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Title: The functional relationship between municipal by-laws, policies and plans for improved local governance



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1. Background



- ❑ Constitution of the Republic of South Africa, 1996 – Ch 7
- ❑ Expanded developmental mandate
- ❑ Self-governing powers of SA municipalities – legislative and executive powers with certain degree of autonomy
- ❑ S. 11(3) of the Local Government Municipal Systems Act 32 of 2000:
a "municipality exercises its legislative or executive authority by – (a) developing and adopting policies, plans, strategies and programmes, including setting targets for delivery; ...(m) passing by-laws..."
- ❑ In SA: local governance instruments prescribed by law include: policy, resolutions, by-laws, plans such as IDPs etc

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Background cont.



□ Purpose of presentation:

Discuss functional relationship between, by-laws, policies and IDPs – In this process, I share with you some interesting research findings gathered in the course of my LLD studies. More attention is given to policies and IDPs because other presenters have discussed by-laws in some detail.

□ Approach

- Generic relevance of local governance instruments
- Factors to be considered before a governance instrument is used
- Policy instruments that can be used by SA municipalities and their associated functions
- Possible basis for enforceability of executive policies at local level (briefly)
- IDPs – Brief inquiry into the status of adopted IDPs
- Concluding remarks re functional relationship

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2. Generic importance of local governance instruments

- ❑ Main vehicle for achieving defined public objectives
- ❑ Tool for allocation of resources
- ❑ Regulating people's behaviour e.g. by creating incentives
- ❑ Create rights and duties
- ❑ Communicate to society/communities
- ❑ Share government's vision for the future

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3. Factors to be considered before using a governance instrument

The decision-maker must understand:

- ❑ The variety of instruments available to the decision-maker – by-law, resolution, policies, IDPs, other plans etc
- ❑ The differences amongst the range of available instruments
- ❑ How each instrument fits into others
- ❑ The processes for designing and implementation and
- ❑ The need for effective coordination of instruments – especially those instruments engaged in complementary tasks

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4. Policies that can be used by SA municipalities



- ❑ Lack of general legislative guidelines on municipal policy-making and implementation
- ❑ Ss 74–75 and 96–98 of the Systems Act prescribes process for municipal tariff policies and debt collection policies
- ❑ But what is a policy????
- ❑ Supreme Court of Appeal in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* [2001] 4 All SA 68 (A) noted that:

“The word ‘policy’ is inherently vague and may bear different meanings. It appears to me to serve little purpose to quote dictionaries defining the word. To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct...

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Policies cont.



... Because of this I do not consider it prudent to define the word either in general or in the context of the Act. I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear. – See par 7

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Policies cont.



- ❑ Different national intellectual traditions in the study of policy instruments
- ❑ Origin of the idea of policy-making – established branch of Public Admin
- ❑ No generally-accepted prescriptive model to policy formulation – generic process with emphasis on public participation
- ❑ In South Africa, policy studies is relatively recent and still evolving

Three types of policies and associated functions

- ❖ **Political policies**
 - A plan of action adopted by a political party or the government in power

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Policies cont.

- Presented to the electorate/public as a series of value preferences which it seeks to implement upon election/re-election
- Cannot be enforced irrespective of their content and at best, remains the party's/government's vision for the future
- Propaganda documents – can be refined and submitted to the legislature as a bill
- ❖ **Administrative policies**
 - Administrative policy refers to guidelines developed by the executive or senior admin managers to guide various (municipal) departments on the practical steps to be followed in effectively and correctly implementing policy adopted by the executive or legislation (by-law)

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Policies cont.



- internal policy documents which give directions on how subordinate staff members should approach certain tasks
- Some have internal binding force
- ❖ **Executive policies**
- Designed by political executive institutions (e.g. executive mayors or executive committees of municipal councils) to give effect to legislation/by-laws
- Responsibility of executive to transform legislation into a form that is passed unto various gov't departments for implementation
- Original legislation may expressly require a member of the executive to adopt policy to give effect to legislative provision

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Policies cont.



- Legislation may require that the executive give meaning to some provisions through interpreting and delimiting the scope of application
- Executive policies should complement, but "cannot override, amend or be in conflict with laws“, including subsidiary legislation
- Executive policies can also emanate from negotiations between municipal executives and community residents with regard to the content of a socio-economic right that the executive seeks to provide
- Executive policies are enforceable to the extent that they create rights and impose duties

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6. Basis for the enforcement of executive policies at local level



- ❑ Interpretation of the positive duty imposed on government (the state) by *inter alia*, sections 24(b), 26(2), 27(2) and 29(1)(b) of the Constitution to "take reasonable legislative and other measures" to give effect to relevant socio-economic rights
- ❑ Constitutional delegation of authority – original legislation delegating power to executive – discretion enjoyed in the type of instrument to be used

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7. IDPs and other plans



- ❑ The *Systems Act* regulates in detail various aspects of the IDP (Ch 5) – process of design, adoption, implementation and amendment etc
- ❑ Integration of different sub-plans – Spatial Development Framework (SDF), Water Services Development Plan (WSDP), Integrated Energy Plan (IEP), Waste Management Plan (WMP); Air Quality Management Plans (AQMP) etc
- ❑ Main criticism: the Systems Act prescribes a blanket approach to integrated development planning

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Adoption and legal status of IDP



- ▶ After drafting an IDP, it must be adopted by the council of a municipality
- ▶ Upon adoption, the IDP becomes the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development
- ▶ An adopted IDP binds a municipality in the exercise of its executive authority, except where it is inconsistent with national or provincial legislation
- ▶ The IDP is not a static plan – it is supposed to be (annually) reviewed and amended by a municipality in accordance with prescribed procedure

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IDP cont.

- ▶ The process for amending an IDP is spelt out in s 3 of the *Local Government: Municipal Planning and Performance Management Regulations* (2001) GN R796 in GG 22605 of 24 August 2001
- ▶ An adopted IDP "binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a by-law." See – s 35(1)(c) of the Systems Act
- ▶ Legal status of an IDP???

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8. Concluding remarks re functional relationship



- Complementary relationship exist between by-laws, policies, IDPs and other local governance instruments – tools to realise developmental mandate
- Rights and duties should preferably be created through by-laws
- Where rights are created in an executive policy and not subsequently transformed into by-law, that policy can be used to hold a municipality accountable

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Thank You
Dankie

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