential township and nature area on the same piece of land was a contradiction in terms and would defeat the objects and purposes of the Physical Planning Act in relation to a proclaimed nature area.

Respondents argued that even if the permit was invalid in terms of the Physical Planning Act, the permit had been validated by section H3(d) of the Environmental Conservation Second Amendment Act 115 of 1992. The court however pointed out that the Environmental Conservation Second Amendment Act 115 of 1992 had been promulgated in July of 1992, after proceedings in the case had already been instituted and that the permit in issue could not be retrospectively validated by virtue of legislation passed while the court proceedings were pending.

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[39] s16 of Environmental Conservation Act 73 of 1989 -(1) A competent authority may by notice in the Official Gazette concerned declare any area defined by him, to be a protected natural environment and may allocate a name to such area: Provided that such protected natural environment may only be declared-
(a) if in the opinion of the competent authority there are adequate grounds to presume that the declaration will substantially promote the preservation of specific ecological processes, natural systems, natural beauty or species of indigenous wildlife or the preservation of biotic diversity in general

The court ordered that the permit be set aside as unauthorized and *ultra vires* the provisions of the Physical Planning Act. It concluded that the Administrator had failed to properly apply his mind and had exercised his discretion in a manner which had frustrated the clear purpose of the Nature Conservation Act and had rendered its provisions of no importance whatsoever. On this ground the permit was invalid, therefore it had to be set aside.

Following the decision of the court, Myburgh Park (Pty) Ltd launched an application with the court (Provincial Division) seeking a declaration that the issue of certain permits, compliance with particular regulations and the issue of written authorization to the applicant in terms of the Environmental Conservation Act, 73 of 1989 were not prerequisites for the proposed development.[40] Earlier attempts by the applicant to develop the property had resulted in the installation of bulk infrastructure at a cost of R4 million. The development was then halted by the court's decision to set aside permission to zone, subdivide and develop the property.

The Provincial Minister of Planning and Administration (Western Cape) opposed the application on the grounds that the declarator sought by the applicant was an attempt to seek the court's opinion about hypothetical and theoretical questions, which would not bind the parties. The court held that in installing the services in the relevant areas, the applicant had at all times acted bona fide and on authority of permits and approvals granted at the time and that the area to be developed was not zoned 'open space' but 'subdivisional area'. The development application had accordingly not required the written authorization provided for in section 22(1) of the Environmental Conservation Act. In terms of the declarator the issuing of a permit to the applicant in terms of clause 2.1(b) of the "Directions with regard to the Management and Development of the Langebaan Nature Area;[41] the issuing of a permit in terms of clause 2 in terms of the "Directions in terms of the Environmental Conservation Act, 1982;[42] the issuing of a written approval in terms of clause 2 of the "Directions in terms of the Environmental Conservation Act, 1989;[43] the issuing of written authorization in terms of section 22(1) of the Environmental Conservation Act 73 of 1989

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[40] Myburgh Park Langebaan (PTY)LTD v Langebaan Municipality and Others 2001 (4) SA 1144 (C)
[41] Promulgated on 14 December 1984 by the Minister of Environmental Affairs and Tourism in Notice 863 (Government Gazette 9525)
[42] Promulgated on 17 October 1986 by the Minister of Environmental Affairs and Tourism in Notice 2166 (Government Gazette 10487)
[43] Promulgated on 3 December 1991 by the Administrator of the Cape Province in Provincial Notice 845 (Official Gazette of the Province of the Cape of Good Hope 4727

and compliance by the applicant with the "Regulations Regarding Matters Identified Under section 22(1)"[44] were not prerequisites for development by the applicant, in accordance with the application for amendment of rezoning conditions/rezoning and subdivision.
The Langebaan Municipality had refused to consider the applicants' application until the necessary permits had been issued. The court directed it to consider and deal with the application for the amendment of zoning conditions and subdivision in accordance with LUPO and/or any other legislative provisions.

The findings in these two matters appear to be contradictory as in the first instance the argument is in favour of environmental protection whilst in the latter case it is argued that since the land was already zoned subdivisional area, authorization in terms of the Environmental Conservation Act, 73 of 1989 was not a prerequisite for the proposed development. Since the municipality had refused to consider the application until such time as an environmental authorization had been granted the court directed the municipality to consider the application for the amendment of zoning conditions and subdivision in accordance with LUPO and/or any other legislative provisions, which does not rule out environmental considerations all together. These cases further illustrate the difficulties experience in terms of the environmental legislation with its numerous amendments. Officials often have to grapple with commencement of activity dates to determine whether in fact that activity constitutes an identified activity in terms of section 22(1) of ECA.[45]

4. The appeal process

Applicants who have applied for a departure, rezoning or subdivision and had said application refused at municipal level have a right to appeal to the Administrator in terms of section 44 of LUPO. The appeal has to be lodged with the municipality as well as the Department within twenty-one days of the date the applicant was made aware of the decision, which the municipality advises by registered mail. On receipt of the appeal the department will advise the municipality of the appeal, request comments from the municipality regarding its decision and give all objectors, in a case where an approval had been granted, the opportunity to comment on the appeal. If one

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[44] Promulgated on 5 September 1997 by the Minister of Environmental Affairs and Tourism in Government Notice R1183 (Government Gazette 18261)
[45] Environmetal Conservation Act, 73 of 1989

takes into account the timeframes[46] as set out in the Promotion of Administrative Justice Act an applicant should have a response to his/her appeal within 180 days of such appeal being lodged. However, this is practically not possible at present.[47] Lack of capacity within the department (as at September 2004 there were thirteen officers processing the applications for the entire Western Cape), response times from municipalities and other commenting bodies, the arranging of site visits and the sheer bureaucracy within the department result in applications taking six months and more to be finalized. An applicant is also permitted to lodge an appeal in terms of Regulation 18 of LUPO if the municipality fails to take a decision or notify the applicant of its recommendation timeously. In such situations, even though the municipality may have delegated authority to take a decision, that decision-making power will be ceded to the Department. Any decision taken by the municipality in this regard will then be considered to be a recommendation only.[48] Those parties who are unhappy with the conditions applicable to the planning approvals they have been granted may apply for the amendment of such conditions in terms of section 42 of LUPO.

Whilst legislation is in place to protect the rights of property owners and the environment, individuals who, in making a decision may be biased, may make a politically motivated decision, misinterpret the law or simply fail to apply their minds administer such legislation. For this reason both planning and environmental approvals and refusals as the case may be, are subject to review by the court.

Should a party be unhappy with a decision taken by the Department s/he may access documentation pertaining to the file as a right extended by the Constitution[49] to establish whether any further measures are required. The Access to Information Act, 2000[50] was enacted to give effect to the right. In terms of the Constitution[51] everyone furthermore has the right to administrative justice that is lawful, reasonable and procedurally fair and anyone whose rights have been adversely affected by administrative action has the right to be given written reasons. To

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[46] Act 3 of 2000, Reasons for administrative action, Section 5(1) – "Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action, may within 90 days after the date on which that person became aware of the action…request the administrator concerned to furnish written reasons for the action. Section 5(3) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action."

[47] See Circular No. C 14/1999 1.2.4 with regard to timeframes stipulated

[48] See Circular No. 9/2003 with regard to appeals in terms of regulation 18 of LUPO

[49] Act 108 of 1996: Section 32

[50] Act 2 of 2000

[51] Act 108 of 1996: Section 33

give effect to this right the Promotion of Administrative Justice, 2000 was enacted. The Act provides that an administrative action, in certain instances[52] could be subject to judicial review by a court or tribunal. The matters listed below were taken on review and set aside by the court on the grounds that the MEC failed to apply his mind or on procedural irregularities, thus illustrating the importance and the need for the option of a review.

4.1 **Minister of Planning Administration and Culture of the Province of the Western Cape, Christo Nel and Hangklip-Kleinmond Municipality**

In the case of the MEC of Planning Administration and Culture of the Province of the Western Cape, Christo Nel and Hangklip-Kleinmond Municipality[53] the applicant sought an order reviewing three decisions taken by the Minister on 27 January 1998 in regard to a property known as Erf 324 Rooi Els. An approval had been granted for the rezoning of the property from undetermined purposes to subdivisional area; the subdivision of the property and to alter a restrictive condition against the title deed of the property.

An application for the rezoning and subdivision of the property had been made with Betty's Bay Municipality on 26 July 1993. The application had been advertised as required by LUPO and 72 objections were lodged against the proposed rezoning and subdivision, amongst them an objection from the National Department of Environmental Affairs and Cape Nature Conservation.
In terms of LUPO a local authority may consider an application for rezoning of land only if authorized to do so by the provisions of a structure plan. At the time no structure plan existed for Rooi Els. Also, when an objection is received from a government department the municipality does not have delegated authority to approve a rezoning/subdivision, the matter will have to be referred to the Premier for a decision.

The owner wanted to subdivide the property into 24 erven but the Municipality's planning consultant suggested a layout consisting of 13 erven. The owner accepted this and submitted a second application with a layout for 13 erven. The layout was approved by the Municipality on 16

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[52] Promotion of Administrative Justice Act, 2000 (Act 3 of 2000, Section 6(2)(a)-(f)
[53] Case No: 10543/98 – Judgement 3 November 2000, Conradie, J

June 1994, even though it had not been advertised prior to approval. There had been 13 objections to the second application. Cape Nature Conservation did not support the second application either. The Minister disregarded the fact that the municipality had taken an invalid decision and dealt with the second application as though it were a revised version of the first. Upon investigation it was discovered that a restrictive condition in the title deed prevented subdivision. An application was then made for the removal of the restrictive title deed condition. The municipality recommended that the application be refused. The application was referred to the Planning Advisory Board (PAB), without whose recommendation the restriction could not validly be removed.[54] The Board did not make a recommendation on the removal of the restriction but recommended the approval of a township consisting of only 8 erven. This was interpreted as an implied recommendation for the removal.

Even though Klein Hangklip is in an environmentally and ecologically sensitive area, no real consideration was given to environmental legislation. The Provincial Director of Land Affairs in his explanatory affidavit stated that the matter had been viewed as one of a sensitive nature, even though no EIA had been done. The court found that good intentions are not adequate compliance with ECA and that the director had made no mention of ECA in the report on which the decision was based. The failure to take an essential step in the process of arriving at a conclusion on the establishment of a township on the property had tainted all three component decisions, which were accordingly set aside.

[54] See Beck and Others v Premier of the Western Cape and Others, 1998 (3) 487 (c) at 517B

4.2 **Paola v Jeeva and the North and South Central Local Council**

In the Paola v Jeeva and the North and South Central Local Council[55] the original application was for the review and setting aside of a decision of a local authority to approve building plans. Although this application had been made in Durban and refers to a decision of a local authority it had consequences for the Western Cape in that one of the main issues which the case revolved around was the issue of view and several applicant's/objectors who had unsuccessful applications lodged at Provincial level contacted the Department in the hope of having said decisions reviewed. The applicant was of the opinion that the alterations to the Jeeva property would affect his property's unsurpassed view to the extent that it would almost be obliterated by it and thus decrease the market value of his property by approximately 30%. Judge Kondile dismissed the application. After the judgment the appellant discovered that the municipality did not have a building control officer, as required by section 5(1)[56] of the National Building Regulations and Building Standards (Act 103 of 1977), an issue raised by the appellant before the Supreme Court of Appeal. Counsel for the appellant stressed that the appellant was not contending that he had a right to a view that was being infringed but that he did have a right not to have plans passed in respect of an adjoining erf in circumstances where a statute prohibited the passing of such plans.
The court found that the decision to approve the plans without considering a recommendation from a duly appointed building control officer could not be regarded as valid. The approved plans could therefore not be considered valid and the decision was set aside. The Appeal Court's judgment was interpreted as having the effect of prohibiting any local authority in South Africa from approving building plans that would enable a person to erect a building that would impair the view of any proprietor and therefore cause a decrease in the market value of such property. The judgment seemed to suggest that impaired view and the significant decrease in market value of a property would be factors that have to be taken into account when considering an application.

[55] Paola v Jeeva and North and South Central Local Council, Supreme Court of Appeal, 475/2002, also see Paola v Jeeva and Others 2002 (2) SA 391 (D)
[56] '… a local authority shall appoint a person as building control officer in order to exercise and perform the powers, duties or activities granted or assigned by or under this Act'

4.3 **Camps Bay Ratepayers and Residents Association and Others v Minister of Planning, Culture and Administration Western Cape and Others**[57]

The application was lodged for the purpose of review on the grounds of procedural irregularities. The main point of discussion in this case is the failure on the part of the Minister to read the contents of the application, especially the objections and letters of support, but instead relying on a condensed version of these documents which were slanted and inaccurate, the failure to follow correct procedure, and the absence of notice to affected parties in the township. The word township in this regard does not refer to an informal settlement but rather to a sum of all the properties demarcated in an area to form that township.

In 1984 the owner of the property sought to consolidate three erven and to subdivide the consolidate land into three separate portions. Application in terms of the Removal of Restrictions Act, was made to the Municipality of Cape Town and the provincial authority for the removal of the title deed condition prohibiting subdivision. The condition prohibiting the erection of flats on the subject property was also removed when the application was approved even though the applicant had not amended the application to request the removal of that condition. The decision to remove the condition as well as the Ministers failure to consider the actual objections resulted in what the court saw as a fatally flawed decision which was subsequently set aside.

5. Limited considerations for the approval or refusal of applications

Any application for rezoning or subdivision may be refused solely on the basis that the proposed rezoning/subdivision is not desirable or on the basis of its effect on existing rights, except any alleged right to protection against trade competition.[58] In the case of an approval, due consideration should be given to the safety and welfare of the community concerned, the

[57] Citation 2001 (4) SA 294 (C)
[58] Section 36(1) of LUPO

preservation of the natural and developed environment concerned or the effect on existing rights concerned, with the exception of any alleged right to protection against trade competition. An application in terms of LUPO can be refused on the grounds of desirability only, resulting in an inconsistency in decision making as the perceptions and bias of officials often influence whether or not an application is desirable. One official may consider authorizing a day-care centre within a residential area to be desirable as the day-care may be viewed as a source of income for the applicant, could be creating employment if staff are employed and may be seen as providing a much needed service to the area. Another official dealing with a similar application may consider undesirable the noise generated by the children, the increase in traffic caused by parents picking up and dropping their children and the inconvenience caused to neighbours as a result of a lack of parking. Deciding on whether an application is desirable is especially problematic when it comes to large residential developments as consultants are well versed in accentuating the positive aspects in their development applications in order for the application to be considered desirable. The consultant may claim that the new development is aimed at meeting the housing shortage in the area, will provide a safe and secure living environment and will provide employment opportunities to the local inhabitants in the construction phase, irrespective of whether these claims are false. When dealing with these applications, the applicants' should be held to the promises they make during the application phase and be made to provide proof to that effect. When developers made proposals for the Lagoon Bay development[59] they emphasized the extent to which the 'millionaire's estate' would create employment in the area, especially since there were high levels of unemployment amongst farm workers. The polo estates[60] have gotten around the legislation by means of incremental development and by owners assisting each other. To accommodate the growing number of polo enthusiasts being attracted to the Plettenberg Bay area surrounding property owners have established polo fields which they refer to as practice fields but would not require EIA as they are not operating resorts even though their fields are being used as an extension to the Kurland resort. If applicants are to be held accountable they would be less likely to make promises of job creation within a community knowing full well that they are unlikely to engage or require the skills of members of that community. The occurrence of false claims made as part of an application are less likely if the proposed job opportunities and skills provision form part

[59] File reference EG12/2/1-37 Farm Hoogekraal (Lagoon Bay)
[60] Kurland Estate in the Crags, Plettenberg Bay

of a legal contract between the applicant and authorities or if such claims become a condition of approval.

LUPO serves the purpose of dealing with applications which require authorization for activities that are permitted in terms of the applicable regulations or where provision is made for the authorization of such activities. There are situations in which an activity does not require authorization in terms of LUPO but a prohibition exists in the title deed to the property. In this situation an application has to be lodged to remove the restrictive condition, irrespective of whether the activity is permitted in terms of LUPO. Planning applications are still dealt with separately from the environmental applications and officials from the components are not required to work together on these applications. Individuals working in the planning component are furnished with planning legislation and receive training pertaining to planning matters and the same applies to the environmental component. At this point officials are not required to know or learn the legislation of their opposite component. Only officials in the Law Enforcement and Compliance sub-directorate are required to know the planning and environmental legislation but at this time the component consists of one permanent employee and five contract employees which makes ensuring compliance with the legislation extremely difficult.

2.2.3 **Removal of Title Deed Restrictions**

When a restrictive condition is registered against the title deed of a specific erf, the landowner is prohibited from performing any action that is contrary to the restriction. Should a land owner want to subdivide his property and the restrictive condition stipulates that the property may not be subdivided, such landowner could apply to the responsible authority for the amendment or removal of the restrictive title deed condition. This is a time-consuming and cumbersome procedure. As an alternative the party could apply to a competent court for an order removing or amending the restrictive condition or if the condition is listed in favour of a trust or group, negotiate for the removal of the condition. An application the court can however only be made if the municipality and interested and affected landowners support the removal of the restrictive title deed condition.

Following court judgments against local authorities and the provincial government, the then Department of Planning, Local Government and Housing, issued Circular No. C 14/1999[61] as the procedure to be followed when advertising removal of restriction applications. It should be noted that paragraph 1.1.3 of the circular indicates that objections against an application for the removal of a restrictive title condition should be lodged within 21 days of the publication of the advertisement. The period for objections has since been amended to 30 days.

The circular also stipulates that "[i]f the municipality fails to transmit its comments and recommendation within a period of thirty days after receipt of the application, the Provincial Government shall proceed with the application". To date, whether for the purpose of promoting intergovernmental relations or co-operative governance, the department has not proceeded with an application until such time as the municipality had furnished its comments.

2.2.4 **Less Formal Township Establishment Act (Act 113 of 1991)**

With the housing shortage and the ever increasing numbers of people living in informal settlements the above-mentioned Act was promulgated to shorten the procedures for the establishment of townships and less formal residential settlements and residential tribal land. The Administrator (the Premier) is empowered to designate land for informal settlement when satisfied that an urgent need exists for land on which to settle individuals in a less formal manner.[62] The Administrator may also suspend servitudes or conditions of title if such servitude or condition is deemed to be inconsistent or undesirable or if the cancellation of the condition in accordance with formal procedures will unnecessarily delay the opening of a township register in respect of the land. A General Plan must be submitted to the Surveyor-General for approval, after which the plan is filed in the Deeds Office. A Township Register has to be opened at which time the land is deemed to be a township established in accordance with ordinary township procedures.

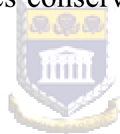
The Administrator is further empowered to establish or cause the establishment of a township if satisfied that a demand for housing in the area justifies such establishment and may make available

[61] Dated 26 August 1999 – A copy is attached as Annexure B
[62] Section 3(1) of Act 113 of 1991

State land controlled by him through purchase, expropriation or any other means of acquisition. Once approved, a General Plan must be submitted to the Surveyor-General for approval, after which the plan is filed in the Deeds Office so the Township Register can be opened. Normal town planning and building standards do not relate to less formal settlements.[63]

2.2.5 **Natural Heritage Resources Act, 1999 (Act 25 of 1999)**

It is important that history and historical resources are preserved. Sites with historical significance are protected and preserved as a consequence of this Act. If one considers an area like Bo-Kaap, it would be financially beneficial for those owning property to sell to big developers who could demolish the existing homes and construct homes worth millions. The Heritage legislation however prohibits the destruction of those homes as they are seen as being representative of the development of Malay culture, the people who lived there and as being part of the history of the Western Cape. The legislation requires that all policy, administrative practices and legislation must promote the integration of heritage resources conservation in urban and rural planning and social and economic development.[64]



2.2.6 **Development Facilitation Act, 1995 (Act 67 of 1995)**

From a planning perspective, this Act stipulates the conditions made applicable to property within an area indicated on a layout plan. It further provides clarity on what rights property owners have in terms of such property, such as erecting buildings or making alterations to existing buildings.
Of interest is regulation five,[65] which deals with the relaxation of side and rear space. It stipulates that the responsible authority may upon receipt of a written application, permit the erection of a building within the side or rear space and that such permission shall be valid for the life of the building concerned. The relaxation of building line restrictions is commonly used by local authorities in the Western Cape, with the exception of the City of Cape Town municipality which insists that application be made for a removal of a title deed restriction.

[63] Van Wyk, J, Planning Law – Principles and Procedures of Land Use Management, 1999: 151
[64] National Heritage Act, 1999, Section 5(6)
[65] Regulations in terms of the Development Facilitation Act, 1995- No. R1 in Government Gazette No 20775 of 7 January 2000

2.2.7 **Western Cape Planning and Development Act**[66]

The purpose of this Act is to replace racially based planning and development legislation, to establish a system of development planning in the province; consolidate planning and development into one law; to regulate, monitor and support planning and development at provincial, regional and municipal levels for urban and rural areas and to provide frameworks, norms and standards in planning and development. The Act contains similar provisions to LUPO with regard to rezoning, departure and subdivisions. The most striking difference is the removal of discretion relating to advertising. This Act[67] will remove the discretionary power permitted with regard to advertising departure and subdivision application in terms of LUPO.

Provisions for accelerated development[68]as provided for in the Less Formal Township Establishment Act have been included to address situations where land has to be made urgently available. Section 34(1) makes provision for advertising procedures in this regard. The Less Formal Township Establishment Act presently does not include advertising procedures, which is a one of the shortcomings of the Act.

The Act further makes provision for the removal of restrictions or relaxation of restrictions[69] registered against the title deed of land.

The Planning Advisory Board (PAB) establish in terms of LUPO will be replaced by a Planning Review Board (PRB).[70] The planning review board will have greater powers than the PAB, which is an advisory body. The chairperson of the PRB will be able to subpoena any person who may in the opinion of the board give material information about the subject of the inquiry, refer a matter for mediation, may dismiss an appeal and make a cost order as it may consider just. Issues of environmentally sustainable planning are also addressed in the legislation.[71]

The Act is a step in the right direction to addressing the problems faced by applicants when having to decide which piece of legislation they have to apply in terms of and ensuring that environmental

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[66] Act 7 of 1999, Assented to 4 April 1999 – date of commencement to be determined by the Premier
[67] Act 7 of 1999, see Sections 15(2), 17(2), 24(2) and 56 for advertising requirements
[68] Act 7 of 1999, Section 33 and 34
[69] Act 7 of 1999, Section 43(1)
[70] Act 7 of 1999, See Section 50(1) (a)-(f) lists the bodies or persons who have a right of appeal to the planning review board
[71] Act 7 of 1999, Schedule IV, sections 5 and 6

considerations become an integral part of decision making when considering planning applications.

2.2.8 **Land Use Planning Bill**[72]

The Land Use Planning Bill is still being considered and will likely undergo several amendments to accommodate the requirements of the different provinces. The stated purpose of the Land Use Planning Bill is to provide uniformity throughout South Africa in land use management, the establishment of spatial planning, land development, spatial development frameworks as well as to repeal certain laws.

The Act would empower the Premier of a province to enact legislation in that province on matters of special provincial interest or concern and matters not specifically dealt with by this 'Act'. Such legislation would however only be passed after consultation with municipalities and will have to be consistent with the Act.[73] In terms of this Act spatial planning, land development and land use management will have to promote and enhance equality, effiency, integration, sustainability and fair and good governance.[74] The Premiers of all provinces will be required, within a period of three years, to publish or amend a provincial development framework to guide spatial planning, land development and land use management in their respective provinces[75]. The commencement of this Act will also see current scheme and town planning regulations being replaced, within a period of five years, by new land use schemes which will bind landowners, including any other person having a right or interest in that land, in the area to which the scheme applies.

Although the terminology[76] will change somewhat the applicable procedure for lodging an application will remain almost unchanged. The approval of land use, be it for township establishment, subdivision, consolidation of land, amendment of a land use or town planning

[72] National Minister Agriculture and Land Affairs, unpublished Land Use Management Bill – 15 July 2004
[73] National Minister Agriculture and Land Affairs, unpublished Land Use Management Bill – 15 July 2004, Chapter 2, Section 6(1) and 6(3)
[74] See ss 10-14
[75] National Minister Agriculture and Land Affairs, unpublished Land Use Management Bill – 15 July 2004, Part 3: Provincial spatial development framework, Section 18(1)
[76] The term 'Competent Authority' is replaced by 'Land Use Regulator, Planning Advisory Board is replaced by Planning Tribunal

scheme or the removal, amendment or suspension of a restrictive condition would only be issued by the land use regulator. The land use regulator, when considering a land use application affecting the environment will have to take into account and ensure compliance with section 24 of the National Environmental Management Act of 1998.[77] Present legislation does not make provision for the consideration of environmental impacts of an activity on an area. In situations where an activity does not require authorization in terms of the Environmental Conservation Act the protection or maintenance of the environment has, in the past, not been a consideration for planning approval to be granted.

The Act is not prescriptive in terms of the time periods applicable when lodging applications or with regard to the appeal process, as provinces will more than likely be required to draft their own regulations and ensure that the timelines are in line with those prescribed in terms of the Administrative Justice Act. The time frames in the Western Cape are likely to be in line with timeframes applicable to LUPO and removal of restriction applications. With regard to applications that affect a provincial interest, where the Premier has taken a decision, such decision is final and only subject only to review by a High Court.[78]

The legislation also makes provision for the establishment of land use and land use appeal tribunals in each province.[79] The legislation makes further allowance for parties convicted of an offence in terms of s79(1)[80] to be liable to a fine not exceeding half a million rand or to imprisonment for a period not exceeding five years or to both the fine and imprisonment. A convicted person would further be liable for a fine of ten thousand rand for each day the conduct for which that person has been convicted continues. As a deterrent, the penalty policy would encourage property owners to act within the legal framework and at the same time arm the enforcement components of applicable departments with an enforcement tool. The Act is aimed at simplifying the application process for both applicants and officials by not having to first determine under which piece of legislation an application should be dealt with, thus making land

[77] Act No. 107 of 1998

[78]National Minister Agriculture and Land Affairs, unpublished Land Use Management Bill – 15 July 2004, Section 42(3)

[79] ss62.(2)(a) and 78(7) a member of Parliament, provincial legislature or a municipal council are disqualified from becoming or remaining a member of a Land Use Tribunal

[80] Person who without good cause contravenes section 37 or 65(1)(c), uses land contrary to an applicable land use scheme, etc.

use planning applications less cumbersome. The change of terminology may prove somewhat problematic, and to many may appear as just a case of semantics, but the Act itself is likely to make the process more efficient and user friendly. The function of the tribunals will be similar to that of the Planning Advisory Board (PAB)[81] the main difference between the two bodies is however that the PAB can only make recommendations whereas the tribunals as listed above will have decision-making powers. The legislation in terms of the Act would serve to repeal in their entirety the Removal of Restrictions Act as amended, the Physical Planning Act as amended as well as the Development Facilitation Act.

3. **CHAPTER 3: PLANNING AND THE ENVIRONMENT**

In this chapter I will discuss the importance of protecting the environment as a resource and the legislative actions taken to ensure the preservation of the environment for future generations. Legislative protections have been put in place to ensure that development does not come at the expense of the environment. The current legislation has a number of loopholes which are often exploited by consultants hoping to develop sensitive areas or simply to get a Record of Decision authorizing the activity they wish to engage in. Planned amendments to the legislation are now being considered to address these shortcomings.

3.1 **Environmental Law and Land Use Management**

The manner in which land is used clearly impacts upon the environment, making land-use planning a vital component of environmental management.[82] When big developers[83] purchase land in Constantia and redirect the flow of the river to ensure that the owners of those homes have riverfront property it impacts on all life along that river and could seriously impact on those people living close to the river bank or down stream if the river should flood as a direct consequence of its flow being redirected. These developers consider their profit margins and the type of buyer they are hoping to attract, rather than the effect on the environment, making environmental law

[81] A board made up of members of the public with a background and knowledge of planning and planning legislation
[82] Kidd, M, Environmental Law: A South African Guide, 1997:153
[83] File Reference Erven 2499 and 2527, Strwaberry Lane, Constantia – Diversion of the Spaanschemat River

enforcement a necessity to ensure compliance. South African common law of property, which regards ownership as "an absolute, abstract and exclusive right that allows an owner to use his property as he deems fit,"[84] "These rights are curtailed by various Acts of parliament and ordinances to such and extent that it is no longer possible to speak of an unqualified right…".[85] Van der Walt[86] argues that even persons or communities whose land rights have been detrimentally affected by apartheid laws and practices have in terms of the land reform provisions in sections 25(6) and 25(7) of the Constitution limited positive property guarantees. As claim rights are against the state, the rights are limited by the applicable legislation and the availability of state resources. Environmental legislation further curtail some of the rights individuals may exercise on their property. Farmers for example are not allowed to simply plant virgin land,[87] remove fynbos to build roads or upgrade roads, or to construct 4x4 trails on their property without applying for the necessary authorization. In the Western Cape however the cultivation or any other use of virgin ground[88] is not considered a listed activity although it is in the other provinces. In 1986 the World Commission of Environment and Development (the Brundtland Commission) accepted the concept of sustainable development as a basis for environmental management,[89] highlighting the importance of development that can be sustained with minimal effect on the environment. To further promote sustainable development a code of practice known as Integrated Environmental Management (IEM) has been developed to ensure that issues of environment are integrated into all stages of the development process so that a balance between conservation and development may be achieved.

[84] Kidd, M, Environmental Law: A South African Guide, 1997: 153
[85] Langenhoven, PC, "*Partitioning of Land* in Butterworths Forms & Precedents Volume 9 Part 1 – Property Law, Managing Editor: JP Naude, Butterworths, Durban 1992: 191
[86] Van der Walt, AJ, Constitutional Property Clauses – A Comparative Analysis, Kluwer Law International, Juta 1999
[87] Land that had not been planted for a period of 10 years
[88] Activity 10 of R1182
[89] Barnard, D, Environmental Law for All: A Practical Guide for the Business Community, the Planning Professions, Environmentalists and Lawyers, 1999:55

3.2 **Environmental Conservation Act, 1989 (Act 73 of 1989)**

The Environmental Conservation Act empowers a Competent Authority[90] to declare an area a protected natural environment if in the opinion of such authority adequate grounds exist to presume that such declaration will substantially promote the preservation of specific ecological processes, natural systems, natural beauty or species of indigenous wildlife or the preservation of biotic diversity in general.[91] A consultation process would have to precede any such declaration being made. The competent authority may also exclude or withdraw an area from a protected natural environment.

The Minister is required to identify activities, which in his opinion may have a substantial detrimental effect on the environment. These activities have to be issued by notice in the Official Gazette.[92] Any party wishing to undertake a 'listed activity'[93] is required to obtain a written authorization prior to undertaking such activity. In order to obtain the authorization, the competent authority will have to consider reports eg. an Environmental Impact Assessment (EIA) report concerning the impact of the proposed activity on the environment. When a party embarks on an activity which would require environmental authorization s/he is required to complete an application form and a scoping checklist. The information provided in these documents will be used to consider the application and the impact such application will have on the environment. If it is determined that further information is required the party will be required to submit a plan of study for scoping[94] or submit a scoping report without a prior plan of study.[95] If the information in the scoping report is not sufficient for the purpose of making a decision the report will have to be supplemented by an EIA.[96] In the case where an authorization is granted and the applicant fails to

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[90] Minister of Environmental Affairs and Tourism, in terms of section 22(1) of the Environment Conservation Act, 1989 (Act No. 73 of 1989), designated the competent authority, as defined in section 1 of the said Act (as amended by Proclamation R.43 of 8 August 1996), in each province as an authority which may issue a written authorisation to undertake or cause to undertake an activity identified in Government Notice No 1182 dated 5 September 1997, insofar as the regulations published in Government Notice No 1183 dated 5 September 1997 may be applied by such competent authority

[91] Environmental Conservation Act, 1989, s16(1)

[92] Government Notice No. R.1182 ECA, 1989, s21(2) Activities include any activity in any of the following categories, but are not limited thereto:(a)Land use and transformation; (b)water use and disposal;(c)resource removal, including natural living resources;(d)resource renewal;(e)agricultural processes;(f)industrial processes;(g) transportation;(h)energy generation and distribution;(i)waste and sewage disposal;(j) chemical treatment;(k)recreation.

[93] Activities were amended by Government Notice R.670, 10 May 2002

[94] R1183 of September 1997, 5(1)(a)

[95] ECA, R1183 of September 1997, 5(1)(b) – information relating to the content of such reports are in R1183, 5(2)

[96] ECA, R1183 of September 1997, 5(3)(b)

comply with a condition imposed, the authorization may be withdrawn after 30 days of informing the person in writing. The competent authority may declare an area as a limited development area, preventing any development without prior authorization to curtail development in certain areas. A limited development area can however only be declared after a proposal had been advertised and interested and affected parties had been consulted with. The competent authority may also exempt parties from having to obtain authorization for an activity, subject to any conditions he may deem fit.

There is presently much confusion surrounding which activities are 'listed' as there are many grey areas that are being used by applicants to get out of applying for environmental authorization and in some cases the information furnished is not a true reflection of the situation and whether an EIA is required. A refusal to apply for authorization by the owner of Erf 4868 Hout Bay illustrates how property owners use the legislation to bypass the legislation. In this matter a road was upgraded in a sensitive area and milkwood trees cut down without a Department of Water Affairs and Forestry permit. Neither department has been able to prosecute the individual as he has argued that he had commenced the activity prior to the promulgation of the regulations and that the road is in fact a firebreak. An application received for the McGregor Waste Treatment plant illustrates how information furnished can be misleading. The consultant furnished information to the Department as well as DWAF on which basis DWAF issued a permit and the Department advised that the activity was not listed. Following complaints from surrounding property owners officials investigating the matter determined that the plant was in fact in a seasonal wetland and would have required an EIA. Environmental Impact Assessment is an important tool used to assist the authorities in making decisions which limit damage to the environment. The case of *Silvermine Valley Coalition v Sybrand van der Spuy Boerdery*.[97] illustrated when EIA can be applied and when it fails to be applicable. The purpose of the application to the court was to get the first respondent (Sybrand van der Spuy Boerderye**)** to be ordered to commission a full and independent Environmental Impact Assessment (EIA) in terms of section 21 of the Environmental Conservation Act (ECA), alternatively in terms of sections 2 or 24 of National Environmental Management Act (NEMA), in respect of the planting of a vineyard and construction of dams on Farm 1000 and Farm 1404, Simonstown. On 10 February 1984 the area, located in Cape

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[97] Citation 2002 (1) SA 478

Peninsular Protected Natural Environment, was declared a nature area[98] in terms of section 4 of the Physical Planning Act (Act 88 of 1967). The land in question was said to have been used for gravel quarrying.

The first respondent argued that his initial attraction to the area was the vineyard manager's belief that the site had potential for vineyards despite its degraded state. In his opinion the vineyard activities in a degraded area would enhance rather than detract from the environment. Cape Nature Conservation Board and the South African Parks Board advised the vineyard manager to apply for exemption from ECA regulations regarding to change of land use. On 22 November 1998 the Provincial Administration and Cape Nature Conservation (CNC) granted an exemption to first respondent. After a site visit the Department of Agriculture granted a permit and the Department of Water Affairs and Forestry (DWAF) was of the opinion that the scale of the vineyard was unlikely to have any significant effect on the water downstream, particularly given the farming and management methods and the proposed mitigating measures. The record of decision indicated that there would be no significant negative environmental impact as a result of the proposed activities on the site. The Redhill Conservation Group lodged an appeal against the decision and argued that the exemption had been granted without due consideration of the myriad of impacts on the surrounding environment.
Only interested parties from government departments had been given the opportunity to comment on the exemption application, not the broader community. The appeal was upheld. First respondent argued that there was no need to apply for exemption or authorization under ECA and its regulations as the regulations were not applicable. The Minister of Environmental and Cultural Affairs of the Western Cape informed Redhill that legal advice had been obtained to the effect that he was unable to interdict first respondent from establishing the vineyard on the site as the activity did not constitute a change of land use, thus authorization/exemption was not required.

The court found that an EIA after the fact would have no effect on the continuation of an activity; and that the investigative process envisaged by section 24 of NEMA was intended to aid the authorizing official to decide whether a permit should be granted. The change of land use from

[98] "Any area which can be utilized in the interest of and for the benefit and enjoyment of the public in general and for the reproduction, protection or preservation of wild animal life, wild vegetation, objects of geological, ethnological, historical or any scientific interest"

agricultural or undetermined use to any other use did not require authorization or an exemption in terms of ECA (s21 para 2(c). The National Environmental Management Second Amendment Act[99] addresses the issue of impact assessment after the fact, in that section 24G[100] provides that the Minister or MEC may direct the applicant to compile a report containing an assessment of the nature, extent, duration and significance of the impacts of the activity on the environment, including the cumulative effects.

The policy within the Department with regard to parties undertaking listed activities, sometimes in sensitive areas without prior authorization, has been to instruct such parties to apply to the Department and then to issue *ex post facto* Records of Decision, this policy is based on a legal opinion from Adv. N.J. Treurnicht SC of 6 March 2002 in which he states that "…*ex post facto* authorisation can be given. Section 22(1) of the ECA prohibits the undertaking of an activity identified in terms of Section 21 thereof (a *"listed activity"*) without authorisation. It also creates the power to grant authority for such an activity. When this sub-section is read with Section 29, it is clear that the mere undertaking of the activity without authorisation amounts to an offence.

Section 22(2) thereof stipulates what must precede the granting of the authorisation, viz. consideration of the contents of an impact study in respect of the *"proposed activity"*. Although it must be accepted that the words *"proposed activity"* refer, on the face of it, to an activity which will take place in future, it is similarly clear that this sub-section refers to the existence of a jurisdictional pre-requisite for a decision, viz. an impact assessment. Read in its proper context it deals with the sequence of first considering the report and then deciding on the authorisation. Whilst it may be accepted that the scheme of the Act is clearly aimed at requiring and obtaining permission *in initio*, it does not follow therefrom that *ex post facto* authorisation is prohibited by the provisions of Section 22". This is definitely not a situation which should be encouraged as parties are indirectly encouraged to undertake an illegal activity and then apply to have it legalized, rather than having to follow the application procedure which can be costly especially if an environmental impact assessment is required.

[99] Act 8 of 2004, the provisions of which became effective on 7 January 2005
[100] Rectification of unlawful commencement or continuation of listed activity

3.3 **National Environmental Management Act, 1998 (Act 107 of 1998)**

The Act (NEMA) applies to the actions of all organs of state that may significantly affect the environment. The Act requires that all development must be socially, environmentally and economically sustainable. NEMA also requires that the Minister with concurrence of the MEC has to identify activities and geographical areas in specific areas in which specified activities may not be commenced without prior authorization from the Minister or MEC.

In terms of the Act procedures to ascertain the potential impact of activities must be investigated, assessed and communicated must be in compliance with section 24 (7).[101] Every person who causes has caused or may cause significant pollution or degradation of the environment is required to take reasonable measures to prevent such pollution or degradation of the environment from occurring, continuing or recurring and if authorized to do so should minimize and rectify such pollution or degradation of the environment.[102]

The Department mainly employs the NEMA regulations to issue directives to transgressors requesting them to cease the activity or to rehabilitate the area in which the damage was caused as NEMA has a general duty of care requirement and the requirement to prove significant degradation or pollution as a result of the activities is easier to meet than having to prove substantial detrimental harm as required by the ECA.

The Act makes provision for penalties but these are only applicable if parties are found guilty of an offence in terms of the Act and thus far the Department has been reluctant to prosecute environmental contraventions. As far as enforcement of the legislation is concerned the Department is reactive, rather than proactive, as members of the public, the local authority or Cape Nature Conservation have to report that an illegal activity is occurring and the Department will then send an official to investigate. In a number of cases the damage has already been done and at best the Department can insist that the area be rehabilitated if it is at all possible.

[101] National Environmental Management Act, 107 of 1998
[102] National Environmental Management Act, 107 of 1998, s28, Duty of care and remediation of environmental damage

3.4 **Draft Environmental Impact Assessment Regulations, R.764 of 25 June 2004, in terms of NEMA**

The proposed amendments to the existing environmental impact assessment regulations are considered necessary as the current processes are deemed to be too cumbersome. Officials are further required to consider too many exemption applications placing an undue administrative burden placed on them. There are also concerns that the current regulations cause unnecessary delays for development. The current regulations require applicants to furnish a plan of study for scoping, a scoping report, a plan of study for environmental impact assessment followed by an environmental impact report before the application is considered. The amended regulations are meant to create a mechanism for quick assessment of applications by giving applicants a clear indication of the activities, which would require an EIA. The applicant is thus saved the time and is spared the cost of having to pay a consultant to conduct an EIA and draft a report if such a report is not necessary for the activity to be undertaken. Although it is the intention to lessen the administrative burden of officials, the opposite could occur. Applicants may opt to follow the initial assessment process to save on the cost of an EIA. If it is found that an EIA is required a new application will have to be lodged and officials will be required to assess the application based on the new information.

The amended regulations are also supposed to give greater clarity as far as specifying listed activities are concerned and to ensure stricter application of regulations in sensitive areas.

Schedule 1 of the regulations lists the definitions and interpretations of words and expressions used within the document. Although the list is extensive several of the definitions have been amended during the consultation process and are likely to be further amended. To address the lack of clarity which exists in determining when an EIA is required and to save applicants the cost of undertaking an EIA when it is not required, Schedule 2 identifies activities which require environmental authorization and require a screening process to be undertaken. Schedule 3 of the regulations list the activities that are known to have a significant impact in most instances and would therefore automatically require an EIA. The Minister or MEC may identify geographical area in terms of

Schedule 4 which may not commence without environmental authorization. These include geographical areas or sites identified by any legislation or in any government policy or plan that has been adopted for the purpose of protecting or conserving biological, water, landscape, geological, archaeological, palaeontological, architectural or cultural resources; core areas of biosphere reserves; and areas designated for conservation or protection by the Republic in terms of any international agreement, treaty or convention to which the Republic is a party.

3.5 **National Environmental Management Second Amendment Act, Act 8 of 2004**

The Act amongst other things repeals and replaces the existing section 24,[103] has inserted new sections 24A to 24I,[104] repealed and replaced the existing section 43,[105] added two new subsections to the existing section 50,[106] and created a transitional arrangement relevant to the new section 24G.[107] The new section 24G deals with applications, by parties who have committed offences in terms of section 24F(2), for the rectification of the unlawful commencement or continuation of a 'listed activity', whilst section 24F(4) provides that person convicted of an offence in terms of 24F(2) is liable to a fine of up to R5 million or to imprisonment for a period of up to ten years, or to both. Section 24A provides that before identifying any activity or area the MEC must publish a notice in the relevant Gazette specifying, through description, a map or any other appropriate manner, the activity or area that s/he is proposing to list, and inviting all interested parties to submit written comments on the proposed listing within a period specified in the notice. Following the public participation process the Minister or MEC is required to publish the activities or area and the date on which the list will come into effect.[108] To date the Western Cape MEC has not published such notice as a consequence of the legislation, at present no list of activities or area exist in the Province. Without the publication of the list, no party can be found guilty of an offence in terms of section 24F(2) nor can applications for rectification be considered as for all intents and purposes there are no listed activities. The Act will repeal the Environmental Conservation Act which precludes objectors of access to a second opportunity to state their case. In the past objectors

[103] Section 2 of the Amendment
[104] Section 3 of the Amendment
[105] Section 4 of the Amendment
[106] Section 6 of the Amendment
[107] Section 7 of the Amendment
[108] Section 24D of the Amendment

had the option to object in terms of the ECA and had got a second bite of the cherry in terms of a NEMA.

Environmental legislation is becoming and is likely to remain an integral part of land use planning. The process thus far has been a slow one and the courts have not always helped the cause. Kidd[109]discusses the case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* and argues that the court's flawed interpretation of the legislation consigned the applicants to failure and set a precedent for future cases, which is most unfortunate. Although Kidd's concern for the protection of the environment is admirable we live in a society which has to deal with housing shortages, poverty, declining economic growth, HIV/Aids and a myriad of other issues. The findings of the court does not mean that the environmental legislation had been incorrectly interpreted, rather that after considering other socio-economic issues environmental protection had to be a secondary concern. The Kyalami Ridge matter revolved around a decision to establish a transit camp on the Leeuwkop Prison premises, after obtaining consent from the local authority and the Department of Public Works. As it was felt that the need to house approximately 300 Alexandra residents rendered homeless by floods was urgent, no consultation process was entered into. The residents (Kyalami Ridge Environmental Association) demanded the suspension of operations on the site and successfully applied for an interdict. The activities on the land involved a change of land use, which would require a public participation process, and was thus contravening ECA and also infringing on NEMA.

On application to the High Court, government was instructed to consult with affected parties and the decision was set aside. The matter was referred to the Constitutional Court to consider the following issues: the legality of government's decision to establish a transit camp in the absence of empowering legislation; infringement of applicants' rights to just administrative action; failure of government to comply with the Townships Ordinance, relevant planning scheme, NEMA, ECA and the National Building Regulations and Building Standards Act; and whether the camp would constitute a nuisance.

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[109] Kidd, M, 2001, The Constitutional Court's Dilution of NEMA: Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another 2001 (3) SA1151 (cc)

The court found that government had to address the right to housing as established in the Grootboom[110] case and that it was fulfilling its constitutional obligation, exercising its rights as the owner of the land and it has the executive power to implement policy decisions. Although the decision did not consider the contraventions of the environmental legislation it should not necessarily be viewed as a failure of the court to give recognition to the importance of environmental protection. The court had considered the provision of housing to be of greater importance than environmental concerns as South Africa presently has a severe housing shortage. Planning legislation could be used to rezone and make available greenfield and brownfield areas for the development of low-income housing. These areas should not however be allocated for housing only but should be developed to create human settlements that are sustainable and environmentally friendly. People should have access to health services, employment, places to gather and safe public open spaces as well access to retail goods and services. These issues should all be taken into consideration when low-income housing developments are considered. This does not however mean that the environment will always come second.

3.6 **Environmental Conservation v Development**

The most commonly used definition of sustainable development is "meeting the needs of the present without compromising the ability of future generations to meet their own needs" put forward by the Brundland Commission.[111] The main goals of sustainable development include reducing poverty, ensuring high quality living environments, protecting local ecosystems and developing more representative and accountable government.[112] Sustainable development depends on reducing ecological destruction and on improving the material quality of life of the world's poor.[113] According to Yanarella and Levine[114] studies have indicated that sustainable cities have been and are likely to be compact cities, though compactness alone is not a

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[110] Government of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

[111] Satterthwaite, Sustainable Cities or Citied that contribute to Sustainable Development, Urban Studies 1997, pg 1668

[112] Mitlan and Satterthwaite, Cities and Sustainable Development, Background Paper prepared for Global Forum 1994

[113] Wackernagel, M.and W. Rees, Our Ecological Footprint: Reducing Human Impact on the Earth, 1996.

[114] The Sustainable Cities Manifesto: Pretext, Text, and Post-Text", Built Environment, 1992

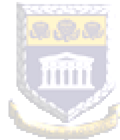
definitive indicator of sustainability. Levine[115] identifies high population density, humanly scaled architecture, social heterogeneity, an urban rural balance, primary political loyalties to the city as a whole, aesthetic richness and diversity of design, and social commitment to durability and repair as critical components of the modern sustainable city. To progress towards the achievement of sustainable development goals, the environmental performance of cities has to improve not only in terms of environmental quality within their boundaries, but also in terms of reducing the transfer of environmental cost to other people, other ecosystems or into the future.[116]

It is clear that the manner in which land is used impacts upon the environment and therefore land use planning is a vital component of environmental management. Because of the increasing number of golf courses and polo fields being established in pristine areas utilizing water limited resources, especially along the Garden Route, the establishment of said golf courses and polo fields has attracted much attention, as it is a land use that could severely impact upon the environment and other natural resources. While it can be argued that golf estates are of value for tourism and job creation the negative impacts of these activities on natural resources still have to be assessed. In response to questions from the press[117] the Department indicated that at least 29 golf estates have been approved in the past ten years. There are a further ten estates, which have applied for authorization in the past but currently do not enjoy legally approved status for various reasons and there are currently 21 applications for golf courses or estates being considered by the department, 11 of these in the Garden Route area. Polo-fields in the Knysna area are also becoming problematic. Currently, there isn't any policy or guidelines available in this regard but the MEC, Minister Tasneem Essop, has indicated that assessing the impact of these activities and devising a policy in this regard would be a priority.
The Draft Report Rapid Review and Polo Field Developments in the Western Cape[118] indicates that a significant percentage of homebuyers on golf estates are non-golfers demonstrating that buyers are attracted to other aspects of these developments such as lifestyle and security. This would suggest that it may not be necessary to place further pressure on water and valuable

[115] cited in Yanarella and Levine, The Sustainable Cities Manifesto: Pretext, Text, and Post-Text", Built Environment 1992
[116] Satterthwaite, Sustainable Cities or Citied that contribute to Sustainable Development, Urban Studies 1997
[117] File reference E17/2/1/1/1
[118] December 2004

agricultural land resources to establish further golf developments. The Department of Agriculture indicated to researchers that they would definitely not allow the subdivision and development of high potential agricultural land. There is concern that the inflated prices being paid for agricultural land for development will eventually impact on the cost of agricultural production and ultimately on the cost of production. In a country with already high unemployment the sale of agricultural land for the development of golf courses or polo fields has seen farm workers loosing not only their jobs but also the accommodation that many of them had traditionally enjoyed. There is also a fear that the inflated prices could impact on land reform, which is based on the willing buyer willing seller concept. Land reform and land restitution has been extremely slow and many previously disadvantaged farmers are losing patience with the process. The high cost of the land is making it increasingly unaffordable for the state to purchase land as part of the land reform process. Golf courses and polo fields do not only impact on the spatial and natural environment but also have far reaching socio-economic impacts. Government officials will have to consider all these factors when assessing the viability and ecological sustainability of golf courses.

4. **CONCLUSION**



The Western Cape is a province with much to offer in terms of development as well as natural beauty, but there is considerable unemployment and for these individuals development and the creation of employment is of greater importance than conservation. It is the responsibility of all three spheres of government to promote environmental education to inform these parties of the link between conservation and sustainable development.

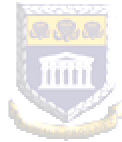
Although legislation is in place there is currently very little being done in terms of enforcement and compliance, especially with regard to environmental legislation. With the current legislation and various regulations it is sometimes difficult for both the administrator and the applicant to ascertain whether such application is in fact necessary or in which situations an EIA is compulsory. The proposed NEMA amendments may improve the situation as the purpose of the amendments are to give clarity as to which activities are listed activities which require authorization prior to the commencement of such activities, and in which situations EIAs are

compulsory. The regulations further provide the Minister/MEC with the option to request additional information or that an EIA be undertaken if such additional information or EIA is considered necessary.
With regard to the planning legislation, such legislation may be somewhat dated but it does make regulating land use activities easier and compared to the environmental legislation provide for fewer grey areas. Future spatial development will require greater consideration to be given to township establishment as the present system, although not racially based has done nothing to move away from apartheid type planning. Most new townships especially black and low-income townships are still a distance from the city center and relegate certain communities to crime-ridden areas with high rates of poverty and unemployment. There are still a number of loopholes in the legislation that are regularly exploited by applicants and this needs to be addressed. There also needs to be consistency in applying the legislation to ensure that applicants are assured of equal access to development opportunities as well as equal treatment.

The integration of Environmental Affairs and Development Planning has been a step in the right direction as it is a step toward encouraging development and job creation whilst having due consideration for the environment. It would probably be more effective if the functions were integrated fully and planning and environment didn't function as two separate entities. There still appears to be a 'them-and-us' divide between the components, which does not promote cooperation when applications with both planning and environmental implications have to be dealt with. Having a review process in place is central to protecting the rights of property owners as well as the occupiers of land as it provides an avenue through which to seek redress if in the opinion of the affected party his/her rights will be negatively affected. Having access to the court is costly and excludes many communities from taking the necessary steps to protect their rights when only the court can set that decision aside. Steps are being taken to provide these communities with access to alternative means through which to seek redress. The proposed planning and planning appeal boards are meant to make it easier for disadvantages communities to be heard.

Golf course and polo field developments are having huge impacts on the spatial, natural, social and economic environments within their areas of establishment. The Rapid Review process initiated by the Minister of Environmental Affairs and Development Planning to establish the impact and

sustainability of these estates is a positive step, how future applications for these developments are dealt with will however determine the value of the exercise.



BIBLIOGRAPHY:

1. **Barnard, D, (1999)** Environmental Law for All: A practical guide for the Business Community, the Planning Professions, Environmentalists and Lawyers, Impact Books cc, Pretoria

2. **Campbell, S., (1999),** *Planning: Green Cities, Growing Cities, Just Cities? Urban Planning and the contradictions of Sustainable Development* in The Earthscan Reader, Earthscan Publications Ltd, London

3. **Conyers, D, and Hills, P, (1986)** An Introduction to Development Planning in the Third World, John Wiley & Sons Ltd, Chichester

4. **Duffy, H., (1995),** Competitive Cities, Succeeding in the Global Economy, E and FN Spon, London

5**. Fuggle, R.F., Rabie, M.A, (2000),** Environmental Management, Juta & Co. Ltd, Cape Town

6**. Glazewski, J (2000)** Environmental Law in South Africa, Butterworth Publishers, Durban

7**. Govender, K**, Pearl, R, **(2001)** *Natural Resource Policies for the New Millenium: Is South Africa moving toward a more sustainable path?* South African Journal of Environmental Law and Policy, Volume 8(1), 39-76

8. **Hardoy, J.E., Satterthwaite, D., (1981),** *Shelter: Need and Response, Housing Land and Settlement Policies* in Seventeen Third World Nations, John Wiley & Sons Ltd, Chichester

9. **Kidd, M, (2001)** *The Constitutional Court's Dilution of NEMA: Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others,* South African 2001 (3) SA 1151 (cc)

10. **Kidd, M, (1999)** Environmental Law: A south African Guide, Juta & Company Ltd, Cape Town

11. **Langenhoven, PC, (1992)** "*Partitioning of Land* in Butterworths Forms & Precedents Volume 9 Part 1 – Property Law, Managing Editor: JP Naude, Butterworths, Durban, pp 187-211

12**. Mitlin, D., & Satterthwaite** (1994) Cities and Sustainable Development, Background Paper prepared for Global Forum '94, IIED, London

13. **Ngobese P, Cock, J, (1997)** *Development and the Environment* in Managing Sustainable Development in South Africa (2nd Ed) Fitzgerald P, McLennan A, Munslow B, Oxford University Press, Cape Town (256-272)

14. **Retief F.P, Sandham, L.A, (2001)** Implementation *of Integrated Environmental Management as part of Integrated Development Planning,* South African Journal of Environmental Law and Policy, Volume 8(1), 77-79

15. **Satterthwaite, D.** (1997) Sustainable Cities or Citied that contribute to Sustainable Development, Urban Studies, 34 (10-12), 1667-1695

16. **Tomlinson, R., (1994),** Urban Development Planning – Lessons for the Economic Reconstruction of South Africa's Cities, Witwatersrand University Press, South Africa

17. **Van der Walt, AJ**, **(1999)**, Constitutional Property Clauses – A Comparative Analysis, Kluwer Law International, Juta

18. **Van Wyk, J., (1999),** Planning Law – Principles and Procedures of Land Use Management, Juta & Co. Ltd, Cape Town

19. **Wackernagel, M.and W. Rees** (1996) Our Ecological Footprint: Reducing Human Impact on the Earth, New Society Publishers, BC Canada.

20. **Wallis, M, (1997)** *The Problem of Bureaucratic Administration* in Managing Sustainable Development in South Africa (2nd Ed) Fitzgerald P, McLennan A, Munslow B, Oxford University Press, Cape Town (84-97)

21. **Watson V (1998)**: "*Planning Under Political Transition – lessons from Cape Town's Metropolitan Planning Forum*", in International Planning Studies, Vol 3 (3).

22. **Yanarella, E J, & R S Levine** (1992) "*The Sustainable Cities Manifesto: Pretext, Text, and Post-Text*", Built Environment, 18 (4), 301-313

1. Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)
2. Physical Planning Act, 1967 (Act No. 88 of 1967) as amended
3. Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985)
4. Development Facilitation Act, 1995 (Act No. 67 of 1995)
5. National Heritage Resource Act, 1999 (Act No. 25 of 1999)

6. Less Formal Township Establishment Act, 1991 (Act No. 113 of 1991)

7. Environmental Conservation Act, 1989 (Act No. 73 of 1989)

8. National Environmental Management Act, 1998 (Act No. 107 of 1998)

9. Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)

10. Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)

11. No. R. 1182 5 September 1997 Environment Conservation Act, 1989 The Identification under Section 21 of Activities which may have a substantial detrimental effect on the environment.

12. No. R. 1183 5 September 1997 Regulations regarding activities identified under section 21(1)

13. Government Notice 1399, 12 December 2001, Control of Vehicles in the Coastal Zone

14. Regulation 764 of 25 June 2004, Draft EIA regulations

15. Removal of Restrictions Act 1967, Act No. 84 of 1967

16. Rapid Review of Golf Courses and Polo Field Developments Draft Report, December 2004

17. Legal opinion by Adv. NJ Treunicht SC, 6 March 2002

Cases:

1. Corium (Pty) Ltd and Others v Myburg Park Langebaan (Pty) Ltd and Others 995 (3) SA 51

2. Myburgh Park Langebaan (PTY)LTD v Langebaan Municipality and Others 2001 (4) SA 1144 (c)

3. Silvermine Valley Coalition v Sybrand van der Spuy Boerderye 2002 (1) SA 478

4. Save Klein Hangklip Association v Minister of Planning Administration and Culture of the Province of the Western Cape, Christo Nel, Hangklip-Kleinmond Municipality Case No: 10543/98 3 November 2000

5. Paola v Jeeva and North and South Central Local Council, Supreme Court of Appeal, 475/2002

6. Paola v Jeeva and Others 2002 (2) SA 391 (D)

Navrae / Enquiries / Imibuzo: JB Roelofse

Departement van Beplanning, Plaaslike Bestuur en Behuising
Department of Planning, Local Government and Housing
iSebe loCwangciso, uLawulo lweeDolophu noLwakhiwo-zindlu

TEL: (021) 483-4627

DATUM/DATE: 26 August 1999

TO ALL MUNICIPALITIES IN THE PROVINCE
OF THE WESTERN CAPE

CIRCULAR NO. C 14 / 1999

PROCEDURES FOR APPLICATIONS IN TERMS OF THE REMOVAL OF RESTRICTIONS ACT, 1967 (ACT 84 OF 1967) AND THE LAND USE PLANNING ORDINANCE, 1985 (ORDINANCE 15 OF 1985)

1. In the light of recent judgements against local authorities and/or this Provincial Government in respect of applications/appeals processed in terms of the above legislation the following amended procedures are proposed:

1.1 Applications for the removal, amendment or suspension of conditions in terms of the Removal of Restrictions Act, 1967 (Act 84 of 1967).

1.1.1 The applicant shall lodge with the municipality the original application, whilst a copy shall simultaneously be forwarded to this Provincial Government at the under-mentioned address (section 3(2) of the Act).

1.1.2 The municipality shall transmit its comments and recommendation on the application to the Provincial Government. If the municipality fails to transmit its comments and recommendation within a period of thirty days after receipt of the application, the Provincial Government shall proceed with the application (sections 3(2) and 3(8) of the Act).

1.1.3 The Provincial Government shall subsequently request the municipality to advertise the application and shall also determine which landowners are directly affected by the application. The municipality shall also be requested to serve notices on these landowners. The advertisements/notices shall clearly state that objections may be lodged within 21 days with the Provincial Government with a copy to the municipality. After expiry of the 21 day period the municipality shall obtain the comment of the applicant on any objections

2/...

Privaatsak X 9083
KAAPSTAD 8000
Waalstraat 27
Faks (021) 4833633

Private Bag X9083
CAPE TOWN
27 Wale Street
Fax (021) 483 3633

and provide the Provincial Government with comment and recommendations thereon (sections 3(6) and 3(7) of the Act).

1.1.4 The application will then be further processed by the Provincial Government.

1.2 Appeals in terms of Section 44 of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985)

1.2.1 In the event of an appeal by an applicant against a decision of a municipality the municipality shall, in writing, inform all persons who have submitted valid objections against the application and these objectors shall be given 21 days to comment on the appeal.

1.2.2 In the event of an appeal by an objector, the municipality shall inform the applicant and all other objectors of such an appeal and the appellant as well as any other objectors must be given 21 days to comment thereon.

1.2.3 The Chief Executive Officer may publish an advertisement in an appropriate newspaper which states that an appeal was received, that particulars of the appeal are open for inspection during office hours at a particular address and that comment on the appeal may be submitted within 21 days to the municipality if the Chief Executive Officer is of the opinion that it will be an unreasonable financial burden or it will not be possible to serve a copy of the appeal document on the objectors/applicant as with a petition. If it will also be an unreasonable financial burden to serve the appeal document on the objectors or the applicant due to the bulkiness or technical nature of the document, the Chief Executive Officer may serve a written notice on the objectors/applicant wherein similar particulars as in the above-mentioned advertisement are mentioned.

1.2.4 The Chief Executive Officer shall, within one month after the expiry of the 21-day period mentioned in paragraphs 1.2.1, 1.2.2 and 1.2.3 above, submit his Council's comment on the appeal and any other comment to the Provincial Government for further processing.

1.2.5 The 21-day period provided for the lodging of, and comment on an appeal, shall be reckoned from the date of registration of the municipality's letter to the date of receipt of an appeal/comments by the Provincial Government/municipality. The days shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on a public holiday, in which case such Sunday and public holiday shall also be excluded.

1.2.6 In order to enable the Chief Executive Officer to still comply with regulation 24 of the Regulations Made In Terms of Section 47(1) of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985), as promulgated in Provincial Notice 1050/1988 dated 5 December 1988, an appeal shall be deemed to be complete on the day following the day on which the 21-day period mentioned in paragraphs 1.2.1 and 1.2.2 above expires.

3/...

Home owners' association.

29. (1) Either the Administrator or the council concerned, as the case may be, may impose conditions under section 42 as to the granting of an application for subdivision in terms of section 25(1), in relation to the compulsory establishment by the applicant for subdivision of a home owners' association.

(2) A home owners' association coming into being by virtue of the provisions of subsection (1)—

(*a*) shall be a body corporate;

(*b*) shall have a constitution which—

(i) has as its object the control over and the maintenance of buildings, services and amenities arising from the subdivision concerned;

(ii) provides for the implementation of the provisions of paragraph (*c*), and

(iii) has been approved by the council concerned in order to ensure that the provisions of subparagraphs (i) and (ii) are being complied with, and

(*c*) shall have as its members the owners of land units arising from the subdivision concerned, who shall be jointly liable for expenditure incurred in connection with the association.

(3) A home owners' association which came into being by virtue of a condition imposed under the Townships Ordinance, 1934 (Ordinance 33 of 1934), and which exists at the commencement of this Ordinance, shall be deemed to be a home owners' association which came into being by virtue of the provisions of subsection (1) of this section.

(4) (*a*) If a home owners' association referred to in subsection (2) or (3) fails to meet any obligation resting on it by virtue of the provisions of subsection (2)(*b*)(i) or (*c*) and the community concerned is in the opinion of the council concerned adversely affected by such failure, the said council may take all steps required to rectify that failure, and recover from the owners referred to in subsection (2)(*c*) the amount of any expenditure incurred by it in relation to such steps.

(*b*) Amounts so recovered shall for the purposes of subsection (2)(*c*) be deemed to be expenditure incurred in connection with the home owners' association concerned.

Amendment or cancellation of plan of subdivision.

30. (1) Either the Administrator or a council, as the case may be, may after an application has been granted under section 25 and after consideration of objections received in consequence of an advertisement in terms of subsection (2) of this section and after consultation with the owner of the land concerned, the Surveyor-General and, in the case of the Administrator, with the local authority concerned, in relation to land units not yet registered by virtue of the granting of that application, amend or partially cancel the plan of the subdivision concerned, including a general plan, or cancel the plan of the subdivision concerned, including a diagram or general plan, provided any public street or public place concerned is closed in terms of the Municipal Ordinance, 1974 (Ordinance 20 of 1974), or the Divisional Councils Ordinance, 1976 (Ordinance 18 of 1976).

(2) The director, where the Administrator may act under subsection (1), or the town clerk or secretary, where a council may so act, as the case may be, shall, if he is of the opinion that the amendment or cancellation of a plan of subdivision under subsection (1) adversely affects the interest that any person has in land, advertise the proposed amendment or cancellation of a plan of subdivision, and thereupon the provisions of section 24(2)(*d*)(ii) or (4)(*b*) shall *mutatis mutandis* apply.

(3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply to general plans in existence at the commencement of this Ordinance.

Registration of and building upon land units.

31. (1) Before registration by virtue of a subdivision in respect of which an application has been granted under section 25 is effected by the registrar of deeds concerned, the transferor shall furnish proof to the local authority concerned that any condition on which the application for subdivision concerned was granted, has been complied with, and no written authority under section 96(1) of the Municipal Ordinance, 1974 (Ordinance 20 of 1974), or section 96(1) of the Divisional Councils Ordinance, 1976 (Ordinance 18 of 1976), shall be issued unless such proof has been furnished.

(2) Except with the approval of either the Administrator or if authorised thereto by scheme regulations, a council, a building or structure may only be erected on a land unit forming part of a subdivision which has been confirmed.

Reversion of certain places and land.

32. If the plan of a subdivision including a diagram or general plan, is in terms of section 27 deemed to have lapsed in part or is cancelled in part under section 30, the ownership of the public streets and public places concerned which are shown on the part thereof which is so deemed to have lapsed in part or which is so cancelled in part, shall revert to the owner of the land concerned.

CHAPTER IV: PLANNING ADVISORY BOARD

Establishment of Planning Advisory Board.

33. (1) [1](*a*) The Administrator shall establish a board to be known as the Planning Advisory Board for the province.

(*b*) The Administrator may establish one or more standing committees comprising any number of members of the advisory board for the purpose of exercising any power or performing any duty of the advisory board in terms of this Ordinance, determined by the Administrator.

[2](1A) The Planning Advisory Board and any standing committee referred to in subsection (1)(*b*) which were established in terms of this Ordinance before the assignment of the administration of this Ordinance under section 235(8) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), to a competent authority within the government of a province, shall cease to exist with effect from the date of such assignment; provided that any matter pending before such Planning Advisory Board or standing committee immediately before the said date shall be disposed of by such Planning Advisory Board or standing committee as if it had not ceased to exist.

(2) The advisory board shall consist of such number of members, not exceeding seven, as the Administrator may from time to time determine.

(3) The members of the advisory board shall be appointed by the Administrator from persons who in his opinion have knowledge and experience of matters connected with the application of this Ordinance.

(4) The Administrator shall appoint every member of the advisory board on such conditions, including conditions as to the payment of remuneration and allowances, as the Administrator may determine at the time of the member's appointment; provided that a person who is in the full-time service of the State shall not be appointed a member of the advisory board.

(5) The Administrator shall designate a member of the advisory board as the chairman thereof and another member as the vice-chairman thereof.

(6) When the chairman of the advisory board is absent or is unable to perform his functions, the vice-chairman shall, subject to the provisions of subsection (9), act in his stead and when the vice-chairman so acts, he may exercise or perform any power or duty of the chairman.

(7) (*a*) Every second year after the establishment of the advisory board, such members thereof as may be designated by the Administrator (except the chairman, who shall hold office as such for four years) shall vacate office as members of the advisory board and the Administrator shall, subject to the provisions of subsection (3), appoint new members in their place.

(*b*) No member of the advisory board shall hold office for an uninterrupted period of longer than four years.

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[1] (a) substituted by Proc. No. R168/1994, *Government Gazette* 16049 (31.10.94) w.e.f. 31.10.94.
[2] (1A) inserted by Proc. No. R168/1994, *Government Gazette* 16049 (31.10.94) w.e.f. 31.10.94.