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Provincial Land Use Legislative Reform

Northern Cape Province: Status Report

September 2011

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Table of Contents

List of Tables

List of Figures

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1.0. Introduction

The purpose of this report is to investigate the status of land use legislation in the Northern Cape (see attached Figure 1). The Northern Cape comprises 27 local municipalities located in the following 5 district municipalities (DMs): Frances Baard DM, John Taolo Gaetsewe DM, Siyanda DM, Namakwa DM and Pixley ka Seme DM. Kimberley is located in the Sol Plaatje Local Municipality which is part of the Frances Baard DM. The Provincial department of Co-operative Governance, Human Settlements and Traditional Affairs is based in Kimberley but have regional offices in the district municipalities.

The report reviews broadly the state of land use legislation relevant in the Northern Cape Province, provides an understanding of land use in practice and comments on law reform processes where applicable. The report also outlines institutional responsibilities, decision making structures and processes; then draws implications for the status of current land use legislation and conclusions on the laws as applied in the province.

The research material used in the report is based on secondary sources, a desk top understanding of the status of land use legislation, the collection of empirical information and qualitative interviews conducted primarily with the Northern Cape provincial department of Co-operative Governance, Human Settlements and Traditional Affairs (PG: NC CoGHSTA) and local municipal officials in the planning division of Sol Plaatje Local Municipality.

In order to understand the way the provincial legislation is implemented in practice, the research sought to identify what works well in the application of the relevant laws, what does not work well, what needs to change to make it work better, what innovations there are in practice, what the demands are on officials and what officials at both municipal and provincial spheres of government would like to see in new provincial and national planning legislation.

The focus of this investigation is on understanding the practical issues with implementation. The report therefore focuses on and analyses the following main aspects of land use law in practice:

- A description of existing land use legislation and a brief analysis thereof;
- The findings in respect of empirical information collected from provincial and municipal officials who were interviewed;
- The implementation of the law and reflecting on the qualitative information obtained from official and other role-players to inform what works well in the current application of the law and what does not work so well;
- Recording the findings on institutional and administrative issues that go along with implementation (structure of departments, where decision making responsibility lies, the capacity within the institution studied, administrative systems and so on); and
- Drawing conclusions that can begin to inform a framework for new provincial legislation.

2.0.Provincial Legislative Status Quo

This section provides a list of the legislation that applies in the Northern Cape Province as well as applicable national legislation that has implications for spatial planning, land development and land use management in the province.

a) Provincial legislation

i) Northern Cape Planning and Development Act, No.7 of 1998[1] (NCPDA)

The purpose of the NCPDA is to provide a set of procedures and regulations to complement accelerated development procedures as provided for in the Development Facilitation Act No. 67 of 1995 (DFA); to ensure effective and co-operative planning and land development through a set of principles which will guide the preparation and implementation of integrated land development, the management of rural and urban land and its development through land use mechanisms.

The NCPDA makes provision for the drafting of Land Development Plans (Spatial Plans) and the formulation and implementation of Zoning Schemes, land development procedures and

[1] The report uses the shortened version as NCPDA

regulations (Land Use Management Schemes). The Act also makes provision that the existing Zoning and Town Planning Schemes, including the Zoning Schemes approved in terms of the Land Use Planning Ordinance, No. 15 of 1985, the Black Communities Development Act, No. 4 of 1984 and the Rural Development Act, No.9 of 1987, remain in place subject to adherence to Chapters IV and V of the NCPDA. In practice, applications for township and land development, rezoning and subdivisions must adhere to the NCPDA and be read with the existing scheme regulations.

ii) Land Use Planning Ordinance No. 15 of 1985 (LUPO)

This ordinance was officially replaced by the Northern Cape Planning and Development Act (NCPDA) but the zoning schemes that were approved in terms of it remain applicable.

iii) Other legislation

Removal of Restrictions Act No. 84 of 1967
Physical Planning Act No 88 of 1967
Subdivision of Agricultural Land No. 70 of 1970
Municipal Ordinance No. 20 of 1974
Black Communities Development Act No. 4 of 1984
Rural Areas Act No. 9 of 1987
Development Facilitation Act No. 67 of 1995 (DFA)
The Constitution of the Republic of South Africa No. 108 of 1996
National Environmental Management Act No. 107 of 1998 (NEMA)
National Heritage Resources Act No. 25 of 1999
Municipal Systems Act No. 32 of 2000
Municipal Systems Act No. 32 of 2000 as amended by Regulations under this Act certificate in terms of Section 118 –Municipal Systems Regulations
Municipal Planning and Performance Management Regulations of 2001 (Government Gazette No. 22605 No. R. 796 dated 24 August 2001)
Mineral and Petroleum Resources Development Act No. 28 of 2002

Planning Professional Act No. 36 of 2002

National Environmental Management Act: Integrated Coastal Management Act No. 24 of 2008

2.1.History of the Planning Laws reform

According to Van Wyk (1999), the first comprehensive ordinance regulating the establishment of townships in the Cape Province was the Townships Ordinance 13 of 1927. This ordinance was repealed by the Townships Ordinance No. 33 of 1934. In 1985, the Land Use Planning Ordinance No. 15 of 1985 was introduced in the Cape Province (which included what is now known as the Northern Cape). Since 1998, provincial legislation reform here has operated at two levels. Firstly, the adoption of a new provincial act, the Northern Cape Planning and Development Act No. 7 of 1998. Secondly, the NCPDA provides for further reforms, for example, the preparation and adoption of Spatial Development Frameworks (SDF's-also known as Land Development Plans) and Land Use Management Schemes (LUMS) by municipalities in the province.

The Northern Cape has successfully replaced its inherited planning ordinance, i.e. the Land Use Planning Ordinance No. 15 of 1985 (LUPO) with a new Provincial Act (Smit, 2008). The Northern Cape Planning and Development Act No. 7 of 1998 was assented to on 4 April 2000 and came into operation on 1 June 2000. In terms of section 82(1) of the Act, any application for the planning, development or utilization of land in the province shall be made in terms of either the provisions of this Act or the provisions of the DFA, unless the MEC consents to the application being made in terms of another law. Despite this mention of the DFA in the act, all applications are submitted and decisions made in terms of the NCPDA. In most cases (mostly non-urban areas), land use applications are done in accordance with the NCPDA, read in conjunction with LUPO for areas listed in Schedule E of the NCPDA.

In accordance with the Official Notice No. 14 of 2000 (Provincial Gazette 523 dated 10 July 2000), Schedule of Powers and Duties, certain powers and functions are delegated to local spheres of government. These include the implementation, administration and approval of land

use applications related to the municipal area of jurisdiction, subject to the MEC approving the Land Development Plan/SDF (Chapter IV) and the Zoning Schemes land development procedures and regulations/LUMS (Chapter V) of the Municipality. The MEC has approved the LDPs/SDFs of the following municipalities: Sol Plaatje, Hantam, Kamiesberg, Kareeberg, Karoo Hoogland, Khâi-Ma, Richtersveld and Umsobomvu.

There are municipalities that have their own Land Use Scheme Regulations in place, but most use the NCPDA and the Land Use Planning Ordinance No. 15 of 1985. At a detailed level, there is presently a lack of consistency in the town planning schemes in the province as a result of the schemes having been approved in terms of the following various ordinances. In Sol Plaatje Municipality for example, the Kimberley Town Planning Scheme was approved in the 1950s in terms of the Townships Ordinance No. 33 of 1934, while the Galeshewe and Ritchie Town Planning Schemes were approved in terms of LUPO. To address this problem among other reasons[2], the Sol Plaatje Municipality is in the process of finalizing the Land Use Management Scheme (LUMS) which is being prepared under the provisions of Chapter 5 of the NCPDA. For the purpose of the LUMS, section 5 of the NCPDA is deemed to refer to Chapter 5, section 26(e) of the Municipal Systems Act No. 32 of 2000. The proposed LUMS (approved by the MEC) will supersede the town planning regulations in terms of any previous legislation as well as the scheme regulations in terms of LUPO (Sol Plaatje Municipality, 2010) after being gazetted. It is anticipated that the outcome of the successful implementation of the LUMS will be a single set of regulations for each local municipality in the province. At the time of writing, none of the municipalities had yet implemented a LUMS under the NCPDA.

According to the Province of the Northern Cape (2010): Gazette Extraordinary No. 1468, a generic set of land use management system regulations has been drafted and approved by the MEC, which is to be used by municipalities and amended to local conditions. Section 79(1)(a) 'Regulations and guidelines' of the NCPDA provides for the preparation of such LUMS

[2] Also required by the NCPDA

regulations as follows: 'subject to the provisions of this act, the MEC may make regulations and guidelines in terms of this act and, generally, relating to all matters, subject to the provisions of section 76, which he/she may deem necessary or expedient to prescribe in order to achieve the purposes of this act; and (b) without derogating from the generality of subsection (1)(a), regulations or guidelines may be made on any of the following aspects:…(ii) aspects which can be addressed in zoning schemes and land development procedures.'

It should be noted that although 'zoning schemes' and 'land use regulations' can be read or understood as two independent items, the draft Sol Plaatje LUMS approaches them as one. This is evident in the notice of the draft scheme, notice 92 of 2008: Northern Cape Provincial Gazette No. 1243 "The Sol Plaatje Municipality hereby gives notice in terms of section 42(2) of the Northern Cape Planning and Development Act of 1998, read together with Chapter 1 of the Municipal Systems Act No. 32 of 2000, that a *Zoning Scheme and Land Development Procedures and Regulations*, to be known as the Sol Plaatje Land Use Management Scheme 2008 (LUMS), has been prepared by the Municipality."

2.2.Description of the Current Applicable Planning Legislation

a) Northern Cape Planning and Development Act No. 7 of 1998

As noted before, the Northern Cape Province has successfully adopted its new legislation in the form of the Northern Cape Planning and Development Act No. 7 of 1998. The process of formulating the NCPDA was driven by the then Department of Local Government and Housing. This department has now been transformed and merged into the Department of Co-operative Governance, Human Settlements and Traditional Affairs (CoGHSTA).

The MEC for CoGHSTA administers the Act, and decision-making powers rest with local municipalities, except in cases where appeals to the decisions are lodged, and in cases where decisions are made in terms of other legislation such as the Removal of Restrictions Act in which case, the MEC must approve the application after the resolution by a municipality and recommendations by the Northern Cape Planning Advisory Board (NCPAB).

The NCPDA itself is very flexible in terms of who can make decisions in terms of the Act, which understandably provides allowance for some powers to be delegated to the municipalities. This 'flexibility' is evident in that the act mentions the following as having power to make decisions in terms of the act: the MEC, a competent authority (a local council, a district council or any other body or authority designated by the MEC by notice in the Provincial Gazette) or any other body or bodies established in terms of the act.

The formulation of the NCPDA was largely based on the Development Facilitation Act No. 67 of 1995 (DFA), as the preamble of the act clearly states *'to provide for a single set of procedures and regulations to complement the…development procedures as provided for in the DFA'*.

This implies that most aspects of the NCPDA are identical to the provisions of the DFA. For example, the appeal process in terms of the PDA follows a similar procedure as prescribed in the DFA and most critically the Northern Cape Appeal Tribunal is established in terms of the DFA. This is notable in the following extract from the Province of the Northern Cape Provincial Gazette No. 1497 of 28 February 2011, with reference to the appointment of an appeal tribunal by the Premier of the Northern Cape Province. *'By the powers vested in me in terms of section 24 of the Development Facilitation Act, 1995, I Hazel Jenkins, hereby appoint the following persons to the Northern Cape Development Appeal Tribunal in terms of Section 24(1)(a) for a term of 5 years...'*

It is understood that the NCPDA does not provide for the appeal tribunal to be established in terms of the Act. "For the purpose of…the NCPDA 'appeal tribunal' shall refer to the appeal tribunal as *established in terms of the Development Facilitation Act*…, which tribunal shall have the powers and duties assigned to it in terms of section 24 of the Development facilitation Act, 1995, read with section 74 of this Act, to hear and decide on any appeals lodged in terms of this Act." Section 74 of the NCPDA outlines the appeal process. This is an example of integrating appeals in a way that avoids duplication or over-regulation. However, given the 2010

Constitutional Court ruling on the DFA, it is now imperative for the NCPDA to be independent of the DFA and to have a provision for the appeal tribunal to be formed in terms of the Act. Section 74 of the Act outlines the appeal process, implying that even though the process might be similar to the DFA's, the appeal process followed is in terms of the NCPDA and not the DFA.

The NCPDA has some unique aspects of which the following is the most notable: the Act allows for the preparation of Spatial Development Frameworks and Land Use Management Schemes (LUMS). These are respectively referred to as land development plans and (zoning schemes and) land development procedures and regulations in the act. Municipalities in the province have, however not managed to successfully implement the LUMS as a result of failing to comply with the necessary requirements such as procedures (time frames) and advertising/ public participation steps prescribed in the act. As mentioned earlier, the Sol Plaatje Municipality is the most advanced in the process as their draft LUMS were at least compiled and advertised in 2008.

b) Other Legislation

It is worth noting that the Less Formal Township Establishment Act No. 113 of 1991 (LeFTEA) has not been used in the province since the NCPDA was implemented. For example, low-income housing projects are rezoned in terms of the NCPDA, in accordance with the applicable town planning schemes. The NCPDA repealed various legislation listed in Schedule C of the Act, of which LeFTEA is one. Section 81(1) of the act reads as follows 'The laws, ordinances and regulations listed in Schedule C are repealed with effect from the dates mentioned in that schedule.' The date in respect of LeFTEA's repeal is the commencement of the NCPDA, which was 1 June 2000.

It should further be noted that LeFTEA is also listed in Schedule B and the Act indicates in section 81(2) that 'a matter in connection with which, before the commencement of this act, action was taken in terms of a law listed in Schedule B and which has not been disposed of at the commencement of this act, from the commencement, be finalized in terms of that law or this act,

as determined by the MEC.' In other words the MEC has the discretion to determine under which law any incomplete LeFTEA applications are processed.

The tender advertised by the Frances Baard District Municipality for township establishment in Phokwane Local Municipality illustrates this practice of not using LeFTEA. *'The township establishment project is guided from beginning until completion…by the following: Northern Cape Planning and Development Ac, No. 7 of 1998, Spatial Development Framework, IDP…'* No mention at all is made of LeFTEA.

i) Removal of Restrictions Act, No. 84 of 1967

Chapter VII of the NCPDA deals with removal of restrictions (RoR). RoR applications are submitted to a local municipality and final decisions made by CoGHSTA upon the resolution/ comments from the municipality and the recommendation from the NCPAB. It was discovered that it is rare that the provincial government would deviate from the recommendation of a municipality in terms of granting approval for removal of title deed restrictions.

Although Chapter VII of the NCPDA provides guidelines for removal of restrictions applications, the ultimate decision is still made in terms of the Removal of Restrictions Act. The Provincial Gazette of the Northern Cape No. 1362 of 2009 portrays this situation *'notice in terms of the provisions of section 2(1) of the Removal of Restrictions Act 84 of 1967, that the MEC for Housing and Local Government has…approved the removal of the restrictive Title conditions of Title deed…in order to facilitate the rezoning of the erf.'*

As the above notice mentions rezoning, it should be noted that rezoning and removal of restrictions applications can be submitted and considered simultaneously. However, a decision cannot be taken on a rezoning in terms of the NCPDA unless the removal of restrictions process is finalized under the RoRA. By implication a rezoning cannot be granted if a removal of restrictions application is not yet approved.

ii) Subdivision of Agricultural Land Act No. 70 of 1970

Applications subject to Subdivision of Agricultural Land Act No. 70 of 1970 are submitted to the provincial department of agriculture that provides a recommendation to the national department of agriculture where a final decision is made. Although applications can be submitted simultaneously, in practice a decision in terms of Act 70 of 1970 generally precedes a decision on land use application.

This Act presents certain challenges in current day planning practice in respect of the development of wind, solar and other renewable energy mechanisms which a new provincial law should attempt to address.

iii) Municipal Ordinance No. 20 of 1974

Municipal Ordinance No. 20 of 1974 is used by local municipalities in matters including closure of public open spaces, public places and streets.

iv) National Environmental Management Act No. 107 of 1998 (NEMA)

Applications for environmental authorisations are submitted to and approvals granted by the provincial department of environmental affairs and nature conservation. Currently, planning and environmental applications/processes can run in parallel but the planning approval cannot be granted unless a positive environmental authorization (record of decision [ROD]) is issued. By implication, if an environmental application is turned down, a land use application will likewise be refused. Refer to section 4.2. Relationship between provincial and other legislationsof this report (relationship between provincial and other legislation) for a case of the previous practice where the Sol Plaatje Municipality followed a process that approved land use applications even before environmental record of decisions were issued.

v) National Heritage Resources Act, No. 25 of 1999

Ngwao Boswa Kapa Bokoni, normally referred to as ‘Boswa’, is the provincial heritage resources authority of the Northern Cape. Boswa is established in terms of the Heritage

Resources Act and is under the governance of a council appointed by the MEC for Sport, Arts and Culture and is administered by the staff of the Heritage Resources Unit of the Department (http://www.northern-cape.gov.za). The Act makes provision in Section 27(18) that "no person may destroy, damage, deface, excavate, alter, remove from the original position, subdivide or change the planning status of any heritage site without a permit issued by the heritage resources authority"; Section 34(1) states that "no person may alter or demolish any structure which is older than 60 years without a permit"; and Section 38(1) outlines the nature of development that requires a Heritage Impact Assessment (HIA).

It was evident from the interviews that the effectiveness of the implementation of the act is questionable as it is an 'open secret' that some projects tamper with heritage buildings without undertaking the necessary applications. Although not confirmed by any of the officials, it is understood that there could be a number of potential causes of this problem. One, buildings might be renovated or demolished without submission of the necessary building plans. This can be difficult to control given the limited enforcement initiatives. Two, officials can allegedly approve land use applications and plans without ensuring that heritage matters are complied with.

It should be noted that the South African Heritage Resources Agency (SAHRA) still handles all archaeological matters in the province, implying that all necessary impact assessment matters are submitted to SAHRA's Cape Town office as well as Boswa. The Heritage Resources Act states that subject to the provisions of section 8, the protection of archaeological and palaeontogical sites are the responsibility of a provincial heritage resources authority. However, one of the provisions contained in section 8 of the Act notes that a provincial heritage resources authority or a local authority shall not perform any function in terms this Act or any other law for the management of heritage resources unless it is competent to do so. Although it could not be established on what grounds the archaeological matters are dealt with by SAHRA, it is understood that Boswa does not have competency to deal with such matters.

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vi) Mineral and Petroleum Resources Development Act No. 28 of 2002

Decisions on applications for mining rights are made by the national minister of mineral resources. In the Northern Cape, it was discovered that there is apparent 'abuse' of the interpretation of mining vs. surface rights (the issue of mining permits on land that is not zoned appropriately). In this regard mining companies normally acquire mining rights without the consent of the landowners, the reason being the mining activity would only exploit the (sub-surface) mining rights and not the surface rights. Although no firm empirical evidence could be acquired from the authorities, one can presume that with the separation of mining and surface rights the mining companies are under the impression that land use regulations are not applicable to mining sites. At the moment neither NC CoGHSTA nor the municipalities have done anything to address this situation. In a way, their hands are tied as there is no clear guidance provided in the legislation.

The other trend evident in the province is that mining companies choose not to comply with the rehabilitation requirements in terms of NEMA. They rather opt to pay the penalties that are relatively minimal compared to the cost of rehabilitating the mines.

vii) Planning Professional Act No. 36 of 2002 (PPA)

The PPA stipulates that a person may not perform planning duties unless he or she is registered in terms of the Act. There are enormous challenges with capacity in the Northern Cape Province as in rural areas, applications are made by non-planning professionals without adhering to planning legislation, planning principles, design and aspects related to bulk infrastructure, zoning, land use, topography, environmental issues and so on.

viii) National Environmental Management Act: Integrated Coastal Management Act No. 24 of 2000 (ICMA)

The ICMA makes provision for the determination of the coastal zone, the high-water mark, the coastal protection zone, coastal set-back lines, coastal development management and coastal planning schemes. All these aspects influence the spatial planning and land use management of municipalities located along the coast.

2.3. Description of Implementation of Provincial Planning Law

2.3.1. Institutional Responsibilities

As noted before, Northern Cape CoGHSTA (the MEC) administers the NCPDA and the local municipalities have decision-making powers, except in the case where appeals to the decisions are lodged and in cases where decisions are made in conjunction with other legislation such as the Removal of Restrictions Act.

Final decision making regarding land use applications in terms of the Northern Cape is made by the Council of a local municipality upon a recommendation by officials within the planning department or equivalent in the case of municipalities that do not have professional planners. The application process is outlined in section 4.

Appeals: the Designated Officer (DO) is an officer in the Northern Cape CoGHSTA designated by the MEC to serve as the DO of the appeal tribunal with the assistance of the tribunal registrar who deals with matters pertaining to issuing of notices. Appeals are lodged with the DO as outlined in the process below.

3.0.Implementation Aspects at Provincial Government Level

This section focuses on the main issues that relate to the implementation of the NCPDA at a provincial level, that is, the Department of Cooperative Governance, Human Settlements and Traditional Affairs (CoGHSTA).

3.1.Removal of restrictions

Decisions on removal of restrictive conditions of title deeds are made at the Provincial level, by the MEC. This decision is made upon the application being submitted to the municipality and the municipality assesses the application and provides a comment/resolution to the provincial government. Chapter VII of the NCPDA deals specifically with the removal of restrictions process. Section 59(1) of the NCPDA permits an owner of land to apply in writing to a municipality for the amendment, suspension or removal of a restrictive condition of title. The local municipality processes the application and provides a recommendation/comment to the provincial department. The application is tabled to the NCPDB that provides a recommendation to the MEC: CoGHSTA who then makes a final decision in terms of section 2(1) of the Removal of Restrictions Act No. 84 of 1967 (refer to section 2.2. above). RoRA is one of the pieces of legislation listed in Schedule B of the NCPDA that can be further dealt with in terms of this Act.

3.2. Appeal process

Following a decision by a municipality on a land use application (refer to section 4 below), an applicant in respect of an application made in terms of NCPDA, including an application in terms of a zoning scheme and land development procedures and regulations, who is aggrieved by the decision, and a person or body who or which has objected to the approval of such an application in terms of the Act, including an application approved in terms of a zoning scheme and land development procedures and regulations may lodge an appeal in writing to the appeal tribunal within 21 days following notification of the decision by the municipality.

In lodging an appeal, the appellant shall submit to the designated officer a letter stating the reasons and basis for appeal and shall simultaneously notify the MEC, district, local council concerned, as the case may be, of that action. A designated officer refers to ‘an appropriate officer in the provincial Government designated by the MEC to serve as the designated officer of the appeal tribunal as provided for in the Development Facilitation Act.’

The municipality's representatives and the appellant have to be present at the appeal hearings. Section 74(6) of the act stipulates *'the designated officer shall, in consultation with the tribunal registrar, notify the appellant and the MEC…or local…council, as the case may be, and any other parties who may in the opinion of the designated officer have an interest in the matter, within 7 days of the appeal being lodged, of the date, time and venue of the hearing, which shall not be greater than 60 days following the date that the appeal was lodged by the appellant.'*

The appeal tribunal may, following its deliberations in terms of its powers and duties, and after consultation with the MEC, district or local council concerned, in its discretion dismiss an appeal. In terms of the powers and duties assigned to the appeal tribunal in respect of any application against which an appeal is lodged, first refer it for mediation after consultation with the parties involved in a dispute and after the prescribed requirements and procedures for mediation have been complied with.

Within 7 days of the Appeal tribunal reaching a decision on the matter, the tribunal registrar shall notify in writing the appellant, the MEC or district or local council, as the case may be, and any other parties who had an interest in the matter of the decision of the appeal tribunal. About 12 appeals per annum are recorded by the Appeal Tribunal, which are mostly liquor-license related appeals.

3.3.Appointment of Commissions and Forums

a)Planning and Development Commission

The NCPDA provides for the establishment of the Planning and Development Commission which shall advise the MEC on the following matters:

- Any inconsistencies within the act or with any other relevant law which may make its operation or implementation inefficient or non-effective.
- Inefficiencies in the administration of the act.
- Any allegations of mismanagement in the implementation and administration of the act.

- Any inefficiencies which may result from a lack of co-operation and integration between the various departments, agencies and spheres of government which impact on the effectiveness and efficiency of planning and land development within the province.
- Investigating and reporting on mechanisms and approaches which will advance the implementation of effective co-operative governance within the field of planning and development.
- The preparation of regulations, guidelines and user manuals which may result in the more effective administration and implementation of the provisions of the act.

The CoGHSTA has struggled to establish a planning and development commission since 2009 in terms of the PDA. The call for nominations was published in the Province of the Northern Cape Provincial Gazette No. 1362 of 30 November 2009. A number of factors influenced this situation including the lack of interest from the planning and related fraternity, lack of sufficient remuneration against time spent on commission matters, lack of human and financial resources, cumbersome bureaucratic procedures required to establish commissions which involve endorsement by legislature.

From 2009, the intention to appoint a commission was only published on 26 July 2010 (Provincial Gazette No. 1452 of 2010) and the actual appointment followed later on: "By the powers vested in me in terms of Section 4(1) of the Northern Cape Planning and Development Act (Act No.7 of 1998), I…hereby give notice…that after having advertised the vacancies, I intend to appoint the following persons to the Northern Cape Planning and Development Commission for a term of five (5) years… Any comments or objections in respect of these appointments must be forwarded…with 21 days of publication hereof."

Although the usefulness of the planning and development commission is acknowledged, the authorities feel that the formulation of a commission would be less complicated if it were formulated as a form of a 'committee of investigation' rather than a commission per se. The

Commission would investigate matters relating to the formulation of guidelines for the preparation of Land Use Management Schemes (LUMS), among other things.

c) Forum for Co-operative Planning and Development

Similar to the complexities involved in setting up the commission as discussed above, the appointment of a forum has never been done since the NCPDA was promulgated. Section 9(1) of the NCPDA states that the MEC shall, by proclamation in the Provincial Gazette, establish the Forum for Co-operative Planning and Development in the Northern Cape. The Forum is expected to present, within six months of the end of the provincial financial year, an annual report of its activities to the Premier and the Executive Council of the Province, setting out its achievements, failures, problems and proposals for the next year of office.

According to the NCPDA, functions of the Forum are as follows:

- Ensure through co-operation, communication, information dissemination, capacity building and empowerment:
  - The general principles contained in Chapter 1 of the act, as well as other national initiatives or policies which may impact on planning and development are implemented effectively
  - The respective powers, duties and responsibilities allocated to the provincial and local spheres of government with regard to planning and development are carried out in a coordinated, effective and cost efficient way
  - The private and investment sector and community based organizations become active participants in the formulation and implementation of planning and development policies, objectives, implementational strategies, prioritized programmes and projects.

3.4. Capacity

In NC CoGHSTA, there is only one (1) planner (professional planner) involved directly in spatial planning and land use matters and there is one (1) planner in the Human Settlement Section. Overall, it is estimated that in the entire Northern Cape, there are about 35 planners. Three of the five District Municipalities have professional planners (Francis Baard DM,

Namakwa DM and Pixley ka Seme DM) and only two municipalities have professional planners (Khara Hais Municipality [2] and Sol Plaatje Municipality [1])

The department does not have a computerized tracking system and is currently working on a hard-copy filing basis. At the moment, because most applications are dealt with at a municipal level, CoGHSTA does not see an urgent need for a computerized system. Regardless of the absence of such a system, they have established a manual data capturing system.

4.0. Implementation Aspects at Municipal Level

This section considers the implementation of the NCPDA at the municipal level, in Sol Plaatje municipality.

a) Pre-application requirements

The NCPDA does not provide for any pre-application requirements. Regardless of this, municipalities like Sol Plaatje are open to discuss application requirements with the applicants before the submission of a formal application. The only section where one came across the 'pre-application' aspect in the act is in 'Schedule A: interim procedures for application made in terms of this act'. In terms of Section 44(1) of the NCPDA provision was made for *interim* procedures in respect of land use applications until such time that a common set of procedures is developed to become the new procedures in terms of which land use applications are assessed. At the time of writing, these common procedures had not been established and approved thus the interim procedures remain in force. Section 3 of the Schedule A deals with advertisement of the application and notes: 'the application shall thereafter be advertised in two or more of the following ways…(d) in conjunction with at least two of the mentioned options, hold public meetings, either prior to the submission of the application or after.' It however appears that this provision is normally not utilized.

b) Application submission and processing

The land use applications are submitted to the planning unit of the Municipality. The application is then circulated to various departments / units for their comments and also advertised for the public to comment and/or object. After receiving the comments the planning departments compiles a report (containing a recommendation) that is tabled before the Council for approval/refusal. In the Northern Cape, there is no tribunal system that deals with planning approvals; rather councilors make final decisions based on recommendations from officials who have assessed a particular application.

It is not clear how the application submission and circulation happens in small municipalities with no planners. However, the Northern Cape Provincial Gazette No. 1468 of 2010 provides an indication of the status quo in such areas: "*Town planning departments are non-existent at most municipalities, therefore planning matters are handled by environmentalists, technical experts, administrators, municipal managers, councilors, and IDP officials*."

Schedule A of the NCPDA 'interim procedures for applications made in terms of this act' provides the breakdown of the applications and processing process as follows, and summarized in Figure 2 below. Section 44(1) notes that "prior to the approval of the procedures provided for in section 40, any application made to amend or alter land use rights, including rezonings, departures and consent shall be processed in accordance with the procedure specified in Schedule A.'

'Within a period of two weeks after receiving an application, the council shall in consultation with the applicant, request any additional information which the municipality deems necessary to enable: (a) the public to effectively assess the application and formulate comments and/or objections, (b) the council to make an informed assessment of the application and thereafter a decision.

The municipality shall then, in consultation with the applicant, cause the application to be advertised to any person, persons or body who may have an interest in the application. The

application shall be advertised in two or more of the following ways: (a) serving a notice, (b) displaying a notice on a land unit, (c) publishing a notice in the press, (d) in conjunction with at least two of the above options, holding public meetings, either prior to the submission of the application or after.

The municipality shall inform in writing any national or provincial department which may be affected by the application and in particular any department which may be responsible for the provision or maintenance of services flowing from the application. Such department shall be allowed a period of 60 days to comment and in the event of such a comment not being forthcoming within that period, that department shall be deemed not to have commented. Compliance with this provision does however not exist in practice, the probable reason being understaffed departments or lack of capacity in various departments.

Following the receipt of any comments or objections, such comments and/or objections shall be referred to the applicant for his/her consideration and response. Should the applicant fail to respond to the objections and/or comments within a period of 90 days following the applicant's receipt of the comments and/or objection, the application shall be deemed to have lapsed.
In the event of the applicant revising his/her application in response to the comments and/or objections submitted to an extent that the nature and content of the application is altered, he or she may (if it is considered to be in the public interest) cause the revised application to be re-advertised.

The applicant shall be entitled to respond to any further comments and/or objection which may arise, and the period of time taken by the applicant to respond to any of the comments and/or objections referred to her shall not be more than 90 days. The application shall thereafter, within a period of 60 days, be referred to the council for decision, together with a report, objections and/or comments received and a recommendation made.

c) Decision-making

In considering any application made in terms of the NCPDA, the desirability of the outcome of the application shall be considered in relation to the following criteria: its compatibility and consistency with the principles outlined in the act, including the general principles as prescribed in the Development Facilitation Act, No. 67 of 1995; its compatibility and consistency with an applicable and approved provincial plan, district council plan and/or land development plan (note this is the equivalent of a spatial development framework); and its effect on existing rights (except any alleged right to protection against trade competition).

Procedural compliance (in accordance with the NCPDA - compliance within the prescribed time frames) and adherence to the administrative law (e.g. provision of reasons for decisions) are the most common challenges.

Table 1: Timeframes for Land Use Applications

Dates (for use by the Municipalities)	**Time-frames**	**Action**	**NCPDA Section**
		Receive application and recover costs: administration, advertisements, etc. - costs must be paid by the applicant before application can be processed	
	Within 2 weeks	Collect all relevant information from applicant (See list of relevant documents to be attached to the applications) (Recommendation: Submit application to Council for information to adhere to Chapter 4 of the Local Government: Municipal Systems Act No. 32 of 2000 – Public Participation)	Schedule "A" Section 2.
	Not more that 60 days	Advertise application: - in two of the official languages in local newspapers	Schedule "A" Section 3.

		- serve notice to surrounding owners and all persons or bodies who may have an interest in the application (affected parties) per register post (Council shall allow between 2 and 60 days [normally 14 days] after the date of advertisement for comments or objections to be lodged in writing) Inform in writing any national or provincial department that may be affected and allow 60 days for comments Send to relevant internal sections (water, sanitation, energy/electricity, streets and storm water, etc.) for evaluation and recommendations (and cost implications if applicable)	NCPDA Section 77.
	Applicant must respond within 90 days after date of letter	Refer comments/objections to applicant to respond	Schedule "A" Section 4.
	Within 60 days	Submit item with all the relevant information to council	Schedule "A" Section 4. (5)
	Within 7 days after council meeting Within 21 days following notification	Notify applicant and objectors of the council's decision. An appeal against the council resolution may be lodged in writing to the appeal tribunal	Schedule "A" Section 4. (6) NCPDA Section 74.

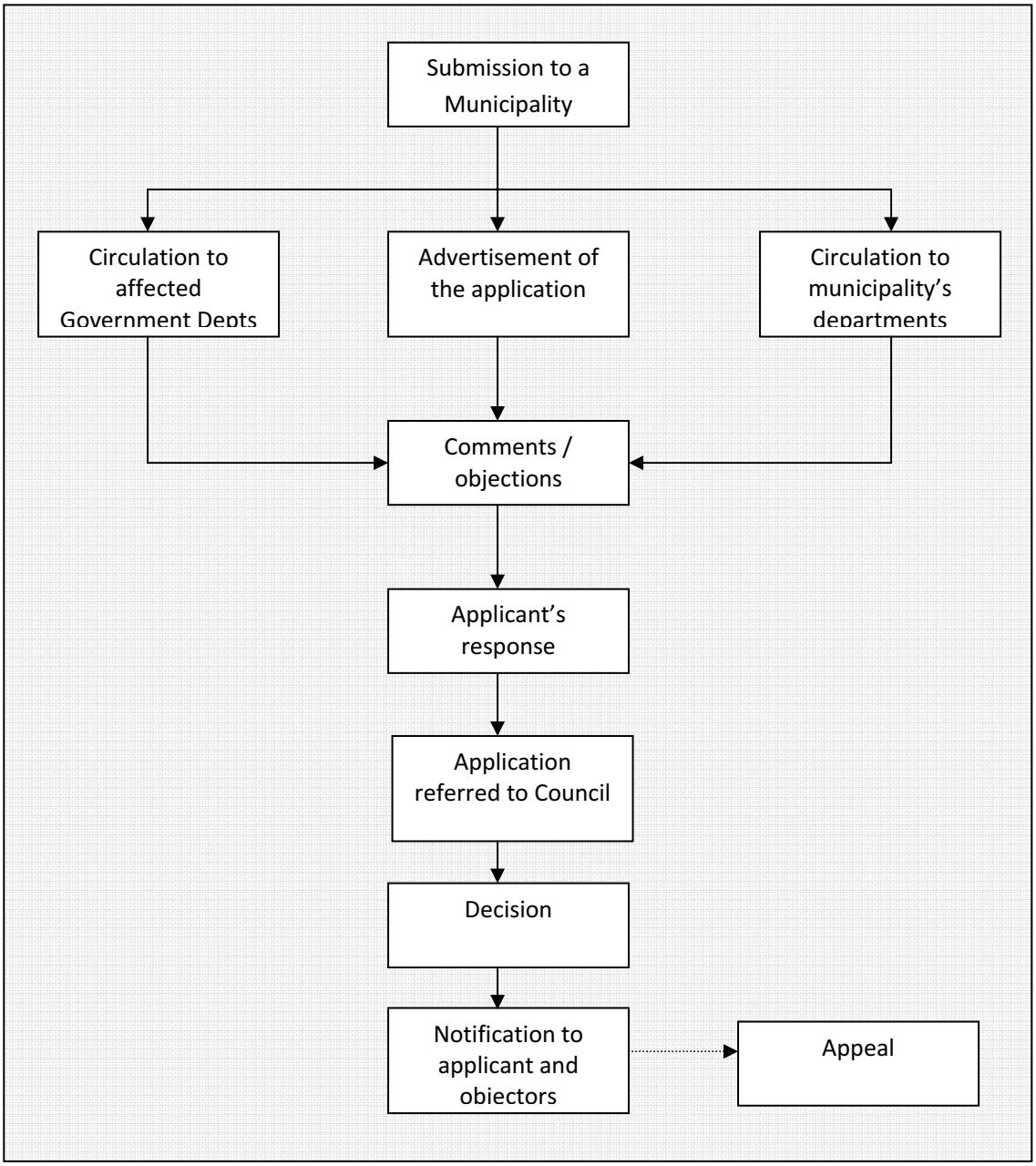
		If the application also involves the removal of restrictions (The LUM and ROR applications run concurrently): • The municipality must submit the application to the Department to be approved or refused by the MEC - with all the relevant information after the above-mentioned process was followed • If the application was submitted to the Appeal Tribunal for consideration, then it can only be submitted to the Department after the appeal hearing (Appeal Tribunal or Court) subject to the outcome of the hearing (all relevant documents must be attached to the application). • The Northern Cape Planning and Advisory Board will consider the application and make recommendations to the MEC. • The MEC may grant the application or refuse it. • After the MEC approves the application, it must be proclaimed in the Provincial Gazette.	Removal of Restrictions Act, No. 84 of 1967

d) Post approval steps

Schedule A of the act stipulates that within 7 days of the decision being taken, the applicant and any affected objectors shall be notified of the decision and any conditions attached thereto and shall be informed of their right to appeal in terms of section 74 of the act, should either party feel aggrieved by the decision.

In terms of Section 65 3(c), the validity period of an approved application is two years with a further extension period of three years on application before the expiration of the initial two-year period.

Figure 1: Summary of application process in terms of NCPDA



Source: Compiled by author from steps provided in the NCPDA

4.1 Performance of Provincial Legislation – the case of Sol Plaatje Local Municipality

a) How long it takes

On average, it takes about 8 months to decide a land use application, regardless of the fact that Section 40(3)(f) of the act notes that '…the overall time … shall not exceed 120 days from the

date of the application, excluding the time taken by the applicant to respond to the need for additional information…'. The DO process does not speed up the process as it only deals with appeals not applications. Despite the maximum time reflected in the Act and the above average timeframes gathered from engagements with municipal officials, the Sol Plaatje Annual Report 2009 – 2010 notes that '*due to the current development moratorium imposed on 05 August 2009 and no control over complication of inter-sectoral consultation comments, approval of all applications will take more that 12 months to process."*

b) Reasons for delays

Delays affecting application include lack of, or insufficient information provided on the applications (NCPDA prescribes two weeks for all required information to be gathered. However, NC CoGHSTA advises the municipalities not to accept applications if all the required information is not attached/included) as well as delayed comments from units of the municipality due to outstanding information or infrastructure capacity issues. As shown in the above extract from the Annual Report, there is no proper control of inter-sectoral comments.

c) Computerized tracking systems

The staffs of the planning unit in the Sol Plaatje Municipality do not have a computerized tracking system. All applications are recorded on files with distinct reference numbers. At the end of a financial year, the number of applications and progress/status of applications in a particular year are captured onto a spread sheet. This spread sheet is, however not consistently compiled, and consequently its accuracy is questionable. This information is very critical for the municipality as it is used as input into the Municipality's Annual Report. To confirm whether this data finally lands in the Annual Report, an exercise was undertaken to compare the number of applications recorded in the Sol Plaatje Municipality Annual Report 2009/10 and the results were very close. The Annual Report noted that 33 applications were approved and the spreadsheet obtained from the municipality shows that about 28 were approved. Should it be the case that the spreadsheet feeds into the Annual Report, the impact of the inaccuracy can be

critical as the this report is submitted to the Auditor General as the performance report for the municipality.

d) Number of staff

The municipality has 3 planners (1 Professional Planner) who deal with land use matters, 3 supporting administrators and 2 personnel charged with urban control. It was noted that the Municipality experiences a very high turn-over of planners with probable reasons being uncompetitive salaries and a sometimes un-conducive (political) environment.

e) How many decisions they make a year

The municipality is not entirely sure of the applications they decide on an annual basis. They refer to the spreadsheet mentioned earlier. When one peruses it, the accuracy is definitely questionable due, among other reasons, to blank cells and contradictory information on the same application. The spread sheet shows that 37 applications are approved per year and approximately 50 are re-evaluated. For the 2009/2010 financial year, about 19 applications were not approved as a result of infrastructure capacity not being sufficient to accommodate the proposed developments. This is mainly the case for sewer and water and not so much for electricity.

To reiterate, the accuracy of this information is questionable (as shown in section 4.1.3. above) and the only way to get precise information would be to go through each hard copy file which is impossible for the municipality with limited staff compliment.

f) Where most applications are (geographically)

The Sol Plaatje' s spread sheet only shows the street that a property subject of the application is located, without indicating exactly where in the Municipality the street is. The Municipality is of the view that most applications are located within the greater Kimberley area.

4.2. Relationship between provincial and other legislations

Currently, there is no guidance in the NCPDA as to how approvals in terms of this act relate or align with approvals made in terms of other legislation. For example, prior to 2010, the Sol Plaatje Municipality approved land use applications without necessary approvals from other legislation such as NEMA. This created confusion as applicants felt that having land use rights meant other approvals would automatically fall in place. Following a very environmentally controversial project with a land use approval, the municipality has reviewed this practice and taken a decision that all relevant approvals should precede land use decisions. In 2008, the then mayor of Sol Plaatje Municipality said the following in defence of the Council's decision to approve the rezoning for Northgate development "*no, it's always done like that. We don't wait for the EIA. We approve a piece of land, and once the approval is done, then that's it. And in most cases we've never had a problem…*" extract from Carte Blanche[3] (11 January 2009).

The above case clearly reflects lack of alignment between planning and other legislation (environmental in this case). It is ideal that the provincial legislation should therefore clearly and carefully cover the relationship with other applicable legislation and spell out how respective approvals feed into and inform each other.

4.3. Ongoing Enforcement Aspects

The enforcement aspect that is operational in the Sol Plaatje Municipality is compliance related to contravention of the provisions of the town planning schemes. In the Sol Plaatje Municipality, there is an urban control section situated in the planning unit of the department. Only two people operate in this urban control section and their role is to look out for properties whose land uses do not comply with the provisions of the respective town planning schemes. It was noted that these people are not necessarily planners but are however trained on matters pertaining to land use.

[3] The extract was downloaded from www.savetheflamingo.co.za/news/carteblanche11jan2009.pdf, as the original is no longer available on the Carte Blanche website.

5.0. Summary of Stakeholder Views of Provincial Planning Legislation

a) What Works Really Well With All the Current Legislation?

One aspect that both the Municipality and the provincial government are highly happy with is the fact that the NCPDA makes provision for the preparation of Spatial Development Frameworks as well as Land Use Management Schemes. The content and guidelines for the preparation of these are clearly outlined in Chapters 4 and 5 of the NCPDA.

The notice of SDF preparation is however made in terms of the Municipal Systems Act No. 32 of 2000. This is evident in the Northern Cape Provincial gazette No. 1318 of 2009 regarding the approval of the Sol Plaatje SDF– "Notice is hereby given in terms of Chapter 4, section 21(1), (2) and (3) of the Municipal Systems Act that the Sol Plaatje Municipal Council has approved the Spatial Development Framework (SDF)…"

Moreover, Chapter 4 of the NCPDA requires that a provincial development and resource management plan (PDRMP) be prepared for the province. This PDRMP is effectively a provincial spatial development framework which is in the process of being drafted.

In terms of procedural matters, the NCPDA is clear on the process to be followed in submitting, processing and deciding on land use applications (Schedule A of the act). Furthermore, the Act provides clear procedures for removal of restrictions; this is covered in Chapter 8. Sol Plaatje municipality also mentioned the short time frames as a good element of the act, although in practice applications are not always finalized within the timeframes stipulated in the act.

b) What does not work well?

As mentioned earlier, the issue of the Act being prescriptive in the appointment of a Planning and Development Commission as well as the Forum is complicated in practice, due to a number of reasons such as cumbersome bureaucratic processes. Although the potential usefulness of such

a commission and forum is acknowledged, it might be more practical to envisage something more in line with an ad hoc committee rather than a formal, statutory structure.

c) What Aspects of the Provincial Law Should Be Changed?

Northern Cape CoGHSTA is in the process of initiating a process to amend the PDA to include terminology that aligns it with other legislation such as the Spatial Planning and Land Use Management Bill. For example, land development plans will be renamed SDFs and transitional councils will be replaced with municipalities. There is also potential to divorce the NCPDA from the DFA and to consider retaining the relevant sections of the DFA particularly the sections that work well in practice, in a new provincial law. If this path is chosen then it will be important to complete the process before the DFA is repealed.

6.0. Overview of Key Issues That Have Implications for Provincial Planning Legislation in the Province

a) Nature and Application of the Laws

- NCPDA applies in the entire province with decision-making powers resting with local municipalities (refer to section 2.2.).

b) Nature of the institutional arrangement

- The decision making is undertaken at a municipal level (with final decisions made by Council upon recommendation by officials) and the appeals are handled by the provincial appeals tribunal established in terms of the DFA (refer to sections 2.2. and 3.2.)

c) Capacity constraints

- Capacity limitations are evident at Sol Plaatje Municipality with the issue worsened by a very high staff turnover (refer to section 3.0.). Constraints are also evident in smaller municipalities with no planners, in which case the applications are sometimes assessed by non-planning officials, but mostly professional planners at a district level.

Northern Cape CoGHSTA: Spatial Planning provides training/capacity building at least every two years on the adherence to planning legislation including approval of building plans vs scheme regulations vs title deeds. Prior to 2008, a copy of a title deed was not attached to building plan applications and the municipalities acted *ultra virus* if the title deeds conditions conflicted with the scheme regulations. The training includes administration and adherence to all the relevant legislation listed in Section 2.0.

7.0. Preliminary Conclusions and Recommendations

- The CoGHSTA and the Sol Plaatje Municipality are satisfied with the NCPDA despite issues like the appointment of a Planning and Development Commission. It is worth noting though that such appointment does not have a major impact on the day to day application of the Act. It is imperative that in the new legislation, the appointment of bodies to undertake the work similar to the proposed commission or forum be tackled differently, with a more careful appreciation of practical difficulties.
- There have not been any experiences related to inability or difficulty of implementing the Act; as a result the authorities feel that the NCPDA is essentially the basis for a 'new' provincial legislation.
- It should be borne in mind that the NCPDA was enacted over ten years ago, before the promulgation of the Municipal Systems Act. As a result, North Cape CoGHSTA is intending to amend the act to mainly incorporate terminology that aligns with other relevant legislation and clarify relationships. For example, land development plans will be substituted with SDFs to align with the MSA and transitional councils will be replaced with local municipalities and so on.
- Interestingly, related to the above, although the Act at the moment does not show the relationship to the MSA, the NCPDA is very important in that the contents of a Spatial Development Framework are clearly detailed in the Act. This level of detail is not present in the MSA.

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- The NCPDA does not provide guidelines as to how land use approval processes relate to other relevant legislation, environmental, heritage, mineral resources and agriculture.
- The Act has a very strong relationship with the DFA, which is mainly evident in that the Appeal Tribunal is appointed in terms of the DFA. Given the recent constitutional court ruling on the DFA, it would be imperative to understand ways in which the new provincial legislation can move away from the reliance on the DFA and appoint structures without the DFA.
- The Act does not position planners as professionals entitled to implement the Act. This is understandable as it would otherwise be restrictive given that some municipalities (mostly rural) do not have planners.
- Record keeping is not up to standard particularly at Municipal level (where applications are dealt with). The impact of inaccurate record keeping cannot be underestimated given that such records ultimately inform the annual report of the municipalities. The issue of record keeping is not stipulated in the Act.
- Municipalities seem to get away with not processing applications in accordance with the time-frames stipulated in the Act, although sometimes the delays are due to matters beyond their control.
- The Act provides for withdrawal of structure plans approved in terms of LUPO or any other structure plan complied with or any equivalent spatial plan dealing with land development. This is critical in avoiding duplication of laws.
- The Act provides for land use approval to be extended for a period of 5 years (including an initial 2-year period).
- As one of the decision making criteria, the Act is very clear on the required consistency with a provincial development and resource management plan (provincial SDF), and local council land development plan (Municipal SDF) which is not the case with older legislation like LUPO.
- By repealing LeFTEA, the NCPDA provides for low cost housing to be approved in terms of the Act and associated zoning schemes.

- Although all decisions are made in terms of the NCPDA, the act provides for applications to be read with other legislation such as LUPO. This provides flexibility in order to avoid a vacuum before the LUMS are formulated throughout the province.
- The Act is specific and clear in terms of the process to be followed when a RoRA application is submitted. A new provincial act could draw lessons from this.
- A new provincial law should give consideration to governing (a) the question of penalties in terms of land use contraventions and (b) the use of sub-surface and air rights.

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Planner: Northern Cape: CoGHSTA (Development and Planning) – Interview conducted on 24 May 2011.

Planner and Member of Appeals Tribunal: Northern Cape: CoGHSTA (Development and Planning) – Interview conducted on 24 May 2011.

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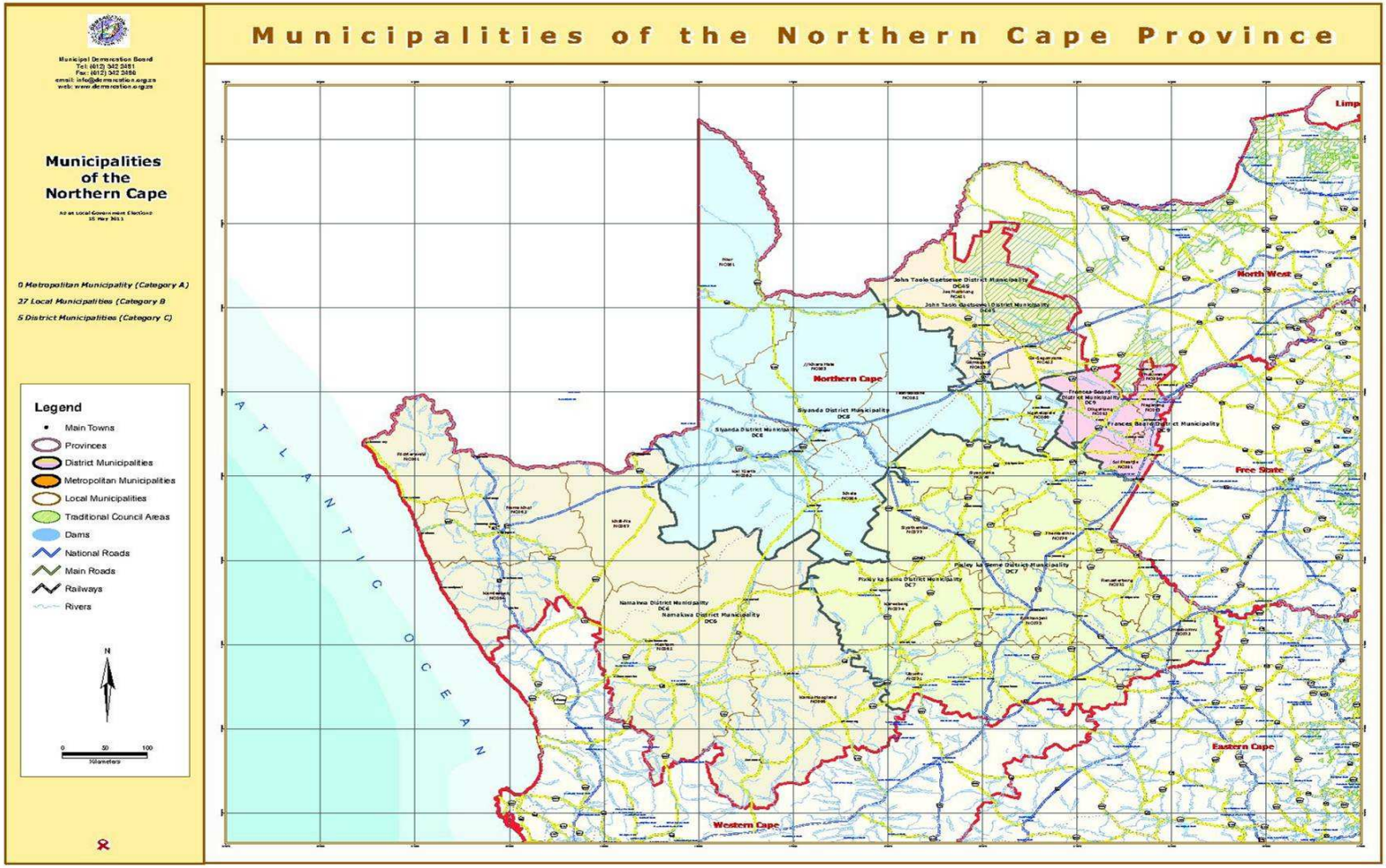
Figure 1: Municipalities of the Northern Cape



Source: Municipal Demarcation Board, 2011(http://www.demarcation.org.za/pages/default_new.html)