



Joburg Metro Building  
158 Loveday Street  
Johannesburg

PO Box 32160  
Braamfontein  
2017

Tel +27 11 407 6471  
Fax +27 11 403 5230  
[www.sacities.net](http://www.sacities.net)

# **Provincial Land Use Legislative Reform Mpumalanga Province: Status Report September 2011**

## **Acknowledgements**

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## Table of Contents

<b>LIST OF TABLES</b>	<b>3</b>
<b>LIST OF FIGURES</b>	<b>3</b>
<b>1.0. INTRODUCTION</b>	<b>4</b>
<b>2.0. PROVINCIAL LEGISLATIVE STATUS QUO</b>	<b>6</b>
<b>3.0. PERFORMANCE OF PROVINCIAL LEGISLATION</b>	<b>30</b>
<b>4.0. STAKEHOLDER VIEWS OF PROVINCIAL PLANNING LEGISLATION</b>	<b>32</b>
<b>5.0. OVERVIEW OF KEY ISSUES THAT HAVE IMPLICATIONS FOR PROVINCIAL PLANNING LEGISLATION IN THE PROVINCE</b>	<b>39</b>
<b>6.0. CONCLUSIONS AND RECOMMENDATIONS</b>	<b>41</b>
<b>7.0. REFERENCE</b>	<b>47</b>
<b>8.0. ANNEXURES</b>	<b>48</b>

### List of Tables

Table 1: Applications received by Province in 2010.....	311
Table 2: Applications received by Mbombela in 2010.....	366

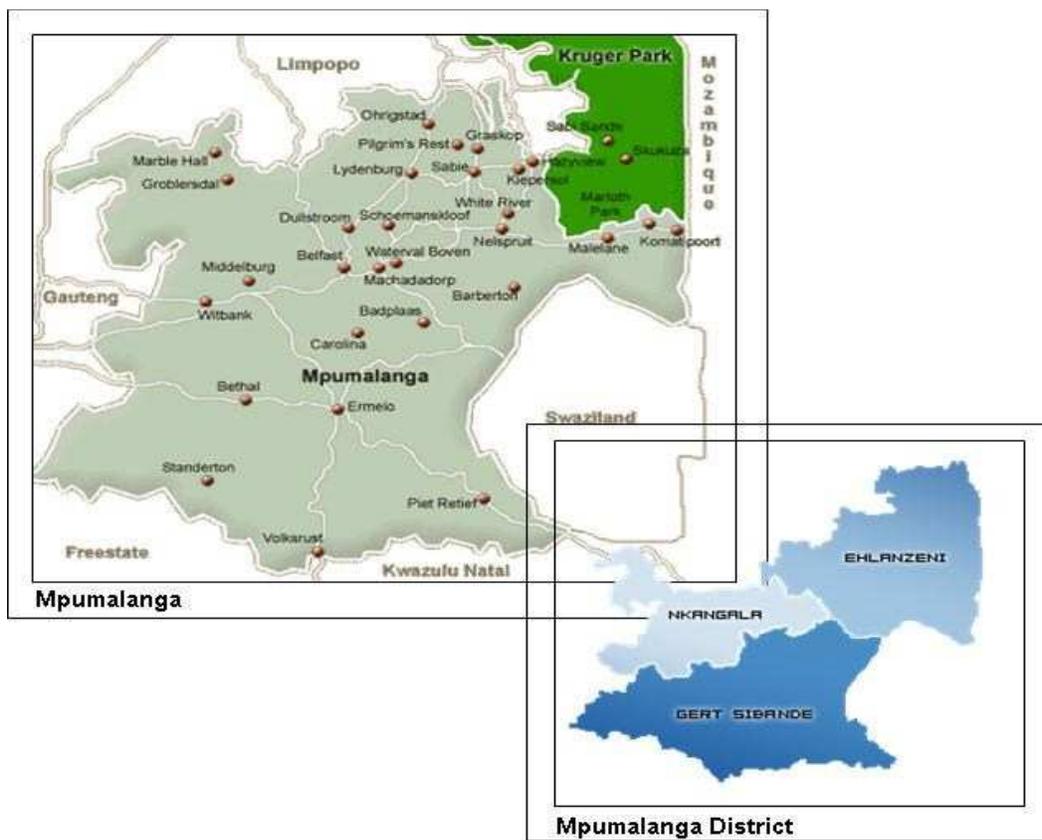
### List of Figures

Figure 1: Provincial Map .....	4
Figure 2: Homelands.....	5

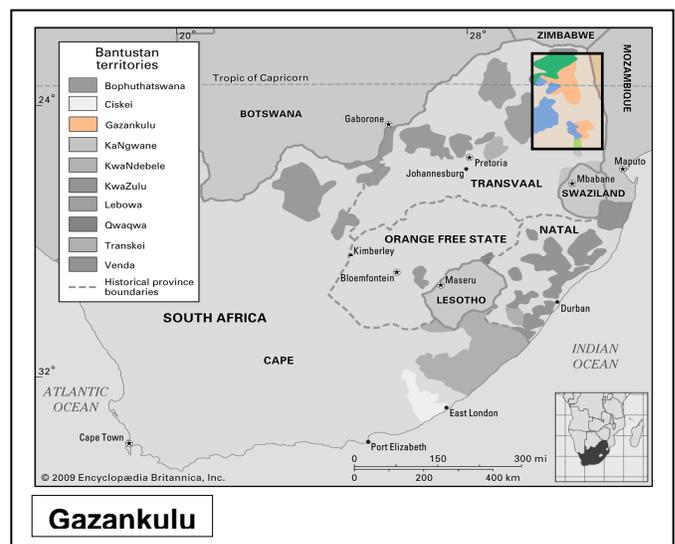
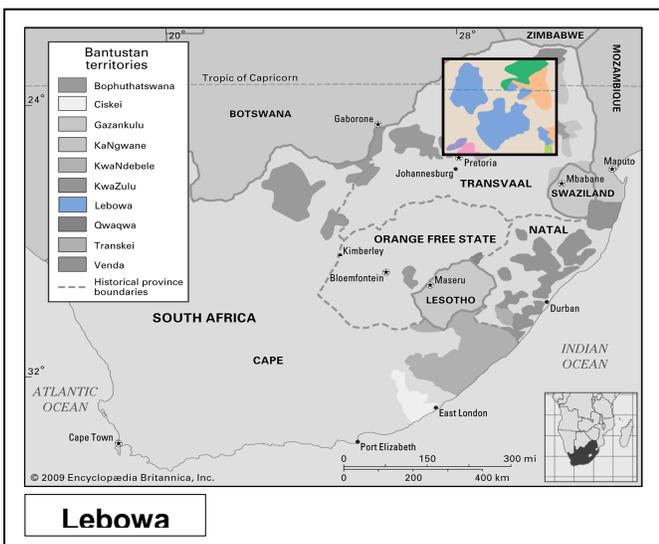
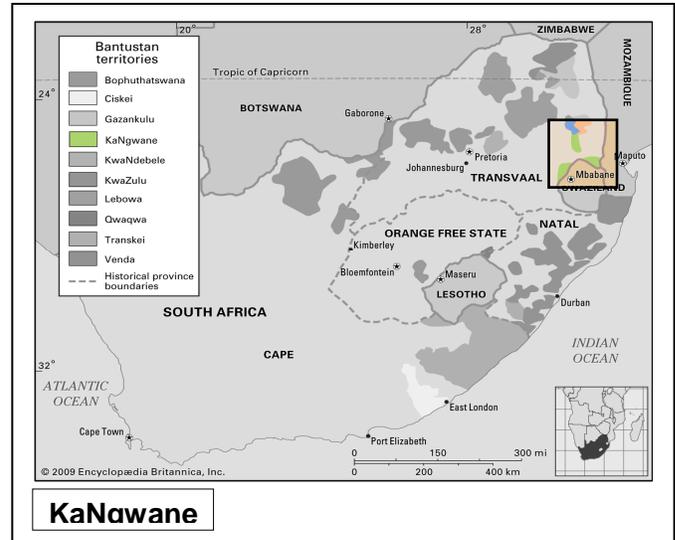
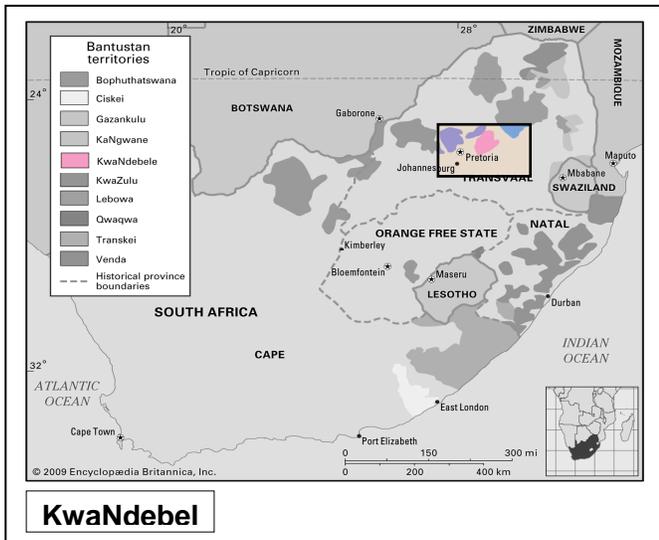
## 1.0. Introduction

Mpumalanga Province was established in 1994. It comprises three district municipalities (Elanzeni, Gert Sibande, and Nkangala), and nineteen local municipalities (refer to figure 1).

The Province contains parts of former homelands (Kwandebele, Kangwane, Gazankulu, and Lebowa) and parts of the old Transvaal Province as indicated in figure 2 below. This composition influences the planning law environment as will be seen in due course.



*Figure 1: Provincial Map*



*Figure 2: Homelands*

This report aims to provide an understanding of the provincial legislation on spatial planning and land use management status quo in Mpumalanga Province, with the objective of contributing to the development of a more appropriate legislative process for facilitating better land use management and delivery of development.

The methodology adopted in this report is to review the state of the Province's legislative framework, provide insight into the application of current laws and processes, obtain some

empirical information, conduct interviews with officials, highlight provincial legislation issues, and provide conclusions that may influence future provincial legislation.

## **2.0. Provincial Legislative Status Quo**

### **2.1. History of the Planning Laws reform**

Mpumalanga Province inherited a racially-based spatial planning and land use management system, and notwithstanding the steps by the democratic government to address the legacy of this system by means of integrated planning, vestiges of the system remain.

There are two aspects that are covered briefly below, namely the land use management component of planning, and the forward planning component.

With regard to the regulatory component, the Mpumalanga Town-planning and Townships Ordinance 15 of 1986, (“Ordinance 1986”), applicable to former “white”, “Indian”, and “coloured” areas, is the main provincial legislation relating to the regulation of land use. The Province has authorized most local municipalities to deal with land use regulation in their areas of jurisdiction, but this excludes former black areas or released areas in terms of the repealed Black Laws Amendment Act No. 1949. The Townships Board and other statutory boards established by Province in terms of Ordinance No. 15 of 1986, provide an “oversight” function to the municipal planning activities, and deal with appeals and related matters.

On the other hand, the traditional areas and former homelands, that are subject to a variety of customary and “black areas” laws relating to settlement, land use and different forms of tenure (such as The Less Formal Townships Establishment Act of 1990, and the regulations in terms of the Black Administration Act of 1927) are administered by the Provincial government and have not been integrated into the municipal planning system.

In addition, the laws applicable to the former rural areas of Mpumalanga which constituted the old Transvaal province (such as the Physical Planning Act) are also still administered by Province.

One of the consequences of the fragmented and inequitable land use management system was the introduction of the Development Facilitation Act (“DFA”) in 1995, an interim measure of wide applicability that could be used in parallel with other laws by all provinces while they were

addressing the much needed reform of laws in their areas of jurisdiction. This opportunity – for law reform - has not been exercised by Mpumalanga and instead the DFA (1995) has become an alternative to the existing procedures in the province, with a provincially appointed development tribunal to deal with land development area applications. The DFA (1995) has also provided a set of normative planning principles that are applicable to all land use decisions and are generally recognized as promoting a more sustainable form of development than previously catered for in concepts such as “need and desirability”, which were the chief criteria for decision-making in terms of the Ordinance (1986). Other innovative aspects included the composition of the DFA Tribunal, the responsibility placed on the applicant for the requisite information, the specified timeframes for activities, and the public involvement aspects. The DFA Tribunal has functioned effectively for a number of years, but a successful Constitutional Court challenge to its use for “municipal planning” mounted by the City of Johannesburg in 2009 and upheld by the Court on 18 June 2010 will effectively discontinue its use by 18 June 2012.

With regard to the forward planning component, the DFA (1995) introduced the need for all municipalities to prepare Land Development Objectives (“LDOs”). These, according to Berrisford (2004), were “to provide an interim substitute for the inherited structure plans and guide plans inherited from both the Physical Planning Act and certain old order provincial planning ordinances.” These remain a legal requirement, and where approved by the Member of the Executive Committee have a legal effect. As far as could be established, there are no longer any approved LDOs in Mpumalanga.

The introduction of the Municipal Systems Act in 2000 required that every municipality produce a five-year Integrated Development Plan (IDP) with a spatial component in the form of Spatial Development Frameworks (SDFs) has provided a new legal means to direct forward planning decisions and include guidelines for the land use management of the affected municipality, effectively superseding the earlier legal options. Regulation 2 (4) of the Municipal Planning and Performance Management Regulations (2001) added further detail to the spatial development requirements including the need to: give effect to the DFA principles; set out objectives for the desired spatial form of the municipality; contain strategies and policies to achieve the desired spatial form; set out basic guidelines for the land use management system; set out a capital investment framework for the municipality’s development programmes, be aligned with the spatial development frameworks of neighbouring municipalities; and provide a visual representation to indicate where public and private land development and infrastructure

investment should take place, the desired or undesired use of space, the urban edge, areas where intervention should take place, and areas where priority spending is required.

More recently, in April 2011, the national government has published the Spatial Planning and Planning Bill (2011) that is intended as framework legislation to regulate land use planning throughout the country.

From the above, it is clear that there has been a gradual move towards a more effective and uniform set of laws that match the constitutional requirements of the country. However, there remain numerous aspects of the current fragmented legal and institutional arrangement that need urgent reform to facilitate a better and more integrated land use planning system.

The need for new provincial planning law is widely recognized to address the shortcomings of the present system, adapt the positive components of the DFA (1995) and related laws, and to align with the developmental challenges facing wall-to-wall municipalities. In the interim, there are innovative processes in Mpumalanga to use the current Ordinance (1986) provisions for an adaptation of the existing town planning schemes to make them applicable to all circumstances and ensure that they can accommodate the land use changes expected in the near future.

## **2.2. Description of the Current Applicable Planning Legislation**

The following description provides an overview of currently applicable planning legislation as discussed with Mr T Kleynhans, Mrs M Stoop, and Mrs E Van Jaarsveld of the Directorate Land Administration, Department of Agriculture, Rural Development and Land Affairs (“DARDLA”), based in Mbombela. Additional input was provided by Mbombela planning officials Mr M Coetzee and Mr B Steyn (Pers. Comm. 9 June 2011).

### **a) Transvaal Town-planning and Townships Ordinance No. 25 of 1965**

The ordinance is administered by Province (Department of Agriculture, Rural Development and Land Affairs).

*Comment:* According to the Province, it is unlikely that there are still township and rezoning applications in terms of this Ordinance that have not reached finality. There is uncertainty as to

whether all existing zoning rights approved in terms of this Ordinance (1965) have been assimilated into new land management schemes at municipal level.

**a) Mpumalanga Town-planning and Townships Ordinance No.15 of 1986 (“Ordinance, 1986”)**

The Ordinance provides guidance as to the purpose of town planning, the regulation of land use by town planning schemes (including the content and application procedures), the establishment of townships, the roles and functions of statutory boards.

All but two municipalities are considered “authorized” by Province in terms of s2 of the Ordinance for the purposes set out in Chapters II (town planning schemes), III (establishment of townships by private land owner), and IV (establishment of townships by local authority). In effect, they can consider, approve, or refuse land use applications. The criteria used for decision making include municipal policies and SDFs, need and desirability, and the normative principles in the Development Facilitation Act.

The provincial DARDLA, which is responsible for the implementation of the Ordinance (the criteria specified in the Ordinance,1986), through its statutory boards (Townships Board and Services Appeal Board) deals with appeals for undue delay, disputes on merit, services contributions, extensions of township boundaries and other matters. These are long processes, and generally require hearings and input from the municipalities.

*Comment:* The Ordinance (1986) was aimed at the town planning needs of smaller and less diverse communities than are defined by the new wall-to-wall demarcations, that is largely white towns and cities.

It is argued in some quarters that the national government’s assignation (Proclamation 161 of 1994) of the administration of the Ordinance (1986) to the provinces infers its applicability to entire areas of municipal jurisdiction (including former tribal and black areas). A legal opinion in this regard has been sought by DARDLA. However, in practice, the application of different laws to different geographical and types of communities indicates that this view has not been generally accepted.

The authorized municipalities are generally geared for procedures in the Ordinance (1986) but need to adapt to the wider scope of their jurisdictions by introducing new land use management

schemes. Where this is not the case, due to capacity and experience constraints, the DFA currently provides a suitable alternative.

The current system is not being maintained, with records of existing town planning schemes and decisions/permissions not being kept at Province as required in the Ordinance (1986) regulations, and there have been considerable deviations from the prescriptions for the content of town planning schemes. It is likely that some of the “old” information has been lost.

The Constitutional Court 2010 ruling on the municipal power over land use matters has not affected day-to-day operations of municipalities or the provincial Department’s approach to land use matters.

#### **b) Public Resorts Ordinance No. 18 of 1969**

This Ordinance was assigned to the Province to establish provincial public resorts outside old municipal boundaries.

*Comment:* Whereas the Ordinance was important in a tourism-orientated province such as Mpumalanga, and whereas it applied to areas outside the Ordinance (1986) influence, the wall-to-wall municipal jurisdictions would bring any future applications into the municipal planning ambit.

In future, and if the Ordinance is still deemed applicable, it is likely that permissions would need to be considered together with comment/authorization from municipalities and environmental authorizations.

#### **c) Transvaal Board for the Development of Peri-Urban Areas Ordinance No. 20 of 1943**

The Ordinance applied to areas outside local authority areas and under the control of the Transvaal Board for the Development of Peri-Urban Areas.

These areas included local authority areas of jurisdiction established under the Local Government Ordinance No. 17 of 1939, the Native Affairs Act of 1920, and the Black Administration Act No. 38 of 1927, and scheduled or released areas.

*Comment:* The Board was defined as a local authority with town planning powers until these were repealed in terms of the old Ordinance, 1965 (Oranje, 1999).

#### **d) Town Planning Schemes/Land Use Management Schemes drawn up in terms of the Townships Ordinances**

The Town-planning and Townships Ordinance provides guidance as to the purpose of town planning, the regulation of land use by town planning schemes (including the content and application procedures).

The Province should maintain an updated copy of each town planning scheme in its area of jurisdiction, as it is obliged to do in terms of s57(2) of Ordinance (1986).

*Comment:* As indicated earlier, the geographic applicability of “old” town planning schemes was fairly limited, leaving large parts of the new wall-to-wall municipal areas unregulated other than by customary laws, other old order laws, and the DFA (1995). However, four local municipalities (Mbombela, Umjindi, Bushbuckridge, and Nkomazi) are in the process of extending their town planning schemes to cover their full jurisdictions, while six (Emalahleni, Emakhazeni, Steve Tshwete, Govan Mbeki, Dr JS Moroka and Thembasile Hani) have proclaimed town planning schemes (Burwise, R).

As mentioned earlier, DARDLA has commissioned a legal opinion to clarify the applicability of the Ordinance in traditional areas, as this is an important consideration for the validity of wall-to-wall schemes.

Regarding the maintenance of the scheme records, a fully updated set of schemes is not available at the Province, and this would seem to underline the gradual breaking down of the role of information custodianship by the Province.

#### **e) Physical Planning Act No. 88 of 1967 and No. 125 of 1991**

Act No. 88 is widely used in Mpumalanga and the administration of s8, s9, s9A, and s12 was assigned to the Province by Proclamation R47, dated 3 August 1996. The MEC fulfils the decision-making function. When objections are received, these are heard by the Townships

Board before a recommendation is made to the MEC. S6 of Act 88 restricts land use change in “controlled areas”, s8 provides for permits to allow for land use change in “controlled areas”. S4(2) of Act 125 allows MEC to require preparation of a regional structure plan for future development of a planning region, requiring consistency in regulations, etc.

*Comment:* This is widely used for permissions in areas outside town planning schemes and province is the custodian for permits issued under the Act.

The validity of land use permits issued in terms of the Act has been questioned, as it should not apply to areas within municipal jurisdictions, which now cover 100% of the Province.

Officials at Province indicated that none of the Act No. 88 structure plans are applicable in the Province, and that the provincial view is that the spatial development frameworks prepared in terms of the MSA (2000) have superseded the guide plans.

A similar view was held in respect of the Act No. 125 provision for “regional structure plans”, which has not been used in the Province, but appears inconsistent with new planning laws, especially since the introduction of the Municipal Systems Act.

#### **f) National Environment Management Act No. 107 of 1998 (“NEMA”)**

The Act is closely linked to land use planning and listed land use activities have to be approved in terms of planning and environmental law. The Act sets out principles in s2 that are based on the concept of sustainable development, that has a more environmental bias than the DFA definition of the term, and includes cultural and heritage conservation. This process for environmental authorizations for listed activities is a function fulfilled by the relevant Provincial Department, which has fully functional authority in terms of the Constitution over environmental matters.

The NEMA process generally affects the establishment of new townships or settlements in all types of application process (egR293 [1962], Less Formal Township Establishment, Ordinance, 1986, and DFA [1995]), but can also affect land use applications in established areas. It is largely ineffectual where land invasion or informal settlement has occurred.

*Comment:* Authorization is generally a long process (often 12 months), run in parallel with land use planning procedures. Where applicable to land use approvals, it is often a pre-requisite (condition) for land development to proceed.

The parallel process of environmental approval that duplicates much of the advertisement and information required for land use applications could be modified to better align with the latter.

### **g) Less Formal Township Establishment Act No. 113 of 1991 (“LeFTEA”)**

This was assigned to the province under Proclamation R159 of 1994.

(Note: Section 3[5]-The Designation of Land, Sections 9[2], s9[3], 26[2] and 26[3] Registration of Ownership, and Sections 19[6A] and 19[7]- the Establishment of a Township on Behalf of the Administrator, of the Act have not been assigned to the provinces [Oranje, 1999].)

The Act provides for three chapters:

Chapter 1 for Less Formal Settlement, Chapter 2 for Less Formal Township Establishment, and Chapter 3 for Settlement by Indigenous Tribes.

S3 and s10 provide for land designation, and s4 and s11 for settlement and township development and related matters.

S6 and s17 allow for settlement and township established in terms of the Act to be deemed to be “a township established in accordance with the law governing the establishment of townships in force in the area in which the designated land is situated”, allowing it to be dealt with in terms of the Ordinance (1986).

*Comment:* S10 and s11 are widely used to establish new townships in former homeland areas in Mpumalanga, notwithstanding its procedural shortcomings.

### **h) Removal of Restrictions Act No. 84 of 1967 (“RoRA”)**

The Act has been assigned to the provinces in terms of Proclamation R160 of 1994.

S5 applies to the removal of restrictive title conditions and allows for simultaneous rezoning too.

The Premier may alter, suspend or remove, permanently or temporarily, conditionally or unconditionally, restrictions or obligations registered against the title deed of land that relate to subdivision, or the purpose for which the land may be used, or requirements to be observed in connection with the development of buildings on the land.

Criteria for removal/amendment include that it should be in the interest of the development of the area, in the public interest, etc.

*Comment:* Permissions are dealt with by the MEC, with the Townships Board dealing with hearings in the case of objections.

It performs an important role in allowing for the alignment of zoning and title conditions to be effected. Alternatives to the Act include the removal of the restrictions by agreement with affected interested parties, or by Court Order.

#### **i) National Heritage Resources Act No. 28 of 1999**

The Act seeks to protect heritage resources in the Province, including afforded to buildings of 60 years or older in terms of s34, heritage impact studies. S31 requires planning authorities to take account of heritage resources in the compilation of its town planning schemes and spatial plans, while s38 specifies that applicants for certain categories of development (e.g. exceeding 5000m<sup>2</sup> in extent) must advise the responsible heritage authority of the intended development and that it may require a heritage impact assessment report .

The provisions of s38 do not apply if an evaluation of the impact of the proposed development is required in terms of NEMA or other legislation, provide that the evaluation fulfils the requirements of the relevant heritage resource authority and the comments of such authority have been taken into account in the granting of the consent.

*Comment:* The extent of implementation of the Act's provisions is not clear. There is no provincial heritage resources agency in Mpumalanga, and the heritage role would fall to the South African Heritage Resources Agency. Notwithstanding the preceding comment, there would be a need to address archaeological/historical remnants of Stone Age villages, graves and such other components of the National Estate as set out in s3 at the pre-development stage of a land use application.

#### **j) Subdivision of Agricultural Land Act No. 70 of 1970**

S3 does not allow for subdivision of agricultural land or transfer unless the Minister of Agriculture consents thereto.

Although this Act was repealed by the Repeal Act (No 64 of 1998), the latter has not yet been signed into law.

The Act does not apply to Agricultural Holdings, former “old” municipal areas, and South African Development Trust Land. Oranje (1999) indicates that different versions of the Act are in operation in Lebowa and KwaNdebele, but notes that as these areas contain large tracts of Trust land it would only be of minor significance in these former homelands.

*Comment:* It is understood that applications are submitted directly to the National Department of Agriculture for approval, and that there are significant delays in this regard.

In Mpumalanga, where farm portions are subdivided to land parcels smaller than 20ha but larger than 1ha, these are deemed to be rural residential properties and a change of land use application is required together with the subdivision application.

#### **k) Agricultural Holdings (Transvaal) Registration Act No. 22 of 1919**

Excisions of holdings from the provisions of the Act (i.e. cancellation of the agricultural holding certificate, and reversion of the holding to a farm portion) in terms of s6 of the Act are approved by the National Minister of Public Works.

*Comment:* The title deeds of holdings contain significant limitations on the land uses permitted and the extent of subdivisions. The consent to excise the holding removes the restrictions. It is generally required for township applications, prior to the opening of the townships registers, and can cause a delay in this regard.

#### **l) Local Government Ordinance No. 17 of 1939**

S67 provides for Municipal road closures, and s68 provides for Municipal park closures.

*Comment:* These approvals are normally the sole discretion of the municipality, but applications for park closures are also received by Province.

#### **m) Division of Land Ordinance No. 20 of 1986**

The Ordinance was assigned to the Province by proclamation 109 of 1994.

The Ordinance applies to a limited range of land categories as defined in s2.

Mpumalanga Province has “authorized” municipalities to approve land division applications for subdivisions down to 8565m<sup>2</sup> in areas without formal engineering services, where the application does not constitute township establishment.

*Comment:* The role of provincial government is similar to that of the authorized municipalities in areas outside the municipal jurisdiction (which would no longer pertain in view of the new municipal demarcations) and to deal with appeals against municipal decisions.

#### **n) Black Communities Development Act No. 4 of 1984 and Land Use Regulations**

Chapters VI and VIA are still valid, the rest of the Act having been repealed. These provide existing leaseholders certain security of rights until the township register is opened and full ownership can be conferred. Administration of sections 52 (leasehold) and 57B (registration of ownership) have been assigned to Province.

The Township and Land Use Regulation R1897/1986 (Annexure F) was assigned to Province by Proclamation R163 of 1994. It is used for land use management in townships established in terms of the Act.

*Comment:* The last townships established in the Province under this Act have been assimilated into the dominant land use systems.

S15 of the Upgrading of Land Tenure Act No. 112 of 1991 provides for formalization of townships where the general plans have been approved and the registration of full ownership (see reference to Act below).

**o) Deeds Registries Act No. 47 of 1937**

The Act was promulgated for the registration of townships, ownership, servitudes and other rights to land.

*Comment:* The Act is integral to the ownership of property and is directly linked to the Land Survey system.

**p) Sectional Title Act No. 95 of 1997**

The Act provides for an alternative form of property ownership. Sectional Schemes must comply with zoning and approved building plans.

**q) Administration of Land Survey Act No. 8 of 1997**

The Act regulates the cadastral surveying of land parcels for registration, and related development purposes.

**r) Municipal Systems Act No. 32 of 2000**

The Act requires that every municipality prepare an Integrated Development Plan (IDP).

S26(e) requires that an integrated development plan include a spatial development framework.

S32 provides for Province to comment on municipal spatial development frameworks.

S35 provides for an approved spatial development framework to prevail over any plan defined by the Physical Planning Act No. 125 of 1991.

S62 provides for appeals against decisions taken by any political structure or official. There is no record of any appeal lodged under this section.

*Comment:* The consideration of land use applications by the provincial statutory boards is affected by these municipal “policies”.

In Mpumalanga, it has become the norm for SDFs to be used as land use control tools, rather than the strategic, long term plan for the municipality. The distinction between this function and that of a land use regulatory tool needs clarification.

Investigations by Mbombela into the use of the MSA (2000) for the establishment of new Land Use Management Schemes for its area of jurisdiction have not been followed through due to legal technicalities, and it is now seeking to establish a wall-wall Scheme in terms of the Ordinance.

#### **s) Development Facilitation Act No. 67 of 1995 (“DFA”)**

The Act provides for alternative procedures for land use development through a provincially-established and -managed Development Tribunal.

Chapter 1 provides a set of nationally applicable normative principles that are used to guide development decisions and forward planning.

Although the Tribunal has the power to suspend the operation of a wide range of laws that impact on land use (such as NEMA, subdivision of agricultural land and excisions), it has been inclined to require that these be addressed separately before final approval is forthcoming.

*Comment:* The Act is seen by applicants as an alternative to the existing procedures, guaranteeing a faster and more objective outcome. It is used in areas where there is legal uncertainty about the legal process to follow.

Its use is not encouraged by municipalities as the timeframes and requirements clash with the established systems, and it is seen as a way of side-stepping the municipalities. Its use is also opposed by traditional leaders. As in the case of other provincially-administered land use regulatory acts, the incorporation of approvals into the Municipal system has proved difficult,

although services provision in consultation with municipalities is a condition imposed in approvals.

Its use will effectively discontinue by 18 June 2012 unless an extension of time is granted by the Constitutional Court.

#### **t) Upgrading of Land Tenure Rights No. 112 of 1991**

The Act has been assigned to the Province.

It provides, amongst other things, for upgrades of tenure to ownership and protection of rights granted in respect of tribal land.

The process followed depends on the nature and legality of tenure in the settlement (deeds of grant, permissions to occupy, or other forms of tenure and their legality as per Schedules 1 and 2) and the stage reached in the settlement establishment process (e.g. whether there is an approved general plan).

Schedule 1 rights include deeds of grant or rights of leasehold as defined in Regulation 1 of Proclamation R293 (1962), any quitrent title as defined in Regulation 1 of Proclamation R188 (1969), any right to leasehold as defined in the Black Communities Development Act, and any right to leasehold as set out in the Conversion of Certain Rights to Leasehold Act (1 of 1988), deeds of grant or rights to leasehold as set out in Regulation 1.1 of the Regulations for Land Tenure in Towns, 1988, deeds of grant or rights of leasehold as set out in the Regulations for the disposal of South African Development Trust Land, 1988.

Schedule 2 rights include permission granted to occupy an allotment in terms of Regulation 5(1) of the Irrigation Scheme Control Regulations of 1963, permission granted to occupy an allotment in terms of Proclamation R188 (1969), any right of occupation granted to any registered occupier as defined in Section 1 of the Rural Areas Act (House of Representatives) Act No. 9 of 1987, and any right to occupy tribal land granted under indigenous law or tribal custom.

*Comment:* Province undertakes a large number of tenure upgrades in townships and rural settlements.

#### **u) Mineral and Petroleum Resources Act No. 28 of 2002**

The Act made the State the custodian of mineral resources as of 1 May 2004, repealing the Minerals Act (1991).

All old order rights, including mining rights, surface right permits and industrial stand grants had to be renewed within a given time, failing which they lapsed.

Consent from the Department of Mineral Resources and Energy, or the holders of valid mineral rights, is required when applying for land development rights.

Where it is involved in land use approvals, Province will require approval from the Department for applications for township establishment, filling stations and other uses. The reverse is not necessarily true, where prospecting or mining rights may be granted by the Department of Mineral Resources and Energy without consultation with the affected municipality or Province, or reference to its spatial planning frameworks or land use management schemes.

*Comment:* The matter was raised by the Govan Mbeki officials, where coal mining prospecting rights are being issued around expanding township areas (such as Secunda) and restricting the expansion options.

In land use applications, its importance as a parallel approval required for the development of any land cannot be overlooked.

Notwithstanding the lack of consultation mentioned above, the relevance of municipal approval of land uses, including mineral extraction, and particularly where zonings apply within municipal jurisdictions, has been underlined by the City of Cape Town vs. Macsand (Pty) Ltd Court judgement, dated 20 August 2010.

#### **v) National Land Transportation Transition Act No. 22 of 2000**

S22 requires the preparation of a land transport framework, which must include the spatial plans for the province, and, once approved, s29 requires public transport input and approval for any substantial change in land use.

*Comment:* Not mentioned in interview, but impacts directly on land use plans.

#### **w) Black Administration Act No. 38 of 1927 and Land Use and Planning Regulations**

R293 of 1962 applies to urban development (township development, granting and registration of tenure, issuing of building permits, etc) in former homelands and self-governing territories, other than in Kangwane and in Lebowa where it was amended.

Annexure F (from the Black Communities Development Act, 1984) was assigned to the province in 1994 and is used for land administration in these areas.

The Land Use Regulations, Proclamation R188 of 1969, applies to rural land tenure and development where lesser requirements for survey and registration is required, making it more difficult to upgrade tenure and formalize developments in these areas (Oranje M, 1999).

Proclamation R1886/90 relates to township establishment and R1888/90 to the preparation of town planning schemes in “scheduled” and “released” areas in former homelands and self-governing territories (Oranje M, 1999).

*Comment:* A guideline document has been prepared by Province for the formalization of settlements and the upgrading of land tenure rights in townships proclaimed in terms of R293, and dense rural settlements situated on land governed by R188 of 1969.

The guideline recognizes that the formalization of settlements and upgrading of land tenure rights requires cooperation between spheres of government, traditional authorities and the affected communities.

The nature of the tenure in existing settlements is important for formalization (i.e. Deeds of Grant, Permissions to Occupy, or any other form), as well as compliance with certain basic developmental and cadastral requirements.

#### **x) Homeland Laws**

The KwaNdebele Town Planning Act No. 10 of 1992 purports to apply to parts of the former KwaNdebele homeland and is aimed to regulate the planning, establishment and development of towns.

Other than these Acts, there do not appear to be any other local proclamations pertaining to land administration in the former homelands and tribal areas.

*Comment:* The Province is responsible for the administration of the Acts, and appears to use the provisions of R188 (1969) and R293 (1962) in other former homeland areas.

**y) Advertising on Roads and Ribbon Development Act No. 21 of 1940**

S9 to s11 affect access, subdivision, and advertising, and impose building lines along identified public roads.

The Act has been assigned to the Province in terms of Proclamation 23 (Government Gazette No 16340). The MEC fulfils the role of the controlling authority.

*Comment:* Compliance with the Act is made a condition of approvals of rezonings and township.

**z) National Water Act No. 36 of 1998**

Section 144 stipulates that “for the purposes of ensuring that all persons who might be affected have access to information regarding potential flood hazards, no person may establish a township unless the layout plan shows, in a form acceptable to the local authority concerned, lines indicating the maximum level likely to be reached by floodwaters on average once in every 100 years

*Comment:* Floodlines certified by a professional engineer must be reflected on layout plans and on any land applications contiguous to water courses.

**aa) Communal Land Rights Act No. 11 of 2004**

The Act aims to address land use management and relations between traditional and elected authorities in the former homeland areas.

*Comment:* The provisions of the Act were challenged on Constitutional grounds and have been suspended.

There is a need to address this unresolved aspect of land use management and customary laws that now are relevant in many municipal areas.

### **bb) Land Administration Act No. 2 of 1995**

This Act provides for the delegation of powers and the assignment of the administration of laws regarding land matters to the provinces, provides for the creation of uniform land legislation, and provides for matters incidental thereto.

*Comment:* The Act pertains to proclaimed areas including former homelands, areas for which a legislative assembly was established in terms of the Self-governing territories Act of 1971, and any area that was referred to in s25 of the Black Administration Act of 1927, or section 21 of the Development Trust and Land Act of 1936, and which is situated outside the two aforementioned areas.

As can be seen from the description of the laws and their applications, the complexity is heightened by the limited geographic applicability of certain laws, the new reality of wall-to-wall municipal areas, and the differing needs of communities in urban, traditional, and rural areas. It is further complicated by the institutional capacity constraints at most levels of government.

## **2.2.1. The Most Important Laws for Land Use Planning**

### **a) Forward Spatial Planning**

#### **i) Local Government: Municipal Systems Act No. 32 of 2000**

This Act has required the preparation of municipal integrated development plans and spatial development frameworks.

Chapter 5 requires municipalities to adopt Integrated Development Plans (IDP) and Spatial Development Frameworks (SDFs) to provide for the forward planning and matching allocation of resources and budgets to achieve the desired developmental municipal vision, with an emphasis on the most critical development and internal transformation needs. It requires the

development strategies to be aligned with any national or provincial sectoral plans and planning requirements binding on the municipality. It also requires a spatial development framework that must include basic guidelines for the land use management system for the municipality.

The IDPs and SDFs have been prepared to various degrees of success by all the municipalities in Mpumalanga. The province has an approved Provincial Spatial Development Framework, although not in terms of any legislation. It is not clear whether the alignment with sectoral plans and policies has been achieved, nor whether the current IDPs are adequately realistic, but there is provision for their regular updating.

In Mpumalanga, the use of SDFs for land use control purposes is commonplace with very detailed cadastral-level proposals for future development, whereas they should be more strategic providing guidance on a policy level. The development of the “new” land use management schemes has exposed this lack of clarity about the role and function of SDFs in Mpumalanga.

All previous Land Development Objectives (DFA 1995), Physical Planning Act (1991) Guide Plans appear to have fallen into disuse, although not formally withdrawn.

## **b) Land use management and development planning**

### **i) The Mpumalanga Town-planning and Townships Ordinance No.15 of 1986**

Provides guidance as to the purpose of town planning, the regulation of land use by town planning schemes (including the content and application procedures), the establishment of townships, the roles and functions of statutory boards.

It is understood that all but two municipalities are considered by DARDLA as “authorized” in terms of the s2 of the Ordinance (1986) and can consider, approve, or refuse land use applications.

Province, and more specifically the DARDLA, provides an oversight role and deals with appeals lodged against local authority performance (undue delay in the consideration of applications) and appeals on the grounds of merit.

## **ii) The Removal of Restrictions Act No. 84 of 1967**

Assigned to the Province, and allows for the removal of restrictive conditions registered against the title deed of land that relate to the establishment of townships or to town planning, subdivision, or the purpose for which the land may be used, or requirements to be observed in connection with the development of buildings on the land. It allows for simultaneous rezoning too.

## **iii) The Development Facilitation Act No. 67 of 1995**

Provides wide ranging options for land use applications particularly where there is uncertainty about the legality of the process being used, and where multiple legal requirements must be addressed (such as subdivisions, removal of restrictions, and rezonings). Its use as an alternative tends to mask the shortcomings of the fragmented and slow land use system. The Constitutional Court ruling (2010) on the validity of Chapters V and VI has not diminished its use to-date, but its applicability will terminate in June 2012.

## **iv) The Black Administration Act No 38 of 1927 and Land Use and Planning Regulations**

Used for the development of subsidized housing schemes by the Province, in traditional areas. The indications are that most of these settlements in traditional areas of Mpumalanga are undertaken in terms of R293 (1962).

In conclusion, although only primary legislation is discussed above, the legal situation relevant to land use matters is much more complex with a layers of diversity and different authorities involved. The fragmented regulation of land use and development is unsatisfactory and a more rational system of spatial planning, regulation, and alignment with other development plans and interests is needed to improve the situation. These aspects and the legacy of past approvals from old order laws, such as LEFTEA (1991), and R293 (1962) are part of the scope of matters that could be addressed in the formulation of new provincial land use laws.

### **2.3. Description of the new Provincial Legislation**

There is no current move afoot to draft a new Mpumalanga land use management bill.

It is possible that the prospect of new national legislation will revive interest in a new provincial bill, and ensure a consistency of content and approach to these matters throughout Mpumalanga.

### **2.4. Description of Implementation of Provincial Planning Laws**

#### **2.4.1. Institutional Responsibilities**

The main provincial structure for land use management and spatial planning is the Department of Agriculture, Rural Development and Land Reform: Directorate of Land Affairs Administration, and its sub-directorates of Development Planning, Land Use Administration, and Statutory Bodies.

#### **a) Mpumalanga Department of Agriculture, Rural Development and Land Reform**

##### **i) Decision making**

- The Member of Executive Committee is responsible for matters referred to him/her by the Mpumalanga Townships Board in terms of s59 and s104 of the New Ordinance (1986), and s7 of the Removal of Restrictions (1967) and for applications in terms of the Physical Planning Act 1967, R293 (1962), R188 (1969), Roads and Ribbon Development Act, and LEFTEA;
- The Mpumalanga Townships Board is responsible for matters under s139 of the New Ordinance (1986) and provides an advisory function to the MEC and hears matters where there are objections, before making recommendations to the MEC;
- The Services Appeal Board functions are undertaken by the Townships Board;
- The Mpumalanga Development Tribunal is responsible for applications under the Development Facilitation Act of 1995; and
- The Mpumalanga Development Appeal Tribunal responsible for appeals under the Development Facilitation Act of 1995.

## **ii) Staff complement**

- Development Planning has one town planner
- Land Use administration has 3 administrative staff
- The DFA Development Tribunal has one town planner and 3 administrative staff
- The Townships Board has two administrative staff

### **2.4.2. Implementation Aspects**

In a general sense, land use in Mpumalanga contains formal and “informal” elements, notwithstanding the applicability of land use planning and management laws throughout the Province.

With regard to the formal component, Mpumalanga’s land use management regulatory regime relies on DARDLA, local municipalities, and traditional authorities for its implementation.

As indicated earlier in this document, the main provincial land use laws used are the Ordinance (1986) and the DFA (1995) and R293.

The main types of application include the establishment of townships, land development areas, the rezoning of land from one use to another, the simultaneous removal of restrictions and rezoning of land, the subdivision of land, the consolidation of land, consent uses in terms of existing land use rights and relaxations of various development controls (e.g. height, parking, and building lines) established through town planning schemes.

The Mpumalanga Ordinance (1986) provides for the following procedures:

Applications for new development rights or variances to existing rights are lodged with the municipality in terms the relevant sections of the Ordinance and reasons for the proposal and supporting documents as required are provided by the applicant. There is no process to return what might be considered an incomplete application. The application is usually advertised for public comment and is circulated to municipal and government departments and stakeholders for

comment. Thereafter the responsible administrative municipal structure or department evaluates the application in terms of the criteria prescribed in the relevant law and municipal spatial frameworks and makes a recommendation to the decision-making structure or Council Committee on whether to approve or refuse the application, together with proposed conditions that are intended to regulate the use and protect the amenity of other land uses in the vicinity. Once the decision has been made, the applicant is advised accordingly and takes steps to comply with any conditions imposed before the permission may be exercised. An example of the process, relating to township establishment, is set out in Annexure 1.

The DFA (1995) is an alternative application procedure that relies on the administrative capacity of dedicated staff in the roles of Designated Officer, Registrar and the specially constituted Development Tribunal to respond within the stringent timeframes. With regard to the special features of the DFA (1995) some notable features are:

- The chapter 1 principles for land development and conflict resolution
- The response times that are very short with, for instance, a requirement for pre-hearing and hearing dates to be between 80 and 120 days from the date of submission to the Designated Officer, and notice of these hearings being given in the prescribed manner at least 65 days prior to the hearing dates.
- The information requirements are stringent and wide-ranging and require specialist input on all aspects of the application, including engineering, environmental and social aspects.
- The provision for a pre-hearing conference to ensure that the necessary aspects have been addressed prior to the hearing taking place.
- The composition of the Development Tribunal, with representatives from government and the private sector.

The post-decision procedures have not proven to be easily managed, as there is usually a need to involve municipalities in the final stages of compliance with the Development Tribunal decision, particularly in respect of services agreements and the incorporation of the approval into the respective Ordinance Town Planning Scheme, as well as the need for parallel approvals in terms of NEMA and Minerals and Energy. The DFA (1995) does not provide for the lapsing of matters awaiting a decision, but does have lapsing clauses if certain conditions imposed in terms of a decision are not met (i.e. 5 months for the submission of a General Plan to the Surveyor General). Condonation can also be sought from the

DFA Tribunal for failure to comply with instructions or conditions imposed by the Tribunal, and there is provision for appeals to a specially constituted Appeal Tribunal. The DFA process is set out in Annexure 2.

The R293 (1962) procedures are not explicit in the regulations but in practice follow a procedure that involves an evaluation of the site and its suitability for development from legal, services, geotechnical and environmental points of view, followed by the submission of the required layout plan and motivation to both the Department and the local municipality in much the same way as is followed in the Ordinance (1986) other than the endorsement from the tribal authority.

### **2.4.3. Implementation and other related legislation**

The wider legal requirements for applications (i.e. parallel approvals and comments) are addressed by requiring permissions or comments from the affected parties (e.g. environmental authorizations, and Department of Mineral and Energy consent) before approvals are effective.

The most important parallel planning-related legislation would include the following, which have been more fully described in the earlier table of applicable laws:

#### **a) The Subdivision of Agricultural Land Act No. 70 of 1970**

Requires the Minister of Agriculture to authorise subdivisions of land outside the pre-2000 town areas. The process follows the land use approval, and impacts on the opening of township registers, as the Registrar of Deeds requires proof of compliance with the Act. The approvals are now applied for through an electronic process.

#### **b) The Mineral and Petroleum Resources Development Act No. 28 of 2002**

Requires the Department of Minerals and Energy to issue a letter consenting to the establishment of a township before the municipality will issue the certificate to allow the register to be opened. The application is referred to the Department at the time of lodging with the municipality. The permission is generally subject to a five year applicability clause, failing which a further application must be lodged.

#### **c) The National Environmental Management Act No. 107 of 1998,**

Requires the provincial Department of Economic Development, Environment and Tourism, to authorise the land use application where is a so-called ‘listed activity’ in terms of the regulations

to the Act. The authorization requires an application to be lodged by a suitably qualified environmental practitioner, culminating in a record of decision/authorisation that can stipulate requirements that include land use management controls and environmental measures to be taken to mitigate the impacts of the proposed development. Conflicting conditions imposed by the Department and the land use regulator can necessitate appeals or amendments to the authorization. The authorization is generally subject to a two to five year applicability clause, which if not exercised requires extension of time applications and lapsing if the extensions are not timeously lodged. The process tends to duplicate the land use planning process in terms of public participation, and to rely heavily on the planning application for clarification of potential impacts. However, as the process is independent and not coordinated with the land use application, it can result in fruitless expenditure if either application should fail.

**d) The Advertising on Roads and Ribbon Development Act No. 21 of 1940,**

Requires an application to the controlling authority (the MEC with input from Department of Public Works, Roads and Transport) for permission. The provisions of the Act and the requirements of the controlling authority are generally incorporated into the land use application considerations, and the exercise is usually a compliance issue.

**e) The Agricultural Holdings (Transvaal) Registration Act No. 22 of 1919,**

Imposes land use and subdivision restrictions on holdings necessitates that the holding to be developed be freed of these limitations or that it be excised from the provisions of the Act by cancellation of the agricultural holdings certificate in terms of s6. These approvals are currently approved by the National Minister of Public Works.

### **3.0. Performance of Provincial Legislation**

The following information is intended to provide an idea of the type and number of applications/appeals received by Province in 2010:

**a) Applications received 2010**

*Table 1: Applications received by Province in 2010*

<b>Applications received 2010</b>	<b>Number</b>
Business Rights/Change of Land Use Physical Planning Act No. 88 of 1967 Roads and Ribbon Development Act No. 21 of 1940	44
Subdivision Agricultural Land Act No. 70 of 1970	53
Township Establishment Town Planning and Townships Ordinance No. 15 of 1986	30
Removal of Restrictions Removal of Restrictions Act No. 84 of 1967	8
Second Dwelling in terms of Title Deeds	10
Excision Agricultural Holdings Registration Act No. 22 of 1919	11
Extension of boundaries Town Planning and Township Ordinance No. 15 of 1986 Section 88	4
Tenure Upgrading Tenure Upgrading Act No. 112 of 1991	6
Less formal township establishment Less Formal Township Establishment Act No. 113 of 1991 Section 10	5
Less formal township establishment Less Formal Township Establishment Act No. 113 of 1991 Section 11	5
Subdivision and Rezoning in towns Subdivision and Rezoning in township Act No. 4 of 1984 R293, R 188, Ordinance No. 20 of 1986, Ordinance No. 15 of 1986	18
Developments Development Facilitation Act No. 67 1995	7

Consent for sub-division Act No. 21 of 1940 (Surveyor General)	16
Amendment Schemes Section 57 (1) (c) Town Planning and Townships Ordinance No. 15 of 1986	48
<b>Appeals</b>	
Appeals to Township Board and MEC	30

## **b) Facilities**

The infrastructure available to the planners is adequate.

The application tracking system is a manual filing system.

Regarding information availability, it appears that Province does not have a full record of land use management schemes or a complete record of amendments and planning permissions.

## **4.0. Stakeholder Views of Provincial Planning Legislation**

### **4.1. What works well in the current legislation**

#### **a) Provincial view**

On the forward planning aspects, the Province has approved an Integrated Provincial Spatial Development Framework as part of its provincial growth and development strategy.

The MSA (2000), and the need for Integrated Development Plans, has given impetus to the preparation of municipal spatial development frameworks for most, if not all municipalities, and these have provided valuable guidelines for future development opportunities and municipal interventions.

In the urban parts of “established” municipalities, the Ordinance (1986) appears to provide the best and most familiar processes. Its procedures have been tested over a long period, have become accepted and understood by the development fraternity, and fit the municipal and provincial land use management structures.

The Ordinance (1986) addresses the requirements for applications to be made, the procedures and the decision-making entities and provide a framework for town planning regulations.

The DFA (1995) is seen as a necessary alternative to the Ordinance (1986) and has applicability throughout the Province. Its cost and intricacies make it better suited to larger applications. The Development Tribunal appears to be functioning well.

Where “newer” municipalities are concerned, and in the rural areas, the use of the DFA (1995), R293 (1962) and customary laws are the main options for regulating land uses and settlement patterns.

#### **i) Mbombela:**

Mbombela is an authorized local municipality covering 4 341km<sup>2</sup>, including a large tract of the Kruger National Park and seven traditional authorities. Of its approximately 530 000 residents, about 413 000, or 78%, live in rural/informal areas. It has a number of developmental challenges, including engineering services backlogs, uncontrolled urbanization, poverty, and health issues.

The municipality has set objectives for its urban and rural management, including the control of land use development, the training of the Town Planning Tribunal to take informed decisions, the completion of its land use management scheme, the formalization of informal settlements and adequate forward planning.

It addresses forward planning in terms of its approved Spatial Development Framework, and deals with the technical and legal aspects of appropriate development of townships and land, regulation of land use in terms of the various town planning schemes (Nelspruit, Hazyview, White River, and the Peri Urban Scheme). Innovative use of aerial photography and other techniques have been used to address the rural and tribal areas in the municipality.

Mbombela is preparing a new wall-to-wall land use management scheme that includes traditional land, and will comprise a register of current land zoning, clauses, the spatial development framework and an electronic mapping system. It is hoped that the new scheme will be promulgated in December 2011, although opposition is expected from traditional leaders.

The Council's land use decision-making structures are aligned to the types of procedure found in the Ordinance (1986).

The Urban and Rural Management Division is responsible town planning administration (7 staff), development control (4 staff), geographic information, building control and advertising control. An electronic filing, circulation, and record-keeping system is used at the municipality.

The timeframe for decisions on rezoning and similar applications is generally between 6-9 months, with townships taking about 12-18 months.

## **4.2. What does not work well**

### **a) Provincial view**

The spatial development frameworks prepared under the Municipal Systems Act (2000) have tended to have an urban bias, and far more work is needed to relate planning and land use management schemes to the local circumstances, particularly in rural/traditional areas.

Their use by municipalities for "land use control" purposes, as opposed to their intended purpose of being a "strategic plan", needs to be addressed by more guidance on the role, format, and content of an SDF from National level. In addition, the spatial planning has not been matched with infrastructure investment and development spending by municipalities, while monitoring of progress towards developmental goals requires better data and information systems.

Better and more integrated decision making between the provincial and local spheres of government, including traditional structures, is essential. This is particularly important in addressing the low cost housing needs in the Mpumalanga.

Some old order laws, such as R293 (1962), while providing a valuable option for land use development have shortcomings that have had to be addressed by practical adjustments to the information required by the authorities for decision making. These laws do not match the structures at municipalities, fail to integrate the outcomes with the planning systems at local level, are outdated, and do not involve interested and affected parties. The retrospective

upgrading of tenure in these and similar settlements is a huge undertaking, effectively requiring a back-to-front township establishment process to ensure registration of ownership of properties.

The diversity of laws of similar planning intent, but with different approving authorities, and conflicting competencies requires specialized knowledge and insight on the part of the implementing authorities for a balanced outcome. The potential for confusion is significant and can result in delays, wrong outcomes, and poor integration with municipal systems, often to the detriment of communities that require assistance. Over time the accumulation of applications not integrated with the formal systems of land use registration, particularly low income housing settlements will be detrimental to the functioning and viability of municipalities (Mbombela alone reported 3940 erven formalized in 2010).

Although the Ordinance (1986) is still the dominant land use planning tool, the Province is no longer receiving records of planning approvals from municipalities, and vice versa. While the absence of a full history of planning approvals is understandable given the diversity of sources from former homelands, municipal and provincial structures, its importance to the administrative capacity of the municipalities, the incorporation of rights into new legal systems, the determination of land values for rates purposes is substantial.

The timeframes for circulation of applications are not fixed in law, other than in the DFA, and the consequence is general delay in the processing of applications.

If the use of the DFA (1995) were to be discontinued, steps would need to be instituted to conclude outstanding applications them within reasonable timeframes as the Act does not provide for their lapsing. Unresolved DFA (1995) applications could become a further administrative difficulty in a new legal system.

The staffing and administrative capacity of the officials responsible for the provincial planning of Mpumalanga will need to be assessed in the light of any new planning laws and the land use planning role of Province in the future.

The promotion of a pro-active development facilitation culture in provincial government, rather than a bureaucratic control culture, will depend on the training and experience of staff in the future. (This is also true of local municipalities where improved capacity, better information, shared services, and reporting systems would improve performance).

There is inadequate monitoring and follow-up on compliance with conditions imposed, as law enforcement is lacking and under-capacitated. The cumulative impacts of land use decisions need to be quantified to determine whether planning objectives set out at national, provincial and local level are being achieved.

**i) Mbombela:**

In relation to the huge area covered by the municipality, the formal core of urban development is a small but essential component of the municipal economy.

The current municipal system is focused on Ordinance (1986) and related town planning schemes applicable in the municipality as can be seen from the table below (Coetzee, 2011: telephonic comm., 13 July). Where there are applications outside of the area described above, the municipal function requires augmentation by Province, particularly in the rural and traditional areas.

The applications received in 2010 are set out in the table below:

*Table 2: Applications received by Mbombela in 2010*

<b>Applications received 2010</b>	
Advertising signs	619
Rezoning in terms of the Town Planning and Townships Ordinance 15 of 1986	86
Township Establishment in terms of the Town Planning and Townships Ordinance 15 of 1986	21
Subdivision/consolidation TP Scheme/ Ordinance	137
Consent and Other TP Scheme	967 3
Tenure Upgrades	940

Reference was made by the official interviewed to Proclamation 161 of 1994 by the national government whereby the administration of the new Ordinance (1986) was assigned to competent authorities, “insofar as that Ordinance, 1986, is applicable in, or in a part of, the province concerned.” The view is that the Ordinance, 1986, applies to the whole municipal area, and that a legal opinion on this interpretation has been sought by DARDLA.

The reality is somewhat different, with a number of different laws and procedures used by the Province for approving for land uses outside the town planning scheme areas, with comments from the municipality. The Province also addresses appeals, DFA (1995) applications, “non Ordinance” township applications through its statutory boards.

The uncontrolled urbanization in areas without adequate services or economic activity is indicative of a system that is not able to cope. Interventions such as the proposed wall-to-wall land use management scheme will improve the formal framework for land use administration, but unless supported by adequate capacity and traditional leadership buy-in will not resolve the problems. The inability to enforce the regulatory framework for building plan approvals in terms of the National Buildings Regulations and Building Standard Act No. 103 of 1977, other than in the urban areas is indicative of the wider dilemma confronting Mbombela and its administration of the municipal area.

An understanding of the development and social dynamics in the municipal areas is needed in order to create an appropriate provincial response in terms of land use management laws, better spatial planning guidance, funding for infrastructural and supporting initiatives, and so on.

### **4.3. What aspects of each law should be changed**

#### **a) Provincial view**

It is crucial, in the short term, that Province addresses, as soon as possible, the applicability of the Ordinance, 1986, on the former homelands, because 3 town planning schemes have already been proclaimed and 3 more underway.

Whereas it may be possible to amend the existing laws to bring about an adequate alignment, it would be preferable that the legal system is improved holistically rather than piecemeal.

The laws should be rationalized so that a single law, or suite of aligned laws, addresses planning and land use regulation. The plethora of existing laws dealing with the province in a divided manner must be repealed, and the peculiarities of, for instance, rural and urban needs should be addressed as part an integrated approach.

New provincial law on land use planning must include clarity on the roles of different spheres of government, future planning, regulatory planning (such as the new town planning schemes being prepared and proclaimed in Mpumalanga), time frames, clear decision making structures, and realistic assumptions about what can be achieved given available capacity. New laws must assimilate existing approvals and applications into the new legal framework.

The risk associated with not producing a provincial planning law with guidance to local municipalities, is that a myriad of different approaches and land use management schemes could be initiated in terms of the municipalities' competency to deal with land use planning.

The likelihood of an effective one-step transition from one regime to a newer one is minimal. A structured transition with added institutional capacity a provincial level should be introduced.

#### **i) Mbombela**

The practicalities of land use administration in the new, extensive, "wall-to-wall" municipalities needs to be considered in the formulation of new planning laws.

While Mbombela itself has a sizeable urban centre, the biggest land component in the new municipal demarcation is rural and has no acceptable form of municipal services. The administration of these extensive areas is a major challenge.

Any new land law reform must take a "less urban approach" and allow for innovative techniques to address the need to work towards a more formal planning and regulatory system than is currently catered for in the Ordinance (1986). Some of these innovations are contained in the draft land use management scheme under preparation for Mbombela.

#### **4.4. What aspects need to be addressed by National legislation**

##### **a) Provincial view**

It is clear the current system does not address the planning and regulatory needs of the province in an effective way. The system is too diverse in terms of procedures, the applicability of laws and local arrangements.

National Law provides an opportunity to provide a framework for consistency about the content of provincial law, but allow for the diversity that occurs at provincial and local municipal level.

It should provide for the repeal and succession of existing acts that are related to land use planning, particularly any national acts such as Less Formal Township Establishment Act (1991), the Black Administration Act (1927).

##### **i) Mbombela**

A national framework law would be beneficial to addressing the need for a more uniform and appropriate law.

#### **5.0. Overview of key issues that have implications for Provincial Planning Legislation in the Province**

##### **a) National Spatial Planning and Land Use Management Bill (2011)**

The Constitution provides for land use planning powers at the three spheres of government. National law may regulate both provincial and municipal land use planning, and the draft Spatial Planning and Land Use Management Bill (2011) aims to do this and provide the framework for consistency in the content of provincial law. In terms of the draft legislation the scope of provincial planning is defined to allow the preparation of provincial spatial development frameworks, decision-making in respect of land use matters falling within provincial executive competence, and the making of laws necessary to implement provincial planning.

It is apparent that the Constitution only provides for limited national intervention on provincial planning. Section 44(2) read with section 147(2) provide that that national law may regulate provincial planning insofar as it is necessary to

- i) Maintain national security
- ii) Maintain economic unity
- iii) Maintain essential national standards
- iv) Establish minimum standard required for the rendering of services; or
- v) Prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

#### **b) The realities of the development challenges in municipalities**

The proposed provincial planning law must address the challenges of developmental government and transformation. The current legal framework has elements that work fairly effectively in established urban areas, but which cannot cope with the demands for formalising and addressing the needs of the wider provincial community.

The current constraints in areas of governance, service delivery, and financial management need to be considered in respect implementing a new system of land use management in spheres of government, and particularly the transition arrangements at municipal level.

The special circumstances in traditional areas into the Province require attention relating to the integration of customary practices and laws and a clear role for traditional leaders, given the national trend toward formalisation of development and land tenure.

#### **c) Nature of the laws**

The preference is for a single national framework law and province-specific, but aligned, provincial law to apply. The current legal environment is fraught with numerous and often counter-productive laws that unnecessarily complicate forward planning, development and administration.

#### **d) Nature of the institutional arrangements:**

Effective land administration requires cooperation between the three spheres of government, usually where comments or related approvals or registrations are required to finalise applications or property transfers.

#### **e) Timeframes**

The processes that have been in place from the pre-1994 era, other than the DFA (1995), have had largely open-ended timeframes associated with their application. It would be beneficial if limits could be set in key provisions of the law to expedite decision-making.

#### **f) Information and draft regulations**

The availability of planning data and its use in forward planning for monitoring progress towards developmental goals is necessary in view of the current absence of base line information.

With regard to draft regulations, it is clear that the application of uniform documentation across the Province would facilitate an easier land use planning environment for public and private developments.

### **6.0. Conclusions and Recommendations**

#### **6.1. Conclusions**

##### **a) Planning roles**

The three spheres of government have been allocated land use planning powers by the Constitution. Berrisford (2011) states that provincial legislation with regard to planning plays a critical role in the division of authority between provincial government and local government. This includes the municipal power over municipal planning as listed in Schedule 4B of the Constitution (1996), and the limited scope of provincial authority over this function.

The pressure for changes to the existing system has been heightened with the Constitutional Court ruling 2010 about the use of Chapters V and VI of the DFA (1995), and the explicit reference to the municipal responsibility for the functional area of “municipal planning.”

The Provincial government in Mpumalanga has historically played a significant role in municipal planning by virtue of the existing legislation. The Constitutional considerations, the demarcation of wall-to-wall municipalities, the mismatch between old laws and new planning directions, and

the concept of developmental local government necessitate a rethink about the future role of the Province in planning matters. At this stage however there is no indication from DARDLA about steps to address the DFA (1995) ruling or to initiate an investigation into the implications for its future role in land use planning. There is however an initiative to establish the legality of the use of the Ordinance (1986) in traditional areas.

The general view expressed by officials interviewed is that land use approval at municipal level is preferable, owing to local knowledge and municipal management requirements. However, at present this preference only applies at capacitated municipalities, while other municipalities will need some form of provincial intervention or support.

There appears to be support for appeals against municipal decisions, possibly through an independent tribunal. In principle, the appealed decision must be considered by a separate entity.

Where there are overlapping procedures, such as in the case of environmental approvals, the matters covered in such approvals must be tailored to avoid duplication, unnecessary expense, and mismatches.

Where there are conflicting interests, such as mineral rights holders' approvals in coal mining areas of the Province and urban development needs, provision must be made for resolution of the differences between the affected spheres of government.

Given the challenges faced by geographically extensive municipalities, some with formal urban areas and others without any, it would seem that there is a vital role for Province to support and guide land use planning, address traditional areas, impose standards, monitor and provide planning support.

The above cannot be achieved with the current lack of capacity at Province, nor without interventions to address the capacity and skills shortcomings of most of the 19 local municipalities in Mpumalanga.

## **b) Relationships between spheres of government**

Effective land administration requires cooperation between the three spheres of government and needs further work. In particular, the involvement of traditional councils in land use decisions needs to be addressed, as development in these areas can be stifled by land ownership constraints, uncertainty about rights and infrastructural limitations.

Clarification of roles and responsibilities in the current legal framework would assist, but in the event of a new law it would be essential to workable relationships. In Mpumalanga, the mineral rights issue as well as the subdivision of agricultural land issue are frustrating future land use planning and regulatory decisions.

## **c) Integration of development strategies**

It is not clear whether the guidance contained in the provincial spatial development framework is achieving the anticipated changes in development patterns on the ground. There does not appear to be base-line information that is monitored to assess changes over time and there needs to be a system established to address this need.

An understanding of the practicalities and economics of achieving appropriate spatial development patterns must underpin the strategies proposed in spatial development frameworks. It appears that decisions on land use are often influenced by the spatial development framework, and less by aspects such as availability of services and land ownership.

The alignment of policies and strategies and their dependencies (e.g. the provision of engineering services) needs greater attention if integrated initiatives are to work.

It is important that information on policies and statutory matters are available to the public and other departments. This can be improved, particularly by use of electronic systems.

## **d) Statutory Boards**

Members of statutory boards need to be provided with adequate training about the role of land use planning and planning regulation.

They should preferably be staffed with members who have a degree of expertise in the field, or be advised by suitable experts.

Adequate administrative support is required if the boards are to function effectively, particularly if timeframes for decisions are introduced.

#### **e) Institutional capacity**

The leadership of the responsible departments, particularly in political appointments, needs to be clear on the purpose and mission of the land use function.

It is clear that the complexity of the current legal environment requires experienced staff to maintain the efficacy of the system, but that new and aligned laws could shift the emphasis to a more developmental skill requirement.

The introduction of new laws needs to be cognizant of available capacity at the implementing institution.

#### **f) Diversity of legislation**

The current diversity of laws regulating and impacting on land use, and the dispersed nature of its applicability is not useful to development facilitation.

The popularity of the DFA (1995) stems from its wide applicability and greater certainty in the determination of appropriate land use rights. A single, clear set of planning laws linked to spheres of government and their Constitutional competencies appears vital to effective planning.

The development of new Land Use Management Schemes for each municipality will assist in the administration of the very extensive municipal jurisdictions, and provide insight into appropriate provincial and national laws. It would be preferable if these were consistent in important respects relating to the primary content in order to avoid greater municipal diversity.

### **g) Performance**

The records of planning applications can be used to give an indication of the volume of work of a regulatory type, particularly at municipal level. A system of analysis and monitoring would provide insight into land use changes and the capacity to manage the regulatory requirements.

The other relevant consideration about performance is whether the planning guidance and decisions on land use matters are contributing towards the achievement of national goals and sustainable development. There is no mechanism for this type of assessment at present.

It is clear that, insofar as private investment in the Province is concerned, it is imperative that a reliable and consistent system of land use development is put into place. The current system, other than the DFA (1995), is fragmented and not adequate for the security that investors require.

In the case of municipalities, municipal rates and services income is affected by land ownership, land use rights, and other key factors. A good land use management system is critical to their financial management and the achievement of their developmental and intergovernmental responsibilities.

## **6.2. Recommendations**

It is important that a national framework for land use planning and management be finalised to create certainty about alignment and content of provincial legislation. The national sphere would also seem to have better opportunity to resolve conflicts arising from non aligned laws, than the lower spheres of government.

This process could be best informed if initial steps towards new provincial law are undertaken by Mpumalanga to place it in a more informed position vis-à-vis engagement between it and the national department of Rural Development and Land Reform responsible for the Spatial Planning and Land Use Management Bill (2011).

The scope of land use planning dictates that it interacts with all three spheres of government, and involves numerous other aspects of development, including engineering services, environment, housing and heritage, as well as the laws that regulate those sectoral interests. The effective functioning of the land use planning system will of necessity remain complex even if the planning laws are aligned, but this can be improved by better alignment between the

administrative structures that play significant roles in land use planning and the institutional arrangements associated with them.

The current initiative to establish the applicability of the Ordinance (1986) to the whole of Mpumalanga should be concluded as soon as possible, given the possible void that will result if the DFA (1995) ceases to operate.

## 7.0. Reference

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## 8.0. Annexures

### 8.1. Annexure 1: Overview of township application procedure

PROCEDURE	TIMING IN MONTHS																	
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
Pre Application Phase	■																	
Township Establishment																		
Preparation and Lodging	■	■																
Advertisement			■	■														
Comments from Council and other Authorities				■	■	■												
Reply to Comments and Planners Report to Council							■											
Decision of Tribunal								■	■	■								
Draft Conditions of Establishment											■	■						
Acceptance of Draft Conditions													■					
SG Erf Numbers, Plan amendment & Approval														■				
Final Conditions of Establishment														■				
Conditions of Establishment															■	■		
Compliance with Pre-Proclamation Conditions:																	■	■
● Cancellation of Title Conditions (if applicable)																	■	■
● Approval of the General Plan																	■	■
● Approval of the Amendment Scheme																	■	■
● Other Miscellaneous Conditions																	■	■
● Opening of Township Register																	■	■
Proclamation																		■
Site Development Plan and Building Plans																		■

