

**Provincial Land Use Legislative Reform
Eastern Cape Province: Status Report
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Acknowledgements

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1.0. Introduction

The Eastern Cape Province came into existence in 1994 and consists of a portion of the old Cape Province and the ‘independent homelands’ of Ciskei and Transkei (refer to figure 1). The Eastern Cape Province comprises two metropolitan areas (Nelson Mandela Bay and recently declared Buffalo City). It has 5 district councils and 38 local municipalities (<http://gis.ecprov.gov.za/>). Refer to Figure 1.

The purpose of this report is to investigate the status of land use legislation in the Eastern Cape provincial planning regions in South Africa. The report reviews the state of land use legislation relevant in the Eastern Cape Province, provides an understanding of land use in practice and comments on law reform processes where applicable. The report also outlines institutional responsibilities, decision-making structures and processes; then draws implications on the status of current land use legislation and conclusions on the laws as applied in the provinces and how these might inform new provincial legislation.

1.1. Study approach

The research material used in the report is based on secondary sources, a desk top understanding of the status of land use legislation, the collection of empirical information and qualitative interviews conducted primarily with the Eastern Cape provincial department of Local Government and Traditional Affairs (PG: EC LGTA) and local municipal officials in the planning departments of Nelson Mandela Bay Municipality (NMBM) and Buffalo City Municipality (BCM). These municipal departments are respectively known as Land Planning and Management, in the Directorate: Human Settlements and City Planning Division in the Department of Development Planning located in the Directorate of Planning and Economic Development.

In order to understand the way the provincial legislation is implemented in practice, the quantitative and qualitative research examined the performance of the legislation in practice. The aim was therefore to identify, among others, what works well in the application of the relevant laws, what does not work well, what needs to change to make it work better, what innovations there are in practice, what the demands are on officials - all with a view to understanding what officials at both municipal and provincial sphere of government consider appropriate in new provincial planning legislation.

The focus of this investigation is on understanding the practical issues with implementation. The report therefore focuses on and analyses the following main aspects of land use law in practice:

- A description of existing land use legislation and a brief analysis thereof;
- The implementation of the law(s) and reflecting on the qualitative information obtained from officials and other role-players to inform what works well in the current application of the law and what does not work so well;
- The findings in respect of empirical information collected from provincial and municipal officials who were interviewed;
- Recording the findings on institutional and administrative issues that go along with implementation (structure of departments, where decision making responsibility lies, the capacity within the institution studied, administrative systems and so on); and
- Drawing conclusions that can begin to inform a framework for new provincial legislation.

2.0. Provincial Legislative Status Quo

2.1. History of the planning laws reform

The Eastern Cape's planning law history is complex in that it has an array of legislation that seeks to manage land tenure, land administration and land use in rural, urban and traditional areas as early as 1927 with the promulgation of the Black Administration Act No.38 of 1927 which was repealed by the Townships Ordinance No. 33 of 1934. It also has the Land Use Planning Ordinance No. 15 of 1985, which was promulgated in 1985 and is still prevalent today. The latest legislation was passed in 1997 with the promulgation of the Regulation of Development in Rural Areas Act No. 8 of 1997. For the purposes of this research, this legislation could not be clarified in practice, as it would appear that it has to do with land allocation and certain powers associated herewith.

The complexity in respect of land administration, including land tenure and land use management is particularly apparent in the traditional areas of Transkei and Ciskei (Ntsebeza, 1999). In post-apartheid times where the roles, powers and functions of tribal or traditional authorities became not only questionable but were vigorously challenged by tribal communities, it became more difficult to administer land according to the old apartheid style system. In the old apartheid style system Chiefs represented traditional authorities who appointed headmen to liaise between them and the people who occupied the land. According to Ntsebeza (1999), tribal authorities (comprising chiefs and headmen) were later established at the local level and sub-

headmen were appointed at village level. This author further outlines the history of land administration in these old Bantustan areas and raises questions in respect of four areas.

The first area that Ntsebeza (1999) raises has to do with the urban bias of the Ruling Party and the consequent inability to deal with traditional areas' complex land arrangements established during colonial and apartheid rule. The second deals with the fact that land in traditional areas, even though administered by tribal or traditional authorities in the previous dispensation, in large part still legally vests with the State. The third aspect is that there are grave inconsistencies between the way land administration and associated decision-making occurs between democratically applied laws and customary laws which refer to 'unwritten law passed on from generation to generation' (van Wyk, 1999). The last aspect has to do with the roles, powers and functions assigned to local government in respect of land administration post-1994 when representative councilors were elected in former Bantustan areas. This system brought into being the separation of powers versus the 'fusion of authority characteristic of the past' (Ntsebeza, 1999: 87) ,where authority in terms of land administration vested with Traditional Authorities who operated autonomously and largely in terms of customary laws. The implication for land use planning is that the administrators of the law in traditional areas generally merged land and land use law and by and large used customary law as a fundamental component in the application of these laws.

2.2. Description of the Current Applicable Planning Legislation

This description depicts the complex set of legislation that came into being each with its own purpose and intent to govern land and land use regulation in the Eastern Cape in urban, rural and traditional area contexts. All these laws still apply in one form or another and did not come about with the express intent of reforming planning law holistically. The fact of their existence as a set of regulatory instruments has made planning law and indeed planning law reform a lot more complex when applied in practice to the degree that planning law has collapsed in traditional areas and the fear of lawlessness in respect of land use management is often expressed by administrators of the law.

2.2.1. Existing planning legislation applicable in the Eastern Cape

a) The Physical Planning Act No. 125 of 1967, as amended in 1991

National land use legislation in the form of the Physical Planning Act No. 125 of 1991 (PPA) required that provincial authorities prepare Structure Plans for the area under their Authority. These were expected to promote and give guidance in respect of the physical development of land. The Zoning Schemes administered at municipal level that are applicable to certain areas should not be inconsistent with these Structure Plans. While Structure Plans cannot confer or take away rights in respect of land, they may be used to authorize land use changes provided that there is consistency between existing Structure Plans and local Zoning Schemes, which have legal applicability in terms of provincial legislation, in this case mainly the Land Use Planning Ordinance No. 15 of 1985.

The investigation of Nelson Mandela Bay Municipality (NMBM) revealed that former structure plans that existed and were formulated prior to democracy are not referred to or recognized by the LM. These structure plans were largely revised and referred to as (local) policy plans and were sent to PG: EC Local Government and Traditional Affairs for information purposes and not approval. Everyone accepts this practice as the use of old structure plans is considered unconstitutional. However, there are applicants who sometimes rely on the old structure plans to motivate changes in land use to their benefit and have at times raised legal questions or threats when the LM reminds them of the declared invalidity of the structure plans. In the case of Buffalo City, the position in respect of structure plans is similar to NMBM.

b) Municipal Ordinance No. 20 of 1974

The ordinance is used by local municipalities in matters involving closure of public open spaces, public places and streets.

c) The Black Communities Development Act No. 4 of 1984

It is important to note that while the Black Communities Development Act was repealed in 1991 by section 72(1) of the Abolition of Racially Based Land Measures Act No. 108 of 1991, section

72(2) of this Act stipulated that Chapters VI and VIA of Act No. 4 of 1984, and any regulation made hereunder, will remain in full force until further repealed. These chapters and regulations made provision for the granting of leaseholds in Black Development Areas (Department of Land Affairs, 1999). Such provisions had to be retained while township registers were being opened to phase out leaseholds in favour of full ownership which was denied Blacks in urban areas prior to 1991. Chapters VI and VIA of Act No.4 of 1984 remains in force as an interim measure to enable the holder of an existing leasehold right to perform certain dealings until upgraded to ownership, that is until a township register is opened in the Deeds Office to demonstrate legal title to a cadastrally defined property (Mammon, 2008). These provisions of the BCDA remain in force in all areas of the Eastern Cape.

d) The Land Use Planning Ordinance 15 of 1985 (LUPO) read with Townships Ordinances, No. 33 of 1934 where applicable

To protect the impact of development on property rights and to demonstrate the desirability of land use in an area

This Ordinance is the legal mechanism through which the majority of land use change applications (rezoning, subdivision, departures, consent uses and other minor land use matters) are ultimately adjudicated as revealed by the hubs' investigations of Nelson Mandela Bay Municipality (NMBM) and Buffalo City Municipality (BCM).

In terms of the current regulatory framework that the Eastern Cape hubs largely work within, the Land Use Planning Ordinance, No. 15 of 1985 is the law most frequently used to obtain development rights on public and private land and within which land uses may be permitted. This ordinance is also the predominant legal mechanism through which all land use change applications (rezoning, subdivision, departures) are ultimately adjudicated, notwithstanding the applicability of other land use legislation.

In terms of section 36 of LUPO, an application shall be refused solely on the basis of a lack of desirability of the contemplated use of land concerned, including the guideline proposals included in a relevant structure plan insofar as it relates to desirability, or on the basis of its effect on existing rights concerned. The use of 'desirability' is a distinctive criterion for decision-making and an important feature of LUPO in motivating the reasons for the change of land use in a planning application. Where an application is not refused by virtue of the desirability referred

to, regard shall be made in considering particulars relating to the safety and welfare of the members of the community concerned, the preservation of the natural environment and developed communities concerned or the effect of the application on existing rights, with the exception of any alleged right to protection against trade competition.

There are 12 zoning schemes across the NMBM municipal area, some of which predate LUPO and some of which exist in terms of LUPO. A single, relatively small area governed by the Khayamandi Scheme is the only township established in terms of LeFTEA. Five areas governed by the Ibhayi, Kwadwesi, Kwamagxaki, Kwanobuhle and Motherwell Schemes were established in terms of the BCDA and the remainder area governed by the Area A, Despatch, Port Elizabeth, Section 8 (of LUPO) and the Uitenhage Schemes were established in terms of LUPO.

e) The Less Formal Township Establishment Act No. 113 of 1991 (LeFTEA)

While the Less Formal Township Establishment Act No.113 of 1991 (LeFTEA) which was seen as an interim measure to establish urban development for informal/emergency/Breaking New Ground human settlement purposes is still used in the Eastern Cape Province, its use has become less popular in the Nelson Mandela Bay and Buffalo City. LeFTEA provides for a faster but lesser form of settlement for poorer urban households. This provision was probably founded on the expectation that when transformation to democracy occurred, the need to cater reasonably quickly for those who would be flocking to the urban areas could be satisfied by site and service (Mammon, 2008). As stated earlier, only one area governed by the Khayamandi Scheme was established in terms of LeFTEA in the NMBA municipal area and the Act is no longer used in Buffalo City Municipality since some four years ago.

f) Development Facilitation Act No. 67 of 1995 (DFA)

With South Africa's transformation to democratic governance, strategic/integrated planning was introduced in the mid 1990's. The Development Facilitation Act No. 67 of 1995 (DFA) was an interim measure, a statute that operated alongside and in parallel to the existing legislation, allowing applicants to choose which route to follow to get land use approvals (Claassen, 2009; van Wyk, 1999). Among other objectives, the Act was adopted to introduce measures to facilitate and speed up the implementation of reconstruction and development programmes and

projects and set out principles for land development. One of the admired principles called for the integration of the social, economic, institutional, environmental and physical aspects of land development as well as the promotion of compact development. This was done mainly through the establishment of development tribunals. The Eastern Cape appointed Development Tribunals implying that the DFA may be used across the entire province even though it was found that this legislation is not widely used.

g) The Black Areas Administration Act No. 38 of 1927 (Black Areas Land Regulations R188)

To provide for the amendment of regulations to govern the administration of the former South African Development Trust land situated outside a township.

Enacted in terms of the Black Areas Administration Act to govern former South African Development Trust (SADT) land outside of townships. R188 was amended by R23 of 1992

h) Townships Ordinances No. 33 of 1934

This ordinance regulates township establishment and land use in old 'white' Transkei areas. Although the Townships Ordinances No. 33 of 1934 was repealed by the LUPO when areas which were established in terms of this Ordinance were planned or re-planned, LUPO makes provision for these areas to be further dealt within its own provisions in terms of Section 7(1). In parts of the Eastern Cape, the town planning schemes enacted in terms of the Townships Ordinance of 1934 are still in operation.

i) Ciskei Land Regulation Act No. 14 of 1982

Repeal of the whole with effect of the date of registration of a community's community rules under section 19(1) of 'this Act', but only within the area comprised of that community's communal land and with effect from the date on which Proclamation No. R 188 of 1969 is repealed in that area

j) Ciskei Land Use Regulations Act No. 15 of 1987

To provide for land-use planning control and control of use rights, the subdivision of land and the removal of restrictions.

k) The Ciskei Township Amendment Decree No.44 of 1990

To amend Proclamation R293 of 1962 and to repeal the Townships Amendment Act 1984 and the Townships Amendment Act 1987.

l) The Ciskei Township Amendment Decree No. 17 of 1993

Passed with the intention of further managing land use.

m) The Land Administration Act No. 2 of 1995

To provide for the delegation of powers and the assignment of the administration of laws regarding land matters to the provinces; to provide for the creation of uniform land legislation; and to provide for matters incidental thereto.

i) Regulations governing the Granting of Leasehold;

Regulations made in terms of the Black Communities Development Act No.4 of 1984.

ii) Upgrading of Land Tenure Rights Act, No.112 of 1991;

To provide for the upgrading and conversion into ownership of certain rights granted in respect of land.

iii) Proclamation 174 of 1921 (Transkei Commonage);

To provide for granting of permissions to occupy land on the commonage in the former Transkei area.

iv) Proclamation R.26 of 1936: Location regulations: Unsurveyed districts: Transkeian territories

To provide for permissions to occupy various sites in certain districts in the former Transkei

v) Ciskei Townships Regulations: proclamation R.293 of 1962

This proclamation was enacted in terms of section 25 of the Black Administration Act No. 38 of 1927 and provides for the administration and control of townships.

vi) Ciskei Land Regulations Act, No. 14 of 1982

To provide for the continued application, adaptation and modification of the provisions of Proclamation R.188 of 1969 in the former area of Ciskei.

n) Eastern Cape Regulation of Development in Rural Areas Act No.8 of 1997

Stripped traditional authorities in the Eastern Cape of their development duties as prescribed in the Bantu Authorities Act as amended. These include the allocation of land (Ntsebeza, 1999).

o) Removal of Restrictions Act No. 84 of 1967

To apply for the removal of a restrictive condition of title where submission is made to a Local Municipality and Provincial Government simultaneously and then Deeds Registry Office after decision gazetted by Provincial Government: Department of Cooperative Governance and Traditional Affairs

p) Subdivision of Agricultural Land No. 70 of 1970

Provincial Government Department of Agriculture is a commenting sphere only but ultimate decisions in terms of whether land zoned for or being changed to/from 'Agriculture' lies with the National Department of Agriculture.

q) National Environmental Management Act No. 107 of 1998

Provincial Government: Department of Environmental Affairs is responsible for the assessment of environmental impacts and issues a record of decision (RoD) in connection herewith. However, where State or Parastatal land is the subject of a land use application, the provincial

sphere is a commenting authority only and the National Department of Environmental Affairs is the ultimate decision making authority and issues the RoD directly.

r) Heritage Resources Act No. 25 of 1999

The Provincial Government: Heritage Department makes decisions on heritage impact assessments that accompany land use applications but in the case of sites declared national heritage sites, the South African Heritage Resources Agency (SAHRA) makes the decisions. The Eastern Cape Province has a dedicated department responsible for assessing heritage impact where required. The Heritage Resources Act makes provision for a Provincial Heritage Resources Council to be established to evaluate heritage applications and to enforce heritage – until such time as Local Authorities are assessed for competency and take over the function. The role of Provincial Government Heritage Departments is ambiguous and some argue superfluous in terms of the Act.

s) Municipal Systems Act No. 32 of 2000

Makes provision for the formulation of Integrated Development Plans (IDPs) and Spatial Development Frameworks (SDFs) at city or metropolitan scale or municipal area which are typically approved by relevant local municipal councils with participation from provincial government as a stakeholder.

t) Mineral and Petroleum Resources Development Act No. 28 of 2002

Applications for mining rights are submitted to the office of the regional manager but final decisions on the granting of rights rest with the National Minister and his/her Department of Mineral Resources. However, mining rights cannot be exercised without environmental and land use approvals being granted.

2.2.2. Existing planning legislation applicable in the traditional areas of the Eastern Cape

For the purposes of recording and analysing the information on legislation collected towards this research, the term ‘traditional areas’ for the Ciskei and Transkei will be used as suggested by the interviewees. Since 1994, self-governing areas in the Ciskei and Transkei fell away officially.

According to Van Wyk (1999), in terms of the National States Constitution Act 21 of 1971 the so-called independent states of Ciskei and Transkei, now officially in the Eastern Cape Province, were established. In terms of that legislation their parliaments were able to promulgate their own legislation. Thus each passed their own laws over time until Section 229 of the interim Constitution provided that all laws in these states remain until such time that the laws are repealed or amended by a competent authority (Van Wyk, 1999: 11-12).

While Proc R293 of 1962 and Proc R188 of 1969 initially applied in the Transkei and Ciskei, they were largely amended and repealed in the case of R188 (Act No. 14 of 1982). According to Eastern Cape Provincial Procedures Manual, undated (<http://drupal6dev15.econsultant.co.za>) the Ciskei Land Regulations Act No. 14 of 1982 permitted the continued application, adaptation and modifications of the provisions of R188 in the old Ciskei areas.

Proclamation R293 of 1962 was amended together with the repeal of the Townships Amendment Act of 1982, the Townships Amendment Act of 1984 and Townships Amendment Act of 1987 by the Ciskei Townships Amendment Decree No. 44 of 1990 with the express intent of permitting local government to exercise its powers in respect of:

- a) Letting of residential property (Schedule A);
- b) Permitting applications for deeds of grant in terms of ownership (Schedules B and F);
- c) Granting certificates of occupation of a unit let for residential purposes (Schedule D)
- d) Permitting disposal of land through sale (Schedule E)
- e) Permitting applications for the transfer of ownership for residential purposes (Schedules G, H and U)

From a land use management perspective, R188 and R293 do not make provision for mechanisms to control future land use on land that is administered in terms of these statutes. Their focus is largely on the day to day administration and management of townships although there are a few aspects of these statutes that cover land use management and zoning parameters including demarcation of sites, permitted land uses, controls in respect of keeping animals, business and trade, cemeteries and so on (Eastern Cape Provincial Procedures Manual, undated, <http://drupal6dev15.econsultant.co.za>).

Van Wyk (1999) confirms that in the Ciskei, the Land Use Regulations Act No. 15 of 1987 was and is still the applicable legislation today. This Act ‘provides for land-use planning control and control of use rights in Chapter II, the subdivision of land in Chapter IV and the removal of

restrictions in Chapter V. The Ciskei Township Amendment Decree No. 17 of 1993 was passed with the intention of further managing land use. Zanzile (2007) confirms that in the Amathole District the ‘main regulatory mechanisms for land use change applications are the Land Use Planning Ordinance (ex-RSA), Townships Ordinance (Transkei) and Land Use Regulation Act (Ciskei), each of which creates statutory land-use planning boards for the approval of applications’.

Laws on land use and land administration that were conflated in the Ciskei and Transkei in the apartheid era and, presumably for historical reasons, continued in this fashion. Some of these reasons may well include the areas mentioned earlier by Ntsebeza (1999) in respect of: a) the inability to deal with traditional areas’ existing and complex land arrangements; b) the inconsistencies between the way land administration and associated decision making occurs between democratically applied laws and customary laws; and c) the separation of powers vested in local government structures.

Against this very complex background, particularly in respect of traditional areas, it is the view of the Eastern Cape provincial department (Local Government and Traditional Affairs) that planning law in the Eastern Cape needs to be overhauled completely and reconceptualised in view of the many different uncertainties and changes that have major implications for settlements and influencing settlement patterns. According to the Eastern Cape LG&TA officials interviewed, the Constitutional framework or starting point within which planning law should therefore be established should be that of ‘Ubuntu’ rather than modernism. In this way all peoples’ rights would be realized, not just the rights of those who own private property, which is the way planning law presently operates.

2.1.3 National legislation impacting on planning

Strategic and/or integrated spatial plans take the form of Spatial Development Frameworks (SDFs) that are indicative land use planning instruments to guide a city’s urban development and/or a region’s forward planning. SDFs are the spatial representations of Integrated Development Plans (IDPs) which, according to section 25 of the Municipal Systems Act No. 32 of 2000 (MSA), is a strategic plan for the development of a municipality and its municipal area of jurisdiction (Berrisford and Kihato, 2008). These plans are required in terms of the MSA and related legislation to be updated regularly. SDFs are typically planning policies related to issues such as definition of the Urban Edge, Densification, Gated Development etc. and are expected to

give guidance to decision makers within the respective metropolitan areas whose officials are delegated to deal with land use applications. Even where these policies exist it is apparent that they do not necessarily shape urban spatial development through effective land use management control. While SDFs are the spatial planning instruments endorsed and approved by municipalities there are desirability criteria in terms of LUPO that have a different (and often conflicting) legal effect. This could potentially fuel tension between local and provincial government when municipal decisions are appealed in defense of spatial and/or policy frameworks that direct spatial planning particularly in urban areas.

Chapter 5 of the Municipal Systems Act No. 32 of 2000 (MSA), requires local authorities to adopt an Integrated Development Plan (IDP) that aligns resources and the capacity of the local authority with the implementation of the plan and policy framework (in other words, the SDF) and is the general basis on which annual budgets must be based. This includes the improvement of the quality of life of society in general and in particular, the poor and other disadvantaged groups. Expenditure on infrastructure in terms of this legal framework therefore focuses primarily but not only on, the provision of basic services, which derives benefits for a large majority of households through public investment. Forward planning documents and policies are however, generally inadequately co-ordinated with infrastructure planning strategies. While the IDPs are expected to bring spatial, economic and infrastructural aspects into alignment, they do not in reality do this equitably across areas of jurisdiction.

National legislation associated with land use management is powerful in terms of its impact on land use decisions when relevant and applied through various triggers. Decision making in terms of national laws not only often precedes land use regulatory decisions (the granting or refusal of land use applications and/or development rights) but also sets the conditions within which land use and/or development rights may be exercised. At the same time, authorizations for heritage and environmental impact assessments (adjudicated by provincial authorities unless ownership of land vests with a State or parastatal department in the case of environmental authorizations in which case the adjudication is dealt with by the National Department of Environmental Affairs) often render land use decisions meaningless in terms of the shape and form that ultimately prevails when development rights are exercised. Furthermore, the lack of clear alignment and ambiguity between and among various laws is evident for example in the application of the Mineral and Petroleum Resources Development Act No. 28 of 2002 (MPRDA). A land owner would be granted a mining right/permit in terms of MPRDA without being aware that

compliance with a provincial land use law and authorisation in terms of NEMA would be required before mining activity can commence.

Interestingly, while NMBM only grants / refuses a land use application once a record of decision is issued by the competent authority in terms of NEMA, BCM grants applications subject to an approved record of decision which clearly indicates inconsistencies in the way that associated planning laws are applied in practice in the same province. The BCM officials indicated a discomfort with this approach as it may mean that a land use application is approved in terms of LUPO but at risk of not receiving a positive Record of Decision (RoD) in terms of NEMA. This situation has not arisen previously however as officials try to delay decisions on land use applications until an EIA RoD has been received. The risk is greatest when politicians pressurise officials to deal with land use applications prior to a RoD being in place.

According to van Wyk (1999), the Removal of Restrictions Act (RoRA) is a discretionary piece of legislation where the discretion of the provincial government official has to consider all matters that pertain to the relevant application based on whether the interests of the public would be upheld should the restrictive condition of title be removed. Only since 01 October 2010 did it become obligatory on NMBM that no land use application be granted which was considered to breach the terms of that restrictive condition until such a restrictive condition of title is removed. Before this date, the municipality would grant approvals for land use applications which were made conditional upon the removal of a restrictive condition of title by the Eastern Cape provincial government.

Hence in the Eastern Cape, there is a considerable number of planning laws that are either applicable in different parts of the Province, or represent parallel routes to development. The laws have also spawned land use management instruments such as zoning schemes of different standards and responsible authorities. In addition to having to comply with this plethora of legislation, planning and development must also accommodate requirements of sector laws at national and provincial sphere (e.g. NEMA). Moreover, there are many other laws that intersect with traditional areas' contexts but fall officially outside of the Eastern Cape's boundaries.

2.3. Description of the New Provincial Legislation

The Eastern Cape Province embarked on a law reform process in the early 2000s which was not extensive and never completed. The process got as far as completing a situational analysis and holding a few meetings outlining the intent of the new law among key stakeholders. This process

was stopped because of a lack of capacity, uncertain guidance from national level planning authorities and competency confusion among different spheres of government as well as the difficulty in incorporating traditional areas' planning into a new unified planning law for the entire province.

In terms of the traditional areas of the Eastern Cape, the second hint of proposed law reform was the national Communal Land Rights Act or CLaRA (Act No. 11 of 2004) which sought, among other things, to 'improve land use management and relieve some of the tension and conflict that exists between traditional and elected authorities' (Bank and Mabhena, 2011). However, in 2010 in response to a community challenge the Constitutional Court found the Act unconstitutional and ruled that the Act could not be implemented in its entirety. The court ruled that there was inadequate consultation in respect of the content of the Act with affected communities and provincial structures. It also ruled as valid the communities' claim of insecurity of tenure being perpetuated by only titling outer boundaries of traditional areas.

2.4. Description of Implementation of Provincial Planning Laws

2.4.1. Institutional Responsibilities

a) Land Use Planning Ordinance 15 of 1985 (LUPO)

Local Government is delegated by the provincial government to administer all applications in terms of LUPO, subject to conditions and qualifications which may differ in the case of each municipality's circumstances and depending on what other associated legislation applies. For example, when a land use application is submitted and / or a township is established in terms of LUPO and the provisions of the BCDA, Subdivision of Agricultural Land Act or RoRA apply, the Eastern Cape Provincial Department of Local Government and Traditional Affairs has the final decision-making authority on the application.

Submissions of appeals against a local authority's decision in terms of LUPO are also ultimately taken by the MEC for Local Government and Traditional Affairs who may seek the advice of an established Planning Advisory Board (see section 2.4.2. below).

b) Less Formal Township Establishment Act No. 113 of 1991 (LeFTEA)

Submissions of applications in terms of LeFTEA are made to the Provincial Department of Local Government and Traditional Affairs and the final decision made on an application rests with the MEC for Human Settlements, Safety and Liaison on the recommendation of the Provincial Department of LG&TA which considers the comments of the LM.

c) Development Facilitation Act No. 67 of 1995 (DFA)

In terms of the DFA, the development tribunal is the decision-making authority on a land development application. The LM is a stakeholder in as far as it can comment, object or make representations for or against an application. However, according to a planning consultant interviewed, the LM's position as a key stakeholder has strengthened after the 2010 Constitutional Court judgement in the City of Johannesburg case (see section 2.4.2 below).

Traditional areas legislation (Land Use Regulation, Act 15 of 1987 (Ciskei) and Townships Ordinance, No. 33 of 1934 (Transkei)

All applications for the former Ciskei and Transkei areas are submitted to Local Municipalities who advertise, consider and recommend the applications to the Eastern Cape Department of Local Government and Traditional Affairs for final decision making.

2.4.2. Implementation Aspects

a) Pre-application requirements

The Eastern Cape planning legislation does not provide for any pre-application requirements. Both the provincial government and municipalities are, however open to discuss application requirements and the level / nature of applications with the applicants before the submission of a formal application.

b) Application submission, processing, decision-making and appeals

i) Land Use Planning Ordinance 15 of 1985 (LUPO)

Applications are submitted to the LM in terms of relevant sections of LUPO depending on the nature of the land use application (rezoning, subdivision etc.) and advertised for public comments and objections. The process outlined in section 4.1. below is typically followed by the LM. An application is then considered in terms of section 36 of LUPO as described in section 2.2.1. above.

Should a decision of a LM be appealed, the application is referred to the Eastern Cape LG&TA department for consideration. A planning advisory board (PAB) has been established in terms of section 43 of LUPO to advise the MEC on appeals. The PAB is independent and comprises a number of planning and related professionals such as attorneys, valuers and environmentalists. Typically the process involves the appeal against a LM's decision being submitted to the MEC

with a copy to the municipality. The municipality may respond with a planning assessment of the appeal and may present its case to the PAB. The PAB may require both the municipality and appellant to attend a hearing. A recommendation is made by the PAB to the MEC who may confer with his/her senior legal advisors/planning staff on the matter. The advice of the PAB does not have to be taken by the MEC who may decide differently on internal advice received. The appellant is notified and has recourse to the High Court if not in his/her favour.

What is interesting to note is that in NMBM where a local authority takes the same position as objectors to an application and the applicant appeals, the objectors are not recognized as parties to the appeal by the province and are not afforded any opportunity to make representations in the appeal processes. There are fundamental legal difficulties with this approach.

ii) Less Formal Township Establishment Act No. 113 of 1991 (LeFTEA)

Firstly, the notification to submit in terms of LeFTEA must be lodged with the Department of Local Government and Traditional Affairs. The Applicant forwards the application to the provincial department and advises that he/she intends applying in terms of LeFTEA. The provincial department then instructs the local municipality to advertise the application which constitutes the public participation process. The Local Municipality is then obligated to consider the comments and submit the application to the provincial department of LG&TA for consideration and recommendation by the Minister of Human Settlements, Safety and Liaison, who takes the final decision on the application. Should the application be approved, the provincial department (LG&TA) will advertise the approval in the provincial government gazette.

iii) Development Facilitation Act No. 67 of 1995 (DFA)

In terms of section 32 of the DFA, a land use development application is submitted to a tribunal where upon a designated officer considers: (a) the land development application; (b) any comments, objections or representations received within a prescribed period; (c) any reply by the applicant to such comments, objections or representations prior to the consideration of the application by the tribunal. According to a planning consultant interviewed, since the 2010 Constitutional Court judgment in the City of Johannesburg case, land development applications are submitted simultaneously to the development tribunal and the affected local municipality.

The DFA Tribunal is served by a Designated Officer, a Registrar and a Deputy Registrar who form the secretariat located within the Department of Local Government and Traditional Affairs

and who run the day to day affairs of the Tribunal. The Tribunal's members include a Chairman and six ordinary members who are professionals in the legal, environmental, planning and engineering disciplines.

In terms of the DFA, any decision or determination by a tribunal is final provided that any party to a dispute may, within the period and in the prescribed manner, appeal against the decision of a tribunal in regard to that dispute or any related order as to costs to the development appeal tribunal. The development appeal tribunal may decide any appeal made to it, confirm, vary or set aside the order or decision appealed against or make any order or decision, including an order as to costs, according to the requirements of the law or fairness.

A development appeal tribunal consists of five members appointed by the Premier and provided that at least one member shall have knowledge of law, and an appeal shall be heard by not less than three members of a tribunal. A tribunal shall, within a reasonable time after it has made a decision, provide reasons for its decision in writing to any interested person or body requesting such reasons and, if such reasons were so requested, also to the provincial government. Without derogating from the constitutional right of any person to gain access to a court of law, the proceedings of a tribunal or of a development appeal tribunal may be brought under review before any division of the Supreme Court having jurisdiction under the Supreme Court Act No. 59 of 1959.

iv) Traditional Areas Legislation

Once a recommendation is received from the Local Municipalities, the Spatial Planning Branch of the Department of Local Government and Traditional Affairs prepares a report for submission to the applicable Board i.e. the Townships Board for the Transkei applications and the Land Use Planning Board for the former Ciskei and former RSA areas. These applications are either approved by the Board and the applicant is notified directly of the outcome and/or recommended to the MEC as circumstances or conditions in terms of the applicable legislation may permit.

c) Enforcement

The Eastern Cape Province does not enforce any land use decisions taken. Responsibility for enforcement lies with local municipalities, for example in terms of section 39(1) of LUPO and section 26(1) of Act 15 of 1987.

2.4.3. Implementation and other related legislation

A major conflict exists between customary law (which is largely unwritten yet widely practiced in traditional contexts) and planning legislation which seeks to create order in space according to different legal, social and economic principles to those applied in customary law. Thus planning law in traditional areas is often ignored, according to the provincial officials interviewed. The same officials further argue that, where planning applications are made by planning practitioners, they do so within the framework of the existing planning laws.

The DFA Tribunal exists but is slowly weakening. However, chapter 1 of the DFA, which covers the planning principles, is useful and the principles are applied because they embrace the concept of sustainability. Planning justifies its existence on predictability, yet there are so many uncertainties such as the impact of climate change that one has to begin to gear planning towards vulnerabilities in the environment, which can be addressed through a Provincial Spatial Development Plan (PSDP) type policy rather than a definitive law which must address issues of adaptation and mitigation.

The planning process is no doubt influenced by the national legislation impacting thereon. There are major implications for time frames when the provisions of NEMA, HRA, Subdivision of Agricultural Land Act and so on, apply. Because national legislation (NEMA and RoRA in particular) run in their own sequences and no rezoning can be approved/refused until a record of decision is obtained, there is always a tension between planning and other legislation especially because planning's role is to coordinate different pieces of legislation and now NEMA seems to have taken over this role.

Other national imperatives can also impede spatial and land use management at a local level. For example, National Transport Plans can emphasize national public investment projects that could potentially influence negatively the local economy of a metropolitan or hub area.

Liquor licenses are issued in contravention of zoning laws because the provincial government administers liquor licenses while local government is responsible for land use and zoning. This makes enforcement of planning legislation very difficult.

3.0. Performance of Provincial Legislation-Eastern Cape: Local Government and Traditional Affairs

3.1. Number of Applications Submitted Per Type

Table 1: No. of applications per type per annum (2010)

Application Type	Number of Applications
Removal of Restrictive Conditions	121
Rezoning	15
Subdivisions	43
Rezoning & Consolidation	2
Rezoning & Departure	2
Rezoning & Special Consent	1
Subdivision & Consolidation	1
Subdivision & Rezoning	20
Subdivision & Rezoning & Consolidation	1
Appeals in terms of LUPO	58
Less Formal Township Establishment (LeFTEA)	11
Amendment of General Plan	16
Amendment of Scheme Regulations	2
Township Establishment	10
TOTAL	303

Only 303 applications have been recorded above out of the 319 indicated on the application list provided. The remaining 16 are either not applications (3) or the type of application is not clearly indicated.

3.2. Number of rejected applications

- Approximately 15% of applications as rejected mainly due to applications being incomplete

3.3. Number of withdrawn applications and main reasons for withdrawal

- Only a few applications (± 5) were withdrawn
- No specific reason was given for the withdrawal of the applications

3.4. Applications per legislation type (LeFTEA, Ordinance etc.) and per application type

Table 2: No. of applications per legislation type

Applicable Legislation	Number of Applications
Less Formal Township Establishment Act (113 of 1991)	11
Removal of Restrictions Act (84 of 1967)	121
Land Use Planning Ordinance (15 of 1985)	58 (all appeals except 1 appeal i.t.o. a Removal of Restrictions application)
Development Facilitation Act (67 of 1995)	20
TOTAL	210

Only 210 applications in terms of legislation type have been recorded above out of the 319 indicated on the application list. It is not indicated in the table in terms of which legislation the applications for rezoning, subdivision, etc. are made; thus an assessment was made from the information submitted. Of the 20 DFA applications, none were recorded in the former Ciskei/Transkei areas implying that the DFA is not used here.

The number of applications per type is as per Table 1 above.

It should be noted that only 303 applications have been recorded out of the 319 indicated on the application list submitted. The remaining 16 are either not valid applications (3) or the type of application is not clearly indicated.

3.5. How long it takes

- Applications processing periods vary from a month referring to Removal of Restrictions applications to 2 years or more if an application is incomplete and the applicant/municipality is not responding.

3.6. Reasons for delays

- Incomplete applications
- Delays in responses from applicant
- Delays in responses from municipality
- Shortage of personnel

3.7. How many appeals, what kind of applications appealed

Table 3: Number and type of appeals

Appeal Application Type	Number of Applications
Appeal	9
Appeal Departure	7
Appeal Removal of Restrictions	1
Appeal Rezoning	29
Appeal Rezoning & Departure	1
Appeal Subdivision	8
Appeal Subdivision & Departure	1

Appeal Subdivision & Rezoning	3
TOTAL	59

3.8. How long it takes to make decisions (submission to decision, then post approval period to notification)

- After the Townships Board recommendation to the MEC approval can take another 6 weeks

3.9. Do administrators have computerised tracking systems or not?

- The Department of Spatial Planning has computerised tracking systems

3.10. Number of staff

- 11 personnel in Spatial Planning (of which 5 are recent appointments that are either newly qualified or in training)
- It is estimated that at least 15 Professional Planners are required

3.11. How many decisions they make a month? A year?

Table 3 lists a number of applications but does not indicate whether these are the number of applications submitted or the number of decisions made.

3.12. Where most are (geographically)?

- The PG: EC Department of Local Government and Traditional Affairs deals with all former Ciskei and Transkei, DFA and Act 113 applications but only deals with the Appeals from the LUPO Ordinance 15 of 1985 applications

3.13. Value of applications

- No record kept

4.0. Stakeholder Views of Provincial Planning Legislation

4.1. Qualitative inputs

a) What works well?

Local Government administers all applications submitted to it in terms of LUPO, the DFA, LeFTEA, Ordinance 15 of 1987 and any other relevant legislation in the Nelson Mandela Bay and Buffalo City municipal areas. It must, however, be noted that the NMBM has had only two applications in terms of the DFA one of which was withdrawn before conclusion. It is also important to note that LeFTEA has hardly been used in both these hubs and in fact both municipalities encourage applicants not to use this legislation. It was found that the structure and procedures of LUPO work well for both applicants and officials.

When an application is submitted and/or a township is established in terms of the relevant legislation, the provisions of the 1934 Ordinance and 1984 BCDA may also apply depending on whether these pieces of legislation are applicable to the area that the application falls within. Typically the application process is as follows and according to officials is clear and works well especially in terms of the Land Use Planning Ordinance (LUPO). In the case of DFA applications, submissions are made simultaneously to the LM and the Tribunal. The LM goes through the following process and serves on the DFA Tribunal in respect of defending their recommendation to the DFA Tribunal to grant/refuse an application.

- Pre-application discussions happen in principle only
- Submission of an application is made in terms of the relevant legislation to the LM
- Advertisements are placed in local media calling for public objections/comments
- Circulation to external government departments where required e.g. Department of Agriculture
- Circulation is done internally to all relevant departments and comments received and assimilated by the Department of Land Planning and Management (NMBM) and (who prepares a report to Portfolio Committee: Human Settlements); and makes a considered recommendation to grant/refuse a land use application on the basis of internal departmental comments received and objections from the public, if any
- The Portfolio Committee considers the recommendation made in the report and accepts/rejects recommendation
- Portfolio Committee decision submitted to Mayoral Committee for final decision making
- Mayoral Committee decision submitted to Council for information

- The applicant is notified of the decision of Council and granted the right of appeal (note that section 62 of the MSA is not used in the NMBM nor in the case of BCM in respect of an unsuccessful applicant's right of appeal)
- Should there be an appeal from the applicant or an aggrieved objector against the LM's decision, the MEC (Eastern Cape Provincial Government: Department of Local Government and Traditional Affairs) handles the appeal.
- There are also other circumstances, among others, in which Provincial Government takes responsibility for land use decisions and granting development rights on the basis of recommendations from the relevant Local Municipality which include:
 - The rezoning from land zoned for Agriculture or Public Open Space in terms of LUPO
 - A government department objects to the land use application but the Local Municipality recommends approval of an application
 - An applicant/objector/member of the public appeals an application approved by a Local Municipality in terms of LUPO.

Delegations are limited in the NMBM. However, in the case of the BCM, if an application is compliant with its local Spatial Development Framework at precinct planning level, officials are delegated to make a decision on the application provided there are no objections from the public.

Other than the clarity of structure and procedure in terms of LUPO, the hubs reported that nothing else works very well and is confusing particularly the planning process followed in terms of the DFA. The confusion does not only exist with applicants but also with administrators of the law.

b) What does not work well?

BCM attempted to prepare a zoning scheme in terms of the LUPO in respect of its old RSA areas and Ordinance No.15 of 1987 in respect of the old Ciskei areas that were incorporated into BCM, as well as all the old Cape Provincial Administration township areas which were regulated in terms of Proclamation R293. This application is submitted to the Eastern Cape Province with the primary purpose of BCM having delegated authority to consider land use applications in terms of a single zoning scheme. However, the delegations were never officially approved and the BCM proceeded along these lines anyway by using a single scheme as Council policy to regulate these townships. Inconsistencies between this new zoning scheme and the old regulations are addressed in terms of departures or any other lawful mechanism.

It is obvious that having 12 different zoning schemes in the Nelson Mandela Bay municipal area discussed earlier does not bode well for local level planning. Law reform at local level is therefore underway in the NMBM to begin to consolidate its 12 zoning schemes into a single integrated zoning scheme (IZS). This IZS is in the process of being finalized and will be going through a testing process once participated and approved by NMBM Council. Once tested it will be reviewed and finalized to go through a legal process in terms of LUPO and/or any other relevant source legislation.

The DFA does not work well because its principles are too broad and can be motivated from any perspective. The result of DFA hearings in BCM in particular is that they drain planning and other strategic resources in the municipality. As opposed to the DFA, LUPO is very specific in terms of demonstrating need and desirability as criteria for motivating the merits of a decision.

The BCDA has been repealed but certain regulations have been retained which could very well be absorbed into new planning legislation so as to streamline planning legislation. The same can be said for LeFTEA.

Delegations and directives from Provincial to Local Municipalities do not work well. It appears that the system whereby memoranda and/or circulars were sent to Municipal Managers to advise of revisions/directives/delegations has been abandoned. Local officials relied on these directives to deal with changes in the planning context and legal environment.

The Local Municipalities' role in respect of enforcement is unclear and in terms of the various pieces of legislation for example the DFA and where it is clear, there are not sufficient resources to implement enforcement. At the same time, political interference can lead to the prevention of enforcement which is very unhealthy for planning practice and implementation.

Planning applications can be prepared by anyone and not necessarily a registered planner in terms of the Planning Professions Act No. 36 of 2002. The quality of the submission and motivation of an application for land use changes are therefore sometimes weak, under-motivated or over-prepared in some instances; and there is no way of monitoring the behaviour of applicants on behalf of the public in the case of unregistered applicants.

LUPO allows for development contribution levies to be charged by LMs. NMBM only charges for transport development levies determined by the findings of a Traffic Impact Assessment. There is no bulk infrastructure levy for services. This should not be discretionary but determined in law, the view held by BCM as well.

c) What should be changed by a new provincial law?

BCM seems to have found a reasonable idea for a future provincial law between hierarchies of plans in terms of the MSA and the Eastern Cape Provincial Spatial Development Plan (PSDP). Ideally, BCM believes that the PSDP should be used as a mechanism to provide norms and standards and the LM's SDF should provide land use management guidelines which can filter down through the scales to zoning scheme parameters, potentially in the form of land use management schemes or by-laws that begin to inform how a precinct/site is designed and developed. This system would work well especially when unknowns or uncertainties such as climate change and other sustainability criteria are introduced into the environment under consideration because it allows for flexibility. This flexibility is necessary for the Provincial sphere of government to address uncertainties through creating or changing new norms and standards that should ideally be communicated to Local Municipalities through the old circular/delegations system. Accordingly, land use management guidelines can then begin to be developed at the local level and SDF's amended where required by LMs in alignment with higher order plans such as the PSDP. Delegations could simultaneously be sent to Local Councils and (Appeal) Tribunals for ease of understanding who has decision making authority. In this respect, a new provincial law should therefore address planning norms and standards in respect of the following:

- Delegations in respect of who does what and under what competencies and authority
- Clarity of planning processes and procedures
- The simplification of land use management schemes
- Planning policy statements which can be more detailed plans in the hierarchy at local area planning level
- The number of planners prescribed in respect of the number of applications that are assessed per annum and a mechanism for review of this should be allowed for
- Emphasise mentorship particularly in municipalities that have very few experienced planners or twin these to where resources are located within a province

The NMBM had the following views on what a new provincial law should address.

- A new provincial law should permit the LM to have maximum autonomy on spatial planning and land use management
- Ideally there should be a single land use application assessment by the LM but external oversight must be allowed for, where necessary
- A new provincial law should make it obligatory for public infrastructure development programmes to be directly linked to funding sources and concrete commitments in terms of time frames
- Enforcement should be defined and interpreted as a decision deemed by a LM
- Pre-application discussions can happen in principle but must NOT be determined in legal procedure. This would be dangerous as developers seek comfort from politicians at the beginning stages of applying for land use and development rights
- While oversight of appeals processes outside the LM is necessary, it may not be appropriate for these processes to be evaluated by provincial level government. So, the question arises who judges a decision by a LM which is appealed against? This must be seriously considered in new legislation
- There should be a single responsibility at LM level from submission to decision. This means that the current appeal mechanism must be reviewed and perhaps the role for province would be to apply for leave of appeal against a LM's or Tribunal's decision as opposed to a prescribed role for provincial government in all appeals as is presently the case in terms of LUPO
- There is no doubt inconsistency in the way that the law is applied presently therefore new provincial laws must be consistent throughout the nine provinces in South Africa.

The Eastern Cape Provincial Departmental view is that new provincial law should focus on the collective, the public aspects of making settlement and promote collaboration in a manner that it begins to consider how new common meaning unfolds in respect of livelihoods, common pool resource management and the creation of livelihood zones each focusing on their own unique characteristics and landscape assets. A new provincial law therefore needs to seek a balanced approach between rural and urban and take account of the ways that people navigate their day to day existences. Clearly, a new law cannot be a one size fits all and must therefore understand how people themselves make settlement and develop codes that are appropriate for different contexts and at the same time respect the preservation of land.

d) What should be addressed by national legislation that will make provincial laws work better?

- National legislation should seek to resolve the tension between LUPO and NEMA, as NEMA has a significant say that can go against the spatial intents of approved SDFs and other local imperatives.
- Planning law should seek to open up debates between what is appropriate for local economies and whether national imperatives and investments would undermine or enhance local economies and insist on thorough participation by LMs that are directly affected but do not necessarily own the land that is to be used for national projects.
- If there is disagreement between Provincial and municipal level governments in respect of provincial level planning directives such as the Eastern Cape PSDP then what recourse is there for a LM to resolve the disagreement/s in terms of national planning law? A PSDP should be the integration of local SDFs (IDPs) with National imperatives which is not presently the case.
- A National Planning Commission's role could be to resolve spatial planning and land use matters at a strategic level and among and between different spheres of government.
- Planning at national level and all other levels must seek to address the apartheid spatial legacy of the past and ensure that future challenges such as sustainable ways of creating settlement are not only entrenched in law but also monitored and evaluated on a consistent basis.

4.2. Quantitative inputs by the hubs

Table 4: Performance of hubs

No.	Question	Nelson Mandela Bay Municipality (2010 Data)	Buffalo City Municipality (2008 Data)
1	How many applications of each type?	<ul style="list-style-type: none"> • Rezoning (approximately 400) annually • Subdivisions (approximately 160) annually • Consents (approximately 410) annually • Departures (approximately 45) annually 	<ul style="list-style-type: none"> • Rezoning (approximately 289) annually • Subdivisions (approximately 351) annually • Consents (approximately 37) annually • Departures (approximately 507) annually

No.	Question	Nelson Mandela Bay Municipality (2010 Data)	Buffalo City Municipality (2008 Data)
		<ul style="list-style-type: none"> • Site Development Plans (approximately 250) annually 	Site Development Plans – not indicated
2	How long does it take from submission to getting a hearing/decision, on average?	<ul style="list-style-type: none"> • Approximately 12 months 	Approximately 10 months
3	Main reasons for any delays	<ul style="list-style-type: none"> • Lack of information by applicants • Removal of title deed restrictions • Environmental compliance (i.e. EIA's) 	<ul style="list-style-type: none"> • Comments from other spheres of government in terms of legislation such as NEMA No. 70 of 1970 • Comments from internal departments • Incomplete applications / not sufficient information from applicant
4	How many applications are approved, how many declined, how many withdrawn before decision	<ul style="list-style-type: none"> • 85% of applications are approved (approximately) • 15% of applications are declined (approximately). Applications that are withdrawn are very rare. 	<ul style="list-style-type: none"> • 98% of applications are approved (approximately) • 1% of applications are declined (approximately). • 1% of applications are withdrawn
5	How long after decision to notification	<ul style="list-style-type: none"> • Approximately 2-4 weeks 	Approximately 6 weeks
6	No. of appeals received	<ul style="list-style-type: none"> • Approximately 20 annually 	Approximately 3

No.	Question	Nelson Mandela Bay Municipality (2010 Data)	Buffalo City Municipality (2008 Data)
7	Main kinds of applications that are appealed	<ul style="list-style-type: none"> Rezonings 	Rezonings in terms of LUPO
8	How long it takes for appeal body to make a decision?	<ul style="list-style-type: none"> Approximately 12 Months 	Approximately 12 Months
9	No. of staff undertaking the planning function?	<ul style="list-style-type: none"> 4 Management 13 Professional / Technical 	14 excluding top management
10	Budget to undertake function?	<ul style="list-style-type: none"> Salaries & Wages : approximately R6 million 	R17.5 million (operating budget)
11	No. of members on board/decision making structures (including appeal structures) and compositions (all officials/experts, etc.)	<ul style="list-style-type: none"> Human Settlements Committee (political) comprising 15 persons including the Chairperson and supported by approximately 23 officials 	Standing Committee on Development Planning (political) 14 persons including the Chairperson and supported by approximately 12 officials
12	How often it convenes, how many applications heard per setting, etc.	<ul style="list-style-type: none"> Committee sits every six weeks and considers approximately on average some 60 to 70 applications per sitting 	Committee sits every 4-5 weeks and considers approximately on average some 5 applications per sitting
13	Other relevant empirical information that they may have (e.g. value	<ul style="list-style-type: none"> 11510 Building plans with a value of R2 509 million for the 2010/11 financial year. 	None

No.	Question	Nelson Mandela Bay Municipality (2010 Data)	Buffalo City Municipality (2008 Data)
	of applications, location etc.).		

5.0. Overview of key issues that have implications for Provincial Planning Legislation

- Existing provincial planning legislation is structurally unable to address the manner in which customary law is practiced which results in planning legislation being largely ignored in traditional areas and not working here. It is critical for new provincial legislation to address this through a system that embraces the way that local traditions address settlement making in their own right. This may mean having to consider people-centred participation processes and a rethinking of making boundaries based on inappropriate freehold title/individual erven which have implications for the way one considers the relationship between planning, tenure/title as well as the existing system of cadastral registrations.
- The roles, powers and functions assigned to local government in respect of land administration in traditional areas post-apartheid brought into being the separation of powers concept which conflicts directly with the single authority structures that existed in the past where land administration, land tenure and land use management were also largely conflated. With planning clearly being a local competency, it means that a new provincial law has to carefully consider the question of resources for LM's to fulfill their roles without compromising the environment.
- The challenges of climate change and other uncertainties that prevail in the environment require flexibility thus requiring flexibility in planning law as well. Because laws are generally technical and absolute in instances, the question needs to be raised as to whether planning legislation is the placed to govern uncertainty.
- While the provincial view holds that the DFA is more appropriate to deal with planning at a level of principle (and particularly the principle of sustainability), the hubs hold the view that LUPO works well procedurally and from a planning process point of view.
- The demands on the planning regulatory environment by other associated legislation such as NEMA, exacerbates the practice and implementation of planning laws that are already numerous and varied, even further which results in fragmentation both spatially and institutionally.

- The law reform process in the Eastern Cape was not followed through as a result of lack of capacity, uncertain guidance from national level planning authorities and competency confusion among different spheres of government as well as the difficulty in incorporating traditional areas' planning into a new unified planning law for the entire province. These matters could potentially impede a new process in drafting a new provincial law.
- Appeal processes are generally long, cumbersome, expensive and too open-ended for land use decisions to be meaningfully and timeously taken and implemented.

6.0. Preliminary Conclusions and Recommendations

6.1. Preliminary Conclusions

It would appear that LUPO is the predominant legislation in the NMBA and BCM and that the DFA is not frequently used here even though a DFA Tribunal has been established. Only 20 DFA applications throughout the province were received in 2010. LeFTEA has only been used to establish one township in NMBM and not many applications are received throughout the province in terms of this legislation. Most applications are therefore received in terms of LUPO and by far the majority of applications are made in terms of RoRA (see Table 4 above). Unsurprisingly, the legislation applicable in traditional areas of the old Ciskei and Transkei is hardly used and no applications have been submitted to municipalities in these areas in terms of the DFA.

The interviewees felt that nothing works particularly well in terms of the current legislation given the lack of clarity in terms of institutional understanding of where planning decision making and responsibilities lie against so many different pieces of legislation governing and affecting planning and the political interference in decision making processes that have been established over time. Whereas the municipalities revered LUPO as working well procedurally and from a planning process point of view; the provincial government felt that the DFA had better currency from a sustainable development point of view; at least at a level of principle.

The key directions for planning law reform lies mainly in the following areas.

- Planning legislation is best placed as the coordinating legislation as there are many spatial, technical and conceptual issues that other legislation such as NEMA cannot hope to coordinate.
- Spheres of government at provincial and/or national should seek to resolve planning matters at a strategic level and not at a level of detail where the LM should ideally have maximum

autonomy and delegation powers to make spatial planning and land use decisions and be resourced to enforce these.

- Provincial government should set norms and standards and LMs should attend to detail and in this regard, the tools in respect of a hierarchy of plans could potentially be useful in being written in law.
- The payment of bulk infrastructure contribution levies should be determined in law rather than only be discretionary as is presently the case with LUPO.
- Ideally appeals should be handled by LMs but where necessary some measure of oversight should be allowed for at a different sphere of government.
- New planning legislation must have some transitional arrangements in place between the enactment of new national and the new provincial legislation's implementation as well as ensure consistency among the nine provinces.

6.2 Preliminary Recommendations

- From the hub investigations, it would appear that LMs are well placed to administer planning laws in the future either through autonomy or delegations. As this may not be the case for all LMs in the Eastern Cape Province, the role of the province in administering planning law is obviously very important, particularly in two key areas: one, supporting a new and innovative planning law and system in traditional and rural areas and two, ensuring that appropriate planning measures are put in place in the varied contexts of the Eastern Cape.
- Provincial government should ideally set norms and standards through the mechanism of its PSDP or any other relevant mechanism for local municipalities to frame their land use management guidelines with full participation from LMs. In terms of this approach, it is not clear whether doing local level planning and making final decisions on applications on behalf of municipalities, is an appropriate role for provincial level planning.
- There is no doubt that all planning legislation in the Eastern Cape needs to be repealed and consolidated into a single piece of legislation that carefully balances the varying contexts within the province and gives particular attention to the ways in which traditional areas value and use land. It was found that most provincial applications were in terms of RoRA which confers different rights on land to what would typically be understood as development rights in terms of planning legislation which in turn begins to question whether RoRA can simply be repealed in new planning legislation. The repeal of all legislation including RoRA must therefore be carefully considered and participated to give effect to an acceptable new integrated planning law.

- The Eastern Cape case raises an interesting question in respect of the intersection between planning and tenure, title and cadastre reform. It is recommended that this relationship be studied further with a view to understanding new forms of appropriating space and settlement that are more appropriate to the varied context of this province; and potentially the country.

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Planner: Land Planning and Management, Nelson Mandela Bay Municipality – Interview conducted on 27 May 2011

Ordinary member of Planning Advisory Board: Eastern Cape Province - Interview conducted on 27 May 2011

Ordinary member of Planning Advisory Board: Eastern Cape Province - Interview conducted on 27 May 2011

Senior Manager: Spatial Planning. Province of the Eastern Cape: Local Government and Traditional Affairs - Interview conducted on 15 June 2011

Branch Head: Zoning and Land Use Management in the Directorate of Planning and Economic Development: City Planning Division in the Department of Development Planning - Interview conducted on 15 June 2011

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Figure 1: Municipalities of the Eastern Cape Province

Source: Municipal Demarcation Board, 2011

(http://www.demarcation.org.za/pages/default_new.html)