

THE IMPLEMENTATION OF LUPO:  
THE CASE OF THE CAPE TOWN CITY COUNCIL

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INTRODUCTION

One of the major principles underpinning South African local government reform in the 1980s was devolution of power to local authorities. The issue of devolution has been one of the most hotly debated local government issues amongst academics, local government practitioners and urban observers. On the one hand, the government argued that extensive devolution to local authorities had occurred (Botha, 1985), while on the other academics and certain local government practitioners have retorted that minimal devolution has in fact taken place (Craythorne, 1990; Cameron, 1991). In the Cape, the Land Use Planning Ordinance (LUPO) of 1985 has been held up by the government as an example of its devolution policy. A special issue of this journal in 1987 discussed LUPO's major aims and objectives and likely impact. This paper examines the impact of LUPO upon the activities of the Cape Town City Council (CCC) from 1987 to 1990, with specific reference to the question of whether this Ordinance has, in fact, given the local authority greater control over its town planning function.

INTERGOVERNMENTAL  
TERMINOLOGY

Intergovernmental relations can be defined as the geographical division of powers among the various tiers of government within a nation state. There are various concepts used to describe different forms of intergovernmental relations. The generally accepted distinction is that decentralisation is a blanket term, encompassing a number of sub-categories: devolution, deconcentration, and delegation. Decentralisation can be defined as "the transfer of responsibility for planning, management, and resource-raising and allocation, from the central government and its agencies to field organisations of those agencies, sub-

ordinate units of government, semi-autonomous public corporations, area-wide, regional or functional authorities or non-governmental private or voluntary organisations" (Rondinelli, 1981:137).

Devolution is the most extensive form of decentralisation. It is the "conferment of rule-making and executive powers of a specified or residual nature on formally constituted sub-national units" (Vosloo, Kotze and Jeppe 1974:10). However, devolution does not mean that local authorities have *carte blanche* to do as they wish. They are not city states; their ability to make policy is limited in a number of ways, for example they cannot make laws which conflict with national legislation and their powers are often specified by a higher tier of government. Deconcentration is normally the least extensive form of decentralisation. It often involves the transfer of the workload from the central government head offices to regional branches located outside the executive capital (Rondinelli, 1981:137). It may involve limited discretionary powers for field staff to perform functions within central government guidelines. However effective control over major policy decisions normally resides at central level. Delegation falls somewhere along the continuum between decentralisation and deconcentration. Delegation entails the transfer of broad authority to plan and implement decisions concerning specific activities to organisations such as local authorities that are technically and administratively capable of performing them (Rondinelli, 1981: 138). Although delegated power is normally controlled by the attachment of conditions by the delegating body, this form of delegation can lead to the exercise of a certain amount of judgment and discretion on the part of local authorities.

THE INTRODUCTION OF LUPO

In 1985 the Cape Provincial Council promulgated the Land Use Planning Ordinance (LUPO) No 15 of 1985, which replaced the cumbersome and outdated Township Ordinance No 33 of 1934, which reflected the highly centralised state of affairs which had hitherto pertained and in which most planning decisions had to be referred to the Administrator for final approval. LUPO took effect on 1/7/1986 and provided for, among other things:

- (i) that the land scheme of the entire province is subject to zoning schemes, whereby the permissible use of land is prescribed in scheme regulations, and that a change of use of land is subject to rezoning approval on a uniform basis;
- (ii) for control over the subdivision of land;
- (iii) for total flexibility in the application of zoning schemes by means of the approval of departures;
- (iv) for the introduction of structure plans which have as their objectives the provision of guidelines for future development in a specific area, and the empowering of local authorities to deal with rezonings themselves within the constraints of such plans;
- (v) for a right of appeal to the Administrator against the decisions of local authorities;
- (vi) for a right of appeal to an appeal committee if a local authority and a developer cannot come to an agreement with regard to the supply of services (CPA, 1987:27). According to a senior Cape Provincial Administration (CPA) planner, LUPO had four main objectives:

\* The first was the promotion of forward planning in order to expedite township establishment.

Accordingly, forward planning was to be embodied in structure plans.

- \* The second was the reinforcement of free market principles in land use control. An attempt was made in LUPO to give free market principles greater recognition.
- \* The third was rationalisation of procedures. A major problem of the old ordinance was that it was difficult and cumbersome to administer. LUPO accordingly simplified and streamlined procedures.
- \* The fourth and most important objective for the purposes of this paper, was the promotion of devolution of power. Special mechanisms were written into the ordinance in order to give positive substance to this policy in respect of land use planning. The underlying principle was that the devolution of land use control could be achieved effectively by control over forward planning. The CPA felt that in terms of this approach, a fairly flexible system of devolution could be instituted. Provision was made for a fairly flexible system along a sliding scale in which levels of devolution could vary from place to place. Control was accordingly concentrated on structure plans, which were to be used to devolve zoning schemes and, through the zoning scheme, the power to subdivide land (Theunissen, 1987: 2).

LUPO provoked an immediate response from planners in the CCC's Town Planning branch who took issue with the claim that LUPO embodied devolution of powers. They pointed out that nearly all the major powers conferred in terms of LUPO including the approval of rezoning, subdivisions, departures, deemed zoning and any decision or action of a council were subject to review by the Provincial Administrator, a government appointee<sup>1</sup>. Only a few minor powers were non-reviewable. This form of decentralisation was in fact a form of delegation and not devolution. The power to review any decision or action was retained by the Administrator, who could direct the council to act, or could act for it, as the case may be. There

were also a number of powers which were not delegated. The Administrator's control over local authority planning and policy was extended through his powers to approve or reject structure plans. In respect of appeals, he had wide-ranging powers to overturn local authorities' decisions.

It was argued that this power of intervention had the effect of nullifying the powers delegated to local authorities. There were also a number of planning functions retained by other government agencies. For example, even though local authorities now had responsibility for preparing a structure plan, they had to conform to the Department of Constitutional Development and Planning's (now Planning and Provincial Affairs) guide plans for the area (Ketelbey and Commins, 1987:45-48). They concluded that it appeared "that delegation of powers to local authorities under the LUPO does not effectively grant them greater freedom to decide or to act" (Ketelbey and Commins 1987:47). This was also the CCC response. An official CCC document concurred with this interpretation of events, pointing out that only a few development control powers had been delegated (CCC, 1987:12).

The successful implementation of LUPO was predicated upon local authorities drawing up their own structure plans. However, a number of local authorities, including the CCC, had by 1988 not drawn up their own structure plans. By this time the city had committed itself to public participation in future development. This involved getting public input before producing structure plans for different areas and entail an extended period for consultation. The CPA were, however, anxious to delegate powers as soon as possible and were contemplating drawing up their own structure plan which would give the city new powers but would set the parameters for Cape Town's future development (CCC, 1986:2-3).

Accordingly, in 1988 the MEC for Local Government, Pieter Schoeman, announced that an inquiry was to be made into giving local authorities greater powers regarding sub-divisions of properties and departures from the zoning scheme. It was announced that the intention was to ensure that the Administrator would retain the right

only to adjudicate appeals. At that stage many of the larger applications had, in terms of LUPO, to be transferred to him (*Cape Times*, 22/7/1988). This was a tacit admission on the part of the CPA that LUPO was not as decentralised as initially claimed.

In terms of CPA circular GDK/LDC/9/1988, the Administrator approved a general structure plan for the Cape Province which authorised local authorities, with effect from 1/1/1989, to grant or refuse zoning applications with the exception of the following cases:

- (a) any rezoning where a state institution, including a Management Committee, was not in favour thereof;
- (b) any rezoning below the one-in-50-year floodline, unless an approved structure plan existed for the relevant area;
- (c) any rezoning of a public open space where an appropriate structure plan had not been approved by the Administrator;
- (d) any rezoning of land within parameters of the highwater mark for which a permit is required in terms of the Environmental Conservation Act;
- (e) any rezoning which is inconsistent with another structure plan applicable to the area concerned, and which has been approved by the Administrator;
- (f) any rezoning permitting the development without further consent, of flats and/or town-houses (groups of dwelling houses) in a low density single residential area.

In addition, the Administrator retained his right to adjudicate on appeals from applicants or objectors.

According to a senior CPA official, 90% of the Administrator's powers were delegated to local authorities in terms of this structure plan. However, it is important to note that the CPA's intention was to delegate all the powers that were deemed to be of minor importance. Decisions in respect of important items and appeals were still to be handled by the Administrator. The CCC does not consider that it has received major powers in land use planning (Interviews with the Chairman: Town Planning Committee and senior CCC planner, 1990). A

senior CPA official agreed with this interpretation, explaining that the reason for these delegated powers was primarily administrative convenience. The planning section had assumed control of Black local government affairs in 1986 and it found itself with insufficient staff to perform its functions. The 1988 structure plan must be seen very much in this context of trying to delegate certain minor powers in order to speed up the workflow at CPA's town planning branch (Interview with senior CPA planner, 1990).

However, the CCC is also responsible to a certain extent for the fact that few substantive powers have been delegated to it. The fact that it had not drawn up a citywide structure plan meant that substantive powers could not be delegated. The CPA circular in this regard stated that local authorities should proceed with the preparation of structure plans because this might result in councils obtaining more powers (CPA, GDK/LDC 9/1988). The CCC did apply for exemption in terms of the previously noted six items which must be referred to the Administrator: on the grounds that the city was a large local authority with extensive expertise in its town planning branch (with more than 40 planners it is the biggest local authority town planning branch in the country), and was well equipped to handle these functions. However, this request was turned down by the CPA. Its viewpoint was that this structure plan was intended to be a uniform document applicable to all local authorities for an interim period of five years. It would be difficult to administer if there were exceptions. At the end of 1998 this structure plan will lapse. By this time the CCC should have drawn up its own structure plan which would have allowed it to receive more substantive delegations (Interview with senior CCC planners and senior CPA planner, 1991).

### **CCC/CPA INTERGOVERNMENTAL RELATIONS**

All appeals in respect of land use planning are handled in the following way: if there is an appeal, the CCC's documentation as well as the objections must be submitted to the Administrator. Senior planning staff of the physical planning branch go out to examine the erf concerned. In addition, all views of interested parties are thoroughly canvassed. The senior planning

staff then make recommendations which are submitted to the CCC's Executive Committee (EXCO). The Administrator, after consultation with EXCO, then makes the final decision (Interviews with senior CPA and CCC officials, 1990).

How has the delegation of planning power affected the intergovernmental relations between the CCC and CPA? From 1986 until 1988 there was little change in the centralised way in which land use planning issues were handled. However, in 1987 a major land use controversy between the CCC and CPA emerged. The CCC had turned down an application to rezone a property in Kenilworth from residential to business use (service station). However, according to the Chairman of EXCO, the Administrator rezoned the site without any discussions with those affected, without consultation and without calling for objections. This was despite the fact that there was large-scale resident opposition to business intrusion into the area (*The Argus* 1/5/1987; *Southern Suburbs Tatler*, 24/4/1987). After vociferous resistance to this decision the CCC went to the Supreme Court and won an uncontested victory. (By this time, however, the CPA had withdrawn its decision.) The applicant then reapplied, the CCC again turned down this application and the CPA overruled the CCC's decision once more. This matter was eventually resolved when the particular oil company bought the property and decided not to rezone (*Southern Suburbs Tatler*, 25/2/1988; *Cape Times*, 4/12/1987 and 16/12/1987). There were also other occasions when the CCC's decisions were vetoed on zoning issues (*Cape Times*, 2/6/1988).

The Kenilworth garage incident can, however be considered a turning point with respect to appeals. It caused a great deal of rancour in CCC circles. The CCC and CPA subsequently decided that when there were appeals the MEC for Local Government Pieter Schoeman, and the Chairman of the CCC Town Planning Committee Clive Keegan, would go on site visits together. These two politicians developed quite a good rapport with appeal matters also often being discussed informally between them over the telephone. After this relations improved and the CPA became more receptive to

the CCC's view when it came to appeals, siding with the local authority on most of these issues. If an appeal was upheld, full reasons for the decision were given to the CCC. Notwithstanding this, it must be reiterated that the Administrator still retained most of the important final decision-making powers.

### **THE TRANSFER OF PLANNING POWERS TO THE HOUSE OF ASSEMBLY**

On 1/4/1989 certain planning powers were transferred to the Local Government Department, House of Assembly, in terms of the "general affairs"/"own affairs" formula. This formula affected the CCC's area of jurisdiction in the following ways:

- (i) all the Administrator's planning powers in respect of White residential areas were to be transferred to the House of Assembly;
- (ii) all planning powers in respect of Coloured and Indian residential areas were to be retained by the CPA;
- (iii) all planning powers in respect of White Central Business Districts (CBDs) and industrial areas were to be transferred to the House of Assembly (CPA diagram, 1989; Department of Local Government, House of Assembly, 1989).

The transfer of CBDs in particular must be considered rather surprising because of the fact that the city is a free-trading area where Blacks, Coloureds and Indians may trade. In addition, thousands of members of these groups commute and work there. A similar argument to a lesser extent can be made about industrial areas. In any event, approximately 80% of planning functions were transferred to this Own Affairs Department.

This also means there are now two LUPO provincial ordinances: one for "general affairs" and one for "own affairs". The White Own Affairs Department soon amended their ordinance. While it was a procedural change to give the Department greater powers to introduce regulations in terms of appeals, it soon became apparent that this duplication had the potential of becoming an administrative nightmare for everyone concerned. There is now a joint CPA/Own Affairs liaison working committee on land use

planning to ensure that changes to the ordinance are done jointly (Interviews with senior officials CPA and Department of Local Government, House of Assembly, 1990).

### HOUSE OF ASSEMBLY/CCC INTERGOVERNMENTAL RELATIONS

In practice, 90% of CCC appeals are now handled by the White Minister's Council. It follows the same procedure as that of the CPA for considering appeals, the only difference being that the Ministerial Representative and not the Administrator has the final decision. Although this paper covers only the first 21 months of this relationship, one can already suggest that this White Own Affairs Department's attitude to planning is different from the CPA's and is out of step with the government's supposed policy of devolution.

This allegation is made on the basis of the following: the Department constantly upholds appeals against local authorities' zoning decisions and it has also abandoned the joint site-visit mechanism that the CCC and CPA used in respect of appeals. Its viewpoint is that such visits are a violation of the *audi alterem partem* rule. It felt that it would be illegal to have a joint visit with only one of the parties concerned in an appeal (Interview with Department of Local Government: House of Assembly officials, 1990).

Furthermore, no reasons were furnished to the CCC for the upholding of appeals. According to a CCC official, one out of every two appeals is upheld by the Ministerial Representative, who has the final say in this regard. This has caused a great deal of disquiet among members of the CCC. The Chairman of the CCC's Town Planning Committee, Clive Keegan, has stated, in response to this spate of reversals of decisions on appeal, that "we are obviously powerless to do anything and have just become feeble, emasculated rubber stamps" (*The Argus*, 25/10/1990).

As to why the Department is adopting such a centralist attitude one can only surmise, whilst there is no conclusive evidence to support this claim, three possible reasons may be suggested. Firstly, because of its apartheid orientation, the Department is more likely to have attracted staff of a conservative bent, who are steeped in the traditional bureaucratic authoritarian attitude towards local authorities. Secondly, it is a muscle-flexing exercise. The Department is a new creation and it is attempting to assert its authority on local authorities through these centralist actions. This argument is plausible to a certain extent. It is much smaller than the CPA, and some of these actions can be attributed to attempts to elevate this "own affairs" structure to the same level as its "general affairs" counterparts. It may be trying to show local authorities that it is a new force to be reckoned with.

The third suggests that the reason for this centralist approach has nothing to do with any ulterior motives, but relates to the lack of competent planners to handle these functions. It was mentioned by a number of interviewees that although 80% of the CPA's land use planning functions were transferred to the Own Affairs Department, this was not matched by the concomitant transfer of staff. The latter body had only two planners transferred to it, while the CPA retained more than 20 planners on its staff. In addition, neither of these two planners held senior positions, they were and are still hopelessly overburdened with work and have insufficient time to review each appeal properly. The patently authoritarian decisions must therefore be seen as being just as much due to "work overload" as to a muscle-flexing exercise.

As to why this state of affairs arose may be attributed to: firstly, these powers were transferred in great haste. There had not been sufficient systematic investigation into what functions

should be transferred. It was felt in government circles at the time, most forcefully by Chris Heunis, then Minister of Constitutional Development and Planning, that these powers had to be transferred as soon as possible to embody the "own affairs" component of the constitution<sup>2</sup>. Secondly, there was a great deal of opposition within the CPA to the transfer to such powers<sup>3</sup>. The structure of the South African public service is such that senior posts depend on the number of subordinate staff. If a substantial number of personnel were to have been transferred, this would have reduced the staff establishment and led to the abolition of certain senior posts and generally reduced the prospects for promotion. The investigation into which functions could not be transferred was also carried out internally by the CPA's Organisation and Workstudy Department (although it was subject to final approval by the Commission for Administration). It is then perhaps not surprising that insufficient staff were transferred.

### CONCLUSION

This case study has shown that the implementation of LUPO has not led to a major increase in the Cape Town City Council's control over its town planning policy. Although there has been a certain amount of decentralisation of planning powers to the CCC, they have not been major in content nor devolved in nature. What land use powers have been decentralised to local authorities have been of the delegated variety. Most of the important powers are held by the Provincial Administrator, a government appointee. Also, the Administrator and the White Ministerial Representative have the right to hear appeals against the CCC's planning decisions. The centralist attitude of the latter body, in particular, has made a mockery of the government's much vaunted policy of devolution.

1 In 1986 the elected Provincial Council system was scrapped. Under the current provincial system, the Administrators are vested with extensive powers.

2 According to CPA interviewees, Minister Heunis had in fact pressured the authority to transfer powers as soon as possible to the House of Assembly. This was to mollify right-wing supporters of the government, who saw the "own affairs" concept as a mechanism for protecting Whites' rights.

3 The CPA had in fact argued that local government must be considered a "general affairs" aspect of community development. Accordingly, no local government powers should be transferred to the Own Affairs Ministries.

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