Principle based planning as a means of facilitating development: the provisions of the Development Facilitation Act and the proposals of the Green Paper on Development and Planning

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Abstract

This article is an attempt to place a perspective on the new system of planning proposed by the Green Paper on Development and Planning issued by the Department of Land Affairs in May 1999. It is to some extent based on comments made to the Department by the author on behalf of the Association of Consulting Town and Regional Planners (North Region), South Africa Planning Institution (Gauteng, Mpumalanga, Northern and North West Provinces) and the Association of Chartered Town Planners in South Africa. The kernel of the article arose from a debate regarding the desirability of having a statutory significance attached to policy documents. It will become evident that answering this point, which may, at first glance be a misleadingly simple one, has resulted in an examination of the new system of principle based planning in the perspective of existing circumstances in planning and on the basis of the experiences of others in dealing with development. The debate regarding statutory significance is related to: the number of statutes affecting planning; the content and effect of land development objectives/integrated development plans and the effect on capacity in the profession. The system requires a significant adjustment to the way in which planning is approached. It is based on the interpretation of principles and not a reliance on prescriptive mechanisms such as town-planning schemes. In the context of the new system and its manner of operation, there are contradictions in what is proposed by the new system. There are two main conclusions: that the content of Integrated Development Plans and the method of their formulation are critical in allowing principle-based planning to succeed; and that the legal requirement imposed on local authorities to plan has a significant effect on capacity and that present staffing policies actively work against the system being successful.

BEGINSEL-GEBASEERDE BEPLANNING: DIE BEPALINGE VAN DIE WET OP ONTWIKKELINGSFASILITERING EN DIE VOORSTELLE VERVAT IN DIE GROEN-VERSLAG OOR ONTWIKKELING EN BEPLANNING

Dié artikel poog om perspektief te plaas op die nuwe beplanningstelsel vervat in die Groen-verslag van Mei 1999 oor Ontwikkeling en Beplanning van die Departement van Grondsake. Dit is tot 'n mate gebaseer op die kommentaar van die outeur aan die Departement namens die Vereniging vir Konsulterende Stads- en Streekbeplanners (Noordelike Provinsie), Suid-Afrikaanse Beplanningsinstituut (Gauteng, Mpumalanga, Noordelike en Noorwes-Provinsie) en die Vereniging vir Geoktrooieerde Stads- en Streekbeplanners in Suid-Afrika. Die artikel het sy ontstaan te danke aan 'n debat oor die wenslikheid vir die wettiging van beleidsdokumente. Met 'n eerste oogopslag lyk 'n oplossing vir die kwessie bedrieglik-eenvoudig. Dit het daartoe gelei dat die nuwe sisteem van beginsel-gebaseerde beplanning nagegaan moes word ten opsigte van die ervaring van andere t.o.v. ontwikkeling. Die debat oor die statutêre belang is verbandhoudend tot die aantal statute oor beplanning, die inhoud en effek van grondontwikkelings-oogmerke/geïntegreerde ontwikkelingsplanne en die invloed op die kapasiteit van die professie. Die sisteem benodig groot aanpassings ten opsigte van die wyse waarop beplanning benader word. Dit is gebaseer op die interpretasie van beginsels en nie op 'n vertroue in voorgeskrewe meganismes soos stadsbeplanningskemas nie. In die konteks van die nuwe sisteem en die manier waarop dit . opereer, is sekere teenstrydighede aanwesig t.o.v. dít wat die nuwe sisteem voorstel. Twee afleidings kan gemaak word, naamlik dat die inhoud van die Geïntegreerde Ontwikkelingsplanne en die geformuleringswyse, krities is vir beginsel-gefundeerde beplanning; en dat die wetlike vereistes vir plaaslike owerhede 'n groot invloed het op kapasiteit, daarbenewens hou die huidige indiensnemingsbeleid nadelige gevolge in.

The legal framework

There are a multitude of statutes that have an affect on development in the country, that have implications on policy formulation and development applications. A list of those which have an influence in Gauteng (which is not exhaustive) includes; the Development Facilitation Act, 1995, the Physical Planning Act, 1967, the Advertising on Roads and Ribbon Development Act, 1940, the Agricultural Holding (Transvaal) Registration Act, 1919, the Townplanning and Townships Ordinance, 1986 the Division of Land Ordinance, 1986, the Gauteng Removal of Restrictions Act, 1996 and the Environment Conservation Act, 1989. The Development and Planning Commission identified the problems inherent in such a cumbersome system in the Green Paper on Development and Planning (DPC (1999(1)). The Development Facilitation Act, 1995 (Act 67 of 1995) was enacted as overarching legislation in the country, in an attempt to rationalise the system.

The situation is however, complicated by the structure of government. The Constitution of the Republic of South Africa Act, 1996 (Act 102 of 1996), hereinafter referred to as the Constitution provides that differing spheres of government may enact their own legislation, provided that the provincial legislation falls within the ambit of, and does not defeat, the intentions of the national statute(s). In some provinces, provincial statutes have partially repealed the DFA (e.g. Kwa Zulu Natal Development and Planning Act, 1999, the proposed Gauteng Development Planning Bill), whereas in others, the DFA has become the primary statute (Mpumalanga), and in others, the DFA is not implemented (the Free State and Western Cape).

A further complication is that other central government departments have

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adopted the principles of "integrated planning" and apart from the Land Development Objectives of the Development Facilitation Act, Integrated Development Plans are required by the Department of Provincial and Local Government (formerly Constitutional Development), Integrated Transport Plans by the Department of Transport, and Integrated Environmental Management Plans by the Department of Environment and Tourism. The interrelationship between these plans is uncertain.

The post 1994 statutes not only determine and require that policy[1] planning is carried out, but also determine to a greater or lesser degree how development applications are to be lodged and who has authority for their approval. There is a separation between approval by provincial and local bodies; in some instances the provincial body is only an appeal body, but in others, the sole approval body. Although the multitude of statutes provide choice in the manner in which one may submit an application, there is duplication in the system and in some instances, a dual application and approval process is required. The most significant complication lies in approval in terms of Section 22 of the Environment Conservation Act, 1989 as well as approval in terms of, for example, the Town-planning and Townships Ordinance, 1986 or other statute affecting land use change.

The Development and Planning Commission, established in terms of Section 5 of the Development Facilitation Act, 1995 (Act 67 of 1995), recommends that the system be rationalised to one national and nine provincial statutes to overcome these[2] problems. It does not however, place any priority on this and instead recommends (section 3.6.3.4) a transitional period. (DPC, 1999(1)) In view of the emphasis that the Commission places on the legislative framework of the past and the problems that became manifest, this is not a supportable stance. The thrust of planning at national scale must be towards the immediate rationalisation of the legal system within which development occurs. It seems trite that the profession battles with concurrent legislation that has an identical but duplicating effect. There is the potential for the system to be implemented without the necessity of provincial statutes that merely repeat what is in the primary statute, on the basis of local conditions, since the Act allows for an MEC to interpret the provisions of the DFA by notification in the *Provincial Gazette*.

The DFA introduces a number of principles which provide yardsticks for the formulation of policies, administrative practices, laws and decision making and which furthermore, are applicable to any law that deals with land development. The Act introduces several important features that form the basis of the discussions in this article:

- That government bodies are required to plan (Chapter IV, dealing with Land Development Objectives)
- That decision making is by a Tribunal appointed by the Provincial MEC, which is apolitical (technical) as opposed to one comprised of elected representatives
- That Land Development Objectives have a certain statutory significance (Section 29 of the Act) and finally
- That government department and bodies are required, in terms of the Regulations, to complete actions within specified time frames in regard to land development applications (Regulation 21 of the Development Facilitation Regulations, 2000).

The Act confers sufficient power on a Tribunal to take decisions that override any of the other statutes mentioned, with the possible exception of the Environment Conservation Act, 1989 (the ECA) and statutes affecting mining and mineral rights[3]. There is a question mark as to whether the DFA has greater authority than the ECA, as a result of the difference in the method by which power is devolved to the provincial MEC[4]. Efforts are being made at present to overcome this inconsistency, since the regulations to both Acts effectively require the same process to be followed in arriving at a decision regarding the environment. The significant difference between the Green Paper and the DFA relates to the fact that decision making is made at the provincial level, whereas the Commission feels strongly that planning (spatial planning) should occur at the local level (DPC 1999(1)). This is dealt with in other sections.

Far from rationalising the system, the proposals of the Commission do little more than extend the life of a presently cumbersome system, and then replace it with one that might be equally cumbersome. To be fair however, the Commission can do little to influence decisions beyond the Department of Land Affairs, under whose jurisdiction it operates. The implication is that planning administration must be rationalised. Although the Commission moves that

[1] The term policy planning is adopted to mean IDP and LDO planning and is distinct from development applications.

[2] The Green Paper on Development and Planning, May 1999.

[3] Section 2 of the DFA provides that the principles of Section 3 of the Act apply to all bodies and have an over-riding influence on any other laws.

[4] The DFA provides that actions be devolved to the provincial level in the body of the Act, whereas the ECA devolves power from the Minister to the MEC in the Regulations to the Act. The former is a direct devolution of power, whereas the latter is indirect.

the home for spatial planning be in the Department of Land Affairs, this would still leave other aspects related to planning in differing departments (e.g. Provincial and Local Government (formerly Constitutional Development), Trade and Industry, Transport and the like) and would not address the issue of rationalisation. There has to be a strategic planning department/function established that can, by law, provide and create both horizontal and vertical integration in order to avoid the manifest and numerous problems that the Commission identifies. Such a department should, of necessity, be established at all levels of government and would be inter- and multi-disciplinary.

Principle based planning

To turn to the specific provisions of both the DFA and the Green Paper with respect to development, the fundamental issue facing the profession is not just the need to plan but more significantly, the manner in which planning is to function in the future. The latter affects how plans are produced and furthermore, the significance of policy on decision-making.

Normative planning

The Green Paper on Development and Planning issued by the Department of Land Affairs postulates that planning should be a normative exercise, as opposed to one that is based on rules and regulations, as has been the case in the past (DPC, 1999(1)) The idea of 'normative' planning had its roots in the 1960s where the profession searched for a means by which comprehensiveness could be attained. Comprehensiveness in this instance recognised the criticism of planning as being a technocratic exercise where some remote body imposed a remote definition of the 'public good' on the society affected by its actions.

Faludi (1973) postulates that John Friedmann first introduced the idea of "normative" planning in discussing the differences between "functional" and "normative" planning. Functional planning deals with the means by which plans are produced, with the alteration and adaptation of the means without reference to the end state of the plan. Normative planning on the other hand, concentrates on the end state and the effect that the plan has on society, with the adaptation of both the means and the end in the planning process (Friedmann, 1966/7).

Other authors, such as Wheaton and Wheaton (1965), and Davidoff (1965), placed emphasis on the influence of society as a fundamental facet of comprehensive planning, the former dealing more with the ethical fabric of the planning as the protector of the "public good", and the latter examining advocacy as a planning role in making the values of society, or a sector of society known, and thereby influencing decision and policy making authorities. The effect was a two-fold change in the nature of planning. On the one hand, theorists such as McLoughlin (1969) and Etzioni (1967) proposed theories which dealt with the manner in which decisions can, or should, be taken, whereas others, such as Davidoff (1965), Friedmann (1966/7), and more recently, in the South African context, Muller (1982), concentrated more on a debate on the ethical responsibilities of a planner. The common factor was that the idea of a fixed, desired end state was abandoned in favour of a more flexible approach where the recognition of change (both technical and societal) became the basis of planning. More fundamentally, the influence of society became an accepted and recognised pre-condition of plan formulation and decision-making.

Patsy Healey (1996:282) in analysing several British development plans concludes :

> "A development plan is the product of processes of interaction between a range of parties, and in turn becomes an object, a point of reference, for continuing interactions. Within these interactions, one or many discourses may evolve, each with its own 'story line'. Plan preparation itself may involve a process of 'making story lines', although more usually pre-existing 'stories' and strategies are consolidated in plan making and translated into reference criteria for regulatory decisions and development briefing. The analysis of the communicative work of plans is thus only one part of the more general analysis of the discourses and 'discourse making' involved in planning activity."

As the international community of planners battled with the shift away from technocracy, the same was not true of South Africa. Under a rigid government, planning was confined to being largely a technical exercise based on prescriptive spatial and political strategies that were imposed on society as a whole through apartheid legislation. The desired end state of the nation, effectively determined in a spatial sense by the 1913 and 1936 Land Acts and thereafter reinforced either by statute (for example, the Physical Planning Act of 1967) or policies such as the National Physical Development Plan, 1975, and the Regional Industrial Decentralisation Policy, 1982-1991, continued to be pursued. Societal influence was minimal at best and excluded from the majority.

Principle based planning

On my reading of the Commission's interpretation of the principles, the generality of the principles themselves and the content of approved local Land Development Objectives, I believe that normative planning can only be considered as being in its infancy and have therefore preferred

to employ the term "principle based" planning as being more definitive of the present approach. The following paragraphs detail my thoughts. The DFA requires that general principles relating to land development be used in the compilation of all policies, plans, administrative practices and laws (Section 2). Section 3(1) of the Act lists the thirteen principles. The Act requires that the 13 principles underpin land development objectives, and that applications for land development include a section on the relationship between proposals and the principles.

The principles are derived from ideas of what "good planning" is (particularly Section 3(1)(c)) and are, to an extent, prescriptive. For example, the notion of the *compact city* (DFA : Section 3(1)(c)(vi)) may not necessarily be in tune with the normative approach. It implies that residential densities must increase, although the values in that area might be in conflict with such a notion. The notion of increased density is easily justified from a technical viewpoint, but normative planning requires a balance between technical issues and societal values. It might be argued to the contrary that the philosophy of the Green Paper is such that the balance between the context and the principles (in other words, their interpretation) will determine the relevance of any specific principle in policy formulation and decision-making. In this sense, the principles provide a framework within which a normative approach can occur. All too often however, the notion of compactness has translated into increased densities without reference to societal values, locational attributes or a proper recognition of the environmental context. In a similar sense, decisions are taken contrary to LDO's, as a result of the content of the document offering little to guide decision makers. This aspect is discussed with regard to IDP/LDO content in a later section.

The extent to which the principles are normative is therefore debatable from two aspects. Firstly, they are statutory and therefore imposed and secondly, they are not necessarily interpreted fully in LDO documents to the extent that they provide guidance to decision-makers. They do however provide a transitional framework between the past and future systems. A normative basis to planning has the implication that planning must become more *interpretative*, given the generality of the 13 principles of the Act. The principles are to be interpreted by national, provincial and local government bodies, as well as by local non-government bodies in the formulation of policy. They are furthermore, interpreted by applicants in land development applications. Despite criticism of the generality of the principles, they provide flexibility in the decision-making process and are well suited to be interpreted at the appropriate level of government.

The new system

The system may be simplified to be as follows:

- The formulation of land development objectives by a local authority, for approval by the provincial minister in executive committee. The approval process is based on the relationship between local authority areas and the provincial imperatives (if set). There is a strong requirement for public participation in the formulation of LDO's, (see for example, the Gauteng Regulations (Gauteng 1996)). The LDO document therefore becomes strongly political
- The requirement for land use management systems is based on a similar idea of flexibility and a movement away from rigid rules and regulations. The system provides the controlling mechanism of land development (DPC 1999(1))
- Land development applications decided on by an apolitical (technical) tribunal who are required to relate the application to the relevant land development objective. Section 29 of the Act provides that decisions cannot be inconsistent with any approved land development objective. The objectives therefore have a statutory importance.

The fundamental departure from the past is that local authorities are required to plan. Underpinning this system is the legislated requirement for development to be facilitated, which is detailed to the extent that a development tribunal can order any law, policy, condition of title or servitude, process or product invalid, if their existence has a dilatory effect on the development process[5]. Furthermore the Regulations to the DFA set down time frames within which the public authorities must act on an application.

A contentious aspect of the system is the separation between the political process of the formulation of land development objectives and the technical nature of the decision making process. This forms the bulk of the discussion set-out below and relates directly to whether policy planning should have a statutory significance. Allied to this is the content of policy documents, since there is a supposition that policies exist, which can guide decision-making.

Technical or political decision-making?

The DPC (1999(1)) contends that decision making be based on a technical interpretation of policy which is formulated by means of a strongly political process. Decision-making is based on policy plans, which have the

[5] Section 34(1)(j)(vi)

effect of becoming statutory. Section 29 of the Development Facilitation Act, 1995 precludes a Tribunal taking a decision that "is inconsistent with any land development objective contemplated in this Chapter ...".

The system is premised on policies and plans being available to decision-makers. Although Section 29 makes provision for decisions to be made in the absence of such plans, it is clear that decision-making is facilitated by the presence of policies and plans. In favour of technical decision making is the view that decision making is better served by a technical interpretation of the relationship between an application and the particular IDP and the general principles of the Act and is competent, since the IDP is a statutory document and there is, in the majority opinion of the Commission, a need to separate policy formulation and decision making. Allied to this is the fact that, without a dominant political party in the political tribunal, decisions may vary[6].

The debate against technical decision-making is that development is an intensely political process and it is necessary for decision makers to have control over the process. There is a cost associated with the establishment of local tribunals should planning devolve to the local level.

The DFA makes provision only for a single (professional) Tribunal which functions at a provincial level. There appears to be merit for a mechanism to be introduced (Section 29) that gives some certainty to the local authority that policies will not be easily ignored by an external decision-making body. The debate revolves around a number of aspects:

- Whether IDPs should have a statutory significance, or not
- The content of IDPs
- The level of government at which decisions are taken.

Statutory significance

The view on this aspect can be summarised as follows: In favour of making plans statutory is the idea of certainty. There are advantages to certainty enjoyed by both the public and private sectors and by the local community that is likely to be affected by the proposals. This notion is carried forward to the extent that the life of a plan seems to be determined by statute. The contrary argument is that statutory significance is at odds with the notion of development. The problem is that land use policies become entrenched and any application that is contrary to the plan runs the risk of being seen as an illegal action. It furthermore constrains the actions of the market (and would therefore be contrary to Section 3(1)(m) of the DFA which limits public sector interference in development). Unless reviewed properly and regularly, it pre-supposes that the future can be precisely determined, whereas development is dependent on any number of factors that cannot be regulated or made statutory.

If the new system is aimed at facilitating development, then the idea of a statutory plan must be seen as being inimical to that process. The following factors should be considered;

- The Green Paper and DPC 27/99 both refer to the need to move away from the past system, based on rules and regulations, towards a normatively based, flexible system.
- In assessing the past systems of planning in South Africa, the DPC was highly critical of past planning actions, such as the production of Guide Plans in terms of the Physical Planning Act, 1967 (as amended in 1991) which enjoyed a statutory significance in that compatibility certificates were required to effect a land use change that might be considered contrary to the Guide Plan.
- Experience in other countries (primarily the U.K.) indicates that giving policies and plans statutory significance has the effect of negatively affecting the development process, to the extent that ultimately, policy plans were not submitted for formal approval to the Department of the Environment and remained in draft form. Effectively they formed a guiding mechanism for public and private sector actions. A not insignificant problem was that the plan (i.e. the spatial representation of the proposals) could never become statutory, requiring a detailed listing of proposals for each land parcel within the plan's framework.

The presence of Section 29 of the DFA (1995) and the proposals of the Green Paper, (1999(1)) are clearly at odds with the notion of normatively based planning, flexibility and a rejection of planning based on a series of rules and regulations. There is the real danger that IDPs become little more than a series of rules and regulations, until such time as they are reviewed. The flexibility inherent in the new system will be lost. The following factors need consideration:

- It is not trite to say that IDPs tend towards an entrenchment of the status quo, or at best, a marginal recognition of the future. This is not surprising as property owners have a perfectly valid need to protect their investments and the majority are not sufficiently

[6] The author is aware of instances where, due to political groupings, densities granted to properties in one area, with essentially the same locational criteria and advantages varied from 20 to 35 dwellings per hectare. Note that the LDO/IDP for the area was not resolved and what policy documentation was available referred to the general area merely as one of opportunity.

[7] Annual review is interpreted as being a monitoring function, whereas substantive review is an amendment to the provisions of the policy.

mobile to easily relocate. The IDP may well ignore the regional, provincial or national significance of a town or suburb

- The IDP can only be successful if reviewed properly. It has been suggested that this is accomplished through an annual review period with substantive amendments being made every five years[7]. The review period is statutory in as much as a local authority need not substantively review an LDO before the expiry of the 5-year period. It fails to recognise that trends and patterns in development shift in arbitrary cycles and five years may well be too long a period for a substantive review to be effective. Similarly, it does not recognise that different areas have different development pressures and require modification at different times. Issues relating to local authority capacity, a significant problem identified in the Green Paper, militate against review being successful
- There is no mechanism available for an applicant to show that an IDP may be ill founded, or has become outdated. There is no mechanism that requires that outdated IDPs become invalid or that IDPs become void if not reviewed within the statutory period[8].

In general, it is considered that attaching a statutory significance to policy planning is less desirable than so doing. Experience has shown that there is little benefit to be derived from such a system.

IDP content

The content of the IDP becomes critical. On the one hand, it may be too broad to be easily interpreted yet on the other, it may well be too detailed to retain flexibility. Section 29 prohibits tribunals from taking decisions that are *inconsistent* with IDPs. Inconsistency has a negative connotation and can be likened to "in conflict with"; the Afrikaans text uses the term "strydig met". The development proposal must therefore have a negative impact on the IDP in order for it to be rejected. If it has a neutral effect then it can be approved. If the land use proposal does not appear in the IDP, then it is not sufficient for it to be rejected on that basis alone – the test is whether it will have a negative effect on the IDP.

Notwithstanding the above, the level of detail of the IDP determines the ability of a tribunal to relate an application to the IDP. The relationship between the IDP content and the land use management system employed is also critical as the management system will determine, to some extent, the manner in which the IDP is framed. Some local plans for example are specific in ascribing zonings and development controls to properties. Consistency might be interpreted very narrowly for example, a rejection of a marginal variance in a development control. On the other hand, an IDP that is too general has infinite flexibility and the debate regarding consistency could be extremely difficult to articulate. Generality will affect the ability of the Tribunal to relate the application to the IDP and would therefore render the provisions of Section 29 somewhat meaningless.

The content of the IDP also affects the willingness of applicant's to take advantage of the provisions of the DFA in submitting development applications[9]. The Regulations to the Act require a great deal of preparation by the applicant, and without a certainty in whether the application will be successful; the risk of obtaining approval is magnified. From a decision maker's point of view, greater detail in IDPs makes a decision easier, but flexibility is impaired by detail. The interpretation of what constitutes consistency with an IDP therefore become critical and this interpretation may vary from tribunal to tribunal.

Level of government

If one is to accept the view that Section 29 was introduced as a result of the separation of policy making (local) and decision making (provincial) to differing levels of government, then there may well be a case for statutory significance to fall away. Should decision-making be devolved to the local authority through an amendment to the DFA through the provisions of the provincial legislation then one is faced with an immediate contradiction between the administrative and judicial functions of the local authority[10]. If a local tribunal is appointed and financed by the local authority, criticism could be raised about its objectivity in interpreting IDPs.

Synthesis

In the system is a dilemma that faces the profession. On the one hand are the numerous advantages to the new system to all persons affected by

[8] The Gauteng Development Planning Bill, issued for comment in November 2000, permits applications that are "inconsistent" to be approved if the applicant can demonstrate that; the application falls within the ambit of the development principles, or if it is in the "public good" (Section 50(2)).

[9] The Act requires that most, if not all documentation be attended to prior to the decision being taken by the Tribunal. The facilitation of development through being able to act much more quickly after a tribunal decision is taken is advantageous, but without certainty regarding the outcome of the application, it might well militate against this particular procedural route.

[10] The IDP would be adopted by the same body that would assess a land development application. There is the possibility that inconsistency would be applied strictly in accordance with the provisions of the IDP and flexibility would be impaired.

development, yet on the other, there is the potential that attaching a statutory significance to policies may work against development. Both the process leading to approval of development applications and the content of IDPs, must be carefully determined and monitored if the idea of a technical decision making body is to have relevance and acceptance at the local level.

The issue that must be answered is whether a technical body can take a decision on the basis of politically influenced plans, without the plans having a statutory significance. To this end, the following factors must be considered:

- There must be a clear and accepted interpretation of the general principles in the IDP, at whatever level of government it is generated. This gives guidance to the decision maker regarding the interpretation of the IDP in relation to an application for development
- The IDP must demonstrate the interaction between the land under its jurisdiction and the adjoining IDP areas. This implies that each IDP would be informed and influenced by others
- The IDP must look to the future. Those areas that experience the greater pressure for development are often the areas whose inhabitants (residents) are most vociferous against development. A projection of the status quo cannot be considered to be effective in dealing with the future. By their nature, the IDPs must consider other matters in reaching finality[11]
- The content of the IDP must be flexible enough to bear interpretation and to accept change, which implies that alternative forms of development must be considered and prioritised. This may take the form of alternative land uses, but may also, within reason, articulate unacceptable forms of development
- There must be an acceptance that the IDP is not finite and that different interpretations may well have merit[12].
- A decision should not be based on the number of objections to the application, but rather on the technical merit of the application versus that of the objectors (i.e. a decision is not an election)
- The tribunal should be directed to publish its reasons for approval or refusal of an application, and in so doing, relate the decision taken to *its* interpretation of the IDP and principles against the proposals of the application. This will provide all parties to the development process with clarity and in so doing, aid certainty to some extent. This will have the effect of establishing precedent and decision-making would therefore become a process within itself
- The IDP must provide its own process of monitoring and review – there must be a clear statement regarding the responsibilities for review and a minimum time period for review
- Penalties must be levied against a failure to review IDPs, to the extent that the IDP be visited with nullity
- Applications must show the relationship between their provisions and those of the IDP. In the event of the application being contrary to the general aims of the IDP, demonstrate clearly why such an application should receive approval. Applications must not however be automatically rejected on the basis of being contrary. Provision must be made for an applicant to demonstrate that a policy is outdated, because the shift in development trends will, in all probability, be different to those of the review periods of the policy. The debate revolves around a number of issues:

- Whether there should be a separation of policy formulation and decision making processes
- The content and detail of IDPs
- At what level decision making should occur.

In response to the first issue, it is considered that the experience of the DFA Tribunal has indicated the value of a separation between policy and decisions on applications. The system permits inconsistencies that arise in decision-making at the local level to be avoided and permits consistency in approach and decision-making. This is not to suggest however that a political decision making body *would be* inconsistent, although there appears to be sufficient evidence in the profession that political groupings

[11] In one instance the choice between the resident's wishes (20 dwellings per hectare) and the technical opportunity of providing for sustainable infrastructure development (35 dwelling units per hectare) is yet to be resolved by the local authority.

[12] Interpretation may be made through consensus, but equally, be made by the decision maker after reference to the opposing parties. Experience has shown that successful interaction between the applicant and the local resident's association has permitted consensus to be reached within the framework of the local IDP. This does however presuppose an informed association and, furthermore, one that is willing to debate the form and substance of development as compared to rejecting it out of hand.

The local IDP was flexible enough to permit discussion (for the example, the maximum floor area ratio permitted in the area was not defined, but rather, the document relied on the satisfaction of environmental principles to achieve a desired end state).

[13] Section 5.3.6 of the Green Paper states: "The bodies that make decisions regarding land development applications must be able to use the spatial aspects of IDPs as the framework and basis of decision making. The regulations that define what should be contained in the spatial aspect of IDPs must therefore be clear and give local authorities guidance. This is similar to the way in which DFA Tribunals are bound by LDO's when reaching decisions".

do affect decisions taken on similar applications.

It is fundamental to the system that the content of IDPs be carefully considered in order to facilitate a correct decision. This is necessary whether there is a technical or political tribunal taking a decision. It may however require that IDPs have some statutory significance[13] . The relationship between the IDP and the management system will influence the ability of a decision making body to be "consistent". The interpretation of principles as well as a spatial representation will assist, but even so, the IDP may become little more than a blueprint plan and ultimately, defeat the aims of the new system. In reply to the third, it appears that it would be retrogressive to take away power from the local authority in as far as decisions on land use changes are concerned.

The challenge is to achieve a mind-set away from the idea of an IDP as primarily a product, to one where it becomes both a product and a process. Normative planning is based on interaction and a continued debate and reaction to changing values and technical possibilities. In Friedmann's terms, it is a continued manipulation of both the means and the end. Patsy Healy's idea of a "democratic plan" provides us with a idea of the future:

> "Explicating political, economic and moral dilemmas will produce a necessary ambiguity in a plan. The democratic plan should bring this ambiguity to the foreground rather than suppress it in a deceptive presentation of a technically robust consensus. A plan may thus both express established rules and seek to challenge them" (Healey 1996:266).

The relationship between policy formulation and development control

A matter that has received attention is the relationship between the idea of principle-based planning and the traditional forms of land use control that exist. There is furthermore a move towards a system that suggests that the policy document has the ability to confer rights on properties. This idea must be rejected for the following reasons:

- It automatically removes any flexibility from planning
- It has an immediate and significant impact on ratepayers
- In the light of the previous discussion on IDP content, could probably never be based on consensus.

Comments forwarded to the Development Planning Commission state that, in the same way that it is desirable to separate political and technical decision making, there must be a separation between policy formulation and development control. To this end, the notion of principle based planning requires a great deal of interpretation of the general principles of the Act and the land use provisions of any IDP.

Interpretation in planning

The generality of the 13 principles of the DFA have an immediate consequence for the planning system in that they must be interpreted at the level at which they are to be implemented. Not all of the principles will be appropriate and those that are will have a differing importance, depending of the scale of planning that is undertaken.

It is however imperative that the principles are interpreted in land development objectives if the policy is to attain the robustness that it seeks. From a planner's perspective, the implication is the effect that policy has on land (spatial) development. To this end, the policy must relate to the management system of a local authority but there is a danger that the flexibility inherent in interpreting policies is lost through the introduction of spatial plans that are similar to the guide and structure plans of the past. Some LDOs are detailed to the extent that development controls (such as floor area ratio or density) are pre-determined and are as a consequence entrenched, since inconsistency could relate to *any* divergence from an adopted control.

There is a further danger in too much reliance being placed on the policy plan and there is certainly the perception that LDOs are finite and have a set life, which is based on the five-year substantive review period. This period coincides neatly with political tenure but from a development point of view, becomes meaningless since development cannot be so neatly packaged and pre-determined. The danger is however that there is only the statutory necessity to review at this period, which does not imply that a policy cannot be reviewed in a short period, but which does imply that, for various reasons, it may well be convenient for a policy to have as long a life as possible. Conversely, there is a danger that a policy may be too general to be of assistance in decision-making. At present there is a gap between the need for certainty and the flexibility of process, which may be ascribed to two primary factors:

- The inherited knowledge and traditional approach of the past system regarding the formulation of spatial policies
- The existence of traditional town-planning and zoning schemes on which the technical detail of policy plans rest[14].

Zoning and town-planning schemes

It is, I believe, of relevance to realise that with the devolution of decision making power to authorised local authorities provided for in the 1986 Town-planning and Townships Ordinance (Gauteng) (Ordinance 15 of 1986), town-planning schemes were not adjusted in so far as procedures were concerned. Prior to the coming into operation of the 1986 Ordinance, the 1965 Ordinance (Ordinance 25 of 1965) determined that township establishment and rezoning application were to be considered at provincial level (by the Townships Board). Secondary (consent) use applications were decided upon by a local authority in terms of a procedure defined in the relevant town-planning scheme. The procedural distinction between primary and secondary uses ('important' and 'less important') fell away, and the local authority became the master of its own planning decisions. The important advantage of secondary uses (they were generally quicker to obtain) became redundant, but the dual purpose of schemes continued.

Given the generality of the definition of land development in the Development Facilitation Act and the move towards a unitary system, the distinction within the town-planning scheme of consent use procedures appears trite, since any change in land use could be dealt with in by means of single application. The effect of the procedural difference is minimal and the definition of use zones offers merely an indication of what is and is not considered a compatible land use mix. My experience is that zoning schemes have generally failed. This statement is based on a number of factors:

Firstly, the reliance on the 'Special' use zone (with attendant annexure or schedule) in applications, as opposed to placing the property in one of the predetermined use zones. The definition of the use zones is at fault. The requirements of development and the prescription represented by use zones often preclude the use of a single use zone, arising from either the need for a secondary use to be incorporated as a primary use, or the absence of a land use type in the use zone. The catch-all 'Special' use zone is then employed.

Secondly, the system may be abused. Since a use zone may permit a number of primary rights, any one of them may be built in isolation, possibly defeating the intention of planning for that property[15].

Thirdly, schemes define development controls, which determine floor area, density, height, coverage and a range of other factors. Few schemes provide a developer any flexibility in these controls, leading to an increased development period, the costs of which are passed on to the end user. The result of a reliance on zoning and control is that developments are made to fit the zoning, whereas the better solution would be for the zoning to be tailored to fit the development. Zoning and conditions have the effect of levelling the playing field, but remove the ability to stop poor developments and might well reduce the beneficial impact of good developments.

Zoning and planning permission

The principle-based approach to development is entirely against the setting down of *predetermined* standards and regulations for development. It requires that each development be assessed on its own merits, within an overall city structure and vision that is provided by the IDP. The system requires that a decision be made on the basis of a clearly articulated development proposal (a site development plan in traditional terminology) that provides sufficient detail for its merit to be assessed. The site development plan becomes the application, as opposed to a zoning proposal being motivated and assessed on the basis of what *might* happen if such a zoning was approved. Certainty in development would be provided by a clearly articulated product, rather than on reference to other developments that enjoyed the same zoning.

Land Use Management Systems must be seen to be regulatory mechanisms separate from policy formulation. The interpretative nature of the new system means that the relative importance of the traditional town-planning scheme is down-graded to the extent that it need only be a register of land uses and a series of definitions of land use types.

The importance given to policy formulation implies that matters relating to the relationship between use zones can be replaced by a clear statement

[14] Although the content of IDPs/LDOs varies, there is the clear need for spatial planning policies to relate to the legal and technical framework in existence – that is, the relevant town-planning scheme that has jurisdiction. The variance in definitions between town-planning schemes (for example, the Johannesburg, Randburg and Sandton Schemes) within a functional metropolitan region has been identified as a problem. The problem is exacerbated in as much as the boundaries for the metropolitan local councils include not only two or more of the Scheme areas, but area also subject to the control mechanisms of the Black Communities Development Act (now replaced by Regulations to the Town-planning and Townships Ordinance, 15 of 1986). Not only is there variance in the detail (i.e. the definition of a particular use zone, land use or development control), but the relationship between the sophisticated and the less sophisticated creates an illogical management framework against which equitable policy documents can be tested.

[15] The Standard Bank computer centre in River Club is an example of offices being built on a property zoned Business 3, where the intention was for a shopping centre to be erected. Similar examples are present in the Sandton Town Planning Scheme area. On the other hand, the developments provide proof that isolated office functions do not have a deleterious effect on the neighbourhood.

in the policy regarding the relationships between alternative *land uses*. They should, as far as possible, avoid being too prescriptive regarding development control ratios, such as floor area ratio, density and the like. In addition, the relationship between land uses should be specified at the policy stage, with reference to both alternative land uses and secondary land uses that are deemed appropriate in the area. The blanket approach to zoning currently in operation would therefore fall away in favour of a well-defined local development framework. The town-planning scheme then becomes no more than a record of decisions regarding land use change.

Technical controls should be tailored to the product, as opposed to the product being tailored to the controls. Decisions must be taken rapidly, since the success of the product may be lost through dilatory processes. The way forward is a reversal of the traditional role of planners, which will require them to be primarily involved in policy formulation and its review and *not* in the processing of development applications.

The effect on capacity in the public sector

What is clear concern to both the Commission and to members of the planning profession is the effect that the present transitional period has on the capacity of the profession to implement the changes required by new legislation and the proposals of the Green Paper. Negative effects on the profession arise from a number of sources:

- The present policy of the government in freezing posts vacated by incumbents
- The statutory requirement that local authorities are required to produce plans
- The number of differing procedures, application types and similar mechanisms required by different pieces of legislation
- The absence of job reservation not only in so far as development applications is concerned, but also in relation to the absence of a requirement for professionally qualified (registered) town and regional planners in government services
- The use of consultants to not only prepare policy documents on behalf of the local authority but in some instances, to give of their time in overcoming backlogs in applications
- Arising from the above, a lack of recognition of the profession by the public service.

Criticisms that have been levelled against the IDP process have arisen in part from the use of private sector consultants in the formulation of these documents, largely as a result of lack of capacity in local authority staff establishments. Although there may be some merit in this criticism, the fact remains that the use of the private sector professionals was forced on local authorities by a deliberate policy of not replacing staff. It seems rather unfair to blame one sector of the profession for circumstances that were well beyond its control.

The more serious manifestation of a lack of capacity has been the inability of local authorities to implement IDPs. This arises not only from existing demands in processing development applications, but also from the fact that officials were not involved at first hand in the formulation of policy documents and therefore do not enjoy ownership of such policies. There is a clear implication arising from the above that limits the effectiveness of the profession in implementing the requirements of existing statutes and the proposals of the Green Paper. At another level however, present policy relating to employment in the public sector is inimical with the statutory requirement to plan.

In the light of previous comments made regarding the role of local authority planners in the context of the new system, the policy regarding post freezing could be seen to be illegal in relation to the provisions of the DFA (and other statutes which require planning to be carried out by the local authority) and certainly must be seen as a factor which severely limits the ability of the local authority to achieve principle based planning. The effect on the new system on the administrative structures and capacity of the country is one which has not been fully investigated and which requires urgent attention.

Conclusion

The number of statutes that are in existence have a negative effect on planning and development in the country. There is an urgent need to rationalise the legislative framework surrounding planning and by implication, the administrative arrangements that would emanate from such rationalisation. It is critical that duplication in decision-making be obviated and removed if development is to be accelerated.

There appears to be little need to move beyond the Development Facilitation Act. Weaknesses in the Act, identified by the Commission, can be overcome and provide for the necessary facilitating framework. An additional nine statutes would serve only to perpetuate the cumbersome nature of the system. There is a need for a single department at all levels of government to provide for horizontal and vertical integration. The multitude of differing departments and departmental policies that impact on spatial development creates confusion and has a dilatory effect.

The new system requires and is premised on the provision of policy plans to guide decision making on development. The content and nature of these plans has a profound effect

on the manner in which the system will operate, given the fact that they must interpret broad principles and at the same time give sufficient guidance to decision makers to reach an informed decision. The policy documents presently have a statutory significance, and this significance appears to be related to the separation between policy formulation and decision-making. It may be related to the level at which decisions are made on applications in terms of the Development Facilitation Act. There is an inherent danger that the statutory significance of policy documents leads to the principle-based system being eroded to the traditional and undesirable blueprint based approach. Statutory significance can only be successful if the necessary systems are in place that require review at regular intervals and impose penalties against non-performance. Without such mechanisms, the system will fail.

The system requires interpretation of *general principles at all levels and is* not one that is based on rules, standards and regulations. As a result, there is a significant reversal in the role of local authority planners, who will be involved more in interactive policy formulation, monitoring and review than in the processing of development applications. The policy document itself should guide decision-makers in the relationships between land uses, and alternatives that can be contemplated.

The present significance of town planning schemes will fall away. Decisions on applications should be made on the basis of a product, with controls tailored to fit a defined development proposal, as opposed to the development falling within a zoning. This requires both interpretation and an accelerated approval process. The effect on capacity cannot be underestimated. Present policy regarding public sector employment (in all three spheres of government) is defeating the ability of the country to develop. The implication of the system proposed by the Green Paper is that more, rather than fewer, planners are required to achieve its objectives. What is evident is that there are a number of contradictions manifest in the new system:

- The recognition of the negative effects of past statutory mechanisms that affected development, with an attitude that suggests that the rationalisation of the legal framework for planning is not a priority
- An acknowledgement of the negative effects of a lack of co-ordination, without properly assessing the need to alter structures to require vertical and horizontal co-ordination
- A requirement for planning to occur in a policy framework of ever diminishing staff in government to achieve these ends
- A reliance on the planning profession to achieve ends, without a recognition of the profession's expertise in this area
- A flexible approach, based on the interpretation of principles that never-the-less may well become inflexible and rule bound
- A premise that decision-making occurs on the basis of policy formulation, without the necessary recognition that the policy document may well not lend itself to this.

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