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# A CLASH OF RIGHTS IN THE LEGAL AND SPATIAL PLANNING CONTEXTS: THE CASE OF THE PHILIPPI HORTICULTURAL AREA\*

“Clash”: To come into conflict; to be incompatible; a hostile encounter; a sharp conflict; an argument or disagreement between people.<sup>1</sup>

## SUMMARY

The Philippi Horticultural Area (PHA) is often referred to as Cape Town’s ‘food basket’, providing over one-third of Cape Town’s fresh vegetable produce. Located in the heart of the Cape Flats District, the PHA is surrounded by some of the poorest and most densely populated suburbs in the Cape Town metropolitan region. The agricultural area has come under increasing development pressure in recent years, caught in the midst of the ongoing battle between urban development and housing delivery, on the one hand, and the protection of agricultural activity, on the other. This article evaluates the arguments for and against the development of portions of the PHA against secs. 24-27 of the *Constitution of the Republic of South Africa, 1996* relating to rights associated with the environment; property; housing; healthcare, food, water, and social security. The article seeks to determine whether a balancing of these rights can be achieved within the PHA, and whether portions of the PHA can be developed in a manner that protects and enhances the cultural and environmental integrity of the area, while also allowing urban development to accommodate new and existing communities. We argue that issues related to food security, environmental well-being, and access to land and development are inextricably linked and cannot be dealt with in isolation. Instead, a more holistic approach is needed, which takes a balanced view of these issues and embraces the spirit of the *Bill of Rights* (as contained in Chapter 2 of the *Constitution*) in an all-encompassing manner. Given that the PHA faces enormous challenges such as rampant crime, illegal occupation of land, and so on, we take the position that a balancing of rights is not only the most appropriate strategy for the PHA from a legal point of view, but also crucial to its very survival. We, therefore, argue that



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1 Merriam-Webster “Clash”, <https://www.merriam-webster.com/dictionary/clash> (accessed on 5 December 2019).

a symbiotic relationship must be cultivated between urban and agricultural land uses, through appropriate urban development articulated in a spatial framework that provides clarity as to how urban development can assist in protecting productive agricultural activity. In this way, the role of the PHA as Cape Town's 'food basket' can be better conserved for current and future generations.

## 1. INTRODUCTION

In the run-up to South Africa's first democratic elections in April 1994, the Conference for a Democratic South Africa (CODESA) negotiated the content of the interim *Constitution*,<sup>2</sup> which operated for a period of almost three years, before the Constitutional Assembly adopted the "final" *Constitution of the Republic of South Africa* (hereinafter, "the *Constitution*")<sup>3</sup> that came into force on 4 February 1997.<sup>4</sup> The *Constitution* is the supreme law of the land, with a highly progressive *Bill of Rights* that has been described as "second to none".<sup>5</sup> Sec. 7(1) of the *Constitution* states that "this Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".<sup>6</sup>

The last quarter of a century has seen numerous situations where rights enshrined in the *Constitution* have conflicted or clashed with one another. This has been inevitable, given the structure of the *Bill of Rights*, which is "a generous catalogue of rights, each of which is expressly qualified by the possibility of limitation in the service of countervailing considerations".<sup>7</sup> This article uses Cape Town's Philippi Horticultural Area (PHA) as a case study to demonstrate how rights can potentially be spatially and legally balanced when they clash. It should be noted at the outset that the authors are not legal experts, but professional planners practising in the realm of spatial planning<sup>8</sup> and land development.<sup>9</sup>

The PHA is undeniably one of the most hotly contested parts of Cape Town. While the area is widely considered to be the city's 'food basket', its excellent location in the metropolitan area and proximity to existing and forthcoming

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2 The "interim" *Constitution of the Republic of South Africa Act 200/1993*.

3 *Constitution of the Republic of South Africa Act 1996*.

4 SAHO "A history of the South African Constitution 1910-1996", <http://www.sahistory.org.za/article/history-south-african-constitution-1910-1996> (accessed on 5 December 2019); Currie & De Waal 2013:1-7.

5 SAHO "South African Constitution 1996", <http://www.sahistory.org.za/topic/south-african-constitution-1996> (accessed on 5 December 2019).

6 The *Constitution*:sec. 7(1).

7 Currie 2012:265.

8 Over the years, a number of terms have been used to describe the discipline of spatial planning. For the purposes of this article, 'spatial planning' may be read synonymously with 'town planning'; 'city planning'; 'urban planning'; 'regional planning'; 'town and country planning', and 'urban development planning'.

9 The discipline of spatial planning and land development is deeply entrenched in the legal realm. This is particularly the case in terms of land-use management (subdivision, rezoning, consolidation of properties, registration of servitudes, removal of restrictive conditions of title, and so on).

public transportation infrastructure, render parts of the area highly suitable for higher density urban development. Its vast extent imbues it with the potential to provide sorely needed residential opportunities for tens of thousands of lower income families, where the demand for housing is particularly high. This tension between the protection of existing agricultural activity and the conversion of parts of the PHA to non-agricultural land uses sets up a conflict between certain of the rights enshrined in the *Constitution*. This tension also raises the following questions: How does one go about balancing these intersecting considerations from a spatial planning and land development perspective? How can legal and rights discourse, rights analysis and the balancing mechanism offered by it contribute to resolving these matters?

The aim of this article is to critically review the tension between the conservation of the PHA for agricultural purposes, on the one hand, and urban development (that responds to urbanisation, the demand for affordable housing, the urgent need for Transit Oriented Development<sup>10</sup> and higher density urban environments, as well as the need for mixed-use activities to counter-balance the monofunctionality<sup>11</sup> of the Cape Flats District and apartheid-era spatial planning), on the other. Given the ongoing friction between conservation groups, government departments, built-environment professionals, farmers, landowners and social activist groups involved in land matters in the PHA, it is critical that these intersecting and interconnected matters be considered now, with a view to understanding how a balanced outcome between productive agricultural activity and urban development can be achieved.

This article is divided into seven sections. After this introductory section, the second section provides a general framing of constitutional rights, as they relate to the discipline of spatial planning and land development. Section three provides an overview of the PHA, and is followed by section four, which outlines the key development applications in the area. The fifth section evaluates the main arguments for and against the development of parts of the PHA against secs. 24-27 of the *Constitution* and seeks to ascertain whether a balance of these rights can be achieved within the PHA. Section six outlines a potential strategic way forward, after which section seven concludes the article.

## 2. GENERAL FRAMING OF CONSTITUTIONAL RIGHTS

This section of the article locates some of the content which professional planners address on a day-to-day basis within the ambit of the *Bill of Rights*.

10 Transit Oriented Development (TOD) refers to urban development that responds to an integrated public transport network in relation to its intensity and density. TOD is generally mixed-use in nature (for instance incorporating housing, employment, retail, and social activities) and is usually focused along main public transport routes and around existing and/or new public transport stations (usually rail or bus), served by frequent, high-quality and efficient transportation services. TOD is designed to create a relatively high-density, compact urban form, with the aim of creating more liveable cities. For more information, see City of Cape Town 2016:16-26.

11 The Cape Flats District is largely comprised of residential suburbs.

Specifically, the aim is to highlight the frequency with which matters related to spatial planning and land development are embroiled in rights clashes, as the following examples will demonstrate.

## 2.1 Example One

In 2003, an environmental and technical feasibility study was completed for Protea Village in the Newlands area of Cape Town, which sought to return former residents (who had been displaced under the *Group Areas Act*<sup>12</sup>) to the area. The local homeowners' association strongly objected to any development, on the grounds that the site had been used as a riparian park since the forced removal of residents from the properties in the 1960s, and that development for restitution purposes would not only prevent their recreational access to the park, but also depress their property values.<sup>13</sup> In this instance, a conflict of rights existed between sec. 24 (environment) and secs. 25-26 (property and housing) of the *Constitution*.

## 2.2 Example Two

In 2001, the Constitutional Court ruled on a matter that was similar to the one sketched in the preceding example. In *Minister of Public Works v Kyalami Ridge Environmental Association*,<sup>14</sup> a group of poor residents from Alexandra Township in Johannesburg had been relocated after their dwellings were washed away in a flood. They were given temporary prefabricated homes on a portion of the state-owned grounds of a large farm, on which a prison had been built near Kyalami Ridge, an upper middle-income White residential suburb in the Midrand area.<sup>15</sup> Local property owners objected on environmental and other grounds, and the court was presented with a conflict of rights "with environmental rights applying to the richer property owners and housing rights applying to the poorer flood victims".<sup>16</sup>

## 2.3 Example Three

In 2000, the Constitutional Court handed down a landmark judgment in *Government of the Republic of South Africa v Grootboom*.<sup>17</sup> This matter

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12 The *Group Areas Act* 36/1966.

13 NM & Associates Planners and Designers 2003.

14 *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC).

15 Goldstone 2006:1-4.

16 Youens "Environmental justice in South Africa – A legal discussion with specific reference to the Fuleni Case in Northern KwaZulu-Natal", <https://youensattorneys.co.za/environmental-justice-in-south-africa-a-legal-discussion-with-specific-reference-to-the-fuleni-case-in-northern-kwazulu-natal/> (accessed on 5 December 2019).

17 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

pertained to Mrs Irene Grootboom and other respondents<sup>18</sup> having become homeless as a result of being evicted from their informal homes, which were situated on private land that was earmarked for formal, low-cost housing. The respondents had applied to the Cape Town High Court for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted some form of relief. The appellants<sup>19</sup> were ordered to provide the respondents with shelter and basic services to ameliorate the conditions in which they were living. The appellants instead opted to challenge the High Court order. As mentioned, the case was eventually heard in the Constitutional Court.<sup>20</sup>

This case illustrates a clash among various groups' rights related to land for housing. The first right is access to adequate housing (sec. 26 of the *Constitution*), in this instance by vulnerable evictees including adults and children. Secondly, the right to gain access to land (sec. 25(5) of the *Constitution*) for housing is implicitly involved. The third right refers to that of the private landowner (sec. 25(1) of the *Constitution*), whose land the evictees occupied, to develop his land for any legally permissible purpose. The fourth right refers to the rights of those who were earmarked to occupy the state-assisted low-cost housing, for which the private landowner's land had been earmarked (sec. 25(5) of the *Constitution*).

## 2.4 Example Four

In 2018, a non-profit organisation objected to the proposed development and sale of the publicly held Maiden's Cove precinct, located between the Clifton and Camps Bay coastal areas in Cape Town. The organisation argued that the proposed high-cost housing development would degrade the scenic attributes of the area; render the precinct an exclusive space for the wealthy; and exclude the economically marginalised from enjoying the area's natural beauty. According to former Constitutional Court Justice Albie Sachs, "Maiden's Cove has great historic meaning for the majority of Capetonians who were not allowed onto the beautiful beaches of Clifton and Camps Bay during the long dark years of apartheid".<sup>21</sup> In this instance, given that the site in question is publicly held, a conflict of rights exists between sec. 25(4)(a) (public interest relative to property) and secs. 9 and 24 (equality and environment) of the *Constitution*, as well as the prospective rights of the developer pending the acquisition of the land in question.

18 The respondents included 510 children and 390 adults. Mrs Irene Grootboom brought the application before the High Court on behalf of all the respondents.

19 Namely the National Government; Western Cape Provincial Government; and Cape Metropolitan Council and Local Government: Oostenberg Municipality, as known at the time.

20 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

21 As cited in Mtembu "Former Justice Albie Sachs fights R1bn sale of Clifton land", <https://www.iol.co.za/weekend-argus/former-justice-albie-sachs-fights-r1bn-sale-of-clifton-land-15760788> (accessed on 5 December 2019).

The above examples show that, in respect of matters related to spatial planning and land development, rights enshrined in the *Constitution* often conflict or clash. While there is no doubt that the PHA is a unique area (as discussed later in this article), issues related to its development (or non-development) are not unique from a constitutional law perspective. In fact, we would suggest that every development application that is considered to be contentious is very likely caught in the midst of a clash of constitutional rights, whether the parties involved are aware of this or not.

### 3. OVERVIEW OF THE PHILIPPI HORTICULTURAL AREA

This section introduces the PHA, including the spatial context in which it is located (refer to Figure 1). It provides insights into its historical background, environmental character, socio-economic context, and current role in serving a portion of Cape Town's demand for food.

The historical windswept landscape of Philippi was, as late as the 1880s, often described as “a series of unoccupied sand dunes”<sup>22</sup> unsuitable for agricultural production and more suited to hunting grounds for wildlife. Had it not been for the early immigrant settlers, who were lured to the area in terms of the then government's plans made in 1876 to transform Philippi into a source of fresh produce, the area would not currently be designated as the PHA. German settlers were largely responsible for transforming this harsh environment into workable agricultural lands. It is important to note that the early indigenous occupants of the Cape – the Khoikhoi – were herders and found the area impenetrable. However, it is recorded that the greater Cape Flats area, of which the PHA forms a part, was the “grazing ground for ... [Khoi-Sân] ... herders for over 2000 years prior to the arrival of European settlers”.<sup>23</sup>

Between the 1880s and the 1970s, the German immigrants to the Cape Flats established themselves within the PHA, “creating a cultural landscape”<sup>24</sup> unique within the Cape Peninsula”.<sup>25</sup> As they studied the landscape, the German settlers started employing context-specific systems and methods of farming vegetables, including seasonal rotation, turning the high water table (as a result of the presence of the Cape Flats Aquifer)<sup>26</sup> into a piped irrigation system, and creating furrows as drainage systems.

22 Abrahamse *et al.* 2018:6.

23 Battersby-Lennard & Haysom 2012:23.

24 “Cultural landscapes ... testify to the creative genius, social development and the imaginative and spiritual vitality of humanity. They are part of our collective identity.” (UNESCO “Cultural landscapes”, <https://whc.unesco.org/en/culturallandscape/> (accessed on 5 December 2019)).

25 Abrahamse *et al.* 2018:9.

26 An aquifer is a “water-bearing layer of soil, sand, gravel or rock that will yield significant usable quantities of water” (City of Cape Town 2018:94).



Figure 1: Metropolitan context<sup>27</sup>

27 Authors' map generated from information in City of Cape Town "City of Cape Town map viewer", <https://citymaps.capetown.gov.za/EGISViewer/> (accessed on 5 December 2019).

It was not until the 1920s that the area started to experience suburbanisation through a number of subdivisions, impacting on the German settlers through reducing their population size and threatening their livelihoods in the area.<sup>28</sup> Furthermore, the introduction of the *Group Areas Act*,<sup>29</sup> together with rapid urbanisation in the 1980s, began to establish the broader Cape Flats as an area for the relocation of Coloured and Black communities, who were displaced as a result of declaring certain areas,<sup>30</sup> in which they resided, to be for the exclusive occupation by White persons. This gave rise to further subdivisions of land portions in Philippi for formal suburbs and informal settlements for people of colour, whose histories are associated with displacement and disadvantage, which resulted in them living in abject poverty and unsafe and squalid conditions, far removed from the then core of the city.

At present, covering some 3,187 hectares,<sup>31</sup> the PHA provides over one-third of Cape Town's fresh vegetable produce.<sup>32</sup> In terms of its socio-economic context, the PHA can be characterised as a highly impoverished area, with insufficient service delivery. This is evidenced by low household income levels, where 59 per cent of the 1,791 households in the area have a monthly income of R3,200 or less per month. Only 67 per cent of dwellings in the area are categorised as "formal" and have access to electricity; 68 per cent of households have direct access to piped water; and merely 22 per cent of households have access to a flush toilet that is connected to the municipal sewer system.<sup>33</sup>

In recent years, among other complexities, high crime levels have had detrimental impacts on the viability of farming within the PHA, with farmers allocating substantial budgets to private security. Crime has reduced profit margins substantially, in some cases by as much as 27.71 per cent.<sup>34</sup> "Many farmers argue that the easy public access to the PHA is a problem. Productive fields often extend to less than half a meter from public roads, and hence theft by bakkie syndicates is simple".<sup>35</sup> As a result of theft and vandalism within the PHA, just over 20 per cent of commercial farmers have placed their farms on the market.<sup>36</sup> In addition, farmers face the threat of illegal land occupation, as epitomised by the emergence of nine informal settlements within the PHA,

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28 Abrahamse *et al.* 2018:11.

29 The *Group Areas Act* 36/1966.

30 These were usually well-located and well-serviced parts of Cape Town close to urban opportunities.

31 This is equivalent to 31.87 square kilometres.

32 As calculated from Battersby-Lennard & Haysom 2012:43, read in conjunction with Battersby-Lennard *et al.* 2014:97.

33 City of Cape Town "City of Cape Town – 2011 Census Suburb Philippi Small Holdings", [http://resource.capetown.gov.za/documentcentre/Documents/Maps%20and%20statistics/2011\\_Census\\_CT\\_Suburb\\_Philippi\\_Small\\_Holdings\\_Profile.pdf](http://resource.capetown.gov.za/documentcentre/Documents/Maps%20and%20statistics/2011_Census_CT_Suburb_Philippi_Small_Holdings_Profile.pdf) (accessed on 5 December 2019).

34 Indego Consulting 2018:65.

35 Indego Consulting 2018:65.

36 Indego Consulting 2018:66.



which have grown from 867 residential units in 2011 to 3,321 residential units in 2016,<sup>37</sup> representing a growth of 283 per cent over just five years.

#### 4. OVERVIEW OF KEY DEVELOPMENT APPLICATIONS IN THE PHILIPPI HORTICULTURAL AREA

This section of the article introduces the recent key development applications in the PHA and provides a summary of the main objections to these applications.

##### 4.1 Key development applications

In recent years, there have been a number of land development applications related to various parts of the PHA and immediate surrounds (refer to Figure 2). These applications include seeking permission for residential development, silica sand mining, and large-scale mixed-use developments with residential as the predominant land use.

The responses from the authorities, which consider applications within their respective legal mandates, have been interesting insofar as their different decisions, considerations and application of the relevant legislation are concerned. A number of authorities are typically involved in deciding the outcome of development applications within the PHA, with other authorities being invited to comment on the applications. The authorities include:

- The Western Cape Department of Environmental Affairs and Development Planning, which considers applications for environmental authorisation in terms of the *National Environmental Management Act*,<sup>38</sup>
- Heritage Western Cape, which is usually a commenting authority and whose mandate falls within the *National Heritage Resources Act*,<sup>39</sup>
- The Western Cape Department of Agriculture, which is a commenting authority in respect of the agricultural zoning of the PHA in terms of the *Subdivision of Agricultural Land Act*,<sup>40</sup> and
- The City of Cape Town, whose role is to consider and decide development applications within the Cape Town municipal area in terms of the *City of Cape Town Municipal Planning By-Law*,<sup>41</sup> read in conjunction with the *Spatial Planning and Land Use Management Act*<sup>42</sup> and the *Western Cape Land Use Planning Act*.<sup>43</sup>

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37 Indego Consulting 2018:20.

38 The *National Environmental Management Act* 107/1998.

39 The *National Heritage Resources Act* 25/1999.

40 The *Subdivision of Agricultural Land Act* 70/1970.

41 The *City of Cape Town Municipal Planning By-Law* 2015.

42 The *Spatial Planning and Land Use Management Act* 16/2013.

43 The *Western Cape Land Use Planning Act* 3/2014.

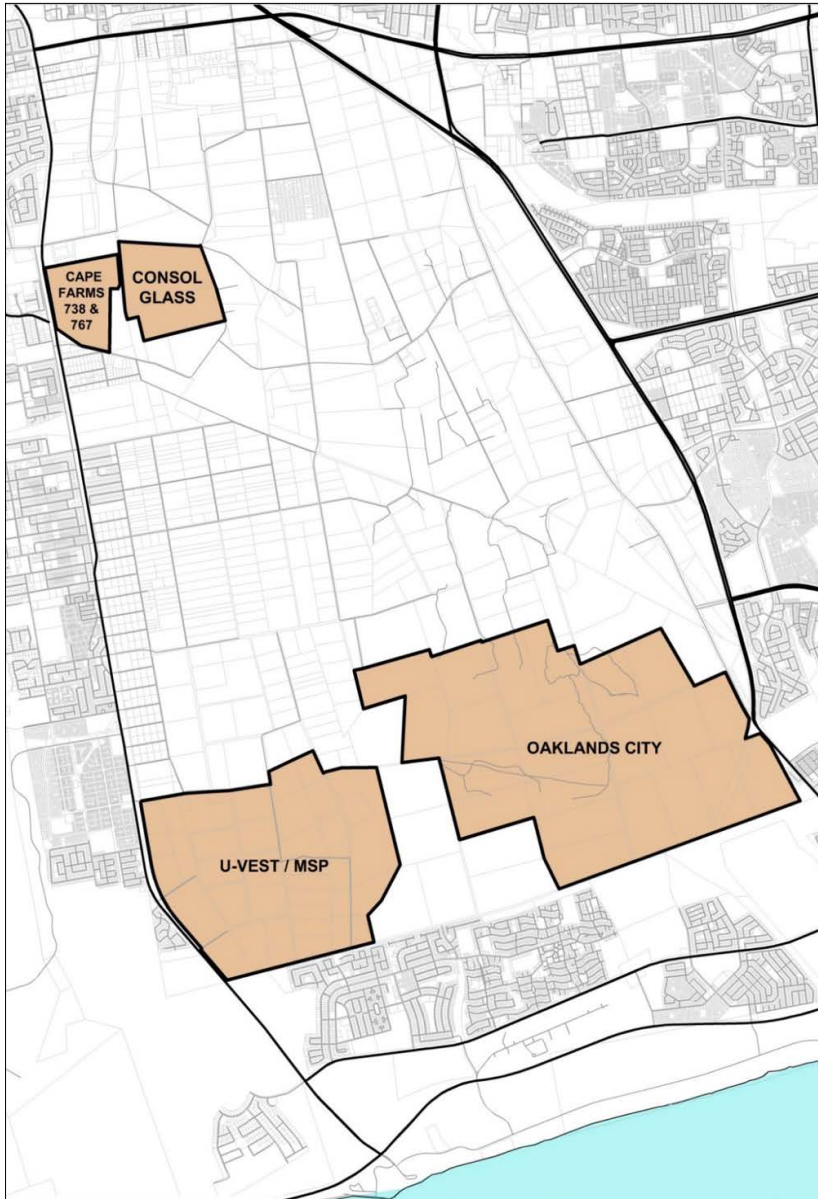


Figure 2: Key development applications in the PHA<sup>44</sup>

44 Authors' map generated from information in City of Cape Town "City of Cape Town map viewer", <https://citymaps.capetown.gov.za/EGISViewer/> (accessed on 5 December 2019).

Various studies<sup>45</sup> and spatial frameworks<sup>46</sup> have been undertaken to date to inform the role of the PHA as Cape Town's so-called 'food basket'. However, none of these have clarified the PHA's long-term role/s relative to the pressure for urban development, and with this, how the conflict of the various rights enshrined in the *Constitution* can be managed. Because it is such a contested area, the PHA requires a clear set of measures or mechanisms (in other words, a considered and comprehensively articulated spatial framework that has the support of all the relevant authorities and stakeholders) that begin to direct its sustainable future. Specifically, it is essential to seek clarity in respect of the following questions:

- Which portions of the PHA are important to conserve and protect for agricultural or food-production purposes, and how is this managed in a sustainable manner?
- Which portions of the PHA or significant environmental or heritage features should be rehabilitated, managed and maintained, and whose mandate is it to carry out these responsibilities?
- Which portions of the PHA could be appropriately developed, and how can development play a role in the conservation, protection, rehabilitation, and management of the PHA as a significant resource?

There is no doubt that the absence of a clear and comprehensive spatial framework, which has widespread buy-in, has resulted in continuous friction between the various parties (conservation groups, government departments, built environment professionals, farmers, landowners, and social activist groups, and so on) involved in land matters in the PHA and, more recently, in clashes between various authorities / government departments.<sup>47</sup> Moreover, the absence of such a framework has resulted in land-development applications and applications for environmental authorisation ending in unsatisfactory, drawn out and expensive procedural processes. Consequently, there have been a number of objections, appeals and court cases in respect of land-development applications pertaining to parts of the PHA.

The lack of a single, clear vision for the PHA (that has the buy-in of all the relevant authorities) is perhaps most evident when comparing the most recent applicable spatial frameworks, namely the City of Cape Town's *Municipal Spatial Development Framework*<sup>48</sup> and the Western Cape Department of Agriculture's *PHA Socio-Economic Agricultural Plan*.<sup>49</sup> In comparing these frameworks (refer to Figures 3 and 4), it is clear that there is significant misalignment between them, with the exception of the eastern portions of

45 See, for example, City of Cape Town 2010; Battersby-Lennard & Haysom 2012.

46 See, for example, City of Cape Town 2018b; Indego Consulting 2018.

47 For instance, the Western Cape Department of Environmental Affairs and Development Planning recently appealed a decision taken by Heritage Western Cape (an entity within the Western Cape Department of Cultural Affairs and Sport) to provisionally protect two properties within the PHA in terms of sec. 29 of the *National Heritage Resources Act 25/1999*.

48 City of Cape Town 2018b.

49 Indego Consulting 2018.

the PHA. Whereas the *Municipal Spatial Development Framework* supports incremental growth within the southern and north-western portions of the PHA, the *PHA Socio-Economic Agricultural Plan* does not. This lack of alignment has serious implications for current and future land-development applications within the PHA, as it may well result in even more clashes or conflicts.

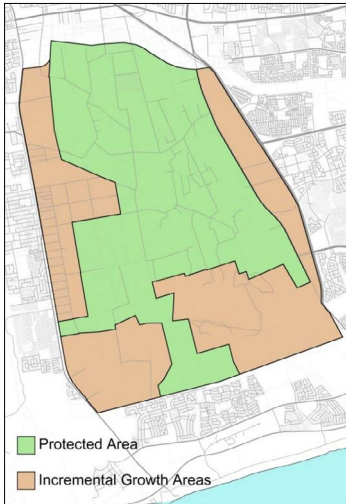


Figure 3: *Municipal Spatial Development Framework*<sup>50</sup>

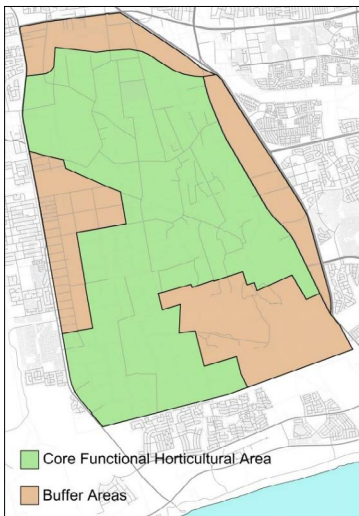


Figure 4: *PHA Socio-Economic Agricultural Plan*<sup>51</sup>

50 Authors' map generated from information in City of Cape Town 2018b.

51 Authors' map generated from information in Indego Consulting 2018.

## 4.2 Objections to development applications

The table below summarises the objections, appeals and court cases in respect of the key development applications within the PHA, and should be read with Figure 2.

Development application	Extent of site (hectares)	Approximate commencement of application process	Nature of proposals	Objections submitted to regulatory authorities	Appeals submitted to regulatory authorities	Subject of court cases
Oaklands City	484	2009	20,000 residential units, with schools, commercial, industrial and other facilities	Yes		Yes*
U-VEST/ MSP	289	2011	Mixed-use, including residential, retail and open space	Yes		Yes**
Consol Glass	55	2016	Silica sand mine	Yes		Too early in process to predict
Cape Farms 738 and 767	36	2017	Mixed-use, largely residential (750 units) and agricultural activity	Yes		Too early in process to predict

\* In this matter (*Philippi Horticultural Area Food and Farming Campaign & 1 Other v MEC for Local Government, Environmental Affairs and Development Planning & 11 Others* 2020 3 SA 486 (WCC)), the Western Cape Division of the High Court was approached to review and set aside a number of approvals pertaining to applications for subdivision, rezoning and environmental authorisation; as well as decisions taken by the relevant regulatory authorities to refuse appeals against the approvals. The regulatory authorities as well as the landowner/developer opposed the court application. The court delivered its judgment on 17 February 2020 in favour of the applicants and directed the regulatory authorities to consider the impacts of the proposed development on the Cape Flats Aquifer, in the context of climate change and water scarcity.

\*\* As part of the matter referred to in the preceding fn., the High Court was initially approached to review and set aside a number of decisions pertaining to the U-VEST/ MSP development application. Following agreement by the parties to separate the issues (reached on 23 August 2018), only the issues pertaining to the Oaklands City development application were ultimately put before the court for determination.

Stakeholders who participate in legislative processes – in terms of the relevant spatial planning and land-development, environmental, and heritage legislation – include conservation groups, farmers, landowners, ratepayers' and residents' associations, as well as social activist groups. Their objections can generally be summarised as follows:

- Livelihoods would be lost and/or compromised by transforming the land for urban development purposes.
- The zoning of the PHA should remain agricultural so as to make the area resilient, protect food security and water reserves for Cape Town, and simultaneously retain the sense of place of the PHA as urban development is not compatible with a rural / rustic atmosphere.
- The environmental qualities of the PHA such as the Cape Flats Aquifer, wetlands and soil conditions are more conducive to agricultural activities than to urban development.
- The PHA has a rich and unique cultural heritage and is a cultural landscape of significant value that must be protected. This, together with inherent environmental and agricultural conditions, must be conserved in perpetuity for the benefit of present and future generations.
- The PHA is a traditional commons area that should be protected for all of Cape Town's inhabitants.

The following section of the article evaluates the abovenamed objections to development within the PHA against some of the arguments made in favour of urban development. This evaluation is undertaken through the lens of secs. 24-27 of the *Constitution*, with a view to ascertaining whether a balancing of rights is achievable within the PHA.

## 5. BALANCING CONSTITUTIONAL RIGHTS IN THE PHILIPPI HORTICULTURAL AREA

As highlighted in Section 2 above, constitutional rights often conflict or clash with one another in respect of matters related to spatial planning and land development. When this occurs, a balancing process is required, which calls for "the maximum harmonisation of all the competing considerations".<sup>52</sup> In the case of the PHA, the clash of rights is far more complex than some of the case examples described in Section 2 of this article. This is due to the issues involved being polycentric, inextricably linked, and unable to be dealt with in isolation. Within the PHA, the conflicts generally arise between sec. 24 (environment), sec. 25 (property), sec. 26 (housing), and sec. 27 (healthcare, food, water, and social security) of the *Constitution*. It could further be argued that, when considering matters related to spatial planning and land development in the PHA, at least four other rights are in conflict with one another and with those listed above. These include sec. 10 (human dignity), sec. 12 (freedom and

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52 Woolman & Botha 2013:91.

security of the person),<sup>53</sup> sec. 28 (children),<sup>54</sup> and sec. 33 (just administrative action)<sup>55</sup> of the *Constitution*.

What adds further complexity is that sec. 39 (interpretation of the *Bill of Rights*) of the *Constitution* states that “the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill”.<sup>56</sup> By implication, the rights listed above must also be balanced with “objectives that have not been accorded the status of rights”,<sup>57</sup> including – but not limited to – spatial planning policy objectives<sup>58</sup> that speak to the rights of the collective in a city. These include, among others, development principles and imperatives such as the need to create higher density urban environments; the need to support liveable, mixed-use neighbourhoods; and the need to enable access to viable public transportation for all inhabitants of the city. Figure 5 conceptually illustrates the multiple clashes between constitutional rights and other objectives relevant to the PHA.

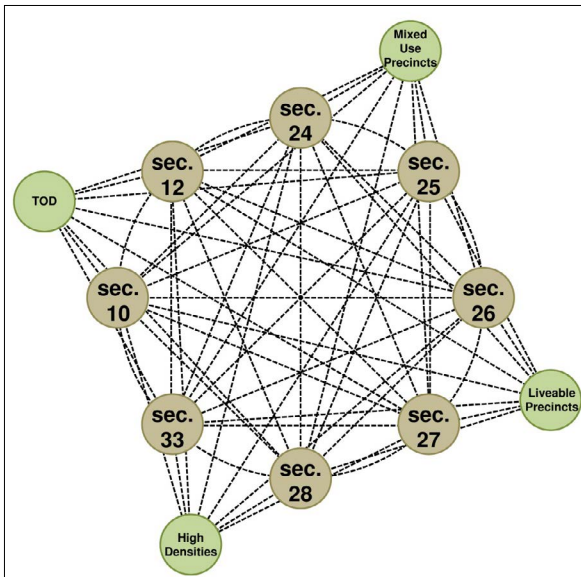


Figure 5: Clashes within the PHA

53 Due to rampant crime in the PHA – discussed in Section 3 above.

54 Specifically, sec. 28(1)(c) relating to the right of children to basic nutrition and shelter, among other rights.

55 Due to a number of inconsistent decisions made by individual government departments over the past few years.

56 The *Constitution*: sec. 39(3).

57 Du Bois 2004:160.

58 Among others, this would include the policy objectives of the City of Cape Town’s *Municipal Spatial Development Framework* (in terms of the *Local Government: Municipal Systems Act 32/2000*) and the objectives of the *Spatial Planning and Land Use Management Act 16/2013*.

In the following subsections, we examine the multiple clashes between rights and other objectives relevant to the PHA, using the terms 'limitation of rights', 'proportionality', 'balancing', 'transformation', and 'democratic constitutionalism' to frame our argument.

## 5.1 Limitation of rights

It is clear that rights are not absolute and that, when they do clash, it is acceptable in certain situations to limit some of the conflicting rights.<sup>59</sup> Sec. 36 (limitation of rights) of the *Constitution* states that "the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".<sup>60</sup> In other words, any of the rights enshrined in the *Constitution* is "notionally subject to the possibility of limitation",<sup>61</sup> provided that the purpose for the limitation is prescribed by law,<sup>62</sup> and by "the definitional parameters of rights as described in the *Constitution*".<sup>63</sup>

When rights and objectives clash, a two-stage inquiry is required. The first stage of inquiry entails determining whether a right has indeed been infringed in the circumstances being considered. Let us briefly consider this first stage of inquiry in relation to the PHA, using the Consol Glass silica sand mine application (referred to in Section 4 above) as an example. Those opposed to the application largely objected on environmental and food-security grounds. If sand mining operations were to proceed, it could be argued that sec. 24 (environment) and sec. 27 (healthcare, food, water, and social security) of the *Constitution* have been infringed. However, those who support housing delivery in the area could argue that the site is ideally positioned for lower income residential units, and for returning dignity to poor communities by providing them with land and adequate housing opportunities. If sand mining operations were to proceed, it could be argued that sec. 10 (human dignity), sec. 25 (property), and sec. 26 (housing) of the *Constitution* have been infringed.

## 5.2 Proportionality

Once it has been established that certain rights have been infringed in a particular situation, the second stage of inquiry is triggered, which involves an assessment based on proportionality. In order to determine whether or not the infringement can be justified, sec. 36(1) of the *Constitution* "lists five factors that may assist us in determining the reasonableness and justifiability of a limitation [of rights]",<sup>64</sup> including:

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59 White "The South African Constitution", <https://slidex.tips/download/the-south-african-constitution-and-bill-of-rights> (accessed on 5 December 2019).

60 The *Constitution*:sec. 36(1).

61 Currie 2012:259.

62 Woolman & Botha 2013.

63 Smit 2008:210.

64 Woolman & Botha 2013:68.



- a. The nature of the right;
- b. The importance of the purpose of the limitation;
- c. The nature and extent of the limitation;
- d. The relation between the limitation and its purpose; and
- e. Less restrictive means to achieve the purpose.<sup>65</sup>

Employing the five factors listed above, let us briefly consider the second stage of inquiry in relation to the PHA, using the Oaklands City development application (referred to in Section 4 above) as an example. For the purposes of simplification, we will assume that the only right that is being limited is that related to food security (by developing on a large portion of land zoned for agricultural purposes), and that, if the necessary development approvals were not granted, only the right related to access to housing would be infringed. As such:

- In considering the nature of the right that is being limited, the proponent could argue that, while access to sufficient food is an important right, access to adequate housing is “of vital importance to our constitutional democracy”.<sup>66</sup>
- In considering the importance of the purpose of limitation of the right, the proponent could again argue that the purpose (to provide sorely needed housing) is of “sufficiently pressing and substantial import to warrant overriding a constitutionally protected right”.<sup>67</sup>
- In considering the nature and extent of the limitation, the proponent could argue that the limitation does not affect the core values underlying the right to have access to sufficient food, in that new residents could undertake vegetable gardening on their new properties (albeit in a different form to large-scale farming). The proponent could further argue that productive agricultural lands in the hinterlands of the Cape Town metropolitan area also fulfil food-security functions for the people of Cape Town, hence the limitation does not amount to a complete denial of the right in question. In other words, “the limitation is narrowly tailored to achieve its objective”.<sup>68</sup>
- In considering the relationship between the limitation and its purpose, the proponent could argue that a rational connection exists “between the means employed and the objective sought”,<sup>69</sup> in that the limitation of the right to have access to sufficient food will lead to the delivery of housing. This “due relation between the limitation and its purpose would render the limitation justifiable”.<sup>70</sup>
- In considering less restrictive means to achieve the purpose, the proponent could argue that, while less restrictive means to achieve the purpose are indeed available (for instance, providing housing on other undeveloped

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65 The *Constitution*:sec. 36(1).

66 Woolman & Botha 2013:71-72.

67 Woolman & Botha 2013:13.

68 Woolman & Botha 2013:82.

69 Woolman & Botha 2013:13.

70 Rautenbach 2014:2232.

land portions within the city), given other considerations such as the development principles and imperatives indicated in Figure 5 “on balance, the limitation is reasonable and justifiable”.<sup>71</sup>

### 5.3 Balancing

“Balancing and proportionality are thought of as two sides of the same coin”,<sup>72</sup> with the former being a component or sub-principle of the latter. Balancing is a metaphor used to describe the process of legal reasoning when rights and objectives clash. “It is an apt metaphor to describe a process that entails finding a resolution to a problem of competing principles by the ascription of relative weights to the competitors”.<sup>73</sup> In some instances, the outcome of the balancing process is that a right will outweigh its competitor/s. In other cases, a balance may be struck between the competing rights or objectives, with no competitor being ousted in favour of its rival/s.<sup>74</sup>

When rights clash, the balancing process enables the “open and candid consideration of competing interests”<sup>75</sup> in a just manner that takes into account all “the specific factors relevant in each particular case”,<sup>76</sup> and with the competitors being “assigned weightings based upon their substantive importance”.<sup>77</sup> In seeking to give each right or objective the weight that they deserve, the following law of balancing must be observed: “The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be”.<sup>78</sup>

In considering the myriad of intertwined and competing interests in the PHA, how does one go about weighing and balancing these intersecting considerations? Is it realistic to think that the balancing process can provide the answers?<sup>79</sup> The “unswerving commitment of the South African courts to

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71 Woolman & Botha 2013:91.

72 Cohen-Eliya & Porat 2010:284.

73 Currie 2012:265.

74 Woolman & Botha 2013:95.

75 Woolman & Botha 2013:7.

76 Banks 2008:35.

77 Bilchitz 2012:273.

78 Petersen 2013:6.

79 According to its critics, the use of balancing as a metaphor to describe the process of conflict resolution in limitations analysis has its shortcomings. Woolman & Botha (2013:95-101) argue that balancing has four main flaws, namely incommensurability; subjectivity and arbitrariness; incrementalism and conservatism; and quasi-scientificity. Botha (2002:613-615) interrogates the balancing process as a method of reasoning, and problematises balancing as a metaphor for rights analysis. He argues that, if legal concepts are structured metaphorically, “it is hard to see how legal language can be considered a neutral instrument for conveying the ends and purposes of the law” (Botha 2002:613). Nevertheless, he concedes that “metaphors are helpful to the extent that they allow us to explain complex concepts and procedures (e.g. adjudication) in terms of more familiar ones (e.g. balancing)” (Botha 2002:614).

balancing<sup>80</sup> would have us believe so. Although rights may not be measurable by the same metric (in other words, they are not commensurable), as a number of constitutional theorists have suggested,<sup>81</sup> they can be compared and balanced by evaluating them against a common point of view, that is, “the point of view of the *Constitution* with its range of values all requiring simultaneous accommodation to the greatest degree possible”.<sup>82</sup> This implies that, when clashing rights are weighed against one another, this must be undertaken against the backdrop of “an open and democratic society based on human dignity, equality and freedom”.<sup>83</sup>

Balancing is also a principle within the discipline of spatial planning and land development. For purposes of clarity, we shall refer to this principle as “balancing in the planning sense”. While the principle is not as clearly defined and articulated as it is in legal scholarship (to which we shall refer as “balancing in the legal sense”), balancing in the planning sense is generally understood to refer to the balancing of “competing spatial requirements”<sup>84</sup> in a land-use programme for a particular land parcel or collection of land parcels. In such a land-use programme, it may be necessary to make provision for different land-use activities such as housing, public facilities, open spaces, commercial / business premises, and so on. Whether a balance is struck between the competing land uses depends on a number of factors, including the financial resources available for the overall development; government subsidisation of housing and public facilities; the need for a social or public facility, should the surrounding area not offer such a facility; whether the land has engineering services such as electrical infrastructure in place or not; whether the respective development rights are in place or not, and so on.

So fundamental is balancing in the discipline of spatial planning and land development that, on 8 November 2019, the South African Council for Planners<sup>85</sup> – in a press release marking World Town Planning Day<sup>86</sup> – discussed the principle of balancing in its opening statement:

At its heart, planning is about equity: it serves to balance the competing demands and needs of all people and of the built and natural environment. Planning seeks to act in the public interest to ensure fairness in the use of land and resources between those in need of housing, of jobs, of services and of infrastructure and those whose lives, property or outlooks might be harmed by such development. And it serves to strike

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80 Currie 2012:256.

81 See Webber 2010; Cohen-Eliya & Porat 2010; Woolman & Botha 2013.

82 Currie 2012:262.

83 The *Constitution*:sec. 36(1).

84 Dewar 2000:5.

85 The South African Council for Planners is mandated with regulating the planning profession, in terms of the *Planning Profession Act* 36/2002.

86 World Town Planning Day, celebrated since 1949, is an annual event in the international spatial planning calendar. 2019 marked the 70<sup>th</sup> anniversary of the event.

a fair balance in meeting the needs of the present generation with the future needs and quality of life of generations to come.<sup>87</sup>

We argue that, in considering cases as complex as the PHA, the principles of balancing in the legal sense and balancing in the planning sense should be equally drawn on. Whereas balancing in the legal sense has been critiqued as a metaphor for rights analysis,<sup>88</sup> the discipline of spatial planning and land development can be drawn on to take balancing in the legal sense beyond being a metaphor, to the point that rights can be spatially balanced when they clash. At the same time, whereas balancing in the planning sense has been insufficient to resolve the disputes between the various parties involved in land matters in the PHA, legal and rights discourse, rights analysis and the balancing mechanism offered by it may have (the metaphoric) teeth to contribute to resolving these matters, or, at the very least, provide an alternative approach to finding an appropriate resolution. As it stands (and as discussed in Section 4.2 above), in respect of two of the key development applications within the PHA, the courts have already been approached to resolve the matters and conflicts that various stakeholders and interested parties have not been able to settle. We believe that it may only be a matter of time before the Constitutional Court is approached, in order to consider the clash of rights in respect of the PHA at the highest level.

#### 5.4 Transformation

It is generally agreed that the *Constitution* has an overtly transformative nature; “substantively transformative aspirations”;<sup>89</sup> “massively egalitarian commitments”;<sup>90</sup> and, generally, an important role to play in the transformation of South Africa from social and economic perspectives, among others. This is perhaps most clearly evidenced by the repeated reference to the protection of human rights.<sup>91</sup> In this light, the *Constitution* has been metaphorised as “a bridge between the apartheid past and a more just future”.<sup>92</sup> The term ‘transformative constitutionalism’ has been used to describe the aspirational aspects of the *Constitution*, and can be described as “a long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction”.<sup>93</sup> Transformative constitutionalism entails “the abolition or reform of what is perceived as having been wrong in the past and the promotion and development of what

87 The South African Council for Planners “World Town Planning Day”, [http://sacplan.org.za/documents/SACPLAN\\_Press-Release\\_Message-Chairpersons-Presidents-WTPD.pdf](http://sacplan.org.za/documents/SACPLAN_Press-Release_Message-Chairpersons-Presidents-WTPD.pdf) (accessed on 5 December 2019).

88 See, generally, Botha 2002.

89 Klare 1998:170.

90 Klare 1998:188.

91 Banks 2008.

92 Botha 2002:613.

93 Klare 1998:150.

is considered right for the future”.<sup>94</sup> It “focuses on attaining substantive justice and substantive equality”<sup>95</sup> and can be viewed as a move away from “a racially-based, resource-biased society to an egalitarian one where all enjoy the aims, values and rights upheld in the *Constitution*”.<sup>96</sup>

The notion of transformation envisaged by the *Constitution* is not static. Rather, it is a process of constant change “in the pursuit of a more just society”.<sup>97</sup> The late Chief Justice of South Africa, Pius Langa, posited that:

Transformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services ... [it] ... is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.<sup>98</sup>

In this light, the traditional metaphor of the constitutional bridge is “misleading as it seems to suggest that transformation is a temporary event, that at some point we will reach the other side of the bridge. Transformation then ends because we have reached our desired destination”.<sup>99</sup> If we accept that the notion of transformation envisaged by the *Constitution* is a process of constant change, then “what matters is the very activity of bridge-building”.<sup>100</sup>

Transformation forms the backbone not only of the *Constitution*, but also of post-apartheid spatial planning legislation. For instance, in its preamble, it is noted that – among other considerations – the purpose of the *Spatial Planning and Land Use Management Act*<sup>101</sup> is “to address past spatial and regulatory imbalances”.<sup>102</sup> This is reiterated in sec. 3(f), which states that “redress[ing] the imbalances of the past”<sup>103</sup> is an object of the *Act*, and in sec. 7(a)(i), which states that “past spatial and other development imbalances must be redressed through improved access to and use of land”.<sup>104</sup> This is reinforced by sec. 42(1), in terms of which a municipal planning tribunal must take into account the constitutional transformation imperatives and the respective rights of all affected parties, when considering and deciding a development application.<sup>105</sup>

In addition, sec. 12(1)(i) of the *Spatial Planning and Land Use Management Act*<sup>106</sup> states that municipalities must prepare spatial development frameworks

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94 Van der Walt 2005:657-658.

95 Kibet & Fombad 2017:365-366.

96 Rosa 2011:542.

97 Rosa 2011:565.

98 Langa 2006:354.

99 Langa 2006:353-354.

100 Hailbronner 2017:533.

101 The *Spatial Planning and Land Use Management Act* 16/2013.

102 The *Spatial Planning and Land Use Management Act* 16/2013.

103 The *Spatial Planning and Land Use Management Act* 16/2013:sec. 3(f).

104 The *Spatial Planning and Land Use Management Act* 16/2013:sec. 7(a)(i).

105 The *Spatial Planning and Land Use Management Act* 16/2013:sec. 42(1).

106 The *Spatial Planning and Land Use Management Act* 16/2013.

which, among other matters, “address historical spatial imbalances in development”.<sup>107</sup> The City of Cape Town’s *Municipal Spatial Development Framework*<sup>108</sup> translates this directive successfully, with “spatially transforming Cape Town”<sup>109</sup> being one of the six overarching components of the spatial vision and concept of the framework. Spatial transformation is defined as “the process of reversing the negative impacts of apartheid spatial planning (spatial fragmentation, inefficient urban form, racial segregation and ghettos of poverty, etc.)”.<sup>110</sup> It entails the metropolitan-wide transformation of the apartheid city,<sup>111</sup> with an emphasis on addressing spatial economic imbalances. Spatial transformation is envisaged to occur “via dense and transit-oriented growth and development”,<sup>112</sup> with the aim of “building integrated communities”<sup>113</sup> and “increasing opportunities to a greater number of people in highly connected areas”.<sup>114</sup>

Spatial transformation is not envisaged to be a one-off event, but rather a long-term process that requires the buy-in, co-operation and inputs of multiple public and private sector stakeholders.<sup>115</sup> In other words, spatial transformation is in part dependent on solidarity and on alliances being formed and negotiated between the different stakeholder groups that make up society. In this respect, the notion of spatial transformation is comparable with the notion of transformation envisaged by the *Constitution*, in that it is also considered to be a process of constant change that necessitates ongoing dialogue and debate.

## 5.5 Democratic constitutionalism

We argue that, in considering cases as complex as the PHA – where the interests of multiple parties are at stake (and in respect of which diametrically opposed views have been tabled) – it is critical that a fair balance be struck, thus avoiding a “winner-takes-all result”.<sup>116</sup> By undertaking a balancing process in the PHA and bearing transformation imperatives in mind, the spirit of the Bill of Rights can be enlisted to question the unjust resource distributions that plague not only this part of the city, but also Cape Town generally (and indeed the nation as a whole). In a country that has some of the world’s widest socio-economic disparities, and where the land reform debate has quite recently

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107 The *Spatial Planning and Land Use Management Act* 16/2013:sec. 12(1)(i).

108 City of Cape Town 2018b.

109 City of Cape Town 2018b:35.

110 City of Cape Town 2018b:99.

111 Among other factors, the apartheid city was (and continues to be) characterised by the siting of low-income communities of colour on the peripheries of South African cities, far removed from economic and other opportunities. As a result, these individuals are forced to spend a disproportionate amount of their income on transportation, in order to access opportunities.

112 City of Cape Town 2018b:20.

113 City of Cape Town 2018b:20.

114 City of Cape Town 2018b:99.

115 City of Cape Town 2018b:54.

116 Petersen 2013:21.

taken centre stage once again (indeed coupled with proposed amendments to the Constitution itself), the PHA should not be viewed as a site of contestation, but rather as a prime opportunity to transform the status quo and achieve a more egalitarian society that respects all human rights and welcomes plurality and difference. This would indeed be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.<sup>117</sup>

Although the PHA is certainly a unique area, the conflict of rights it faces parallel broader development challenges. For instance, the *2016 Community Survey* shows that 13.2 per cent of households in the Western Cape “ran out of money to buy food” in the twelve months preceding the survey.<sup>118</sup> The same report shows that 16.6 per cent of dwellings in the province are classified as “informal”.<sup>119</sup> “The nexus between affordable housing and agricultural development / food security becomes a difficult area to navigate ... that highlights the residual complexities stemming from centuries of racial oppression”.<sup>120</sup> Rights are clearly indivisible, meaning that they “overlap with each other and are completely interdependent”.<sup>121</sup> In the case of the PHA, it would, therefore, be short-sighted and callous to oust any right in favour of its competitors, without critically evaluating *all* the competing interests in an all-encompassing manner.

It is imperative that these clashing rights be approached from an urban inclusion and access point of view, in other words against the backdrop of constitutional transformation imperatives (and spatial transformation imperatives as intended by the principles of post-apartheid spatial planning legislation). The Constitutional Court has been very clear on the overall goal of the *Constitution* to bring about the progressive realisation of socio-economic rights (especially for the poorest of the poor) and of human dignity being the “master concept in the Bill of Rights”.<sup>122</sup> In *Government of the Republic of South Africa v Grootboom*,<sup>123</sup> the Constitutional Court held that “those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored”. Unfortunately, this call has not been heeded, and slow housing (and land) delivery, together with the general unaffordability of housing in Cape Town, has forced the poor to resort to self-help measures in the form of land invasions and informality discussed in Section 3 above.

## 6. A STRATEGIC WAY FORWARD

From the discussions in the previous sections of the article, a key question arises. Given the large number of competing interests in the PHA, how do

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117 The *Constitution*:sec. 36(1).

118 Statistics South Africa 2016:87.

119 Statistics South Africa 2016:60.

120 Murphy “Inserting food security into the land debate”, <http://www.politicsweb.co.za/news-and-analysis/inserting-food-security-into-the-land-debate> (accessed on 5 December 2019).

121 White “The South African Constitution”, <https://slidex.tips/download/the-south-african-constitution-and-bill-of-rights> (accessed on 5 December 2019).

122 Woolman & Botha 2013:116.

123 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

we balance these rights with each other (and with the development principles and imperatives mentioned in the introductory paragraphs of Section 5 above) from a spatial planning perspective, such that no competitor is ousted in favour of its rivals? A large volume of precedent exists across the globe, which can be drawn on to provide clues to find the best possible land-use strategy for the PHA. The precedent draws attention to the fact that an either / or approach (in other words, either agricultural activity or urban development) is by no means the only option, and that a balanced approach (in the planning sense) has the potential to be a viable option, as demonstrated in many parts of the world.

In Japan, for instance, the transitional zone between urban and rural areas is comprised of a dense intermixture of supposedly incompatible land uses. According to Herbert and Nakai:

This land use mix or mosaic reflects a distinctive cultural tradition, but is regarded as a failure by European and American planning criteria. Instead the Japanese emphasize the positive aspects of a development philosophy based on expansion and on urban / rural mixture and regard it as a more useful and realistic proto-type for the rapidly urbanizing and industrializing countries of Asia than the segregationist restrictive notions of land use planning embodied in the West.<sup>124</sup>

In other parts of the world, the distinction between urban and agricultural land uses is also beginning to be blurred, partially driven by public interest in the production and distribution of food, against the backdrop of climate change, socio-economic inequality, food security, and water scarcity. Modern world cities are beginning to embrace the notion of agricultural or agrarian urbanism, where urban development and productive landscapes begin to interface, so that citizens can not only be directly integrated with the environmental, social and economic means of production, but also benefit from the sense of place.<sup>125</sup>

There is no conceivable reason as to why appropriate urban development cannot support productive agricultural landscapes such as the PHA. Such development would bring urban inhabitants closer to agricultural land, make them care for the land and, in this way, contribute to the PHA and its unique characteristics being protected over time. In other words, the idea of urban development as a protective transitional zone to the PHA has the potential to be a practical spatial conservation planning instrument.

A specific land-use strategy, which could be explored, is to allow for partial strip-type development of the edges of the PHA, especially in the form of adequate housing for home-seeking urban citizens. Such a strategy could simultaneously respond to the rights related to human dignity (sec. 10 of the *Constitution*), property (sec. 25) and housing (sec. 26). At the same time, the land-use strategy would have the potential to respond to freedom and security of the person (sec. 12), as development along the edges of the PHA could

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124 Herbert & Nakai 1988:92.

125 Duany & Plater-Zyberk "Agrarian urbanism", <http://www.dpz.com/Initiatives/AgrarianUrbanism?from=Thought.AgrarianUrbanism> (accessed on 5 December 2019).



enable surveillance over the agricultural area by permanent residents, thus discouraging criminal activity. As a result, the strategy could also support food security (sec. 27), as a reduction in crime in the area, among other factors, would make farming more viable, thus promoting its continuation. This land-use strategy could also support other objectives such as the development principles and imperatives mentioned in the introductory paragraphs to Section 5 above. Although such a balanced outcome would by no means be easy to achieve, the end result would be far more desirable than the current stalemate situation. It would ensure that rights enshrined in the *Constitution* are upheld for all competing parties.

In order for such a land-use strategy to be implemented, a considered and comprehensively articulated spatial framework to guide spatial interventions in the area is a prerequisite. This spatial framework should be based on a combination of site overlays, which depict the conditions of the PHA, so as to present an evidence-based understanding of the area. This would need to include agreement between the relevant authorities and stakeholders (including landowners) on the three questions posed in Section 4.1 above, relating to the most suitable treatment and use of portions of the PHA. In this way, it can be determined whether land is developable or not; how much land is developable; and the extent to, and manner in which land could be developed, including what land uses may or may not be appropriate for particular portions. Given the multiple rights clashes experienced within the PHA, it is critical that these factors be considered through the lens of a balanced approach, which supports both constitutional and spatial transformation imperatives.

## 7. CONCLUSION

There is no doubt that the PHA is a unique landscape and is significant in providing over one-third of Cape Town's fresh vegetable produce, amidst rights clashes that have long histories of conflicts and complexities. As such, it is incontestable that the area's role as a productive landscape must be protected for current and future generations. However, the potential role of urban development in protecting and assisting the PHA's productive role should not be underestimated and should be investigated further. *In our view, it is clear that a symbiotic relationship between agricultural activity and urban development can be established, and that they need not be viewed as mutually exclusive.* It is also clear that an either / or approach is not desirable for the PHA, and that certain rights and considerations do not necessarily need to be valued and prioritised over others.

The arguments presented in this article suggest that the debates related to the PHA's protection as a productive agricultural area versus its development are not unique from a clashing of rights point of view. Like many sites in South Africa, these debates require a balanced perspective that considers the rights enshrined in the *Constitution* on a fair and equitable basis, with a view to supporting transformation imperatives.

We return to the definition of the term 'clash', quoted as a preamble to this article:

Clash: To come into conflict; to be incompatible; a hostile encounter; a sharp conflict; an argument or disagreement between people.<sup>126</sup>

Various parts of this definition apply to the situation within the PHA. There are indeed ongoing *conflicts* between rights enshrined in the *Constitution*; there have been numerous *arguments* and *disagreements* between the various parties involved in land matters in the area; and many of these could be described as '*hostile*'. However, one part of the definition does not hold true for the situation within the PHA, namely that the competing rights, interests and priorities of those involved are most certainly not *incompatible*. This article has attempted to demonstrate that an approach to the PHA case that is premised on balancing (both in the legal and spatial planning senses) can ensure that a "winner-takes-all" result is avoided. Furthermore, by drawing on international precedent and putting in place a considered and comprehensively articulated spatial framework, urban and agricultural land uses can co-exist in a mutually supportive manner.

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126 Merriam-Webster "Clash", <https://www.merriam-webster.com/dictionary/clash> (accessed on 5 December 2019).

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