



Draft Spatial Planning and Land Use Management Bill

Isandla Institute's Comment

Isandla Institute is a public interest think-tank focused on fostering just, equitable and democratic urban settlements. It pursues this by conducting cutting edge research, knowledge sharing, the development of alternative frameworks and methodologies, advocacy and consultancies. Isandla Institute's urban land programme has focused on the land governance system in South Africa. It has traced the negative impact that an incoherent spatial and land use planning and management system has had on the development of post-apartheid South African cities and advocates for the need for the urban poor to have access to well-placed urban land, both a means and a precondition for realising their right to the city.

Isandla Institute thanks the Department of Rural Development and Land Reform for the opportunity to comment on this Bill. In this document Isandla Institute has limited itself to a commentary on the deeper conceptual weaknesses and silences within the Bill. A more detailed commentary on specific provisions will be more productive once these issues have been addressed. However, if the Department is interested in this level of detail, Isandla Institute can certainly provide further, more detailed, inputs.

1. Introduction

The spatial structure and functioning of South African cities have largely continued the patterns of exclusion and inequality that were embedded during Apartheid. Despite early indications that the socio-spatial transformation of South African urban areas would be a priority (for example, in the rapid promulgation of the Development Facilitation Act), the 'heart' of the planning system has remained focused on high-level strategic planning through Integrated Development Plans (IDPs) and, at a regulatory level, on enforcing environmental and heritage standards. The state's most powerful tools in transforming the urban form, appropriate regulation and land-use management, have thus far remained unaddressed, in many cases forcing local government to use outdated and inappropriate mechanisms to achieve the socio-spatial objectives indicated in IDPs.

This Bill is an opportunity to equip local officials and structure of the processes of local government to increase the livability, productivity, integration and sustainability of South African cities. It is also an opportunity to begin to recognise the complex diversity of uses and functions land has in enabling citizens to claim their right to their city. The structure of the commentary largely follows that of the Bill, although it begins and ends with more general comments about the underdevelopment of the legislated processes within the Bill and its institutional location within the state.

2. The underdevelopment of legislated processes

Isandla Institute is aware that a pressing time line was created by the Constitutional Court judgement about the Development Facilitation Act (DFA) for the formulation and promulgation of this Bill. However, it seems as though this is being achieved by deferring or devolving much of the procedural detail; those aspects of spatial planning and land use management that detail the

functional systems that determine land development. These are the indispensable ‘nuts and bolts’ that determine the efficacy of the whole system.

The Bill seems to try to pursue a ‘one size fits all’ approach to legislating a system of land governance. However, perhaps in an effort to avoid any ‘powers and functions’ conflicts between the different spheres of governance, it has adopted a minimalist approach by detailing as few of the functional systems as possible. While there is always a tension between prescription and allowing for local discretion when formulating effective legislation, experience (see point 4 below) has shown that provincial and municipal staff require basic guidance with regards to implementing the principles and processes envisaged in this new approach to spatial and land use planning and management.

The central problem is that the Bill repeals the DFA, thereby leaving, in many provinces, only outdated provincial ordinances until new provincial legislation is passed (or requiring the amendment of more up-to-date provincial legislation in line with this Bill). Producing appropriate legislation is a complex and costly process that can take a long time. There is a very real danger that development within provinces will be negatively affected by these lag times, and that some provinces may be unable to draft legislation capable of encapsulating the principles and intent indicated in this Bill. ***An alternative would be to outline a series of basic procedures and systems, encapsulating the key elements of the Bill, which will apply in all provinces until provincial legislatures are able to supplant them with local legislation.*** This would create the opportunity for highly capacitated provinces and municipalities to adopt more locally-appropriate systems, while ensuring a basic quality of practice across municipalities.

In addition, while the spatial justice aspects of the Bill are to be applauded, a great deal of the ‘nuts and bolts’ of this transformative intent is dependent on the compulsory norms and standards determined by the Minister. ***While there is a brief reference to public consultation, Isandla Institute would like to highlight that a great deal of the thrust of the Bill will rest on these ‘norms and standards’ and so a clear programme of extensive engagement should be outlined.***

3. Commentary on the principles and approach advocated in the Bill

The formulation of the principles identified in the Bill, particularly the multifaceted characterisation of spatial justice, is to be welcomed. This section focuses on three progressive aspects of the approach to spatial planning and land use management advocated for in the Bill: spatial justice, the recognition of informality and the formulation of sustainability.

3.1. The need for a clear prioritisation of spatial justice and urban land reform

While the two are not necessarily mutually exclusive, the ‘balance of forces’ between the need to achieve spatial justice and to ‘enable economic growth’ remains somewhat inconclusive in the Bill¹. Two comments are important to make about the indeterminacy of these signals. First, while progressive social values were promoted in the White Paper on Spatial Planning and Land Use Management, they had little effect in the practice in local government under pressure to maximise

¹ For example, spatial justice is embraced as a discrete principle (s6(a)), while the promotion and stimulation of an effective and equitable functioning of the land markets is one aspect of ‘spatial sustainability’ (s6(b)). However, the priorities indicated in the more ‘practical’ s23(1), which outlines the purpose and content of land use schemes, places economic growth before spatial justice. Finally, s6(a)(vi) and Section 55, which indicate that the effect on the value of nearby properties cannot be used to impede decisions made in accordance with the Act, would seem to be the most forceful recognition of the need to consider non-market factors when pursuing spatial justice.

economic growth and municipal revenues. ***The progressive aspects of the Bill, therefore, need to be indicated with more force; that is, when local government is asked to navigate difficult trade-offs they should be compelled to pursue the option most likely to directly maximise the realisation of the socio-economic rights of citizens, particularly the poor and vulnerable groups.*** Second, ***this would be further strengthened by a more detailed description in Section 55 of the types of factors that should be weighed when applying the Act.*** That is, changing it from a negative injunction to a positive outlining of the most salient factors that should be considered (e.g. Section 35(3) and (4) of the Constitution that outline the factors that should be considered during the expropriation of property). The extensive jurisprudence in Central and South America that seeks to balance the protection of private property with its ‘social functions’ (particularly in so far as it can enable the realisation of collective second and third generation rights) could be instructive to formulate such a list of factors. ***These factors should promote spatial justice, serve to curtail speculative activity and the underdevelopment of public and private land, and democratise urban space.***

The pursuit of social justice, as outlined in s6(a)(iii), will require ‘provisions that enable redress in access to land and property by disadvantaged communities and individuals’. However, the exact nature of such provisions remains underdeveloped throughout the rest of the Bill. For example, land use schemes should ‘include provisions to promote the inclusion of affordable housing in residential land development’ but there is little indication of the *mechanism* to be used by local government to do this ‘promotion’ (s22(2)(d)). South African and international experience shows that such goals need to be linked directly to muscular land use management instruments, generally referred to as ‘value capture’ instruments. ***This Bill needs to be far more explicit about the mechanisms available to local government officials to enable its transformative principles.*** One example to be found in the Bill is the provision which requires residential developers (although it gives no indication of scale so this may equally apply to subdivisions) to provide ‘land for parks, or open space’. ***This requirement would be substantially strengthened by expanding the possible uses of this land by adopting a phrase such as ‘land for social infrastructure or public good’².***

The ‘social function of property’ also implies the active participation of citizens in shaping rights and responsibilities of individuals and groups during the development of land and space. While there is reference to ‘transparent processes of citizen engagement’ in the ‘good administration’ principle, the pursuit of spatial justice would seem to demand a stronger approach to citizen involvement. The provision outlined in s11(1)(o) for ‘substantial citizen engagement including direct participation’ in the formulation of SDFs would seem to be closer to this conceptualisation. ***Isandla Institute would therefore recommend a more active formulation of participation, which is explicitly linked to the pursuit of spatial justice, in the principles and processes of planning.***

3.2. The need for a coherent approach to addressing informality and incrementalism

One of the most exciting aspects of the Bill is the consistent recognition of the historical exclusion of informal areas in spatial planning and land-use management. ***The two most progressive aspects of this are the references to incrementalism³ and the references to security of tenure (linked to the incremental upgrading of informal areas).*** Translated into practice these could make a huge difference in confirming a shift in government policy towards a positive approach to engaging with informality and the needs of the urban poor.

² The phrase ‘other uses’ is in the title but not the body of the section.

³ For example, the reference in the principles (s6(a)(iv)) of the need to develop a land use management systems that are ‘flexible and appropriate’ for the management of informal areas and the ‘incremental introduction of land use management’ in (s22(2)(c)).

However, there are two comments to be made about the current formulation. First, it remains unclear whether these references ‘add up’ to a coherent approach to informality. This is made even more poignant by the weight given to provincial legislation in the Bill and the hostility indicated thus far by provincial legislatures to informality (e.g. KwaZulu-Natal’s Elimination and Prevention of Re-emergence of Slums Act). ***A more systematic treatment of how these different references add up to an approach to informality, and how they connect to the approach being pursued by other departments (e.g. Breaking New Ground), would strengthen these provisions.***

Second, their connection to the formal system (and mechanisms that enable the ‘redress in access to land and property for underprivileged communities’) remains undefined. A great deal of the academic and activist debate about land use management reform is centred on this question. Either two parallel systems are created, each with their own set of ‘appropriate’ mechanisms, are established or a single integrated system is pursued (with some recognition of the distinct needs for informality in some areas). There are extensive arguments on either side of this issue; each with concrete and tangible implications for the establishment and functioning of the wider system envisaged by the Bill. ***It is therefore important to be as explicit as possible about the aims, functions and implications of the approach to informality, and its relationship to wider planning and management systems embraced by the Bill.***

3.3. The integration of environmental considerations into the principles and approach

While there are a number of references to the need to ‘comply with environmental legislation’, the imperative to integrate sustainability into spatial planning and land use management remains somewhat fractured throughout the Bill. The environmental sustainability aspects in ‘spatial sustainability’ (‘locations that are sustainable and limit urban sprawl’) and ‘spatial resilience’ do not add up to a coherent approach to navigating the complex social and environmental challenges involved in formulating SDFs or regulatory procedures. There is a very real danger that the parallel systems that have thus far developed between spatial/land planning and environmental planning are replicated or aggravated by the tone set in the Bill. ***The Bill needs to include a far more explicit and rigorous approach to questions of environmental and social sustainability.***

4. Problematic conceptualisation of local government in the ‘spatial planning system’

Establishing a wider system of planning within which land use management can operate is a huge step forward. However, there is a worrying lack of attention in the Bill to the planning powers and purview of municipalities. Given the focus of the constitutional court judgement that requires ‘municipal planning legislation’, the tone and provisions of the Bill continue to suggest a relatively top-down approach to planning and decision-making. The conceptualisation of the role and powers of local government, particularly the need to empower this sphere with the autonomy to pursue locally-determined priorities and procedures, remains underdeveloped. ***This may undermine some of the transformative potential of Bill, or even make it vulnerable to a Constitutional Court challenge.***

In order to further enable local government, the Bill needs to improve and clarify the relationship between different systems of planning at a municipal level. For example, research commissioned by the Department of Rural Development and Land Reform (DRDLR) in 2010 has shown that compilers of SDFs struggle with the following aspects:

- a) Applying national and provincial spatial policies and principles and related planning concepts to the reality at the municipal level.

- b) Formulating practical and implementable SDFs, with measurable targets that will allow for assessing the success of an SDF.
- c) Aligning SDFs with other sector planning in municipalities and with the planning of neighbouring municipalities.
- d) Achieving buy-in of SDFs, thus improving their status and role in guiding decisions made by municipalities.

There is little indication in this Bill that these issues have been substantively addressed. In fact, legislating this new framework of interconnected SDFs, with the injunction that that they improve integration and coordination across scale, would seem to aggravate the current difficulties experienced by municipalities when translating wider policy and different sectoral demands into 'practical and implementable SDFs'. The danger with this new planning system is that it continues and deepens the current pattern of SDFs, which are produced, often at some cost to the municipality by external experts, but have little impact on the decision-making and practice of municipal officials. The Bill is therefore an opportunity to clarify the connection between IDPs and SDFs (the references to the Municipal Systems Act (MSA) provide little substantive guidance⁴).

As outlined above, another pressing example is the relationship between the spatial/land use planning and the environmental and heritage planning regulatory systems. Despite the opportunity that s28-9 creates for the integration of these processes at the local level, it continues to limit this to a case-by-case basis that have to be negotiated by local authorities (effectively ensuring this will only occur in highly capacitated municipalities) and provides no guidance on navigating the 'trade-offs' and 'risks' that may occur when combining disparate planning systems that are underpinned by different rationalities, professions and bureaucratic norms.

5. Lack of clarity about interfaces within the 'spatial planning system'

The success or failure of the Bill will also be determined by the intergovernmental relations that make up the interfaces between scales and functions. It is these interfaces that have the devilled attempts at integration and establishing coherence in planning. It seems likely that references to the need for planning at different levels to be 'co-ordinated, aligned and be in harmony' and 'integrate and spatially express policies and plans emanating from the various sectors' (in line with established IGR systems and the MSA) will be sufficient to achieve these outcomes. ***The mechanisms that will enable these outcomes must be further developed.*** For example, Sections 36 and 40 outline the scopes of the Provincial and Municipal Planning Tribunals – indicating that the determining factor is the difference between 'municipal' and 'provincial' interest. Where a clash emerges, the provincial overrides the municipal, potentially undermining the municipality's ability to enact their SDF. Little guidance is given to navigating these dynamics; in fact, the current formulation encourages the emergence of dichotomies and inconsistencies between different spheres. In the case of this example, an alternative would be to have municipal and provincial officials jointly sitting on an appeals tribunal to try and coordinate the priorities across different scales.

⁴ Spatial planning provides a *dynamic opportunity* for many of the political processes that that produce the priorities identified in the IDP to be debated, crystallised and 'tested' against/in the 'real world' opportunities and dynamics made visible through SDFs. Rather than a passive representation of a wider process, as they often currently are in practice, the formulation of SDFs contain the *possibility* to further interrogate the 'trade-offs' and 'risks' that are an inherent part of the planning process.

6. The Department of Cooperative Governance and Traditional Affairs as the most appropriate institutional 'home' for this legislation

Finding the appropriate institutional home for spatial planning and land use management has remained a challenge to the formulation and implementation of this legislation. The Department of Land Affairs has traditionally had an overwhelmingly rural orientation, which has been reinforced by its recent renaming to the Department of Rural Development and Land Reform, and this legislation, with its primary focus on regulating urban land development, has been a difficult fit. ***Isandla Institute recommends that this legislation, and the departmental and ministerial powers outlined in it, should be transferred to the Department of Cooperative Governance and Traditional Affairs.*** It is a more appropriate department because of its experience with the promotion of the current system of Integrated Development Planning and because land use management is such a central part of the practice of local government.

Isandla Institute would once again like to thank the Department for the opportunity to comment on the Bill. For more information, please contact

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