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**A CRITICAL REVIEW OF THE EXTENT TO WHICH CONTEMPORARY PLANNING  
LEGISLATION APPLICABLE WITHIN THE CITY OF CAPE TOWN PROVIDES LEGAL  
MECHANISMS FOR PROMOTING SPATIAL JUSTICE**

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**Abstract**

Proper planning and land use management are central to the creation of quality of life for the people of a country. In South Africa, land use planning had been shaped to political ideologies to divide land on the basis of race. With the advent of democracy in South Africa, centuries of inequality and discrimination were rectified by the promulgation of the Constitution which most notably attempts to protect the fundamental rights of equality- and property rights in a planning context. The South African Government has since passed legislation aimed to achieve the realization of the rights which the Constitution aimed to protect and to establish more humane and environmentally sustainable living and working environments for South Africans. However, the challenges of urbanisation, transportation and fragmentation in the urban contexts still exist and land use management and land development management remain the least transformed and least developed areas of post-apartheid planning. This research considers the theoretical basis of spatial justice and the role of the law in achieving it. It identifies and critically considers potential legal measures contained in contemporary spatial planning legislation aimed at promoting the realisation of spatial justice, and its effectiveness in doing so. Given the prevalence of different regional and local planning legislation, and bearing in mind the limited scope of this research, the focus of the above legal enquiry is delimited to spatial planning legislation applicable in the City of Cape Town.

## 1. Introduction

Spatial (in)justice refers to an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice<sup>1</sup>. It involves the fair and equitable distribution in space of socially valued resources and the opportunities to use them. Spatial justice does not replace social, economic, or other forms of justice, but instead views justice differently from a critical spatial perspective<sup>2</sup>.

Spatial justice<sup>3</sup> as a development principle of planning legislation is, in theory, intended to address and rectify the past legacy of racial inequality, segregation, and sustainable settlement patterns. Spatial justice means that past spatial and other development imbalances are redressed through improved access to and use of land, which is achieved by employing the components of a planning system. Land governance is the starting point to implementing spatial justice. It is a key instrument to organise land and resolve disputes and conflict, thereby ensuring that society functions efficiently and achieves its goals<sup>4</sup>.

Land governance relates to all processes and structures associated with land, land rights, land use and land development.<sup>5</sup> Planning law is an important form of land governance and is concerned with the determination of principles and devices underpinning spatial planning, land use management and land development management in the different spheres of government in order to promote the health, safety and welfare of society as a whole.

Land use management involves the alteration of land use by way of procedures that facilitate land development, rezoning and the removal of restrictions. Land development management includes township layout and establishment, subdivision of land and erection of buildings within the context of sustainable development<sup>6</sup>.

The law, in the form of land governance, therefore plays an important role in the eradication of spatial injustice.

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<sup>1</sup> Soja E *The City and Spatial Justice* JStor 2009 Paper prepared for presentation at the conference Spatial Justice, Nanterre, Paris, March 12-14, 2008

<sup>2</sup> Ibid

<sup>3</sup> As defined in section 7(a) SPLUMA

<sup>4</sup> Manikoth A R *Urban Land Governance and Spatial Justice: Case of Rotterdam Municipality, Netherlands* MSc Thesis: International Institute of Urban Management of Erasmus University, Rotterdam (November 2018) at 22

<sup>5</sup> Afinowi O A *An Outline and Critical Assessment of the Role of Planning laws in the Regulatory Framework of Climate Change Adaption in South Africa and Nigeria* July 2018 PhD Thesis UCT at 40

<sup>6</sup> Van Wyk J *Can Legislative Intervention achieve Spatial Justice?* (2015) 381 XLVIII CILSA at 33

South Africa is the crudest example of spatial injustice where people were discriminated against and marginalised on the basis of race, as regards housing, mobility, economic opportunity and education. With the advent of apartheid, sophisticated local, regional and national planning legislation and mechanisms were applied in respect of urban areas predominantly inhabited by white persons, while a system of separate land use was introduced for predominantly rural areas designated for the use of black persons<sup>7</sup>.

With the advent of democracy in South Africa, centuries of inequality and discrimination were rectified by the Constitution<sup>8</sup> in 1996. Notably the property-, equality- and housing clauses were included to also address the inequalities and dire planning shortcomings brought about by the colonial heritage and apartheid regime. The enactment of the Development Facilitation Act<sup>9</sup> was the new vision for planning, setting out general principles for land development applicable to legislation and decision making throughout the country.

In 2011 the National Planning Commission released its *Diagnostic Overview* which covered the spatial challenges facing South Africa and reinforced the fact that the spatial legacy of Apartheid continued to affect the entire country.

The requirements that spatial planning, land use management and land development must be sustainable, equal, efficient, integrated and based on fair and good governance were finally entrenched in the landmark Spatial Planning and Land Use Management Act<sup>10</sup>. SPLUMA contains a distinctive formulation of spatial justice, requiring integration, inclusivity, diversity, participation and location in planning<sup>11</sup> and contains the most concrete principle of spatial justice found current day South African legislation, in line with global principles of spatial justice.

With the above background in mind, this research paper seeks to critically explore the theoretical question of what is spatial justice and the role of the law in promoting it. A review of the South African legal framework and how it, in particular that applicable in the Cape Town, makes provision for such spatial planning mechanisms to eradicate spatial injustice will be undertaken. The question of whether these legal mechanisms are likely to promote spatial justice in Cape Town, will also be considered.

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<sup>7</sup> Ibid.

<sup>8</sup> Constitution of the Republic of South Africa, 1996. "the Constitution".

<sup>9</sup> Act 67 of 1995 "DFA"

<sup>10</sup> SPLUMA Spatial Planning and Land Use Management Act 16 of 2013.

<sup>11</sup> Fainstein S *Spatial Justice and Planning* JStor 1/2009 at 2; These principles reflect Fainstein's three hallmarks of urban justice, namely equality, diversity and democracy.<sup>11</sup>

The methodology will comprise of a desk-top study of relevant literature and legislation. The literature relating to the concept of spatial justice and the role of the law in achieving it will firstly be considered, in order to introduce the concept, reflect on the potential role of law in promoting its realisation, and develop a theoretical matrix identifying potential legal mechanisms in South Africa's relevant spatial planning legislation. Key potential legal mechanisms embedded in the theoretical matrix will include spatial planning principles and objectives; the prescription of decision-making criteria and the development of spatial plans.

## 2. Spatial Justice

Spatial justice links together social justice and space.

The organization of space is a crucial dimension of human societies and reflects social facts and influences social relations. Justice and injustice therefore become evident in space in a land use context. The understanding of the interactions between space and society is necessary to understand social injustices and to formulate territorial policies aiming at addressing them<sup>12</sup>.

Various views on the concept have developed since its inception.

### 2.1 Conceptualising Spatial Justice

The concept of spatial justice came to prominence particularly in the work of Henri Lefebvre, and two geographers, Edward Soja and David Harvey<sup>13</sup>. They viewed the achievement of social justice as being realized and visible in space. They argued that social justice cannot be achieved abstractly, because social relations take place in a particular space. For Soja the two terms cannot be separated since spatial relations are constitutive of, and constituted by, relations of social justice<sup>14</sup>. Practically, this debate has implications for planning, urban design, and other interventions aimed at addressing social inequality in cities<sup>15</sup>.

Spatial (in)justice refers to an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice. This involves the fair and equitable distribution in space of socially valued resources and the opportunities to use them.<sup>16</sup> Spatial justice as

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<sup>12</sup> Van Wyk at 33

<sup>13</sup> Watson S *Spatial Justice in the City* Taylor & Francis 2020 at 1

<sup>14</sup> Ibid

<sup>15</sup> Ibid

<sup>16</sup> Soja at 3

such is not a substitute or alternative to social, economic or other forms of justice, but rather a different way of looking at justice from a critical spatial perspective. Space is socially produced and therefore can be socially changed<sup>17</sup>.

According to Soja, critical contemporary spatial thinking comprises the principles of ontological spatiality of being<sup>18</sup>, the social production of spatiality<sup>19</sup> and the socio-spatial dialectic<sup>20</sup>. For him, the idea of socio-spatial relations is therefore fundamental. This means that space shapes social relations as much as social relations shape space. Spatial justice involves the fair and equitable distribution in space of socially valued resources and opportunities to use them<sup>21</sup>.

Similarly, social processes such as social stratification, racism, or gender inequality become etched into the physical environment, creating spaces of oppression and discrimination that create or sustain a particular social process.<sup>22</sup> Urbanization exacerbates these social processes<sup>23</sup>.

Spatial (in)justice can be seen as both outcome and process. Therefore, distributional patterns are intrinsically as just/unjust as the processes that produce these outcomes.<sup>24</sup> Locational discrimination, created through the biases imposed on certain populations because of their geographical location, is fundamental in the rendering of spatial injustice and the creation of lasting spatial structures of privilege and advantage. The three most familiar forces shaping locational and spatial discrimination are class, race, and gender. Their effects are not reduced to segregation only<sup>25</sup>.

Locational discrimination created through the biases imposed on certain populations because of their geographical location is fundamental in the production of spatial injustice and the creation of lasting spatial structures of privilege and advantage<sup>26</sup>. The spatiality of

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<sup>17</sup> Ibid.

<sup>18</sup> Soja at 4: "All are spatial as well as social and temporal beings".

<sup>19</sup> Ibid "Space is socially produced and can therefore be socially changed".

<sup>20</sup> Ibid "The spatial shapes the social as much as the social shapes the spatial".

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Madden L A *Rights to the City and Spatial Justice: The Search for Social Justice* Thesis California State University, Long Beach August 2014 at 19

<sup>24</sup> Soja at 4

<sup>25</sup> Ibid

<sup>26</sup> This occurs through the lack of provision of infrastructure such as hospitals and good schools to certain parts of the city.

justice concept has also been described as “territorial justice”, shaping contemporary debates on justice and democracy ever since<sup>27</sup>.

The urban system and everyday urban functioning are primary sources of inequality and injustice, as the accumulation of locational decisions in a capitalist economy results in the redistribution of real income in favour of the rich over the poor<sup>28</sup>. This redistributive injustice is aggravated further by racism, patriarchy, heterosexual bias, and many other forms of spatial and locational discrimination.<sup>29</sup>

## 2.2 The main schools of thought

The essential two main schools of thought in conceptualizing spatial justice are “the just city” and “the right to the city”.<sup>30</sup>

While “the just city” theory accepts that the existing scenario does not proactively promote or create justice, it believes in working with the system and making necessary procedural and outcome-based alternatives to create a just city<sup>31</sup>.

On the other hand, “the right to the city” theory analyses the problem and realises that it is the present economic paradigm of capitalism as the root cause (structural problem) for the injustice and advocates revolution through social movements within cities through a rights-based approach<sup>32</sup>.

### 2.2.1 The Right to the City

Debates about spatial justice have been dominated by a spectrum of strong Marxist and neo-Marxist perspectives<sup>33</sup>. These arguments centre around radical formulations based on an understanding of the urban process in capitalism from a Marxist viewpoint<sup>34</sup>. Inequality and injustice were regarded to be inherent in the social relations of the capitalist society.

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<sup>27</sup> Watson at 1

<sup>28</sup> Soja at 4

<sup>29</sup> Soja at 4

<sup>30</sup> Manikoth at 16

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Watson at 2

<sup>34</sup> Soja at 4

The influence of Marxist urban geography assumed that questions of spatial justice have arisen from the structural inequalities of capital / labour relations<sup>35</sup>. It opposes the notion that justice should be the primary consideration for policy makers, on the basis that genuine reform is impossible under capitalism since capitalism necessarily continuously reproduces inequality and thereby resists attempts at reform<sup>36</sup>.

While witnessing the urban crisis in Paris, Lefebvre and others viewed space through its social production and argued that the manner in which society organizes space, produces and reproduces injustices<sup>37</sup>. The work of Henri Lefebvre created a radically new conceptualization of space and spatiality and specifically an urban spatial concept of justice with him calling for control over the right to the city and the right to difference to be taken back<sup>38</sup>.

The theory of the right to the city is about the rights of all urban inhabitants to participate in the shaping of the city regardless of race, ethnicity, socioeconomic status, gender and citizenship. Social justice is thus achieved in the urban area by creating space for greater democratic participation and inclusiveness in the design of the city, in particular for those that are excluded and marginalized within society<sup>39</sup>. The struggle over the right to the city is therefore both a political challenge to the existing power relations, as well as an economic challenge to neoliberal production and commodification of all space<sup>40</sup>.

Soja's more recent development of the concept of spatial justice focuses on the practical application of some of the more abstract ideas of Lefebvre. For Soja, with the neoliberal acceleration of urbanization, ordinary individuals are at an important point in history for the struggle of the right to the city and spatial justice<sup>41</sup>.

Spatial justice is a complimentary idea to that of the right of the city. It comes out of the same strain of radical geography and a desire to connect space with justice<sup>42</sup>. Soja explains that spatial justice is based on the fact that being a human and living life is a social, temporal, and spatial experience<sup>43</sup>. One essential component is that development is uneven globally,

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<sup>35</sup> Watson at 3

<sup>36</sup> Fainstein at 3

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> Madden at 11

<sup>40</sup> Ibid at 12

<sup>41</sup> Ibid

<sup>42</sup> Soja at 5

<sup>43</sup> Ibid

regionally, and locally. Because of this, all the injustices we encounter in the context of a larger social justice movement, are evident in the built environment we inhabit<sup>44</sup>.

### 2.2.2 The Just City

For Peter Marcuse, the emphasis was on social injustice and the different ways this is portrayed spatially, while Soja afforded a primacy to spatial relations determining social inequalities<sup>45</sup>.

In Marcuse's discussion, as a just city theorist, the focus is more on unequal access to urban resources, education, and civil rights, which then lead to patterns of urban segregation, which has the effect of multiplying the very inequalities that produce them<sup>46</sup>. He argued that the main objectives of planning policies are to address and reduce such inequalities, through justice and the redistribution of resources, on the one hand, or through affording attention to the issues of representation and decision-making processes, on the other<sup>47</sup>.

Fainstein prefers a framework of political and legal institutions that prevent excessive concentrations of property and wealth, especially those which tend to lead to political domination<sup>48</sup>. Equal opportunity is to share primary goods, which includes self-respect as well as wealth. The fair distribution of benefits and mitigating disadvantage should be the aims of public policy<sup>49</sup>. She proposes criteria that offers a set of expectations that ought to form the basis for achieving spatial justice, comprising the furtherance of equality, diversity and democracy<sup>50</sup>.

Van Wyk<sup>51</sup> remarks that a fundamental objective in all societies should be to continually strive to increase justice or to decrease injustice. The physical environment in which we are born and grow up is one of the most important determinants in our well-being and life chances. Location affects communities, local economies, labour markets and infrastructure networks. Access to markets and suppliers determines their survival and profitability. Long distances between jobs and housing and poor services exacerbate poverty and inequality.

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<sup>44</sup> Ibid

<sup>45</sup> Watson at 2

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid at 9

<sup>49</sup> Ibid

<sup>50</sup> Ibid. In terms thereof all new housing developments should provide decent units for households with lower incomes and suitable living environment for everyone. There should be broad consultation that includes representatives of groups currently living in and outside affected areas.

<sup>51</sup> Van Wyk at 35

According to Van Wyk, the three most familiar forces that shape spatial discrimination are class, race, and gender. A spatial environment that is determined by these discriminatory forces is unjust, which is then referred to as spatial injustice<sup>52</sup>.

Principles of spatial justice are closely related to the history, culture, traditions, politics and social values in a society. Van Wyk proposes that the most significant forms of spatial justice based on race, class, ethnicity and gender, the involuntary confinement of any group to a limited space and the allocation of resources unequally over space.

Watson states that spatial justice, the erosion of social inequalities or differences constituted in relations of power, across city spaces, can only ever be resolved temporarily, producing in time new patterns and distributions that need to be addressed<sup>53</sup>. This fluidity results in the vibrant energy of the city, which makes possible new formations and relations which themselves are constantly settled and are unsettled. Spatial justice is an elusive objective and always worth striving for even if the gains are temporary and fluid<sup>54</sup>.

### **3. The role of the law in achieving spatial justice**

As a development principle of planning legislation spatial justice<sup>55</sup> is, in theory, intended to address and rectify the past legacy of racial inequality, segregation, and sustainable settlement patterns<sup>56</sup>. Spatial justice means that past spatial and other development imbalances are redressed through improved access to and use of land, which is achieved by employing the components of a planning system.

Land governance is the starting point to implementing spatial justice<sup>57</sup>.

Land governance is a key instrument to organise land and resolve disputes and conflict, thereby ensuring that society functions efficiently and achieves its goals. Manikoth identifies the main conflicts on land as being between social justice, being “pro poor” and economic development on the one hand, and the protection of the environment and the best use of land on the other<sup>58</sup>. Good land governance resolves these conflicts and improves equity and sustainability in an attempt to achieve spatial justice.

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<sup>52</sup> Ibid.

<sup>53</sup> Watson at 3.

<sup>54</sup> Ibid at 4.

<sup>55</sup> As defined in section 7(a) SPLUMA

<sup>56</sup> Manikoth at 16

<sup>57</sup> Ibid

<sup>58</sup> Ibid

Land governance determines the manner in which decisions on land are implemented and enforced, while competing interests in land are managed.<sup>59</sup> Weak land governance can have adverse consequences by exacerbating existing inequities, corruption and conflict.

Principles of good land governance to achieve spatial justice are tenure security of disadvantaged groups, equitable participation, adherence to the rule of law, sustainability, efficiency and effectiveness<sup>60</sup> It includes the guarantee of services on land and the fair and equitable distribution of State resources such as the provision of infrastructure and basic amenities<sup>61</sup>.

Of utmost importance to good land governance is the safeguard of human rights, which is essential as good governance is primarily based on the preservation of human rights. The recognition and enforcement of such rights is a way to ensure effective and good land governance<sup>62</sup>. Only strong legal and institutional systems can produce good land governance.<sup>63</sup>

Land governance has a pluralistic nature which requires several legal and policy frameworks to synchronize with each other, as well with as the process of governance within a State. It is the convergence of the laws, rules, policies, processes and structures through which access to land and its use are controlled, thereby promoting spatial justice<sup>64</sup>. Land governance therefore relates to all processes and structures associated with “land, land rights, land use and land development”.<sup>65</sup> Planning law is therefore an important form of land governance and determines principles and devices underpinning spatial planning, land use management and land development management in the different spheres of government in order to promote the health, safety and welfare of society as a whole<sup>66</sup>.

The purpose of planning is broadly described in planning instruments as improving the quality of life and welfare of the community as a whole. Since 1994 the concept of the welfare of the

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<sup>59</sup> Afrinowi at 21. It is multidisciplinary and comprises a unique set of definitive principles and procedures, it relies on other disciplines such as administrative law, property law and environmental law.<sup>59</sup>

<sup>60</sup> Manikoth at 39

<sup>61</sup> Ibid.

<sup>62</sup> Afrinowi at 22.

<sup>63</sup> Manikoth describes “land governance” as encompasses the law, the processes employed to implement the law, land use, land value capture mechanisms, the institutions that are responsible for land management and stakeholder management, which all culminates in the efficient and equitable shaping of urban development. Manikoth at 16

<sup>64</sup> Ibid

<sup>65</sup> Afrinowi at 33

<sup>66</sup> Ibid.

community could be seen to incorporate all communities and not only one community or group<sup>67</sup>.

Van Wyk argues that mechanisms to achieve spatial justice should be strategic tools that test urban planning and housing decisions, taking into account their impact on the space of the city. She regards them as mechanisms which are used to spatialise political debate and social struggle. It can be applied to gather and polarise different interests in resistance movements. The mechanisms can also motivate for a geographically equitable distribution of resources, services, and access<sup>68</sup>.

Government policies which address the inclusion of people and areas which were previously excluded promote spatial justice if their emphasis is on informal settlements, former homeland areas and areas characterised by poverty and deprivation<sup>69</sup>. Spatial planning mechanisms should comprise provisions that enable access to land and property by disadvantaged communities and persons. Land use managements systems must therefore include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas<sup>70</sup>.

While the focus of planning law is on spatial planning, land use management and land development management, spatial justice can only be achieved if it is one of its fundamental principles. This can be achieved through the prescription of spatial justice as one of its main principles and objectives, decision-making criteria, the perimeters for the development of spatial plans and the possible inclusion of incentives to land owners and property developers<sup>71</sup>.

Van Wyk<sup>72</sup> defines planning law as that area of the law that provides for the establishment of a sustainable spatial planning framework and for the management of land use and land development, if it is intended to ensure the health, safety and welfare of society as a whole, while considering the effect on the environment and the requirements of transport.<sup>73</sup> Land use management involves the alteration of land use by way of procedures that facilitate land development, rezoning and the removal of restrictions. Land development management includes township layout and establishment, subdivision of land and erection of buildings within the context of sustainable development<sup>74</sup>.

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<sup>67</sup> Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A)

<sup>68</sup> Van Wyk at 35.

<sup>69</sup> Ibid.

<sup>70</sup> Van Wyk *ibid.*

<sup>71</sup> Ibid.

<sup>72</sup> J Van Wyk *Planning Law 2ed* (2012) Juta &Co at 12.

<sup>73</sup> Ibid at 10

<sup>74</sup> Ibid.

As the law is concerned with people and the regulation of society, planning is similarly concerned with people and the regulation of their environment. The social aspect is central, where there are people there must be planning and there must be law. Law and planning interface in planning law<sup>75</sup>. However, not only the physical aspects of land use regulation, but also the social aspects, are relevant. In the context of South Africa of today, this would include improving existing social relations and adjusting the imbalances of the past<sup>76</sup>.

Spatial planning is equipped to promote spatial justice through the creation of integrated development plans, spatial development frameworks and town planning. It establishes zoning and land use schemes in order to determine the specific uses of erven in townships and thereby create a foundation for future land use that will support sustainable development and therefore spatial justice<sup>77</sup>.

Spatial planning generally refers to the expression of a spatial vision for a particular area. These are laid down in spatial development frameworks, which may be adopted at local, regional, provincial, or national levels<sup>78</sup>. Land use management refers to the management of land use through the granting of land use rights to parties that seek to develop land. This is made possible through the granting of zoning rights or decisions on various types of land use applications. The main difference between spatial planning and land use management is that land use management grants actual land-use rights, while spatial planning does not<sup>79</sup>.

The principles and guidelines contained in policy manifests in legislation and planning mechanisms which are then, in turn, implemented to improve the lives of the citizenry<sup>80</sup>. These planning mechanisms include spatial development frameworks which guide all development activities and is the foremost planning instrument in South Africa. It entails future spatial planning and a spatial planning framework of all municipalities, provinces and nationally. It sets out in detail the existing and future development to be carried out, according to the development principles<sup>81</sup>. Spatial justice is then promoted through effective development principles with the concept as a core function.

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid at 246

<sup>78</sup> J de Visser Y & Poswa X *Municipal law making under SPLUMA: A Survey of Fifteen "First Generation" Municipal Planning By-Laws* PER / PELJ 2019(22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a4658> 2019(22); at 2.

<sup>79</sup> J Van Wyk *Planning Law* at 12.

<sup>80</sup> Ibid at 13

<sup>81</sup> Ibid.

Spatial development frameworks form the basis of all planning activities and include the integrated development plans of municipalities. It is a strategic planning mechanism as it promotes all factors that may affect the planning process and how such a process may be optimised. In addition, wherever the planning authority exercise its discretion, such discretion must be guided by the spatial development plan. In assessing likely social impacts, the process entails an assessment of the activities and projections of likely impacts and seeks to monitor and mitigate the negative social impacts of such activities<sup>82</sup>. In doing so, spatial justice can be promoted.

Integrated development planning is a planning mechanism which states the long-term developmental goals of municipalities which incorporate the plans of all sectors within a municipality and must aim to promote sustainable developmental activities and thereby spatial justice.<sup>83</sup>

Town planning schemes lay out areas of activities which may be carried out within specific zones in municipalities. It assists with the implementation of the spatial development frameworks and is legally binding on all land private individuals, corporations or state departments. All developmental activities within a municipality must conform to the planning scheme.<sup>84</sup>

Development control is a planning mechanism aimed at ensuring that the various plans are complied with. By maintaining planning standards within a town or city and regulating its developmental activities, spatial justice can be attained if the control is exerted effectively, considering the development principles. Zoning divides a city or town into different and overlapping uses. It is a form of development control which determines what development may be carried out in the various zones. Zoning, and re-zoning, which are sensitive to sustainable development and spatial justice can be a useful mechanism to promote overall spatial justice when the use of land is applied in the interest of society as a whole, bringing previously marginalised communities closer to commercial nodes and places of employment<sup>85</sup>.

Planning law has moved beyond mere planning and encompasses much more. Planning law is an enhancer of the environment and quality of life within it. It coordinates social aspirations and the resources to meet such needs.

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<sup>82</sup> Afinowi at 54

<sup>83</sup> Ibid at 55.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

In the new democratic dispensation in South Africa, spatial planning and land use management have the express obligation to promote social and economic inclusion<sup>86</sup> and to redress the imbalances of the past. Planning law is therefore available to achieve social and redistributive justice, and therefore spatial justice<sup>87</sup>. It should be noted though that land use planning law and the mechanisms available in terms thereof, are forward looking and do not rectify past injustices by the removal of existing rights.

#### **4. Legal mechanisms in the South African legal framework to promote spatial justice in the City of Cape Town**

The concept of spatial justice first formally appeared in South Africa in the 2011 National Development Plan<sup>88</sup> in addressing the transforming human settlements<sup>89</sup>. It describes spatial justice as the reversal of the old order policy of confining particular groups to restricted space<sup>90</sup>.

Cape Town's spatial form was initially shaped by its natural surroundings and the development of its transport infrastructure, especially the rail service and road network which constitutes a southern corridor. By the 1950s, however, Cape Town's urban form was increasingly being shaped by apartheid policies, through which forced removals and discriminatory laws were implemented<sup>91</sup>. Black and coloured communities were forced to live in segregated townships on the fringes of the city. This contributed fundamentally to the sprawling urban form which comprises the city of Cape Town today<sup>92</sup>.

Against this background, it is crucial deliver spatial justice to the inhabitants of Cape Town. What follows in this paper is a review of the lead up to the current land use planning laws and mechanisms which apply to the city of Cape Town, while considering their potential and effectiveness to promote spatial justice.

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<sup>86</sup> The Spatial Planning and Land Use Management Act 16 of 2013. "SPLUMA".

<sup>87</sup> Section 3(f) SPLUMA

<sup>88</sup> "NDP"

<sup>89</sup> Chapter 8

<sup>90</sup> The NDP's proposals include: developing tenure arrangements; prioritising development in inner cities and around transport hubs; introducing incentives to support compact mixed development within walking distance of transit stops and densifying housing along transit routes; including an element of affordable housing in all new developments; regularising informal settlements; and recognising residence rights. None of the proposals is legislatively regulated and none has been directly incorporated in the Spatial Planning and Land Use Management Act 16 of 2013.

<sup>91</sup> Afinowi at 40.

<sup>92</sup> City of Cape Town *Municipal Spatial Development Framework* 2018

#### 4.1 The developments in law leading to contemporary South African planning law

Property development in South Africa, especially in previous “white” residential areas, followed the standards in Europe and the USA, while planning and development within the non-white locations and townships were regulated by the government and saw little or no improvements over the years<sup>93</sup>

Planning law was first introduced in South Africa during the 1920s with the promulgation of the Native (Urban) Areas Act No 21 of 1923. Its purpose was to establish settlements for black people on the outskirts of towns inhabited by white people. A separate authority was established in terms thereof to administer these townships, including the collection of revenues and rents and the allocation of passes into so-called white areas. This can be said to have been the advent of institutionalized spatial injustice. No integrative housing development or public participation in the allocation of human settlements were possible for black people.

After many years and several discriminatory laws during which the majority of South Africans have been deprived on many levels with no secure tenure to land, living in squalor and poverty, democracy happened in 1994. In this new dispensation, the primary focus of town planning urgently shifted to the implementation of legal mechanisms to correct the injustices of the past.

First and foremost are the landmark mechanisms contained in section 26 of the Constitution<sup>94</sup> which provide for everyone to have a right of access to adequate housing, while eviction is permitted only in terms of a court order. Residential displacement and spatial injustice that was widely practiced under apartheid, are prohibited<sup>95</sup>.

The Constitution completely changed the face of all prior planning laws in South Africa with numerous clauses applying directly and indirectly to fundamental human rights in land use planning. It entrenches the principle of spatial justice in South Africa.

Land reform provisions are incorporated into the Property clause of the Constitution and reflects its dual nature of both property protection and land reform. Referred to as the

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<sup>93</sup> Afinowi at 42.

<sup>94</sup> The Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>95</sup> Section 26

“deprivation clause”, the Property clause effectively refers to land use planning and development controls, building regulations and environmental conservation measures.

The Housing clause integrates planning and housing. It promotes the redistribution of land through the greater and more speedily availability of land.

The foremost feature of the Constitution is the Equality clause which provides guidelines for planning law and prohibits the differentiation of people and categories of people. It condemns unfair discrimination which may lead to impairment of the fundamental dignity of persons as human beings. In terms of this provision, residential displacement, a spatial injustice that was widely practiced under apartheid, is no longer allowed.

Not only has the Constitutional Court given meaning to section 26, but it has not hesitated to criticise the continuing existence of spatial injustice<sup>96</sup>. The court ordered the City of Johannesburg to provide unlawful occupiers with temporary accommodation in a location as near as possible to the area where they were residing<sup>97</sup>. The court stated that authorities have a duty to consider the proximity of schools and employment opportunities when it people are relocate people to decent housing.<sup>98</sup> In terms of the judgment, an element of spatial injustice had been transformed into spatial justice.

Flowing from the spatial justice principles entrenched in the Constitution, the first substantial attempt at introduced a planning system aimed at alleviating the housing backlogs and the principles necessary to guide legislation, policy and practice was in the form of the Development Facilitation Act 67 of 1995<sup>99</sup>. Many of the components of spatial justice were contained in the DFA, requiring land development to contribute to the correction of the historically distorted spatial patterns of human settlement.<sup>100</sup>

The Housing Act 107 of 1997 similarly attempted to apply spatial justice by stating that housing is a vital part of developmental planning and that integration and consultation must play a role in housing development. Public participation in housing development was emphasised and the involvement of communities in local government matters were required.

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<sup>96</sup> *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA20214(CC) paras11-15; *Western Cape Provincial Government: In re DVB Behusing (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) para 42.

<sup>97</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* 2012 2 SA 104 (CC) para 104.

<sup>98</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR 723 (CC) para 256.

<sup>99</sup> “DFA”.

<sup>100</sup> The DFA was repealed in terms of SPLUMA in 2014.<sup>100</sup>

Spatial planning underwent important changes with the introduction of the Local Government: Municipal Systems Act. 29 It compels municipalities to adopt spatial development frameworks as part of their strategic planning<sup>101</sup> and municipalities started to plan the future development of their municipal areas<sup>102</sup>.

The requirements that spatial planning, land use management and land development must be sustainable, equal, efficient, integrated and based on fair and good governance were finally entrenched in the landmark Spatial Planning and Land Use Management Act<sup>103</sup>. Repealing the DFA and other planning laws<sup>104</sup>, SPLUMA showcases a distinctive formulation of spatial justice, requiring integration, inclusivity, diversity, participation and location in planning<sup>105</sup>.

#### 4.2 SPLUMA as the South African national planning law

In its preamble, SPLUMA sets the scene by recognizing that many South Africans continue to live and work in places defined and influenced by past spatial planning and land use laws and practices which were based on racial inequality, segregation and unsustainable settlement patterns.

As its starting point, section 3 sets out its objects, which include the requirement that the system of spatial planning and land use management promote social and economic inclusion and redress the imbalances of the past. It requires there to be equity in the application of spatial development planning and land use management systems.

Containing the principle of spatial justice and setting out the components thereof, section 7(a) entrenches the legislative instruction to the State to promote spatial justice in South Africa. The identified components of spatial justice<sup>106</sup> effectively constitutes a codification of the instruction to organs of State and all concerned that past spatial and other development imbalances must be transformed through improved access to and use of land<sup>107</sup>; that spatial

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<sup>101</sup> Integrated Development Plans.

<sup>102</sup> J de Visser Y & Poswa X *Municipal law making under SPLUMA: A Survey of Fifteen "First Generation" Municipal Planning By-Laws* PER / PELJ 2019(22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a4658> 2019(22) at 2. However, there was no statutory connection between the land use management activities of provincial governments (or municipalities acting in terms of delegated powers) and the municipal spatial development frameworks. This disjuncture impeded the ability to plan and guide developments through budgets and spatial plans.

<sup>103</sup> SPLUMA Spatial Planning and Land Use Management Act 16 of 2013.

<sup>104</sup> 5 In addition to the DFA, SPLUMA also repealed the Removal of Restrictions Act 84 of 1967; Physical Planning Act 88 of 1967; Less Formal Township Establishment Act 113 of 1991; and the Physical Planning Act 125 of 1991.

<sup>105</sup> These principles reflect Fainstein's three hallmarks of urban justice, namely equality, diversity and democracy.

<sup>106</sup> The Act itself does not convert the principles into enforceable provisions, which are effectively left to the municipal by-laws envisaged by SPLUMA to provide the detail required to make SPLUMA procedurally implementable.

<sup>107</sup> Section 7(a)(i)

development frameworks and policies at all spheres of government must address the inclusion of people and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterized by widespread poverty and deprivation<sup>108</sup>; spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons<sup>109</sup>; that land use management systems must include all areas of a municipality and must include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas<sup>110</sup>; that land development procedures must include provisions that include access to secure tenure and the incremental upgrading of informal areas<sup>111</sup>; and that a municipal planning tribunal considering an application before it, may not be impeded or restricted in the exercise of its discretion solely on the ground that the value of the land or property is affected by the outcome of the application<sup>112</sup>.

Having formalised the principle of spatial justice, SPLUMA prescribes the manner in which it must be implemented<sup>113</sup>. It is to apply to all organs of State and other authorities responsible for the implementation of legislation regulating the use and development of land, and guide the preparation, adoption and implementation of any spatial development framework, policy or by-law concerning spatial planning and the development or use of land; the compilation, implementation and administration of any land use scheme or other regulatory mechanism for the management of the use of land; the sustainable use and development of land; the consideration by a competent authority of any application that impacts or may impact upon the use and development of land; and the performance of any function in terms of this Act or any other law regulating spatial planning and land use management.<sup>114</sup>

Aside from setting out the objectives and different components of spatial planning, the Act distinguishes and defines national, provincial and municipal planning<sup>115</sup>. This confirms SPLUMA's role as framework legislation, providing an overall matrix for planning at the three levels of government<sup>116</sup>.

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<sup>108</sup> Section 7(a)(ii)

<sup>109</sup> Section 7(a)(iii)

<sup>110</sup> Section 7(a)(iv)

<sup>111</sup> Section 7(a)(v)

<sup>112</sup> Section 7(a)(vi)

<sup>113</sup> Section 6

<sup>114</sup> Notwithstanding the categorisation of the principles in this section, subsection 6(2) stipulates that all principles contained in the Act apply to all aspects of spatial development planning, land development and land use management.

<sup>115</sup> Chapter 1

<sup>116</sup> The implementation of the spatial justice principles and components are mostly left to local authorities. The only pragmatic instrument for implementation introduced by SPLUMA is the "incremental upgrading area", which

National government is directed in Chapter 4 to adopt a national spatial development framework and provinces to adopt provincial spatial development frameworks in accordance with the objectives set out in section 12.<sup>117</sup> These entail coherent, forward-thinking spatial development planning that meets the SPLUMA development principles. Of significance is that these provisions entrench the national and provincial spatial development frameworks as statutory plans<sup>118</sup>, affording statutory powers for the promotion of spatial justice at planning level.

SPLUMA is therefore in itself is a potentially significant contribution to ensuring that the common principle of spatial justice is embedded in spatial planning and implementation<sup>119</sup>. It articulates the State's obligation to realise the constitutional imperatives and therefore embeds the principle of spatial justice in our planning laws<sup>120</sup>.

It is clear that SPLUMA and the planning instruments which it forms the legal basis of, is capable to achieve spatial justice. However, the implementation thereof is still rooted in and restricted by the old order of spatial planning, thereby allowing the spatial injustice of the past to continue to a large extent. Although a level of desegregation is occurring among the middle classes and some inner cities are increasingly occupied by poorer black people, many of the old spatial patterns and practises remain.<sup>121</sup>

Van Wyk holds a similar view that SPLUMA provides few tangible mechanisms, instruments, procedures, and resources required for the transformation of spatial injustice into spatial justice in planning procedures. She argues that because much of the implementation of the Act is left to by-laws, while SPLUMA provides the framework, condemns the planning system to the inconsistency, uncertainty and fragmentation experienced in the past.<sup>122</sup> With the characteristics of spatial justice being equality, diversity and democracy, she feels it will

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is a land-use zone or area defined within a spatial development framework or land-use scheme for which specific policies have been drafted for the incremental upgrading of informal areas or slums. It comprises the progressive introduction of administration, management, engineering services, and land-tenure rights to an area that has been established outside existing planning legislation and may include any settlement or area under traditional tenure.

<sup>117</sup> Chapter 4; In such an area specific criterion apply to local plans that must be more detailed while land-development procedures may be shortened

<sup>118</sup> Before SPLUMA, national and 48 Chapter 1 of SPLUMA. 49 Chapter 2 of SPLUMA. 50 Chapter 3 of SPLUMA. 51 De Visser & Poswa at 13 This new status does not drastically alter the legal status of the national and provincial SDFs, provincial development frameworks were adopted without any specific basis in law. Sections 13 and 14 provide for the preparation process of the national spatial development framework, which must, *inter alia*, coordinate and integrate provincial and municipal spatial development frameworks

<sup>119</sup> Ibid

<sup>120</sup> The application of a principle, albeit a legislative one, is difficult to enforce in practice and remains subjective in the hands of the planner or decision-maker.

<sup>121</sup> N Klug, M Rubin, A Todes op cit (n. 31) at 122

<sup>122</sup> J Van Wyk J *Can legislative intervention achieve spatial justice?* CILSA, Vol 48, No. 3 (Nov 2015) p 381.

require meaningful participation integration, inclusivity and diversity for the public to rebuild their space and community<sup>123</sup>.

By directing municipalities to apply land use schemes in its spatial development frameworks and in decision making on development applications, SPLUMA lays the foundation for an inclusive spatial planning and land use management system which provides for integrated housing development and addresses the housing rights of disadvantaged communities in South Africa<sup>124</sup>. She argues that however, to build on that foundation and converting spatial injustice in housing being converted into spatial justice, will demand a clear understanding of the concept of spatial justice. Her view is that authorities will have to come to the realisation that there is no alternative but to implement spatial justice and to engage with affected communities while they are doing so.

Research shows that SPLUMA's impact on transformation is dependent on the quality of mechanisms<sup>125</sup>, processes and systems established by the various spheres of government, and specifically the extent to which the development principles are translated into achievable, contextualised spatial outcomes in each spatial impact area<sup>126</sup>.

#### 4.3 Provincial planning law

Provincial planning is an exclusive provincial competency, listed in Schedule 5A of the Constitution and only provincial governments may legislate and administer provincial planning.

In line with its competency in terms of SPLUMA, the Western Cape government passed the Western Cape Land Use Planning Act<sup>127</sup>. It provides, *inter alia*, for its own development principles and the ability to repeal certain old-order laws.<sup>128</sup>

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<sup>123</sup> Van Wyk J *Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?* The Comparative and International Law Journal of Southern Africa, Vol. 48, No. 3 at 27

<sup>124</sup> Ibid at 41

<sup>125</sup> South African Cities Network *SPLUMA as a tool for Spatial Transformation* Research Study 17 March 2015 at 30.

<sup>126</sup> Ibid.

<sup>127</sup> Act 3 of 2014 "WCLUPA".

<sup>128</sup> The long title of the Act sets out its purpose as the consolidation of provincial- and regional planning and development, urban and rural development, regulation, support and monitoring of municipal planning and regulation of public places and municipal roads arising from subdivisions; to make provision for provincial spatial development frameworks; to provide for minimum standards for, and the efficient coordination of, spatial development frameworks; to provide for minimum norms and standards for effective municipal development management; to regulate provincial development management; to regulate the effect of land development on agriculture; to provide for land use planning principles; to repeal certain old-order laws; and to provide for matters incidental thereto.

In terms of WCLUPA, the Premier is mandated to monitor compliance with the development principles referred to in Chapter VI, as well as provincial land use planning and the impact of housing, regional planning and development, urban and rural development, main public infrastructure facilities and services, on provincial land use planning.

The development principles set out in section 59(1) of Chapter VI are expressly branded as principles of spatial justice and include provision for past spatial and other development imbalances to be redressed through improved access to, and utilisation of, land; spatial development frameworks and policy at all spheres of government, in order to address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements and areas characterised by widespread poverty and deprivation; spatial planning mechanisms, including zoning schemes, to incorporate provisions that enable redress in access to land by disadvantaged communities and persons; land use management systems to include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas and informal settlements; land development procedures to include provisions that accommodate access to, and facilitation of, security of tenure and the incremental upgrading of informal areas; a competent authority contemplated in the WCLUPA or other relevant authority considering an application before it, may not be impeded or restricted in the exercise of its discretion solely on the ground that the value of land or property will be affected by the outcome of the application; and the right of owners to develop land in accordance with current use rights should be recognised.

In section 59(2) land use planning is to be guided by the principles of spatial sustainability which include, inter alia, the principles that planning result in communities that are viable; and the basic needs of all citizens are met in an affordable way.

Section 59(3) states that land use planning is guided by the principles of efficiency, whereby integrated cities and towns should be developed, the social, economic, institutional and physical aspects of land development should be integrated; the availability of residential and employment opportunities in close proximity to, or integrated with, each other must be promoted; historically distorted spatial patterns of settlement corrected; and the quality and functionality of the public spatial environment is promoted.

Section 59(4) relates to land use planning which is to guide good efficiency with the preparation and amendment of spatial plans, policy, zoning schemes and procedures for land development and land use applications, transparent processes of public participation that afford all parties the opportunity to provide inputs on matters affecting them; and that

legislation, procedures and administrative practice relating to land development should be clear, promote predictability, trust and acceptance in order to inform and empower members of the public.

The spatial justice development principles are to be implemented in terms of section 58 by all organs of state responsible for the implementation of legislation regulating the utilisation and development of land and must guide the preparation, adoption and implementation of a spatial development framework or zoning scheme and of any policy or law concerning land use planning; any steps to ensure sustainable development; the consideration by a competent authority in terms of the WCLUPA and any other relevant authority of an application that impacts on the utilisation and development of land; and the performance of a function in terms of the WCLUPA or other legislation regulating land use planning.

Section 4 requires the provincial government to compile a provincial spatial development framework with the purpose of making provision for the coordination, integration and alignment of provincial development policy and the land use implications thereof; indicate desirable land use and promote predictability in the utilisation of land; and facilitate coordination, integration and alignment of national, provincial and municipal land use planning policy.

The provincial spatial planning development framework<sup>129</sup> adopted by the Western Cape Province, confirms that its purpose is, *inter alia*, to redress the spatial legacy of apartheid. It admits that people, economic activity, social needs, infrastructure and natural resources are not evenly distributed across the landscape<sup>130</sup>. This uneven geographic distribution is not incidental and impacts directly on economic growth, social justice, and the ability of the natural environment to support human activities now and in the future<sup>131</sup>.

In its introduction<sup>132</sup> of the PSDF it acknowledges that spatial policies have historically been actively used as a political tool to shape the economy, social fabric and the way natural resources were used mostly to the benefit of the privileged.

With such an honest starting point, the document claims to set out a bold vision for changing the development path of the Western Cape. Admitting further that this cannot be achieved

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<sup>129</sup> "PSPDF"

<sup>130</sup> Par 1.1

<sup>131</sup> Ibid

<sup>132</sup> Par 1.2

overnight, it notes that the proposals contained in the PSDF have substantial implications for the allocation of public resources and that it will take time to be put in place<sup>133</sup>.

The PSDF is clearly a guideline and it requires itself to not to be applied rigidly but in a developmental way that takes account of the particular circumstances of each case<sup>134</sup>. As a spatial plan it is supposed to lay down guidelines for the future spatial development in such a way as will most effectively promote order and the general welfare of the community. As such, it guides and determines decisions, particularly when the desirability of proposed developments is tested.

The function of the PSDF is therefore to provide guidelines and directives to help decision-makers to determine the desirability of proposed development by considering whether or not it is socially, economically and ecologically sustainable. This will require both provincial and municipal decision-makers to consider which of the policy statements in the PSDF are relevant in the circumstances and the weight that should be given to each, in order to secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development<sup>135</sup>.

In assessing the provincial legislation and its ability to promote special justice, its acknowledgement, especially in the PSDF, of its obligation to change the development path in the province is encouraging. It does admit, however, that it will take time and will not be achieved overnight.

The guidelines which it provides, are subject to discretion by the decision makers and is not to be applied rigidly but in a developmental way that takes account of the particular circumstances of each case<sup>136</sup>. While it is supposed to lay down guidelines for the future spatial development, its effectiveness to promote order and the general welfare of the community are dependent on human discretion. That, in itself, dilutes the mechanism with the views and subjective prejudices if the person applying the guidelines.

In line with SPLUMA, the spatial justice elements are entrenched in the WCLUPA and in the PSDF. However, much of the actual planning in Cape Town will be governed by the

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<sup>133</sup> Suggested timeframes for implementation are given for the proposals in Chapter 8.

<sup>134</sup> Par 1.3

<sup>135</sup> Ibid

<sup>136</sup> Par 1.3

delegated municipal powers, guided only by the PSDF. The actual application of social justice in Cape Town will therefore not be directly from provincial level.

What is also apparent from the provincial land use planning laws, is that they apply spatial justice while looking forward. It does not have the ability to retrospectively infringe on existing rights to correct injustices of the past.

#### 4.4 Municipal planning law

Before the new constitutional dispensation, municipalities were not empowered to make their own law. They exercised delegated powers and their laws were subject to administrative review.

The Constitution changed this and establishes municipal law-making as a legal and constitutional reality. Municipalities are to transform from merely service providers into fully fledged governments, responsible for not only implementing but also making and adopting laws and policies<sup>137</sup>. Notwithstanding this new municipal dimension, section 6(1)(a) of SPLUMA requires that the constitutional development principles apply to the preparation, adoption and implementation of municipal by-laws on spatial planning and land use management.<sup>138</sup>

Municipalities are, nonetheless, not necessarily the only decision makers on matters in their designated areas. SPLUMA envisages that the national government will decide development projects that trigger the national interest while the WCLUPA requires that the provincial government must decide on development projects that trigger the provincial interest. Three planning decision-making processes may be triggered on the same project, with their respective spatial justice development principles being applied in each instance.

Municipalities are empowered to adopt municipal spatial development plans<sup>139</sup>, which are required to be part of the municipality's integrated development plan. These plans state the forward planning vision of the municipality, which are important policy instruments. A MSDF must assist in integrating, coordinating, aligning and expressing development policies and plans emanating from the various sectors of the spheres of government as they apply within the municipal area<sup>140</sup>. The principle of spatial justice finds application in practice, applying in

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<sup>137</sup> De Visser and X Poswa at 22

<sup>138</sup> Ibid

<sup>139</sup> "MSDF"

<sup>140</sup> Section 12(5).

terms of section 6 of SPLUMA to all organs of state and other authorities responsible for the implementation of legislation regulating the use and development of land<sup>141</sup>.

SPLUMA strengthens the link between municipal spatial planning and land use management. Section 22(1) prohibits land use management decisions that are inconsistent with an MSDF. A deviation from the MSDF is permitted only if site-specific circumstances justify it. Secondly, the land use scheme adopted by the municipality, must give effect to municipal spatial development frameworks. Given that land use schemes grant land use rights this suggests that MSDFs will somehow have a direct bearing on land use rights.<sup>142</sup>

#### 4.4.1 The City of Cape Town Municipal Planning By-Law

The municipal planning by-law is emerging as an essential component of the planning framework. Neither the national government, nor the provincial government is competent to prescribe the kind of detail required for municipal officials or tribunals to effectively carry out land use management powers.

In adopting its 2015 Municipal Planning By-Law the City of Cape Town, it subordinated itself to the SPLUMA and WCLUPA development principles which apply to all organs of state responsible for the implementation of legislation regulating the use and development of land. By doing so, the municipality bound itself to promoting spatial justice in terms thereof.

Section 21 of the by-law provides for the adoption of policies to guide decision making in respect of applications made in terms of this By-Law. One such municipal policy comprises densification<sup>143</sup>. It provides, inter alia, that rapid and continuous low-density development is threatening the long-term sustainability of Cape Town, and has created the challenge that the place-making qualities and urban vibrancy of neighbourhoods and the city as a whole are being threatened. The inefficiency caused by this fragmented and low-density form of development has serious economic implications, limiting access to opportunities and causing a wastage of supporting economic resources. In terms of the policy, densification is viewed as a necessary step to promote the longer-term sustainability of urban and rural environments. This is one example of a step towards the correction of the old order low

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<sup>141</sup> Which guide the preparation, adoption and implementation of any spatial development framework, policy or by-law concerning spatial planning and the development or use of land; the compilation, implementation and administration of any land use scheme or other regulatory mechanism for the management of the use of land; the sustainable use and development of land; the consideration by a competent authority of any application that impacts or may impact upon the use and development of land; and the performance of any function in terms of this Act or any other law regulating spatial planning and land use management.

<sup>142</sup> Ibid

<sup>143</sup> Approved by Council on 29 February 2012 under reference C58/02/12

density planning in former “white” residential areas, in contrast to the small dense residential allocations to black and coloured people, with all people being nearer to amenities.

In line with chapter 6 of SPLUMA, a municipal planning tribunal is constituted in order to determine land use and development applications within the municipal area. When considering applications, the tribunal is guided by the developmental principles set out in SPLUMA and the WCLUPA, which includes, inter alia, the principle of spatial justice.

The tribunal determines whether an application is desirable and in doing so the relevant issues of social impact, the impact on safety, health and wellbeing of the surrounding community are considered. These criteria are open to interpretation and require exercise of judgement.

An interesting provision is that councillors, who are political appointments, are not allowed to serve on the tribunal, although they may request to be present at a hearing. This precludes, to a large extent, political agenda’s being pursued as had been the case in the old apartheid order.

Spatial justice is therefore also given a role in the process of decision making of the tribunal, although such decisions allow the officials to interpret the principle and the circumstances of each case, and exercise its judgment accordingly. These subjective criteria will no doubt dilute the effectiveness of the promotion of spatial justice to some extent.

Municipalities are now obliged to take the principle of spatial justice into account, not only in determining land uses through spatial development frameworks and land use schemes, but also in decision-making on development applications.<sup>144</sup>

Municipal planning by-laws are emerging as essential components of the planning framework. The national- and provincial governments are not competent to prescribe the kind of detail required for municipal officials or tribunals to effectively carry out land use management powers<sup>145</sup>. As the planning framework develops further, the municipal planning by-law will further increase in importance. While national and provincial planning laws will continue to provide outer parameters and overall guidance, the municipal planning by-law is “where the rubber hits the road” and where municipalities can provide locally relevant solutions.<sup>146</sup>

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<sup>144</sup> Township establishment, amendments to land use schemes, removals of restrictive conditions, subdivisions and consolidations.

<sup>145</sup> Visser and Poswa at 12

<sup>146</sup> Ibid.

#### 4.4.2 Integrated Development Plan

Adopted in accordance with the Municipal Systems Act, Act No. 32 of 2000 and as provided for in section 4 of SPLUMA, the Integrated Development Plan<sup>147</sup> of the City of Cape<sup>148</sup> is a strategic mechanism that is intended to guide the activities of the local government in consultation with residents and stakeholders.

It recognizes that the conflicts of the past also manifest physically, since apartheid spatial planning still fragmentizes communities and influences where Cape Town citizens live and work, and the quality of their neighbourhoods. The municipality intends to build a more inclusive, integrated and vibrant city that addresses the legacies of apartheid with regard to the built environment, it rectifies existing imbalances in the distribution of different types of residential development, and avoids the creation of new structural imbalances in the delivery of services.

Building integrated communities means proactively and directly working to reverse the impact and practices of apartheid to improve all Cape Town residents' quality of life. The IDP acknowledges that one of the ways in which this can be achieved is by facilitating spatial transformation of the City.

Key commitments in the IDP are to address existing imbalances in the distribution of different delivery of services. The desired outcomes are a greater mix of income groups, land uses, population density, and the adequate and equitable provision of social facilities, recreational spaces and public institutions.

The IDP sets out various ways in which to implement the intended spatial transformation, including new densified housing developments<sup>149</sup>. Densification objectives is *inter alia* pursued through the ongoing social housing programmes, requiring partnerships with private investors and developers.

The IDP includes an integrated settlement project which aims to encourage a mix of formal and semi-formal approaches to settlements, which will be achieved by developing integrated,

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<sup>147</sup> For the period 2017 to 2022

<sup>148</sup> "IDP"

<sup>149</sup> All housing units to be designed so that they are adaptable, extendable and able to densify over time; vacant and within the urban edge to be utilised more efficiently through infill initiatives; the release of unused land owned by other state departments; the promotion of mixed-use retail and residential development along key development nodes and transport corridors; and the banking of land for future use, where the right type of development is not immediately possible.

sustainable human settlements that will include various housing types, extending from the semi-formal approach of enhanced serviced sites to a more formal approach of brick-and-mortar houses.

The municipality's transport and development authority<sup>150</sup> includes transport, urban development and human settlements elements. TDA Cape Town has been tasked to reverse the effects of apartheid spatial planning, and to further develop and implement a new spatial order for Cape Town including an inner-city housing strategy and implementation plan.

The IDP constitutes the municipality's innovative attempt to take local government to the next level. The key priorities are transformational, and the municipality relies on it to change the way in which it functions to make Cape Town a more inclusive and transformed spatially just city through spatial planning.

#### 4.4.3 Municipal Spatial Development Framework

Against the backdrop of the IDP and the notable shift towards densified and transit-oriented development, the City of Cape Town approved its current Municipal Spatial Development Framework<sup>151</sup> on 25 April 2018. It aims to, *inter alia*, address the fragmented and inefficient regional and metropolitan spatial form that resulted from apartheid.

As a spatial interpretation of the municipality's IDP, the MSDF sets out the spatial vision and development priorities to achieve a reconfigured, inclusive spatial form for Cape Town. It is informed by the requirements of SPLUMA, the 2015 municipal planning by-law as well as a range of other national, provincial and local policy and law<sup>152</sup>.

Fundamental to the MSDF is ensuring spatial transformation via dense and transit-oriented growth and development anchored by an efficient transport system.

In terms of SPLUMA, municipalities are obliged to take the principle of spatial justice into account not only in determining land uses through spatial development frameworks and land use schemes, but also in decision-making on development applications (such as township establishment, amendments to land use schemes, removals of restrictive conditions, subdivisions and consolidations).

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<sup>150</sup> "TDA Cape Town"

<sup>151</sup> "MSDF"

<sup>152</sup> Key national informants are the National Development Plan and the national Integrated Urban Development Framework. The municipality's policy that has been adopted after 2012 and that has been an important informant of this MSDF includes the Transit-Oriented Development Strategic Framework, the Integrated Public Transport Network and the Densification Policy and a range of social, economic and environmental policies.

For the MSDF to succeed in such aim, it is essential for it to identify significant structuring and restructuring elements of the spatial form, now and into the future; to address the fragmented and inefficient regional and metropolitan spatial form that resulted from apartheid. It must translate the vision and strategy of the IDP into a desired spatial form for the municipality, inform public and private investment decisions that affect Cape Town's spatial form and represent the different sectoral interests of players in the physical, social and economic environment.

The MSDF observes that connected, inward growth is the most cost-effective way of reducing the social and economic costs of the current inefficient urban form. It implies a greater mix of residential and non-residential land use (diversification) through the increased use of space, both vertically and horizontally (densification). Increased congestion as a result of continued sprawl and the non-performing rail network places an increased burden on the poorest of the poor who commute long distances between home and work and contributes to social inequality with a concentration of poverty far from places of employment. These guidelines are aimed at promoting spatial justice by bringing the disadvantaged closer to employment and amenities<sup>153</sup>.

The MSDF recognizes that Cape Town must focus resources inwards in support of intensification and prioritise investment in favour of sustainable job-generating economic growth over the medium-term. This objective is a precondition to the realisation of all other spatial development goals including spatial equity. The MSDF identifies strategies that require the transformation of the apartheid city as well as addressing spatial economic imbalances. It repeats the vision of the IDP that achieving spatial transformation will require an intensification of land uses in areas supportive of transit-oriented development. Spatial transformation is based on reversing the impact of apartheid spatial planning by creating more opportunities for more people in highly connected areas<sup>154</sup>. Further, it seeks to counter the creation of new low-income communities on the periphery of the city and the need for the poor to spend a disproportionate amount of their income on transport.

The MSDF sets out various policies relating to the implementation of the principles of the IDP for the transformation of Cape Town from an apartheid city, which includes the redress existing imbalances in the distribution of different types of residential development, and actively pursue integration outcomes in future decision-making; transforming marginalised

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<sup>153</sup> City of Cape Town *Municipal Spatial Development Framework* 2018 Chapter 1 & 2

<sup>154</sup> Ibid.

areas and informal settlements into economically and socially integrated neighbourhoods; encouraging public/private partnerships to develop integrated human settlements and diversify housing delivery; supporting incremental housing delivery methods and tenure in support of a single property market, and respond to informality by proactively addressing current regulatory challenges<sup>155</sup>.

In practice it has always been a challenge to establish and manage the relationship between strategy, policy and land development and management. Many land use decisions ignore policy, not only because of administrative and institutional issues but because policy is seen as disconnected from “reality” or market conditions<sup>156</sup>.

This uncertain relationship between policy directives and decision-making of land use applications creates uncertainty and a weak base from which to progressively realise a transformed landscape.

Although there are a number of reasons for the above, one is that policy and strategy are to a large degree driven by “new” directives such as SPLUMA and other related legislation, while the land use management system is largely still based on previous legislation. This disjuncture creates a number of challenges including the inability to realise substantive spatial transformation through mechanical compliance.

Furthermore, the schemes are static in nature and are largely records of existing rights with administrative rules. These rules (scheme clauses and regulations) are in their nature not dynamic enough to bring about spatial transformation.

Cape Town’s spatial, social and economic challenges<sup>157</sup> have compelled the municipality to place sustained job generating economic growth at the heart of its spatial priorities. For that to be realised, the COCT determined that identified investment in well located growth nodes is required, that transit-oriented corridors must be reinforced and growing nodes must be linked with lagging nodes through connective infrastructure.

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<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> The external factors impacting upon planning in Cape Town include its spatial history; its natural assets and resources; people, activities and land use trends; socio-economic needs, and its transport infrastructure

## 5. Conclusion

Spatial justice has become a political objective to achieve improved standards of living for all. In the broadest sense it refers to an intentional and focused emphasis on the spatial or geographical aspects of justice and injustice. This involves the fair and equitable distribution in space of socially valued resources and the opportunities to use them.<sup>158</sup>

When the main schools of thought of the spatial justice theory are analysed and considered, it was found that “the right to the city” movement argues that it is the present economic paradigm of capitalism which is the structural problem and therefore the reason for the injustice. It motivates for revolution through social movements within cities with a rights-based approach. In contrast, “the just city” theory contends that the existing scenario does not proactively promote or spatial justice, but in working with the system and making necessary procedural and outcome-based alternatives, a just city can be created.

The question of what the role of the law is in promoting spatial justice was answered by considering that the aims and objectives of planning laws and the entire planning process are achieved through practical mechanisms or techniques. These planning mechanisms include spatial development frameworks which guide all development activities and is the foremost planning instrument in South Africa. It entails future spatial planning and a spatial planning framework of all municipalities, provinces and nationally, existing and future development being determined by the development principles. The promotion of spatial justice depends on the nature of the principles and the application thereof.

A review of the legal mechanisms in the South African legal framework which may promote spatial justice in the City of Cape Town, indicate that, following the initiatives set out in the Constitution, several attempts at creating a new land use planning system failed, until the introduction of SPLUMA. This landmark legislation signalled the dawn of a new sustainable land use planning framework for South Africa.

SPLUMA contains development principles which makes a strong case for promoting spatial justice. In line with those provisions, the mechanisms flowing from that Act were considered and similar provisions were found to be present in the various mechanisms.

By directing municipalities to apply it in its spatial development frameworks, land use schemes and, most importantly, in decision making on development applications SPLUMA lays the foundation for an inclusive spatial planning and land use management system in

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<sup>158</sup> Soja at 3

terms of which integrated housing development is facilitated and the housing rights of disadvantaged communities in South Africa are addressed. To build on that foundation so that spatial injustice in housing is transformed into spatial justice requires a proper understanding of the content of spatial justice, a realisation that there no choice in applying it and in doing so to engage with affected communities.

Most of the land use planning in the City of Cape Town, is regulated by the City of Cape Town By-law and its MSDF. This mechanism flows from the WCLUPA and is governed by the spatial justice development principles set out therein, mirroring the development principles in the Constitution.

The question remains as to how will these laws and mechanisms change the way that Cape Town has been planned to date and whether it will bring us closer to an urban environment which reflects spatial justice? With the constitution of legal frameworks to facilitate spatial justice and implementing legal mechanisms to achieve, notwithstanding remaining challenges South Africa and, in particular Cape Town, have come a long way.

Ultimately, the municipal spatial planning in Cape Town remains constructed by its heritage to a large extent. Reshaping Cape Town to adhere to principles of spatial justice seems to be no easy task. Urbanisation continues unabated, low-income groups are still marginalised to the outskirts of cities, the wealthy control the economic centres, unemployment continues to rise and the population continues to grow rapidly.

Spatial planning is hampered by various elements, which includes the fact that the development principles are subjective and difficult to enforce, and the fact that the development principles and the implementation thereof are forward looking, it is difficult to change the planning, or lack thereof, of the past. New development will be strictly assessed on the development principles, but the constraints of the past remains.

It seems that, by following the just city theory, spatial justice in Cape Town may be slower to be achieved than it is hoped for. Soja's view that perfectly even development, complete socio-spatial equality, pure distributional justice, as well as universal human rights are never achievable, has merit in the Cape Town scenario.

Every city or town in which we live has some degree of injustice embedded in it, making the selection of sites of intervention of utmost importance. The desire to increase justice or to

decrease injustice is a fundamental objective in all societies, a crucial principle for sustaining human dignity and fairness.

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**September 2020**

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