Important legal issues for provincial legislation dealing with Spatial Planning and Land Use Management

A Discussion Document
Acknowledgements

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About this project

This project emerged out of a collaborative effort between the South African Cities Network (SACN) and the national Department of Co-operative Governance, looking into the status of spatial planning and land use management practices across the country. Through an examination of SACN member cities as well as key economic hubs across all nine provinces, an accurate picture of how spatial planning and land use management is carried out emerged. This was used to craft the recommendations on the necessary contents of provincial land use management legislation, contained in this document. The project had a series of other outputs including nine reports detailing practice, based on research and a series of provincial workshops, and a cross-cutting report that summarises the key messages of the report. These are available on the SACN website.

January 2012
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Spatial Planning and Land Use Management

A Discussion Document
## Acronyms and Abbreviations

<table>
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<th>Acronym</th>
<th>Description</th>
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<tr>
<td>EIA</td>
<td>Environmental Impact Assessment</td>
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<tr>
<td>IDP</td>
<td>Integrated Development Plan</td>
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<td>LDO</td>
<td>Local Development Objectives</td>
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<td>MEC</td>
<td>Member of the Executive Council</td>
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<td>MSA</td>
<td>Municipal Systems Act, No. 32 of 2000</td>
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<td>MSDF</td>
<td>Municipal Spatial Development Framework</td>
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<td>PAJA</td>
<td>Promotion of Administrative Justice Act, No. 3 of 2000</td>
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<td>PSDF</td>
<td>Provincial Spatial Development Framework</td>
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Promotion of Administrative Justice Act, No. 3 of 2000
Townships and Town Planning Ordinance 15 of 1986
Each of the three spheres of government has a legitimate role to play in regulating land use and spatial planning. This report examines how their respective roles are allocated. It does so particularly with a view of recommending what could be included in provincial legislation governing land use and spatial planning that is both provincial planning (as provided in Schedule 5A of the Constitution) and municipal planning (as provided in Schedule 4B of the Constitution). Given that a national legislative process was ongoing parallel to this project, the recommendations do not delve into the detailed content of what national legislation should contain.\(^1\) It nevertheless, at a broad level, does include a number of key components of such legislation.

The implications of the Constitutional Court’s 2010 decision in City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and others\(^2\), also known as the DFA judgment, are crucial to determining this allocation of powers and functions. Although the Constitution makes it possible for there to be conflicts between national, provincial and municipal planning legislation (with prescribed rules to resolve those conflicts\(^3\)), in practice such conflicts must be avoided at all costs.

The Constitutional Court emphasised that the regulation of land use is a key part of municipal planning and so falls within the exclusive executive competence of local government. Nevertheless, there are clearly two grounds on which provincial legislation can limit that. First, provinces (as well as national government as they hold this legislative competence concurrently) may regulate the manner in which land use decisions are taken (although this regulation cannot be so extensive as to take away municipal power to exercise discretion). Second, there are areas related to land use in which provinces do enjoy some executive decision-making, e.g. housing, agriculture and environment, and in these areas there has to be a degree of municipal compromise.

Three definitions are central to allocating the various spheres’ roles and functions, and these could be usefully spelled out in provincial legislation. They relate to definitions of what municipal planning, provincial planning and a region is. Definitions for each of these are proposed.

Besides these definitions, this document dwells on a number of other issues that provincial legislation should address. There is a role for provincial legislation to identify innovative techniques for including district municipalities in decision-making. In particular, the idea of shared services centres is suggested.

\(^1\) This is through the Spatial Planning and Land Use Management Bill (SPLUMB).

\(^2\) 2010 (6) SA 182 (CC).

\(^3\) Sections 146 and 147 of the Constitution.
Provincial legislation also has to establish an integrated provincial planning framework, aligning spatial planning frameworks at provincial, regional (where applicable) and municipal levels. That alignment can relate either to planning processes or planning outcomes. In relation to municipal spatial planning, the provincial legislation needs to build on the framework already established through the Municipal Systems Act, No. 32 of 2000 (MSA).

Other important areas for provincial legislative intervention are: the establishment of minimum standards for both provincial and municipal planning; the identification of the instances in which provincial structures are able to take or to influence land use decisions; a system for appeals against land use decisions, whether municipal or provincial; and the design of model municipal bylaws.

The central conclusion of the report is that national, provincial and local government all have legislative powers in relation to land use. Because of the wide range of provincial and municipal contexts (in terms of planning capacity as well as economic conditions), the structure of a new system must be such that national law provides a framework within which provinces may make their own laws, but where the national law also provides an optional model law that a province may or may not choose to adopt instead. Similarly, provincial law must create a provincial framework for municipalities while also providing model bylaws for municipalities that are unable to devise their own. Due to the probability that some provinces may not be able to compile either their own planning laws (or model bylaws), the national law can also provide for model bylaws for municipalities in those provinces where there is no provincial legislation.
Important legal issues for provincial legislation dealing with Spatial Planning and Land Use Management

Since 1995 there has been uncertainty among the three spheres of government as to where the various elements of the legislative and executive authority for land use and spatial planning reside. The 1996 Constitution (Constitution of the Republic of South Africa Act, No. 108 of 1996) did not clarify matters, leaving the three spheres to puzzle over the meanings to be associated with a number of terms that appear in Schedules 4 and 5 of the Constitution. These include: urban and rural development; municipal planning; regional planning and development and provincial planning. Each of these represents a functional area of legislative competence, denoting the particular rules that will apply first as to whether or not a particular sphere may make the laws concerned and second to clarify which sphere gets to exercise executive powers on a day-to-day basis.

In the 15 years that have passed since 1996, there have been five provincial laws enacted that deal with land use and spatial planning. Of those five, only two have been implemented, and have been implemented in the Northern Cape in the late 1990s and in KwaZulu-Natal in 2010. During that same period national government has produced a Green Paper on Planning and Development, a White Paper on Land Use Management and Spatial Planning, as well as numerous drafts of land use management and, most recently, spatial planning and land use management bills. A great deal of difficulty has been experienced in designing a new legislative framework for planning. Much of this difficulty hinged on the complexity of defining what constitutes municipal planning for the purposes of Schedule 4 Part B of the Constitution. Considerable clarity on this matter was introduced by the Constitutional Court in the 2010 DFA judgment.

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4 The different meanings of legislative and executive authority are central to this report. Legislative authority is the authority to make (or enact) legislation, which can be national or provincial legislation or municipal bylaws. Executive authority is the authority to make decisions as a sphere of government and in terms of the applicable legislation.
5 Schedules 4 (‘Functional Areas of Concurrent National and Provincial Legislative Competence’) and 5 (‘Functional Areas of Exclusive Provincial Legislative Competence’) set out the different areas of legislative competence for provincial government, in relation to the legislative powers of national government and, indirectly, local government as well.
6 The five provincial laws were enacted by Gauteng, KwaZulu-Natal (two), the Northern Cape and the Western Cape.
There remains significant uncertainty as to what will form the foundations of new national legislation, but on the basis of the most recent (May 2011) draft of the Spatial Planning and Land Use Management Bill (SPLUMB), it can safely be assumed that there will be a need for provincial legislation in this area. This report explores, from the perspective of local government in general and the larger cities in particular, the question of how such provincial legislation should be designed and drafted.

7 In this regard, the department of Rural Development and Land Reform had commissioned experts to draft provincial laws by December 2011.
All three spheres of government have effectively, if not explicitly, been allocated land use and spatial planning powers by the Constitution. Provincial legislation, with regard to this, plays a critical role in clarifying the division of authority between provincial and local government. This report deals with some of the challenging questions pertaining to the division of authority between the three spheres of government, with a particular emphasis on provincial and local governments.

Central to any provincial law dealing with land use and spatial planning is the notion that land use planning by municipalities is based on their constitutional power over municipal planning as listed in Schedule 4B of the Constitution. A provincial law may impose certain limitations on the municipality’s land use and spatial planning authority; but must respect the institutional integrity of municipalities by neither taking a decision on behalf or instead of a municipality, nor by limiting its discretion to such an extent that in fact the outcome of the decision is pre-determined.

2.1. Limits to municipal power over land use matters

There are two types of limitations to a municipality’s power over land use matters, which must find expression in the provincial law with regard to planning.

First, a municipality’s original powers (i.e. with respect to Schedules 4B and 5B of the Constitution), of which many are relevant to land use planning, are not exclusive to that municipality. A municipality does not even have complete and unlimited control over municipal planning. Further, although a provincial government also has authority over those matters, especially concerning the making of legislation, its authority is limited. The Constitution does not permit provincial government to deal with the detail of matters contained in Schedules 4B and 5B, or assume executive authority, but allows the provincial government to regulate minimum standards for and monitor the implementation of land use and spatial planning.

Second, there are many functional areas in Schedules 4A and 5A that are relevant to land use planning: housing, agriculture and environment are key examples. Provincial government has full authority over these matters; it may legislate, implement and administer in these functional areas without the limitations that apply to provincial involvement in matters set out in Schedules 4B and 5B. It is inevitable that the provincial exercise of those powers limits a municipality’s power over land use.
It is therefore important to understand the combined implications of these two limitations of municipal powers. There will always be two categories of land use application: first, those over which the municipality has extensive decision-making power and to which provincial and/or national legislation may only apply minimum standards and monitoring of schemes and; second, those over which provincial governments have a more direct decision-making power. This latter category is dealt with in more detail in point 8 below.

2.2. National/provincial overlap

In the context of provincial legislation over land use planning, it is important to note that national and provincial governments may both make and implement laws on functional areas relevant to land use planning, listed in Schedule 4 of the Constitution. National government may regulate municipal planning, and is currently preparing legislation to do so (SPLUMB, 2011). Provincial government may also regulate municipal planning. All nine provinces have provincial legislation that, in some way or another, deals with municipal planning. Some of these provincial laws (such as the Townships and Town Planning Ordinance 15 of 1986 [T] and the Land Use Planning Ordinance 15 of 1985 [C]) predate the Constitution and are constitutionally problematic. Some provinces have already adopted new laws to deal with municipal planning under the current Constitution.

If both national and provincial government legislate on municipal planning and there is a conflict between the national law and the provincial law, the Constitution provides for a mechanism for courts to resolve the conflict (section 146). However, the Constitution demands that this scenario be avoided at all cost and instructs national and provincial governments to proactively co-ordinate their legislative efforts. In other words, just as the drafters of national legislation must consult with provinces, so too provinces that prepare provincial legislation must consult with national government. In any event, conflicting national and provincial laws would aggravate the existing fragmentation of land use and spatial planning law and is, for that reason, undesirable.

The preferred approach is for provincial legislation to regulate municipal planning in detail and for national legislation to be limited to those matters that require national uniformity. This approach respects the respective constitutional mandates, but also allows for a more nuanced and province-specific approach that acknowledges the particular legal and capacity contexts of local government in a particular province.

This does not have to mean that all provinces must immediately adopt provincial legislation. National government can fill the gap left by provinces that are not interested or not ready to adopt their own legislation (see point 9 below).

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8 Of the five laws adopted by provinces only two are actually operational, those of Kwazulu-Natal and the Northern Cape.
9 Section 41(1)(h) of the Constitution obliges all three spheres of government to “co-operate with one another …by ... coordinating their actions and legislation”.

Provincial legislation is critical in order to provide a measure of stability in the question of division of responsibilities between provincial and local governments. In order to achieve that, it is advisable that provincial law defines the key constitutional competencies involved, most notably the competencies of provincial planning and municipal planning.

It has been argued that definitions are not constitutionally permitted or useful. However, provincial legislation is constitutionally permitted to define municipal planning, just as it is competent to define provincial planning. The definition of municipal planning cannot be formulated or understood in terms of the practice, under the current provincial Ordinances, of 'authorising' particular municipalities to conduct town planning. A municipality’s authority with regard to municipal planning exists irrespective of a provincial definition because it exists in terms of the Constitution. This also means that the fact that a particular activity is not mentioned in a definition does not mean that the municipality is prohibited from undertaking that activity.

However, it is still helpful for a provincial law to define the key concepts of the law surrounding land use planning, particularly if there is broad agreement among the two spheres of government, provincial and local, with regard to the content of the definitions. Ultimately, the provincial definition can be challenged in court and could be declared unconstitutional if it seeks to limit, instead of describe municipal planning.

If national legislation contains definitions of municipal planning (4B) and provincial planning (5A), alignment with the national definition is critical.

### 3.1. Defining municipal planning

The courts have provided guidance on the meaning of the term municipal planning. The definition of municipal planning must be consistent with the Constitutional Court’s ruling in the DFA judgment. The court stated that municipal planning includes “the control and regulation of land use” and concluded that re-zoning and township establishment are part of municipal planning. It is probably safe to say that the instrument of subdivision is included in the court’s use of the term township establishment.

The broad principle is that the vast majority of land use and spatial planning decisions are taken at municipal level. Provincial involvement must be specifically motivated for and
defined. The definition of municipal planning must therefore be wide enough to capture a broad spectrum of land use planning and development management decisions.

Some elements that could be considered for a definition of municipal planning are:

- Adoption of bylaws to deal with all aspects of land use planning and development management (except those that fall within provincial planning)
- Adoption and amendment of forward planning instruments, like Spatial Development Frameworks (SDFs), at municipal level
- Preparation and adoption of zoning schemes
- Receiving and considering development management applications
- Deciding on development management applications including deviations from municipal forward planning instruments and conditions of approval.

As stated earlier, provincial government also has constitutional authority over municipal planning. It may be advisable for the provincial law to define the provincial authority with respect to municipal planning. This authority is often characterised with reference to ‘regulate, monitor and support’ but the provincial law could spell out in greater detail what this means in practice.

Every effort should be made to align the provincial definition with any national definition. If the provincial law contains a definition of municipal planning that deviates from a national one, this may be problematic and a court may be asked to determine which definition prevails in terms of section 146 of the Constitution.

### 3.2. Defining provincial planning

The definition of provincial planning must define with sufficient precision the areas where provincial government exercises authority (see below at point 8). There is some emerging jurisprudential guidance on the meaning of provincial planning. In the case of *Lagoon Bay Lifestyle Estate (Pty) Ltd v The Minister of Local Government, Environmental Affairs and 10 The current definition of municipal planning in the May 2011 SPLUMB is limited to the adoption and amendment of Integrated Development Plans (IDPs) and SDFs and the control and regulation of the use of land where the nature, scale and intensity of the land use does not affect the provincial planning mandate of provincial government or the national interest.

### A proposed definition of municipal planning:

"planning for the development and management of the municipal area, which includes: making, approving and amending an integrated development plan and spatial development frameworks; managing land use and development, subdivision and consolidation; preparing, adopting and amending a town-planning or zoning scheme; receiving, considering and deciding applications for land use and development, which includes refusing, approving and approving subject to conditions such applications; representing the interests of the municipality’s residents and the broader public spatial interest in provincial planning processes; and the preparation, adoption and publicising of guidelines, policies and other instruments and procedures to guide the use and development of land in the municipality"
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Development Planning of the Western Cape and Others (Lagoon Bay Case) it was held that not all questions involving zoning of land and the establishment of townships invariably, regardless of the circumstances, fall exclusively under the rubric of municipal planning, or that all such questions must be determined exclusively by municipalities. Instead, provincial government can exercise executive authority under matters akin to municipal planning in various instances. The court agreed with the argument that such areas constitute “a category of planning decisions which will have an impact beyond the area of a single municipality and will have effects across a larger region” and fall into such a category because of among others “size and scale”.

The judgment in the case of Maccsand v City of Cape Town, currently before the Supreme Court of Appeal, may also shed further light on the meaning of provincial planning.

A provincial planning definition could include the following elements:

- Preparation and adoption of forward planning frameworks at provincial and regional level
- Development management decision-making with respect to matters that go beyond municipal planning
- A definition of when a land use application goes beyond municipal planning (see below at point 7).

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12 para 14.
13 para 10.
14 An appeal against the decision in City of Cape Town v Maccsand 2010 (6) SA 63 (WCC).
15 The case was heard before the Supreme Court of Appeal in August 2011, although the court has not yet reached a decision. Thereafter, it may still go to the Constitutional Court. At issue is the question of whether or not a mining permit in terms of the Mineral and Petroleum Resources Development Act, No. 28 of 2002 does away with the need for additional approvals by the municipality. The municipality in this case is arguing that its municipal planning functions empowers it to require planning approval for a mining project. The province is, however, arguing that in term of its provincial planning mandate it is also empowered to approve land use applications where the impacts of the land use change have provincial significance, that is, where they have an impact that extends ‘extra-municipally’.
16 The definition in the May 2011 SPLUMB refers to: (1) the compilation of the Provincial Spatial Development Framework (PSDF), (2) planning for the execution of powers insofar as they are related to the development of land and the change of land use, and (3) the making and review of policies and laws necessary to implement provincial planning. This definition is exhaustive, i.e. it provides that provincial planning comprises those elements and not more.
If the provincial law contains a definition of provincial planning that deviates from the national one, this is problematic. The Constitution treats differences between national and provincial laws with respect to provincial planning differently from differences with respect to municipal planning. Provincial planning is a Schedule 5A legislative function, which means that the Constitution reserves this for provinces. The Constitution provides for very limited scope for national laws on provincial planning in section 44(2) of the Constitution. Read together with section 147(2), the only circumstances in which national legislation may regulate provincial planning is where it is “necessary –

a. to maintain national security;
b. to maintain economic unity;
c. to maintain essential national standards;
d. to establish minimum standards required for the rendering of services; or
e. to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.”

As the Constitution requires that the fulfilment of these conditions is necessary to justify national legislation, this is indeed a hard test. For example, if the national legislature wanted to argue that it is necessary for it to regulate provincial planning in order, for example, “to maintain essential national standards” it would have to show that it would not simply be useful or helpful, but that it would be necessary, that without that regulation of provincial planning it would not be possible to maintain national standards.

3.3. Defining region

It is important that the provincial law defines what it considers to be a region because regional planning and development is a provincial legislative competence in Schedule 4A of the Constitution, albeit a legislative competence held concurrently with national government. The definition of a region must, of necessity, refer to a geographical area that spans two or more municipalities. If this area straddles a district municipality boundary, there is no doubt that the provincial government is competent to plan for that area. If the area does not straddle a district boundary, the provincial competence is less obvious as the district municipality may be competent. The provincial law can provide clarity on the envisaged role for district municipalities.

The Constitution treats differences between national and provincial laws with respect to provincial planning differently from differences with respect to municipal planning.

Proposed definition of a region:
“an area that spans more than one municipality and which has distinctive economic, social or natural features”

Section 44(2) of the Constitution.
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Currently, Schedules 4B and 5B read with section 84 of the Municipal Structures Act, No. 117 of 1998, confirm that district municipalities are responsible only for integrated development planning for the district as a whole (including the adoption of SDFs). The Constitution and section 84 of the Structures Act do not provide for any development management responsibility for district municipalities and their ‘original’ role is limited to forward planning. However, the division of authority between district and local municipalities is possible. Section 85 of the Structures Act permits the Member of the Executive Council (MEC) for Local Government to authorise the district municipality to perform municipal planning functions on account of capacity problems in a local municipality. This is a rather rigid instrument, but it would enable a more efficient allocation of municipal planning functions in a district.

More flexible arrangements can be made in the form of shared services, which could be achieved through provincial land use legislation in relation to land use and planning functions and services. However, if local municipalities want to transfer their constitutionally mandated development management authority to the district municipality, empowering legislation is required. Provincial legislation could provide that framework for the sharing of municipal planning functions and resources in a district municipality. In the absence of equivalent provisions in national legislation, and given the capacity and service delivery challenges in many parts of the country, there is a sound argument for provincial legislation to take this on.
05 Provincial development principles

The provincial law may provide for principles that guide planning and land use management in that particular province. Again, it is likely that national legislation will contain the development principles, and the provincial law could refer to those principles and complement them where there are province-specific development principles to be added\(^\text{18}\).

\(^{18}\) The May 2011 SPLUMB proposes such a set of national principles.
Provincial legislation should provide for an integrated provincial forward planning framework, comprising of SDFs at provincial, regional and municipal level that are realistically aligned. This legislation will reflect the provincial government’s dual legislative mandate, to deal with both *provincial planning* and *municipal planning*. In the manner that it does each of these it has to be very aware of the distinct and separate constitutional framework that applies to each of those mandates.

### 6.1. Clarifying alignment

The provincial law should clarify principles and mechanisms for alignment between the various planning frameworks. It can provide that land use and spatial planning decision-making at any level of government be in line with the content of these planning frameworks. Alignment can be presented in the provincial law in the form of a *process*, i.e. the bringing together of the two spheres of government in the drafting of forward plans. In other words, municipalities participate in the drafting of provincial forward plans and provincial government participates in the drafting of municipal forward plans without any change to the authority to adopt the plans. The law would then make it a precondition for the validity of the process that the two spheres participate in each other’s plan-making. The final decision to approve and adopt the plan would rest with the particular sphere that is responsible.

Alignment can also be presented in the provincial law as an *outcome*. For example, the provincial law could require that a proposal in a municipal forward plan be permitted in terms of the designation on the provincial forward plan or plans applicable to that area. This alternative sounds easier in theory than it will be in practice as there is a limited set of (constitutional) issues that would determine whether or not a particular provision of a provincial plan could in fact dictate what should be in a municipal plan19.

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19 The alignment requirement would have to be shown not to compromise the right of the municipality to “exercise any power concerning a matter reasonably necessary for, or incidental to the effective performance of its functions” (section 156(5) of the Constitution) and that does not “encroach on the geographical, functional or institutional integrity of government in another sphere” (section 41(1)(h)) of the Constitution.
6.2. Provincial SDF

The provincial law should provide for the preparation and adoption of a SDF, as well as for the core content of the provincial SDF. The clarity of the provisions with regard to the provincial SDF is important for municipalities as there cannot be ambiguity.

First, it is important that the legislation guides the provincial government into the adoption of a provincial SDF that assists municipalities in their planning. If the legislation is clear on what is expected from the provincial SDF, municipalities can hold the provincial government accountable for the quality of the provincial plans. It also strengthens their case when a conflict arises between the provisions of the two spheres’ plans in relation to the same area.

Second, given the prominent role of local government in regulating land use and spatial planning, provincial governments should preferably refrain from micro-managing land use in their province through detailed and prescriptive provincial forward plans. Such an approach will inevitably lead to conflicts with local government and will engender uncertainty and confusion.

Examples of minimum requirements for a provincial SDF that could be taken up in provincial legislation are:

- An assessment of existing levels of development
- Inclusion of a spatial development vision
- A spatial reflection of the provincial growth path
- The interface conditions between rural and urban
- The interface conditions between municipalities bordering on landscapes with special characteristics of provincial value or interest
- The identification of areas of specific provincial interest as a result of:
  - Agricultural potential
  - Tourism potential
  - Heritage potential
  - Environmental vulnerability
  - Industrial potential
  - Housing delivery
  - Urban development potential, etc.
6.2.1. Participation of municipalities

The provincial legislation should contain provisions for the participation of municipalities in the development of the provincial SDF. It is not sufficient for the provincial law to provide that municipalities may comment on a draft provincial SDF, just like any other stakeholder. Collaborative drafting (even though the document is approved by one sphere) is different from commenting on drafts. As stated above, this is a critical element of the drive towards alignment.

There are various mechanisms that could be considered. One example is the appointment of a steering committee into which representatives of all district and metropolitan municipalities are co-opted. Another is the use of formal forums such as the provincial intergovernmental forums established by the Intergovernmental Relations Framework Act.

6.2.2. Adoption by the provincial cabinet

It is advisable for the provincial law to provide that the provincial SDF is adopted by the provincial executive in order to facilitate the integration of spatial priorities of the various departments into one provincial spatial plan. Depending on the appetite within the provincial executive committee to adopt such an approach, the provincial law could also go beyond facilitating integration of provincial departments to requiring it.

6.2.3. Other issues for inclusion

The provincial law can clarify:

- The time period covered by the provincial SDF, i.e. a long-term planning document spanning at least 10 or 15 years
- The intervals at which the provincial government must carry out a comprehensive review of its provincial SDF, e.g. every five or ten years
- The status of the provincial SDF as a document that does not grant land use rights but binds all organs of state in the exercise of their forward planning and development management authority.

6.3. Regional planning frameworks

The provincial law should not make it compulsory for the provincial government to adopt wall-to-wall regional plans. There may, however, be regions for which the provincial government wants to adopt specific forward planning documents and the provincial law can enable the provincial government to adopt regional plans in these instances, through its legislative
competence in Schedule 4A for regional planning and development. As indicated earlier, the definition of a region is critical for the proper understanding of the regional dimension to forward planning.

The provincial law can also enable two or more adjoining municipalities to jointly prepare and adopt a regional planning framework.

6.4. Municipal SDF

Currently, the municipal SDF is the only statutory forward planning instrument (if Local Development Objectives (LDOs) and old-order planning instruments such as structure plans are disregarded). The MSA lists the SDF as a core component of the IDP and provides a broad framework for the content of the SDF.

6.4.1. Minimum requirements for the preparation and adoption of the municipal SDF

The MSA does not specify any procedures for the preparation or adoption of the SDF other than the broad procedural requirements that deal with the IDP. Provincial governments are constitutionally permitted to complement the provisions of the MSA with provincial legislation dealing with the preparation and adoption of the municipal SDF. These requirements could, for instance, deal with community participation. Importantly, municipalities should prepare and adopt SDFs in accordance with their own bylaws and procedures, and the provincial legislation may not go beyond setting minimum procedural requirements for the adoption of the municipal SDF.

These provisions should not contradict the provisions of the MSA (or the 2001 IDP regulations) surrounding IDP preparation. In the event of a conflict, the provisions of the MSA will probably prevail as they deal with an essential national framework.

6.4.2. Minimum requirements for the content of the municipal SDF

The provincial law could prescribe a list of issues that must be addressed or contained in all municipal SDFs.

For example, the provincial law could specify that the municipal SDF must identify areas designated for inclusionary housing or informal settlement upgrading and that it must identify areas of agricultural, environmental or tourism potential.

Provincial governments are constitutionally permitted to complement the provisions of the MSA with provincial legislation dealing with the preparation and adoption of the municipal SDF.

For example, the provincial law could specify that the municipal SDF must identify areas designated for inclusionary housing or informal settlement upgrading and that it must identify areas of agricultural, environmental or tourism potential.

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20 Regulations 3-5 in the IDP Regulations, 2001 also cover some of the procedural aspects of preparing the IDP.
Important legal issues for provincial legislation dealing with Spatial Planning and Land Use Management set forth that it must identify areas of agricultural, environmental or tourism potential. It could also prescribe that the SDF include mechanisms to mitigate and adapt to climate change.

It is likely that national legislation will contain minimum requirements for the content of the municipal SDF and provincial legislation must, as far as possible, fall in line with those national norms. If the provincial law contains further, province-specific minimum requirements (e.g. land reform, coastal management, nature conservation, tourism etc.) these will be read together with the national minimum requirements and municipalities will have to comply with both as well as with other national legislation dealing with each of those matters. Should the provincial planning law contain minimum requirements that contradict national minimum requirements, the question will be asked which requirement prevails and this will be a thorny constitutional issue.

In order to avoid subjecting municipalities to fragmented planning frameworks, it is therefore critical that national and provincial minimum requirements for municipal SDFs are aligned.

6.4.3. Alignment between district and local SDFs

The MSA requires that both district and local municipalities adopt municipal SDFs. These spatial frameworks should be aligned. If the IDP alignment framework (which includes alignment of SDFs) does not suffice to ensure coherence in the district, the provincial law could include more specific mechanisms to avoid conflicts between district and local SDFs, such as compulsory consultation. As far as possible, the resolution of conflicts over SDFs in districts should be left to the municipalities in those districts to resolve without provincial interference. However, ultimately it may become a matter of provincial planning if the dispute remains unresolved and threatens coherent planning in the district. One suggestion may be for the provincial law to require each district council to adopt a dispute resolution mechanism and, if this mechanism fails, to permit the provincial executive to make a ruling on the dispute.

6.4.4. Direct provincial involvement in the municipal SDF

There is no doubt that the adoption of a municipal SDF for a municipal area needs to take provincial concerns and interests into account and that the municipal SDF must be aligned with provincial SDFs. This will become even more important when the insistence on the link between forward planning and development management gains momentum in the law. The interface between national and provincial projects, programmes and functions (such as...
housing projects, health and education infrastructure, etc.) on the one hand and municipal development management decisions on the other, finds expression in the municipal SDF.

Provincial legislation can very usefully provide for mechanisms to achieve the alignment of municipal SDFs with provincial and national interests or frameworks. Alignment of a municipality’s planning with that of its neighbouring municipalities also needs to be managed. The mere statement in a provincial law referring to the need for alignment in these cases is not sufficient.

The provincial law could provide for compulsory participation, i.e. provisions that compel the municipality to specifically seek the input of the provincial government into the municipal SDF. It could also contain a legislative instruction to the municipal council to consider the provincial inputs and to explicitly reflect and report on the consideration of those inputs.

The question is how far the provincial involvement in the municipal spatial development framework may go. Is it limited to the above consultative requirements or may it go further? One approach may be for the provincial law to provide for a mechanism for representatives of the provincial government to participate in the drafting of the municipal SDF. The crucial test here though would be whether there is sufficient professional capacity within the provincial administration to participate in the drafting of all the SDFs in the province.

Essentially, there are two approaches to the question whether a provincial law may include direct executive oversight over the municipal SDF, i.e. is the municipal SDF purely an expression of municipal planning or is it also an expression of provincial planning?22

The two approaches can be described as follows:

- The first approach is that only municipalities are permitted by the Constitution to adopt spatial plans for specific municipal areas. Provinces must conduct provincial forward planning by adopting province-wide or region-wide spatial plans and the provincial law may therefore only provide for provincial adoption of province-wide or region-wide spatial plans. The municipal SDF, adopted in terms of the MSA, is the only permissible spatial plan for the municipal area and it is adopted by the municipal council.

- The second approach is that provincial planning includes the authority for the provincial government to conduct forward planning, that this forward planning may relate to a specific municipal area and that it may be contained in a forward planning document

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22 Often there are other provincial policies such as growth and development strategies which are prepared by other departments i.e. not the department responsible for planning, and Municipal Spatial Development Frameworks (MSDF’s) have to align with these as well. It is important that municipal planning align with these policies, but be independent expressions of municipal planning, where possible.
for a specific municipal area. The provincial forward planning document must be limited to forward planning in respect of provincial functions and may not compromise or impede the municipality’s ability to perform its functions. But it is constitutionally possible that there are two forward planning documents for one specific municipal area. The one will be the SDF, which the municipality adopts in terms of the MSA. The other one will be the SDF adopted by the provincial government for a municipal area but dealing with provincial matters, such as the designation of broad zones for environmental protection, coastal setbacks, identification of land with agricultural potential, possibly the determination of the urban edge, and so forth. A next step in this approach may be to integrate the provincial and municipal SDFs into one process resulting in one SDF adopted jointly by the provincial government and the municipality. This approach requires the identification of the municipal planning elements and the provincial planning elements of the SDF and the allocation of decision-making authority with respect to those elements to the respective spheres of government, whilst containing it in one process.

The first approach, while constitutionally sound, may not serve municipalities in the long run. Provincial governments, faced with a prohibition to draft and adopt spatial plans for municipal areas, will turn to other constitutional competencies to constrain city authority over land use. Competencies such as environment, agriculture, soil conservation, and nature conservation form a constitutional basis for provincial governments to prohibit certain developments, for example through requiring special approvals. This may lead to further fragmentation and usurpation of municipal planning authority. It can be avoided through the insistence on one integrated SDF for the municipal area that reflects both municipal and provincial interests. Again, the test will be whether a solution that is legally sound and which, on paper, appears highly attractive will be effective in practice, given capacity and resource constraints.
07 Minimum standards with regard to municipal planning

The provincial law should contain a framework for municipal decision-making with regard to development management. Provinces are empowered by the Constitution to do that in order to see to the effective performance by municipalities of their municipal planning function (section 155(7) of Constitution).

This framework could deal with matters that require uniformity across the province. Some examples of aspects that could be considered are:

- Status, components and purpose of zoning schemes
- Minimum content of zoning schemes, such as:
  - Densification
  - Designation of inclusionary housing provisions
  - Minimum requirements for improving informal settlement areas
  - Measures to protect the environment, heritage and agricultural land
  - Respect for the urban edge
  - Measures to facilitate accessibility for persons with disabilities
  - Regard for aesthetics
  - Measures to mitigate and adapt to climate change.
- Minimum standards on how to deal with land that is not zoned
- Minimum standards for zoning public land for redevelopment
- Uniform zoning terminology
- Minimum standards for the amendment and revision of zoning schemes, including the possibility for provincial governments to make inputs
- Transitional arrangements with regard to existing zoning schemes
- Minimum standards with respect to development management procedures and decision-making, such as:
  - Maximum timelines
  - Public participation standards
  - Integration of approval processes
  - The consideration of strategic planning documents, including the IDP and provincial SDF, in decision making.
• Uniformity in concepts, such as:
  → Public notice
  → Who may lodge a development management application.

The law should also provide for monitoring of planning in municipalities. It is important for provincial governments to monitor overall land development trends in the province. Monitoring is particularly relevant in the context of certain development management decisions requiring provincial approval. Depending on the system adopted for identifying those decisions, monitoring provisions will be critical.

The provincial law could provide for the professionalisation of the exercise of development management authority by requiring the involvement of registered planners in some or all development management decisions. Related to this could be provisions for managing decision-making in municipalities which do not have any registered planners.
Provincial authority to take land use planning decisions

A critical question, which provincial legislation must address, is whether certain land use applications require provincial approval and if so, how this will be dealt with. The answer to this question depends on how the provincial power over provincial planning is interpreted. One argument is that the DFA judgment implies that provincial planning may only refer to forward planning and that the Constitution prohibits provinces from exercising any decision-making authority with regard to land use applications.

Another argument is that the Constitution does empower provincial governments with both forward planning and development management authority but that this authority is limited and that the provincial development management authority must be narrowly defined with reference to specific provincial interests only. This definition should not be vague because developers and municipalities need certainty. It may not be possible to provide for an absolutely ‘waterproof’ definition unless scientific triggers are used (e.g. related to size, or distance). The disadvantage of scientific triggers may be that developers will prepare applications with dimensions just below the triggers in order to avoid provincial involvement.

A substantive definition is advisable. Over time, the definitions will crystallise as a result of practice, application and court/appeal judgments. One approach may be to include and define key aspects such as scale (e.g. "scale that will demonstrably and materially impact on the land use of the relevant region as a whole or of the Province") and impact (e.g. "impact on the protection of agricultural resources of provincial importance and protecting and preserving the cultural heritage and natural resources of the Province"). A similar approach was adopted in the Lagoon Bay Case referred to previously.

If the provincial law proceeds on the basis that certain development applications require provincial approval, a number of questions arise.

8.1 One decision or two?

If a development application falls within the definition of provincial planning, does the provincial government then have full and exclusive decision-making authority and the municipality none? Or do they both exercise their own authority with respect to the same matter? In other words, does the developer only need permission from the provincial government or does the developer need permission from both the provincial government and the municipality? These are two alternative approaches, each of which has its own merits.

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23 The May 2011 SPLUMB does not envisage any ‘first instance’ development management authority for provincial government. It only provides for provincial development management authority in the form of deciding on appeals against certain municipal decisions.
The first approach is to be preferred from the point of view of a simple and straightforward development management regime. The ‘double’ approval requirement for applications that affect the provincial interest inevitably complicates the system.

The last approach, the ‘double’ approval requirement, is however to be preferred from the point of view of constitutional correctness. The provincial approval then is additional to the municipal approval and the provincial approval may only deal with issues of provincial interest. The two processes may still be integrated through practical arrangements between municipalities and the provincial government as is currently done in some provinces in relation to planning and Environmental Impact Assessment (EIA) processes.

8.2 Who receives the application?

The planning law should clarify who receives the land use application that affects the provincial interest. Some of the options are:

- The applicant submits one application to the municipality. The provincial law compels the municipality to forward the application, together with a recommendation, to the provincial government for a provincial decision in cases where the application affects the provincial interest. This provincial decision is then the only decision required. In this scenario, the onus is on the municipality to verify whether a provincial decision is required.

- The applicant submits applications to both the municipality and to the provincial government who each consider the application in terms of their own separate processes.

- The applicant submits one application to the municipality and ‘copies’ the provincial government into the application.

- The applicant submits one application to the municipality. The municipality is the first to consider the application in terms of its own bylaws and procedures. If the municipality approves the application, a subsequent decision of the provincial government is required. If the municipality does not approve the application, the matter ends there. In this scenario the provincial government does not consider applications that were refused by the municipality (even though it may be constitutionally competent to do so). The question is whether this is a problem in practice.

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24 The May 2011 draft SPLUMB suggests that the provincial government may executively ‘assume’ responsibility for the decision on a particular application. However, the Constitutional Court has warned against provincial governments usurping municipality authority.
The provincial law must deal with the issue of appeals. The regulation of a province-wide uniform framework for appeals against land use decisions falls within the authority of provincial government to regulate.

Again, conflicts with national legislation should be avoided. If a national law prescribes the grounds for appeal, it will be near impossible for a provincial law to design an appeal framework that does not contradict the national legislation. Should the provincial law contradict the national then the criteria of section 146 will have to determine which law prevails. This scenario should be avoided at all cost.

A number of key questions that surround the issue of appeals need to be addressed in the provincial law.

9.1 Internal appeals

The provincial law should deal with the question as to whether internal appeals against municipal land use decisions remain part of the planning framework. The MSA provides that the section 62 appeal applies where there is no alternative. Many municipalities use section 62 appeals as an internal appeal mechanism. The failure of an aggrieved party to exhaust the internal appeal before going to court may be used as a defence in the court proceedings because the Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA) demands that all remedies are exhausted before a court is approached.

The role and usefulness of internal appeals is an area of debate. What is clear, however, is that there are limitations to the section 62 appeal which render it only partly useful as a mechanism for the reconsideration of municipal planning decisions. Some important limitations follow below.

First, the internal appeals may only be lodged against decisions taken in terms of the delegated authority as it provides no recourse against decisions taken by the council. Second, the outcome of an internal appeal may not affect rights accrued. In the context of land use management, this is a significant drawback. A feature of most land use applications is the allocation of rights to use and develop land, so the value of an appeal, the outcome of which cannot affect those rights, is questionable. Third, the Supreme Court of Appeal has ruled that third parties in building applications may not use the section 62 appeal. In practice, therefore, the section 62 appeal is open only for unsuccessful applicants. On the whole, the

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25 Municipality of the City of Cape Town v Reader and others 2009 (1) SA 555 (SCA).
primary intention of a third party in appealing a planning decision is to cancel or reduce the land use and development rights awarded to the applicant. Third party appellants would thus not have an interest in section 62 appeals even if they were entitled to lodge them.

It is submitted that, should the provincial law provide for an alternative appeal mechanism, that the section 62 appeal falls away, especially if the provincial law provides so specifically. Should it do so, the provincial law could consider provisions that enable an internal appeals system that avoids the danger of a municipality having to reconsider its own decisions on appeal. One option would be the establishment by neighbouring municipalities of a shared appeal structure to consider appeals from all constituent municipalities.

9.2. Provincial appeal body?

Another vexed issue is whether the provincial law may provide for the appeal to a provincially appointed appeal body.

An appeal to a provincially appointed appeal body violates the Constitution because it amounts to a provincial decision on applications that fall within the municipal planning authority of municipalities. This does not, however, necessarily mean that the High Court is the only recourse for someone aggrieved by a land use decision. It may be advisable for provincial lawmakers to consider other avenues to provide effective recourse without forcing all aggrieved parties to go to court. For example, the provincial law could provide for a provincial assessment\(^\text{26}\) of a municipal decision without a final say for the provincially appointed body. Someone aggrieved by a municipal land use decision may request the provincial review body to assess the decision. The assessment body may confirm the decision of the municipality or it may disagree with the decision in which case the matter is referred back to the municipality for a second decision. The only compulsory element for municipalities in this scenario is that they must allow aggrieved parties to follow the assessment route, that their decision is suspended for the duration of the assessment and that they have to take a second decision. This type of limitation of municipal authority is permitted in terms of the provincial power to regulate a framework with minimum standards.

Other dimensions to the debate are: the composition of the assessment body; the appointment process to that body; and the safeguards for independence from provincial politics. If the assessment body comprises representatives of both spheres of government, the appointment process is transparent and the body is immunised (both operationally and in terms of decision-making) from provincial political interference. This may go a long

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\(^{26}\) The term ‘assessment’ probably needs an alternative. The logical alternative is ‘review’ but this is too close to judicial review and will lead to confusion. A further alternative might be a ‘monitoring review’, to distinguish it from a judicial review and which fits better with the constitutional duty of provinces to monitor municipal planning by local government. It is however a clumsy phrase.
way in making the assessment of municipal decisions both palatable and constitutionally permissible. For administrative ease, it may be prudent to combine the secretarial and support services for this body with those provided to a shared appeal structure (as envisaged above at 9.1), although the distinct functions (appeal and assessment) would need to be carefully maintained.

The same configuration may be applied to persons aggrieved by a provincial decision. In other words, someone aggrieved by the provincial decision with regard to a development application that affects the provincial interest, could follow the same route and ask the assessment body for an assessment of the provincial decision.
The Constitution empowers provinces to adopt legislation with regard to provincial planning. Not all provinces may be ready or have the appetite to adopt provincial legislation. This does not mean that national legislation should therefore deal exhaustively with all planning issues. The concern around provincial legislation should prompt national government to support provinces adequately by promulgating ‘default provincial legislation’ that may be replaced by provinces as and when they are ready.

Municipalities are constitutionally empowered to adopt municipal bylaws with regard to municipal planning. National and provincial laws regulating municipal planning must thus be predicated on the assumption that municipalities will receive, consider and approve land use applications in terms of their own bylaws. In many instances, this will not be practical because not all municipalities are ready to adopt municipal bylaws. Again, this does not mean that provincial government must deal with all planning issues in detail but should rather prompt provincial governments to support municipalities adequately by promulgating model bylaws, or by adopting default provincial legislation that may be replaced by municipalities as and when they’re ready.

The combination of the above means that the national planning law should include both default provincial laws as well as model bylaws or default municipal bylaws.

In other words, what is required is a national framework law that guides provincial governments in establishing their own provincial planning frameworks within the bounds of national standards and with exceptions for land use matters that affect the national interest. For those provinces that prefer to rely on national policy and law, it should include detailed provincial frameworks. Those detailed frameworks would have to include detailed regulations that apply to municipalities that do not have the capacity to adopt their own bylaws.

The above picture can perhaps best be illustrated as follows:
The essence of a new framework for planning legislation

National legislation, including, amongst other things:
- Default provincial legislation for provinces that are not ready to adopt provincial laws
- Default municipal bylaws for municipalities in those provinces that are not ready to adopt municipal bylaws.

Provincial legislation, including:
- Default municipal bylaws for municipalities that are not ready to adopt municipal bylaws.

Municipal bylaws, adopted by municipalities in terms of provincial legislation.

The above approach would avoid the continuation of defunct provincial laws that render provinces and municipalities vulnerable to constitutional challenges to their decisions. It would also maintain the institutional integrity of provincial and municipal governments which can replace the default rules whenever they are ready to do so.

The purpose of this report is to explore the implications of the legislative and constitutional framework for provincial legislation regulating, by and large but not exclusively, municipal planning. Accordingly, Annexure 1 sets out a possible skeletal structure for such a law.
Annexure 1: Proposed outline for a provincial and municipal planning bill

Chapter 1: Definitions

Chapter 2: Co-operative governance
1. Provincial support to and monitoring of municipal planning
2. District-local allocation of municipal planning functions
3. Shared planning services
4. Dispute resolution

Chapter 3: Supplementary planning principles for the province

Chapter 4: Provincial planning
1. Scope and purpose
2. Alignment of provincial and municipal planning processes
3. Purpose of provincial SDF
4. Role of local government in preparation of provincial SDF
5. Contents of provincial SDF
   a. Assessment of existing levels of development
   b. Spatial depiction of provincial growth and development strategy
   c. Identification of areas of special provincial interest
6. Adoption of provincial SDF by provincial cabinet
   a. Legal effect of provincial SDF
   b. Time period for validity of provincial SDF
   c. Intervals at which provincial SDF must be revised
7. Regional planning frameworks
   a. Only to be prepared where necessary
   b. Joint preparation by municipalities
   c. Status in relation to other SDFs
Chapter 5: Municipal Planning

1. Scope and purpose
2. Relationship between municipal SDF and IDP
3. Minimum requirements for preparation and adoption of municipal SDF
   a. Community participation
   b. Mandatory steps in the planning process
   c. Council adoption of the municipal SDF
4. Minimum requirements for content of municipal SDF
5. Alignment between district and local municipal SDFs
   a. Mandatory consultation
   b. Dispute resolution
   c. Role of provincial government in alignment of district and local municipal SDFs
   d. Role of provincial government in preparation of municipal SDF

Chapter 6: Land use management

1. Linkages between land use management and SDFs
2. Minimum standards for municipal land use management
   a. Status and purpose of LUM Schemes
   b. Minimum contents of LUM Schemes
   c. Allocation of land uses to unzoned land
   d. Calculation of services contributions
   e. Uniform terminology
   f. Inclusion of areas of special interest (e.g. informal settlement upgrading areas, areas under traditional leadership, inner city slums)
   g. Amendment and revision of LUM Schemes
   h. Transitional arrangements for existing LUM Schemes
   i. Decision-making standards in relation to decision-making structures, decision-making criteria, timelines, public participation, integration of processes, etc.
   j. Uniform standards for giving public notice, who may submit an application, who may respond, etc.
   k. Development application procedures and decision-making
   l. Joint applications
   m. Post-approval procedures
3. Provincial authority for LUM where provincial interests are affected
   a. Identification of LUM matters of provincial interest
   b. Dual approval from municipality and province
   c. Procedures for managing dual approvals
4. Appeals
   a. Internal municipal appeal (alternative to section 62 appeals)
   b. Establishment of municipal appeal structure
   c. Establishment of appeal procedures
   d. Criteria for appeals (who may appeal)
   e. Appeal decisions – status
   f. Provincial assessment of municipal decisions
   g. Internal provincial appeal (for appeals against LUM decisions of province)
   h. Establishment of provincial appeal structure

Chapter 7: Transitional arrangements
1. For laws to be repealed
2. For structures / bodies to be abandoned
3. For phasing out old schemes
4. For applications in process in terms of other laws

Chapter 8: Model by-laws/default regulations
1. LUM Scheme amendment/re-zoning/development applications
2. Consent uses
3. Township establishment
4. Services agreements
5. Informal settlement upgrading
6. LUM in areas under customary law
7. Closing a public space
8. Subdivision
9. Consolidation
10. Alignment with National Building Regulations
11. Exemptions and condonations
12. Fees and charges
13. Enforcement
14. Other