A Legal Perspective on the Role of Municipalities in Navigating the Relationship between Land Use Planning and Mining

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"The best way to realize co-operative governance is to ensure that all branches do exactly what they are empowered to do – and no more."

Woolman S & Roux T "Co-operative Government & Intergovernmental Relations"
in Woolman S and Bishop M (eds) *Constitutional Law of South Africa 1* 2 ed (RS 1 2009) 14-16.

Declaration

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My family's faith and support never wavered, celebrating every milestone with a metaphorical standing ovation.

My husband, Ockie, deserves an honorary doctorate.

Abstract

The legislative and executive powers dealing with mining and land use respectively are allocated to different spheres of government. Mining rights are issued by the Department of Mineral Resources (DMR), as representative of the national government, whereas land use and zoning are regulated by municipalities, the local sphere of government. According to a 2012 ruling by the Constitutional Court of South Africa, a mining right holder cannot commence mining activities, despite holding the mining right, unless and until the land is appropriately zoned by the municipality in whose jurisdiction the land is located. The separate functions of the two spheres of government make duplication in application processes inevitable. The potential for conflicting decisions is also apparent.

This project aims to determine how alignment of the respective processes of obtaining a mining right and land use approval can provide for better co-operation between the responsible government authorities. This question translates into two sub-inquiries:

a) How do municipalities currently regulate land use for mining purposes?

b) Should municipal rezoning procedures be incorporated into the application process for mining rights?

These issues are considered by examining three selected municipalities' rezoning procedures and policies and comparing these to the requirements of mining right applications. The thesis investigates the extent to which these procedures overlap and are duplicated. Potential policy changes are explored, to suggest streamlining application processes by providing a more cohesive solution. The three selected municipalities are the City of Cape Town Municipality in the Western Cape Province, the Sol Plaatje Municipality in the Northern Cape Province and the City of uMhlathuze Municipality in KwaZulu-Natal Province.

The thesis shows how poor intergovernmental relations and processes hamper effective co-operation and collaboration between the DMR and municipalities. While it is imperative that each government institution retains legislative and executive authority over their respective constitutional powers – DMR over mining activities, and municipalities over land use issues – the thesis argues that greater efforts at process alignment or synchronisation are necessary. It offers suggestions for improvement.

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Table of Abbreviations

cl(s)	Clause(s)
DFA	Development Facilitation Act 67 of 1995
DMR	Department of Mineral Resources
fn(s)	Footnote(s)
GG	Government Gazette
GN	Government Notice
IDP	Integrated Development Plan
LUPA	Western Cape Land Use Planning Act 3 of 2014
MN	Municipal Notice
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NCPDA	Northern Cape Planning and Development Act 7 of 1998
para(s)	Paragraph(s)
PN	Provincial Notice
Proc	Proclamation
reg(s)	Regulation(s)
s(s)	Section(s)
Sch(s)	Schedule(s)
SDF	Spatial Development Framework
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013

Chapter 1: Introduction

1. Introduction

In 2012, municipalities across South Africa suddenly found themselves in unchartered territory – territory dominated up to that point by the Department of Mineral Resources. Two Constitutional Court rulings established that municipalities had sole authority in regulating land use for mining purposes.[1] These rulings effectively placed municipalities in a position of dominance in regulating mining activity as land use within their boundaries. The cases were *Maccsand (Pty) Ltd v City of Cape Town*[2] and *Minister for Mineral Resources v Swartland Municipality.*[3]

Before these judgments were handed down, it was accepted that once a right in respect of mineral extraction has been issued,[4] the right holder could commence mining activities without requiring further authorisations.[5] In these judgments, however, the Constitutional Court ruled that mining activities cannot commence until the land is appropriately zoned[6] by the municipality in whose jurisdiction the land is located.[7] The municipality has the power, according to the Constitutional Court, to interdict a mining company from commencing or continuing mining activities until the company complies with the municipality's land use scheme regulations.[8]

The mining law landscape would never be the same again.

The judgments clearly had far-reaching consequences for investors in the mining industry. The zoning prerequisite imposes yet another obligation on mining companies

[1] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 48 (hereinafter referred to as "*Maccsand* (CC)"); and *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC) (hereinafter referred to as "*Swartland* (CC)". These two cases were heard together by the Constitutional Court. For a discussion of these cases, see Section 3 of Chapter 2 below.
[2] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC).
[3] *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC).
[4] By the Minister of Mineral Resources.
[5] This was also the argument of the Minister of Mineral Resources in the Constitutional Court *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC).
[6] Or the necessary departure from the land use scheme has been obtained from the municipality.
[7] For a discussion of these cases, see Section 3 of Chapter 2 below.
[8] Different terms are used across the world, e.g. territorial management plan, land use plan, zoning scheme, planning scheme, and local development plan. In line with the Spatial Planning and Land Use Management Act 16 of 2013, this thesis uses the term land use scheme.

and adds to the long list of time-consuming and cumbersome processes before mining activities can commence.[9] Investor frustration with bureaucracy in the mining industry is of particular concern in South Africa, as the industry is an important contributor to the economy.[10] The South African government recognises the need to improve the regulatory and policy framework to benefit more fully from the country's mineral resources.[11]

The merits of requiring that the land is appropriately zoned before mining activities commence are not in question. This is a crucial aspect of municipalities' function of land use planning.[12] However, the way in which this additional requirement of rezoning of the land is implemented needs evaluation. This thesis intends to undertake such an evaluation. It is also necessary, first, to investigate the relationship between the rezoning application process and the mining right application process. To appraise this relationship, one needs to understand the constitutional allocation of legislative and executive powers to different spheres of government.

2. Background and Context

Legislative and executive powers are divided among the national, provincial and local spheres of government.[13] These spheres are 'distinctive, interdependent and interrelated'.[14] The functional areas of each sphere are set out in the Constitution. Chapter 2 discusses these issues in greater detail.[15] For present purposes, it is

[9] Roelf W "Update 1 - China's Xi in S.Africa for Minerals, Investment" (16-11-2010) *Reuters* <https://www.reuters.com/article/safrica-china/update-1-chinas-xi-in-s-africa-for-minerals-investment-idUSLDE6AF2B720101116> (accessed 07-09-2018); Janse van Vuuren A "Green Lobby, Land Owners Win Big in Maccsand Case" (13-04-2012) *Miningmx* <https://www.miningmx.com/news/markets/24724-green-lobby-land-owners-win-big-in-maccsand-case/> (accessed 08-09-2018).

[10] In the second quarter of 2018, mining contributed 7% to the country's economy. See Statistics South Africa "Gross Domestic Product: 2nd Quarter 2018" (04-09-2018) *Statistics South Africa* <http://www.statssa.gov.za/publications/P0441/GDP_2018_Q2_Media_presentation.pdf> (accessed 08-09-2018). This compares to an 8% contribution in the fourth quarter of 2017. See Statistics South Africa "Gross Domestic Product: 4th Quarter 2017" (06-03-2018) *Statistics South Africa* <http://www.statssa.gov.za/publications/P0441/GDP_Q4_2017_Media_presentation.pdf> (accessed 08-09-2018). See also National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 201; Badenhorst PJ, Mostert H & Dendy M "Minerals and Petroleum" in Joubert WA and Faris JA (eds) *The Law of South Africa 18* 2 ed (2007) para 1.

[11] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 42.

[12] See discussion in Section 5.3 of Chapter 2 and Section 2 of Chapter 4 below.

[13] Section 40 of the Constitution of the Republic of South Africa, 1996.

[14] Section 40(1) of the Constitution.

[15] See Section 5 of Chapter 2 below.

sufficient to state that the regulation of mining falls under the exclusive competence of the national government.[16] The State is the custodian of all mineral resources in South Africa and the national government has the authority to grant rights to minerals in accordance of the provisions of the Mineral and Petroleum Resources Development Act (MPRDA).[17]

Municipalities have exclusive executive authority over municipal planning,[18] which includes the regulation of land use and the zoning of land.[19] Each municipality can issue by-laws for the effective administration of land use matters within their respective jurisdictions.[20] In exercising this legislative power, municipalities must follow the normative framework set by national planning legislation[21] and adhere to guidelines contained in applicable provincial planning legislation.[22]

The municipal planning functions of the regulation of land use and zoning of land for mining purposes cannot be appropriated by the national Department of Mineral Resources when issuing mining rights.[23] Overlaps of these functions of municipalities and the Department of Mineral Resources are inevitable because mining activities are

[16] *Maccsand (Pty) Ltd v City of Cape Town 2011 6 SA 633 (SCA)* para 14; Glazewski J & Plit L "Mineral and Petroleum Resources" in Glazewski J (ed) *Environmental Law in South Africa* (RS 2 2014) 17-20. See discussion in Section 5.1 of Chapter 2 below.

[17] Mineral and Petroleum Resources Development Act 28 of 2002, s 3(2).

[18] Constitution, part B of sch 4.

[19] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 57. See also *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 131 and Van Wyk J "Planning in All Its (Dis)Guises: Spheres of Government, Functional Areas and Authority" (2012) 15 *Potchefstroom Elec. L.J.* 288 295-302. See below discussion in Section 5.3 of Chapter 2 and Section 2 of Chapter 4.

[20] Constitution, s 156(2). See also Bronstein V "Legislative Competence" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa 1* 2 ed (RS 6 2014) 15-6 – 15-8; Glazewski J & Rumble O "Administration and Governance" in Glazewski J (ed) *Environmental Law in South Africa* (RS 2 2014) 6-14; Murray C "The Constitutional Context of Intergovernmental Relations in South Africa" in Levy N and Tapscott C (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 66 71.

[21] Most notably, the Spatial Planning and Land Use Management Act (SPLUMA) and the Local Government: Municipal Systems Act 32 of 2000.

[22] Each of South Africa's nine provincial governments may enact legislation for the regulation of, among other things, land development, land use management, spatial planning and municipal planning. (SPLUMA, s 10 read with Sch 1.) For a discussion of this provincial legislative power, see Section 5.2 of Chapter 2 and Section 3.2 of Chapter 4 below.

[23] *Maccsand (Pty) Ltd v City of Cape Town 2012 4 SA 181 (CC)* para 44. See in general Olivier NJJ, Williams C & Badenhorst PJ "Maccsand (Pty) Ltd v City of Cape Town" (2012) 15 *Potchefstroom Electronic Law Journal* 537; Humby T "*Maccsand*: Intergovernmental Relations and the Doctrine of Usurpation" (2012) 27 *Southern African Public Law* 628; and Van Wyk (2012) *Potchefstroom Elec. L.J.* Such appropriation would violate the principle of the Rule of Law. See, in this regard, Section 3 of Chapter 2 below.

carried out on land.[24] However, these functions remain distinct and should be exercised by the functionaries empowered by the Constitution.[25] This means that the Minister of Mineral Resources can issue a mining right, but the municipality remains responsible for the zoning of the land on which the mining is to be undertaken.[26] It is acceptable for the implementation of a decision of one sphere of government to be dependent on the consent of another sphere.[27]

The potential for conflicting decisions by these spheres of government is apparent. Resultant conflicts in authority between a municipality and the Department of Mineral Resources must be resolved through co-operation, mutual trust and good faith.[28] To understand how co-operation between these government authorities can be implemented, it is necessary to examine the application procedures for a mining right and rezoning of land, respectively.

The mining right application process is evaluated in more detail in Chapter 3 and rezoning applications are addressed in Chapter 7. The following discussion is a very brief overview of these two processes to provide the necessary context within which the research question is framed.

If a submitted application for a mining right is accepted,[29] a notice of the application is published to invite public comment on the application.[30] The applicant is also notified to consult with interested and affected parties.[31] The municipality in whose jurisdiction the proposed mining operation is located must also be consulted.[32] The applicant must

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[24] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 43.
[25] Constitution, schs 4 and 5 respectively.
[26] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) paras 48, 51. See also *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC) para 12.
[27] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 48.
[28] Constitution, s 41. The requirement of co-operative government is also set out in ss 3, 31 and 24 of the Local Government: Municipal Systems Act. Co-operative government is discussed in Chapter 2 below.
[29] A decision regarding acceptance is a factual inquiry and depends solely on whether the application meets the formal requirements set out in the MPRDA and accompanying regulations. MPRDA, s 22(2); *Norgold Investments (Pty) Ltd v The Minister of Minerals and Energy of the Republic of South Africa* 2011 3 All SA 610 (SCA) para 56 (decided in the context of a prospecting right application). See more detailed discussion in section 2 of Chapter 3 below.
[30] MPRDA, s 10(1).
[31] MPRDA, s 22(4)(b). See the discussion of the consultation process at Section 3 of Chapter 3 below.
[32] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) para D, definition of "interested and affected parties".

submit a report on the outcome of the consultations before the application and accompanying reports will be considered by the Minister of Mineral Resources.[33]

Many of the requirements for a mining right application are duplicated during the rezoning application process. For example, the rezoning application is also advertised for public participation.[34] Furthermore, various government departments are invited to comment on the proposed rezoning of the land.[35]

As the current legislative provisions dictate that mining applications must be made to the Department of Mineral Resources and zoning applications to the relevant municipality, the duplication in processes is inevitable. This duplication of functions is both time-consuming and extremely costly. In certain cases, it may even become impossible to exercise the mining right. The right holder must commence mining activities within one year after the execution of the right by the Minister of Mineral Resources.[36] However, it is possible that the rezoning application process takes so long that the mining right may lapse before the holder can exercise the right.[37] The delay in mining activities can have the unfortunate consequence that the mining project is no longer financially viable, if possible at all. The inefficiency of this system has major implications for investor confidence in the mining sector.

The lack of collaboration between different spheres and departments of government has been identified as a key constraint to growth in the mining industry.[38] However, if improved, intergovernmental co-operation can also serve as a vital enabler to stimulate the industry.[39]

[33] MPRDA, ss 22(4)(a)–(b) and 22(5).
[34] SPLUMA, s 7(e)(iv) and item (f) of Sch 1.
[35] SPLUMA, s 29(1) and reg 16(6).
[36] MPRDA, s 25(2)(b).
[37] Regulation 16 of SPLUMA specifies maximum timeframes that will apply to rezoning application processes where no timeframes are specified in a municipality's land use planning by-law or the relevant provincial government's planning legislation. When the maximum days for each phase of the application process are added, it amounts to 485 days. See discussion in Section 4 of Chapter 7 below.
[38] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 42-43.
[39] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 42-43.

3. Research Question

The brief account above demonstrates that the various processes to be followed before mining can commence are very cumbersome and time-consuming. This can be a significant deterrent to investors who may be attracted to other jurisdictions where mining regulations are simplified and applications can be finalised in a timely and cost-effective manner. Therefore, it is imperative that mining and related land use regulations be better aligned to provide a more cohesive solution.

The aim of this project is to determine how alignment of the respective processes of obtaining a mining right and land use approval can provide for better co-operation between the responsible government authorities. This question translates into two sub-inquiries:

c) How do municipalities currently regulate land use for mining purposes?

d) Should municipal rezoning procedures be incorporated into the application process for mining rights?

To answer these research questions and investigate the problems relating to the cumbersome processes in the land use and mining context, amendments to current legislation are explored. The aim of these amendments is to simplify mining and related land use procedures, providing a more cohesive solution.

It is acknowledged that many of the duplication issues highlighted above are not limited to mining rights – it may be just as prevalent during the prospecting right application process.[40] However, as prospecting activities are limited to a maximum period of eight years,[41] it is a relatively short-term land use. Therefore, it may prove unnecessary to apply for rezoning of the land, as an application for a temporary departure of the

[40] A prospecting right entitles its holder to search for a specific mineral in a specific area with the purpose of determining the presence of the mineral and whether it occurs in economically viable. A mining right, in contrast, entitles its holder to win and extract a specific mineral in a specific area. See definitions of "prospect" and "mine" respectively in s 1 of the MPRDA.

[41] MPRDA, s 17(6) provides that prospecting rights are awarded for a maximum period of five years. The right may be renewed once for a further period of three years, in terms of s 18(4) of the MPRDA.

prescribed land use may be more appropriate.[42] This research is limited to applications for mining rights and rezoning of land.

The thesis touches on aspects of Constitutional Law, Administrative Law, Mining Law, Planning Law and Local Government Law. An in-depth analysis of all these aspects is not possible within the scope of this study. Therefore, the focus is limited to specific issues that are relevant to the context of the research.

4. Research Approach

The research questions are considered from a theoretical and practical perspective. The investigation is undertaken by way of desk-top research and a collective case study.[43] The case study includes documentary analysis, supplemented by field research and interviews, as indicated below.[44]

The legislative requirements of mining right applications are compared to the rezoning procedures and policies of three selected municipalities. The thesis examines the extent to which these procedures overlap and are duplicated. As mining right applications are regulated by one national statute,[45] the analysis of the application process can be done by way of desk-top research. The regulation of land use is more complex.[46] While the national legislative framework applicable to land use planning can be examined by simple desk-top research, this method must be supplemented when examining municipal rezoning procedures and policies.

[42] SPLUMA, Item 2(d) of sch 5 provides for municipalities to regulate temporary departures from the land use scheme.

[43] A collective case study focuses on two or more cases. For a discussion of collective case studies, also referred to as multiple-case studies, see Stake RE *The Art of Case Study Research* (1995) 5-6; Simons H *Case Study Research in Practice* (2009) 30-31; Yin RK *Case Study Research and Applications: Design and Methods* 6 ed (2018) 54-62; Hyett N, Kenny A & Dickson-Swift V "Methodology or Method? A Critical Review of Qualitative Case Study Reports" (2014) 9 *International Journal of Qualitative Studies on Health and Well-being* <http://dx.doi.org/10.3402/qhw.v9.23606> (accessed 23-10-2018).

[44] For a discussion of case study methodology, see Stake *The Art of Case Study Research*; Simons *Case Study Research*; Yin *Case Study Research and Application*; Hyett et al (2014) *International Journal of Qualitative Studies on Health and Well-being*; O'Gorman K & MacIntosh R *Research Methods for Business & Management: A Guide to Writing Your Dissertation* 2 ed (2015).

[45] Mineral and Petroleum Resources Development Act.

[46] For a discussion of the complexity of South African planning law, see Section 2 of Chapter 4 below.

Section 2 above explains that every municipality in the country can issue by-laws for the administration of land use and zoning matters within their respective jurisdictions.[47] A municipality must exercise this legislative power in line with its own development and land use policies, and within the normative framework of national planning legislation.[48] In addition, the municipality must adhere to guidelines in applicable provincial planning legislation.[49] A detailed analysis of the land use policies and application procedures of all 213 local and metropolitan municipalities,[50] as well as the planning legislation of all nine provincial legislatures, is not feasible within the scope of this study.

Therefore, case-study research is undertaken by focusing on three municipalities. Case-study research is sufficiently flexible to accommodate various research methods, including document analysis, interviews and comparison between selected cases.[51] The main requirement of case-study research is an in-depth analysis of a selected case within its specific context.[52]

The thesis investigates the procedural requirements of three case-study municipalities in respect of their land use policies and applications for rezoning of land within their jurisdictions. The three selected municipalities are the City of Cape Town Municipality in the Western Cape Province, the Sol Plaatje Municipality in the Northern Cape Province and the City of uMhlathuze Municipality in KwaZulu-Natal Province.

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[47] Constitution, s 156(2). See also Bronstein "Legislative Competence" in *Constitutional Law 1* 15-6 – 15-8; Glazewski & Rumble "Administration and Governance" in *Environmental Law* 6-14; Murray "Constitutional Context" in *Intergovernmental Relations* 71.

[48] Most notably, the Spatial Planning and Land Use Management Act (SPLUMA) and the Local Government: Municipal Systems Act.

[49] Each of South Africa's nine provincial governments may enact legislation for the regulation of, among other things, land development, land use management, spatial planning and municipal planning. (SPLUMA, s 10 read with Sch 1.) For a discussion of this provincial legislative power, see Section 5.2 of Chapter 2 and Section 3.2 of Chapter 4 below.

[50] Since the Local Government Elections held on 3 August 2016, South Africa is divided into eight metropolitan municipalities and 205 local municipalities. The local municipalities are grouped together to form 44 district municipalities. See Electoral Commission of South Africa *2016 Local Government Elections Report* (2016) 5. The Constitution (s 155(1)) provides for three categories of municipalities – Categories A, B and C. When read with the definitions in section 1 of the Local Government: Municipal Structures Act 117 of 1998, these categories can be identified to describe a "metropolitan municipality" (Category A); a "local municipality" (Category B); and a "district municipality" (Category C).

[51] Simons *Case Study Research* 3; Yin *Case Study Research and Application* 16; Hyett et al (2014) *International Journal of Qualitative Studies on Health and Well-being*.

[52] Yin *Case Study Research and Application* 15; Simons *Case Study Research* 3-5; Stake *The Art of Case Study Research* xi, 2; Hyett et al (2014) *International Journal of Qualitative Studies on Health and Well-being*.

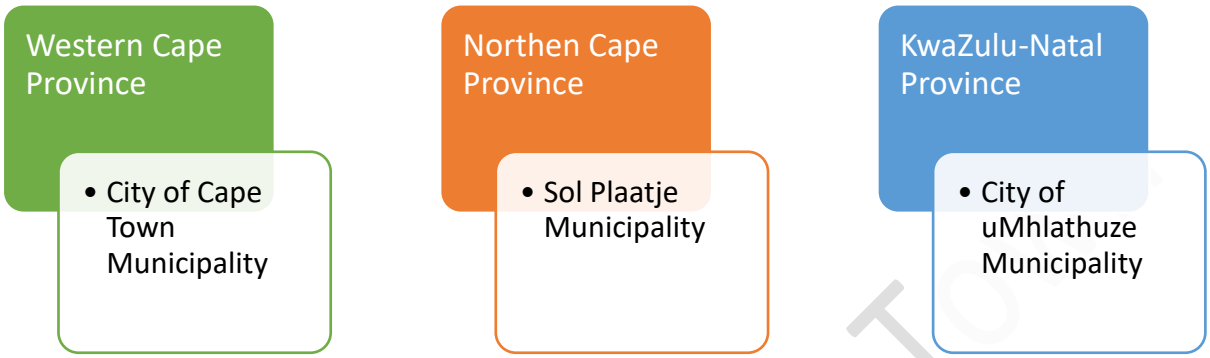

Figure 1: Case-study Municipalities

The comparison between the chosen jurisdictions provides an interesting perspective and important insights for policy reform in the context of land-use planning for mining purposes. These municipalities were selected because of the different legislative frameworks applicable in the three chosen provinces. The selected municipalities represent significant mining areas within these provinces.

Land use in the Western Cape Province is regulated by the Western Cape Land Use Planning Act.[53] This Act is classified as "new-order" provincial legislation[54] enacted to comply with the new national Spatial Planning and Land Use Management Act (SPLUMA).[55] The Western Cape is the only province where provincial legislation has already been enacted that complies with SPLUMA's provisions.[56] New-order provincial legislation also applies in the Northern Cape and KwaZulu-Natal.[57] However, these pieces of legislation were enacted prior to the implementation of SPLUMA.[58] Although the Northern Cape and KwaZulu-Natal are the only provinces (apart from the Western Cape) where new-order planning legislation applies, their respective pieces of provincial legislation are not fully compliant with SPLUMA.[59]

[53] Western Cape Land Use Planning Act 3 of 2014.
[54] 'New-order legislation' refers to statutes enacted after the Constitution of the Republic of South Africa, Act 200 of 1993 (the Interim Constitution). This contrasts with 'old-order legislation', being enacted before the 1993 Constitution, as defined in sch of the 1996 Constitution.
[55] Spatial Planning and Land Use Management Act.
[56] See discussion in section 7.2 of Chapter 2 below.
[57] The Northern Cape Planning and Development Act 7 of 1998 and the KwaZulu-Natal Planning and Development Act 6 of 2008 respectively.
[58] The Northern Cape Planning and Development Act commenced on 1 June 2000, the KwaZulu-Natal Planning and Development Act commenced on 1 May 2010 and SPLUMA came into operation on 1 July 2015.
[59] The Northern Cape Legislature has drafted the Northern Cape Spatial Planning and Land Use Management Bill, 2012 to address the requirements of SPLUMA. However, the Bill has not yet been approved. Until the new legislation is enacted, the old Northern Cape Planning and Development Act

This study specifically avoided established mining centres of South Africa. Vast areas in Gauteng, the Free State and North West provinces have already been identified for mining activities and the land is zoned as such. The research focuses on municipal rezoning procedures where land is to be used for mining activities in the future. Therefore, areas already zoned to allow for mining are not of interest for purposes of this study. Furthermore, the old-order provincial legislation applicable in these provinces[60] state specifically that land use schemes will not restrict mining operations. Therefore, the rezoning of land to be used for mining purposes does not pose the same problem in these provinces.

For these reasons, the case study focuses on areas where mining is taking place, although on a much smaller scale. In these selected municipalities rezoning of land to be used for mining purposes is much more prevalent and problematic. However, that is not to say that these municipalities are homogenous. On the contrary, each municipality operates within a unique context.[61] The diverse contexts are reflected in the way in which the municipalities approach mining activities within their respective jurisdictions.[62]

As the research involves the collection of data from human participants representing the three case-study municipalities, approval from the Law Faculty's Research Ethics Committee is required. On 8 June 2016, the Law Faculty Research Ethics Committee granted ethics clearance in respect of the research project, which clearance was valid for twelve months and open for renewal.[63] Ethics clearance was duly renewed on 24 May 2017.[64]

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still applies. For a detailed discussion of the provincial legislation applicable to the Northern Cape and KwaZulu-Natal, see Sections 3.2 and 4.3 of Chapter 5 below.

[60] These are the old Transvaal Province's Town-Planning and Township Ordinance 15 of 1986 and the Free State's Townships Ordinance 9 of 1969.

[61] See Chapter 5 below for a discussion of each case-study municipality's context.

[62] See Chapters 6 and 7 for analysis of each municipality's approach to mining within its jurisdiction.

[63] Law Faculty Research Ethics Committee *Clearance Process for L0010/2016* (08-06-2016) See Annexure 1 for a copy hereof. For queries regarding the ethics clearance, the Law Faculty Research Ethics Committee Administrator, Ms Lamize Viljoen, can be contacted at lamize.viljoen@uct.ac.za.

[64] Law Faculty Research Ethics Committee *Renewal Process for L0010/2016* (24-05-2017). See Annexure 2 for a copy hereof. For queries regarding the renewal of ethics clearance, the Law Faculty Research Ethics Committee Administrator, Ms Lamize Viljoen, can be contacted at lamize.viljoen@uct.ac.za.

5. Research Outline

The thesis comprises eight chapters. Chapter 2 describes the constitutional allocation of legislative and executive powers to the three spheres of government, as it relates to mining activities and planning law. The way in which these powers overlap underscores the importance of co-operative government. The aim of the chapter is to contextualise the legal framework for co-operative government in the context of land use planning for mining purposes. It examines legislative provisions aimed at promoting intergovernmental relations and co-operation between the Department of Mineral Resources and municipalities where mining takes place.

Chapter 3 focuses on the legislation applicable to mining right applications. It gives an overview of the application process with specific emphasis on provisions dealing with consultation with interested and affected parties. One of the aims is to identify steps in the application process that are duplicated in municipal application processes for rezoning of land. A determination of such duplication can only be confirmed after analysis of rezoning application processes discussed in Chapter 7. Chapter 3 also investigates to what extent the mining right application process caters for consultation with municipalities. Providing sufficient opportunity for input from the municipality in whose jurisdiction the proposed mining project is located, is essential to promote intergovernmental collaboration in the mining context.

Chapter 4 discusses the legislative framework applicable to spatial planning and land use management. It describes the four functional areas of planning law and introduces the different planning instruments available to municipalities.

Chapters 5 examines the context within which each of the three municipalities operates. It introduces the provincial legislation and municipal by-laws that apply in each of the case-study areas. It also explains the role that mining plays in the three chosen municipalities.

Chapter 6 analyses municipal integrated development plans and spatial development plans as instruments of municipal planning. It focuses specifically on how these instruments provide for mining activities in the three case-study municipalities.

In Chapter 7 the land use schemes and rezoning procedures of the three selected municipalities are scrutinised. It investigates how these municipalities address mining activities in their respective land use schemes. The chapter also focuses on rezoning application procedures, where proposed mining activities necessitates rezoning of the land.

Chapter 8 summarises the findings of the thesis and provides concluding remarks and recommendations. It focuses on possible policy reform or procedural changes. Suggestions are made for how application processes can be streamlined to eliminate costly and time-consuming duplications.

Chapter 2: Co-operative Government and Constitutional Powers

1. Introduction

The structure of government fundamentally changed with the advent of the new constitutional dispensation.[65] Prior to 1994, governmental power was structured hierarchically with the lower levels subordinate to the national tier.[66] The three

[65] The change was brought about with the implementation of the Interim Constitution of 1993 (Constitution of the Republic of South Africa Act 200 of 1993, which commenced on 27 April 1994) and the Final Constitution of 1996 (Constitution of the Republic of South Africa, 1996, which commenced on 4 February 1997). *City of Cape Town v Robertson* 2005 2 SA 323 (CC) para 60; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 26, 38; *CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality* 2007 4 SA 276 (SCA) para 37; Du Plessis L "Interpretation of Statutes and the Constitution" in *Bill of Rights Compendium* (RS 30 2014) 2C5 as quoted in *Swartland Municipality v Louw NO and Others* 2010 (5) SA 314 (WCC) para 26; Woolman S & Roux T "Co-operative Government & Intergovernmental Relations" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa 1* 2 ed (RS 1 2009) 14-1; Glazewski & Rumble "Administration and Governance" in *Environmental Law* 6-3; Van Wyk J *Planning Law* 2 ed (2012) 142-143.

[66] *City of Cape Town v Robertson* 2005 2 SA 323 (CC) para 60; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 26, 38; *CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality* 2007 4 SA 276 (SCA) para 37; Du Plessis "Interpretation of Statutes" in *Compendium* 2C5 as quoted in *Swartland Municipality v Louw NO and Others* 2010 (5) SA 314 (WCC) para 26; Woolman & Roux "Co-operative Government" in *Constitutional Law 1*14-1; Glazewski & Rumble "Administration and Governance" in *Environmental Law* 6-3; Van Wyk *Planning Law* 142-143.

spheres[67] of government (national, provincial and local) are now autonomous[68] and distinctive.[69] However, they are also interdependent and interrelated.[70]

Each sphere is required to co-operate with the others to provide an effective government system whereby the constitutional values[71] are upheld.[72] Power struggles and disputes between government departments are likely to arise where jurisdictional areas overlap.[73] Such jurisdictional overlap often occurs in the context of mining in

[67] The Constitution's references (see e.g. ss 40-44) to "spheres" stands in contrast to the term "tiers" used in the pre-constitutional era. The new terminology supports the notion that the three spheres are no longer structured hierarchically. See e.g. Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-7; Levy N & Tapscott C "Intergovernmental Relations in South Africa: The Challenges of Co-operative Government" in Levy N and Tapscott C (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 1 5; De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 66; De Villiers B & Sindane J *Cooperative Government: The Oil of the Engine* (2011) 4. However, some argue that the spheres are equal only in name and that this equality has not translated in practice. See, e.g. Schmidt D "From Spheres to Tiers - Conceptions of Local Government in South Africa in the Period 1994-2006" in Van Donk M, et al. (eds) *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008) 109 109-129; Bekink B *Principles of South African Local Government Law* (2006) 13.

[68] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 (CC) para 46; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 43, 50. The Constitutional Court specifically addressed the issue of local government's autonomy in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 373 and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 26, 38, 126, 128.

[69] Constitution, s 40(1). See also *Minister of Defence and Military Veterans v Thomas* 2016 1 SA 103 (CC) para 14; *Yellow Star Properties 1020 (Pty) Ltd v Department of Development Planning and Local Government (Gauteng)* 2009 3 SA 577 (SCA) paras 27-28; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55; and *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) para 50; Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7; De Visser *Developmental Local Government* 214-215; Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14.9.

[70] Constitution, s 40(1). See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 43 - 44.

[71] These values are set out in s 1 of the Constitution:

> "(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[72] Constitution, s 41(1). See in general Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-7.

[73] Watts RL "Intergovernmental Relations: Conceptual Issues" in Levy N and Tapscott C (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 22 37.

South Africa.[74] This is due to the different functional areas allocated by the Constitution to different spheres of government.

This chapter examines the co-operation between the spheres of government responsible for the regulation of mining and land use for mining activities. An analysis of the extent and content of the powers allocated to the various spheres of government depends on how co-operative government is conceptualised, especially in the context of land use for mining purposes. This chapter provides a brief background to the constitutional allocation of legislative and executive powers to the three spheres of government in South Africa. It focuses on the functional areas of mineral law and municipal planning, specifically land use planning and zoning of land. The purpose of this chapter is to describe and contextualise the legal framework for co-operative government in the context of land use planning for mining purposes. The discussion is limited to South Africa and does not interrogate the development of jurisprudence pertaining to co-operative government and intergovernmental relations in other jurisdictions. First, certain constitutional values pertinent to this study are mentioned.

2. Constitutional Values and Principles

The Constitution sets out certain foundational values and principles.[75] These include the rule of law,[76] just administrative action,[77] transparency,[78] accountability,[79] and efficiency.[80] A detailed discussion of all of these values and principles falls outside the scope of this study. This discussion gives a brief overview of the principles that may find application where the regulation of mineral extraction and land use overlap, with

[74] See e.g. *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 43 where the Constitutional Court confirmed that this overlapping is inevitable because mining activities are carried out on land.

[75] For example, human dignity, equality, promotion of human rights, non-racialism, non-sexism, constitutional supremacy, rule of law, democracy, accountability, responsiveness, openness, separation of powers, co-operative government, checks and balances, etc. See, for example, ss 1, 2, 7-41, 43, 85, 125, 165. A detailed examination of all the values and principles referred to in the Constitution falls outside the scope of this study. Only the values and principles relevant to this research are briefly discussed in this chapter. For a more detailed discussion, see Chapters 10-16 in Woolman S and Bishop M (eds) *Constitutional Law of South Africa 1* 2 ed (RS 6 2014); Currie I & De Waal J *The New Constitutional & Administrative Law I* (2002) 72-124.

[76] Constitution, s 1(c).

[77] Constitution, s 33.

[78] Constitution, ss 41(1)(c), 57(1)(b), 70(1)(b), 116(1)(b), 195(1)(g), 215(1).

[79] Constitution, ss 41(1)(c), 55(2)(a), 57(1)(b), 70(1)(b), 92, 93(2), 114(2)(a), 116(1)(b), 133, 152(1)(a), 181(5), 195(1)(f), 215(1).

[80] Constitution, ss 33(3)(c), 195(1)(b), 214(2)(e).

the sole purpose of contextualising the main focus of the thesis, which is co-operative governance. It is acknowledged that the discussion of the other constitutional values and principles must necessarily remain superficial.

The principle of the rule of law means that the state can only derive its power from the law.[81] No organ of state can exercise powers without being legally authorised to do so, either by the Constitution or constitutionally valid legislation.[82] Therefore, only the duly authorised organs of state can grant mining rights or rezoning applications respectively.[83] The rule of law prohibits the exercise of public power in an arbitrary manner.[84] This implies that there must be a rational relation between the purpose of specific government powers on the one hand and legislation or decisions by officials on the other.[85] Vague legislative provisions also violate the principle of the rule of law.[86]

[81] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 1 SA 343 (CC) para 68; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 20; *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) para 32; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 56; Currie I & De Waal J *The New Constitutional & Administrative Law I* (2002) 78.

[82] Constitution, ss 1(c) and 2; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 58; *Speaker of the National Assembly v De Lille* 1999 4 SA 863 (SCA) para 14*; Sonderup v Tondelli* 2001 1 SA 1171 (CC) para 27; *Mazibuko NO v Sisulu and Others NNO* 2013 6 SA 249 (CC) paras 146-147; *Lekota v Speaker, National Assembly* 2015 4 SA 133 (WCC) para 20; Currie & De Waal *Constitutional & Administrative Law I* 78.

[83] See Section 5 below for a discussion of the constitutional allocation of powers in these contexts.

[84] *Prinsloo v Van der Linde and Another* 1997 3 SA 1012 (CC) para 25; *New National Party v Government of the Republic of South Africa* 1999 3 SA 191 (CC) para 24; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 85; *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 1 SA 495 (CC) para 55; *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) para 32; *Weare and Another v Ndebele NO and Others* 2009 1 SA 600 (CC) para 46; *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development* 2013 2 SA 583 (GSJ) para 39; Currie & De Waal *Constitutional & Administrative Law I* 79.

[85] *S v Makwanyane* 1995 3 SA 391 (CC) at para 156; *Prinsloo v Van der Linde and Another* 1997 3 SA 1012 (CC) para 25; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 85; *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) paras 74, 77; *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC) para 65; *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 3 SA 486 (SCA) para 29; Currie & De Waal *Constitutional & Administrative Law I* 79-80.

[86] *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 108; *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 2 SA 181 (CC) paras 47 and 100; *Kruger v President of Republic of South Africa* 2009 1 SA 417 (CC) para 67; *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* 2009 1 SA 565 (CC) para 27; *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 46; *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 4 SA 71 (SCA) para 35; Currie & De Waal *Constitutional & Administrative Law I* 80.

The rule of law is closely related to the constitutional mandate of just administrative action.[87] The Constitution prescribes 'lawful, reasonable and procedurally fair' administrative action.[88] Delineating the meaning of 'administrative action' for purposes of the Constitution has proven extremely difficult.[89] The Promotion of Administrative Justice Act (PAJA)[90] was enacted to give effect to the constitutional right to just administrative action.[91] PAJA provides a very complex definition of 'administrative action', thereby complicating the issue even further.[92] For current purposes, it is sufficient to state that actions that amount to the implementation of legislation are administrative actions, while the formulation of policy is not.[93] Therefore, administrative action includes the granting of a mining right or the approval of an application to rezone land.[94]

Organs of state must also adhere to the constitutional principles of transparency and accountability.[95] These principles require organs of state to explain and justify their laws and actions.[96] Accountability is not limited to the relationship between the state

[87] Klaaren J & Penfold G "Just Administrative Action" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa 1* 2 ed (RS 6 2014) 63-1 – 63-2; Currie & De Waal *Constitutional & Administrative Law I* 11-12.
[88] Constitution, s 33(1).
[89] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 720; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 143; Klaaren & Penfold "Just Administrative Action" in *Constitutional Law 1* 63-20 – 63-23; Currie & De Waal *Constitutional & Administrative Law I* 93. The Constitutional Court attempted to give meaning to the concept of administrative action by explaining what it is not. It determined that it does not include legislative, executive and judicial action. See, for example, *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 33-34; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) paras 141-142 and *Nel v Le Roux* 1996 3 SA 562 (CC) para 24. For a discussion of the concept of administrative action, see Hoexter C *Administrative Law in South Africa* 2 ed (2012) 162–222; De Ville J *Judicial Review of Administrative Action in South Africa* (2005) 35–87; Currie I *The Promotion of Administrative Justice Act: A Commentary* 2 ed (2007) 42–91; Currie I & Klaaren J *The Promotion of Administrative Justice Act Benchbook* (2001) 34–86; Burns Y & Beukes M *Administrative Law under the 1996 Constitution* 3 ed (2006) 107–149.
[90] Act 3 of 2000.
[91] Klaaren & Penfold "Just Administrative Action" in *Constitutional Law 1* 63-5, 63-10. See also *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 83, addressing a similar constitutional provision relating to the right of access to information (Constitution, s 32).
[92] PAJA, s 1. See also Klaaren & Penfold "Just Administrative Action" in *Constitutional Law 1* 63-21 – 63-22.
[93] *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) paras 142-143.
[94] See definition of 'decision' in PAJA, s 1.
[95] Constitution, ss 1(d) and 41(1)(c).
[96] *Ferreira v Levin; Vryenhoek v Powell NO and Others* 1996 1 SA 984 (CC) para 51; Currie & De Waal *Constitutional & Administrative Law I* 89; Mureinik E "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31 32.

and the public – it extends to branches of government being accountable to each other.[97] This is done through checks and balances.[98]

The principles of transparency and accountability often stand in contrast to the principle of efficiency.[99] Both the Constitution and PAJA refers to the need to promote an efficient administration.[100] To ensure efficiency, organs of state should attempt to reduce administrative burdens and promote cost-effective, speedy and simple procedures.[101] However, these goals need not (and should not) be regarded as antitheses of the principles of transparency and accountability.[102] Rather, efficiency should be an integral part of achieving these principles.[103]

A further constitutional principle relevant to this study is co-operative government. This principle is central to the core argument of this thesis and hence forms the focus of the remainder of this chapter.

3. Overlapping of Government Functions

On various occasions, the Courts have stressed the overlapping functional areas of the spheres of government, pointing out that complete compartmentalisation of these functions is impossible.[104] Nonetheless, the functions remain separate and distinct from

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[97] Currie & De Waal *Constitutional & Administrative Law I* 90.

[98] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 111-112; De Lange v Smuts NO and Others 1998 3 SA 785 (CC) paras 60-61; Currie & De Waal Constitutional & Administrative Law I 95; Seedorf S & Sibanda S "Separation of Powers" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 1 2 ed (RS 6 2014) 12-19, 12-45 – 12-49.

[99] *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) para 41; Klaaren & Penfold "Just Administrative Action" in *Constitutional Law 1* 63-5; Hoexter *Administrative Law* 246-247.

[100] Constitution, ss 33(3)(c), 195(1)(b), 214(2)(e); Preamble to PAJA; PAJA, ss 2(1)(b), 3(4)(b)(v), 4(4)(b)(v) 5(4)(b)(vi), 5(6)(a).

[101] Klaaren J "Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information" (1997) 13 *South African Journal on Human Rights* 549 561; Klaaren & Penfold "Just Administrative Action" in *Constitutional Law 1* 63-13.

[102] Klaaren J "Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information" (1997) 13 *South African Journal on Human Rights* 549 561; Hoexter *Administrative Law* 246-247.

[103] Hoexter *Administrative Law* 246 quoting Corder H "Introduction: Administrative Law Reform" in Bennett TW et al (eds) *Administrative Law Reform* (1993) 1 14.

[104] See e.g. *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 128; *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 47; *Le Sueur v eThekwini Municipality* (9714/11) 2013 ZAKZPHC 6 (30 January 2013) para 20; *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 61.

one another.[105] The different, often overlapping, powers of the various spheres of government reveal the importance of intergovernmental co-operation.

To illustrate the importance of co-operative government where the functions of municipal planning and mining overlap, it is useful to look at practical examples from case law. The contest for jurisdictional supremacy in the context of mining and land use was the issue of litigation in two high-profile cases.[106]

The first case is *Maccsand (Pty) Ltd v City of Cape Town.*[107] In 2007, the then Minister of Minerals and Energy[108] issued a mining permit[109] to Maccsand (Pty) Ltd (hereinafter referred to as "Maccsand") to mine sand on the Rocklands dune in Mitchell's Plain, Cape Town. In 2008, Maccsand obtained a mining right[110] to mine sand on the nearby

[105] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 128; *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 47; *Le Sueur v eThekwini Municipality* (9714/11) 2013 ZAKZPHC 6 (30 January 2013) para 20; *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 61.

[106] A third case dealing with mining and municipal zoning was heard by the KwaZulu-Natal High Court. In *Mtunzini Conservancy v Tronox KZN Sands (Pty) Ltd* 2013 4 BCLR 467 (KZD), the Court took great pains to distinguish the present facts from those in *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC). (See *Mtunzini* paras 68-74; Dale MO, Bekker L, Bashall FJ, Chaskalson M, Dixon C, Grobler GL, Loxton CDA & Gildenhuys J *South African Mineral and Petroleum Law* (RS 24 2018) MPRDA-201 – MPRDA-202.) The *Mtunzini*-case concerned the application of the Minerals Act 50 of 1991, while the Mineral and Petroleum Resources Development Act (MPRDA) was applicable in *Maccsand (CC)*. The Court held that, in 1998, when Tronox obtained its mining authorisation, such authorisations were exclusively subject to the Minerals Act. (See *Mtunzini* paras 12, 31-34 and 72.) No further consents or authorisations were required to commence mining activities. This contrasts with the provisions in s 23(6) of the MPRDA, which states that mining rights are also subject to "any relevant law". In *Maccsand (CC)*, the Court interpreted this to include land use planning legislation. (See *Maccsand* (CC) paras 44-45.) A further distinction between the two cases, according to the *Mtunzini* judgment, relates to the zoning of the land in question. In *Maccsand (CC)* the land was already zoned before mining authorisations were granted. In *Mtunzini*, the mining properties fell outside the municipal zoning area. (See *Mtunzini* paras 73-74.) Humby found the distinctions drawn in the *Mtunzini* judgment unconvincing. (See Humby T "Revisiting Mining and Municipal Planning: *Mtunzini Conservancy v Tronox KZN Sands Ltd*" (2013) 29 *South African Journal on Human Rights* 651.) She criticised the *Mtunzini* judgment, pointing out that the judgment misinterprets the implications of *Maccsand (CC)*. (Humby (2013) *South African Journal on Human Rights* 659-662.) Humby argues that, had the *Mtunzini* judgment placed proper focus on the relationship between national and local government where the function of municipal planning is concerned, the Court would not have found that the municipality's power was subservient to the Minerals Act. (Humby (2013) *South African Journal on Human Rights* 662.)

[107] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC).

[108] On 7 July 2009 the Department of Minerals and Energy was divided into the current Department of Mineral Resources and the Department of Energy respectively.

[109] The definition of "mining permit" in s 1, read with s 27(1)(a) of the MPRDA, states that mining permits are granted for a limited period of two years and an area not exceeding five hectares. Section 27(8)(a) provides for the extension of a mining permit – it may be renewed only thrice, each renewal being for a period of one year.

[110] In terms of the definition of "mining right" in s 1, read with s 23(6) of the MPRDA, mining rights are granted for a maximum period of 30 years, with no limitation as to the size of the area to which it can apply. A mining right may be renewed in terms of s 24(4) for 30-year periods at a time.

Westridge dune. Both dunes are situated in a residential area near schools and private residences. The Rocklands dune was zoned as public open space in terms of the City of Cape Town's land use scheme. The Westridge dune consisted of three erven. Two of the erven were zoned as public open spaces, and the other was zoned as rural. None of these zoning designations allowed mining as a permitted land use. The City of Cape Town Municipality was the registered owner of all four pieces of land in question.[111] In 2009, Maccsand commenced mining operations on the dunes in contravention of the municipality's land use scheme. This prompted the municipality to apply to the Western Cape High Court[112] for an interdict prohibiting the company from mining until the land was appropriately zoned in terms of the Land Use Planning Ordinance 15 of 1985 (LUPO).[113] The High Court granted the interdict.[114] On appeal by Maccsand, the High Court's decision was confirmed by both the Supreme Court of Appeal[115] and the Constitutional Court.[116] The Constitutional Court stated that the Minister of Mineral Resources can issue a mining right,[117] but the exercising of that right by its holder is subject to the local authority's proper zoning[118] of the land on which mining is to be undertaken.[119]

[111] The facts of this matter are discussed in *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) paras 20-22; *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) paras 2-3; and *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) 66H. For a discussion of the *Maccsand* cases, see Humby (2012) *Southern African Public Law*; Olivier et al (2012) *Potchefstroom Electronic Law Journal*; Humby T "*Maccsand* in the Constitutional Court: Dodging the NEMA issue [*Discussion of Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC)]" (2013) 24 *Stellenbosch Law Review* 55; Steytler N & De Visser J *Local Government Law of South Africa* (RS 10 2017) 5-24(4B) – 5(26); Bishop M & Brickhill J "Constitutional Law" (2012) *Annual Survey of South African Law* 116 128-129; Kidd M "Environmental Law" 306 306-310; Dale MO "Mining Law" 865 877-881; Van Wyk J & Steyn PJ *Planning Law Casebook* (2015) 66-70; Van Wyk (2012) *Potchefstroom Elec. L.J.* 298-301; Dale et al *South African Mineral and Petroleum Law* MPRDA-199 – MPRDA-207.

[112] *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC).

[113] On 1 July 2015 LUPO was repealed in the City of Cape Town by the Western Cape Land Use Planning Act. See Proc 9 in *Province of the Western Cape: Provincial Gazette* 7410 of 26-06-2015. On the same day, the City of Cape Town Municipal Planning By-Law, 2015 commenced in terms of Proc 11 in *Province of the Western Cape: Provincial Gazette Extraordinary* 7413 of 29-06-2015. For a discussion of these pieces of legislation, see Section 2.2 of Chapter 5 below.

[114] *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) paras 82B-H.

[115] *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA).

[116] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC).

[117] In terms of the provisions of the MPRDA. The same applies to mining permits, prospecting rights and all other rights described in the MPRDA.

[118] Or the necessary departure from the zoning scheme regulations.

[119] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) paras 48, 51. See also *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC) para 12.

The Constitutional Court heard the *Maccsand*-case together with a similar case, *Minister for Mineral Resources v Swartland Municipality*.[120] In this case, Elsana Quarry (Pty) Ltd (hereinafter referred to as "Elsana") obtained a mining right in February 2009 to mine granite on the farm, Lange Kloof, situated close to Malmesbury in the Western Cape province. Eight months prior to the issuing of the mining right by the then Minister of Minerals and Energy,[121] Elsana applied to the Swartland Municipality to have the farm rezoned from Agricultural I to Industrial III to allow for mining activities. However, before the rezoning application was determined by the municipality, Elsana withdrew the application based on advice received from the then Department of Minerals and Energy. This department advised that, as representative of national government, it had the exclusive competence to grant mining rights and regulate mining activities. Therefore, the Department of Minerals and Energy argued that the exercise of a mining right is not subject to the requirements of municipal zoning regulations and rezoning of the land was unnecessary. The municipality disagreed with this assessment. It contended that, regardless of any mining rights being issued in respect of the farm, mining is prohibited until the farm is zoned as Industrial III.[122] The municipality successfully obtained an interdict from the Western Cape High Court prohibiting mining activities on the farm until the land has been appropriately zoned.[123] The Supreme Court of Appeal rejected the Minister's appeal against the High Court decision.[124] The Constitutional Court, agreeing with the judgment of the Supreme Court of Appeal, held that mining activities can only commence on a piece of land if the relevant zoning scheme allows it.[125]

As was evident in the *Maccsand* and *Swartland Municipality* cases, overlapping of functions of different spheres of government often occurs in the context of mining.[126]

[120] *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC).
[121] On 7 July 2009 the Department of Minerals and Energy was divided into the current Department of Mineral Resources and the Department of Energy respectively.
[122] The facts of this matter are discussed in *Swartland Municipality v Louw NO* 2010 5 SA 314 (WCC) paras 7-8; *Louw NO v Swartland Municipality* 2011 ZASCA 142 paras 2-7; and *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC) paras 3-6.
[123] *Swartland Municipality v Louw NO* 2010 5 SA 314 (WCC) para 46.
[124] *Louw NO v Swartland Municipality* 2011 ZASCA 142 para 14.
[125] *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC) paras 12, 14.
[126] In *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 43, the Constitutional Court confirmed that this overlapping is inevitable, because mining activities are carried out on land.

For example, the Minister of Mineral Resources can issue a mining right,[127] but the exercising of that right is subject to the local authority's proper zoning[128] of the land on which mining is to be undertaken.[129] The local authority will, therefore, have the right to interdict mining activities on a piece of land until the right holder complies with the zoning scheme regulations applicable to the land.

The importance of co-operative government and intergovernmental relations is evident in the processes involved before mining activities can commence on a piece of land. The current lack of co-operation is equally evident in these cases.[130] Co-operation is essential between the various government departments. Without the co-operation of these role players, mining activities cannot commence.

4. Concepts of Co-operative Government and Intergovernmental Relations

The concepts of "co-operative government" and "intergovernmental relations" are relatively new additions to the South African political landscape.[131] As these concepts are entrenched in the Constitution,[132] they are developing more rapidly.[133]

[127] In terms of the provisions of the MPRDA. The same applies to prospecting rights, mining permits and all other rights described in the MPRDA.
[128] Or the necessary departure from the zoning scheme regulations.
[129] See in general *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) and *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC).
[130] See also Section 8 below.
[131] Prior to 1994, these terms were largely unknown, as all major decisions were made at national level. De Villiers B "Intergovernmental Relations in South Africa" (1997) 12 *SA Public Law* 197 197-198; Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-1; Levy & Tapscott "Challenges of Co-operative Government" in *Intergovernmental Relations* 1. See Section 5 below for a more detailed discussion of the structure of government.
[132] Chapter 3 of the Constitution sets out principles for the promotion of co-operative government. In terms of ss 40 and 41 of the Constitution all spheres are obliged to adhere to these principles. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 287 – 288; *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 40.
[133] Layman T *Intergovernmental Relations and Service Delivery in South Africa: A Ten Year Review* (08-2003) 12-20; Malan L "Intergovernmental Relations and Co-operative Government in South Africa: The Ten-Year Review" (2005) 24 *Politeia* 226 226, 228. For a discussion of co-operative government and the final constitution, see Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-5 – 14-22; De Villiers & Sindane *Oil of the Engine* 4. For a discussion of intergovernmental relations during the Interim Constitution, see De Villiers (1997) *SA Public Law*.

Co-operative government and intergovernmental relations are conceptually different.[134] Co-operative government is the "philosophy"[135] of a partnership-driven government and includes the decentralisation of power.[136] It entails a partnership between the spheres of government, each fulfilling a specific role.[137] The principles associated with this partnership-driven government include national unity; proper co-operation and co-ordination between the spheres of government; effective and coherent government; respect for the constitutional status, powers and functions of other spheres of government; and avoiding conflict.[138] Section 5 below discusses these principles in more detail.

[134] Malan (2005) *Politeia* 330; Edwards T "Cooperative Governance in South Africa, with Specific Reference to the Challenges of Intergovernmental Relations" (2008) 27 *Politeia* 65 67.

[135] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 469; *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 40.

[136] Du Plessis "Interpretation of Statutes" in *Compendium* para 2C5; Currie I & De Waal J *The New Constitutional & Administrative Law I* (2002) 121; Malan (2005) *Politeia* 229-230. Scholars compare this partnership-driven government to co-operative federalism (or integrated federalism), as opposed to competitive federalism (or divided federalism). See, for example, Currie & De Waal *Constitutional & Administrative Law I* 119-121; De Visser *Developmental Local Government* 81-82. The classification of South Africa's new governmental system in reference to a federal or unitary state was very controversial. A discussion of this debate falls outside the scope of this study. See, in general, Watts RL "Is the New South African Constitution Federal or Unitary?" in De Villiers B (ed) *Birth of a Constitution* (1994) 75; Haysom N "The Origins of Co-operative Governance: The 'Federal' Debates in the Constitution-Making Process" in Levy N and Tapscott C (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Goverment* (2001) 43; Murray C & Simeon R "Promises Unmet: Multi-level Government in South Africa" in Saxena R (ed) *Varieties of Federal Governance: Major Contemporary Models* (2012) 232 234-236; Steytler N "The Constitutional Court of South Africa: Reinforcing an Hourglass System of Multi-Level Government" in Aroney N and Kincaid J (eds) *Courts in Federal Countries: Federalists or Unitarists?* (2017) 328 329-332; Schwella E "Federalism in South Africa: A Complex Context and Continued Challenges " in Bühler H, et al. (eds) *Federalism - A Success Story? : International Munich Federalism Days 2016* (2016) 73 73-100; Currie & De Waal *Constitutional & Administrative Law I* 119-121; De Villiers (1997) *SA Public Law* 197-201.

[137] Du Plessis "Interpretation of Statutes" in *Compendium* para 2C5; Currie & De Waal *Constitutional & Administrative Law I* 121; Malan (2005) *Politeia* 229-230.

[138] Constitution, s 41(1) lists eight duties of the three spheres to promote co-operative government. These are to:

> "(a) preserve the peace, national unity and the indivisibility of the Republic;
> (b) secure the well-being of the people of the Republic;
> (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
> (d) be loyal to the Constitution, the Republic and its people;
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
> (f) not assume any power or function except those conferred on them in terms of the Constitution;
> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
> (h) co-operate with one another in mutual trust and good faith by—
> (i) fostering friendly relations;
> (ii) assisting and supporting one another;

While co-operative government is described as a philosophy, intergovernmental relations is a mechanism. The term intergovernmental relations refers to a mechanism for achieving the values of co-operative government through institutional and statutory structures.[139] This can be achieved through programme reporting requirements, planning and budget processes and effective communication between the various spheres of government.[140] Fundamentally, intergovernmental relations, therefore, relate to the relationship between the different spheres and departments of government.[141] Intergovernmental relations have vertical and horizontal dimensions.[142] The vertical dimension operates between authorities in different spheres, e.g. between the Department of Mineral Resources and local municipalities. The horizontal dimension relates to relations between departments or authorities in the same sphere, e.g. between the national Department of Mineral Resources and the Department of Rural Development and Land Reform.

By allocating overlapping or concurrent[143] powers to the three spheres of government, the Constitution requires the spheres to co-operate with one another, rather than compete for authority.[144] The Constitutional Court stressed that "intergovernmental co-

(iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another."

For a discussion of these principles, see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 287-292, 469-470; Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-14 – 14-20; Currie & De Waal *Constitutional & Administrative Law I* 122-124; Simeon R & Murray C "Multi-Sphere Governance in South Africa: An Interim Assessment" (2001) 31 *Publius* 65 71–72; Malan (2005) *Politeia* 230.

[139] Malan (2005) *Politeia* 230; Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 12; Powell DM "South Africa's Three-Sphere System: The Challenges for Governance" in Levy N and Tapscott C (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 254 255.

[140] Malan (2005) *Politeia* 228.

[141] Department of Provincial and Local Government *Practitioner's Guide to Intergovernmental Relations in South Africa* (2007) 1; Watts "Conceptual Issues" in *Intergovernmental Relations* 22.

[142] Watts "Conceptual Issues" in *Intergovernmental Relations* 26; Levy N & Tapscott C "Intergovernmental Relations in South Africa: The Challenges of Co-operative Government" in Levy N and Tapscott C (eds) 1 17-18; Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14.7; Van Wyk *Planning Law* 144; De Visser *Developmental Local Government* 218-232.

[143] Steytler N & Fessha YT "Defining Local Government Powers and Functions" (2007) 124 *South African Law Journal* 320 320-321 notes the distinction between "overlap" and "concurrent". Concurrent powers exist where the Constitution allocates the same powers over the same functional areas to two or more spheres of government. See discussion in Section 5 below. Conversely, overlapping powers can exist where different spheres or departments have powers over different aspects of the same issue.

[144] Constitution, s 41(1)(h); Currie & De Waal *Constitutional & Administrative Law I* 119-120.

operation is implicit in any system where powers have been allocated concurrently".[145] The different spheres and government departments must co-ordinate legislation and the execution thereof to ensure an effective government.[146] The Constitution sets out certain parameters for the promotion of co-operative government between the three spheres of government.[147] Each sphere of government is mandated to respect the status of and the powers allocated to every other sphere.[148] They cannot encroach on each other's functional areas[149] and must co-operate with one another in mutual trust and good faith.[150] Their actions and legislation have to be co-ordinated to assist and support one another to provide an effective government.[151]

The Constitution obliges government departments to inform and consult each other on matters of common interest.[152] In *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd*[153] the following definition was given for consultation:

> "The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice."[154]

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[145] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 290.

[146] Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7; Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14.9; De Visser *Developmental Local Government* 214.

[147] Constitution, Chapter 3. See also Watts "Conceptual Issues" in *Intergovernmental Relations* 39.

[148] Constitution, s 41(1)(e). See also Malherbe R "Does the Intergovernmental Relations Framework Act 13 of 2005 Confirm or Suppress National Dominance?" (2006) 4 *Journal of South African Law* 810 812-813.

[149] Constitution, s 41(1)(f) and (g). See also *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) para 58; *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development* 1999 11 BCLR 1229 (C) para 122; Humby (2012) *Southern African Public Law* 631, 633, 635; Malherbe (2006) *Journal of South African Law* 813.

[150] Constitution, s 41(1)(h). See also *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 47.

[151] Constitution, ss 41(1)(c), 41(1)(h)(ii) and (iv).

[152] Constitution, s 41(1)(h)(iii). See also *Uthukela District Municipality v The President of the Republic of South Africa* 2003 1 SA 678 (CC) para 19; Du Plessis "Interpretation of Statutes" in *Compendium* para 2C5; Steytler & De Visser *Local Government Law of South Africa* 16-13.

[153] *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* 1972 1 All ER 280

[154] *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* 1972 1 All ER 280 para 284E. This dictum has been approved on several occasions, for example *Maqoma v Sebe NO* 1987 1 SA 483 (CK) para 491E; *Hayes v Minister of Housing, Planning and Administration, Western Cape* 1999 4 SA 1229 (C) para 1242A-B; *Robertson v City of Cape Town; Truman-Baker v City of Cape Town* 2004 5 SA 412 (C) para 108; *Tlouamma v Mbethe, Speaker of the National Assembly of the Parliament of the Republic of South Africa* 2016 1 SA 534 (WCC) para 92.

Consultation should not be regarded as an end in itself, to be approached as a box-ticking exercise.[155] Instead, other departments or spheres of government should be invited to comment, and there should be sufficient opportunity for them to formulate and present their input.[156] Such input should be given due consideration in good faith.[157]

The constitutional requirement of co-operative government does not dilute the independent standing and powers of the three spheres of government.[158] However, Chapter 3 of the Constitution, dealing with co-operative government, precedes the sections dealing with the allocation of legislative and executive powers to the spheres of government.[159] Therefore, it is necessary to read and interpret the allocation of powers in the context of co-operative government.[160]

5. Constitutional Allocation of Powers

The Constitution divides legislative and executive powers between the national, provincial and local spheres of government according to specific functional areas.[161] Legislative power is the competence to enact legal rules whereas executive power involves the competence to implement these rules.[162] The Constitution confers concurrent legislative authority to the national and provincial governments in respect of issues listed in Schedule 4 of the Constitution. Matters listed in Schedule 5 of the Constitution are assigned to the exclusive legislative competence of provincial government. All other functional areas which have not been listed in either Schedule 4 or 5 are allocated to the exclusive legislative competence of national government. The following three sections describe the allocation of legislative and executive functions

[155] Steytler & De Visser *Local Government Law of South Africa* 16-13.
[156] *Hayes v Minister of Housing, Planning and Administration, Western Cape* 1999 4 SA 1229 (C) para 1242A-B; Steytler & De Visser *Local Government Law of South Africa* 16-13 – 16-14; Laubscher N, Hoffman L, Drewes E & Nysschen J *SPLUMA: A Practical Guide* (2016) 85-87.
[157] Steytler & De Visser *Local Government Law of South Africa* 16-13 – 16-14; Laubscher et al *SPLUMA: A Practical Guide* 85-87.
[158] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 292; Malherbe (2006) *Journal of South African Law* 812-813; Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-14.
[159] Constitution, Chapters 4-7.
[160] *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 41. See also Currie & De Waal *Constitutional & Administrative Law I* 132.
[161] Constitution, s 40.
[162] Burns Y & Beukes M *Administrative Law Under the 1996 Constitution* 3 ed (2006) 41; Currie & De Waal *Constitutional & Administrative Law I* 130, 228-229.

to the national, provincial and local spheres of government respectively, and specifically focuses on the functional areas of mining and planning.

5.1 Powers of National Government

The legislative authority of the national sphere of government vests in Parliament.[163] This legislative authority confers on the national assembly[164] the power to amend the Constitution,[165] to pass legislation on any matter within its exclusive or concurrent competence[166] and to assign legislative power to the other spheres of government.[167] The Constitution does not contain an itemised list of exclusive legislative competences of the national government. Instead, these exclusive competences must be inferred by excluding all functions expressly assigned to the concurrent or exclusive competence of provincial and local government.[168] National government also has certain concurrent competences, which are shared with provincial government.[169] Regulation of mining is not listed as a concurrent or exclusive competence of provincial or local government. Therefore, it falls under the exclusive legislative competence of national government.[170] In the context of planning law, both "regional planning and development", and "urban and rural development" fall under the concurrent legislative competence of national and provincial governments.[171]

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[163] Constitution, s 43(a) read with s 44. Parliament consists of the national assembly and the national council of provinces (see Constitution, s 42(1)). See Currie & De Waal *Constitutional & Administrative Law I* 133-155; Budlender S *National Legislative Authority* 2 ed (2008) 17.1, 17.2, 17.4 for a discussion Parliament's composition, functions and procedures.

[164] In terms of s 42(3) of the Constitution, the national assembly consists of elected officials to represent the people of South Africa. The national assembly ensures government by the people in that it is a national forum where issues are considered publicly, legislation is passed and executive functions can be overseen.

[165] Constitution, s 44(1)(a)(i).

[166] Constitution, s 44(1)(a)(ii).

[167] Constitution, s 44(1)(a)(iii).

[168] This is often referred to as "residual competence". See e.g. *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) paras 71H-72B; *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 46; *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature* 2011 6 SA 396 (CC) para 58; Glazewski & Rumble "Administration and Governance" in *Environmental Law* 6-10; Bronstein "Legislative Competence" in *Constitutional Law 1*15-9.

[169] Constitution, Parts A and B of Sch 4.

[170] *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) para 14; Glazewski & Plit "Mineral and Petroleum Resources" in *Environmental Law* 17-20.

[171] Constitution, Part A of Sch 4. See also *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 54. Under the Interim Constitution (Sch 6) the functional areas of "regional planning and development" and "urban and rural development" fell under provincial legislative competence. See *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) for a discussion of these functional areas in the

The national government's executive competence vests in the President.[172] He exercises this authority, together with the other members of the Cabinet,[173] by implementing national legislation and policy, and co-ordinating the functions of state departments.[174] The Minister of Mineral Resources, a member of the Cabinet, is authorised to grant rights to extract minerals in accordance with the provisions of the Mineral and Petroleum Resources Development Act (MPRDA).[175] The Minister of Rural Development and Land Reform is responsible for spatial planning and land use management.[176] The purpose of this department of national government is to develop policy standards and provide support for the implementation of spatial planning and land use management legislation in South Africa.[177]

5.2 Powers of Provincial Government

A provincial government's legislative authority vests in its provincial legislature.[178] The provincial legislature is empowered to enact legislation relating to any matter within its exclusive[179] or concurrent[180] legislative competence or any matter outside the listed functional areas that national legislation expressly assigns to the province.[181]

context of the Interim Constitution. The 1996 Constitution refers to four functional areas directly relating to planning, namely, "regional planning and development"; "urban and rural development"; "provincial planning"; and "municipal planning". These different planning functions are discussed in more detail in Section 2 of Chapter 4 below.

[172] Constitution, s 85(1).

[173] The Cabinet comprises the President, Deputy President and Ministers appointed by the President in accordance with the provisions of s 91 of the Constitution.

[174] Constitution, s 85(2).

[175] Act 28 of 2002, s 3(2).

[176] Department of Rural Development and Land Reform "Spatial Planning and Land Use Management" (date unknown) *Department of Rural Development and Land Reform* <http://www.drdlr.gov.za/services/geo-spatial-services-technology-and-rural-disaster#.Wm3sgaiWbIU> (accessed 14-02-2018); Van Wyk *Planning Law* 149.

[177] Department of Rural Development and Land Reform "Spatial Planning and Land Use Management" *Department of Rural Development and Land Reform*.

[178] Constitution, s 104(1). See in general, Currie & De Waal *Constitutional & Administrative Law I* 199-201; Madlingozi T & Woolman S "Provincial Legislative Authority" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2005) 19-1 – 19-19.

[179] Any matter within a functional area listed in Sch 5 of the Constitution. See also *Swartland Municipality v Louw NO* 2010 5 SA 314 (WCC) para 30. National government may, in limited circumstances, intervene in matters within a provincial government's exclusive legislative competence. This may be the case when it is necessary to maintain national security, economic unity or essential national standards. For a full list of circumstances see Constitution, ss 44(2) and 146(2).

[180] Any matter within a functional area listed in Sch 4 of the Constitution. See also *Swartland Municipality v Louw NO* 2010 5 SA 314 (WCC) para 29; *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) paras 69I-71E.

[181] Constitution, s 104(1)(b), read with s 44(1)(a)(iii); *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature* 2011 6 SA 396 (CC) para 1.

Provincial governments have concurrent legislative competence with national government for the functional areas listed in Schedule 4 of the Constitution and enjoy exclusive legislative competence in respect of those functional areas listed in Schedule 5.[182] A provincial government may assign any of its legislative powers to a municipal council in that province.[183] In the context of planning, provincial government shares legislative authority with national government over "regional planning and development", and "urban and rural development".[184] However, it has exclusive legislative authority over "provincial planning".[185]

A provincial government's executive authority vests in the Premier of that province.[186] The Premier, together with the members of that province's executive council, exercises this authority by implementing national and provincial legislation and developing provincial policy.[187]

5.3 Powers of Local Government

Local government, consisting of municipalities,[188] enjoy a newfound autonomy and are no longer dependent on superior legislatures.[189] The Constitution does not specifically refer to local government's legislative competence, other than stating that this competence vests in the municipal council.[190] However, this competence[191] can be

[182] See in general Glazewski & Rumble "Administration and Governance" in *Environmental Law* 6-10.
[183] Constitution, s 104(1)(c).
[184] Constitution, Part A of Sch 4. See also *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 54. The different planning functions referred to in the Constitution are discussed in more detail in Section 2 of Chapter 4 below.
[185] Constitution, Part A of Sch 5. See also *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 54.
[186] Constitution, s 125(1).
[187] Constitution, s 125(2).
[188] Constitution, s 151(1). The Constitution (s 155(1)) provides for three categories of municipalities – Categories A, B and C. When read with the definitions in s 1 of the Local Government: Municipal Structures Act, these categories can be identified to describe a "metropolitan municipality" (Category A); a "local municipality" (Category B); and a "district municipality" (Category C).
[189] This was the case prior to 1994, before the Interim Constitution of the Republic of South Africa (Act 200 of 1993) commenced on 27 April 1994. *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC); Department of Constitutional Development *The White Paper on Local Government* (GN 423 in *GG* 18739 of 13-03-1998) s C para 1.1; Steytler & De Visser *Local Government Law of South Africa* 16-3; Bekink *Principles of South African Local Government Law* 9-14
[190] Constitution, s 43(c).
[191] The extent of a municipality's legislative competence is still unclear. Some argue that this competence is limited, while others call for a wider interpretation. On the one hand, for example, *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) para 28; *Swartbooi v Brink* 2006 (1) SA 203 (CC) para 15; Bronstein V "Mapping Legislative and Executive Powers over

inferred from the fact that municipalities can make by-laws relating to certain issues[192] for the effective administration of matters within its jurisdiction.[193] If a municipal by-law conflicts with national or provincial legislation, it is invalid.[194]

Local government has executive authority over, and the right to administer, local government matters listed in Part B of Schedules 4 and 5 of the Constitution as well as all other matters assigned to it by national or provincial legislation.[195] National and provincial governments must assign the administration of a matter to a local government if the matter would be more effectively administered locally and if the municipality has the necessary administrative capacity.[196] Local government has exclusive executive authority over "municipal planning".[197] The authority over and meaning and content of "municipal planning" have been the subject of several court

'Municipal Planning': Exploring the Boundaries of Local, Provincial and National Control" (2015) 132 *South African Law Journal* 639 641-646 argue that local government's legislative authority is limited to matters necessary for the effective administration of the municipality. On the other hand Currie & De Waal *Constitutional & Administrative Law I* 218; Steytler N & De Visser J "Local Government" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa 2* 2 ed (2008) 22-44; De Visser *Developmental Local Government* 114 argue that, for local government to fulfil its constitutional mandate, it has both the administrative and legislative authority over the matters listed in Part B of Schs 4 and 5 of the Constitution.

[192] Listed in Part B of Schs 4 and 5 of the Constitution.

[193] Constitution, s 156(2); Local Government: Municipal Systems Act, s 11. See also Bronstein "Legislative Competence" in *Constitutional Law 1* 15-6 – 15-8; Glazewski & Rumble "Administration and Governance" in *Environmental Law* 6-14; Murray "Constitutional Context" in *Intergovernmental Relations* 71.

[194] Constitution, s 156(3).

[195] Constitution, ss 156(1)(a) and (b). See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 16; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 73; *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC) para 27; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) paras 45 – 46; *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) para 12.

[196] Constitution, s 156(4).

[197] Constitution, Part B of Sch 4.

cases.[198] This issue is explored in more detail in Chapter 4 below.[199] For present purposes, it is sufficient to state that municipal planning includes the "control and regulation of land use"[200] and the zoning of land.[201]

Despite local government's newfound independence, national and provincial government spheres have legislative and executive authority to regulate the exercise of executive functions by a municipality.[202] This regulative authority of national and provincial governments does not sanction usurping local government functions.[203] It merely allows for norms and guidelines to be created for municipalities to exercise their powers effectively.[204] On the one hand, the Constitution implies a hands-off relationship between municipalities and other levels of government.[205] On the other hand, it recognises the need for national and provincial governments to monitor the

[198] For example, *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2008 4 SA 572 (W); *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning, Western Cape* 2011 4 All SA 270 (WCC); *Lagoonbay Lifestyle Estate (Pty) Ltd v Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape* (320/12) [2013] ZASCA 13; *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 (CC); *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 3 SA 441 (WCC); *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC); *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC); *Le Sueur v eThekwini Municipality* (9714/11) 2013 ZAKZPHC 6 (30 January 2013); *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning* (26165/2010) 2012 ZAWCHC 44 (16 May 2012); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC); *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Appeal Tribunal* 2016 3 SA 160 (CC); *Merafong City v Anglogold Ashanti Ltd* 2017 2 SA 211 (CC).

[199] Chapter 4, Section 2.

[200] *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) para 41.

[201] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 57. See also *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 131 and Van Wyk (2012) *Potchefstroom Electronic Law Journal* 295-302.

[202] Constitution, s 155(7).

[203] *Merafong City v Anglogold Ashanti Ltd* 2017 2 SA 211 (CC) para 171; *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Appeal Tribunal* 2016 3 SA 160 (CC) paras 22-31; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19; *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 (CC) para 46; and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55.

[204] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 22.

[205] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 21; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 373.

effective functioning of local government and to intervene where such functioning is deficient.[206]

6. Characteristics of the Three Spheres of Government

The Constitution ascribes three characteristics to each of the three spheres of government, namely, that they are "distinctive, interdependent and interrelated".[207] These characteristics give substance to co-operative government and intergovernmental relations.[208]

6.1 Distinctive

The distinctiveness of the three spheres of government points to each sphere's legislative and executive autonomy in their different functional areas.[209] In advancing the ideals of co-operative government, the importance of recognising each sphere's autonomy is easily overlooked. De Visser cautioned that "co-operative government is not only about 'lowering the fences of autonomy'".[210] This autonomy is highlighted by three specific principles of co-operative government, as contained in the Constitution.[211] First, each sphere must respect the status of, as well as the functions and powers allocated to the other spheres of government.[212] Second, no sphere may

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[206] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 21; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 373.

[207] Constitution, s 40(1). See also *Minister of Defence and Military Veterans v Thomas* 2016 1 SA 103 (CC) para 14; *Yellow Star Properties 1020 (Pty) Ltd v Department of Development Planning and Local Government (Gauteng)* 2009 3 SA 577 (SCA) paras 27-28; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55; and *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) para 50.

[208] Steytler N, Fessha Y & Kirby C *Status Quo Report on Intergovernmental Relations Regarding Local Government* (01-06-2006) 6.

[209] Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7; Department of Provincial and Local Government *Practitioner's Guide to Intergovernmental Relations in South Africa* (2007) 11; De Visser *Developmental Local Government* 214-215; Steytler & De Visser *Local Government Law of South Africa* 16-3; Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14.9; Steytler N, Fessha Y & Kirby C *Status Quo Report on Intergovernmental Relations Regarding Local Government* 5.

[210] De Visser *Developmental Local Government* 215 quoting from Gloppen S *South Africa: The Battle over the Constitution* (1997) 226.

[211] Constitution, S 41(1). See also De Visser *Developmental Local Government* 215; Ile IU "Strengthening Intergovernmental Relations for Improved Service Delivery in South Africa: Issues for Consideration" (2010) 7 *Journal of US-China Public Administration* 51 54.

[212] Constitution, s 41(1)(e); Department of Provincial and Local Government *Practitioner's Guide to Intergovernmental Relations in South Africa* (2007) 12. See also Simeon & Murray (2001) *Publius* 71–72; Malan (2005) *Politeia* 227.

assume powers or functions not allocated to it by the Constitution.[213] Each sphere, therefore, has final-decision-making powers in respect of its allocated constitutional functions.[214] The allocation of competencies is based on the consideration that the specific sphere is best placed to serve the particular public interest at which the function is aimed.[215] Third, in exercising its powers or functions, no sphere may "encroach on the geographical, functional or institutional integrity" of another sphere.[216] The Constitutional Court pointed out that the third principle relates to the *manner* in which the power is exercised, as opposed to determining *whether* the power exists.[217] The principle is aimed at preventing one sphere of government from undermining other spheres when exercising its allocated powers.[218]

The above principles can easily be contextualised for mining and land use. By granting mining rights in respect of a specific piece of land, the national Department of Mineral Resources cannot undermine a municipality's autonomous power to regulate and determine the use of that land. However, no sphere's autonomy is unbounded.[219] The distinctiveness and autonomy of the three spheres of government are contextualised by the other two characteristics of the three-sphere government system, namely, interdependence and interrelatedness.[220]

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[213] Constitution, s 41(1)(f); Department of Provincial and Local Government *Practitioner's Guide to Intergovernmental Relations in South Africa* (2007) 12.

[214] Department of Provincial and Local Government *15 Year Review Report on the State of Intergovernmental Relations in South Africa* (13-03-2008) 5; Department of Provincial and Local Government *Practitioner's Guide to Intergovernmental Relations in South Africa* (2007) 6; Layman T *Intergovernmental Relations and Service Delivery in South Africa: A Ten Year Review* 8; Steytler N, Fessha Y & Kirby C *Status Quo Report on Intergovernmental Relations Regarding Local Government* 5.

[215] Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7, as quoted in Department of Public Service and Administration *The Machinery of Government: Structure and Functions of Government* (05-2003) 27-28; Powell "South Africa's Three-Sphere System" in *Intergovernmental Relations* 258; and Ile (2010) *Journal of US-China Public Administration* 54.

[216] Constitution, s 41(1)(g); *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) paras 56-60.

[217] *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) para 57. See also Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-16 – 14-17

[218] *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) para 58.

[219] Department of Provincial and Local Government *Practitioner's Guide to Intergovernmental Relations in South Africa* (2007) 12-14.

[220] *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) para 58; Steytler N, Fessha Y & Kirby C *Status Quo Report on Intergovernmental Relations Regarding Local Government* 6.

6.2 Interdependent

The characteristic of interdependence refers to the extent of dependency of one sphere on another, to exercise its constitutional functions and powers.[221] This co-relationship has two sides:[222] (i) a particular sphere is entitled to assistance from another; and (ii) the said entitlement places a duty on one sphere to empower and assist the other sphere.[223]

For example, national and provincial governments have a three-fold supervisory role in relation to local government.[224] First, they have the duty to monitor local governments to ensure that the local governments are fulfilling their constitutional duties.[225] The Constitutional Court, when interpreting and giving content to the duty to monitor, likened it to "observe", "measure" and "keep under review".[226] The Court called it a "hands-off" relationship and stressed that this monitoring duty does not give national and provincial governments the power to control local governments.[227]

[221] Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7, as quoted in Department of Public Service and Administration *The Machinery of Government: Structure and Functions of Government* (05-2003) 27-28; Powell "South Africa's Three-Sphere System" in *Intergovernmental Relations* 258; and Ile (2010) *Journal of US-China Public Administration* 54.

[222] Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7, as quoted in Department of Public Service and Administration *The Machinery of Government: Structure and Functions of Government* (05-2003) 27-28; Powell "South Africa's Three-Sphere System" in *Intergovernmental Relations* 258; and Ile (2010) *Journal of US-China Public Administration* 54.

[223] Constitution, s 154(1); Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7.

[224] De Visser *Developmental Local Government* 82. See also Humby T "Hands on or Hands Off? The Constitutional Court's Denial of a Provincial Municipal Planning Role - *Habitat Council v Provincial Minister of Local Government, Western Cap*e 2013 6 SA 113 (WCC); *Minister of Local Government, Western Cape v The Habitat Council (City of Johannesburg Metropolitan Municipality Amicus Curiae)* 2014 5 BCLR 591 (CC)" (2015) 1 *Journal of South African Law* 178 181-183; Borgström D & Naidoo UK "Playing With Power: The Competing Competencies of Provincial and Local Government" (2017) VI *Constitutional Court Review* 57 60-62.

[225] Constitution, s 155(6)(a) and (7); De Visser *Developmental Local Government* 178-179; Steytler N, Fessha Y & Kirby C *Status Quo Report on Intergovernmental Relations Regarding Local Government* 5.

[226] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 372-373.

[227] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) paras 372-373. See also De Visser *Developmental Local Government* 179.

The second aspect of the supervisory role is that of support.[228] Municipalities are dependent on support from national and provincial governments to build the necessary capacity to fulfil their constitutional duties.[229]

The third aspect of the supervisory role is intervention.[230] The Constitutional Court referred to this as the hands-on element of the relationship between the different spheres of government.[231] Only where monitoring reveals that, despite receiving the necessary support, a local government is failing to fulfil its constitutional or statutory functions, may national and the relevant provincial government intervene.[232]

The three aspects of the interdependent relationship between local government, on the one hand, and national and provincial governments, on the other, is applicable in the mining context. Due to the complex nature of mining activities, as well as the myriad considerations relevant to determine land use for mining purposes, an under-capacitated municipality may lack the necessary expertise to make such a determination. The national Department of Mineral Resources, together with the national and provincial Departments for Rural Development and Land Reform,[233] must monitor the performance of the municipality in dealing with land use applications for mining purposes. If necessary, they should provide financial or institutional support. Only where all efforts at support fail, should the provincial or national Departments of Rural Development and Land Reform intervene.[234]

6.3 Interrelated

The Constitutional Court[235] pointed out that the characteristic of interrelatedness is derived from the very first section of the Constitution, describing South Africa as “one,

[228] De Visser *Developmental Local Government* 82.
[229] Constitution, s 154(1); National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 410; Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7.
[230] De Visser *Developmental Local Government* 82.
[231] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) 373. See also De Visser *Developmental Local Government* 179.
[232] Constitution ss 139 and 155(7). National government has corresponding intervention powers in provincial government matters where the provincial government fails to fulfil its duties. See Constitution, s 100.
[233] Being the departments responsible for Spatial Planning and Land Use Management.
[234] See also the discussion of the different planning functions of the three spheres of government in Section 2 of Chapter 4 below.
[235] *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) para 50.

sovereign" state.[236] The functions allocated to each sphere should, therefore, not be isolated from one another.[237] Interrelatedness refers to the duty on the three spheres to co-operate with each other "in mutual trust and good faith".[238]

The duty to co-operate includes "fostering friendly relations" and "consulting one another on matters of common interest".[239] In the mining context, reports point to a strained or non-existent relationship between the Department of Mineral Resources and local governments.[240] There is little evidence of consultation or co-operation between these spheres. A coherent government that fulfils its constitutional duties and caters for the needs of the people is only possible when all spheres co-operate with one another and act as a cohesive unit.[241]

[236] Constitution, s 1; *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) para 50. See also Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14.9.
[237] *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC) para 26.
[238] Constitution, s 41(1)(h). See also De Visser *Developmental Local Government* 215; Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7, as quoted in Department of Public Service and Administration *The Machinery of Government: Structure and Functions of Government* (05-2003) 27-28; Powell "South Africa's Three-Sphere System" in *Intergovernmental Relations* 258; and Ile (2010) *Journal of US-China Public Administration* 54.
[239] Constitution, s 41(1)(h)(i) and (iii). The duty of co-operation between the three spheres also includes "assisting and supporting one another", "co-ordinating their actions and legislation with one another", "adhering to agreed procedures" and "avoiding legal proceedings against one another." See Constitution, s 41(1)(h)(ii), (iv)-(vi).
[240] Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 1: System Design Trends Analysis Report* (03-2016) 101-102; Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 2: Implementation Operation Analysis Report* (03-2017) 48-50; Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 3: Alternative Models for Mineral-Based Social Benefit* (03-2018) 14; South African Local Government Association *Guidelines on Local Government and Mining Company Engagement on Housing Delivery* (03-2015) 3; Interview with official in the Environmental and Heritage Management Branch of the City of Cape Town Municipality, 13-09-2016; Interview with official in the Spatial Planning Department of the City of Cape Town Municipality, 26-10-2016.
[241] Steytler & De Visser *Local Government Law of South Africa* 16-7; Steytler N, Fessha Y & Kirby C *Status Quo Report on Intergovernmental Relations Regarding Local Government* 6.

7. Regulation of Co-operative Government in Relation to Mining and Planning

This section considers how co-operative government and intergovernmental relations are regulated, particularly in the land use planning and mining sectors. This is done by examining planning and mining legislation. First, the application of the Intergovernmental Relations Framework Act[242] is explored.

7.1 Intergovernmental Relations Framework Act (IRFA)[243]

The Constitution places an obligation on government to pass legislation that provides structural and institutional measures to promote and facilitate intergovernmental relations.[244] More than eight years after the Constitution commenced, government finally complied with this constitutional obligation.[245] This took the form of the Intergovernmental Relations Framework Act (IRFA),[246] which came into force on 15 August 2005. Until then, it was largely up to the Courts[247] to interpret and give effect

[242] Act 13 of 2005.
[243] Act 13 of 2005.
[244] Section 41(2) of the Constitution provides that "[a]n Act of Parliament must—
(a)establish or provide for structures and institutions to promote and facilitate inter-governmental relations; and
(b)provide for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes."
[245] It has rightly been asked whether this delay contravened the constitutional requirement contained in Item 21(1) of Sch 6 of the Constitution that the legislation has to be enacted within a reasonable time. In this regard see Malherbe (2006) *Journal of South African Law* 811-812; Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-20 – 14-21, 14-35. In 2002, some three years prior to the enactment of IRFA, the Constitutional Court also noted the delay with great concern in *National Gambling Board v Premier of KwaZulu-Natal* 2002 2 SA 715 (CC) para 32. Two reasons have been advanced to explain the delay in passing the legislation – See Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-20 – 14-21; Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 6, 11. First, the passing of time allowed for the development of "best practices". Second, support exists for the notion that dispute-resolution mechanisms should be tailor made to meet the needs of specific sectors, rather than providing a general framework.
[246] Act 13 of 2005.
[247] See e.g. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC); *National Gambling Board v Premier of KwaZulu-Natal* 2002 2 SA 715 (CC); *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC); *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development* 1999 11 BCLR 1229 (C); *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC); *MEC for Local Government, Mpumalanga v Independent & Allied Trade Union* 2002 1 SA 76 (SCA); *Uthukela District Municipality v The President of the Republic of South Africa* 2003 1 SA 678 (CC); *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 1 SA 199 (T); *Van Wyk v Uys* 2002 5 SA 92 (C); *Executive Council, Western Cape v Minister of Provincial Affairs & Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of SA* 2000 1 SA 661 (CC); *Government of the Republic of SA v Grootboom* 2001 1 SA 46 (CC).

to the constitutional requirement of co-operative government and intergovernmental relations.[248] IRFA applies to all three spheres of government.[249] Therefore, it is also applicable to the departments and institutions responsible for implementing mining and planning legislation.

IRFA mirrors the co-operative government provisions found in the Constitution. For example, it confirms that government consists of three spheres that are distinctive, interdependent and interrelated.[250] The purpose of IRFA is to provide a framework for all spheres of government and organs of state to facilitate co-ordination when implementing legislation and policy.[251] IRFA provides mechanisms and procedures to settle intergovernmental disputes,[252] guidelines for implementing policy and legislation,[253] and establishes intergovernmental structures.[254] IRFA requires all three spheres of government to co-ordinate the implementation of policies and legislation relating to similar issues; prevent wasteful duplication and jurisdictional contests; take all reasonable steps to ensure adequate institutional capacity and effective procedures for consultation and co-operation with other organs of state; and participate in intergovernmental structures.[255]

[248] Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-9. For a discussion of the failures of the intergovernmental relations system prior to IRFA, see Steytler N, Fessha Y & Kirby C *Status Quo Report on Intergovernmental Relations Regarding Local Government* 6.
[249] IRFA, s 2(1). Parliament and Provincial legislatures are specifically excluded from the operation of IRFA. (IRFA, s 2(2)(a)-(b).)
[250] Preamble to IRFA. See also Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-34; Malherbe (2006) *Journal of South African Law* 813.
[251] IRFA, s 4.
[252] Long title to IRFA.
[253] IRFA, s 4.
[254] IRFA, Chapter 2.
[255] IRFA, s 5.

IRFA provides for the following key intergovernmental relations structures:[256] the President's Co-ordinating Council (PCC),[257] National Intergovernmental Forums[258] (including MINMECS),[259] Provincial Intergovernmental Forums[260] (including the Premier's Intergovernmental Forum,[261] and Interprovincial Forums[262]), Municipal Intergovernmental Forums (including the District Intergovernmental Forums[263] and the

[256] For a full discussion of these and other intergovernmental relations institutions see Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-24 – 14-34; Malherbe (2006) *Journal of South African Law* 814 – 815; De Villiers & Sindane *Oil of the Engine* 3. See also in general, Mathebula FM *Intergovernmental Relations Reform in a Newly Emerging South African Policy* DAdmin Thesis University of Pretoria (2004). Many of these institutions existed prior to the implementation of IRFA. For a discussion of the development of intergovernmental relations institutions prior to the implementation of IRFA, see Levy N "Instruments of Intergovernmental Relations - The Political, Administrative Interface" in Levy N and Tapscott C (eds) *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (2001) 84 84-111; Powell "South Africa's Three-Sphere System" in *Intergovernmental Relations* 262-263; Steytler N, Fessha Y & Kirby C *Status Quo Report on Intergovernmental Relations Regarding Local Government*. The last-mentioned report also evaluates the success of IRFA and its institutions to promote the goals of co-operative government.

[257] IRFA, ss 6-8. The council consists of the President, Deputy President, four national ministers, the premiers of all nine provinces and a municipal councillor representing organised local government (s 6(1) of IRFA). It is a forum for the President to raise matters of national interest, consult provincial and local governments, discuss service delivery and consider reports from other intergovernmental forums. The need for the President's Co-ordinating Council was identified during the intergovernmental relations audit of 1999. See Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 28-33.

[258] IRFA, ss 9-15, read with the definition of MINMEC in s 1; Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 34-46; De Villiers (1997) *SA Public Law* 207-211. These forums each consist of the cabinet member responsible for the functional area at which the forum is aimed, any deputy minister and members of the executive councils of provinces responsible for that functional area, and a municipal councillor representing organised local government. The purpose of these forums is to raise matters of national interest within that functional sphere with provincial governments and organised local government, where applicable. The forums are aimed at the promotion and facilitation of intergovernmental relations in the functional areas for which the minister who established the forum is responsible. Provincial governments and organised local governments, where applicable, are consulted on the development and implementation of national policy and legislation. They also discuss service delivery to detect failures and to initiate preventative or corrective action, if necessary.

[259] The acronym stands for national minister and member of provincial executive committees.

[260] IRFA, s 21. Any premier can establish such a forum in respect of any specific functional area. The aim of such a forum is the promotion and facilitation of effective and efficient intergovernmental relations relating to that functional area between the province and local governments within that province.

[261] IRFA, ss 16-20**.** These forums each consist of the relevant province's premier, the member of the executive council responsible for local government in that province and any other member designated by the Premier, the mayors of all district and metropolitan municipalities in that province, the administrator of any of those municipalities (if applicable), and a municipal councillor representing organised local government. The forums are aimed at the promotion and facilitation of intergovernmental relations between the province and local governments within that province. The purpose is to discuss matters of mutual interest and to consider reports from other provincial intergovernmental forums and district intergovernmental forums.

[262] IRFA, ss 22-23. These forums may be established by the premiers of two or more provinces for the promotion and facilitation of intergovernmental relations between those provinces.

[263] IRFA, ss 24-27. These forums are aimed at the promotion and facilitation of intergovernmental relations between the district and local municipalities in that district. The forum consists of the mayors of the district and all local municipalities in that district (or councillor or administrator, if applicable).

Intermunicipality Forums[264]) and the Intergovernmental Technical Support Structures.[265] Three other key intergovernmental relations institutions, not established in terms of IRFA, are the Forum for Directors-General,[266] the Budget Council[267] and Budget Forums.[268]

The practical impact of these IRFA forums in managing the relationship between land use planning and mining can be questioned. This is evidenced by the lack of intergovernmental co-operation demonstrated in the *Maccsand* and *Swartland Municipality* cases. When these judgments were handed down in 2012, more than six years after the implementation of IRFA, the Department of Mineral Resources and the local authority failed to find common ground. Both spheres of government were competing for jurisdictional supremacy and to have the final word on land use for mining purposes. Therefore, it seems that the forums established by IRFA have little practical application. This is further evidenced by the fact that none of the Courts in the *Maccsand* and *Swartland Municipality* cases made reference to the possible use of these forums in those instances. In general, the provisions and relevance of IRFA were largely ignored in all the judgments in these two series of cases.[269] This raises serious doubts as to the impact of IRFA's provisions in practice.[270]

[264] IRFA, ss 28-29. These forums are established by two or more municipalities for the promotion and facilitation of intergovernmental relations between them. Its purpose is to serve as a consultative forum for these municipalities for the discussion of issues of mutual interest.
[265] IRFA, s 30. Any intergovernmental forum may establish such a technical support structure if there is a need for formal technical support.
[266] Established by Cabinet as a non-statutory forum. See Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 57-65.
[267] Established in terms of the Intergovernmental Relations Fiscal Act 97 of 1997, s 2.
[268] Established in terms of the Intergovernmental Relations Fiscal Act, s 5.
[269] Section 45 of IRFA was briefly considered in the case of *Swartland Municipality v Louw NO* 2010 5 SA 314 (WCC) paras 42-44. Elsana argued that the municipality was unable to institute legal proceedings until the dispute with the Minister of Minerals and Energy has been declared a formal intergovernmental dispute. The Court dismissed this argument.
[270] See also South African Law Reform Commission *Review of Regulatory Compliance and Reporting Burdens Imposed on Local Government by Legislation* (Project 146, Issue Paper 37, 01-05-2019) 4.

7.2 Land Use Planning

Until recently, land use in South Africa was largely governed by fragmented old-order[271] provincial legislation.[272] It was in that context that the *Maccsand* and *Swartland Municipality* cases were decided.[273] To promote greater consistency and uniformity in planning legislation throughout the country, the Spatial Planning and Land Use Management Act (SPLUMA)[274] came into force on 1 July 2015.[275] SPLUMA is a national framework act that provides clear principles and standards for provincial and local governments to formulate their spatial planning and land use policies.[276] It aims to deliver a uniform, effective and comprehensive spatial planning and land use management system for the efficient use of land in the entire country.[277]

SPLUMA recognises the need for procedures and structures that enable and encourage co-operative government and intergovernmental relations in respect of land use management systems.[278] Therefore, the Act provides for intergovernmental support.[279] The national government must support and assist provincial and local governments with mechanisms for capacity building and implement an effective land use management system.[280] Provincial governments must similarly support municipalities in the preparation and adoption of their land use schemes.[281] Provincial governments are required to facilitate the co-ordination of land use management systems of different municipalities and the system of each municipality with national

[271] In Sch 6 of the 1996 Constitution "old order legislation" is defined as "legislation enacted before the previous Constitution took effect". It bears the same meaning in this article, in contrast to "new order legislation" which refers to statutes enacted after the 1993 Constitution.
[272] For example, the Land Use Planning Ordinance 15 of 1985 (LUPO) applies in parts of the Eastern Cape and North-West Provinces; Townships Ordinance 9 of 1969 applies to the Free State and Town-Planning and Townships Ordinance 15 of 1986 is applicable to Gauteng, Limpopo and Mpumalanga. Until 1 July 2015, there was one piece of national planning legislation in operation, namely, the Development Facilitation Act 67 of 1995. Its purpose was to provide general principles relating to land development and land development objectives. This act was repealed by the Spatial Planning and Land Use Management Act (SPLUMA) on 1 July 2015. Also see discussion in Section 3.1 of Chapter 4 below.
[273] The Land Use Planning Ordinance 15 of 1985 (LUPO) was applicable in the Western Cape where the *Maccsand* and *Swartland Municipality* cases originated. LUPO is old order provincial legislation, currently still applicable in parts of the Eastern Cape and North-West Provinces.
[274] Act 16 of 2013.
[275] Also see general discussion of SPLUMA in Chapter 4 below.
[276] Long title read with s 3 of SPLUMA. For a discussion of these principles, see Section 3.2 of Chapter 4 below.
[277] SPLUMA, s 3.
[278] Preamble and s 3(e) of SPLUMA.
[279] SPLUMA, Chapter 3.
[280] SPLUMA, ss 9(1)(a) and 9(2).
[281] SPLUMA, s 10(3)(a).

and provincial plans and strategies.[282] All future spatial planning and land use management in South Africa should be guided by the development principles set out in SPLUMA.[283] These are spatial justice, spatial sustainability, efficiency, spatial resilience and good administration.[284]

SPLUMA does not repeal the old provincial legislation and, accordingly, insofar as they are not in contravention of SPLUMA's provisions, these laws still apply.[285] However, SPLUMA provides for provincial governments to enact new legislation that regulates, among other things, land development, land use management, spatial planning and municipal planning.[286] Some provinces have already drafted new provincial legislation in accordance with this mandate.[287] However, apart from the Western Cape Land Use Planning Act,[288] these acts are not yet in operation.

The various pieces of provincial legislation, whether old or new, authorise municipalities to issue by-laws for the effective administration of land use matters in their respective jurisdictions. The Constitutional Court emphasised the importance of co-operative government in the context of planning as follows:

[282] SPLUMA, s 10(3)(b).
[283] SPLUMA, s 7.
[284] SPLUMA, s 7(a)-(e).
[285] See s 2(2), read with s 59 and Sch 3 of SPLUMA.
[286] Section 10 read with Sch 1 of SPLUMA. Chapter 4 below discusses these aspects in more detail.
[287] Eastern Cape Planning and Development Bill, 2012; Free State Spatial Planning and Land Use Bill, 2016; Draft Gauteng Planning and Development Bill, 2012 (GN 1202 in *Gauteng Provincial Gazette Extraordinary* 128 of 10-05-2013); Limpopo Spatial Planning and Land Use Management Bill, 2017 (PN 116 in *Limpopo Provincial Gazette* 2867 of 24-11-2017); Mpumalanga Planning Bill, 2013; Northern Cape Spatial Planning and Land Use Management Bill, 2012; Draft North West Provincial Spatial Planning and Land Use Management Bill, 2015 (PN 96 in *North West Provincial Gazette* 7651 of 31-05-2016); and Western Cape Land Use Planning Act. For a discussion of the Bills of Mpumalanga, Limpopo, Free State and North-West, see Poswa X & De Visser J *Implementing SPLUMA: A Review of Four 'Post-SPLUMA' Provincial Planning Bills* (2017).
[288] Western Cape Land Use Planning Act. The Act become applicable in a staggered fashion in municipalities across the Western Cape: City of Cape Town (since 1 July 2015), Bergrivier (since 1 August 2015), Swartland (since 1 August 2015), George (since 1 September 2015), Beaufort West (since 7 October 2015), Cape Agulhas (since 7 October 2015), Hessequa (since 7 October 2015), Langeberg (since 7 October 2015), Saldanha Bay (since 7 October 2015), Bitou (since 1 December 2015), Breede Valley (since 1 December 2015), Laingsburg (since 1 December 2015), Matzikama (since 1 December 2015), Mossel Bay (since 1 December 2015), Stellenbosch (since 1 December 2015), Theewaterskloof (since 1 December 2015), Drakenstein (since 1 February 2016), Overstrand (since 1 February 2016), Swellendam (since 1 February 2016), Prince Albert (since 15 March 2016), Witzenberg (since 15 March 2016), Kannaland (since 25 April 2016), Cederberg (since 1 June 2016) Knysna (since 1 June 2016), and Oudtshoorn (since 8 November 2016).

> "Planning entails land use and is inextricably connected to every functional area that concerns the use of land. There is probably not a single functional area in the Constitution that can be carried out without land."[289]

It is evident that all of these functional areas cannot be allocated to one government department or even to one sphere of government. The principles of co-operative government are therefore of paramount importance in the context of land use planning.[290] SPLUMA acknowledges this fact.[291] It anticipates that conflicts may arise where other organs of state need to use land for purposes in contravention of current spatial plans and policies of local or provincial governments.[292] Conflicting land use is also relevant in the context of mining. To this end, SPLUMA enables the Minister of Rural Development and Land Reform to set out procedures for the prevention or resolution of such conflicts.[293]

7.3 Mining

The Mineral and Petroleum Resources Development Act[294] (MPRDA) governs all mining and prospecting activities in South Africa. Surprisingly, the MPRDA contains no direct reference to intergovernmental relations or co-operative government. This lacuna exists despite the fact that a multitude of government departments are involved in issuing the required authorisations and licences before mining activities can commence. For example, the Department of Mineral Resources issues mining rights,[295] environmental authorisations and waste management licences, while the Department of Environmental Affairs is responsible for the regulation of environmental obligations in the mining industry.[296] The Department of Water and Sanitation is the issuing authority for water use licences to mining-right applicants.[297] The local

[289] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 128.
[290] Van Wyk *Planning Law* 145.
[291] Preamble to SPLUMA.
[292] SPLUMA, s 9(3).
[293] SPLUMA, s 9(3).
[294] Act 28 of 2002.
[295] The same applies to prospecting rights, mining permits and all other rights described in the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).
[296] See the discussion on the One Environmental System below.
[297] In accordance with the provisions of the National Water Act 36 of 1998.

municipality in whose jurisdiction the land is located is responsible for enforcing zoning conditions applicable to the specific piece of land.[298]

The MPRDA provides for the establishment of Regional Mining Development and Environmental Committees.[299] One of the functions of the committees is to promote co-operative governance. This function is not stipulated in the Act but is found on the website of the Department of Mineral Recourses.[300] Each committee consists of a maximum of fourteen members from the relevant national, provincial and local levels of government to ensure competence in mining activities, social and labour issues and mining environmental management.[301]

Although the MPRDA does not explicitly address the matter of co-operative government, some progress has been made in the promotion of co-operative government between the Departments of Mineral Resources, Environmental Affairs, and Water and Sanitation. This progress was accomplished by way of an agreement between these three departments in the form of the "One Environmental System" for the environmental regulation of mining.[302] The One Environmental System was rolled out on 8 December 2014[303] to replace the previous disjointed and ineffective system of environmental management in the mining sector.[304]

In terms of the new system, the Department of Environmental Affairs remains responsible for the regulation of environmental obligations in the mining industry.[305] The Department of Mineral Resources is the implementing authority for these

[298] This forms part of the municipal-planning function allocated to the local sphere of government in Part B of Sch 4 of the Constitution.
[299] MPRDA, s 64, read with s 7.
[300] Department of Mineral Resources "Minerals and Petroleum Board" (2011) *Department of Mineral Resources* (accessed 15-07-2018) – copy on file with author.
[301] MPRDA, reg 39.
[302] For a full evaluation of the One Environmental System see Humby T "'One Environmental System': Aligning the Laws on the Environmental Management of Mining in South Africa" (2015) 33 *Journal of Energy & Natural Resources Law* 110.
[303] Department of Mineral Resources "Minerals and Petroleum Board" *Department of Mineral Resources*.
[304] For a discussion on the shortcomings of this system see Centre for Environmental Rights "Mining Companies Launch their First Attacks on the One Environmental System" (17-06-2015) *Centre for Environmental Rights* <http://cer.org.za/news/mining-companies-launch-their-first-attacks-on-the-one-environmental-system> (accessed 14-02-2018).
[305] National Environmental Management Act 107 of 1998 (NEMA), s 50A(2)(b).

regulations[306] and will issue environmental authorisations[307] and waste management licences.[308] The Department of Environmental Affairs is the appeal authority for these environmental authorisations,[309] while the Department of Water and Sanitation continues to issue water use licences for mining activities.[310] All three departments have agreed to fix and synchronise the timeframes for the consideration and issuing of the authorisations in terms of the relevant pieces of legislation.[311]

The One Environmental System is still very new and the success thereof has not yet been proven. There is some scepticism about the prospects of this experimental model of co-operative government.[312]

8. Towards a System of Co-Operative Government for Mining and Planning

Mining regulation falls exclusively in the functional area of national government, while the executive authority over land use and zoning of land are planning functions of the local authority.[313] The latter functions cannot be overruled or usurped by the Department of Mineral Resources when issuing mining rights.[314] Such overruling or usurpation by the Department of Mineral Resources would encroach unlawfully on the functional and institutional integrity of local government. The encroachment would be a total disregard of the constitutional status and the allocated powers of local government.[315]

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[306] NEMA, s 50A(2)(b).
[307] NEMA, s 50A(2)(c).
[308] In terms of the National Environmental Management: Waste Act 58 of 2008.
[309] NEMA, s 50A(2)(c) read with s 43.
[310] In terms of the National Water Act.
[311] NEMA, s 50A(2)(d). The processes involved in the issuing of the required authorisation to commence with mining activities is discussed in greater detail in Chapter 3.
[312] See in general Humby (2015) *Journal of Energy & Natural Resources Law*; Centre for Environmental Rights "Mining Companies Launch their First Attacks on the One Environmental System" *Centre for Environmental Rights*.
[313] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) See also discussion in Sections 5.1 and 5.3 above.
[314] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 44. See in general Olivier et al (2012) *Potchefstroom Electronic Law Journal*; Humby (2012) *Southern African Public Law*; and Van Wyk (2012) *Potchefstroom Elec. L.J.*
[315] This is in contravention of s 41(1)(e) and (f) of the Constitution and the principle of the rule of law. Also see Paterson A "Seeking to Undermine Cooperative Governance and Land-use Planning" (2010) 25 *Southern African Public Law* 692 697; Section 2 above.

The Constitutional Court confirmed that it is acceptable for two or more authorities to regulate different aspects of the same issue.[316] Each sphere or department of government exercises powers allocated by the Constitution,[317] and each sphere or department is regulated by its own enabling legislation.[318] Where functional areas overlap, implementation of a decision of one sphere of government may legitimately be dependent on the consent of another sphere.[319] If the second sphere of government refuses to consent, this does not constitute an illegal veto of the first decision, provided each sphere exercises its powers appropriately.[320] This holds, even when the effect of such refusal is that the first decision cannot be implemented.[321] The resulting conflicts between government authorities must be resolved through co-operation, mutual trust and good faith.[322]

These Constitutional Court developments highlight the role of local government in managing the relationship between land use planning and mining.[323] Municipalities are in a unique position to make a valuable contribution in managing the use of land as a limited resource, while promoting economic growth through mining activities. Instead of competing for jurisdictional supremacy, the Department of Mineral Resources and the local authorities should endeavour to co-operate with one another. Co-operation will facilitate greater alignment of mining and zoning policies. Greater policy alignment, in turn, promotes a more streamlined process to obtain all the required rights,

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316 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) para 85; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) paras 80, 128; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55; and *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 47.

317 Constitution, Schs 4 and 5 respectively.

318 For example, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), the National Environmental Management Act 107 of 1998 (NEMA), National Water Act 36 of 1998, Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), The Western Cape Land Use Planning Act 3 of 2014 and the City of Cape Town Municipal Planning By-Law, 2015.

319 *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 48.

320 *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 48; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC).

321 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) and *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC).

322 Constitution, s 41. The requirement of co-operative government is also set out in ss 3, 31 and 24 of the Local Government: Municipal Systems Act. Also see Ministry for Provincial and Local Government *Intergovernmental Dispute Prevention and Settlement: Practice Guide* (GN 491 in GG 29845 dated 26-04-2007) 9; Olivier et al (2012) *Potchefstroom Electronic Law Journal* 561.

323 *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) para 21.

authorisations and consents before mining activities can commence. An efficient system to authorise mining activities is invaluable for investor confidence and economic growth in South Africa.[324]

Giving effect to co-operative government in practice is very challenging.[325] Despite the constitutional requirement of co-operative government, fragmentation in legislation[326] and power struggles between government departments often derail this ideal.[327] Further obstacles include the absence of co-ordinated and structured systems and policies; inefficient communication between different spheres or government departments; and a lack of qualified personnel and financial resources.[328]

A good example of an attempt at intergovernmental co-operation is the One environmental system" between the Departments of Mineral Resources, Environmental Affairs and Water Affairs.[329] Unfortunately, no similar initiative exists to promote co-operation between the relevant mining and land use regulatory authorities.

Co-operative government in relation to land use and mining is all but non-existent. This can mainly be attributed to three factors: the absence of any reference to co-operative government or intergovernmental relations in mining legislation;[330] the lack of functioning institutional forums or informal initiatives created specifically for intergovernmental co-operation in regards to mining and land use; and a seeming unwillingness of government officials to co-operate with one another.[331] Some argue that mutual trust and a political culture of co-operation is essential to efficient intergovernmental relations, even more so than legal structures and procedures.[332]

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[324] This will also accord with the constitutional principle of efficient administration. See Section 2 above.
[325] Paterson (2010) *Southern African Public Law* 697.
[326] This occurs where a range of laws and policies regulate different aspects of the same issue.
[327] Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-32; Du Plessis W "Legal Mechanisms for Cooperative Governance in South Africa: Successes and Failures" (2008) 23 *Southern African Public Law* 87 87; National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 408-409; Department of Cooperative Governance *Draft Green Paper: Cooperative Governance* (2011) 16.
[328] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 408-409; Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-32; Edwards (2008) *Politeia* 66. See also Du Plessis (2008) *Southern African Public Law* 106-107.
[329] See Section 7.3 above for a more detailed discussion.
[330] See Section 7.3 above.
[331] See also Du Plessis (2008) *Southern African Public Law* 107.
[332] De Visser *Developmental Local Government* 210; Watts "Conceptual Issues" in *Intergovernmental Relations* 25, as referred to by Du Plessis (2008) *Southern African Public Law* 107.

Regrettably, it does not appear that a culture of co-operative government has developed among government officials.[333] Some progress has been made with the IRFA. However, the proper implementation of its provisions is yet to be seen in practice.

By constantly competing for authority, the Department of Mineral Resources and local authorities will be unable to accomplish anything of value. The impasse will frustrate the constitutional principle of co-operative government. These spheres of government should attempt to co-ordinate their actions, assist and support one another to achieve an efficient government.

[333] Woolman & Roux "Co-operative Government" in *Constitutional Law 1* 14-32; Du Plessis (2008) *Southern African Public Law* 106-107.

Chapter 3: Mining Right Applications – A Critical Appraisal of Required Municipal Input

1. Introduction

The State is the custodian of all mineral resources in South Africa and has the authority to grant rights to minerals in accordance with the provisions of the Mineral and Petroleum Recourses Development Act (MPRDA).[334] Approval for prospecting rights, mining rights, mining permits, and other rights[335] referred to in the MPRDA must be sought from the Minister of Mineral Resources.[336] The application procedures for the various rights and permits differ slightly in certain respects. However, there are many common features to the different procedures.[337] This research is limited to mining right applications.

This chapter gives a brief description of the mining right application process. The object is to identify instances in the process where municipal input or involvement is required in terms of the MPRDA, the regulations, as well as other policy documents or

[334] Act 28 of 2002, Preamble and ss 2(b) and 3. For a discussion on the concept of custodianship of the nation's mineral resources, see Dale et al *South African Mineral and Petroleum Law* MPRDA122 – MPRDA136; Badenhorst PJ & Mostert H *Mineral and Petroleum Law of South Africa* (RS 10 2014) 13-3 – 13-5; Mostert H *Mineral Law: Principles and Policies in Perspective* (2012) 74-115, 133-135; Badenhorst PJ & Mostert H "Artikel 3(1) en (2) van die Mineral and Petroleum Resources Development Act 28 van 2002: 'n Herbeskouing" (2007) 3 *Tydskrif vir die Suid Afrikaanse Reg* 469 475-479; Badenhorst PJ "Ownership of Minerals in Situ in South Africa: Australian Darning to the Rescue" (2010) 127 *South African Law Journal* 646 653-662; Van der Schyff E "Who 'Owns' the Country's Mineral Resources? The Possible Incorporation of the Public Trust Doctrine through the Mineral and Petroleum Resources Development Act" (2008) 4 *Tydskrif vir die Suid Afrikaanse Reg* 757; Van der Schyff E "Unpacking the Public Trust Doctrine: A Journey into Foreign Territory" (2010) 13 *Potchefstroom Elec. L.J.* 121; Van der Schyff E "Stewardship Doctrines of Public Trust: Has the Eagle of Public Trust Landed on South African Soil?" (2013) 130 *South African Law Journal* 369; Van der Schyff E *Property in Minerals and Petroleum* (2016) 260-261; Van den Berg HM "Ownership of Minerals under the New Legislative Framework for Mineral Resources" (2009) 20 *Stellenbosch Law Review* 139 143-157.

[335] Also, reconnaissance permission, permission to remove, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right.

[336] MPRDA, s 3(2)(a). The definition of "Minister" in s 1 of the MPRDA refers to the Minister of Minerals and Energy. However, from 7 July 2009 the Department of Minerals and Energy was divided into two separate departments, namely, the Department of Energy and the Department of Mineral Resources. See Amendment of Schedule 1 to the Public Service Act, 1994 (Proc 48 in *GG* 32387 of 07-07-2009).

[337] For a full discussion on the common features of the various application processes, see Dale et al *South African Mineral and Petroleum Law* MPRDA212 – MPRDA212(10).

guidelines issued by the Department of Mineral Resources (DMR). The chapter also identifies points in the mining right application process where the functions of the DMR and municipalities intersect. These points of intersection provide opportunities for improving co-operation between the spheres of government involved in the regulation of various aspects of mining activities, which opportunities may currently be underutilised, judging by the aforementioned documents. Not all aspects of the mining right application process are discussed here: the specific focus is on mandatory consultation with the municipality, as well as potential opportunities for such consultation. Through consultation and better co-operation between the DMR and the municipality, greater alignment of mining and zoning policies can be achieved. This, in turn, promotes a more streamlined process to obtain all the required rights, authorisations and consents before mining activities can commence.

2. Overview of Mining Right Application Process[338]

This section briefly sketches the sequence of the mining right application process. The purpose is to provide context for the discussion in Sections 3 and 4 below dealing with consultation requirements and the social and labour plan, respectively.

The MPRDA prescribes a specific process to be followed when applying for a mining right.[339] Timeframes are prescribed for each step of the process.[340] However, the Mineral and Petroleum Resources Development Amendment Bill, 2013[341] (hereinafter

[338] See generally, *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC); *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* 2011 4 All SA 168 (SCA); *Norgold Investments (Pty) Ltd v The Minister of Minerals and Energy of the Republic of South Africa* 2011 3 All SA 610 (SCA); *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company (Pty) Ltd* 2014 5 SA 138 (CC); *Meepo v Kotze* 2008 1 SA 104 (NC) (also cited as *Sechaba v Kotze* 2007 4 All SA 811 (NC)).

[339] MPRDA, ss 22 and 23. Section 1 of the MPRDA defines "mining right" as "a right to mine granted in terms of section 23 (1)". "Mine", in turn, is defined as "when— … (*b*) used as a verb, in the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area".

[340] See, e.g. MPRDA, s 22(2)-(5).

[341] Mineral and Petroleum Resources Development Amendment Bill B 15D—2013. The National Assembly passed the Amendment Bill in May 2014. However, the President referred the Bill back to the National Assembly on 16 January 2015. Four reasons were advanced for the President's reservations in signing the Bill. First, there were constitutional concerns about the powers awarded to the Minister to amend legislation without due procedure. Second, the Bill could be challenged for contravening the Trade Development Cooperation Agreement. Third, there were concerns about the shortened period for public participation during the drafting process of the Bill. Fourth, there was a lack of consultation with traditional leaders. See Mineral Resources Committee "Mineral and Petroleum Resources Development Amendment Bill [B15B-2013]: Legal Opinion on President's Reservation About Its Constitutionality" (18-

"2013 Amendment Bill") provides for the deletion of all timeframe references in respect of application processes provided for in the MPRDA.[342] In each instance, the specific timeframe reference is substituted with the wording "within the prescribed period". It is presumed that these periods will be prescribed in regulations to the MPRDA. While this approach allows for more flexibility, it creates uncertainty. If the time periods are set out in the regulations to the MPRDA, the Minister will be able to determine the time periods unilaterally, without going through a public consultation process. This may lead to a situation where the Minister allows insufficient time for consultation with interested parties regarding a mining right to be awarded. For purposes of this research, insufficient consultation time is particularly problematic where municipalities are concerned.

The prescribed process to apply for a mining right is illustrated in Figure 1 below. The aspects underlined in the figure are of particular significance for this research and are discussed in greater detail in Sections 3 and 4 below. These are identifying interested and affected parties to be consulted (Section 3.1); call for comments by interested and affected parties (Section 3.2); the applicant's duty to consult (Section 3.3); and the Social and Labour Plan (Section 4).

02-2015) *Parliamentary Monitoring Group* <https://pmg.org.za/committee-meeting/20003/> (accessed 14-02-2018). On 22 August 2018, during a meeting of Parliament's Mineral Resources Portfolio Committee Meeting, the Minister of Mineral Resources expressed the view that the 2013 Amendment Bill should be withdrawn. To date, it has not been officially withdrawn in Parliament. For an overview of the Bill's progress through Parliament, see Parliamentary Monitoring Group "Mineral and Petroleum Resources Development Amendment Bill (B15-2013)" (19-06-2018) <https://pmg.org.za/bill/551/> (accessed 04-10-2018)14-02-2018).

[342] See, for example, cls 17(b)-(d), (f) and 18(e)-(f) of the 2013 Amendment Bill.

Figure 2: Process to Apply for Mining Right[343]

[343] Summary from provisions in MPRDA, ss 22-25.

To commence the application process, the applicant lodges a mining right application at the office of the Regional Manager[344] in whose region the land to which the application pertains, is situated.[345] The application is accompanied by various supporting documents,[346] together with a social and labour plan[347] and an application for an environmental authorisation.[348] The Regional Manager decides whether the mining right application is acceptable for consideration by the Minister.[349] The Regional Manager's decision regarding acceptance is a factual inquiry and depends solely on

[344] MPRDA, s 1 defines "Regional Manager" as "the officer designated by the Director-General in terms of section 8 as regional manager for a specified region". Section 8 in turn states that the Director-General must appoint an officer of the Department as Regional Manager for each of South Africa's mining regions (as referred to in s 7). The Regional Manager performs the functions delegated to him in terms of the MPRDA.

[345] MPRDA, s 22(1)(a) read with reg 2(1) *Mineral and Petroleum Resources Development Regulations* (GN R 527 in *GG* 26275 of 23-04-2004), as amended by *Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002): Amendment of Regulations* (GN R 349 in *GG* 34225 of 18-04-2011). This provision is peremptory – the application cannot be lodged at a different Regional Manager's office. Regional Managers may only accept an application for a mining right where there is no existing right or pending application for the same mineral in respect of the same land (MPRDA, s 22(2)(b)). A Regional Manager in another region may not have the required information to make this determination. For a full discussion of this issue, see Van der Schyff *Property in Minerals* 431-432.) In *Norgold Investments (Pty) Ltd v The Minister of Minerals and Energy of the Republic of South Africa* 2011 3 All SA 610 (SCA) paras 39-44 (decided in the context of an application for conversion of an old-order prospecting right) the court held that it does not affect the validity of a conversion application if it was lodged at a different Regional Manager's office. The court based its finding on the argument that the Regional Manager only acts as a 'post-box for receipt of the application', while the Minister is the ultimate decision maker.

[346] MPRDA, regs 2(2), 10 and 11, prescribed Form D of Annexure I.

[347] MPRDA, regs 10(1)(g) and 42, prescribed Form D of Annexure I. The social and labour plan is discussed in more detail at Section 4 below.

[348] With effect from 8 December 2014, following the implementation of the One Environmental System, the Minister of Mineral Resources is the implementing authority of regulations pertaining to environmental obligations in the mining industry (see s 50A(2)(b) of the National Environmental Management Act 107 of 1998 (NEMA)). The Minister is therefore the competent authority for issuing environmental authorisations in respect of mining rights (s 24C(2A), read with s 50A(2)(c) of NEMA and reg 6(5) *Environmental Impact Assessment Regulations, 2014* (GN R 982 in *GG* 38282 of 04-12-2014)). MPRDA, s 22(1) prescribes that, simultaneously with the application for a mining right, the applicant must also lodge an application for an environmental authorisation. This requirement is contradicted by the 2014 Environmental Impact Assessment Regulations. Reg 16(1)(b)(ix) provides that the application for an environmental authorisation must be accompanied by proof that the mining right application has already been accepted. Reg 16(2) further explicitly states that the application for an environmental authorisation may only be submitted once the mining right application has been accepted by the Regional Manager. The Mineral and Petroleum Resources Development Amendment Bill, 2013 addresses the contradiction between the MPRDA and the 2014 Environmental Impact Assessment Regulations. The Bill deletes the requirement in s 22(1) of the MPRDA that the applicant must make a simultaneous application for an environmental authorisation (see cl 17(a) of the Bill). It provides that an environmental authorisation application must be made once the application for a mining right has been accepted (cl 17(d) of the Bill). During the application process for an environmental authorisation, the impact of the proposed mining activities on heritage resources must also be addressed. See s 24(4)(b)(iii) of NEMA, read with the National Heritage Resources Act 25 of 1999. Also see fn 1261 in Section 4.1 of Chapter 7 below for a reference to the relevance of this Act in the context of rezoning applications.

[349] MPRDA, s 22(2).

whether the application meets the formal requirements set out in the MPRDA and accompanying regulations.[350] Therefore, the merits of the application is not evaluated at this stage. The Regional Manager must, within the prescribed time, notify[351] the applicant whether the application is accepted or whether it is rejected due to certain defects.[352]

If the application is accepted, the applicant is notified to consult with the landowner, lawful occupier and interested or affected parties.[353] The applicant must submit a report on the outcome of the consultations, together with the required environmental reports[354] to the Regional Manager within 180 days of the date of the notice.[355] Upon receipt, the Regional Manager forwards the application and accompanying reports to the Minister for consideration.[356] The Minister must determine whether to grant the mining right or refuse the application and notify the applicant accordingly.[357] If the Minister refuses the application, this must be done within 60 days from receipt of the application from the Regional Manager[358] and the applicant must be notified within 30 days of the decision.[359] No time period is prescribed for a decision to grant a mining right, nor does the MPRDA provide for notification of such a decision to the applicant.[360]

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[350] MPRDA, s 22(2). See also *Norgold Investments (Pty) Ltd v The Minister of Minerals and Energy of the Republic of South Africa* 2011 3 All SA 610 (SCA) para 56 (decided in the context of a prospecting right application).

[351] Such notice should be in writing and served on the applicant in accordance with the provisions of s 97 of the MPRDA.

[352] MPRDA, s 22(2)-(4). If the application is accepted, the applicant must be notified within fourteen days of *acceptance* (which can be no later than 14 days after receipt of the application – see s 22(2)). However, if the application is rejected, the applicant must be notified within fourteen days of *receipt of the application*. The discrepancy in these provisions regarding the date of commencement of the fourteen-day period is curious. The reason for this distinction is not explained in the MPRDA or Regulations. As noted above, all references in the MPRDA to time periods in the application process is removed by the provisions of the Mineral and Petroleum Resources Development Amendment Bill B 15D—2013.

[353] MPRDA, s 22(4)(b). See the discussion of the consultation process at Section 3 below.

[354] National Environmental Management Act 107 of 1998, Chapter 5.

[355] MPRDA, s 22(4)(a) and (b).

[356] MPRDA, s 22(5).

[357] MPRDA, s 23(1) and (3).

[358] MPRDA, s 23(3).

[359] MPRDA, s 23(4). Clauses 18(e) and (f) of the Mineral and Petroleum Resources Development Amendment Bill, 2013 delete the reference to 60 days and 30 days respectively and replace it with "within the prescribed period".

[360] This contrasts with the processes applicable to other rights and permits applied for in terms of the MPRDA. See, for example, s 17(1) allowing the Minister 30 days to grant a prospecting right, and s 27(6) allowing 60 days for the granting of a mining permit. The *lacuna* in the MPRDA regarding the Minister's duty to notify the applicant of the successful outcome of the application violates the constitutional principles of just administrative action, transparency and accountability. See Section 2 of Chapter 2 above.

It is unclear whether, in the absence of a decision by the Minister within 60 days[361] to refuse the application, it can be assumed that the application is granted. Once the right has been granted, the mining right holder must, within 60 days of the date of execution[362] of the right by the Minister, lodge the right for registration at the Mineral and Petroleum Titles Registration Office.[363] The right holder must commence mining activities no later than one year after the execution of the right.[364]

The above description of the mining right application process forms the context of the discussion in Sections 3 and 4 below. These sections each discuss specific aspects of the mining right application process that are important for this study.

3. Consultation with Interested and Affected Parties

The MPRDA provides for input by parties who are interested in, or affected by, the mining right application[365] but does not elaborate on the purpose of the consultation process. However, the aim has been alluded to in various other forums.

In *Meepo v Kotze*[366] (decided in the context prospecting rights,[367] as opposed to mining rights) the court stated that the aim of the consultation provisions is to alleviate the adverse effects of prospecting activities on the rights of landowners by informing them

[361] Calculated from the date of receipt of the application from the Regional Manager. See MPRDA, s 23(3).
[362] MPRDA, s 25(2)(a) specifies that the right must be registered within 60 days from the effective date. Section 1 of the MPRDA defines "effective date" as "the date on which the (…) relevant right is executed".
[363] MPRDA, s 25(2)(a).
[364] MPRDA, s 25(2)(b).
[365] MPRDA, s 10, read with reg 3. Clause 6 of the 2013 Amendment Bill amends s 10 of the MPRDA by specifically referring to consultation with communities.
[366] *Meepo v Kotze* 2008 1 SA 104 (NC) (also cited as *Sechaba v Kotze* 2007 4 All SA 811 (NC)) para 13.1.
[367] Section 1 of the MPRDA defines "prospecting" as follows: "intentionally searching for any mineral by means of any method—
(*a*) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or
(*b*) in or on any residue stockpile or residue deposit, in order to establish the existence of any mineral and to determine the extent and economic value thereof; or
(*c*) in the sea or other water on land".

of the impact of prospecting on their land. The consultation process is, accordingly, designed to resolve disputes between applicants and landowners.[368]

In *SA Soutwerke v Saamwerk Soutwerke*[369] the court went further to say that the consultation process will enable the mining right applicant to address the concerns of affected parties when preparing the required environmental management programme.[370] In *Bengwenyama Minerals v Genorah Resources*[371] the Constitutional Court also confirmed the purpose of consultation with the landowner to be an attempt to accommodate the landowner insofar as there will be interference with the landowner's activities when prospecting commences on the land.[372] The Constitutional Court further stated that engagement must take place in good faith.[373]

In response to the Constitutional Court judgment and the general lack of clarity in the MPRDA regarding the consultation requirements, the DMR issued guidelines for the consultation process.[374] According to the guidelines, the purpose of consultation is to provide interested and affected parties with the relevant information about the proposed mining activities to enable them to make informed decisions.[375] The consultation process also enables the applicant and the consulted parties to identify

[368] *Meepo v Kotze* 2008 1 SA 104 (NC) para 13.1. The Supreme Court of Appeal agreed with this assessment in *Joubert v Maranda Mining Company (Pty) Ltd* 2010 1 SA 198 (SCA) para 12 and *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* 2011 4 All SA 168 (SCA) para 29.
[369] *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* 2011 4 All SA 168 (SCA) para 29.
[370] This decision was handed down on 1 June 2011, prior to the commencement of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 on 7 June 2013. This Amendment Act deleted section 39 of the MPRDA dealing with the requirements of and distinction between environmental management plans and environmental management programmes. However, in terms of section 24 of NEMA, an environmental management programme remains a requirement of the application process for an environmental authorisation.
[371] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 65.
[372] For a full discussion of the Constitutional Court case and the preceding cases in the Transvaal Provincial Division (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* TPD 18-11-2008 case no 39808/2007) and the Supreme Court of Appeal (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (Formerly Tropical Paradise 427 (Pty) Ltd and Others* 2010 3 All SA 577 (SCA)), see Humby T "The *Bengwenyama* Trilogy: Constitutional Rights and the Fight for Prospecting on Community Land" (2012) 15 *Potchefstroom Elec. L.J.* 165; Humby T "The Community-Preferent Right to Prospect or Mine: Navigating the Fault-Lines of Community, Land, Benefit and Development in *Bengwenyama* II" (2016) 133 *South African Law Journal* 316.
[373] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 65.
[374] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown). See also in general Badenhorst PJ, Olivier NJJ & Williams C "The Final Judgment" (2012) 1 *Journal of South African Law* 106.
[375] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 5.

possible ways of accommodating the consulted parties insofar as their rights are affected.[376]

In *Meepo v Kotze* the Court established that the consultation provisions in the MPRDA should be widely construed, as it is the only prescribed means whereby interested and affected parties will be appraised of the impact of the proposed prospecting activities.[377] Before discussing these provisions, it is necessary to establish who qualifies as an interested or affected party for purposes of the MPRDA.

3.1 Who is an Interested and Affected Party?

A crucial element of the consultation process is affected by vagueness and inconsistency in the MPRDA itself.[378] For one, there is no consistency in the MPRDA in the use of the concept of interested or affected persons. The heading of section 10 and the wording of sections 16(4)(b), 22(4)(b) and 27(5)(a) use the phrase "interested and affected *party(ies)*"[379] (emphasis added). This contrasts with the definition of "interested and affected *person*" (emphasis added) contained in the regulations and used in section 10(1)(b). The inconsistency is perpetuated in the 2013 Amendment Bill.

Where it can be assumed that the above-mentioned inconsistency is simply cosmetic, and the "party" and "person" (or their plural) are used interchangeably, the meaning of the term "interested and affected party" (or person) nevertheless is unclear. The text of the MPRDA does not contain any explanation of who an interested and affected party may be. According to the regulations, an "interested and affected person" is "a natural or juristic person or an association of persons with a *direct* interest in the

[376] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 5.
[377] *Meepo v Kotze* 2008 1 SA 104 (NC) paras 13.1 - 13.2. See also Section 3.3 below where the applicant's consultation duty is discussed in more detail.
[378] As stated in Section 2 of Chapter 2 above, vague legislation violates the constitutional principle of the rule of law. *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 108; *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* 2010 2 SA 181 (CC) paras 47 and 100; *Kruger v President of Republic of South Africa* 2009 1 SA 417 (CC) para 67; *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* 2009 1 SA 565 (CC) para 27; *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 46; *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 4 SA 71 (SCA) para 35; Currie & De Waal *Constitutional & Administrative Law I* 80.
[379] This phase is also used in ss 74, 79 and 83 of the MPRDA.

proposed or existing operation or who may be affected by the proposed operation" (emphasis added).[380]

By limiting the concept to persons with a "direct" interest, the definition in the regulations changes the meaning of the phrase used in the MPRDA. The legal validity of this limitation is questionable.[381] The parties to be consulted should not be limited to those with a direct interest, but should rather be widely construed. This will accord with the Court's interpretation of the MPRDA's consultation provisions in *Meepo v Kotze*.[382] The objectives of the consultation process cannot be properly fulfilled on a narrow interpretation of who the parties to be consulted should be.

Consultation with the municipality can be used to illustrate this point. It is conceivable that, although land earmarked for mining is located in one municipality, it may be necessary to provide additional infrastructure in the neighbouring municipality. For example, the neighbouring municipality may experience a sudden housing shortage or insufficient services or road capacity due to the sudden influx of people working on the mining operation or involved in secondary activities. The municipality in whose jurisdiction the mining land is located has a direct interest in a mining right application. However, the proposed mining activities can also have a significant impact on the neighbouring municipality. Neighbouring municipalities are severely impacted by the limiting effect of the definition of 'interested and affected person' in the regulations. As neighbouring municipalities are only indirectly affected, they are not entitled to be consulted according to the provisions of the regulations. This shortcoming in the MPRDA should be addressed urgently.

Due to the uncertainty in the MPRDA, it is necessary to rely on external sources to determine who qualifies as an interested and affected party. In 2011, the Supreme Court of Appeal[383] confirmed that any person whose socio-economic conditions may

[380] MPRDA, reg 1. According to Dale et al *South African Mineral and Petroleum Law* para 115.3, the definition in the regulations cannot be used to interpret this phrase in the Act itself. Although the regulations are not the most authoritative source, it can surely be used as an indication of the legislator's intention regarding the meaning of this phrase.
[381] Dale et al *South African Mineral and Petroleum Law* MPRDA-161 goes so far as to say that this limitation is *ultra vires*.
[382] In *Meepo v Kotze* 2008 1 SA 104 (NC) para 13.1 the court confirmed that the MPRDA's consultation provisions should be widely construed.
[383] *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* 2011 4 All SA 168 (SCA) para 31.

be directly affected by mining operations qualifies as an affected person. This will include persons living and working in the immediate vicinity of mining activities. The court noted that the interpretation of interested party should be limited to those who have a lawful interest in the land in question.[384]

The Consultation Guidelines of the DMR give an indication of who will be considered an interested or affected party by providing a non-exhaustive list.[385] These include landowners, lawful occupiers, host communities, municipalities and other relevant government departments responsible for the environment and infrastructure, and any other person whose socio-economic circumstances may be directly affected by the proposed mining activities.[386]

In terms of the Guidelines, the responsibility is on the applicant to identify all parties who will be interested in or affected by the mining right application.[387] The applicant must compile a list of these parties and submit the list to the Regional Manager. The list must stipulate the names of all interested and affected parties and the nature of their interest.[388]

It seems imprudent to place the sole responsibility on the applicant to identify all interested and affected parties. No provision is made in the MPRDA, regulations or Consultation Guidelines to verify that the applicant has identified and consulted all parties who may be interested in or affected by the proposed mining activities. Applicants may be tempted to take the path of least resistance. There are indications of a trend of selective consultation by applicants, whereby they elect to consult only with parties from whom they expect little objection to the mining right application.[389]

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[384] *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* 2011 4 All SA 168 (SCA) para 30.
[385] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 4.
[386] Other parties listed in the guidelines are traditional authorities, land claimants, and the Department of Land Affairs.
[387] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 6.
[388] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 6.
[389] Humby T "Mining and Environment: Litigation Review" (18 June 2012) *Centre for Environmental Rights and the School of Law at the University of the Witwatersrand* <http://cer.org.za/wp-

Consultation with municipalities is particularly relevant to this study. It is concerning that neither the MPRDA nor the accompanying regulations specifically require consultation with the relevant municipality. Instead, municipalities have to rely on provisions in the Consultation Guidelines or the applicant to identify the said municipality as an interested and affected party.

The 2013 Amendment Bill[390] provides for consultation with "relevant structures".[391] However, this prescribed consultation is limited to the content of the social and labour plan.[392] Given the context of the social and labour plan, one can presume that municipalities are included in the meaning of "relevant structures". This aspect is discussed in more detail in Section 4 below.

The MPRDA contains three sets of provisions dealing with input by interested and affected parties during the mining right application process.[393] The first relates to a notice by the Regional Manager calling for comments by interested and affected parties.[394] Second, the mining right applicant has a duty to consult with specific parties.[395] The third provision deals with input on the applicant's social and labour plan.[396] A discussion of these provisions follows.

content/uploads/2012/06/Wits-CER-Mining-Litigation-Review-Updated-18-June-2012.pdf> (accessed 14-02-2018) 22.

[390] Mineral and Petroleum Resources Development Amendment Bill B 15D—2013. The National Assembly passed the Amendment Bill in May 2014. However, the President referred the Bill back to the National Assembly on 16 January 2015. Four reasons were advanced for the President's reservations in signing the Bill. First, there were constitutional concerns about the Minister's powers to amend the legislation and standard without due procedure. Second, the Bill could be challenged for contravening the Trade Development Cooperation Agreement. Third, there were concerns about the shortened period for public participation. Fourth, there was a lack of consultation with traditional leaders. See Mineral Resources Committee "Mineral and Petroleum Resources Development Amendment Bill [B15B-2013]: Legal Opinion on President's Reservation About Its Constitutionality" *Parliamentary Monitoring Group*. For an overview of the Bill's progress through Parliament, see Parliamentary Monitoring Group "Mineral and Petroleum Resources Development Amendment Bill (B15-2013)" (19-06-2018) <https://pmg.org.za/bill/551/> (accessed 04-10-2018)14-02-2018).

[391] 2013 Amendment Bill, cl 17(e).

[392] 2013 Amendment Bill, cl 17(e).

[393] MPRDA, ss 10 and 22, read with regulation 3.

[394] MPRDA, s 10. See discussion in Section 3.2 below.

[395] MPRDA, s 22. See discussion in Section 3.3 below.

[396] MPRDA, regs 42 and 46. See also 2013 Amendment Bill, cl 17(e); Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010) 18.

3.2 Call for Comments by Interested and Affected Persons

Section 10 of the MPRDA provides that, within fourteen days[397] after a mining right application has been accepted for a specific piece of land, the Regional Manager must make such acceptance known.[398] Furthermore, he must request interested and affected persons to lodge any comments regarding the application within 30 days of the date of the notice.[399] The notice must be placed on a public notice board at the office of the relevant Regional Manager.[400] The Regional Manager must also publish the notice ('the Section 10 notice') in at least one of the following places: the applicable provincial gazette,[401] local or national newspaper,[402] or at the magistrate's court of the district in which the land is located.[403] It appears that Regional Managers prefer to place the notice at the local magistrate's court, as the other methods of publication incur costs.[404]

From a practical point of view, the Section 10 notice does not appear to have great potential of reaching interested and affected parties.[405] It is difficult to conceive a company or members of the public monitoring provincial gazettes, magistrate's court offices or notice boards of the Regional Manager for possible mining right application notices. This is especially true in rural areas where interested and affected parties live very far from regional mining offices or magistrate's courts. Even publication in a local or national newspaper does not have great prospects for being noticed, as these notices will be buried amongst other legal notices relating to deaths, insolvency, etc. It is unlikely that a Section 10 notice will reach its intended audience unless an interested party anticipates a mining right application on a specific piece of land. That party would

[397] As discussed in Section 2 above, the 2013 Bill replaces all references to specific time periods with the words "within the prescribed period". Section 10 of the MPRDA is similarly amended by cl 6 of the Bill. This applies to all references to time periods discussed hereafter.
[398] MPRDA, s 10(1)(a).
[399] MPRDA, s 10(1)(b). See Day 29 of Figure 2: Process to Apply for Mining Right at Section 2 above.
[400] MPRDA, reg 3(2).
[401] MPRDA, reg 3(3)(a).
[402] MPRDA, reg 3(3)(c).
[403] MPRDA, reg 3(3)(b).
[404] Humby T "Mining and Environment: Litigation Review" *Centre for Environmental Rights and the School of Law at the University of the Witwatersrand* 22.
[405] Humby T "Mining and Environment: Litigation Review" *Centre for Environmental Rights and the School of Law at the University of the Witwatersrand* 21-22.

then still be required to monitor the inefficient modes of publication for a possible Section 10 notice.

It appears that the DMR recognises these shortcomings in the MPRDA, as this aspect is addressed in their consultation guidelines. In addition to the Section 10 notice, the guidelines provide that the Regional Manager may also place notices at the relevant municipality.[406] The Regional Manager may furthermore decide to bring the application to the attention of other parties who are directly affected by the mining right application.[407] Unfortunately, these provisions in the guidelines use the word 'may' and are therefore not prescriptive or binding on any Regional Manager. Given that the municipality qualifies as an interested party, one would expect that the Section 10 notice should, at the very least, be sent to the municipality. As a municipality is the sphere of government closest to the public, a notice advertised at the municipal offices also has greater potential to reach its intended audience.

The scope of the Section 10 notice appears to be very limited. It seems that it is only intended as a notice to the public that a mining right application has been received and that they are invited to submit comments on the said application.[408] Unfortunately, the MPRDA contains no requirement that the Section 10 notice should include a copy of the mining work programme or any other information to assist interested parties in formulating their comments on the mining right application. This severely restricts the effectiveness of the Section 10 notice.

The MPRDA's ineffectiveness regarding the Section 10 notice should be addressed to provide for minimum standards of personal notice to certain parties. The Regional Manager should be required to send specific written notices with the relevant information at least to the municipality, landowner, lawful occupier or host community, if the land is so occupied. If these suggested amendments are not effected, the responsibility to inform interested and affected parties of the proposed mining

[406] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 5-6.
[407] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 5-6.
[408] MPRDA, s 10(1).

operation is largely placed on the applicant in terms of section 22 of the MPRDA.[409] This responsibility is further exacerbated by proposed amendments to section 10, in terms of which the applicant will be jointly responsible with the Regional Manager for publication of the Section 10 notice.[410]

Theoretically, the Section 10 notice provides an opportunity for co-operative government. The Regional Manager, as representative of the DMR, and the municipality can liaise with one another regarding their respective interests in the proposed mining project. Rather than treating the consultation process as a box-ticking exercise or shifting the responsibility to notify the municipality to the applicant, the Regional Manager should engage with the municipality on the detail of the proposed project. Unfortunately, Section 10 does not explicitly provide for consultation between the DMR and other affected government departments or municipalities.

The 2013 Amendment Bill furthers the agenda of co-operative government. The Bill provides for the establishment of Regional Mining Development and Environmental Committees.[411] The Committees will be tasked to consider objections received in response to the Section 10 notice and to advise the Minister thereon.[412] The composition of these committees is important for current purposes. In addition to the Regional Manager and the principal inspector of mines,[413] the committee comprises representatives from national, provincial and local government departments with expertise in mining and environmental matters.[414] This is a valuable opportunity for representatives from the municipality to give input on the local context of the area in which the mine will operate.

The Section 10 notice discussed above must be distinguished from the applicant's duty to consult, as described in section 22 of the MPRDA. The following discussion

[409] See further discussion in Section 3.3 below.
[410] Clause 6 of the 2013 Amendment Bill proposing amendments to section 10(1) of the MPRDA.
[411] 2013 Amendment Bill, cl 7. The committees will serve each mining region established in terms of section 7 of the MPRDA.
[412] 2013 Amendment Bill, cl 7.
[413] Section 102 of the Mine Health and Safety Act 29 of 1996 defines "principal inspector of mines" as "the officer appointed by the Chief Inspector of Mines to be in charge of health and safety in any region established in terms of section 47 (2)".
[414] 2013 Amendment Bill, cl 7.

illustrates that section 22's consultation provisions have a broader interpretation than the Section 10 notice requirements.

3.3 Applicant's Duty to Consult

According to section 22 of the MPRDA, the Regional Manager must, within fourteen days of acceptance of the mining right application, notify the applicant to consult with the landowner, lawful occupier and any other interested or affected party.[415] As with the term "interested and affected parties",[416] the MPRDA is silent regarding the meaning of "consultation" in section 22. The regulations do not give any further indication of what the consultation requirement entails. According to the guidelines of the DMR consultation is a two-way communication process between the applicant and the relevant interested or affected party.[417] The applicant is required to seek, listen to and consider the response of all parties involved to allow for openness in the decision-making process.[418] This description seems to envisage interaction between the parties, as opposed to the one-way communication implied by publishing an invitation for comments as contemplated in section 10.

The 2013 Amendment Bill supports this notion of two-way communication between the applicant and interested and affected parties. According to the Bill, the Regional Manager may refer any objection received in response to the publication of the Section 10 notice to the applicant.[419] The amended provision states that the applicant will then be required to consult with the objecting party and submit the result of that consultation to the Regional Manager.[420] The first iteration of the Bill[421] provided that the result must be submitted to the Regional Manager within 30 days of the referral. Various parties raised concerns about the inadequate timeframe afforded to applicants to reach an

[415] MPRDA, s 22(4)(b). Also see Figure 2: Process to Apply for Mining Right at Section 2 above.
[416] Discussed in Section 3.1 above.
[417] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 3-4.
[418] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 3-4.
[419] Clause 6 of the 2013 Amendment Bill proposing amendments to s 10(2) and (3) of the MPRDA.
[420] Clause 6 of the 2013 Amendment Bill proposing amendments to s 10(2) and (3) of the MPRDA.
[421] Mineral and Petroleum Resources Development Amendment Bill B 15—2013.

agreement with objecting parties.[422] In the subsequent version of the Bill,[423] the time reference was deleted and replaced with the wording "within the prescribed period". This implies that new regulations will be issued specifying the period of consultation. As regulations are not subject to the same public-participation requirements as an act, it is possible that the Minister can impose similar inadequate timeframes in the anticipated regulations.

Allowing only 30 days for the applicant to consult with objecting parties and preparing and submitting a report on the outcome thereof, is insufficient. [424] It is unlikely that this inadequate timeframe for consultation will provide any meaningful results.[425] It is quite possible that more than one consultation may be necessary with the same party or group of people. To schedule these meetings, provide all the necessary information, receive feedback and compile reports within a 30-day timeframe, is not feasible.

Section 22 of the MPRDA provides that the applicant must consult with interested and affected parties "in the prescribed manner".[426] The manner of consultation must,

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[422] See e.g. Earthlife Africa Johannesburg Branch, GroundWork South Africa, Centre for Environmental Rights, Environmental Monitoring Group & Vaal Environmental Justice Alliance "Submission to the Portfolio Committee on Mineral Resources on the Mineral and Petroleum Resources Amendment Bill" (06-09-2013) *Centre for Environmental Rights* <http://cer.org.za/wp-content/uploads/2013/09/Joint-Submission-on-MPRDA-Amendment-Bill-6-Sept-2013-Administrative-Justice-Consultation-and-Access-to-Information.pdf> (accessed 24-03-2018) 15; Webber Wentzel "Commentary on the Mineral and Petroleum Resources Development Amendment Bill, 2013" (06-09-2013) *Parliamentary Monitoring Group* <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/130913webbersub.pdf> (accessed 04-10-2018).

[423] Mineral and Petroleum Resources Development Amendment Bill B 15A—2013.

[424] Earthlife Africa Johannesburg Branch, GroundWork South Africa, Centre for Environmental Rights, Environmental Monitoring Group & Vaal Environmental Justice Alliance "Submission to the Portfolio Committee on Mineral Resources on the Mineral and Petroleum Resources Amendment Bill" *Centre for Environmental Rights* 15; Webber Wentzel "Commentary on the Mineral and Petroleum Resources Development Amendment Bill, 2013" *Parliamentary Monitoring Group*.

[425] For an interpretation of meaningful engagement in the context of public participation when drafting legislation, see *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) paras 129-133; *Matatiele Municipality v President of the Republic of South Africa (2)* 2007 6 SA 477 (CC) paras 50, 97; Botha H "Representing the Poor: Law, Poverty and Democracy" (2011) 3 *Stellenbosch Law Review* 521 527, 540; and in the context of eviction proceedings, see *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); Liebenberg S "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" (2012) 12 *African Human Rights Law Journal* 1; Muller G "Conceptualising "Meaningful Engagement" as a Deliberative Democratic Partnership" (2011) 3 *Stellenbosch Law Review* 742; Marais L "Resources Policy and Mine Closure in South Africa: The Case of the Free State Goldfields" (2013) 38 *Resources Policy* 363 366; Louw H & Marais L "Mining and Municipal Finance in Kathu, An Open Mining Town in South Africa" (2018) 5 *The Extractive Industries and Society* 278 279.

[426] MPRDA, s 22(4)(b).

therefore, be prescribed by regulation,[427] but to date, no such regulations have been issued. Therefore, the enforceability of the consultation provisions contained in section 22 is under question. Some authors have argued that the obligations contained in section 22(4)(b) of the MPRDA are unenforceable.[428] This argument is based on case law where the courts have declared legislative provisions unenforceable due to the lack of required accompanying regulations.[429] However, in those instances, the provisions in the relevant legislation were meaningless without the necessary direction provided by the regulations.[430] The current issue of the manner of consultation can be distinguished from those cases. It is possible to interpret the consultation provisions without the required regulations. In fact, the courts have done so on many occasions.[431] The courts are also assisted by the consultation guidelines issued by the DMR.[432] However, the uncertainty created by the lack of prescribed regulations should not be sustained. The required regulations should be issued as a matter of urgency.

The Consultation Guidelines of the DMR place a three-fold duty on the applicant.[433] First, the applicant is required to notify the landowner, lawful occupier and all other

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[427] MPRDA, s 1 defines "prescribed" as "prescribed by regulation".

[428] See Dale et al *South African Mineral and Petroleum Law* MPRDA-228, MPRDA-454.

[429] See, in general, *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 1999 4 SA 788 (T), confirmed by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC); *Manqele v Durban Transitional Metropolitan Council* 2002 6 SA 423 (D) para 427C ff; *Minister for Environmental Affairs v Aquarius Platinum (SA) (Pty) Ltd* 2016 5 BCLR 673 (CC).

[430] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) addressed the South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998. The purpose of this Act was to control the distribution of medicines by classifying it into set categories. To enforce the Act, regulations were required to, inter alia, set schedules whereby the manufacture and distribution of medicines are determined. It was therefore impossible to implement the provisions of this Act without the accompanying regulations. This Act has since been repealed by the Medicines and Related Substances Amendment Act 59 of 2002. *Manqele v Durban Transitional Metropolitan Council* 2002 6 SA 423 (D) dealt with water rights. The case was not based on the constitutional right of access to water, but rather involved the provisions of the Water Services Act 108 of 1997. This Act is aimed at achieving the said right in the Constitution. However, regulations were required to define the extent of the right to basic water supply and basic sanitation. Without these regulations, the Act had no meaning and the court was unable to interpret the content of these rights.

[431] *Meepo v Kotze* 2008 1 SA 104 (NC); *Joubert v Maranda Mining Company (Pty) Ltd* 2010 1 SA 198 (SCA); *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* 2011 4 All SA 168 (SCA); and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC).

[432] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown).

[433] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 7.

interested and affected parties that a mining right application has been accepted. Second, the applicant must consult with all above-mentioned parties. The consultation must include a meeting with the parties during which they are informed in sufficient detail of what the mining operation will entail.[434] This information will enable them to evaluate the impact of the mining operation on their own rights and interests. According to the guidelines, the aim of the consultations is to reach a mutually acceptable agreement regarding the effect of the mining activities on the environment and the socio-economic conditions of the consulted party, if applicable.[435] Thirdly, the mining right applicant must compile a report of the outcome of the consultation proceedings and submit it to the Regional Manager with the environmental reports.[436]

The consultation objective identified in the consultation guidelines, namely, to reach a mutually acceptable agreement, does not accord with the provisions of the MPRDA. The MPRDA contains no provision that an agreement should be reached on any issues. In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*, the Court held that, although an agreement is not required in terms of the MPRDA, consultation should still be undertaken in good faith.[437]

In *Coal of Africa Limited & Another v Akkerland Boerdery (Pty) Ltd,*[438] the landowner (respondent) refused to grant access to the land to the prospecting right holder (applicant). The landowner based the refusal on the prospecting right holder's failure to consult him.[439] The Court held that an interested or affected party cannot rely on an

[434] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 7.
[435] Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 7.
[436] MPRDA, s 22(4)(a) and (b), read with NEMA, Chapter 5.
[437] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 65; Badenhorst et al (2012) *Journal of South African Law* 114.
[438] *Coal of Africa Limited v Akkerland Boerdery (Pty) Ltd* (38528/2012) 2014 ZAGPPHC 195 (5 March 2014).
[439] This case was decided in the context of s 5(4)(c) of the MPRDA, requiring the prospecting right holder to consult with the landowner once again after the right has been granted, but before exercising the right. This section has since been repealed by s 4(d) of the Mineral and Petroleum Recourses Development Amendment Act 49 of 2008. However, the principles established by the court remains valid and applicable to other consultation cases. The repealed s 5(4)(c) was also the object of litigation in *Meepo v Kotze* 2008 1 SA 104 (NC).

applicant's failure to consult if he (the interested or affected party) refused to be consulted or otherwise frustrated the applicant's attempts at consultation.[440]

The MPRDA provides for additional protection of local communities[441] as landowners or occupiers of land.[442] Apart from being included in the consultation processes referred to above, they also have a preferent prospecting or mining right to their land.[443] A discussion of this aspect falls outside the ambit of this thesis.

It is unfortunate that the consultation process between the applicant and the municipality does not enjoy further attention in the MPRDA, the regulations or the Consultation Guidelines. The concerns of the municipality[444] are unique and clearly distinguishable from the issues that may be relevant to the landowner or local community. It is therefore insufficient to have one set of provisions or guidelines addressing the consultation process with these divergent parties.

The process also reveals a missed opportunity on the part of the DMR to give input during the consultation proceedings. This is especially relevant in the case of consultation between the applicant and the municipality.[445] For example, the DMR is best placed to give context to the proposed mining project and how it relates to other mining operations in the area. Where the municipality lacks the financial or technical

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[440] *Coal of Africa Limited v Akkerland Boerdery (Pty) Ltd* (38528/2012) 2014 ZAGPPHC 195 (5 March 2014) paras 82, 83.

[441] The MPRDA define community as "a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community".

[442] See *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* (CCT265/17) 2018 ZACC 41 (25 October 2018) *SAFLII* <http://www.saflii.org/za/cases/ZACC/2018/41.html> (accessed 02-11-2018) in general regarding community consultation and occupation rights.

[443] MPRDA, s 104. See, in general, *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (Formerly Tropical Paradise 427 (Pty) Ltd and Others* 2010 3 All SA 577 (SCA). For a full discussion of this case, see Humby (2016) *South African Law Journal*; Badenhorst PJ & Olivier NJJ "Host Communities and Competing Applications for Prospecting Rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002'" (2011) 44 *De Jure* 126.

[444] For example, conflicting land use, infrastructure and housing requirements, electricity and water supply, road connections, environmental concerns, etc.

[445] Louw & Marais (2018) *The Extractive Industries and Society* 279; Marais (2013) *Resources Policy* 366. For a discussion of the state of relationships between mining companies and municipalities, see Rogerson CM "Mining-Dependent Localities in South Africa: The State of Partnerships for Small Town Local Development" (2012) 23 *Urban Forum* 107 113-121.

capacity to engage with the applicant on equal footing, the DMR can assist to explain technical issues related to the proposed mining project.

One further issue of interest to the municipality is the social and labour plan to be submitted by the mining right applicant. This is discussed in the following section.

4. Social and Labour Plan

When submitting an application for a mining right, the applicant must include a social and labour plan (SLP).[446] The MPRDA sets out the SLP's three-fold purpose.[447] The first objective is to stimulate job-creation and advance the social and economic wellbeing for all citizens.[448] Second, the SLP aims to transform the mining industry by improving social and economic inclusivity and equality in the industry.[449] Third, the SLP is used as an instrument to compel mining right holders to contribute to the socio-economic development of mining areas.[450]

To achieve the abovementioned objectives, the MPRDA lists six aspects that must be addressed in the SLP. It must contain information on the specific mine[451] and an undertaking by the right holder to implement the plan and inform mine employees of the content thereof.[452] The other four prescribed aspects relate to more substantive issues: the SLP must include a human resources development plan,[453] a local economic development programme,[454] procedures relating to downscaling and retrenchment[455] and finally, financial provision for the implementation of the plan.[456]

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[446] MPRDA, regs 10(1)(g) and 42(1), prescribed Form D of Annexure I; s 1.4(a) of the Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010) 6. See also Day 1 of Figure 2: Process to Apply for Mining Right at Section 2 above.

[447] MPRDA, reg 41. The SLP Guidelines issued by the DMR set out four objectives of the SLP (as opposed to the three set out in the regulations to the MPRDA). The first is based on s 2(e) of the MPRDA, setting out the objectives of the MPRDA in general, not the SLP specifically. The second and third SLP objectives in the guidelines accord with the objectives set out in the regulations to the MPRDA. The fourth objective in the guidelines relates to skills development of historically disadvantaged South Africans. See Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010) 5.

[448] MPRDA, reg 41(a). This is a repetition of s 2(f) of the Act, dealing with the objectives of the MPRDA.

[449] MPRDA, reg 41(b). This objective can be compared to the Preamble and s 100 of the MPRDA.

[450] MPRDA, reg 41(c). This accords with s 2(i) of the MPRDA.

[451] MPRDA, reg 46(a).

[452] MPRDA, reg 46(f).

[453] MPRDA, reg 46(b).

[454] MPRDA, reg 46(c).

[455] MPRDA, reg 46(d).

[456] MPRDA, reg 46(e).

A detailed discussion of all requirements of the SLP falls outside the scope of this study.[457] This study is specifically interested in one aspect of the SLP, namely, the local economic development programme. This programme must be aligned with the municipality's integrated development plan.[458] A municipality's integrated development plan, in turn, is an important instrument for municipal planning.[459] Therefore, the SLP is of interest to the focus of this study, namely, the relationship between land use planning and mining.

The SLP should not only align with the integrated development plan of the municipality in whose jurisdiction the mine operates. It must also align with the integrated development plan of municipalities in labour-sending areas.[460] Therefore, all of these municipalities should be consulted when drafting the SLP, which renders the point at which the SLP must be lodged problematic. The SLP must be included when the application for a mining right is lodged.[461] However, mandated consultation processes commence only after acceptance of the mining right.[462] This oversight in the MPRDA results in a convoluted situation where the mining right applicant must consult with the

[457] For a full analysis of the social and labour plan system, see Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 1: System Design Trends Analysis Report*; Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 2: Implementation Operation Analysis Report*; Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 3: Alternative Models for Mineral-Based Social Benefit*; Managing Transformation Solutions *The Marikana Commission of Inquiry: The Problems of the Social and Labour Plan (SLP) 'System' within the Mining Sector in South Africa* (08-2014).

[458] MPRDA, reg 46(c)(iii); Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010) 18; Marais (2013) *Resources Policy* 366; Rogerson (2012) *Urban Forum* 108-109, 121-129; Louw & Marais (2018) *The Extractive Industries and Society* 279-280. For a discussion of Municipal Integrated Development Plans, see Section 2 in Chapter 6 below.

[459] Spatial Planning and Land Use Management Act, s 5(1)(a). For a discussion of the meaning of municipal planning, see Section 2 of Chapter 4 below.

[460] MPRDA, reg 46(c)(iii). The MPRDA and its regulations do not define labour-sending areas. Clause 1(m) of the 2013 Amendment Bill defines labour-sending areas as "areas from where a majority of mineworkers, both historical and current are or have been sourced". This echoes the definition contained in the Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 in *GG* 33573 of 20-09-2010) and para 1.2 of the Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010). A similar definition is contained in the Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018 (GN 611 in *GG* 41714 of 15-06-2018). It defines labour-sending areas as "an area from which a right holder sources [*sic*] majority of its current or historical South African employees". For a full discussion of Municipal Integrated Development Plans**,** see Section 2 of Chapter 6 below.

[461] MPRDA, regs 10(1)(g) and 42(1), prescribed Form D of Annexure I; s 1.4(a) of the Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010) 6. See also Day 1 of Figure 2: Process to Apply for Mining Right at Section 2 above.

[462] MPRDA, s 22(4)(b). This section in the MPRDA does not refer specifically to consultation regarding the content of the SLP. It relates to the general consultation requirement between the mining right applicant and interested and affected parties.

municipalities to draft the SLP, which is then lodged with the mining right application. Subsequently, a second consultation process must follow, during which the mining right applicant obtains input from the municipalities on the SLP.

The 2013 Amendment Bill aims to change this state of affairs. It will shift the point at which the SLP is lodged – lodgement will only take place after the consultation with the community and the municipalities is completed.[463] Should the Bill become law, the regulations must be amended to correspond with the new position.

Although the SLP must align with the municipalities' integrated development plans, very little guidance is given as to how this should be achieved. The MPRDA itself contains no reference to alignment between these two instruments. The only legislative indication of this requirement is found in the regulations to the MPRDA. The regulations state that the local economic development programme of the SLP must include details of projects supported by the mine that deal with infrastructure and poverty alleviation.[464] These projects must align with the integrated development plans of the municipality where the mine operates, as well as municipalities in labour-sending areas.[465] No further information is given in the MPRDA or regulations. Therefore, it is necessary to look for direction elsewhere.

The DMR has issued guidelines relating to the SLP.[466] The guidelines envisage a five-year cycle for SLPs.[467] There is no reference in the MPRDA or regulations that SLPs must be reviewed every five years. However, the 2013 Amendment Bill introduces this requirement.[468] SLP's five-year cycle is significant in the context of alignment with municipalities' integrated development plans. Municipalities must adopt a new integrated development plan every five years.[469] As new SLPs and integrated development plans must be adopted every five years, it provides ample opportunity for

[463] 2013 Amendment Bill, cl 17(e).
[464] MPRDA, reg 46(c)(iii).
[465] See fn 460 above.
[466] Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010). As the content of the guidelines is not contained in legislation, it is non-binding. See Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 1: System Design Trends Analysis Report* 98.
[467] Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010) para 4.7.5, read with the templates for reporting on skills development.
[468] 2013 Amendment Bill, cl 18(a).
[469] Section 25 of the Local Government: Municipal Systems Act 32 of 2000, read with s 24 of the Local Government: Municipal Structures Act 117 of 1998. See Section 2 of Chapter 6 below for a detailed discussion of Municipal Integrated Development Plans.

mining right holders and municipalities to realign these instruments where circumstances change. The DMR is indispensable to facilitate this process. Unfortunately, there are no provisions in the MPRDA, regulations or SLP guidelines to specify the Department's role in this regard. This oversight points to a failure of intergovernmental relations and co-operation between the DMR and municipalities.[470]

A further issue of concern is the monitoring of SLP implementation. The MPRDA regulations identify the DMR as the monitoring authority.[471] No authority is given to municipalities in this regard. Given municipalities' local knowledge and close proximity to mining operations within their jurisdictions, they are in a unique and opportune position to monitor compliance with SLPs. [472] Where municipal capacity for compliance monitoring is lacking, national government should provide support.[473]

5. Conclusion

The accuracy and comprehensiveness of the MPRDA provisions dealing with mining right applications leave much to be desired. The MPRDA contains no definition of consultation, nor is the purpose of the consultation process explained. Prescribed regulations, setting out the manner in which consultation must take place, are lacking. This has already led to some authors bringing the validity of the consultation provisions contained in the MPRDA into question.[474]

The MPRDA is not consistent with its use of the phrase "interested and affected party" and it gives no explanation of who is regarded as an interested or affected party. The lack of clarity in this regard is of great concern. Without proper guidance and regulation

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[470] Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 1: System Design Trends Analysis Report* 86, 100-102; Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 2: Implementation Operation Analysis Report* 48-51; Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 3: Alternative Models for Mineral-Based Social Benefit* 14; South African Local Government Association *Guidelines on Local Government and Mining Company Engagement on Housing Delivery* (03-2015) 3.

[471] MPRDA, reg 45 (GN R 527 in *GG* 26275 of 23-04-2004: Mineral and Petroleum Resources Development Regulations, as amended by GN R 349 in *GG* 34225 of 18-04-2011).

[472] Centre for Applied Legal Studies *The Social and Labour Plan Series - Phase 2: Implementation Operation Analysis Report* 50.

[473] Constitution, s 154(1); National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 410; Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7. Also see discussion in Section 6.2 of Chapter 2 above.

[474] Dale et al *South African Mineral and Petroleum Law* MPRDA-228 read with MPRDA-454. See discussion in Section 3.3 above.

of this aspect, the effectiveness of the consultation provisions in the MPRDA is significantly diluted. By leaving it up to the mining right applicant to determine who the interested and affected parties are, a dangerous amount of responsibility and trust is placed on the shoulders of mining right applicants. This responsibility is not always fulfilled.[475] Proper consultation is one of the only measures to alleviate the adverse effects of mining activities on the rights of interested and affected parties, by informing them of the impact of mining on their own rights and interests. Given the importance of this process, it should not be left solely to the mining right applicant to comply with this requirement. The Regional Manager, as representative of the DMR, should share in this responsibility by giving personal notice to specific interested parties, specifically the municipality.

There is no particular legislative requirement, either in the MPRDA or accompanying regulations, that the municipality must be notified of, and consulted on, a pending mining right application in its jurisdiction. This *lacuna* is cause for great concern. Neither the Regional Manager, nor the mining right applicant is specifically required to involve the municipality in this process. Instead, municipalities are lumped together with other interested and affected parties. The only indication that the municipality must be consulted is contained in the non-binding guidelines issued by the DMR.[476] However, it is still left to the applicant to identify the municipality as an interested party and there is no mechanism to verify that all affected municipalities have been consulted.

It is conceivable that a municipality may only come to know about a mining right application after the right has been granted and the right holder applies for rezoning of the land, if necessary. Neighbouring municipalities, who are indirectly affected by the mining right, may fall through the cracks entirely. This state of affairs is unacceptable and needs to be addressed urgently. Failure to do so also threatens the constitutional principle of co-operative government, discussed in Chapter 2.

[475] See, in general, *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC). In the absence of minimum consultation standards in the MPRDA, it is also difficult to assess to what extent the mining right applicant has met its consultation responsibility.
[476] See Section 3.1 above.

Furthermore, the MPRDA should draw a distinction between different forms of consultation. While the MPRDA provides for consultation between the mining right applicant and interested and affected parties,[477] no provision is made for intergovernmental consultation. The Act should provide specifically for consultation between the DMR and other government departments or municipalities when mining right applications are considered. The proposed establishment of Regional Mining Development and Environmental Committees in terms of the 2013 Amendment Bill can address this lacuna in the MPRDA.[478]

Although the 2013 Amendment Bill also provides for consultation with "relevant structures", which presumably includes municipalities, such consultation is limited to the content of the social and labour plan.[479] Therefore, the Bill does little to address the overall deficiencies of the consultation process in the MPRDA.

This chapter illustrates the shortcomings of the MPRDA relating to consultation with municipalities on proposed mining operations. The mining right application process does not provide sufficiently for input from local authorities. The subsequent chapters investigate whether land use planning legislation caters for input from the DMR when municipalities make decisions regarding land use within their jurisdictions.

[477] See discussion under section 3.3 above.
[478] 2013 Amendment Bill, cl 7. See discussion under Section 3.2 above.
[479] 2013 Amendment Bill, cl 17(e).

Chapter 4: Land Use Planning Legislative Framework

1. Introduction

The previous chapter investigates how the mining right application process provides for consultation and intergovernmental co-operation between the Department of Mineral Resources (DMR) and municipalities. The following part of the thesis focuses on the other side of the coin – the extent to which municipalities are required to consult with the DMR when determining land use applications for mining purposes.

Where a piece of land is not zoned[480] for mining as a permitted land use, a rezoning application to the relevant municipality will be necessary before mining activities can commence.[481] To understand the context within which zoning schemes are determined and land use decisions are made, it is necessary to examine South Africa's land use and planning law frameworks.

2. Functional Areas of Planning

Planning Law is complex.[482] The Constitution allocates planning functions to all three spheres of government and specifically refers to four functional areas directly related to planning.[483] These functional areas are "regional planning and development",[484]

[480] In section 1 of the Spatial Planning and Land Use Management Act, "zone" is defined as "a defined category of land use which is shown on the zoning map of a land use scheme".
[481] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) and *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC).
[482] For example, terms such as 'spatial planning law', 'land use planning law', and 'physical planning law' are used almost interchangeably. A complete discussion of this issue falls outside the scope of this research. For more details, see *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) paras 49 – 57; *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) paras 40-41; Department of Land Affairs *Wise Land Use: White Paper on Spatial Planning, Land Use Management and Land Development* (GN 1646 in *GG* 22473 of 20-07-2001) 65; Steytler & De Visser *Local Government Law of South Africa* 5-23 – 5-24(4); Van Wyk *Planning Law* 11 – 15; Laubscher et al *SPLUMA: A Practical Guide* 6; Du Plessis A *Environmental Law & Local Government in South Africa* (2015) 563.
[483] Constitution of the Republic of South Africa, 1996, Schs 4 and 5. Also see Section 5 of Chapter 2 above for a discussion of the Constitution's allocation of powers.
[484] Constitution, Part A of Sch 4.

"urban and rural development",[485] "provincial planning"[486] and "municipal planning".[487] The boundaries between these four functional areas are blurred and the exact content of each function is not easy to identify.[488] The Constitution itself does not elaborate on the meaning of these concepts. However, the Constitutional Court has stressed that, even though similar wording is used to describe these functional areas, each area remains separate and distinct from one another.[489]

To distinguish between the four functional areas and to determine the content of each function, the Constitutional Court provided the following solution:

> "The prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other spheres."[490]

With "prefix" it is assumed that the Court referred to the preceding adjective. For example, *provincial* planning is to be distinguished from *municipal* planning in that the former relates to planning on a provincial scale, while the latter relates to planning at the municipal level. While the focus of this research is on municipal planning, it is necessary to explore the meaning of the other functional areas as well. By determining the boundaries and content of the other areas, one has a better understanding of the meaning of municipal planning and how wide municipal powers extend in this context.

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[485] Constitution, Part A of Sch 4.
[486] Constitution, Part A of Sch 5.
[487] Constitution, Part B of Sch 4. See, in general, minority judgment in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC); *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC); *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning, Western Cape* 2011 4 All SA 270 (WCC); *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 3 SA 441 (WCC). For a full discussion see Van Wyk (2012) *Potchefstroom Electronic Law Journal*; Van Wyk *Planning Law* 182-201.
[488] Van Wyk (2012) *Potchefstroom Electronic Law Journal* 288; Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* (2016) 62.
[489] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55. Each of the four planning functions included in the Constitution is allocated to a specific sphere of government.
[490] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55. See also *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) para 41; Van Wyk (2012) *Potchefstroom Electronic Law Journal* 297, 305; Humby (2015) *Journal of South African Law* 179-180; Laubscher et al *SPLUMA: A Practical Guide* 12-14.

Regional planning and development falls under the concurrent legislative power of national and provincial government.[491] The adjective "regional" indicates that it refers to planning and development taking place at a regional level.[492] The Constitutional Court pointed out that the functional area of regional planning and development illustrates the close relationship between planning and development.[493]

In the context of urban and rural development, the Constitutional Court cautioned that the meaning of "development" should not be too widely construed.[494] A narrower interpretation will prevent unlawful interference by one sphere of government with the powers of another.[495] This led the Court to conclude that urban and rural development does not include powers to determine land use and zoning, which are part of municipal planning.[496] "Urban and rural development" falls under the concurrent powers of national and provincial government.[497]

The Constitution allocates legislative powers over provincial planning exclusively to provincial governments.[498] In *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council*, the Constitutional Court declined to interpret the meaning of provincial planning while legislation was being

[491] Constitution, Part A of Sch 4. See also the Preamble to the Spatial Planning and Land Use Management Act; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 54. In term of s 6 of the Interim Constitution (Constitution of the Republic of South Africa Act) the functional areas of 'regional planning and development' and 'urban and rural development' fell under provincial legislative competence. See *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) for a discussion of these functional areas in the context of the Interim Constitution.

[492] Van Wyk (2012) *Potchefstroom Electronic Law Journal* 305.

[493] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 54.

[494] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 62.

[495] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 62. Section 41(1)(f) and (g) of the Constitution prohibits the different spheres of government from encroaching on each other's functional areas. See also *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) para 58; *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development* 1999 11 BCLR 1229 (C) para 122; Malherbe (2006) *Journal of South African Law* 813.

[496] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) 63. The Court did not deem it necessary to investigate the meaning of "urban and rural development" any further. See also Van Wyk (2012) *Potchefstroom Electronic Law Journal* 305.

[497] Constitution, Part A of Sch 4. See also the Preamble to the Spatial Planning and Land Use Management Act; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) 60; *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) 31.

[498] Constitution, Part A of Sch 5. See also the Preamble to the Spatial Planning and Land Use Management Act; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 54.

drafted on the subject.[499] This legislation took the form of the Spatial Planning and Land Use Management Act (SPLUMA).[500] SPLUMA gives content to the meaning of provincial planning.[501] Provincial planning includes the drafting and approval of provincial spatial development frameworks;[502] drafting provincial policies and legislation relating to planning;[503] exercising of legislative and executive powers relating to land use and development;[504] and monitoring municipalities' legislative compliance.[505]

Of all the functional areas related to planning, municipal planning is most contested in litigation.[506] At issue is the encroachment by national and provincial governments upon the functional area of municipal planning, which falls under the exclusive executive competence of local government.[507] The Supreme Court of Appeal held that municipal

[499] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 24.
[500] Act 16 of 2013.
[501] SPLUMA, s 5(2). SPLUMA also contains a description of municipal planning (see discussion below). However, the Act does not describe "regional planning and development" or "urban and rural development" other than confirming that these are concurrent functions of national and provincial government. See Preamble to SPLUMA.
[502] SPLUMA, s 5(2)(a). See Section 3.2 of Chapter 6 below for a discussion of provincial spatial development frameworks.
[503] SPLUMA, s 5(2)(d).
[504] SPLUMA, s 5(2)(c).
[505] SPLUMA, s 5(2)(b).
[506] E.g. *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2008 4 SA 572 (W); *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC); *Lagoon Bay Lifestyle Estate (Pty) Ltd v Minister of Local Government, Environmental Affairs and Development Planning, Western Cape* 2011 4 All SA 270 (WCC); *Lagoonbay Lifestyle Estate (Pty) Ltd v Minister for Local Government, Environmental Affairs and Development Planning of the Western Cape* (320/12) [2013] ZASCA 13; *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 (CC); *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development Planning* 2012 3 SA 441 (WCC); *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC); *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC); *Le Sueur v eThekwini Municipality* (9714/11) 2013 ZAKZPHC 6 (30 January 2013); *Clairison's CC v MEC for Local Government, Environmental Affairs and Development Planning* (26165/2010) 2012 ZAWCHC 44 (16 May 2012); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC); *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Appeal Tribunal* 2016 3 SA 160 (CC); *Merafong City v Anglogold Ashanti Ltd* 2017 2 SA 211 (CC).
[507] Constitution, Part B of Sch 4; Preamble to SPLUMA.

planning "is commonly understood to refer to the control and regulation of land use".[508] Municipal planning also includes the zoning of land.[509]

Zoning refers to the public control of land use[510] by the creation of areas or zones, with each zone accommodating (or prohibiting) specific land uses.[511] It originated from the need to create order in the way that cities developed[512] with the aim of protecting the 'health, safety, welfare and morals' of the public.[513] Designating specific land uses to different areas promotes sustainable development.[514] The zoning designation of a piece of land is depicted on the municipality's land use scheme and a rezoning application is required to change the said zoning. These aspects are examined in Chapter 7.[515] The Constitutional Court emphatically stated that all zoning decisions, regardless of the size of the area involved, are part of municipal planning.[516]

SPLUMA gives further content to the concept of municipal planning.[517] Municipal planning includes the drafting and acceptance of integrated development plans, municipal spatial development frameworks and land use schemes.[518] SPLUMA also

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[508] *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) para 41; *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) 27-28. See also *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 57; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 131; Van Wyk (2012) *Potchefstroom Electronic Law Journal* 295-302.

[509] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 57; *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 (CC) para 46; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) 13.

[510] Whitnall G "History of Zoning" (1931) 155 *The Annals of the American Academy of Political and Social Science* 1 1.

[511] These uses include residential, commercial, industrial, agricultural activities, etc. *Cape Town Municipality v Clarensville (Pty) Ltd* 1974 2 SA 138 (C) 139F-G; Van Wyk *Planning Law* 248; Nel V "A Better Zoning System for South Africa?" (2016) 55 *Land Use Policy* 257 259; Nel V "Spluma, Zoning and Effective Land Use Management in South Africa" (2016) 27 *Urban Forum* 79 82.

[512] Whitnall (1931) *The Annals of the American Academy of Political and Social Science* 3.

[513] Dukeminier J, Krier JE, Alexander GS, Schill MS & Strahilevitz LJ *Property* 9 ed (2017) 897; Van Wyk *Planning Law* 246, 249; Nel (2016) *Land Use Policy* 259; Nel (2016) *Urban Forum* 83.

[514] Van Wyk *Planning Law* 246. However, zoning as a land use planning tool has also been criticised for perpetuating Apartheid land use patterns. See, for example, Nel (2016) *Land Use Policy*; Nel (2016) *Urban Forum*.

[515] Sections 2 and 3 of Chapter 7 discusses Land Use Schemes; and sections 4 and 5 is dedicated to rezoning applications.

[516] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) paras 18-19. For a critical view of this judgment, see Humby (2015) *Journal of South African Law*.

[517] SPLUMA, s 5(1).

[518] SPLUMA, s 5(1)(a) and (b). See Sections 2 and 3.3 in Chapter 6 below for a discussion of integrated development plans and municipal spatial development frameworks, respectively. Land use schemes are discussed in Section 2 of Chapter 7 below.

states that municipal planning comprises control over and the regulation of land use.[519] However, this statement is qualified. In terms of SPLUMA, municipal planning only relates to the regulation of land use on a small scale. Where land use is on such a scale that it has a bearing on provincial or national planning, it falls outside the ambit of municipal planning.[520]

This limiting provision in SPLUMA is at odds with the Constitutional Court's interpretation of municipal planning. The Court clearly found that the regulation of land use and all zoning decisions, regardless of scope, falls within the ambit of municipal planning.[521] National and provincial governments cannot usurp these functions according to the scope of the project.[522] They can rather use their powers to co-ordinate planning policies of different spheres of government and give input when municipal planning instruments are drafted.[523] This Constitutional Court judgment was handed down on 4 April 2014. At the time, SPLUMA was already promulgated,[524] but not yet in operation. While the judgment refers to SPLUMA,[525] it does not specifically deal with the abovementioned provision or the constitutional validity thereof.[526] The contradiction between SPLUMA and the Constitutional Court's interpretation of municipal planning is further examined in Section 4.2 of Chapter 7 below.

3. SPLUMA: Overview

To provide some context to the disparity between SPLUMA and the Constitutional allocation of powers, it is useful to discuss the development of South Africa's planning legislative framework and to give an overview of SPLUMA.

[519] SPLUMA, s 5(1)(c).
[520] SPLUMA, s 5(1)(c).
[521] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) paras 18-19.
[522] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19.
[523] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19. For a discussion of spatial planning instruments, see Section 4 below.
[524] GN 559 in *GG* 36730 of 05-08-2013.
[525] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) fns 24, 29.
[526] For an argument cautioning against unlimited power of local government over municipal planning matters, see in general, Humby (2015) *Journal of South African Law*.

3.1 Development of Uniform Planning Legislative Framework

The spectre of Apartheid looms large over South Africa's land use and planning law frameworks.[527] Until 1 July 2015, when SPLUMA came into force, land use was governed by fragmented old-order[528] provincial legislation – relics that survived the transition to democracy.[529] There had been attempts[530] to eradicate the Apartheid legacy, which is particularly evident in land use policies; but this legacy has proven to be very obstinate.[531]

A notable eradication attempt was the enactment of the Development Facilitation Act (DFA) in 1995.[532] The aim of the DFA was to launch extraordinary measures for the implementation of new land development programmes.[533] It provided general principles for the governing of land development throughout South Africa.[534]

[527] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) para 1; Preamble to SPLUMA; South African Cities Network *Addressing the Crisis of Planning Law Reform in South Africa* (01-2012) 9-13; Van Wyk *Planning Law* 49-52; Van Wyk J "The Legacy of the 1913 Black Land Act for Spatial Planning" (2013) 28 *Southern African Public Law* 91 in general; Harrison P, Todes A & Watson V *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 19-38, 57-72, 99-103, 235-236; Berrisford S "Unravelling Apartheid Spatial Planning Legislation in South Africa: A Case Study" (2011) 22 *Urban Forum* 247 247-248.

[528] In Schedule 6 of the Constitution of the Republic of South Africa, 1996, "old order legislation" is defined as "legislation enacted before the previous Constitution took effect". It bears the same meaning in this thesis, in contrast to "new order legislation" which refers to statutes enacted after the 1993 Constitution (Constitution of the Republic of South Africa,).

[529] E.g. the Land Use Planning Ordinance 15 of 1985 (LUPO) applies in parts of the Eastern Cape and North-West Provinces. Townships Ordinance 9 of 1969 applies to the Free State and Town-Planning and Townships Ordinance 15 of 1986 is applicable to Gauteng, Limpopo and Mpumalanga. See *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) para 1; Minister for Agriculture and Land Affairs *Land Use Management Bill* (B27B-2008), Memorandum on the Objects of the Land Use Management Bill (2008); Van Wyk *Planning Law* 49, 51; Van Wyk (2013) *Southern African Public Law* 92.

[530] For example, the promulgation of the Abolition of Racially Based Land Measures Act 108 of 1991, the Upgrading of Land Tenure Rights Act 112 of 1991 and the Less Formal Township Establishment Act 113 of 1991.

[531] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC) paras 1-2. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 590; Van Wyk *Planning Law* 43-52; Berrisford (2011) *Urban Forum* 249-253.

[532] Development Facilitation Act ("the DFA").

[533] Preamble to the DFA.

[534] DFA, s 3. Examples of these principles included the effective and cohesive development of land (section 3(c)); the optimal use of existing resources, including land and minerals (s 3 (c)(iv)); the equal consideration of all land development uses without giving prejudicial preference to any one use (s 3(j); and co-ordination of land development by national, provincial and local government spheres to avoid competing demands on limited resources (s 3(l)).

Its noble objectives notwithstanding, in 2010, the Constitutional Court found parts[535] of the DFA to be unconstitutional.[536] The Constitutional Court declared these parts invalid but suspended the invalidity for a period of 24 months.[537] The suspension was to afford Parliament sufficient time to rectify the defects in the DFA or to replace the Act with new legislation.[538] The Constitutional Court commented that "[t]his situation cries out for legislative reform".[539] Parliament did not meet the deadline of 17 June 2012 set by the Constitutional Court.[540] Even though it was desperately needed, new and effective planning laws proved to be very elusive.[541]

On 22 March 2012, three months before the expiration of the Constitutional Court's deadline, the Department of Rural Development and Land Reform issued a statement regarding the impending deadline.[542] It stated that a bill was about to be introduced to Parliament, which would repeal the DFA.[543] The statement continued that, the Constitutional Court order notwithstanding, all parts of the DFA would remain in effect

[535] Chapters V and VI of the Development Facilitation Act dealing with land development procedures.
[536] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC).
[537] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 95. The Constitutional Court confirmed the order of invalidity made by the Supreme Court of Appeal in *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA) para 50. In the Supreme Court of Appeal case, the invalidity was suspended for eighteen months. The Constitutional Court extended this period to two years.
[538] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 95.
[539] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 33.
[540] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 95.
[541] The various attempts to reform planning policy and legislation included: Department of Land Affairs *Wise Land Use: White Paper on Spatial Planning and Land Use Management* (GN 1646 in GG 22473 of 20-07-2001); Department of Land Affairs *Draft Land Use Management Bill* (GN 1658 in *GG* 22473 of 20-07-2001); Minister for Agriculture and Land Affairs *Land Use Management Bill* (B27-2008); Minister for Agriculture and Land Affairs *Land Use Management Bill* (B27B-2008). The Land Use Management Bill was withdrawn after valid concerns were raised at the portfolio committee meeting of the National Assembly in August 2008 regarding the Bill's constitutionality. See Parliamentary Monitoring Group "Land Use Management Bill [B27-2008]: Deliberations & Adoption" (11-08-2008) *Parliamentary Monitoring Group* <https://pmg.org.za/committee-meeting/9491/> (accessed 13-04-2018). In 2011, the *Draft Spatial Planning and Land Use Management Bill, 2011* (GN 280 in *GG* 34270 of 06-05-2011) was published for public comment. This was followed two iterations of the Bill in 2012 ([B14-2012] and [B14-2012 (Re-introduced)]) and another two in 2013 ([B14A-2012] and [B14B-2012]) before the Act was published in August 2013 (GN 559 in *GG*36730 of 05-08-2013). For a discussion on the history of the Draft Spatial Planning and Land Use Management Bill, 2011, see Van Wyk *Planning Law* 52-54.
[542] Department of Rural Development and Land Reform *Statement by the Department of Rural Development and Land Reform on the Spatial Planning and Land Use Management Bill (SPLUMB) and the Constitutional Court Judgment in the Development Facilitation Act (DFA) Case* (22-03-2012).
[543] This referred to the proposed Spatial Planning and Land Use Management Bill, as approved by the Cabinet on 20 March 2012 for introduction to Parliament.

until the new Bill is passed. However, the Supreme Court of Appeal[544] held that the unconstitutional parts of the DFA will not be valid after the deadline set by the Constitutional Court. The Supreme Court of Appeal confirmed that policy statements made by government departments cannot supersede a Constitutional Court order declaring legislation invalid.[545]

On 1 July 2015, almost three years after the expiration of the Constitutional Court's deadline, the DFA was finally repealed in its entirety.[546] It was replaced by SPLUMA.[547]

3.2 SPLUMA: Aims, Purposes and System

SPLUMA aims to uphold greater consistency and uniformity in planning legislation throughout the country.[548] It addresses the varying application procedures and decision-making policies relating to land use that are applicable in the various provinces.[549] It is the first post-1994 planning legislation that provides a cohesive land use management system for the whole of South Africa and is binding on all spheres of government.[550] As a framework act, SPLUMA provides clear principles and standards for spatial planning and land use policies of provincial and local governments.[551] It specifically highlights the important role of municipalities in national and provincial development programmes.[552]

SPLUMA does not repeal old provincial legislation.[553] Insofar as these are not in contravention of SPLUMA's provisions, old provincial legislation still applies.[554] However, provincial governments may enact new legislation where necessary for the regulation of, among other things, land development, land use management, spatial planning and municipal planning.[555] Some provinces have already drafted new

[544] *Shelton v Eastern Cape Development Tribunal* 2016 JOL 36726 (SCA).
[545] *Shelton v Eastern Cape Development Tribunal* 2016 JOL 36726 (SCA) para 18.
[546] SPLUMA, s 59 read with Sch 3.
[547] Proclaimed by GN 26 in *GG* 38828 of 27-05-2015.
[548] Long title and s 3(a) of SPLUMA.
[549] Long title of SPLUMA.
[550] Nel (2016) *Urban Forum* 80.
[551] Long title read with s 3 of SPLUMA.
[552] Preamble to SPLUMA.
[553] SPLUMA, s 59 read with Sch 3.
[554] SPLUMA, s 2(2).
[555] SPLUMA, s 10 read with Sch 1.

provincial legislation in accordance with this mandate.[556] However, apart from the Western Cape Land Use Planning Act,[557] these bills are still in the drafting phase.

SPLUMA identifies four components that make up South Africa's spatial planning system.[558] These are (i) spatial development frameworks;[559] (ii) land use schemes;[560] (iii) land development application procedures;[561] and (iv) development principles and norms and standards.[562] The first three components are discussed in Section 4 below.

The following discussion relates to the fourth component of the spatial planning system, namely, development principles and norms and standards. These guide all spatial planning and land use management in South Africa.[563] Municipalities must be guided by these principles when drafting spatial development frameworks, land use schemes or procedures for land development applications, as well as when making decisions regarding land use and zoning.[564] SPLUMA lists five development principles, namely, spatial justice, spatial sustainability, efficiency, spatial resilience and good administration.[565] The five principles are extended into specific components or requirements.[566] Neither all principles nor all of their respective components will automatically apply to every instance of spatial planning or land use management.[567]

[556] Eastern Cape Planning and Development Bill, 2012; Free State Spatial Planning and Land Use Bill, 2016; Draft Gauteng Planning and Development Bill, 2012 (GN 1202 in *Gauteng Provincial Gazette Extraordinary* 128 of 10-05-2013); Limpopo Spatial Planning and Land Use Management Bill, 2017 (PN 116 in *Limpopo Provincial Gazette* 2867 of 24-11-2017); Mpumalanga Planning Bill, 2013; Northern Cape Spatial Planning and Land Use Management Bill, 2012; Draft North West Provincial Spatial Planning and Land Use Management Bill, 2015 (PN 96 in *North West Provincial Gazette* 7651 of 31-05-2016); and Western Cape Land Use Planning Act. The KwaZulu-Natal Planning and Development Act was enacted prior to SPLUMA.
[557] Act 3 of 2014.
[558] SPLUMA, s 4(a)-(d).
[559] SPLUMA, s 4(a), read with ss 12-22. See Section 3 of Chapter 6 below for a detailed discussion of the various spatial development frameworks.
[560] SPLUMA, s 4(c), read with ss 24-32. See Section 2 in Chapter 7 below for a discussion of land use schemes.
[561] SPLUMA, s 4(d), read with ss 33-52. See Section 4 in Chapter 7 below for a discussion of land development application procedures.
[562] SPLUMA, s4(b), read with ss 6-8.
[563] SPLUMA, s4(b).
[564] SPLUMA, s 4(b); Laubscher et al *SPLUMA: A Practical Guide* 63; Van Wyk *Planning Law* 93.
[565] SPLUMA, s 7(a)-(e).
[566] SPLUMA, s 7(a)(i)-(vi), 7(b)(i)-(vi), (c)(i)-(iii), (d) and (e)(i)-(iv).
[567] Laubscher et al *SPLUMA: A Practical Guide* 63.

In each case, it is necessary to determine which principles and components are applicable, depending on the circumstances.[568]

A detailed discussion of all five principles and their respective components falls outside the scope of this study.[569] However, it is useful to evaluate which of these principles and components promote co-operative government in the context of mining and land use planning. It is also necessary to contemplate which of these principles and components will be relevant when considering land use for mining purposes.

The development principle of good administration has the biggest impact on co-operative government and intergovernmental relations. This principle requires a cohesive approach to land use planning by all three spheres of government.[570] As pointed out earlier, all three spheres are responsible for certain aspects of planning, as allocated by the Constitution.[571] When each sphere of government prepares its respective spatial development frameworks,[572] the other spheres must give input.[573] This provision in SPLUMA uses the word "must", not "may".[574] The requirement to give input is, therefore, mandatory.[575] This input involves comments by specific departments in each sphere responsible for specific sectors or industries. For example, the national DMR must give input on the spatial development framework of every municipality where mining takes place.

Another development principle relevant in the context of land use planning and mining is efficiency. SPLUMA requires procedures for land development applications to be streamlined and efficient.[576] While application procedures should allow sufficient time for public and intergovernmental consultation, it should strike a balance to remain streamlined and efficient. Any inefficiencies or duplication of powers during the land

[568] Laubscher et al *SPLUMA: A Practical Guide* 63.
[569] For a discussion of these principles, see Laubscher et al *SPLUMA: A Practical Guide* 63-85; Van Wyk *Planning Law* 93-94.
[570] SPLUMA, s 7(e)(i)
[571] See Section 2 above, as well as the related discussion in Chapter 2.
[572] Section 12(1) of SPLUMA requires all three spheres of government to prepare their respective spatial development frameworks.
[573] SPLUMA, s 7(e)(ii), read with ss 13(1), 15, 18(1) and 20. See Section 3 of Chapter 6 below for a detailed discussion of spatial development frameworks.
[574] See SPLUMA, s 7(e)(ii).
[575] Van Wyk *Planning Law* 94.
[576] SPLUMA, s 7(c)(iii). See also s 8(2)(c) dealing with norms and standards of land use management and land development to be prescribed by the Minister of Rural Development and Land Reform.

use application process will amount to a violation of the guiding principles in SPLUMA.[577]

The third development principle to consider is spatial sustainability. This includes development in locations that are sustainable.[578] For example, expansive mining operations in built-up urban areas are less sustainable than in more remote locations. However, municipalities must also consider the cost of providing infrastructure and social services in these remote areas.[579] SPLUMA specifically advocates for development within a municipality's "fiscal, institutional and administrative means".[580] Therefore, even though this development principle relates to *spatial* sustainability, other sustainability concerns also play a role. Spatial sustainability also requires land development measures that protect the environment and valuable agricultural land.[581] It is more probable that extensive mining activities will be undertaken on vacant land, as it is impractical to commence mining operations in built-up areas. Therefore, the majority of new mining projects will be proposed on vacant land that is currently utilised as open spaces, environmentally protected areas or agricultural land. In accordance with the principle of spatial sustainability, municipalities have the difficult task of balancing the need for mining and associated economic growth with the mandate to protect the environment and fertile agricultural land.

SPLUMA requires the Minister of Rural Development and Land Reform to specify norms and standards for land development.[582] This must be done after consultation with provincial and local spheres of government.[583] Despite SPLUMA's provisions, the Minister has to date failed to prescribe these norms and standards.[584] The norms and standards must establish a framework for preferred land use patterns.[585] It must also identify land use projects relating to specific economic sectors.[586] The norms and

[577] This is discussed in greater detail in Section 4-6 of Chapter 7.
[578] SPLUMA, s 7(b)(vi).
[579] SPLUMA, s 7(b)(v).
[580] SPLUMA, s 7(b)(i).
[581] SPLUMA, s 7(b)(ii) and (iii).
[582] SPLUMA, s 8(1), read with the definition of "Minister" in s 1.
[583] SPLUMA, s 8(1), 54(1)(b). In s 8(1) SPLUMA uses the word "must", thereby placing an obligation on the Minister to prescribe these norms and standards. This is in contrast to s 51(1)(b) that uses the word "may", suggesting that the Minister can decide whether or not to prescribe these norms and standards.
[584] Laubscher et al *SPLUMA: A Practical Guide* 85.
[585] SPLUMA, s 8(2)(d)(ii).
[586] SPLUMA, s 8(2)(iii).

standards must provide mechanisms to identify vacant or under-utilised land that is strategically located.[587] All of these aspects are relevant in the context of land use for mining purposes.

Mining is an important sector for South Africa's economy.[588] As such, it must be specifically addressed in the norms and standards prescribed by the Minister. The norms and standards should also specify whether mining is a preferred land use in a particular region of the country. In consultation with the Minister of Mineral Resources, the Minister of Rural Development and Land Reform can identify specific parcels of vacant or under-utilised mining land that is strategically located for exploitation. In this regard, SPLUMA specifically provides that the Minister of Rural Development and Land Reform can prescribe sector-specific norms and standards guiding development and land use for a specific purpose.[589] Norms and standards applicable to the mining sector can be prescribed in consultation with the Minister of Mineral Resources.

In addition to the abovementioned consultation requirements, SPLUMA provides many other opportunities for intergovernmental consultation. The next section focuses on consultation and co-operative government provisions that impact on land use for mining purposes.

3.3 SPLUMA's Provision for Co-operative Government

In its preamble, SPLUMA acknowledges that the previous fragmented planning law system inhibited the goal of co-operative government. To address this shortcoming, SPLUMA dedicates an entire chapter to intergovernmental support.[590] Land use management departments in provinces and municipalities are entitled to assistance and support from the Minister, within available resources.[591] The Minister has a duty to monitor the progress made by provinces and municipalities in complying with their respective mandates in terms of SPLUMA.[592] Where provincial and municipal capacity is lacking, the Minister must create mechanisms to support and build the necessary

[587] SPLUMA, s 8(2)(iv).
[588] See discussion on p 2 of Chapter 1 above.
[589] SPLUMA, s 8(3).
[590] SPLUMA, chapter 3.
[591] SPLUMA, s 9(1)(a).
[592] SPLUMA, s 9(1)(b).

capacity.[593] Similarly, provincial governments must create mechanisms to monitor, support and build capacity at the municipal level to implement a land use management system.[594] The mechanisms referred to in SPLUMA can refer to financial and technical support, training, administrative assistance, etc.[595] These provisions in SPLUMA accord with the supervisory role of national and provincial government in respect of municipalities, as contemplated in the Constitution.[596]

Municipalities must consult with any organ of state regulating an activity that also requires approval in terms of SPLUMA.[597] The purpose of the consultation is to co-ordinate the respective governing activities and to avoid duplication.[598] For example, when considering a rezoning application for mining purposes, a municipality must consult with the DMR.[599] This provides an opportunity to identify duplications in the respective application procedures for mining rights and rezoning of land. SPLUMA also enables municipalities to enter into agreements with these organs of state.[600] The agreement can formalise the relationship between the municipality and organ of state to eliminate any identified duplications during the respective application procedures. For example, the municipality and the DMR can determine that the environmental impact assessment or public consultation done during the mining right application process is sufficient and need not be repeated during the rezoning application process.

SPLUMA even allows the municipality and the DMR to exercise their respective powers jointly.[601] They may coordinate their processes and issue separate authorisations or they may issue one, integrated authorisation.[602] When issuing an integrated

[593] SPLUMA, s 9(2); Constitution, s 154(1); National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 56, 410, 437; Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7.
[594] SPLUMA, s 10(5).
[595] Laubscher et al *SPLUMA: A Practical Guide* 100, 110.
[596] Constitution, s 154(1). For a detailed discussion of this aspect, see Section 6.2 of Chapter 2 above.
[597] SPLUMA, s 29(1).
[598] SPLUMA, s 29(1).
[599] Laubscher et al *SPLUMA: A Practical Guide* 161.
[600] SPLUMA, s 29(2), read with reg 17(1).
[601] SPLUMA, s 30(1).
[602] SPLUMA, s 30(1).

authorisation, the municipality and the DMR must still comply with all relevant legislative requirements.[603]

The practical implementation of this provision in the context of rezoning and mining can be questioned.[604] It will entail individual co-operation agreements between the DMR and every municipality wishing to take advantage of this opportunity. The terms of these agreements will have to be individually negotiated and agreed upon in each instance. Alternatively, the DMR can decide only to conclude agreements with municipalities where mining has a strong presence. However, this will lead to a situation where mining right applicants must follow different procedures, depending on where the proposed mine is situated. This will undermine uniform application procedures applicable to the entire country. The abovementioned reservations notwithstanding, SPLUMA makes a concerted effort to promote the constitutional mandate of co-operative government and intergovernmental relations in spatial planning matters.

4. Spatial Planning Instruments

This dissertation focuses on four spatial planning instruments used in municipal planning. These are integrated development plans; spatial development frameworks; land use schemes; and application procedures for land development.

[603] SPLUMA, s 30(2). See also *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) paras 84-97; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 1 SA 337 (CC)* para 80; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 58-59; and *Maccsand (Pty) Ltd v City of Cape Town 2012 4 SA 181 (CC)* paras 47-48; *South African Shore Angling Association v Minister of Environmental Affairs* 2002 5 SA 511 (SE) para 517D-519E *Hout Bay & Llandudno Environment Conservation Group v Minister of Local Government, Environmental Affairs & Development Planning, Western Cape* (23827/2010) [2012] ZAWCHC 22 (22 March 2012) paras 27-28; Steytler & De Visser *Local Government Law of South Africa* 5-24(4B) – 5(26); Laubscher et al *SPLUMA: A Practical Guide* 161-168.

[604] See Section 3.2 in Chapter 8 below for a further discussion of joint authorisations.

Figure 3: Municipal Spatial Planning Instruments

A municipality's integrated development plan is a comprehensive, strategic document that forms the foundation of all the municipality's activities.[605] It steers municipal policies, decisions and spending priorities.[606] Municipal integrated development plans, and how these plans address mining activities, are analysed in Chapter 6 below.[607]

As part of its integrated development plan, a municipality must prepare a spatial development framework. This framework guides land use management in the municipality.[608] It contains a five-year spatial development plan[609] and a long-term spatial development vision. This vision depicts the desired patterns of spatial growth

[605] Local Government: Municipal Systems Act, s 25(1); De Visser *Developmental Local Government* 103.
[606] Local Government: Municipal Systems Act, ss 25(1)(c) and 36. See also Department of Provincial and Local Government *Integrated Development Planning Guide Pack* (2001) 4; Harrison P "The Origins and Outcomes of South Africa's Integrated Development Plans" in Van Donk M, et al. (eds) *Consolidating Developmental Local Government: Lessons from the South African Experience* (2008) 321 321; De Visser *Developmental Local Government* 219.
[607] Section 2 of Chapter 6 gives an overview of the purpose and requirements of integrated development plans. The content of the integrated development plans of the case-study municipalities are examined in Sections 4.1-4.3 of Chapter 6.
[608] SPLUMA, s 20(2); Local Government: Municipal Systems Act, s 26(e).
[609] SPLUMA, s 21(b).

and development.[610] Chapter 6 below discusses spatial development frameworks in greater detail and examines how these frameworks can provide for mining activities.[611]

The third spatial planning instrument discussed in this dissertation is land use schemes. The use of land within each municipal jurisdiction is regulated through the municipality's land use scheme.[612] The scheme includes zoning categories of permitted land uses.[613] The use of any piece of land is restricted to the purpose provided for in its designated zoning category.[614] Municipal land use schemes are discussed in Chapter 7 below.[615]

Where a piece of land's assigned zoning category does not permit a proposed land use (for example, mining), a rezoning application will be necessary.[616] Rezoning qualifies as "land development" in terms of SPLUMA.[617] The application procedure for land development, specifically rezoning, is the fourth planning instrument examined in this dissertation.[618] Rezoning application procedures are analysed in Chapter 7 below.[619]

5. Conclusion

Where previous land use planning legislation evolved slowly in the new democratic dispensation, SPLUMA brought a revolutionary change in the planning law regulatory framework. For the first time since 1994, one spatial planning system is applicable to the entire country. Greater uniformity in policy and land use application procedures is envisaged across all nine provinces. Guided by SPLUMA's normative framework,

[610] SPLUMA, ss 12(1)(b) and 21(c).
[611] Section 3 of Chapter 6 gives an overview of the purpose and requirements of spatial development frameworks. The content of the spatial development frameworks of the case-study municipalities are examined in Sections 4.1-4.3 of Chapter 6.
[612] Definition of "land use scheme" in SPLUMA, s 1.
[613] SPLUMA, s 24(2)(a).
[614] SPLUMA, s 26(2)(a). Pending the adoption of a land use scheme in a specific municipal jurisdiction, the land can be used for the purpose set out in the town planning scheme or for the same lawful purpose immediately before the enactment of SPLUMA. See SPLUMA, s 26(2)(b)-(c) and (3).
[615] Section 2 of Chapter 7 gives an overview municipal land use schemes. The content of the land use schemes of the case-study municipalities are examined in Sections 3.1-3.3 of Chapter 7.
[616] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) paras 48, 51; *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC) para 12. For a discussion of these judgments, see Section 3 of Chapter 2 above.
[617] Definition of "land development" in section 1 of SPLUMA.
[618] SPLUMA, s 4(d), read with ss 33-52.
[619] Section 4 of Chapter 7 gives an overview rezoning applications. The rezoning application procedures of the case-study municipalities are examined in Sections 5.1-5.3 of Chapter 7.

provincial governments can prepare their own legislation for the regulation of land development, land use management, spatial planning and municipal planning.[620] These more detailed provincial provisions, in turn, enable municipalities to draft by-laws setting out detailed requirements for rezoning applications.

SPLUMA compels municipalities to consult the DMR as the regulator of mining activities when considering a rezoning application.[621] Whereas this provision for intergovernmental relations is encouraging, this should not be the first point of contact between the municipality and the DMR. Consultation between the DMR and the relevant municipality at this late stage will have limited results. By the time that a municipality considers a rezoning application for mining purposes, the DMR may already have granted the mining right. Consultation between the municipality and the DMR should, therefore, be an ongoing process from the moment that the DMR receives an application for a mining right.

To this end, SPLUMA provides for potential co-operation at an earlier stage.[622] A municipality may agree with the DMR to avoid duplication in processes or the submission of information relating to both applications for a mining right and rezoning of land, respectively.[623] SPLUMA also provides that municipalities and the DMR may exercise their powers jointly.[624] They can do this by issuing separate or integrated authorisations.[625]

Co-operation initiatives between municipalities and the DMR should be encouraged. However, careful consideration should be given to the terms and implementation of these initiatives. Co-operation agreements should be structured in such a way that it does not amount to the appropriation of the constitutional functions allocated to a different sphere of government. The terms of such agreements will also be dictated by the unique context within which each municipality operates.

[620] SPLUMA, s 10 read with Sch 1.
[621] SPLUMA, s 29(1). See discussion at Section 3.3 above.
[622] SPLUMA, s 29(2).
[623] SPLUMA, s 29(2).
[624] SPLUMA, s 30(1).
[625] SPLUMA, s 30(1).

The following chapter examines the contexts of the three case-study municipalities, namely, the City of Cape Town Municipality, Sol Plaatje Municipality and uMhlathuze Municipality. The context forms the backdrop against which each municipality's land use policies and planning instruments are examined in subsequent chapters.

Chapter 5: Case-Study Contexts

1. Introduction

Spatial and land use planning must be approached holistically, based on a strong policy framework that guides decision making at all levels of government. However, differing circumstances may be present in various parts of the country. Each municipal jurisdiction operates in a different context and faces unique challenges. The imperatives of each area are dependent on the geological, environmental, economic, political and social context. Municipalities are also subject to different provincial legislation and municipal by-laws. For this thesis, three municipalities have been selected for a study of how mining is addressed within their unique land-use contexts. To examine the respective municipalities' integrated development plans,[626] spatial development frameworks,[627] land use schemes[628] and requirements for rezoning applications,[629] one must first understand the context within which each of these municipalities operates.

Chapter 4 explains how SPLUMA,[630] as national framework legislation, provides for provincial governments to enact legislation that regulates, inter alia, land development, land-use management, spatial planning and municipal planning.[631] This chapter introduces the provincial legislation and municipal by-laws that apply in each of the case-study areas. It also explains the role that mining plays in the three chosen municipalities. The three municipalities are the City of Cape Town Metropolitan Municipality, Sol Plaatje Local Municipality and City of uMhlathuze Local Municipality.[632] Each municipality's location in relation to the rest of the country is illustrated by the figure below.

[626] See discussion in Sections 2 and 4 of Chapter 6 below.
[627] See discussion in Sections 3 and 4 of Chapter 6 below.
[628] See discussion in Sections 2 and 3 of Chapter 7 below.
[629] See discussion in Sections 4 and 5 of Chapter 7 below.
[630] Spatial Planning and Land Use Management Act.
[631] SPLUMA, s 10 read with Sch 1. See discussion at Section 3.2 of Chapter 4 above.
[632] For brevity, this thesis refers to the three municipalities as the City of Cape Town Municipality, Sol Plaatje Municipality and uMhlathuze Municipality, respectively. See Section 4 of Chapter 1 for the motivation for selecting these three municipalities.

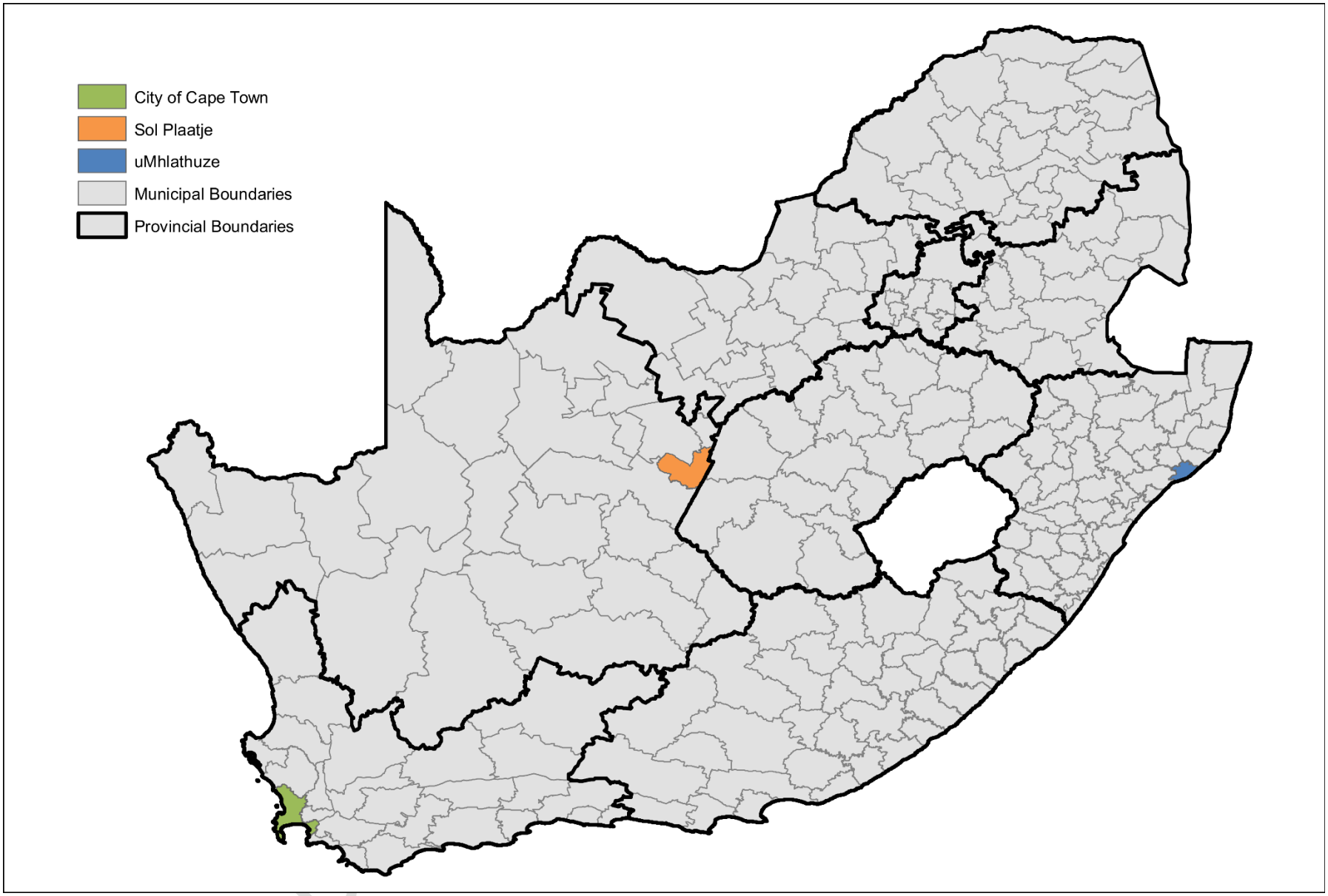

Figure 4: Location of Three Case-Study Municipalities within South Africa[633]

[633] Map drafted by technician at University of Cape Town GIS Laboratory, based on information of Statistics South Africa *Census 2011 Statistical Release* (P0301.4 - 2012).

2. City of Cape Town Municipality

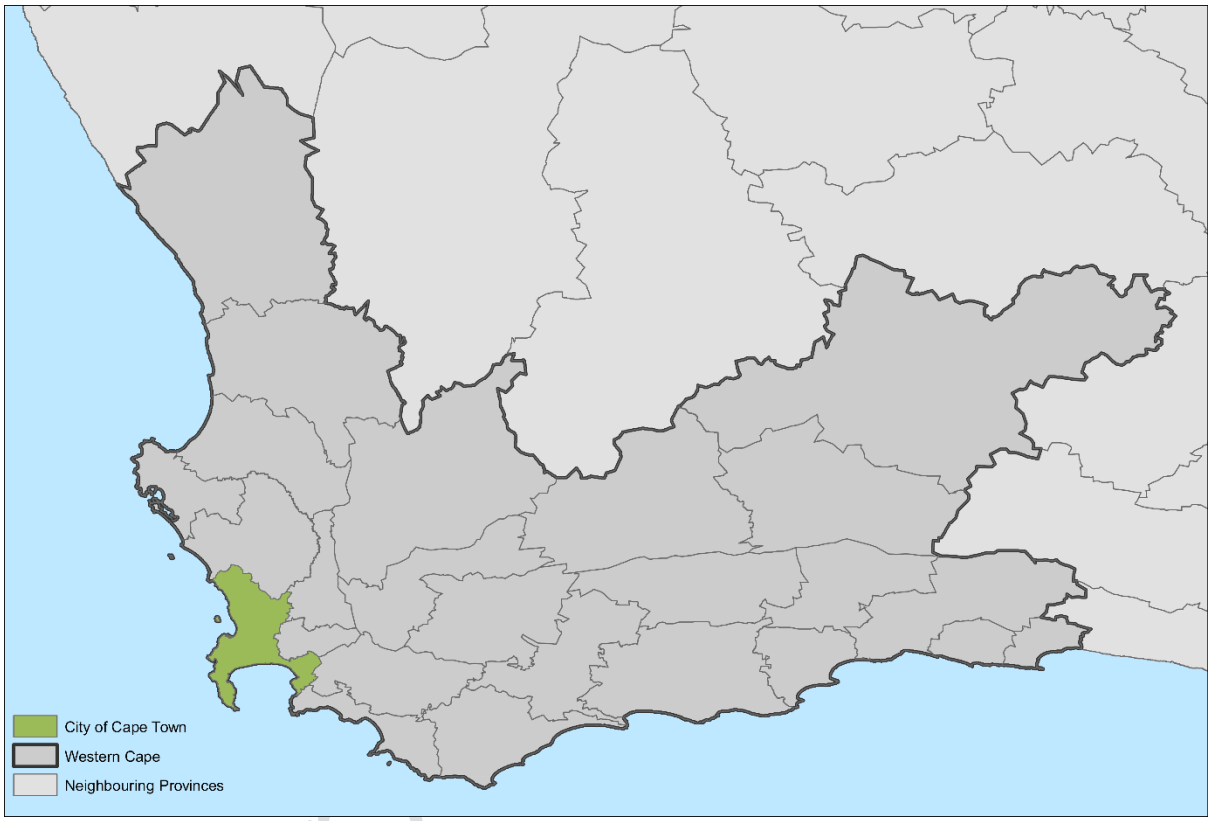

Figure 5: Location of the City of Cape Town Municipality within the Western Cape Province[634]

The City of Cape Town Municipality is situated on the southern peninsula of the Western Cape Province. The City of Cape Town is one of eight metropolitan municipalities in the country and the only one in the Western Cape Province.[635] As a metropolitan municipality, it is densely populated with 4 005 016 people living in an area of 2 461km².[636] After Johannesburg, Cape Town is South Africa's most populous

[634] Map drafted by technician at University of Cape Town GIS Laboratory, based on information of Statistics South Africa *Census 2011 Statistical Release*.

[635] A metropolitan municipality is a Category A municipality, as described in s 155(1) of the Constitution of the Republic of South Africa, 1996. It has exclusive executive and legislative authority in its jurisdiction. See definition of "metropolitan municipality" in s 1 of the Local Government: Municipal Structures Act. The other metropolitan municipalities in the country are Buffalo City Metropolitan Municipality (Eastern Cape), City of Ekurhuleni Metropolitan Municipality (Gauteng), City of Johannesburg Metropolitan Municipality (Gauteng), City of Tshwane Metropolitan Municipality (Gauteng), eThekwini Metropolitan Municipality (KwaZulu-Natal), Mangaung Metropolitan Municipality (Free State) and Nelson Mandela Bay Metropolitan Municipality (Eastern Cape).

[636] Statistics South Africa *Community Survey 2016, Provinces at a Glance* (RP 03-01-03) 1; Statistics South Africa *Community Survey 2016, Provincial Profile: Western Cape* (03-01-07, 2018) 8, 12, 17; See also Statistics South Africa "City of Cape Town" (Date unknown) *Statistics South Africa* <http://www.statssa.gov.za/?page_id=993&id=city-of-cape-town-municipality> (accessed 30-06-2018);

city; it is also the second-largest economic centre in the country.[637] With a large population come pressing demands for housing, social infrastructure and other municipal services.[638] In addition, to ensure food security for the growing urban population, the City of Cape Town must protect its agricultural resources.[639] The City is also home to unique Fynbos vegetation, with some of the species occurring nowhere else on earth.[640] The Cape Floral Protected Region is a UNESCO Heritage Protected Area.[641] Mining, as a land use activity, competes with all of these other demands and priorities for the limited space that is available within the City of Cape Town's boundaries.

2.1 Mining Context

When compared to the rich gold and platinum deposits of other provinces,[642] the Western Cape has limited precious mineral deposits.[643] As such, popular perception does not generally associate Cape Town with the mining industry. However, the Western Cape – the Cape Town area in particular – has significant deposits of limestone, dolomite, silica sand and kaolin,[644] which are predominantly used in the

[637] Main O (ed) *The Local Government Handbook: South Africa - A Complete Guide to Municipalities in South Africa* 8 ed (2018) 207.
[638] The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 18-23.
[639] The agricultural sector contributes 9,7% to the City's economy. Main (ed) *Local Government Handbook* 207. See Annexure 3 to this thesis for a map depicting areas in the City of Cape Town Municipality that is of agricultural significance.
[640] Pool-Stanvliet R, Duffell-Canham A, Pence G & Smart R *The Western Cape Biodiversity Spatial Plan Handbook* (2017) 44; Cowling RM, Pressey RL, Rouget M & Lombard AT "A Conservation Plan for a Global Biodiversity Hotspot — The Cape Floristic Region, South Africa" (2003) 112 *Biological Conservation* 191 192.
[641] United Nations Educational, Scientific and Cultural Organization (UNESCO) "World Heritage List: Cape Floral Region Protected Areas" (Date Unknown) *UNESCO* <https://whc.unesco.org/en/list/1007/> (accessed 01-07-2018).
[642] Significant gold deposits are found in the Free State, North-West and Gauteng Provinces, while platinum deposits are found in North-West, Gauteng, Limpopo and Mpumalanga Provinces. See Minerals Council South Africa "Gold" (Date unknown) *Minerals Council South Africa* <http://www.mineralscouncil.org.za/sa-mining/gold > (accessed 22-06-2018); Minerals Council South Africa "Platinum" (Date unknown) *Minerals Council South Africa* <http://www.mineralscouncil.org.za/sa-mining/platinum> (accessed 22-06-2018).
[643] Council for Geoscience, Western Cape Regional Office *Mineral Commodities in the Western Cape Province, South Africa* (2014-0012) 1; Duxburys "Structure Plan for Mining in the Cape Metropolitan Area and Portions of West Coast and Winelands Areas" (09-2000) *City of Cape Town* <http://resource.capetown.gov.za/documentcentre/Documents/City%20strategies,%20plans%20and%20frameworks/Structure%20Plan%20for%20Mining,%202000.pdf> (accessed 08-10-2019) 20.
[644] Section 1 of the Mineral and Petroleum Resources Development Act defines "mineral" as "any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits…". Therefore, it includes limestone, dolomite, silica sand and kaolin.

construction industry.[645] For example, building sand is mined from the dunes in Macassar, Mitchells Plain and Philippi,[646] while stone aggregate is mined in the Tygerberg Hills near Durbanville.[647] These areas are depicted in the figure below.

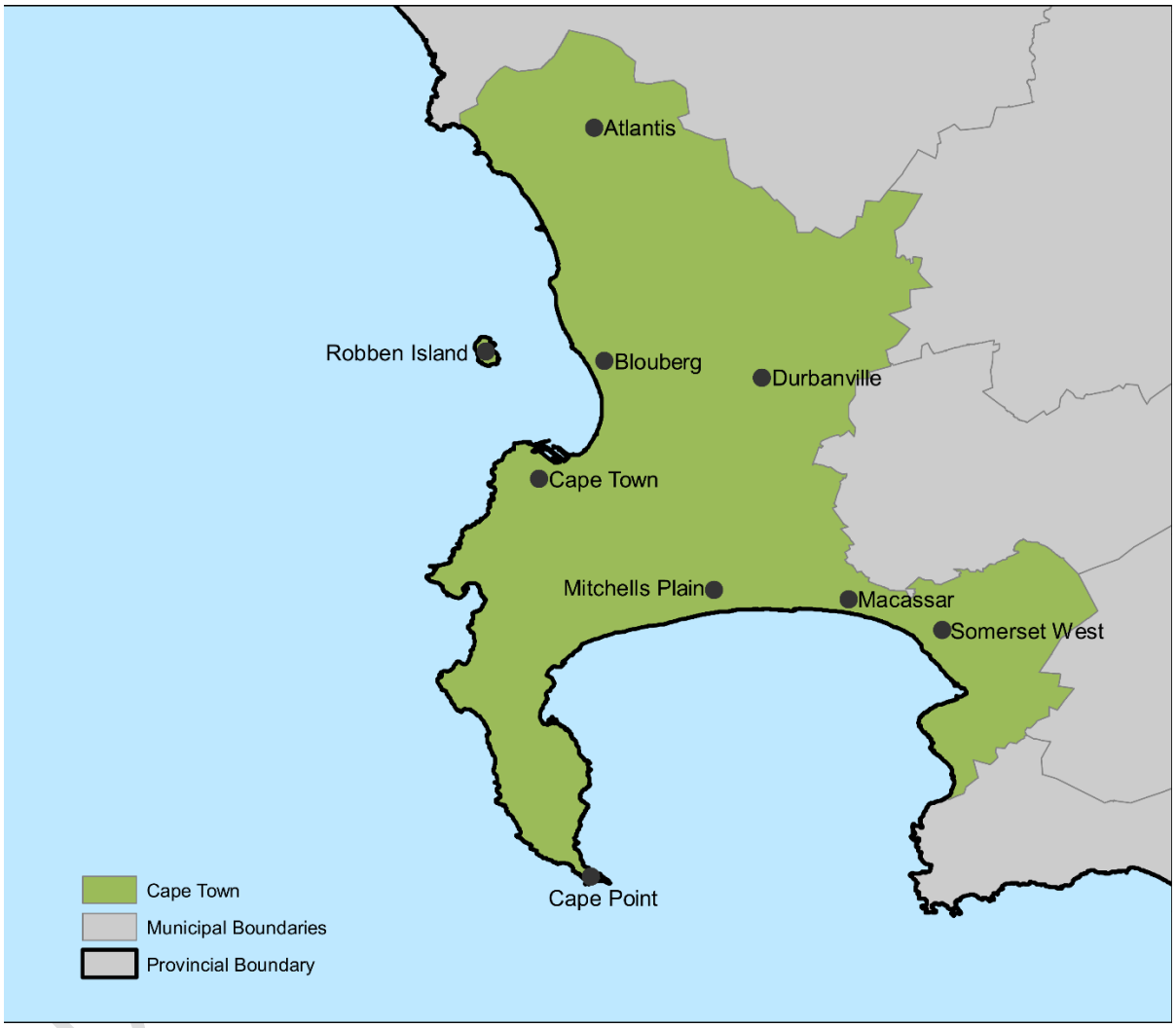

Figure 6: Municipal Borders of the City of Cape Town[648]

The absence of a large-scale mining industry within the jurisdictional area of the City of Cape Town should not come as a surprise. As a metropolitan municipality with a high population density, much of its land is used for residential and commercial

[645] Council for Geoscience, Western Cape Regional Office *Mineral Commodities in the Western Cape Province, South Africa* 1, 4-9**;** Duxburys "Structure Plan for Mining in the Cape Metropolitan Area and Portions of West Coast and Winelands Areas" *City of Cape Town* 21-23.
[646] Council of Geoscience for the City of Cape Town *Report on Economically-Viable Mineral Resources in the City of Cape Town's Administritive Area* (2011) 3, 8; Council for Geoscience, Western Cape Regional Office *Mineral Commodities in the Western Cape Province, South Africa* 12-13.
[647] Council of Geoscience for the City of Cape Town *Report on Economically-Viable Mineral Resources in the City of Cape Town's Administritive Area* 4; Council for Geoscience, Western Cape Regional Office *Mineral Commodities in the Western Cape Province, South Africa* 7-8.
[648] Map drafted by technician at University of Cape Town GIS Laboratory, based on information of Statistics South Africa *Census 2011 Statistical Release*.

purposes.[649] Nevertheless, two directional Constitutional Court decisions in relation to mining and zoning originated in the Cape Town area. The foremost one is the case of *Maccsand v City of Cape Town*.[650] The related case of *Minister for Mineral Resources v Swartland Municipality*[651] originated in the adjacent Swartland Municipality, also situated in the Western Cape Province.[652] In both the *Maccsand* and *Swartland Municipality* cases, the Constitutional Court confirmed that all mining activities must comply with the relevant municipality's zoning scheme regulations.

Following these judgments, the City of Cape Town opted to take a pragmatic approach to mining activities taking place in contravention of zoning scheme regulations.[653] The City acknowledged the contribution of the mining industry to the region's economy;[654] but also that this had to be balanced with the need to comply with the Constitutional Court's rulings.[655] The City decided to allow existing mining activities to continue, pending the completion and approval of the required rezoning applications within set timeframes.[656] All newly proposed mining projects must comply with applicable zoning scheme regulations.

2.2 Planning Legislative Context

National, provincial and local government legislation apply in the City of Cape Town. Planning law is governed by SPLUMA, at national level; the Western Cape Land Use

[649] According to Statistics South Africa *Community Survey 2016, Statistical Release* (P0301) the City of Cape Town Metropolitan Municipality has an estimated population of 4 004 793 people spread over 2 461km², indicating a population density of 1 627 people per square kilometre.
[650] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC). Refer to Section 3 of Chapter 2 for a discussion of the facts.
[651] *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC). Refer to Section 3 of Chapter 2 for a discussion of the facts.
[652] As the Swartland Municipality is also located in the Western Cape Province, the same provincial legislation is applicable, i.e. the Western Cape Land Use Planning Act.
[653] Van der Merwe J "Statement by the City's Mayoral Committee Member for Economic, Environmental and Spatial Planning: Council Approves Balanced Approach to Mining Activity Compliance" (23-07-2014) *City of Cape Town* (accessed 20-07-2016) - copy on file with author.
[654] Van der Merwe J "Statement by the City's Mayoral Committee Member for Economic, Environmental and Spatial Planning: Council Approves Balanced Approach to Mining Activity Compliance" *City of Cape Town*.
[655] Van der Merwe J "Statement by the City's Mayoral Committee Member for Economic, Environmental and Spatial Planning: Council Approves Balanced Approach to Mining Activity Compliance" *City of Cape Town*.
[656] Van der Merwe J "Statement by the City's Mayoral Committee Member for Economic, Environmental and Spatial Planning: Council Approves Balanced Approach to Mining Activity Compliance" *City of Cape Town*.

Planning Act,[657] at provincial level; and the City of Cape Town Municipal Planning By-Law ('the Cape Town By-Law'),[658] at local government level.

The Western Cape was the first province to pass provincial land use planning legislation to comply with SPLUMA's mandate to do so.[659] The Western Cape Land Use Planning Act (LUPA)[660] was assented to on 31 March 2014.[661] It repealed the previous old-order provincial legislation, namely, the Land Use Planning Ordinance.[662] LUPA has been applicable in the City of Cape Town Metropolitan Municipality since 1 July 2015.[663] It was implemented in a staggered fashion in other municipalities across the Western Cape Province.[664]

From the outset, LUPA recognises the constitutional principle that land use planning falls within the jurisdiction of municipalities.[665] It confirms that municipalities must regulate procedures for the receipt, consideration and determination of land use applications.[666] It also prescribes that municipalities must provide for public participation procedures for land use applications and criteria for how land use applications will be decided.[667] In terms of SPLUMA, provincial planning legislation must aim to build capacity at local government level.[668] LUPA complies with this

[657] Western Cape Land Use Planning Act was assented to on 31 March 2014 and came into operation in the City of Cape Town on 1 July 2015. PN 99 in *Western Cape Provincial Gazette Extraordinary* 7250 of 07-04-2014; Proc 9 in *Western Cape Provincial Gazette* 7410 of 26-06-2015. The implementation of ss 22(4), 25, 26, 27, 28(c) and 66(4)(c) of LUPA was delayed until 25 April 2016.
[658] City of Cape Town *Municipal Planning By-Law, 2015* (Proc 11 in *Western Cape Provincial Gazette Extraordinary* 7413 of 29-06-2015) came into operation on 1 July 2015.
[659] SPLUMA, s 10 read with Sch 1. See discussion in Section 3.2 in Chapter 4 above.
[660] Act 3 of 2014.
[661] PN 99 in *Western Cape Provincial Gazette Extraordinary* 7250 of 07-04-2014.
[662] Land Use Planning Ordinance 15 of 1985. This ordinance still applies in parts of the Eastern Cape and North-West Province.
[663] Proc 9 in *Western Cape Provincial Gazette* 7410 of 26-06-2015. The implementation of sections 22(4), 25, 26, 27, 28(c) and 66(4)(c) of LUPA was delayed until 25 April 2016.
[664] Bergrivier (since 1 August 2015), Swartland (since 1 August 2015), George (since 1 September 2015), Beaufort West (since 7 October 2015), Cape Agulhas (since 7 October 2015), Hessequa (since 7 October 2015), Langeberg (since 7 October 2015), Saldanha Bay (since 7 October 2015), Bitou (since 1 December 2015), Breede Valley (since 1 December 2015), Laingsburg (since 1 December 2015), Matzikama (since 1 December 2015), Mossel Bay (since 1 December 2015), Stellenbosch (since 1 December 2015), Theewaterskloof (since 1 December 2015), Drakenstein (since 1 February 2016), Overstrand (since 1 February 2016), Swellendam (since 1 February 2016), Prince Albert (since 15 March 2016), Witzenberg (since 15 March 2016), Kannaland (since 25 April 2016), Cederberg (since 1 June 2016) Knysna (since 1 June 2016), and Oudtshoorn (since 8 November 2016).
[665] LUPA, s 2(1), read with s 156 and Part B of Sch 4 of the Constitution. See also *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19.
[666] LUPA, s 2(2)(b).
[667] LUPA, s 2(2)(c) and (d).
[668] SPLUMA, s 10(6).

mandate by compelling the Provincial Minister[669] to assist municipalities in the performance of land use planning functions.[670] This support can take the form of training and technical support or the drafting of model municipal policies and by-laws.[671]

In line with SPLUMA,[672] LUPA provides land use planning principles to be implemented by municipalities across the Western Cape when drafting planning by-laws.[673] Like SPLUMA,[674] LUPA categorises these land use planning principles under specific themes, namely, spatial justice, spatial sustainability, efficiency, good administration and resilience.[675] Although LUPA organises the categories slightly differently from SPLUMA,[676] the content of the principles is almost identical. Some of these principles are of special significance to land use for mining purposes. This discussion briefly highlights the specific principle themes relevant to this thesis, namely, spatial sustainability, efficiency and good administration.

The first relevant principle theme is spatial sustainability. It is impractical for mining activities to be undertaken in built-up areas. Therefore, it is likely that most new mining projects will be proposed on land utilised as open spaces, environmentally protected areas or agricultural land. In accordance with the principle of spatial sustainability, LUPA provides that land use planning should ensure the protection of the environment and valuable agricultural land.[677] Municipalities have the difficult task of balancing the need for mining and economic growth, on the one hand, with the mandate to protect the environment and fertile agricultural land, on the other.[678]

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669 Section 1 of LUPA defines "Provincial Minister" as the "Provincial Minister responsible for land-use planning". Currently, this is the Western Cape's Minister of Local Government, Environmental Affairs and Development Planning.
670 LUPA, s 3(7).
671 LUPA, s 3(7)(b) and (d).
672 SPLUMA, s 7.
673 Preamble to LUPA.
674 SPLUMA, s 7.
675 LUPA, s 59(1) – (5).
676 For a discussion of the principles set out SPLUMA, see Section 3.2 in Chapter 4 above.
677 LUPA, s 59(2)(a)(ii) and (iii), read with s 59(2)(b). This accords with s 7(b)(ii) and (iii) of SPLUMA.
678 Municipalities' legislative powers to regulate environmental issues was the subject of litigation in *Le Sueur v eThekwini Municipality* (9714/11) 2013 ZAKZPHC 6 (30 January 2013). The Constitution (Part A of Sch 4) allocates the functional area of "environment" as a concurrent legislative and executive competence of national and provincial government. This notwithstanding, the Court found that it is within a municipality's competence to give effect to national and provincial environmental legislation by regulating environmental protection matters at local government level. See *Le Sueur v eThekwini Municipality* (9714/11) 2013 ZAKZPHC 6 (30 January 2013) par 40. For a discussion of this case, see

The fact that the City of Cape Town is a metropolitan municipality does not exclude the relevance of agriculture and environmental protection within its boundaries. In fact, the unique fynbos vegetation occurring in the area highlights the City's role to protect the natural environment.[679] The agricultural sector is of equal importance – it contributes 9,7% to the City's economy.[680] The City must take these factors into account when considering the rezoning of agricultural land or environmentally sensitive areas to allow for mining activities.

The drafters of LUPA recognised the necessity to strike a balance between these competing interests. Under the principle of efficiency, LUPA requires the optimised use of resources, land and minerals when developing land.[681] SPLUMA also refers to the optimised use of resources under the principle of efficiency, but it contains no specific reference to land and minerals.[682] In the past, land use practices in the Western Cape tended to favour the protection of the environment and the agricultural industry, more so than in the rest of the country.[683] Therefore, it is significant that LUPA includes a specific reference to the optimised use of minerals. This reference points to a shift in policy in favour of the mining industry. It appears to recognise that there should be a greater balance between the protection of the environment and agricultural land on the one hand and the optimised use of mineral resources on the other.

The land use planning principles categorised under the theme of good administration are of greatest importance to intergovernmental co-operation[684] in the context of land use for mining purposes. This principle requires a cohesive land use planning strategy

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Humby T "Localising Environmental Governance: The *Le Sueur* Case " (2014) 17 *Potchefstroom Electronic Law Journal* 1660; Freedman W "The Legislative Authority of the Local Sphere of Government to Conserve and Protect the Environment: A Critical Analysis of *Le Sueur v eThekwini Municipality* [2013] ZAKZPHC 6 (30 January 2013)" 567; Du Plessis AA & Van der Berg A "*RA Le Sueur v eThekwini Municipality* 2013 JDR 0178 (KZP): An Environmental Law Reading" (2014) 25 *Stellenbosch Law Review* 580; Muir A "The Le Sueur Case and a Local Government's Constitutional Right to Govern" (2015) 20 *Southern African Public Law* 556; and Bronstein (2015) *South African Law Journal*.

[679] Pool-Stanvliet et al *Western Cape Biodiversity Spatial Plan Handbook* 44; Cowling et al (2003) *Biological Conservation* 192.

[680] Main (ed) *Local Government Handbook* 207. See Annexure 3 to this thesis for a map depicting areas in the City of Cape Town Municipality that is of agricultural significance.

[681] LUPA, s 59(3)(a).

[682] SPLUMA, s 7(c). See also the discussion in Section 3.2 in Chapter 4 above.

[683] Interview with Senior Environmental Professional at the City of Cape Town's Environmental Resource Management Department dated 13 September 2016.

[684] As required in terms of s 41 of the Constitution.

involving all spheres of government, where all departments give their sectoral input when spatial development frameworks are developed.[685] Land use applications, which include applications for rezoning, should contain a transparent process of public participation involving all affected parties.[686] LUPA's principle of good administration also requires efficient and streamlined development application procedures.[687] Chapter 7 below discusses the rezoning application procedure of the City of Cape Town.[688] A rezoning application to the City often runs parallel with a land development application submitted to the Provincial Government in respect of the same mining project.[689] The duplication in processes appears to violate the development principle of good administration, set out in LUPA, and the principle of efficiency, set out in SPLUMA.[690] Chapter 7 investigates this apparent duplication in greater detail.[691]

Under the theme of good administration, section 59(4)(i) of LUPA also states that all spheres of government should be led by legislative land use planning systems and act accordingly.[692] This provision is in urgent need of analysis: What are the implications of this provision in LUPA for the mining industry? Can it be argued that this provision compels the Department of Mineral Resources (DMR), when considering mining right applications, to be guided by zoning scheme regulations applicable to a specific piece of land? Should the Minister of Mineral Resources refuse a mining right application if mining activities are clearly irreconcilable with the applicable zoning scheme? Such an assertion can potentially violate the provisions in the Constitution where specific functions are allocated to specific spheres of government.[693]

Chapter 2 of this thesis explains that mining regulation falls exclusively in the functional area of national government.[694] In contrast, the executive authority over land use and

[685] LUPA, s 59(4)(a) and (b). This accords with s 7(e)(i) and (ii) of SPLUMA.
[686] LUPA, s 59(4)(d). This accords with s 7(e)(iv) of SPLUMA.
[687] LUPA, s 59(4)(h). SPLUMA organises this requirement under the principle of efficiency in s 7(c)(iii).
[688] See discussion in Section 5.1 of Chapter 7.
[689] Land development applications are made to the head of the provincial department responsible for land use planning ('Head of Department'). See the definition of 'land use application' and 'land development application', read with the definition of 'Head of Department' in LUPA, s 1. See also LUPA, ss 2(2)(b) and 3(3). See more detail discussion in Section 5.1 of Chapter 7 below.
[690] LUPA organises the requirement of efficient and streamlined procedures under the development principle of good administration (LUPA, s 59(4(h)), while in SPLUMA it is organised under the principle of efficiency (SPLUMA, s 7(c)(iii)).
[691] Section 5.1 of Chapter 7.
[692] LUPA, s 59(4)(i) of LUPA.
[693] Constitution, Schs 4 and 5.
[694] Section 5.1 of Chapter 2.

zoning of land are planning functions of local government.[695] Neither functionary can overrule or usurp the constitutional functions of the other.[696] Therefore, LUPA cannot compel the Minister of Mineral Resources to reject a mining right application based on zoning scheme constraints of a specific municipality.

A more acceptable interpretation of section 59(4)(i) of LUPA is that the Minister of Mineral Resources should take greater cognisance of existing land use planning conditions when considering mining right applications. Zoning scheme provisions should be one of the factors considered by the Minister of Mineral Resources when determining mining right applications. The Minister will only be able to do so through consultation with the relevant municipality. LUPA's requirement for all spheres of government to be guided by legislative land use planning systems highlights the need for better intergovernmental co-operation between the DMR and municipalities.[697]

The Cape Town By-Law, applicable at local government level, came into operation on 1 July 2015.[698] Cape Town is one of the first municipalities in the country to issue a planning by-law after the enactment of SPLUMA and provincial planning legislation drafted in accordance with SPLUMA.[699] The Cape Town By-Law controls and regulates municipal planning matters within the City's jurisdiction.[700] Chapter 7 discusses the provisions in the By-Law dealing with land use schemes and zoning.[701]

[695] Section 5.3 of Chapter 2.
[696] Constitution, s 41(1)(f) and (g). See also *Premier, Western Cape v President of the Republic of South Africa* 1999 3 SA 657 (CC) para 58; *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development* 1999 11 BCLR 1229 (C) para 122; Humby (2012) *Southern African Public Law* 631, 633, 635; Malherbe (2006) *Journal of South African Law* 813.
[697] See discussion in Chapter 2.
[698] City of Cape Town *Municipal Planning By-Law, 2015* (Proc 11 in *Western Cape Provincial Gazette Extraordinary* 7413 of 29-06-2015).
[699] De Visser J *Local Law Making in Cape Town: A Case Study of the Municipal Planning By-Law Process* (2015) 29-30 highlights the reluctance of other municipalities to exercise their powers to adopt by-laws.
[700] Preamble to the Cape Town By-Law
[701] Sections 3.1 and 5.1 of Chapter 7 below.

3. Sol Plaatje Municipality

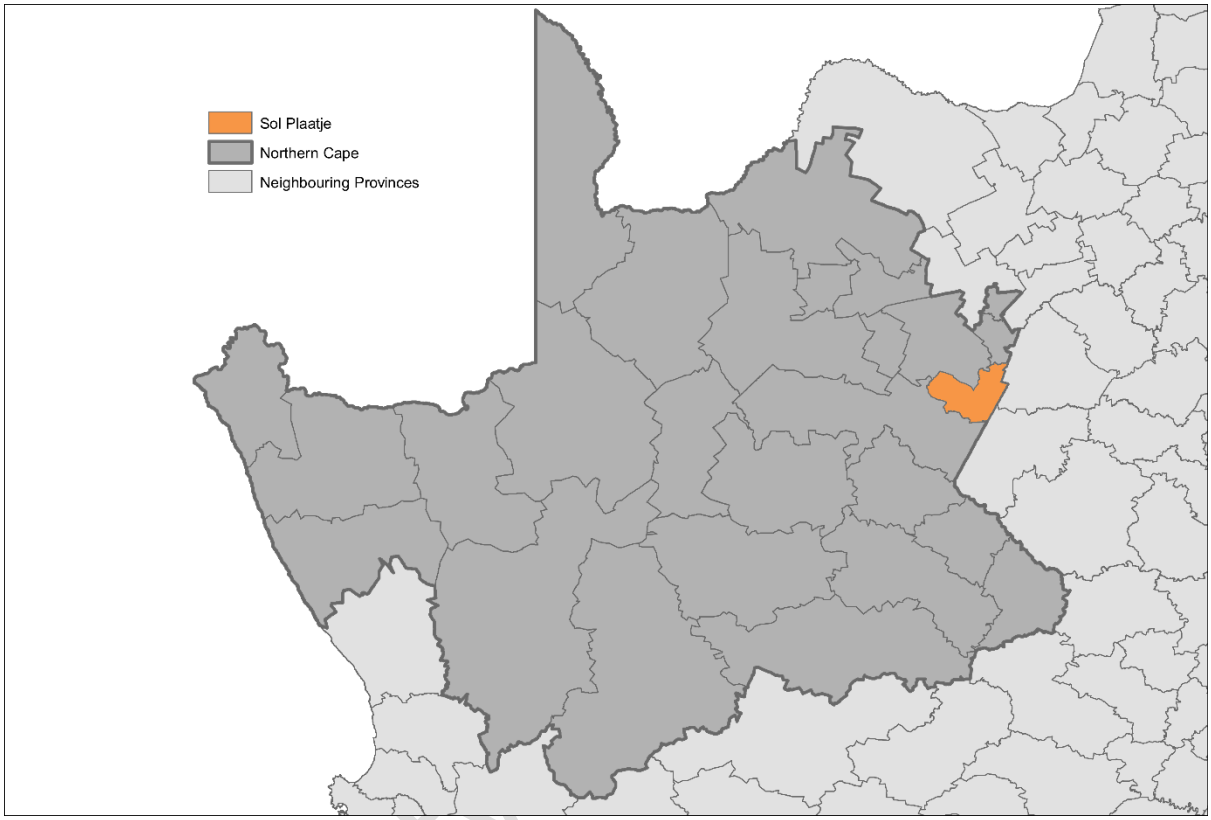

Figure 7: Location of the Sol Plaatje Municipality within the Northern Cape Province[702]

The Sol Plaatje Municipality is situated on the eastern border of the Northern Cape Province. The municipality is very sparsely populated. There are only 255 351 people living within an area of 3 145 km^2.[703] Approximately 98% of the municipality's population resides in the urban areas around Kimberley.[704] The city of Kimberley forms the urban and administrative hub of the Sol Plaatje Local Municipality.[705]

The timeline of South Africa's mining history runs through the heart of Kimberley, arguably the world's most famous diamond mining town. In 1871, Kimberley was at the centre of South Africa's early diamond rush.[706]

[702] Map drafted by technician at University of Cape Town GIS Laboratory, based on information of Statistics South Africa *Census 2011 Statistical Release*.
[703] Statistics South Africa *Community Survey 2016, Provinces at a Glance* 5; Main (ed) *Local Government Handbook* 188; South African Cities Network *Sol Plaatje Municipality* (2017) 8.
[704] Housing Development Agency *Sol Plaatje Local Municipality: Municipal Profile* (2014) 2.
[705] Statistics South Africa "Sol Plaatjie" (Date unknown) *Statistics South Africa* <http://www.statssa.gov.za/?page_id=993&id=sol-plaatjie-municipality> (accessed 31-10-2018).
[706] Department of Mineral Resources *Historical Diamond Production (South Africa)* (R61 / 2007) 1-2; South African Cities Network *Sol Plaatje Municipality* 5.

Kimberley includes the suburbs of Galeshewe and Roodepan. The only other town in the municipality is Ritchie. The location of these areas within the municipality is illustrated in the figure below.

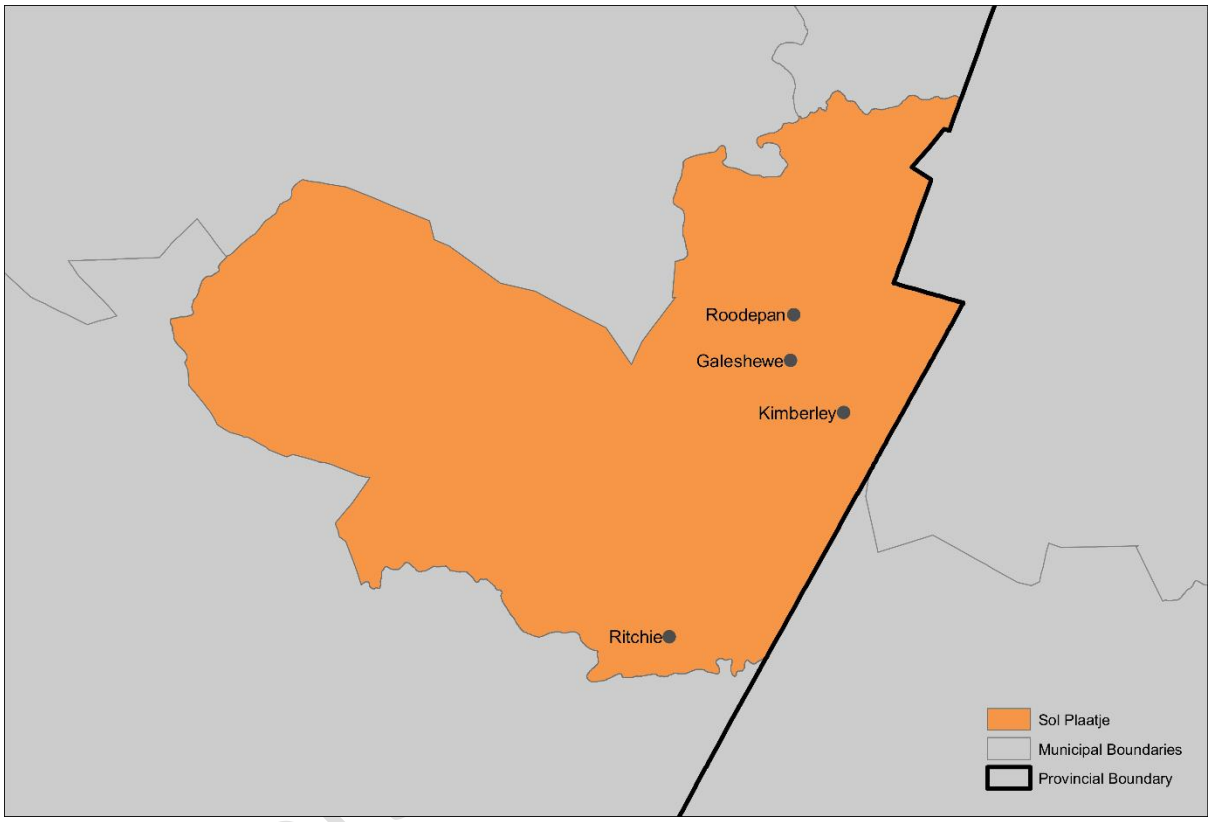

Figure 8: Municipal Borders of Sol Plaatje[707]

The municipality faces several challenges, including inefficient land use patterns and ageing infrastructure.[708] Human settlements are poorly connected and integrated.[709] Urban sprawl exacerbates problems relating to infrastructure and service delivery to

[707] Map drafted by technician at University of Cape Town GIS Laboratory, based on information of Statistics South Africa *Census 2011 Statistical Release*.

[708] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 7, 138; Olivier ES *Service Provision in the Sol Plaatje Municipal Area from a Tourism Perspective* MTech Thesis Central University of Technology, Free State (2010) 156-157; South African Cities Network *Sol Plaatje Municipality* 7 and 9; Beangstrom P "Kimberley's Water Woes Not Over Yet" (04-01-2018) *DFA* <https://www.dfa.co.za/news/kimberleys-water-woes-not-over-yet-12607054> (accessed 04-05-2019); Motse O "Kimberley to Face Total Water Shutdown This Week" (17-12-2018) *OFM* <https://www.ofm.co.za/article/local-news/269295/kimberley-to-face-total-water-shutdown-this-week> (accessed 04-05-2019).

[709] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 8, 17.

far-flung areas of the municipality.[710] Sol Plaatje is also strained by inadequate financial and administrative capacity to address these challenges.[711]

Sol Plaatje's economy is dominated by the general government sector.[712] Kimberley is home to the Northern Cape Provincial Legislature and other Provincial Departments.[713] In addition to the general government sector, other economic activities include retail, industry, agriculture and mining.[714]

In the past, mining formed the backbone of the local economy [715] but is now declining, leading to the stagnation of Sol Plaatje's economy.[716] The decline of the mining industry in the area has contributed to local unemployment. The municipality is faced with an unemployment rate of 31,9%.[717]

3.1 Mining Context

Today, mining still forms a significant part of the municipality's economy at 9.63% of Gross Value Added.[718] However, only 1.5% of land in the municipality is currently occupied by the mining sector.[719] Since its origin, the town of Kimberley developed

[710] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 55, 64; South African Cities Network *Sol Plaatje Municipality* 16; Sol Plaatje Municipality *Annual Report, 2016/2017* 164.
[711] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 7; Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 14, 15, 23; Van Niekerk T "Local Government Turnaround Strategy: Challenges, Constraints and Benefits" (2012) 20 *Administratio Publica* 54 65; South African Cities Network *Sol Plaatje Municipality* 10.
[712] Housing Development Agency *Sol Plaatje Local Municipality: Municipal Profile* 5. The government sector contributes 33,27% of the Gross Value Added of the municipality. Gross value added (GVA) measures an individual industry or sector's contribution to the economy.
[713] Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 65; Housing Development Agency *Sol Plaatje Local Municipality: Municipal Profile* 5.
[714] Statistics South Africa "Statistics by Place: Sol Plaatje" (2011) *Statistics South Africa* <http://www.statssa.gov.za/?page_id=993&id=sol-plaatjie-municipality> (accessed 07-07-2018).
[715] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 30-36, 144.
[716] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 30-36, 144. In 2009, mining in the Sol Plaatje Municipality reached its lowest growth point, reporting negative growth of 21.4%. See Sol Plaatje Local Municipality *Annual Report, 2015/2016* 11. This trend has improved slightly. In the 2017/2018 financial year, for example, mining contributed 8% to the municipality's economy. See Sol Plaatje Municipality *Annual Report, 2017/2018* 17. The number of people employed nationally in the diamond production industry has also been decreasing steadily since 2016. See Minerals Council South Africa *Facts and Figures* (2018) 29.
[717] Statistics South Africa "Statistics by Place: Sol Plaatje" *Statistics South Africa*; Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 33, 40.
[718] Housing Development Agency *Sol Plaatje Local Municipality: Municipal Profile* 5. Statistics South Africa "Statistics by Place: Sol Plaatje" *Statistics South Africa*. Gross value added (GVA) measures an individual industry or sector's contribution to the economy.
[719] The Housing Development Agency *Sol Plaatje Local Municipality: Municipal Profile* 2, based on data from the National Geo-spatial Information (A Component of the Department of Rural Development and Land Reform) *National Land Cover* (2000)**.** According to the Sol Plaatje Municipality *Integrated*

around the mining pits.[720] Today, many of the mining areas are located inside Kimberley's urban edge.[721]

The Sol Plaatje Municipality's mining context is different from that of the City of Cape Town. Sol Plaatje is faced with the legacy of a declining mining industry in the area.[722] Therefore, the municipality's mining focus relates to the rehabilitation of disused mining land.[723] The Sol Plaatje Integrated Development Plan records that 0,4% of the municipality's land comprises of unrehabilitated mining land.[724] Non-compliance by mining companies in respect of their rehabilitation duties is a particular challenge to the municipality. The Municipality is tasked with rezoning disused mining land to more productive land uses, addressing the mining industry's legacy of spatial segregation and recent unemployment.[725]

The declining mining industry and rising unemployment resulted in an increase in informal mining activities in the Kimberley area.[726] Informal mining activities are not recognised in terms of the MPRDA and are, therefore, illegal.[727] Mining activities in

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Development Plan - IDP (2017 – 2022) 9 and 53, the municipality occupies 3 145 km², of which 12,65km² is used for mining.

[720] South African Cities Network *Sol Plaatje Municipality* 10-11.

[721] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53.

[722] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53; South African Cities Network *Sol Plaatje Municipality* 18. For a general discussion of the effects of declining mining activities on local towns and communities, see Marais (2013) *Resources Policy*.

[723] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53.

[724] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53, the municipality occupies 3 145 km², of which 12,65km² is earmarked for rehabilitation post mining. For a more detailed discussion of Sol Plaatje's Integrated Development Plan, see Section 4.2 of Chapter 6 below.

[725] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53.

[726] Mthukwane, D "Kimberley's Desperate Miners: Where the Formal and Informal Sectors Clash" (27-01-2015) *GroundUp* <https://www.groundup.org.za/article/kimberleys-desperate-miners-where-formal-and-informal-sectors-clash_2625/> (accessed 08-10-2018); Agency Staff "The Zama-Zamas are Gone, Replaced by Entrepreneurial Miners with Big Plans" (09-06-2018) *Business Day* <https://www.businesslive.co.za/bd/business-and-economy/2018-06-09-the-zama-zamas-are-gone-replaced-by-entrepreneurial-miners-with-big-plans/> (accessed 08-10-2018); AFP "DIY Mining Gogo Gets Licence to Mine: 'The Earth and Its Minerals Belong to Us Black People'" (07-06-2018) *News24* <https://www.news24.com/SouthAfrica/News/diy-mining-gogo-gets-licence-to-mine-the-earth-and-its-minerals-belong-to-us-black-people-20180607> (accessed 08-10-2018); Marais, J "Kimberley Licence Award Shifted the Debate on 'Zama-Zamas'" (02-09-2018) *Miningmx* <https://www.miningmx.com/special-reports/mining-yearbook/mining-yearbook-2018/34147-kimberley-licence-award-shifted-the-debate-on-zama-zamas/> (accessed 08-10-2018); Khumalo, S "Thousands of Zama-Zamas Receive Mining Permits" (07-06-2018) *Mail & Guardian* <https://mg.co.za/article/2018-06-07-thousands-of-zama-zamas-receive-mining-permits> (accessed 08-10-2018).

[727] Terms such as "informal miners", "artisanal miners", "illegal miners" and "zama-zamas" are used interchangeably. A detailed discussion of the debate surrounding this issue falls outside the scope of this study. See, in general, Wilson L *Unshackling South African Artisanal Miners: Considering Burkina Faso's Legislative Provisions as a Guideline for Legalisation and Regulation* LLM Thesis University of Cape Town (2018); Love J "Report of the SAHRC Investigative Hearing: Issues and Challenges in

and around Kimberley have, therefore, become quite politicised.[728] In June 2018, following years of strife between the formal and informal mining sectors, the DMR awarded mining permits[729] to Kimberley's informal miners.[730] This allows small-scale

Relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa" (08-07-2015) *South African Human Rights Commission* <https://www.sahrc.org.za/home/21/files/Unregulated%20Artisanal%20Underground%20and%20Surface%20Mining%20Activities%20electronic%20version.pdf> (accessed 11-10-2018); Thornton R "Zamazama, 'Illegal' Artisanal Miners, Misrepresented by the South African Press and Government" (2014) 1 *The Extractive Industries and Society* 127; Mkhize MC "New Interventions and Sustainable Solutions: Reappraising Illegal Artisanal Mining in South Africa " (2017) 61 *South African Crime Quarterly* 67; Cramer R "Illegal Mining: The Problem and Possible Solutions" (24-05-2016) *Mineral Law in Africa* <http://www.mlia.uct.ac.za/news/illegal-mining-problem-and-possible-solutions-richard-cramer> (accessed 11-10-2018); Cramer R "Illegal Mining Revisited: Increasing Calls for Decriminalisation and Regulation in the Face of Marginalisation" (08-09-2017) *Mineral Law in Africa* <http://www.mlia.uct.ac.za/news/illegal-mining-revisited-increasing-calls-decriminalisation-and-regulation-face-marginalisation> (accessed 11-10-2018); Mpinga S "Mining Permit Granted to Zamazamas – A Step Towards the Formalisation of Artisanal Small-Scale Mining in South Africa" (25-07-2018) *Mineral Law in Africa* <http://www.mlia.uct.ac.za/news/mining-permit-granted-zamazamas-%E2%80%93-step-towards-formalisation-artisanal-small-scale-mining-south> (accessed 11-10-2018); Mutemeri N & Petersen FW "Small-Scale Mining in South Africa: Past, Present and Future" (2002) 26 *Natural Resources Forum* 286; Minerals Council South Africa "Illegal Mining: Fact Sheet" *Minerals Council South Africa* <http://www.mineralscouncil.org.za/industry-news/publications/fact-sheets/send/3-fact-sheets/386-illegal-mining> (accessed 09-10-2018); Nhlengetwa, K "Why It Doesn't Make Sense that All Informal Mining is Deemed Illegal" (13-04-2016) *University of the Witwatersrand, Johannesburg* <https://www.wits.ac.za/news/latest-news/in-their-own-words/2016/2016-04/why-it-doesnt-make-sense-that-all-informal-mining-is-deemed-illegal.html> (accessed 10-10-2018); Mthukwane, D "Kimberley's Desperate Miners: Where the Formal and Informal Sectors Clash" *GroundUp*.

[728] See, for example Wildenboer N "Mining Giant is Stealing from Community" (28-09-2017) *IOL* <https://www.iol.co.za/news/south-africa/northern-cape/mining-giant-is-stealing-from-community-11389590> (accessed 09-04-2019); Love J "Report of the SAHRC Investigative Hearing: Issues and Challenges in Relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa" *South African Human Rights Commission*; Thornton R "Zamazama, 'Illegal' Artisanal Miners, Misrepresented by the South African Press and Government" (2014) 1 *The Extractive Industries and Society* 127; Mkhize MC "New Interventions and Sustainable Solutions: Reappraising Illegal Artisanal Mining in South Africa " (2017) 61 *South African Crime Quarterly* 67; Mthukwane, D "Kimberley's Desperate Miners: Where the Formal and Informal Sectors Clash" *GroundUp*.

[729] The definition of "mining permit" in s 1, read with s 27(1)(a) of the MPRDA, states that mining permits are granted for a limited period of two years and an area not exceeding five hectares. Section 27(8)(a) of the MPRDA provides for the extension of a mining permit – it may be renewed only thrice, each renewal being for a period of one year.

[730] Mpinga S "Mining Permit Granted to Zamazamas – A Step Towards the Formalisation of Artisanal Small-Scale Mining in South Africa" *Mineral Law in Africa*; Agency Staff "The Zama-Zamas are Gone, Replaced by Entrepreneurial Miners with Big Plans" *Business Day*; AFP "DIY Mining Gogo Gets Licence to Mine: 'The Earth and Its Minerals Belong to Us Black People'" *News24*; Marais, J "Kimberley Licence Award Shifted the Debate on 'Zama-Zamas'" *Miningmx*; Khumalo, S "Thousands of Zama-Zamas Receive Mining Permits" *Mail & Guardian*; Mothibi, T "Kimberley Zama-Zamas Get Mining Permits" (01-05-2018) *Northern Cape News Network* <https://ncnn.live/kimberley-zama-zamas-get-mining-permits/> (accessed 08-10-2018); Anonymous "DMR Takes First Step in Legalising Zama Zamas" (06-06-2018) *Mining Review Africa* <https://www.miningreview.com/dmr-takes-first-step-in-legalising-zama-zamas/> (accessed 08-10-2018).

miners to enter the formal mining economy, decreasing unemployment and making better use of old mining sites.[731]

3.2 Planning Legislative Context

Planning legislation currently applicable to the Sol Plaatje municipal area spans across the pre- and post-SPLUMA eras.[732] At provincial level, the Northern Cape Planning and Development Act ('the NCPDA')[733] came into force on 1 June 2000. At local level, the Sol Plaatje Local Municipality Land Use Management By-Law, 2015 ('the Sol Plaatje By-Law') commenced on 21 September 2015.[734]

The NCPDA was the first new-order[735] provincial planning legislation in the country.[736] It repealed the old-order Land Use Planning Ordinance.[737] The aim of the NCPDA is to establish efficient and co-operative planning and land development in the Northern Cape and its municipalities.[738] The NCPDA provides for the implementation of the national Development Facilitation Act,[739] parts of which have since been declared unconstitutional.[740] The Development Facilitation Act has been repealed in its entirety by SPLUMA.[741] The NCPDA has, therefore, become outdated, as it refers to repealed

[731] Agency Staff "The Zama-Zamas are Gone, Replaced by Entrepreneurial Miners with Big Plans" *Business Day*; AFP "DIY Mining Gogo Gets Licence to Mine: 'The Earth and Its Minerals Belong to Us Black People'" *News24*; Marais, J "Kimberley Licence Award Shifted the Debate on 'Zama-Zamas'" *Miningmx*; Khumalo, S "Thousands of Zama-Zamas Receive Mining Permits" *Mail & Guardian*; Mothibi, T "Kimberley Zama-Zamas Get Mining Permits" *Northern Cape News Network*; Anonymous "DMR Takes First Step in Legalising Zama Zamas" *Mining Review Africa*; Mpinga S "Mining Permit Granted to Zamazamas – A Step Towards the Formalisation of Artisanal Small-Scale Mining in South Africa" *Mineral Law in Africa*.
[732] SPLUMA commenced on 1 July 2015. GN 26 in *GG* 38828 of 27-05-2015.
[733] Act 7 of 1998.
[734] Sol Plaatje Local Municipality *Land Use Management By-Law, 2015* (GN 139 in *Northern Cape Provincial Gazette Extraordinary* 1955 of 21-09-2015).
[735] "New-order legislation" refers to statutes enacted after the Constitution of the Republic of South Africa, 1996, in contrast to "old-order legislation", being enacted before the 1993 Constitution, as defined in Sch 6 of the Constitution of the Republic of South Africa, 1996.
[736] Van Wyk *Planning Law* 123.
[737] Land Use Planning Ordinance 15 of 1985. See Sch C to the Northern Cape Planning and Development Act.
[738] See long title to the NCPDA.
[739] Development Facilitation Act.
[740] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC).
[741] See s 59 and Sch 3 of SPLUMA, which came into force on 1 July 2015. Also see Section 3.1 of Chapter 4 above for a more detailed discussion.

national legislation. Naturally, as it preceded SPLUMA, the NCPDA also does not comply with all of SPLUMA's provisions.[742]

In anticipation of SPLUMA's enactment, the Draft Northern Cape Spatial Planning and Land Use Management Bill ("the Draft Bill") was released in 2012. The Draft Bill aims to repeal the NCPDA.[743] When the Draft Bill was prepared, SPLUMA was also still in the drafting stages[744] and subsequent amendments to the Draft Bill proved necessary. The Northern Cape legislature is in the process of finalising the Draft Bill and it is expected that the Draft Bill will be tabled in 2019.[745] On 8 October 2018, a Repeal Bill was published for public comment, which would repeal the NCPDA.[746] The explanatory summary of the Repeal Bill states that the NCPDA has become obsolete, following SPLUMA's enactment, and that the repeal thereof will not create any legislative vacuum pending the enactment of the Draft Bill.[747] Until the Repeal Bill is enacted, the NCPDA remains in force insofar as it does not contravene SPLUMA's provisions.[748]

The NCPDA provides that the general principles contained in the (now repealed) Development Facilitation Act[749] applies in the Northern Cape Province.[750] With the enactment of SPLUMA, the Development Facilitation Act and its principles were repealed.[751] However, the spirit of many of the Development Facilitation Act's principles lives on in SPLUMA's development principles. Therefore, even though the

[742] This aspect is addressed on a piecemeal basis throughout this discussion. See also Explanatory Summary of the Northern Cape Planning and Development Act 7 Repeal Bill, 2018 (Notice 116 in *Northern Cape Provincial Gazette* 2218 of 08-10-2018).
[743] Northern Cape Planning Bill, cl 62 read with Sch 1.
[744] See *Draft Spatial Planning and Land Use Management Bill, 2011* (GN 280 in *GG* 34270 of 06-05-2011) and Department of Rural Development and Land Reform *Spatial Planning and Land Use Management Bill* (B14A-2012).
[745] See statement in Explanatory Summary of the Northern Cape Planning and Development Act 7 Repeal Bill, 2018 (Notice 116 in *Northern Cape Provincial Gazette* 2218 of 08-10-2018).
[746] Explanatory Summary of the Northern Cape Planning and Development Act 7 Repeal Bill, 2018 (Notice 116 in *Northern Cape Provincial Gazette* 2218 of 08-10-2018).
[747] Explanatory Summary of the Northern Cape Planning and Development Act 7 Repeal Bill, 2018 (Notice 116 in *Northern Cape Provincial Gazette* 2218 of 08-10-2018).
[748] SPLUMA, s 2(2).
[749] Development Facilitation Act, s 3.
[750] NCPDA, s 2.
[751] SPLUMA, s 59 and Sch 3, which came into force on 1 July 2015.

NCPDA predates SPLUMA, it contains provisions that comply with some of SPLUMA's development principles.[752]

For example, the NCPDA provides that any provincial or national department that has an interest in or may be affected by a rezoning application must be notified of such application.[753] In the mining context, the DMR will clearly have an interest in a rezoning application to allow for mining activities. Therefore, the NCPDA complies with the sectoral-input element of SPLUMA's principle of good administration.[754]

The NCPDA further aims to promote sectoral input by requiring the MEC[755] to establish a Forum for Cooperative Planning and Development.[756] The object of the forum is to ensure the effective, co-ordinated and cost-efficient execution of policies, powers and duties relating to planning matters.[757] Hardly any information is available on this forum. In August 2012 (almost 12 years after the implementation of the NCPDA), the establishment of this forum was still listed as an objective in the Northern Cape Provincial Spatial Development Framework.[758] The Draft Provincial Spatial Development Framework of 2018 contains no reference to the forum.[759] The forum is an excellent opportunity for collaboration between the Northern Cape Province's planning department and the DMR. Through greater co-operation, they can co-ordinate their policies to serve their respective interests more effectively. Unfortunately, with so little information available on the forum, its status is uncertain. Regardless of whether the forum was finally established or not, the NCPDA nevertheless fails to comply with SPLUMA's requirement that conditions in planning legislation be met timeously.[760]

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[752] These principles are contained in s 7 of SPLUMA: spatial justice, spatial sustainability, efficiency and spatial resilience, and good administration. For a discussion of these principles, see Van Wyk *Planning Law* 93-94. See also discussion in Section 3.2 of Chapter 4 above.
[753] NCPDA, para 3(3) of Sch A, read with regs 3(1) and 3(3)(b).
[754] SPLUMA, s 7(e)(ii).
[755] Section 1 of the NCPDA defines "MEC" as "the member of the Executive Council of the Province of the Northern Cape who has been assigned the responsibility for the portfolio of Housing and Local Government". This ministry has since changed to Agriculture, Land Reform and Rural Development.
[756] NCPDA, s 9(1).
[757] NCPDA, s 11.
[758] 'The Northern Cape Provincial Development and Resource Management Plan / Provincial Spatial Development Framework (PSDF)' issued by the Office of the Premier of the Northern Cape Department of Cooperative Governance, Human Settlements and Traditional Affairs dated 2012.
[759] Northern Cape *Draft Provincial Spatial Development Framework* (09-2018).
[760] SPLUMA, s 7(e)(iii).

In relation to SPLUMA's principle of spatial sustainability,[761] the NCPDA contains various provisions requiring the sustainable use of the province's resources and the protection of ecologically sensitive areas and public health.[762] The NCPDA also provides for each district council in the province to draft a District Council Settlement and Infrastructure Development and Management Plan ("District Council Plan") indicating the spreading of current and future economic activities within its jurisdiction.[763] These activities include processing and agriculture.[764] The District Council Plan should also indicate the impact of these activities on transportation infrastructure and water and electricity supply.[765]

Mining is not specifically listed as an activity to be included in the District Council Plan. Perhaps it is because the NCPDA was drafted prior to the Constitutional Court judgment of *Maccsand v City of Cape Town*.[766] When the NCPDA was drafted, mining was still regarded as an isolated activity that fell under the exclusive competence of the then national Department of Minerals and Energy.[767] It was generally assumed that mining did not interact with, nor was it impacted by, planning matters.[768]

The NCPDA also provides for each local and representative council to draft a Land Development Plan.[769] The Land Development Plan must identify, locate and assess aspects of the natural environment that are of environmental, topographical, geological and agricultural importance.[770] In contrast to the District Council Plan, the Land Development Plan is specifically required to reflect mineral deposits.[771] The current and future economic trends that must be identified and evaluated in the Land Development Plan specifically include the mining sector.[772] The assessment must

[761] SPLUMA, s 7(b).
[762] NCPDA, ss 14, 15(1)(e), 21(2)(c), 22(1)(f) and 28(1)(c).
[763] NCPDA, s 22(1)(d).
[764] NCPDA, s 22(1)(d).
[765] NCPDA, s 22(1)(d).
[766] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC). Refer to Section 3 of Chapter 2 for a discussion of the facts.
[767] In 2009, this department was replaced by the Department of Mineral Resources.
[768] See, in general, *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) and *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC).
[769] NCPDA, s 27(1).
[770] NCPDA, s 29(1)(a). Other aspects include ecology, biology and scenery.
[771] NCPDA, s 29(1)(a).
[772] NCPDA, s 29(1)(c). Other sectors referred to in the Act are processing, service and informal sectors.

reflect each sector's spatial distribution in relation to its resource base, its required infrastructure and labour needs.[773]

From a strict reading of the above-mentioned provision that a council must locate, identify and assess mineral deposits, it appears that a council has a duty to actively search for minerals within its jurisdiction. This amounts to prospecting[774] or at the very least reconnaissance[775] in terms of the MPRDA. No person or entity, including a municipal council, is allowed to search or prospect for minerals without the required right or permission issued in terms of the MPRDA.[776] Furthermore, reconnaissance and prospecting operations are quite expensive. Even if a municipal council was to obtain the required right or permission, it would lack the financial and technical resources to search for minerals productively. Therefore, this provision in the NCPDA should be interpreted very narrowly. At most, it should mandate a municipal council to include known mineral deposits on its Land Development Plan.[777]

Despite the interpretation issues, the NCPDA complies with SPLUMA's development principle of spatial sustainability on all fronts. It promotes the protection of agricultural land and location-sensitive development. The NCPDA also provides for the consideration of the environmental impact of development, as well as such development's consequences for infrastructure and services.

The NCPDA makes provision for the establishment of the Northern Cape Planning and Development Commission.[778] Among other things, this commission is charged with examining instruments and procedures for the promotion of effective co-operation between government spheres and departments responsible for planning and

[773] NCPDA, s 29(1)(c).
[774] Section 1 of the MPRDA defines "prospecting" as "intentionally searching for any mineral by means of any method— (a) which disturbs the surface or subsurface of the earth, including any portion of the earth that is under the sea or under other water; or (b) in or on any residue stockpile or residue deposit, in order to establish the existence of any mineral and to determine the extent and economic value thereof; or (c) in the sea or other water on land".
[775] In terms of s 1 of the MPRDA, a reconnaissance operation is "any operation carried out for or in connection with the search for a mineral or petroleum by geological, geophysical and photo geological surveys and includes any remote sensing techniques, but does not include any prospecting or exploration operation other than acquisition and processing of new seismic data".
[776] MPRDA, s 5A.
[777] The Council of Geoscience can assist in this regard. Part of the Council's legislative mandate is to promote the search for minerals and to investigate how minerals are distributed across the country. See Geoscience Act 100 of 1993, ss 3(a) and 5; Council for Geoscience "Our Mandate" (2018) *Council for Geoscience* <http://www.geoscience.org.za/index.php/about-us/mandate> (accessed 15-10-2018).
[778] NCPDA, s 4.

development matters.[779] The commission must also advise the MEC[780] on a lack of co-operation between spheres and departments that causes inefficiencies and negatively affects planning and land development.[781] This promotes efficient planning procedures.

The NCPDA's provision for District Council Plans referred to above is also relevant under the development principle of efficiency. The plan must indicate the impact of current and future economic activities on transportation infrastructure, as well as water and electricity supply.[782] By having this information at hand, municipalities can ensure the optimised use of existing infrastructure when approving new developments. This is especially relevant for mining and prospecting activities that can have significant infrastructure and services requirements.

The NCPDA's Land Development Plans referred to above are also relevant under the principle of efficiency, as set out in SPLUMA.[783] The Land Development Plan must evaluate areas of environmental importance.[784] Furthermore, the plan must identify current and future economic trends by sector, including mining.[785] The evaluation must reflect each sector's spatial distribution in relation to its resource base, required infrastructure and labour needs.[786] These plans are important tools to assist local councils in their efforts to prevent negative financial and environmental impacts of new developments, thereby complying with the principle of efficiency.

This provision in the NCPDA relating to Land Development Plans is a double-edged sword for the mining industry. On the one hand, it could recognise the important economic contribution that the mining industry can make to the region, together with all the financial and employment benefits it may have. On the other hand, the plans can also highlight the negative environmental impacts of the mining industry on sensitive areas of significance for biodiversity.

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[779] NCPDA, s 7(1)(c).
[780] Section 1 of the NCPDA defines "MEC" as "the member of the Executive Council of the Province of the Northern Cape who has been assigned the responsibility for the portfolio of Housing and Local Government". This ministry has since changed to Agriculture, Land Reform and Rural Development.
[781] NCPDA, s 7(1)(a)(iv).
[782] NCPDA, s 22(1)(d).
[783] NCPDA, s 27(1); SPLUMA, s7(c).
[784] NCPDA, s 29(1)(a). Other aspects include ecology, biology and scenery.
[785] NCPDA, s 29(1)(c).
[786] NCPDA, s 29(1)(c).

The NCPDA complies with all the elements of SPLUMA's principle of efficiency. It promotes the optimised use of existing infrastructure. It also encourages municipalities to prevent developments with negative financial and environmental impacts. Lastly, it provides for efficient and streamlined procedures through the work of the Northern Cape Planning and Development Commission.

The Sol Plaatje By-Law does not refer to the NCPDA, which is the current applicable provincial planning legislation in the Northern Cape. Instead, the By-Law refers to the Northern Cape Spatial Planning and Land Use Management Bill,[787] which has not yet been passed.[788] The Sol Plaatje By-Law was promulgated to ensure that the municipality's spatial planning and land use policies are consistent with SPLUMA's provisions.[789] It strives to provide municipal services that are efficient, effective and sustainable and development that promotes the social, economic, health and environmental wellbeing of its citizens.[790]

At the outset, it should be stated that the Sol Plaatje By-Law contains several drafting errors. For instance, the index to the By-Law lists 73 sections and three schedules. However, the By-Law only contains 66 sections, two schedules and an annexure. Accordingly, several cross-references within the By-Law are incorrect.[791] For example, section 57 contains several references to section 71 and its subsections, even though the By-Law only contains 66 sections.[792] Perhaps the municipality drafted from a set of model by-laws, deleted sections that were not applicable to their circumstances and failed to consider and eliminate drafting inconsistencies.

Furthermore, certain sections of the By-Law are incomplete. For example, section 60(1)(a), (b), (d), (e) and (f), dealing with offences and penalties, start by referring to specific persons contravening certain sections of the By-Law or failing to comply with certain requirements. However, these subsections are incomplete as they fail to state what the consequences of these contraventions or failures are. It appears that the 'consequences'-provision was inadvertently joined with the content in subsection

[787] See discussion at fn 743 and onwards above.
[788] See s 1 of the Sol Plaatje By-Law.
[789] Preamble to Sol Plaatje By-Law.
[790] Preamble to Sol Plaatje By-Law.
[791] Incorrect cross-referencing that is relevant to this study will be highlighted throughout the discussion.
[792] It is assumed that these cross references should refer to the corresponding subsections of s 57.

60(1)(g). This example, together with the numbering issue referred to above, points to poor drafting and editing of the Sol Plaatje By-Law. Therefore, the By-Law falls at the first hurdle: by being unclear and creating uncertainty, it violates SPLUMA's development principle of good administration.

In an attempt to comply with this principle, the By-Law allows for input from national and provincial government during land development applications.[793] The By-Law requires that the relevant national and provincial department be approached for comments on any development application that is of national interest.[794] This accords with provisions in SPLUMA stating that municipalities must consult any other organ of state who regulates activities that also require approval in terms of SPLUMA.[795] At first glance, this provision in the Sol-Plaatje By-Law is a good example of intergovernmental relations, as it provides for sectoral input from other government departments. However, the provision does not clarify the extent to which the comments from national and provincial government are binding on the municipality.[796]

[793] Sol Plaatje By-Law, s 4(3). (Note: due to a drafting error, the By-Law contains two sections numbered as 4(3). This reference relates to the second section so numbered.) In terms of s 1 of SPLUMA "land development" includes the change of land use or deviation from the use of the land permitted in terms of the land use scheme.
[794] Sol Plaatje By-Law, s 4(3). (Note: due to a drafting error, the By-Law contains two sections numbered as 4(3). This reference relates to the second section so numbered.)
[795] SPLUMA, s 29(1).
[796] For a more detailed discussion of this issue, see Section 5.2 in Chapter 7 below.

4. uMhlathuze Municipality

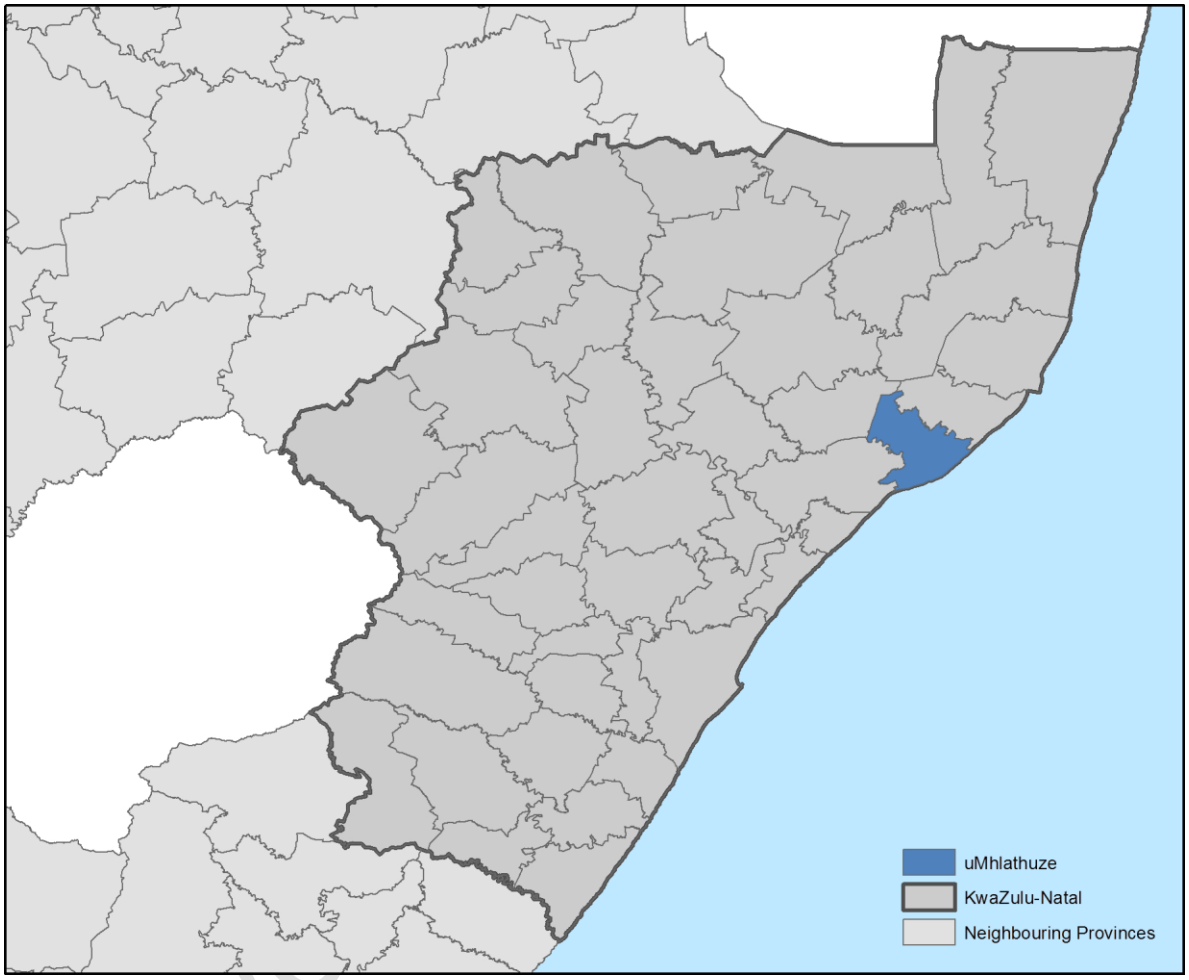

Figure 9: Location of uMhlathuze Municipality in KwaZulu-Natal[797]

The uMhlathuze Municipality is situated on the north-east coast of KwaZulu-Natal. The uMhlathuze Municipality is one of three economic hubs in KwaZulu-Natal, and it is the fastest growing municipality in the province.[798] The municipality has a population of 410 465, spread over 1 233km².[799] Richards Bay is the industrial and tourism centres

[797] Map drafted by technician at University of Cape Town GIS Laboratory, based on information of Statistics South Africa *Census 2011 Statistical Release*, as updated by information from the Municipal Demarcation Board "uMhlathuze" (2016) <http://www.demarcation.org.za/site/mandeni-copy-copy-copy-copy-8-copy-4-copy-2/> (accessed 23-09-2018) following uMhlathuze's boundary changes, in terms of s 21 of the Local Government: Municipal Demarcation Act 27 of 1998, after the Local Government Elections held on 3 August 2016.

[798] The other two hubs are eThekwini and Msunduzi. Main (ed) *Local Government Handbook* 113; Nel EL, Hill TR & Goodenough C "Multi-Stakeholder Driven Local Economic Development: Reflections on the Experience of Richards Bay and the uMhlathuze Municipality" (2007) 18 *Urban Forum* 31 32.

[799] Main (ed) *Local Government Handbook* 113; Statistics South Africa *Community Survey 2016, Provincial Profile: KwaZulu-Natal* (03-01-10, 2018) 10; Statistics South Africa *Community Survey 2016, Provinces at a Glance* 9.

of uMhlathuze.[800] The municipality's commercial activities are centred around Empangeni; Ezikhaleni is its largest suburb.[801] The location of these areas within the municipality is illustrated on the map below.

Figure 10: Municipal Borders of uMhlathuze[802]

[800] Retief F "A Performance Evaluation of Strategic Environmental Assessment (SEA) Processes Within the South African Context" (2007) 27 *Environmental Impact Assessment Review* 84 90; Nel EL, Hill TR & Goodenough C "Multi-Stakeholder Driven Local Economic Development: Reflections on the Experience of Richards Bay and the uMhlathuze Municipality" (2007) 18 *Urban Forum* 31 31; Main (ed) *Local Government Handbook* 113.

[801] Nel EL, Hill TR & Goodenough C "Multi-Stakeholder Driven Local Economic Development: Reflections on the Experience of Richards Bay and the uMhlathuze Municipality" (2007) 18 *Urban Forum* 31 35; Main (ed) *Local Government Handbook* 113.

[802] Map drafted by technician at University of Cape Town GIS Laboratory, based on information of Statistics South Africa *Census 2011 Statistical Release*, as updated by information from the Municipal Demarcation Board "uMhlathuze" following uMhlathuze's boundary changes, in terms of s 21 of the Local Government: Municipal Demarcation Act, after the Local Government Elections held on 3 August 2016.

4.1 Mining Context

The uMhlathuze Municipality is one of the smaller municipalities in KwaZulu-Natal.[803] However, its size belies its great strategic importance to the mining industry. The municipality is home to the deep-water harbour situated at Richards Bay. The harbour constitutes a crucial link in the transport chain for the export of coal and other minerals from South Africa.[804]

The municipality's importance to the mining industry is not limited to its export facilities. It also hosts a number of mining operations, principally for titanium, high-purity iron and zircon minerals.[805] The municipality also hosts several mineral beneficiation operations as part of its local economic development implementation plan.[806] At least 2% of the municipality's land is allocated for mining use.[807] The mining industry contributes approximately 11,6% to the municipality's economy.[808]

4.2 Planning Legislative Context

In addition to SPLUMA at national level, the relevant legislation is the KwaZulu-Natal Planning and Development Act[809] at provincial level and the uMhlathuze Municipality Spatial Planning and Land Use Management By-Law[810] at local government level. The KwaZulu-Natal Planning and Development Act ('the KwaZulu-Natal Planning Act')

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[803] At 1 233km² it is the eleventh smallest municipality in KwaZulu-Natal (out of 43 municipalities), after Mandeni, KwaDukuza, Msunduzi, Mkhambathini, Maphumolo, Umdoni, Umuziwabantu, Ndwedwe, Umzumbe, and Richmond Local Municipalities. See Main (ed) *Local Government Handbook* 100-136.

[804] The Richard Bay Coal Terminal is a world-class coal export terminal. Other mineral-based commodities being exported from the Richards Bay harbour include anthracite, chrome ore, manganese ore, magnetite, copper concentrate and ferro alloys. Richards Bay Coal Terminal "Richards Bay Coal Terminal: Who We Are" (Date Unknown) *Richards Bay Coal Terminal* <https://rbct.co.za/about-rbct-4/who-we-are/> (accessed 21-07-2018); Ports & Ships "Richards Bay" (Date Unknown) *Ports & Ships* <https://www.ports.co.za/richards-bay.php> (accessed 15-07-2018); Transnet National Ports Authority *National Ports Plan - 2017 Update* (2017) 2-9; Transnet National Ports Authority "Port of Richards Bay" (2010) *Transnet National Ports Authority* <https://www.transnetnationalportsauthority.net/OurPorts/RichardsBay/Pages/Overview.aspx> (accessed 27-08-2018).

[805] *uMhlathuze Municipality Integrated Development Plan: 2012/2017* 29; Williams GE & Steenkamp JD "Heavy Mineral Processing at Richards Bay Minerals" in Jones RT (ed) *Southern African Pyrometallurgy* (2006) 181 181-182.

[806] For example, BHP Billiton Aluminium and Richards Bay Minerals are involved in the beneficiation of aluminium and titanium, respectively. uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 217.

[807] *uMhlathuze Municipality Integrated Development Plan: 2012/2017* 154.

[808] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 224; Main (ed) *Local Government Handbook* 113.

[809] KwaZulu-Natal Planning and Development Act.

[810] uMhlathuze Spatial Planning and Land Use Management By-Law, 2017 (MN 93 in *KwaZulu-Natal Provincial Gazette Extraordinary* 1853 of 14-07-2017)

came into force on 1 May 2010.[811] The Act replaced the old-order[812] Town Planning Ordinance of 1949,[813] which was applicable in the province at the time. Among other things, the Act aims to provide norms and standards for provincial planning and development; to facilitate the adoption, substitution and amendment of land use schemes;[814] to enable the development of land falling outside scheme areas; and to aid the amendment, suspension and removal of restrictions applicable to land.[815]

While the KwaZulu-Natal Planning Act is new-order provincial legislation, it predates SPLUMA.[816] The KwaZulu-Natal Planning Act provides for the implementation of the principles of the national Development Facilitation Act,[817] which has since been repealed by SPLUMA.[818] Therefore, similar to the Northern Cape Planning and Development Act, the KwaZulu-Natal Planning Act is outdated in certain respects. However, it remains in force, insofar as it does not contravene SPLUMA's provisions.[819] The KwaZulu-Natal provincial legislature is in the early stages of redrafting its provincial planning legislation in accordance with SPLUMA's mandate.[820]

At local government level, the uMhlathuze Municipality has made greater progress than the provincial government in aligning its planning legislation with SPLUMA's provisions. On 14 July 2017, the municipality published the uMhlathuze Municipality

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[811] PN 3 in *KwaZulu-Natal Extraordinary Provincial Gazette* 225 of 12-02-2009.

[812] Schedule 6 of the Constitution of the Republic of South Africa, 1996 defines "old order legislation" as "legislation enacted before the previous Constitution took effect".

[813] Town Planning Ordinance 27 of 1949 (N).

[814] Section 1 of the KwaZulu-Natal Planning and Development Act defines "scheme" as "a scheme contemplated in Section 5, adopted by a municipality in terms of Section 12(1)(a) and includes:-

(a) Approved amendments thereto contemplated in Section 13(1)(a); and
(b) Permissions in terms thereof contemplated in Section 5(d)(i) and (ii)."

The purpose of the scheme is set out in s 3 of the KwaZulu-Natal Planning Act, namely, "to regulate land use and to promote orderly development in accordance with the municipality's integrated development plan."

[815] KwaZulu-Natal Planning and Development Act, ss 2(1), (3), (5) and (10), read with the long title.

[816] SPLUMA commenced on 1 July 2015. The KwaZulu-Natal Planning Act is new-order legislation, as it was promulgated after the Constitution of the Republic of South Africa, Act 200 of 1993. See the definition of 'old order legislation' in Sch 6 of the Constitution of the Republic of South Africa, 1996.

[817] Development Facilitation Act. See ss 12, 25, 42, 54, 64 and 73 of the KwaZulu-Natal Planning Act, for example, where it refers to the Development Facilitation Act.

[818] Parts of the Development Facilitation Act was declared unconstitutional in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC). The entire Act was repealed by s 59, read with Sch 3, of SPLUMA, which came into force on 1 July 2015.

[819] SPLUMA, s 2(2).

[820] Telephonic interview with senior legal services official at KwaZulu-Natal Department of Co-operative Government and Traditional Affairs dated 10-01-2017. Section 10 read with Sch 1 of SPLUMA provides for provincial governments to enact new legislation where necessary for the regulation of, among other things, land development, land use management, spatial planning and municipal planning.

Spatial Planning and Land Use Management By-Law ("the uMhlathuze By-Law").[821] The By-law regulates spatial and land use planning in the municipality.[822] It also facilitates the adoption and amendment of the municipality's land use scheme and provides for compliance therewith.[823] Furthermore, it sets out procedures for land development applications.[824]

The uMhlathuze By-Law is committed to upholding the constitutional principle of co-operative government. To this end, the By-Law confirms that spatial planning, land development and land use management principles contained in national or provincial legislation apply to the municipality.[825] Furthermore, the Municipal Council[826] is authorised to make policies and implement procedures consistent with national, provincial and local planning legislation.[827] However, this commitment to co-operative government is preceded by a clause setting firm boundaries. The By-law states that, where it conflicts with SPLUMA or provincial planning legislation, the By-law prevails insofar as it executes the exclusive local government competence of municipal planning.[828]

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[821] PN 93 in *KwaZulu-Natal Provincial Gazette Extraordinary* 1853 of 14-07-2017. The By-Law came into operation on 21 September 2017 in terms of PN 119 in *KwaZulu-Natal Provincial Gazette* 1853 of 21-09-2017.

[822] Long title to the uMhlathuze By-Law.

[823] Long title to the uMhlathuze By-Law.

[824] Long title to the uMhlathuze By-Law.

[825] uMhlathuze By-Law, s 3(1).

[826] Section 1 of the uMhlathuze By-Law defines "Municipal Council" as "the Municipal Council of the uMhlathuze Municipality established in terms of section 18 of the Municipal Structures Act". Section 1 of the said Local Government: Municipal Structures Act in turn defines "municipal council" as "a municipal council referred to in section 157 of the Constitution". The said section in the Constitution sets out the composition of municipal councils. The rights and duties of municipal councils are set out in section 4 of the Local Government: Municipal Systems Act. It provides that the legislative and executive authority of the municipality will be exercised without undue interference. The council may use own initiative to govern local government affairs of its local community. It can charge fees and other levies to finance the municipality's affairs. The council is responsible for providing a democratic and accountable government "without favour or prejudice"; encouraging local community involvement through consultation; and for providing financially and environmentally sustainable municipal services to all. Furthermore, the council should work with other organs of state to advance the realisation of the fundamental rights protected in the Constitution.

[827] uMhlathuze By-Law, s 3(2).

[828] uMhlathuze By-Law, s 2(3). The "exclusive executive local government competence" mentioned in this section relates to the competence of "municipal planning" allocated to local government in Part B of Sch 4, read with s 156(1) of the Constitution of the Republic of South Africa, 1996. See discussion in Section 5.3 of Chapter 2 above. The meaning and content of "municipal planning" was analysed in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2008 4 SA 572 (W), *Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA), and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC). See discussion in Section 2 of Chapter 4 above. See also Van Wyk (2012) *Potchefstroom Electronic Law Journal* for a full discussion of the different planning functions of the three spheres of government.

5. Conclusion

The South African mining industry is diverse. This diversity is reflected in the three chosen case-study municipalities. Sol Plaatje Municipality, the birthplace of the country's mining industry, represents a flailing mining area. Declining mining activities are forcing the municipality to focus on mine rehabilitation, more productive land uses and alternative employment opportunities. In contrast, uMhlathuze Municipality's mining industry is flourishing. Not only are mining projects expanding, downstream beneficiation activities are also thriving. Mining also occurs in other, more surprising places. The City of Cape Town, one of the country's metropolitan municipalities, hosts mining projects on the periphery of the urban edge.

The imperatives of each mining area differ depending on the geological, environmental, economic and social composition of its location. This is evident in the three case-study areas. The City of Cape Town has to cater to the needs of its metropolitan population – this includes making land available for housing, infrastructure, commercial activities and food production. Mining must compete with these, apparently more critical, land uses. Sol Plaatje, in contrast, has no shortage of land. Ironically, the abundance of land contributed to poor spatial planning in the municipality. The suburbs around Kimberley are poorly integrated, often separated by mining sites within the urban boundaries. Disused, unrehabilitated mining land has a negative effect on the local population. In uMhlathuze, land must not only be allocated to mining activities but also to extensive beneficiation projects and expanding export facilities at the Richards Bay Harbour.

Given these diverse contexts in different areas of the country, a uniform approach to land use planning for mining purposes is inappropriate. Each municipality must address the unique circumstances and challenges it faces, taking into account the assets and resources available within its jurisdiction. To do municipal planning, municipalities have several instruments at its disposal. This includes integrated development plans, municipal spatial development frameworks and land use schemes.[829] In the following two chapters these instruments are examined more closely, with reference to the three municipalities discussed in this chapter.

[829] SPLUMA, s 5(1)(a) and (b).

Chapter 6: Provision for Mining in Municipal Integrated Development Plans and Spatial Development Frameworks

1. Introduction

Mining challenges municipalities to perform a balancing act. On the one hand, mining competes with other crucial land uses. Land is a finite resource and municipalities are responsible for the regulation and management of the use of this resource.[830] Municipalities must allocate land for housing, infrastructure, healthcare and social services, agriculture, biodiversity promotion, commercial and industrial activities.[831] On the other hand, mining can make a significant contribution to a region's economy, thereby helping to fulfil a municipality's obligation to promote sustainability and economic growth.[832] Mining can be a vital source of employment[833] and can provide infrastructure and social services to the local community.[834]

This chapter discusses municipal integrated development plans and spatial development frameworks as instruments of municipal planning. The specific focus is on how these instruments provide for mining activities within a municipality's jurisdiction. The analysis is conducted by examining the integrated development plans

[830] Part B of Sch 4 of the Constitution of the Republic of South Africa, 1996. See also *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19.
[831] United Nations Convention to Combat Desertification *Global Land Outlook - Working Paper: Land Use Planning* (09-2017) 4-5, 35.
[832] Section 152(1)(c) of the Constitution of the Republic of South Africa, 1996 refers to the promotion of economic development as an objective of local government.
[833] In March 2018, South Africa's mining industry employed 450 000 people. See Statistics South Africa *Quarterly Employment Statistics, March 2018* (P0277) 3. The mining industry's contribution to the country's economy is declining and the industry is currently in a recession, following two consecutive quarters of negative growth. In the fourth quarter of 2017 it decreased by 4,4%, followed by a decline of 9,9% in the first quarter of 2018. See Statistics South Africa *Gross Domestic Product, First Quarter 2018* (P0441) 9.
[834] A Mining company's contribution to infrastructure and social services to the local community is contained in the company's social and labour plan, a requirement in terms of the Mineral and Petroleum Resources Development Act (regs 10(1)(g) and 42(1), prescribed Form D of Annexure I). See also s 1.4(a) of the Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010) 6. For a more detailed discussion on the content of Social and Labour Plans, see Section 4 of Chapter 3 above.

and spatial development frameworks of the three case-study municipalities, namely, the City of Cape Town, Sol Plaatje and uMhlathuze.

2. Integrated Development Plan

An integrated development plan (IDP) is a "single, inclusive and strategic plan for the development of the municipality".[835] The IDP forms the basis of all the municipality's development policies and guides all municipal decisions.[836] It also forms the framework and basis for the municipality's budget and identifies priority areas for municipal spending.[837]

The origins of the IDP can be traced back to 1996 when the Local Government Transition Act was amended to include references to municipal IDPs.[838] Initial IDPs were fraught with difficulties.[839] Some of the shortcomings included a lack of municipal capacity to prepare credible IDPs;[840] poor alignment between IDPs of neighbouring municipalities;[841] and fragmented, divergent development goals of municipal IDPs due to the absence of a unifying national development framework.[842]

[835] Local Government: Municipal Systems Act, s 25(1); *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2008 4 SA 572 (W) para 33; Van Wyk *Planning Law* 271; De Visser *Developmental Local Government* 219-220.
[836] Local Government: Municipal Systems Act, s 36. See also Department of Provincial and Local Government *Integrated Development Planning Guide Pack* (2001) 4.
[837] Local Government: Municipal Systems Act, s 25(1)(c); Harrison "Integrated Development Plans" in *Consolidating Developmental Local Government* 321; De Visser *Developmental Local Government* 219.
[838] The Local Government Transition Act Second Amendment Act 97 of 1996 amended the Local Government Transition Act 209 of 1993. For a detailed discussion of the origins of IDPs, see Harrison "Integrated Development Plans" in *Consolidating Developmental Local Government* 321-337; Van Wyk *Planning Law* 270.
[839] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 47, 233, 259, 272, 274-275; Department of Provincial and Local Government *IDP Hearings 2005: National Report* (30-08-2005); Harrison "Integrated Development Plans" in *Consolidating Developmental Local Government* 323-324.
[840] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 274-275; Department of Provincial and Local Government *IDP Hearings 2005: National Report*; Harrison "Integrated Development Plans" in *Consolidating Developmental Local Government* 324; Harrison P, Todes A & Watson V *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 70.
[841] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 47, 275; Harrison "Integrated Development Plans" in *Consolidating Developmental Local Government* 330.
[842] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 47, 233, 259, 272; Harrison "Integrated Development Plans" in *Consolidating Developmental Local Government* 330-332.

The National Development Plan[843] recognises the importance of such a national framework. The Plan sets out a unifying, long-term vision for development in South Africa. It describes the role of each sphere of government in growing the economy, building capacity and engaging with the private sector to address complex problems of poverty, unemployment, failing infrastructure, etc. When the National Development Plan was adopted in 2012, SPLUMA was still being drafted.[844] The National Development Plan acknowledges that SPLUMA, once enacted, would assist in providing the necessary framework to guide spatial planning in the country.[845]

Each municipality must adopt an IDP every five years.[846] The IDP sets out the municipality's long-term development vision, which includes current and future development priorities.[847] Mining projects, by their very nature, are typically long-term ventures. Therefore, where mining has an impact on a municipality's development priorities, the IDP must reflect mining projects within its jurisdiction that are either ongoing or envisioned for the ensuing five-year period.

A municipality does not prepare its IDP in isolation.[848] IDPs are drafted in accordance with the district municipality's integrated development planning framework, following

[843] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011). See also Department of Planning, Monitoring and Evaluation *Draft Integrated Planning Framework Bill, 2018* (GN 471 in *GG* 41610 of 04-05-2018), cl 7.

[844] The National Development Plan was first released in 2011, presented to the President at a joint-sitting of Parliament on 15 August 2012 and adopted by Cabinet on 6 September 2012. See Address by President Jacob Zuma on the Occasion of the Handover of the National Development Plan During the Joint Sitting of the National Assembly and the National Council of Provinces (Cape Town, 15-08-2012); Address by His Excellency President Jacob Zuma on the Occasion of the 5th Anniversary of the Adoption of the National Development Plan (Cape Town, 12 September 2017). SPLUMA commenced on 1 July 2015. See Proc 26 in *GG* 38828 of 27-05-2015.

[845] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 275.

[846] Local Government: Municipal Systems Act 32 of 2000, s 25, read with the Local Government: Municipal Structures Act, s 24. An IDP is adopted by a newly elected municipal council for its period in office, which is five years. Sections 27 and 29 of the Local Government: Municipal Systems Act provide that each district municipality must, in consultation with local municipalities in the district, prepare an integrated development planning framework, which will be applicable to all local municipalities in the district. Each local municipality will in turn prepare its integrated development plan in accordance with the framework adopted for the district. See also De Visser *Developmental Local Government* 222-223.

[847] Local Government: Municipal Systems Act, s 26(a)-(c); De Visser *Developmental Local Government* 221.

[848] De Visser *Developmental Local Government* 221-232.

consultation between the district[849] and local municipalities.[850] The framework specifies planning requirements of national and provincial legislation that are applicable to the municipalities in the district.[851] It also identifies issues to be addressed and aligned in IDPs of these local municipalities.[852] In addition, an IDP must also be aligned with the National Development Plan and development plans of the province where the municipality is situated.[853]

Furthermore, the drafting process should include consultation with members of the local community, organs of state and other role players.[854] Consultation with other organs of state is critical in the mining context. First, it provides a mechanism for co-operative government, as required by the Constitution and the Municipal Systems Act.[855] Second, it affords an opportunity for the Department of Mineral Resources (DMR) to give input on valuable mineral deposits located within the municipality's jurisdiction. Where the DMR foresees future mining projects in the region – even though no mining right has yet been granted – the municipality can include these potential developments in its IDP. Co-operation with the DMR will enable a municipality to prepare a well-rounded IDP.

As Chapter 3 above explains,[856] a mining right application must be accompanied by a Social and Labour Plan, which must set out the mining right applicant's local economic development programme.[857] The local economic development programme must

[849] Local Government: Municipal Structures Act, s 1 defines a district municipality as "a municipality that has municipal executive and legislative authority in an area that includes more than one municipality, and which is described in section 155 (1) of the Constitution as a category C municipality".
[850] Local Government: Municipal Structures Act, s 1 defines a local municipality as "a municipality that shares municipal executive and legislative authority in its area with a district municipality within whose area it falls, and which is described in section 155 (1) of the Constitution as a category B municipality". In terms of ss 27 and 29 of the Local Government: Municipal Systems Act, each district municipality must, in consultation with local municipalities in the district, prepare an integrated development planning framework. This framework will be applicable to all local municipalities in the district. Each local municipality will in turn prepare its integrated development plan in accordance with the framework adopted for the district.
[851] Local Government: Municipal Systems Act, s 27(2)(a).
[852] Local Government: Municipal Systems Act, s 27(2)(b).
[853] Local Government: Municipal Systems Act, s 25(1)(e). See also National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 277; Department of Planning, Monitoring and Evaluation *Draft Integrated Planning Framework Bill, 2018* (GN 471 in *GG* 41610 of 04-05-2018), cl 9(1)(2); De Visser *Developmental Local Government* 221.
[854] Local Government: Municipal Systems Act, s 29(1)(b).
[855] Chapter 3 (ss 40 and 41) of the Constitution of the Republic of South Africa, 1996 and s 24 of the Local Government: Municipal Systems Act. For a discussion of co-operative government, see Section 4 of Chapter 2 above.
[856] Section 4 of Chapter 3.
[857] MPRDA, reg 46(c).

include details of projects supported by the mine that deals with infrastructure and poverty alleviation in the municipal area.[858] These projects must align with the IDP of the local municipality.[859] Once again, this provides opportunities for intergovernmental collaboration. First, the DMR can facilitate consultation and discussion between the mining company and the municipality on the appropriate content of the Social and Labour Plan. The municipality must advise the mining company on the socio-economic and infrastructure needs and priorities applicable to the municipal area.[860] This will enable the mining company to identify suitable projects for inclusion in its Social and Labour Plan.[861] The municipality's subsequent IDPs (or reviews thereof) should include a reference to these projects.[862] Second, the municipality should provide input and actively engage when mining companies report to the DMR regarding the implementation of their Social and Labour Plans.[863]

Once adopted, an IDP is not set in stone for the ensuing five-year period. Instead, to cater for changing circumstances and priorities, municipalities must review their IDPs annually.[864] If necessary, the IDP may be amended to accommodate new circumstances.[865] For example, where new, previously unforeseen, mining projects are approved by the DMR, these projects can be included in the IDP during the review process.

3. Spatial Development Frameworks

SPLUMA requires all three spheres of government to prepare their respective spatial development frameworks (SDFs).[866] These SDFs are an interpretation and

[858] MPRDA, reg 46(c)(iii).
[859] MPRDA, reg 46(c)(iii); Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010) 18.
[860] Managing Transformation Solutions *The Marikana Commission of Inquiry: The Problems of the Social and Labour Plan (SLP) 'System' within the Mining Sector in South Africa* 42.
[861] Managing Transformation Solutions *The Marikana Commission of Inquiry: The Problems of the Social and Labour Plan (SLP) 'System' within the Mining Sector in South Africa* 42.
[862] Managing Transformation Solutions *The Marikana Commission of Inquiry: The Problems of the Social and Labour Plan (SLP) 'System' within the Mining Sector in South Africa* 42.
[863] Managing Transformation Solutions *The Marikana Commission of Inquiry: The Problems of the Social and Labour Plan (SLP) 'System' within the Mining Sector in South Africa* 42; The DMR's responsibility to monitor the implementation of social and labour plans are set out in the MPRDA, reg 45 (GN R 527 in *GG* 26275 of 23-04-2004: Mineral and Petroleum Resources Development Regulations, as amended by GN R 349 in *GG* 34225 of 18-04-2011).
[864] Local Government: Municipal Systems Act, s 34(a).
[865] Local Government: Municipal Systems Act, s 34(b).
[866] Spatial Planning and Land Use Management Act, s 12(1).

representation of each government sphere's spatial development visions.[867] All spheres and departments of government are guided by these SDFs when making planning and development decisions.[868] The SDFs, therefore, steer investment priorities at all levels of government.[869]

The Minister of Rural Development and Land Reform may prescribe procedures for the resolution of conflict or inconsistencies that may arise between the various SDFs.[870] To date, no such procedures have been prescribed. Therefore, it is up to the institutions affected by the conflict to determine the resolution process in each instance. In doing so, they must be guided by the provisions of the Constitution and the Intergovernmental Relations Framework Act.[871] Interestingly, there is a separate provision in SPLUMA dealing with conflicts between a municipal SDF and the SDF of the province where the municipality is located.[872] This provision is discussed in section 3.3 below.

In the context of mining, SPLUMA provides that national, provincial and municipal SDFs must "give effect to national legislation and policies on mineral resources".[873] The following subsections discuss the requirements of each sphere's SDF, before examining the role of these SDFs in the mining context. A detailed investigation of national, provincial and regional SDFs falls outside the scope of this study. A brief discussion of these SDFs provides sufficient context for the examination of municipal SDFs, which are analysed in greater detail.

3.1 National Spatial Development Framework

SPLUMA requires the preparation of a national SDF, which must be reviewed every five years.[874] Organs of state and members of the public should be consulted on the

[867] Spatial Planning and Land Use Management Act, s 12(1)(a) and (b).
[868] Spatial Planning and Land Use Management Act, s 12(1)(d) and (e).
[869] Spatial Planning and Land Use Management Act, s 12(1)(k).
[870] SPLUMA, s 9(3), read with definition of 'Minister' in s 1.
[871] Laubscher et al *SPLUMA: A Practical Guide* 101. Section 41(1)(h)(vi) of the Constitution requires that all spheres of government and organs of state must co-ordinate their actions and legislation with one another. Section 41(3) requires that every effort must be made to resolve intergovernmental disputes without reverting to court. These constitutional principles are confirmed in ss 39-45 of the Intergovernmental Relations Framework Act 13 of 2005. See also Ministry for Provincial and Local Government *Intergovernmental Dispute Prevention and Settlement: Practice Guide*. These aspects are discussed in more detail in Sections 4 and 7.1 of Chapter 2 above.
[872] SPLUMA, s 22(3).
[873] SPLUMA, s 12(1)(n).
[874] SPLUMA, s 13(1) and (2).

proposed SDF.[875] The Department of Mineral Resources will, therefore, have an opportunity to provide input during the drafting of the national SDF.

Before SPLUMA legislated SDFs for each sphere of government, the National Development Plan referred to the need for SDFs.[876] The National Development Plan states that the purpose of the national SDF is to provide general principles for development at provincial and municipal level.[877] The Plan recognises that it would be inappropriate for the national SDF to contain provisions addressing detailed development issues that are more suitable for provincial and municipal SDFs.[878]

SPLUMA, which came into force on 1 July 2015,[879] places the responsibility of preparing the national SDF on the Minister of Rural Development and Land Reform.[880] On 19 April 2016, it was announced that the Department of Planning, Monitoring and Evaluation is assuming the responsibility of preparing the national SDF.[881] SPLUMA was not amended to indicate the shift in responsibility.[882] An inquiry to a representative from the Department of Rural Development and Land Reform uncovered that this Department is retaining the responsibility to draft the national SDF, with assistance and oversight from the Department of Planning, Monitoring and Evaluation.[883] Nonetheless, the shift in responsibility may be valuable in the mining context. The Department of Planning, Monitoring and Evaluation is responsible for the co-ordination

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[875] SPLUMA, s 13(1) and (4).
[876] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 260-293.
[877] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 278.
[878] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 278.
[879] Proc 26 in *GG* 38828 of 27-05-2015.
[880] SPLUMA, s 13(1) read with the definition of "Minister" in s 1.
[881] Radebe J "Budget Vote Speech of the Department of Planning, Monitoring and Evaluation" (19-04-2016) *Department of Planning, Monitoring and Evaluation* <https://www.dpme.gov.za/news/Pages/Budget-Vote-Speech-Minister-in-the-Presidency-Planning,-Monitoring-and-Evaluation-,Mr-Jeff-T-Radebe,-MP-.aspx> (accessed 04-11-2018). At the time, Minister Radebe was the Minister in the Presidency for Planning, Performance, Monitoring, Evaluation and Administration.
[882] The definition of "Minister" in s 1 of SPLUMA still refers to the Minister of Rural Development and Land Reform.
[883] Personal conversation with a representative from the Department of Rural Development and Land Reform during an intergovernmental workshop hosted by the DST/NRF SARChI Research Chair: Mineral Law in Africa on 21 August 2018 (Law Faculty Research Ethics Committee *Clearance Process Report for L0096-2018: "Coordinating Mineral Regulation and Compliance across Different Organs of State"* (24-07-2018)).

of national planning[884] and its role spans across all departments and levels of government.[885] The monitoring of the implementation of the National Development Plan also falls under its mandate.[886] As such, the Department of Planning, Monitoring and Evaluation has a more complete and balanced view and is thus better placed to draft, or at least oversee, the national SDF.

Despite an undertaking by the (then) Minister[887] to finalise the national SDF by April 2017,[888] only a draft is available to date.[889] The delay of national government to finalise the national SDF is problematic, as provincial SDFs must be prepared in accordance with the national SDF.[890] In the absence of a national SDF, it is up to the premier of each province to interpret the National Development Plan and other national policy when compiling their respective provincial SDFs.[891] This raises the question of how provincial SDFs should give effect to South Africa's mineral policy without guidance from the national SDF. Furthermore, provincial governments may have to redraft their respective SDFs if it is inconsistent with the national SDF, once published.[892]

The negative consequences of national government's failure to prepare the national SDF are acknowledged by the Department of Planning, Monitoring and Evaluation in the invitation for comments on the Integrated Planning Framework Bill, 2018.[893]

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[884] President of the Republic of South Africa *Transfer of Administration and Powers and Functions Entrusted by Legislation to Certain Cabinet Members in terms of Section 97 of the Constitution* (Proc 47 in *GG* 37839 of 15-07-2014)

[885] Department of Planning, Monitoring and Evaluation "Key Focus Areas" (Date Unknown) *Department of Planning, Monitoring and Evaluation* <https://www.dpme.gov.za/keyfocusareas/Pages/default.aspx> (accessed 04-11-2018); Department of Planning, Monitoring and Evaluation *Invitation for Comments on the Draft Integrated Planning Framework Bill, 2018* (GN 471 in *GG* 41610 of 04-05-2018).

[886] Department of Planning, Monitoring and Evaluation "The National Planning Coordination" (Date Unknown) *Department of Planning, Monitoring and Evaluation* <https://www.dpme.gov.za/about/Pages/National-Planning-Commission.aspx> (accessed 04-11-2018).

[887] Minister in the Presidency for Planning, Monitoring and Evaluation, Jeff Radebe.

[888] Radebe J "Budget Vote Speech of the Department of Planning, Monitoring and Evaluation" *Department of Planning, Monitoring and Evaluation*.

[889] Department of Rural Development and Land Reform, and Department of Planning, Monitoring and Evaluation *Draft National Spatial Development Framework* (09-2018).

[890] SPLUMA, s 15(2).

[891] SPLUMA, ss 15(1)-(3). In terms of s 15(1) and (4) of SPLUMA, premiers "compile, determine and publish" their respective provincial SDFs, while the provincial executive councils "adopt and approve" the SDFs. The executive councils have until 30 June 2020 to adopt the provincial SDFs, being five years from the commencement date of SPLUMA.

[892] SPLUMA, s 15(2) requires consistency between the national SDF and provincial SDFs.

[893] Department of Planning, Monitoring and Evaluation *Invitation for Comments on the Draft Integrated Planning Framework Bill, 2018* (GN 471 in *GG* 41610 of 04-05-2018) 7.

Despite this acknowledgement, the Bill itself contains hardly any information on the proposed national SDF. The Bill simply states that it is the responsibility of the Department of Planning, Monitoring and Evaluation to 'ensure coherence in the spatial planning system and alignment of spatial priorities across sectors in the Republic'.[894]

The Draft National SDF of September 2018[895] addresses mining specifically. It recognizes that planning for mining development should be a collaborative effort between all levels of government, as well as mining companies.[896] Consideration must be given to changing population patterns and associated housing requirements, economic diversification, service delivery, infrastructure capacity, etc.[897]

3.2 Provincial and Regional Spatial Development Frameworks

Provincial SDFs must align the policies and strategies of provincial departments and municipalities within their respective jurisdictions.[898] A provincial SDF should co-ordinate SDFs of contiguous municipalities by providing a framework for the province.[899] This is especially relevant in the mining context. Mining rights awarded by the DMR do not necessarily follow municipal boundaries. The natural occurrence of mineral deposits may necessitate that a mining right be granted over an area that straddles common boundaries between municipalities. If the two municipalities' SDFs are not aligned as it relates to mining, the mining project will be near impossible. This highlights the importance of the provincial SDF's co-ordinating function. However, such co-ordination cannot be limited to contiguous municipalities within provincial borders. Mining operations can also straddle the common boundary between municipalities located in different provinces. Co-ordination between different provincial SDFs is, therefore, just as important. Co-ordination between provincial SDFs can be operationalised by using regional SDFs.

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894 Department of Planning, Monitoring and Evaluation *Draft Integrated Planning Framework Bill, 2018* (GN 471 in *GG* 41610 of 04-05-2018), cl 19(2)(f).
895 Department of Rural Development and Land Reform, and Department of Planning, Monitoring and Evaluation *Draft National Spatial Development Framework* (09-2018).
896 Department of Rural Development and Land Reform, and Department of Planning, Monitoring and Evaluation *Draft National Spatial Development Framework* (09-2018) 131.
897 Department of Rural Development and Land Reform, and Department of Planning, Monitoring and Evaluation *Draft National Spatial Development Framework* (09-2018) 131.
898 SPLUMA, s 15(3)(b) and (c).
899 SPLUMA, s 16(d).

SPLUMA provides for the Minister of Rural Development and Land Reform,[900] in consultation with the relevant premier(s) and municipal councils, to publish a regional SDF relating to a specific region of the country.[901] A region is defined as a demarcated geographical area that does not necessarily correspond with provincial or municipal boundaries.[902] Instead, the area can be identified by specific economic or natural features,[903] such as containing significant mineral deposits. A regional SDF can, therefore, be a useful tool to structure spatial planning for areas of significance for the mining industry where these areas do not follow provincial or municipal boundaries.

3.3 Municipal Spatial Development Frameworks

The concept of municipal SDFs was first introduced in 2001 with the commencement of the Municipal Systems Act,[904] which must be read with SPLUMA.[905] A municipality's SDF forms part of its integrated development plan and guides land use management in the municipality.[906] The Municipal Systems Act[907] provides that municipal SDFs must carry out the land development principles set out in the Development Facilitation Act.[908] However, the Development Facilitation Act has since been repealed by SPLUMA,[909] but the Municipal Systems Act has not been updated accordingly. This failure creates unnecessary legislative uncertainty. SPLUMA contains new development principles, namely, spatial justice, spatial sustainability, spatial resilience, efficiency and good administration.[910] These new principles apply to all

[900] See definition of "Minister" in s 1 of SPLUMA. It is unclear whether this duty will also be assumed by the Department of Planning, Monitoring and Evaluation, as is the case with the national SDF.
[901] SPLUMA, s 18(1).
[902] See definition of "region" in s 1 of SPLUMA.
[903] See definition of "region" in s 1 of SPLUMA.
[904] Local Government: Municipal Systems Act, s 26(e) and 35(2), read with reg 2(4) (GN R796 in *GG* 22605 of 24-08-2001). The Act commenced on 1 March 2001 - see Proc R18 in *GG* 22091 of 23-02-2001.
[905] Department of Rural Development and Land Reform *SDF Guidelines: Guidelines for the Development of Provincial, Regional and Municipal Spatial Development Frameworks and Precinct Plans* (09-2014) 12.
[906] SPLUMA, s 20(2); Local Government: Municipal Systems Act, s 26(e).
[907] Local Government: Municipal Systems Act, reg 2(4)(a) (GN R796 in *GG* 22605 of 24-08-2001).
[908] Act 67 of 1995.
[909] SPLUMA, s 59 read with Sch 3.
[910] SPLUMA, s 7. See Section 3.2 of Chapter 4 above for a more detailed discussion of these principles and its relevance for municipal planning in the mining context. These five development principles of SPLUMA can be compared to the spatial development principles contained in the National Development Plan, namely: spatial justice, spatial sustainability, spatial resilience, spatial quality, and spatial efficiency. See National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 277.

municipal SDFs.[911] SPLUMA also provides that municipal SDFs are subject to the norms and standards for land use management and land development, as prescribed by the Minister.[912] However, to date, the Minister has not issued regulations containing these norms and standards, which once again creates regulatory uncertainty.

A municipal SDF must contain a spatial development plan spanning five years.[913] In addition, a long-term spatial development vision is required for desired patterns of spatial growth and development in the municipality over the ensuing ten to twenty years.[914] The long-term spatial development vision in a municipal SDF accords with the same requirement for municipal IDPs to reflect the municipality's long-term development vision.[915] However, the additional long-term condition is unique to municipal SDFs, as the national, provincial and regional SDFs do not have such a requirement.[916] This anomaly is unfortunate. The interdependent nature of the national, provincial, regional and municipal SDFs, necessitates greater consistency between these instruments.[917] A long-term spatial vision for the region, province and country will also assist mining companies and government departments to evaluate the feasibility and desirability of mining development projects.

SDFs of neighbouring municipalities must align and should identify specific projects that are suitable for the development of land within their respective jurisdictions.[918] The SDFs must also identify areas of economic and other development potential for the prioritisation of public and private investment.[919] In the mining context, municipalities will only be able to identify these suitable projects and development areas with the assistance of the DMR. The DMR is best placed to give an overview of existing and potential mining sites in a specific region.

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911 SPLUMA, s 21(a).
912 SPLUMA, s 8.
913 SPLUMA, s 21(b).
914 SPLUMA, ss 12(1)(b) and 21(c).
915 Local Government: Municipal Systems Act, s 26(a).
916 SPLUMA, s 12(1)(b) prescribes that SDFs at national, provincial and municipal level should be "informed by a long-term spatial development vision statement and plan". While s 21(c) of SPLUMA gives further content to this requirement in respect of municipal SDFs, no further details are given that relate to national and provincial SDFs.
917 Laubscher et al *SPLUMA: A Practical Guide* 129-130.
918 Local Government: Municipal Systems Act, reg 2(4)(g) and (h) (GN R796 in *GG* 22605 of 24-08-2001).
919 SPLUMA, s 21(d).

Mining operations also have a potential impact on other aspects of a municipality's SDF. For example, a municipal SDF must contain estimates of housing demands, infrastructure needs, employment trends and population growth over the ensuing five years.[920] The SDF must also assess environmental pressures and identify areas of significance to agriculture or for environmental protection.[921] Mining projects will almost invariably cause an increase in the local population – not only directly related to the mine's labour force but also an indirect influx of people for associated social and economic activities. With an increase in population comes additional housing, social and infrastructure needs. Furthermore, by their very nature, mining projects cause environmental pressures. The municipality must account for all of the impacts of mining activities within its jurisdiction. Information on these projected impacts is contained in mining right applications submitted to the DMR.[922] As such, the DMR has direct access to this data and should inform municipalities accordingly.

SPLUMA requires consistency between a municipality's SDF and its corresponding province's SDF.[923] Where inconsistencies arise, the premier of the province must, in keeping with the Intergovernmental Relations Framework Act,[924] oversee the revision of the SDFs.[925] While SPLUMA provides for the revision of both SDFs, it is silent on which SDF takes precedence. For example, where the provincial SDF and the municipal SDF differ on the interpretation and localised implementation of the country's mineral policy, it is unclear which SDF prevails. Municipalities are responsible for municipal planning and the day-to-day execution of land development.[926] These practical functions of municipalities are contrasted with the more conceptual functions of provincial planning, which are focused on policy and

[920] SPLUMA, s 21(e)-(h).
[921] SPLUMA, s 21(j).
[922] The Social and Labour Plan that accompanies the mining right application must give details of the mine's impact on the local community, the mining operation's contribution to infrastructure and poverty alleviation projects in the area, as well as housing needs of the mine's labour force. MPRDA, reg 46(c)(ii)-(iv) (GN R 527 in *GG* 26275 of 23-04-2004: Mineral and Petroleum Resources Development Regulations). See more detailed discussion of Social and Labour Plans in Section 4 of Chapter 3 above.
[923] SPLUMA, s 22(3).
[924] Act 13 of 2005.
[925] SPLUMA, s 22(3).
[926] Part B of Sch 4 of the Constitution of the Republic of South Africa, 1996; SPLUMA, s 5(1). See also *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19.

framework generation.[927] When considering the inseparable connection between a municipality's SDF and the practical execution of land development, municipal SDFs should take precedence over provincial SDFs where conflicts arise.[928]

4. IDPs and SDFs in the Case Study Areas

As a municipality's SDF forms part of its IDP,[929] it is useful to analyse these documents together. The following subsections examine the IDPs and SDFs of the City of Cape Town, Sol Plaatje and uMhlathuze municipalities. It evaluates how these documents address mining activities within the respective municipalities' jurisdictions.

4.1 City of Cape Town Metropolitan Municipality

The IDP of the City of Cape Town Metropolitan Municipality came into force on 1 July 2017 and will apply until 30 June 2022.[930] The City's IDP has five strategic focus areas,[931] which are aligned with eleven priorities identified by the City.[932] The below figure illustrates this alignment.

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[927] SPLUMA, s 5(2); Laubscher et al *SPLUMA: A Practical Guide* 135-136; South African Cities Network *SPLUMA as a Tool for Spatial Transformation* (17-03-2015) 37. Part A of Sch 5 of the Constitution states that provincial government has exclusive legislative authority over provincial planning.

[928] Laubscher et al *SPLUMA: A Practical Guide* 135-136; De Visser *Developmental Local Government* 124-126.

[929] Local Government: Municipal Systems Act, s 26(e).

[930] The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 1.

[931] These focus areas are opportunity city, safe city, caring city, inclusive city and well-run city. As opportunity city, the municipality aims to create an environment that fosters sustainable economic growth, attracts investment and stimulate job creation. The safe-city focus area relates to effective policing, disaster and risk management, enforcement of traffic rules and other bylaws, etc. Under the banner of caring city, the municipality focuses on service-delivery, especially catering to the needs of its poor and vulnerable citizens. As inclusive city, the municipality envisages integrated communities where all aspects of the previous three focus areas are integrated. The well-run-city focus area is aimed at financial and operational sustainability. It also focuses on the development of its human-resource capacity and restructuring its organisation, where necessary. See The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 12-13, 32-33.

[932] The eleven priorities are: to position Cape Town as a business city that is forward-looking and globally competitive, to use technology as a tool for progress, to be economically inclusive, to ensure security of its resources by using it efficiently, to have safe communities, to deliver excellent basic services, to standardise basic service delivery to informal settlements, to ensure dense urban growth and development, to have an transport system that is integrated and efficient, to build integrated communities, and to have operational sustainability. See The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 32-43. The IDP refers to a transversal alignment between the five strategic focus areas and the eleven priorities (see, for example The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 31, 33). Although this transversal alignment is illustrated by Figure 1 in the IDP, the detailed discussion of each of these priorities does not reflect the transversal alignment. See Annexure 4 of this thesis, for a copy of Figure 1 of the IDP illustrating the transversal relationship between the strategic focus areas and the priorities.

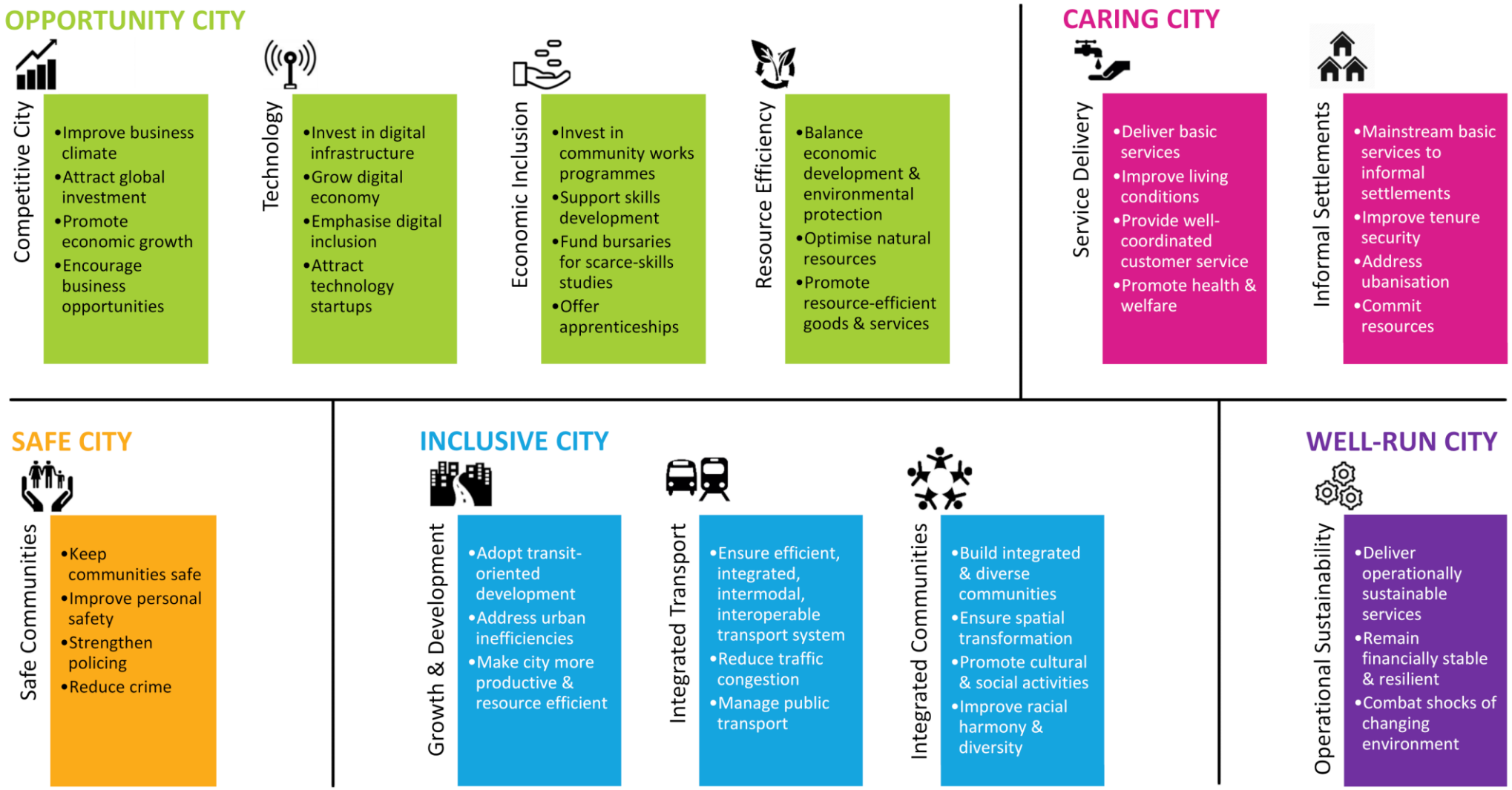

Figure 11: Five Strategic Focus Areas and Eleven Priorities of the City of Cape Town's IDP[933]

[933] Deduction from The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 60-132.

As can be seen from the figure, mining is not specifically mentioned in any of the focus areas or priorities. In fact, mining is only referenced once in the entire IDP and then merely to confirm that the municipality's economy is not reliant on mining activities, contrary to many other parts of the country.[934] In the absence of direct references to mining in the IDP, further investigation is required.

At first glance, priority four in the IDP, namely, "resource efficiency and security",[935] may have a bearing on the mining industry. This priority aims to "achieve an appropriate balance between economic development and the preservation of the natural environment, optimising natural assets, securing resources, and creating a resource-efficient economy".[936] However, upon closer inspection, it becomes apparent that the inclusion of mineral resources was not envisaged under this priority. Instead, this priority focuses on the protection of the natural environment, energy efficiency, water conservation, combating climate change, etc.[937]

Perhaps the absence of mining from Cape Town's IDP can be explained by the nature of the mining activities conducted in the area, namely, mining for sand and other aggregates. These projects typically have a much shorter lifespan than, for example, gold or coal mines. Furthermore, sand mines and other quarries are not a significant source of employment.[938] Therefore, additional housing and social infrastructure for the mine's labour force may not be a concern for the City of Cape Town. Given the mining industry's small contribution to the municipality's economy[939] and its low demands on infrastructure spending, it is not surprising that mining is not regarded as a development priority in the City's IDP.

Despite the economy of the City of Cape Town not being directly reliant on mining, the area is not devoid of mining activities. Sand and other aggregates are mined in the greater

[934] The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 18.
[935] The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 37.
[936] The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 76.
[937] The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 37, 76-78.
[938] In 2015, 10 619 people in the country were employed to do stone quarrying, including stone crushing and clay and sand mining, according to Statistics South Africa *Mining Industry, 2015* (20-01-02 (2015)) 8. This compares with 104 369 employed for mining of gold and uranium ore and 198 951 for mining of platinum group metal ore in the same year.
[939] The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 18.

Cape Town area.[940] These minerals are crucial to the construction industry.[941] When viewed through the lens of the construction industry, the importance of mining to the City of Cape Town becomes apparent. An array of construction projects is required to accommodate Cape Town's growing population.[942] As a metropolitan municipality in South Africa, Cape Town faces rapid urbanisation,[943] accompanied by a host of other challenges. These include housing shortages, job-creation pressures, strained infrastructure and additional service-delivery demands.[944] The construction industry is a crucial tool to face these challenges by building houses, hospitals, schools, water treatment plants, roads, etc. Mining, therefore, plays an indirect role in Cape Town's growth, both economic and otherwise. The mining industry provides the raw materials required by the construction industry to keep up with the City's challenges of urbanisation.

The absence of mining references in the City of Cape Town's IDP may further be attributed to the mining industry's insignificant contribution to the municipality's economy.[945] There are also no high demands on infrastructure spending in the municipality from the mining sector. While the absence of mining references in the City's IDP can be justified, the same does not apply to its SDF. As mining has a physical presence within the City's boundaries, it must be included in the spatial planning of the City of Cape Town.

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940 Council for Geoscience, Western Cape Regional Office *Mineral Commodities in the Western Cape Province, South Africa* 4.

941 City of Cape Town, Directorate of Strategy and Planning *Tender: Specialist Report on the Remaining Extent and Status of Mineral Resources in the City of Cape Town* (2011: SCM-472) 1; Council for Geoscience, Western Cape Regional Office *Mineral Commodities in the Western Cape Province, South Africa* 4; Duxburys Town and Regional Planners and Professional Land Surveyors *Structure Plan for Mining in the Cape Metropolitan Area and Portions of West Coast and Winelands Areas* (2000) 20.

942 City of Cape Town, Directorate of Strategy and Planning *Tender: Specialist Report on the Remaining Extent and Status of Mineral Resources in the City of Cape Town* 1. Between South Africa's 2001 and 2011 population censuses, Cape Town's population grew by 2,6% to 3 740 026. See Statistics South Africa *Census 2011 Municipal Report, Western Cape* (03-01-49, 2012). By 2016 the population grew to an estimated 4 004 793 according to the Statistics South Africa *Community Survey 2016, Statistical Release*, cited in The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 6. See also Statistics South Africa *Community Survey 2016, Provincial Profile: Western Cape* 8, 12, 17.

943 Currently, more than 60% of South Africa's population is living in urban areas. See Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework: A New Deal for South African Cities and Towns* (2016) 4, as referred to in The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 17. The United Nations predicts that by 2030 71,3% of the South African population will live in urban areas. See United Nations *Rural-Urban Linkages for Poverty Reduction: A Review of Selected Approaches from Asia and the Pacific* (2005) as referred to in Department of Cooperative Governance and Traditional Affairs *Integrated Urban Development Framework: A New Deal for South African Cities and Towns* 11.

944 The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 17-21.

945 The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 18.

In 2018, the City of Cape Town approved its 2017 SDF Review to align with the City's 2017-2022 IDP.[946] The SDF sets out three spatial strategies that are incorporated in the City's IDP.[947] These strategies, in turn, consist of sub-strategies and policies.[948] As a metropolitan municipality, the City of Cape Town's spatial planning mainly focuses on transit-oriented development,[949] halting urban sprawl,[950] enabling economic growth and improving the quality of life of its citizens.[951]

In contrast to the City of Cape Town's IDP, the SDF addresses mining directly. This is despite challenges in obtaining input from the DMR regarding existing mining operations and potential future mining sites in the City's jurisdiction.[952] Poor intergovernmental relations with the DMR hamper the municipality's ability to include detailed provisions relating to mining in the City's SDF.[953]

This notwithstanding, the SDF address several aspects of mining. For example, as part of the City's sub-strategy to protect its citizens, one of the policies outlined in the SDF is to "direct urban growth away from risk areas".[954] Mining blasting zones are included as risk areas.[955] The areas encircled in red on the below map of the City of Cape Town depicts precautionary buffer areas around the Tygerberg Hills and in Eerste River where minerals and construction materials are extracted.

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[946] City of Cape Town *Municipal Spatial Development Framework: Review 2017* (25-04-2018) 2.
[947] City of Cape Town *Municipal Spatial Development Framework: Review 2017* 56. The three strategies are: (1) Build an inclusive, integrated, vibrant city; (2) Manage urban growth, and create a balance between urban development and environmental protection; and (3) Plan for employment, and improve access to economic opportunities.
[948] City of Cape Town *Municipal Spatial Development Framework: Review 2017* 56-60.
[949] On 31 March 2016, the municipal council approved the policy: City of Cape Town *Transit-Oriented Development Strategic Framework* (46487). Transit-oriented development focuses on development that optimises movement patterns of people and goods around the city to improve urban efficiency by aiming for a more compact and sustainable urban environment. See also The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 21.
[950] City of Cape Town *Transit-Oriented Development Strategic Framework* 10; City of Cape Town *Municipal Spatial Development Framework: Review 2017* 5, 13, 23. Low-density housing leads to urban sprawl where citizens live far away from employment and other economic opportunities in the city centre. This increases travel costs for citizens. It also leads to higher costs for the City to provide services such as electricity, water, waste removal, etc. over greater distances.
[951] City of Cape Town *Executive Summary: City of Cape Town 2017 Municipal Spatial Development Framework (MSDF) Review* 2.
[952] Interview with an official in the Department of Spatial Planning and Urban Design of the City of Cape Town Municipality, 26-10-2016.
[953] Interview with an official in the Department of Spatial Planning and Urban Design of the City of Cape Town Municipality, 26-10-2016.
[954] The City of Cape Town *Cape Town Municipal Spatial Development Framework 2017-2022* 47, 181.
[955] The City of Cape Town *Cape Town Municipal Spatial Development Framework 2017-2022* 181.

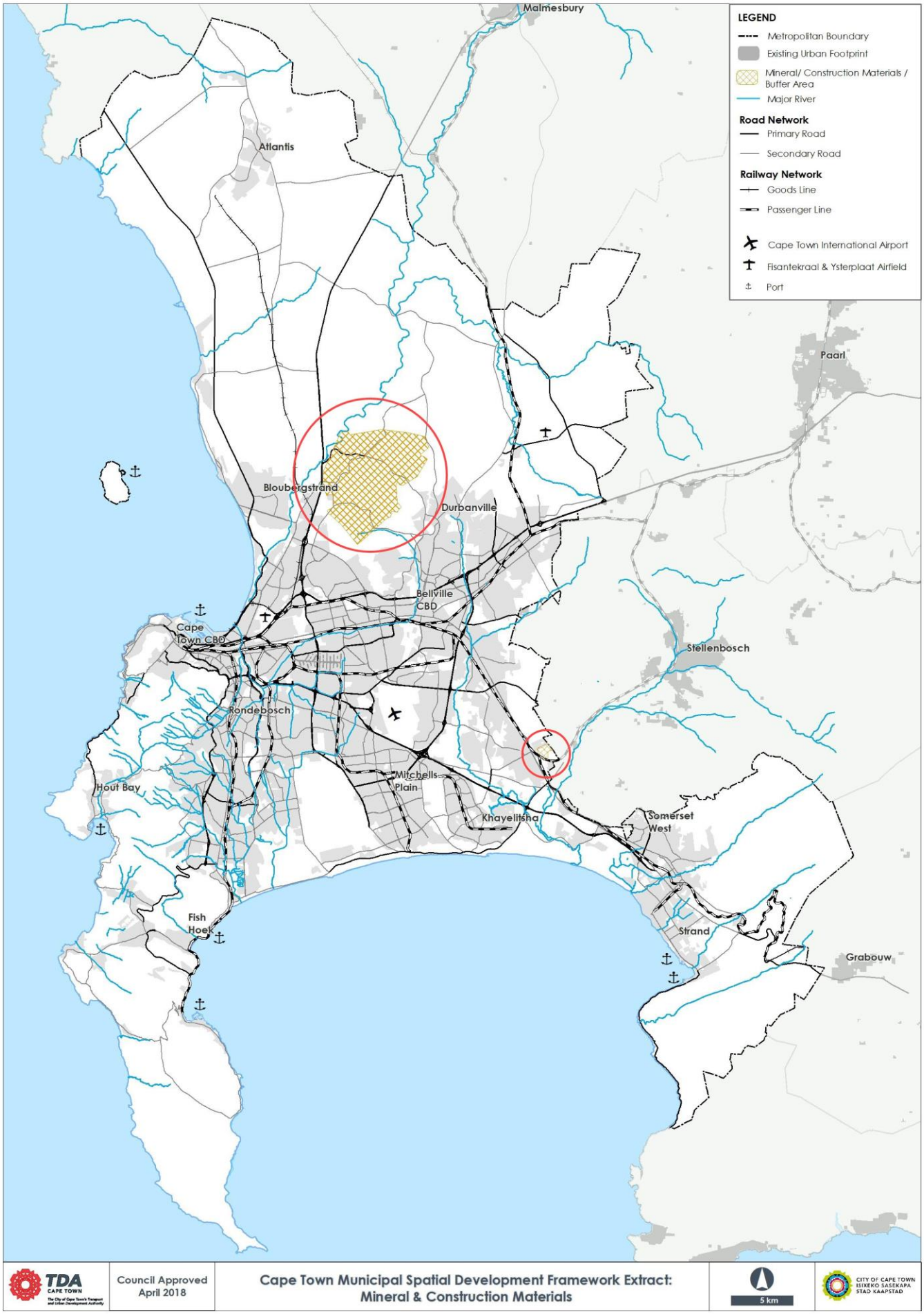

Figure 12: Mineral & Construction Materials Buffer Areas in the City of Cape Town[956]

[956] Extract from Map 5a of City of Cape Town *Municipal Spatial Development Framework: Review 2017* 68. Extract provided by GIS Technician from the City of Cape Town on 26-07-2018.

While the buffer zone protects residents from potential risks associated with mining, it also protects mining areas from urban encroachment. This is closely related to Policy 27 of the SDF, namely, to "adopt a proactive planning approach to mining resource management".[957] The objective is to ensure the protection of mineral deposits located within the City's jurisdiction for future extraction.[958]

The Macassar dunes mining area of the City of Cape Town is another good example in this context. The City identified certain land consisting of sand dunes, for the future development of government-subsidised housing, which would extend to the broader surrounding area.[959] Due to the composition of the sand, the land has significant mining potential.[960] The dunes are suitable for mining of plaster and mortar sand.[961] The municipality, therefore, permitted the land to be used for mining purposes in the interim. The development of the land for housing purposes will commence after mining activities have ceased. By delaying the housing development in the dune area, the City of Cape Town ensures the extraction of mineral resources located within the City's jurisdiction and creates employment for residents in the surrounding informal settlements.[962] The area encircled in red on the map below shows the mining activities on the sand dunes of Macassar, located next to an informal settlement.

[957] The City of Cape Town *Cape Town Municipal Spatial Development Framework 2017-2022* 195.
[958] The City of Cape Town *Cape Town Municipal Spatial Development Framework 2017-2022* 195.
[959] Interview with an official in the Environmental and Heritage Management Branch of the City of Cape Town Municipality, 13-09-2016; The City of Cape Town *Cape Town Municipal Spatial Development Framework 2017-2022* 57.
[960] Council for Geoscience, Western Cape Regional Office *Mineral Commodities in the Western Cape Province, South Africa* 13.
[961] Council for Geoscience, Western Cape Regional Office *Mineral Commodities in the Western Cape Province, South Africa* 13.
[962] Interview with an official in the Environmental and Heritage Management Branch of the City of Cape Town Municipality, 13-09-2016; The City of Cape Town *Cape Town Municipal Spatial Development Framework 2017-2022* 57.

Figure 13: Sand Mining at Macassar[963]

[963] Google Earth Pro V 7.3.2.5487 (10-07-2018) *Macassar, Cape Town 34°3'31.34" S, 18°43'8.32" E* TerraMetrics 2018 & DigitalGlobe 2018.

In its SDF, the City of Cape Town also advocates appropriate development in rural areas.[964] Appropriate development includes additional economic activities, for example, mining.[965] This can enhance rural areas by providing additional employment opportunities and make productive use of land that may otherwise lie fallow.

The City of Cape Town's SDF takes cognisance of the physical presence of mining activities within the City's boundaries, and the potential impact that these activities may have on the City and its residents. The SDF recognises the need to protect both the citizens and the mineral resources located within the municipal area. Therefore, the SDF limits development in mineral-rich areas and creates buffer zones around mining operations.

In summary, it is notable that mining is absent from the City of Cape Town's IDP. This is due to the mining industry's insignificant contribution to the municipality's economy.[966] Furthermore, the industry does not place high demands on infrastructure spending in the municipality. However, the physical presence of mining activities in the area is reflected in the City of Cape Town's SDF. The SDF recognises the need to protect both the citizens and the mineral resources located within the municipal area. Therefore, the SDF limits development in mineral-rich areas and creates buffer zones around mining operations.

4.2 Sol Plaatje Local Municipality

The IDP of the Sol Plaatje Municipality came into force on 1 July 2017 and will apply until 30 June 2022.[967] The first annual review of the five-year IDP has also been completed.[968] In contrast to the City of Cape Town, the Sol Plaatje Local Municipality has a long-established mining history.[969] Kimberley, the municipality's urban and administrative hub, was established during the diamond rush,[970] and so the town has a

[964] Policy 28 contained in The City of Cape Town *Cape Town Municipal Spatial Development Framework 2017-2022* 195.
[965] Policy 28 contained in The City of Cape Town *Cape Town Municipal Spatial Development Framework 2017-2022* 195.
[966] The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 18.
[967] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 103.
[968] Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 16.
[969] See discussion in Section 3.1 in Chapter 5 above.
[970] Meredith M *The Fortunes of Africa: A 5,000-Year History of Wealth, Greed and Endeavour* (2014) 341-348; Thompson L *A History of South Africa* (2001) 111-117; Meredith M *Diamonds, Gold and War: The Making of South Africa* (2007) 13-40.

history rooted in mining.[971] The city's mining history is reflected in its spatial structure, which was optimised for the mining sector.[972] Due to Kimberley's origins as a diamond-mining town, with the town developing around the mining pits, many of the mining areas are currently located inside the urban edge.[973] Given the strong presence of mining activities in the municipality's jurisdictional area, mining enjoys a correlating strong presence in the municipality's IDP. Mining forms a significant part of the Sol Plaatje Local Municipality's economy at 9.63% of Gross Value Added.[974] However, the municipality suffers from a stagnating economy following the decline of mining activities in the area, which previously formed the backbone of the local economy.[975]

Where the City of Cape Town has to allocate and rezone land for new mining ventures, the Sol Plaatje Local Municipality has to deal with the legacy of a declining mining industry in the area.[976] Only 1.5% of land in the municipality is currently used for mining purposes.[977] Therefore, the IDP's focus on mining relates to rehabilitation of unused mining land, reassigning zoning to more productive land uses, addressing the mining industry's legacy of spatial segregation and recent unemployment.[978]

The municipality has identified four strategic objectives with correlating strategic focus areas for implementation during the five-year lifespan of the IDP.[979] The strategic objectives are illustrated in the figure below.

[971] Statistics South Africa "Sol Plaatjie" *Statistics South Africa*.
[972] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 40.
[973] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53.
[974] Housing Development Agency *Sol Plaatje Local Municipality: Municipal Profile* 5; Statistics South Africa "Statistics by Place: Sol Plaatje" *Statistics South Africa*. Gross value added (GVA) measures an individual industry or sector's contribution to the economy.
[975] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 30-36; 144.
[976] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53. For a general discussion of the effects of declining mining activities on local towns and communities, see Marais (2013) *Resources Policy*.
[977] According to the Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 9 and 53, the municipality occupies 3 145 km², of which 12, 65km² is used for mining. The Housing Development Agency *Sol Plaatje Local Municipality: Municipal Profile* 2 states that 1,5% of the municipality's land is used for mining. This is based on data from the National Geo-spatial Information (A Component of the Department of Rural Development and Land Reform) *National Land Cover***.**
[978] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53.
[979] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 143-148.

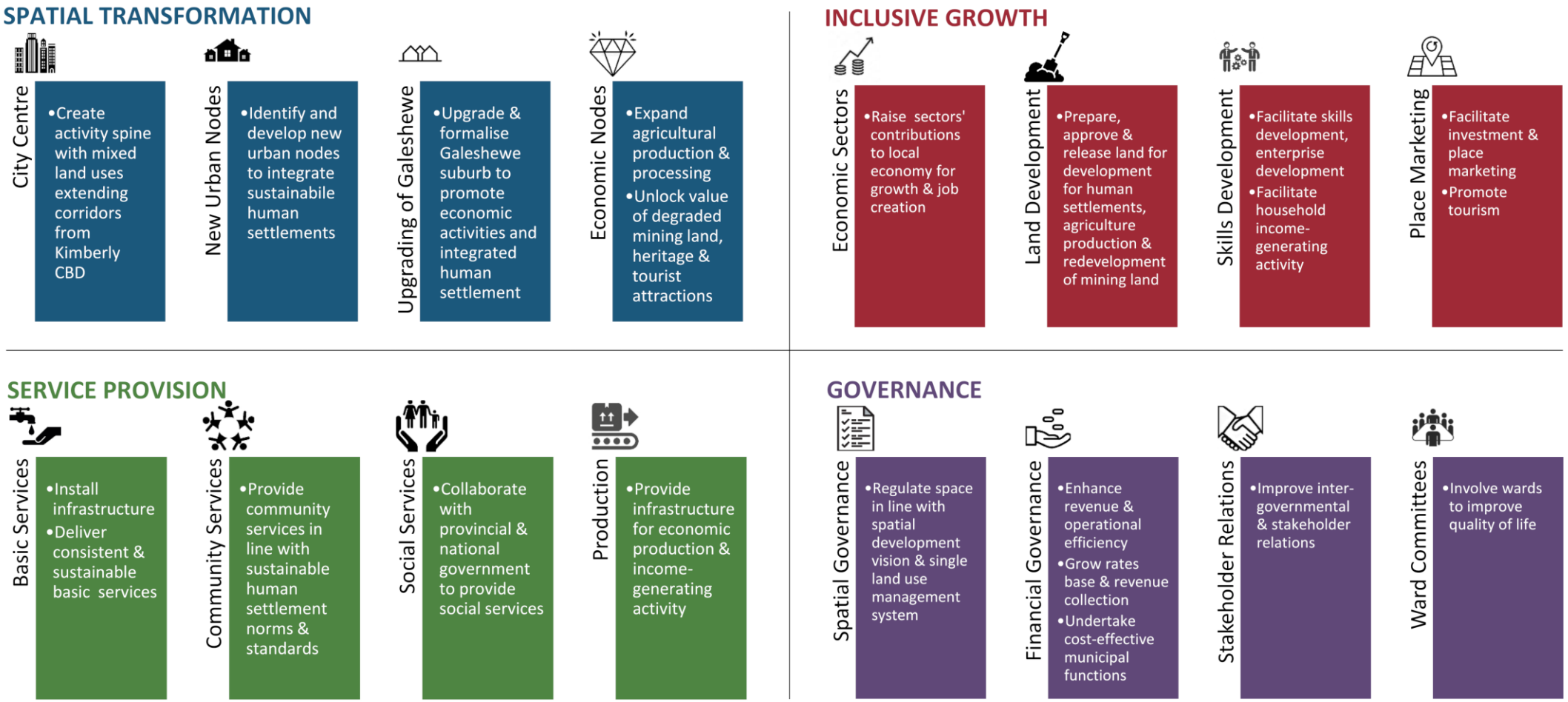

Figure 14: Strategic Objectives with Specific Focus Areas of the Sol Plaatje Municipality's IDP[980]

[980] Deduction from Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 143-148.

Mining is explicitly referred to under two of these strategic objectives, namely, spatial transformation and inclusive growth.[981] The objective of spatial transformation is aimed at reorganising the spatial structure of the municipality to reverse spatial segregation and upgrade informal settlements.[982] One of the envisaged outcomes of the strategic objective of spatial transformation is the clearing of mine dumps and the rehabilitation of mining land.[983] For example, mine dumps in two suburbs of Kimberley, namely, Colville and Floors,[984] have been identified for removal to make land available for housing developments.[985] By clearing mine dumps and rehabilitating mining land, the municipality hopes to "unlock the value of land" that has been degraded by mining activities.[986] The mine dumps of Colville, surrounded by urban settlements, are depicted on the image below.

[981] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 143-144.
[982] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 143.
[983] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53, 65, 143.
[984] Situated in Ward 28 of the Municipality.
[985] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 134; Interview with an official in the Urban Planning Division of the Sol Plaatje Municipality, 16-11-2017.
[986] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 143, 147.

Figure 15: Colville Mine Dumps in Kimberley[987]

[987] Google Earth Pro V 7.3.2.5487 (10-07-2018) *Colville, Kimberley 28°43'7.75" S, 24°45'22.24" E* DigitalGlobe 2018.

The strategic objective of "inclusive growth" aims to attract investment, thereby growing the local economy and creating jobs.[988] Due to the heavy reliance of Sol Plaatje's economy on the local mining industry, its economy stagnated following the decline of mining activities in the area.[989] Under the strategic objective of inclusive growth, the municipality plans to redevelop mining land.[990] A successful example from Kimberley's past is the Big Hole (a hand-dug crater, the result of feverish mining in hazardous conditions blighting the environment and social fibre of the community) that has been developed and transformed into a tourist attraction.[991]

Although mining is not specifically referred to in the fourth strategic objective, namely, governance, it has a potential bearing on this aspect too. The connection between governance and mining is twofold. First, governance as a strategic objective focuses on co-operation between the different spheres of government to promote spatial transformation, economic growth and service delivery.[992] In a municipality where mining has such a prominent presence, engagement with the DMR is essential.

The municipality requires the co-operation of the DMR to ensure that mining companies comply with their environmental obligations.[993] The DMR will similarly play an important role when mining sites are being rehabilitated for other uses. The DMR can also provide valuable input and advise the Sol Plaatje Municipality on the life expectancy of existing mines and potential future mining sites. In its implementation plan of the "governance" strategic objective, the municipality undertook to formulate an intergovernmental

[988] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 144.
[989] Housing Development Agency *Sol Plaatje Local Municipality: Municipal Profile* 5; Statistics South Africa "Statistics by Place: Sol Plaatje" *Statistics South Africa*; Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 30-36; 144.
[990] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 144.
[991] The Big Hole is a giant crater formed by miners digging through diamond-bearing kimberlite. The hole is 214 meters deep with a surface area of seventeen hectares and a of perimeter of 1,6 km. In November 2002, De Beers Consolidated Mines, the owner of the mine at the time, decided to open the tourist centre after the closure of the underground mining activities. See The Big Hole "The Big Hole: The History & A Lasting Legacy for the People of Kimberley" *The Big Hole* <http://thebighole.co.za/thebighole.php> (accessed 15-07-2018); Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 63.
[992] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 146.
[993] In terms of the One Environmental System, the DMR is responsible for the issuing of environmental authorisations and is tasked with the implementation of environmental regulations. National Environmental Management Act, s 50A(2)(c); Department of Environmental Affairs "One Environmental System for Mining Industry to Commence on 8 December 2014" (04-09-2014) *Department of Environmental Affairs* <https://www.environment.gov.za/mediarelease/oneenvironmentalsystem_miningindustry> (accessed 15-07-2018). Also see discussion in Section 7.3 of Chapter 2 above.

strategy during the 2017/2018 financial year.[994] This is to be followed by the implementation of an intergovernmental relations programme during the 2018/2019 financial year.[995] To date, no intergovernmental strategy has been published.

Second, the strategic objective of "governance" also focuses on growing the municipal rate base and revenue collection.[996] The Local Government: Municipal Property Rates Act empowers a municipality to levy rates against immovable property situated within its jurisdiction.[997] These rates are based on the market value of the property.[998] For mining properties, the value of the mining right and the underground structures are excluded when calculating the value of immovable property.[999] Municipal rates are, therefore, only payable on the market value of the land itself, together with any structures and infrastructure above the ground.[1000] It is conceivable that the market value of the mining land itself may be quite low, as there may be a very small market for such land. Low-value, abandoned or unrehabilitated mining land poses a particular challenge for a municipality such as Sol Plaatje.[1001] Very little value remains as basis for the levying of municipal rates on these land parcels.

The Sol Plaatje Municipality attempts to compensate for this by providing for a special rate payable on mining properties. In terms of the municipality's Property Rates Policy, the ratio of rates payable on mining property is 22 times greater than that payable on residential property.[1002] Despite this provision, the municipality may be unable to raise any significant revenue from mining land that lays fallow, burdened by mine dumps, due to the low value of these land parcels. Initiatives to rehabilitate mining land and clear mine dumps will assist to raise the value of the land by enabling more profitable land uses. This, in turn, will result in greater rates revenues for the municipality.

The 2017/2018 review of Sol Plaatje's IDP addresses the important issue of alignment between the municipality's IDP and mining companies' Social and Labour Plans.[1003] The

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[994] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 147.
[995] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 147.
[996] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 146.
[997] Local Government: Municipal Property Rates Act 6 of 2004, s 2 read with definition of "property" in s 1.
[998] Local Government: Municipal Property Rates Act, s 11(1)(a).
[999] Local Government: Municipal Property Rates Act, s 17(1)(f), read with s 46(2) and (3).
[1000] Local Government: Municipal Property Rates Act, s 11(1) read with s 17(1)(f).
[1001] Interview with official in Valuations and Rates Department of the Sol Plaatje Municipality, 16-11-2017.
[1002] Sol Plaatje Local Municipality *Property Rates Policy* (C60/05/17) 25.
[1003] This aspect was not addressed in the Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)*.

2017/2018 Review of Sol Plaatje's IDP records that the municipality and the Kimberley Ekapa Mining Joint Venture identified municipal projects to which the mining company can contribute through its Social and Labour Plan.[1004] These projects are the construction of community halls and roads in Greenpoint (a suburb of Kimberley) and the town of Ritchie.[1005] However, the 2017/2018 Review also confirms that engagement between mining companies and municipalities is ineffective in ensuring socio-economic upliftment of local communities.[1006] This is evident in Sol Plaatje – the municipality suffers from high unemployment,[1007] growing informal settlements,[1008] unfunded community service projects[1009] and ageing infrastructure.[1010]

Officials of Sol Plaatje Municipality reportedly have a good relationship with representatives from the DMR's regional office in Kimberley.[1011] However, the DMR should play a bigger role in facilitating meaningful engagement between municipalities and mining companies that leads to measurable improvement in the socio-economic circumstances of local communities.

The state of Sol Plaatje's SDF stands in contrast to its detailed and up-to-date IDP. The most recent SDF for the Sol Plaatje Municipality was for the five-year period ending 2012.[1012] The 2012-SDF is out of date and not compliant with the provisions of SPLUMA. The municipality is in the process of drafting a new SDF for the period 2017-2022, to correspond with the current IDP.[1013] However, the draft has not yet been released for public comment.[1014] Capacity constraints have been cited for this delay.[1015]

[1004] Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 63.
[1005] Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 63.
[1006] Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 63-64.
[1007] Statistics South Africa "Statistics by Place: Sol Plaatje" *Statistics South Africa*; Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 33, 40.
[1008] Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 93, 94, 132.
[1009] Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 166. These projects include the Roodepan swimming pool, informal traders' market, Greenpoint Square and the fresh produce market.
[1010] Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 9, 75.
[1011] Interview with two officials in the Urban Planning Division of the Sol Plaatje Municipality, 16-11-2017.
[1012] Sol Plaatje Municipality *Spatial Development Framework 2008-2012* (C207/09 25-05-2009).
[1013] Interview with an official in the Urban Planning Division of the Sol Plaatje Municipality, 16-11-2017; Sol Plaatje Local Municipality "Urban Planning" (2016) *Sol Plaatje Local Municipality* <http://www.solplaatje.org.za/Services/Pages/UrbanPlanning.aspx> (accessed 29-08-2018).
[1014] The author has requested a copy of the Draft SDF from the municipality. However, same was not forthcoming. It appears that a copy of the Draft SDF was made available to Thomas Stewart of South African Cities Network, as the Draft SDF is evaluated in the following report: South African Cities Network *Sol Plaatje Municipality*.
[1015] Interview with an official in the Urban Planning Division of the Sol Plaatje Municipality, 16-11-2017; South African Cities Network *Sol Plaatje Municipality* 10.

Nonetheless, this failure is very problematic. SPLUMA prescribes that all land development decisions must be consistent with the municipality's SDF[1016] – a requirement that cannot be complied with in Sol Plaatje under the current circumstances. The failure to adopt an SDF also violates SPLUMA's development principle of good administration, which requires the timeous compliance with any law relating to land development.[1017]

To summarise, the Sol Plaatje Municipality faces specific challenges associated with the legacy of a declining mining industry in the area. [1018] Therefore, the IDP places a specific focus on rehabilitating unused mining land.[1019] In contrast to the City of Cape Town, Sol Plaatje's IDP also refers to the importance of social and infrastructure contributions by mining companies in accordance with their Social and Labour Plan obligations. Sol Plaatje's failure to implement an SDF is problematic, leading to regulatory uncertainty.

4.3 uMhlathuze Local Municipality IDP

The IDP of the uMhlathuze Municipality came into force on 1 July 2017 and will apply until 30 June 2022.[1020] The first annual review of the five-year IDP has also been completed in 2018.[1021] uMhlathuze's IDP lists nine mission-statement elements.[1022] Unfortunately, the IDP does not give any further content to these elements. In the context of mining, one might be drawn to the seventh element, which is aimed at the

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[1016] SPLUMA, s 22(1).
[1017] SPLUMA, s 7(e)(iii).
[1018] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53.
[1019] Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 53.
[1020] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374).
[1021] uMhlathuze Local Municipality *Draft IDP Review 2018/2019* (2018 - DMS: 1242426).
[1022] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 21, 339. These elements are:

- "Job creation and inclusive economic growth through accelerated economic development and transformation;
- Enhancing industry-based skills development and strategic support to education priority programmes;
- Community based initiatives to improve quality of citizens health and well-being;
- Creating safer city through integrated and community based public safety;
- Planned and accelerated rural development interventions;
- Promotion and maintenance of spatial equity and transformation;
- Optimal management of natural resources and commitment to sustainable environmental management;
- Use of Information, Communication and Technology Systems (ICT) to improve productivity and efficiencies in line with Smart City principles; and
- Good governance, capable and developmental municipality".

optimal management of natural resources. However, the term “natural resources” only focuses on environmental protection and climate change; mineral resources are not specifically contemplated.[1023]

In addition to the nine mission-statement elements, the IDP lists eleven goals, 28 objectives and 72 strategies.[1024] These, in turn, are aligned with other instruments, for example, National Key Performance Areas,[1025] National Development Plan Priorities,[1026] National Outcomes,[1027] Provincial Growth and Development Strategies[1028] and the United Nations Sustainable Development Goals.[1029] Although this allows for detailed analysis of the municipality’s goals, objectives and strategies, it makes for a very intricate and complicated IDP, comprising 451 pages.[1030] The figure below is a summarised illustration of the goals, objectives and strategies set out in the IDP.

[1023] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 36, 55, 57. This limited interpretation of “natural resources” is similar to the interpretation of “resource efficiency and security” in the City of Cape Town’s IDP. See The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 33, 37, 76-80.
[1024] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 340-346.
[1025] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 340-346.
[1026] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 34.
[1027] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 34-35.
[1028] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 36.
[1029] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 29-31.
[1030] This is in comparison to the Sol Plaatje’s IDP of 168 pages and the City of Cape Town, a metropolitan municipality, which has an IDP of only 149 pages. uMhlathuze’s 2018 IDP review is even longer at 471 pages. See uMhlathuze Local Municipality *Draft IDP Review 2018/2019* (2018 - DMS: 1242426).

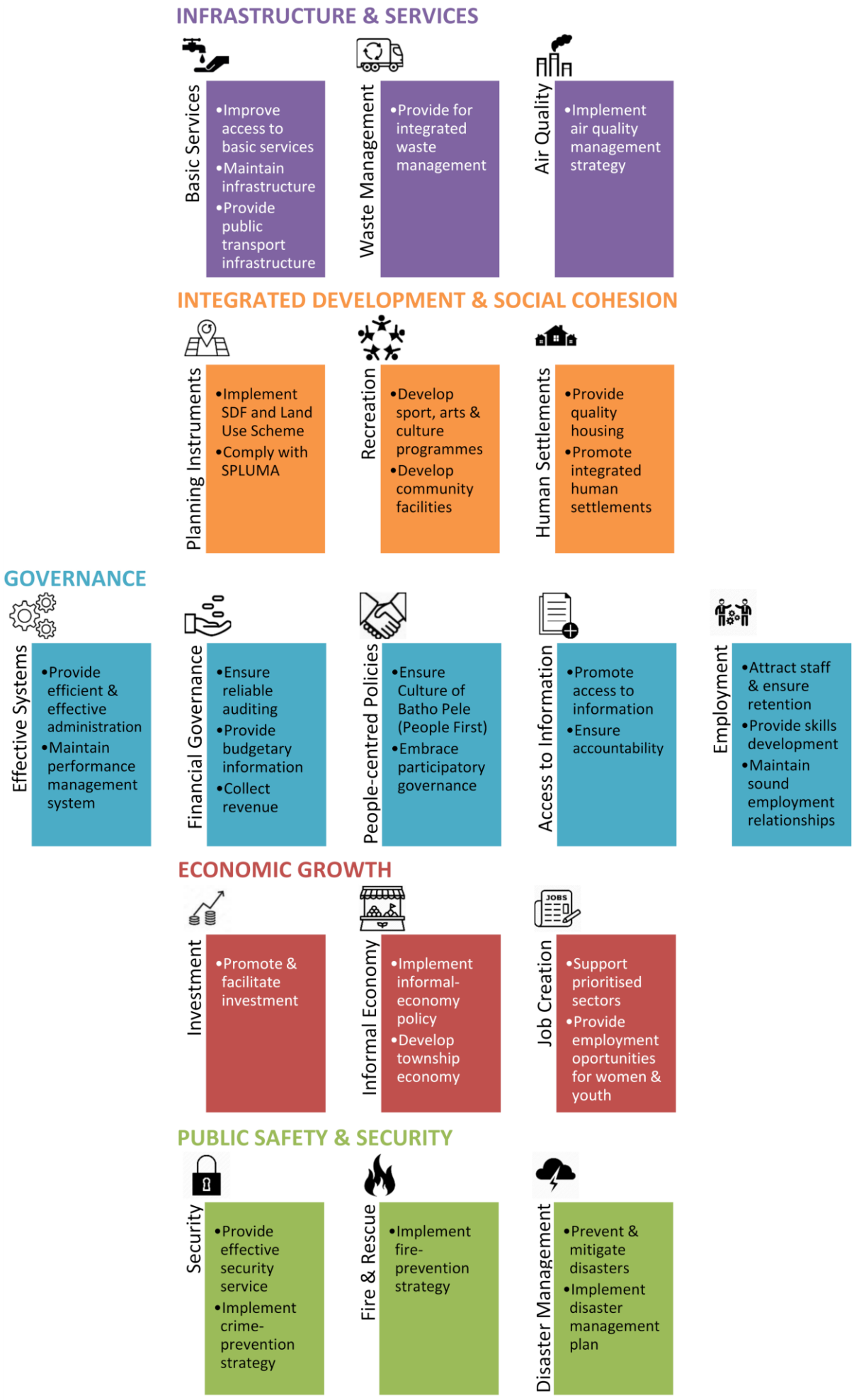

Figure 16: Goals, Objectives & Strategies of uMhlathuze's IDP[1031]

[1031] Deduction from uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 339-346.

The IDP does not contain a development strategy specifically focused on mining. However, upon further investigation, the IDP reveals the municipality's strategic importance for three key areas of the mining sector, namely, mineral extraction, transport of raw and processed minerals, and mineral beneficiation. These three areas are discussed below.

Although the mining industry contributes approximately 11,5% to uMhlathuze's economy,[1032] mineral extraction has a relatively small physical presence in the municipality. According to the IDP, mining only takes place in two contiguous areas north of Richards Bay, namely, Tisands and Zulti North.[1033] Heavy minerals are mined from coastal dunes at these two sites.[1034] Both are operated under the trading name Richards Bay Minerals (RBM), a subsidiary of Rio Tinto.[1035] The mining operations at Tisands are drawing to a close, and the site is being rehabilitated, while operations at Zulti North are expected to continue until 2030.[1036] RBM's presence is being extended to a new site, Zulti South.[1037] It is situated along twenty kilometres of coastline south of Richards Bay and north of Port Durnford.[1038] The mining operations will commence in phases from 2018 – 2021.[1039] The project is already referred to in the municipality's

[1032] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 224; Main (ed) *Local Government Handbook* 113.
[1033] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 50.
[1034] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 50.
[1035] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 50; Williams & Steenkamp "Heavy Mineral Processing" in *Pyrometallurgy* 181; Rio Tinto "Overview and Management" (Date Unknown) *Rio Tinto* <http://www.riotinto.com/energyandminerals/overview-and-management-12967.aspx> (accessed 04-11-2018).
[1036] Rio Tinto "Life of a Mine" (Date Unknown) *Rio Tinto* <http://www.riotinto.com/energyandminerals/life-of-a-mine-12975.aspx> (accessed 04-11-2018).
[1037] Joint interview with four officials in the Spatial and Environmental Planning Department of the uMhlathuze Municipality, 18 July 2017; Rio Tinto "Investor Seminar – Sydney: Q&A Transcript" (04-12-2017) *Rio Tinto* <http://www.riotinto.com/documents/171204_Rio_Tinto_Investor_Seminar_QA_transcript.pdf> (accessed 01-08-2018); Rio Tinto & Richards Bay Minerals *Fact Sheet* (01-2016) 2; Anonymous "RBM Continues Work on Zulti South, Sees Markets Improve" (16-03-2018) *Mining Weekly* <http://www.miningweekly.com/print-version/work-continues-on-rbms-zulti-south-minerals-demand-improves-2018-03-16> (accessed 01-08-2018).
[1038] Harper P "RBM Gets Closer to Extending its Operations" (02-04-2017) *Fin24* <https://www.fin24.com/Economy/rbm-gets-closer-to-extending-its-operations-20170402-2> (accessed 24-08-2018); Moorcroft M "City of uMhlathuze Grants RBM Servitude Rights to Expand Operations" (27-07-2017) *Zululand Observer* <https://zululandobserver.co.za/147376/city-umhlathuze-grants-rbm-servitude-rights-expand-operations/> (accessed 24-08-2018); uMhlathuze Local Municipality *Draft IDP Review 2018/2019* (2018 - DMS: 1242426) 58.
[1039] Harper P "RBM Gets Closer to Extending its Operations" *Fin24*; Moorcroft M "City of uMhlathuze Grants RBM Servitude Rights to Expand Operations" *Zululand Observer*.

IDP.[1040] The IDP notes that the proposed mining site overlaps with current economic and residential interests of local households.[1041] RBM plans to address this problem through its privately funded Resettlement Action Plan with an allocated budget of R9 million.[1042]

The uMhlathuze Municipality is also of strategic importance for the transportation of raw and processed minerals. The municipality is home to the deep-water harbour situated at Richards Bay. The harbour constitutes a crucial link in the transport chain for the export of coal and other minerals from South Africa.[1043] The Presidential Infrastructure Coordinating Commission recognises this link in one of its Strategic Integrated Projects as part of the National Infrastructure Plan.[1044] The project is aimed at "unlocking the northern mineral belt" of South Africa.[1045] Although it focuses on Waterberg and surrounding mining areas in Limpopo and Mpumalanga Provinces, the project highlights the importance of the rail link between these areas and the Richards Bay harbour.[1046] To this end, uMhlathuze's IDP confirms that the municipality has budgeted R100 million for work on the electricity line to the Richards Bay Coal Terminal at the harbour to ensure a steady electricity supply.[1047] Furthermore, the municipality is working closely with Transnet on the expansion of the harbour.[1048]

[1040] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 50; uMhlathuze Local Municipality *Draft IDP Review 2018/2019* (2018 - DMS: 1242426) 58.

[1041] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 436; uMhlathuze Local Municipality *Draft IDP Review 2018/2019* (2018 - DMS: 1242426) 456-457. The proposed community relocation has met with some strong opposition. Following the fatal shooting of an activist on 11 July 2018, 92 organisations issued a joint statement to condemn attacks on community activists. See Bruce L "Joint Statement Condemning Attacks on Civil Society Organisations and Activists" (19-07-2018) *Centre for Applied Legal Studies* <https://www.wits.ac.za/news/sources/cals-news/2018/joint-statement-condemning-attacks-on-civil-society-organisations-and-activists.html> (accessed 24-08-2018).

[1042] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 436; uMhlathuze Local Municipality *Draft IDP Review 2018/2019* (2018 - DMS: 1242426) 456-457.

[1043] The Richard Bay Coal Terminal is a world-class coal export terminal. Other mineral-based commodities being exported from the Richards Bay harbour include anthracite, chrome ore, manganese ore, magnetite, copper concentrate and ferro alloys. See Richards Bay Coal Terminal "Richards Bay Coal Terminal" *Richards Bay Coal Terminal* <https://www.rbct.co.za/> (accessed 15-07-2018); Ports & Ships "Richards Bay" *Ports & Ships* <https://www.ports.co.za/richards-bay.php> (accessed 15-07-2018).

[1044] Presidential Infrastructure Coordinating Commission *A Summary of the South African Infrastructure Plan* (2012) 18.

[1045] Presidential Infrastructure Coordinating Commission *A Summary of the South African Infrastructure Plan* (2012) 18; Infrastructure Development Act 23 of 2014, Sch 3.

[1046] Presidential Infrastructure Coordinating Commission *A Summary of the South African Infrastructure Plan* (2012) 18.

[1047] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 37, 351, 370.

[1048] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 37, 351, 370; Mantshongo A "Media Release: MoU Heralds a New Dawn for uMhlathuze" (05-07-2018) *Transnet*

The municipality also hosts mineral beneficiation operations, for example, the beneficiation of aluminium and titanium.[1049] uMhlathuze's IDP specifically refers to mineral beneficiation as part of the municipality's local economic development implementation plan.[1050] Beneficiation also corresponds with KwaZulu-Natal's Provincial Growth and Development Strategy for job creation, as well as the King Cetshwayo District Municipality Growth and Development Plan for inclusive economic growth.[1051] As part of uMhlathuze's local economic development implementation plan, it envisages a partnership with the DMR and other stakeholders regarding the importing and exporting of minerals for beneficiation.[1052] The IDP sets the target date for this partnership for the 2019/2020 financial year.[1053] Unfortunately, the IDP gives no further details about the content and specific objectives of the mineral beneficiation partnership.

Nonetheless, the IDP's emphasis on mineral beneficiation corresponds with provisions in the National Development Plan.[1054] The promotion of mineral beneficiation in South Africa is identified as an investment priority in the implementation of the National Development Plan.[1055] The National Development Plan acknowledges that local

<https://www.transnet.net/Media/Press%20Release%20Office/TRANSNET%20RBIDZ%20CITY%20MOU%20SIGNING%20CEREMONY%20%20-%205%20JULY%202018.pdf> (accessed 24-08-2018); Transnet National Ports Authority *Construction of Marine Infrastructure in the Port of Richards Bay: Draft Basic Assessment Report* (06-03-2018) 24.

[1049] The IDP refers to beneficiation operations by BHP Billiton Aluminium and Richards Bay Minerals. (See uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 217.) BHP Billiton's smelter facility has since been taken over by South32. See Regan J "Australia's BHP Heads Back to Roots, Drops Billiton from its Name" (14-05-2017) *Reuters* <https://www.reuters.com/article/us-bhp-billiton-australia-namechange/australias-bhp-heads-back-to-roots-drops-billiton-from-its-name-idUSKCN18A0PY> (accessed 25-08-2018); South32 "South Africa Aluminium" (2017) *South32* <https://www.south32.net/what-we-do/places-we-work/south-africa-aluminum> (accessed 25-08-2018). For more information on the titanium smelter operations of Richards Bay Minerals, see Rio Tinto "Beneficiation Processes" *Rio Tinto* <https://www.riotinto.com/energyandminerals/beneficiation-processes-12973.aspx> (accessed 25-08-2018).

[1050] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 244.

[1051] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 244; KwaZulu-Natal Provincial Planning Commission *2035 Provincial Growth and Development Plan: Building a Better Future Together* (2018) 36; King Cetshwayo District Municipality *Integrated Development Plan (2017/18-2021/22)* 52. The uMhlathuze Municipality falls within the King Cetshwayo District Municipality.

[1052] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 244.

[1053] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 244.

[1054] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 42, 146.

[1055] The nine-point plan to promote the National Development Plan was introduced during President Zuma's 2015 State of the Nation Address. See The Presidency "President Jacob Zuma: State of The Nation Address 2015" (12-02-2015) *South African Government* <https://www.gov.za/president-jacob-zuma-state-nation-address-2015> (accessed 25-08-2018). The promotion of beneficiation is also referred to in s 26 of the MPRDA. The current wording of s 26 ("The Minister may") suggests a discretion on the part of the Minister as to whether to promote beneficiation. The 2013 Amendment Bill proposes more peremptory language ("The Minister must"). See s 21(a)(1) of the Mineral and Petroleum Resources Development Amendment Bill [B 15D—2013].

beneficiation of all the country's minerals is not feasible.[1056] The Plan cautions that appropriate locations for mineral beneficiation should be selected carefully, so as not to stifle other vital sectors.[1057] Locations with existing beneficiation capacity and downstream manufacturing potential should be prioritised.[1058] uMhlathuze is strategically located to comply with these requirements. This is evidenced by existing processing facilities for aluminium and titanium.[1059]

Beneficiation in the uMhlathuze Municipality is further promoted by the establishment of the Richards Bay Industrial Development Zone, envisioning the formation of a metal beneficiation hub.[1060] This Industrial Development Zone is a purpose-built industrial estate with easy access to road and rail infrastructure, as well as the deep-water harbour.[1061] With good transport connections, the focus is on export-oriented processing of mineral and other natural resources.[1062] Situated on 240 hectares of land, with potential future expansion on a further 1 000 hectares,[1063] the Richards Bay Industrial Development Zone has a noteworthy impact on spatial planning in the uMhlathuze Municipality. It is also referred to in the municipality's SDF.[1064]

In 2017, the uMhlathuze Municipality adopted its new SDF for the period until 2021/2022.[1065] The first annual review of the SDF was published in May 2018.[1066] The SDF describes several areal nodes within its jurisdiction, based on its land use and

[1056] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 42.
[1057] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 42.
[1058] National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 42.
[1059] South32 operates an aluminium smelter (see South32 "South Africa Aluminium" *South32*), while a titanium smelter is operated by Richards Bay Minerals (see Rio Tinto "Beneficiation Processes" *Rio Tinto*).
[1060] Richards Bay Industrial Development Zone "Metals Beneficiation" *Richards Bay Industrial Development Zone* <http://www.rbidz.co.za/Sectors/View/8> (accessed 25-08-2018)
[1061] Richards Bay Industrial Development Zone "Welcome to RBIDZ" *Richards Bay Industrial Development Zone* <http://www.rbidz.co.za/> (accessed 25-08-2018).
[1062] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 196.
[1063] Richards Bay Industrial Development Zone "The RBIDZ Company" *Richards Bay Industrial Development Zone* <http://www.rbidz.co.za/Pages/TheRBIDZCompany> (accessed 26-08-2018).
[1064] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 19, 50, 90-91, 145-146, 193-197.
[1065] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 1.
[1066] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018).

spatial features, as well as its role within the municipality.[1067] For example, the Dube and Mkhwanazi North and South nodes are identified for providing employment opportunities in the mining sector.[1068] Similarly, the Richards Bay node is noted as a centre of employment, including mining activities.[1069] This node also hosts the port and is, therefore, of strategic importance for the export of raw minerals.[1070]

A core component of the SDF is the delineation of potential expansion areas for future development.[1071] These expansion areas are earmarked for housing and commercial developments, the expansion of the Richards Bay harbour and the Richards Bay Industrial Development Zone, as well as the relocation of the Richards Bay airport.[1072] The SDF also highlights challenges to be overcome before the proposed developments can proceed.[1073] Some of the areas, for example, are currently used for agricultural and mining purposes.[1074]

To overcome the challenges, the municipality concluded agreements with the Departments of Agriculture and Mineral Resources in respect of the proposed expansion areas.[1075] In line with the mineral resources agreement, the SDF acknowledges that future development should not impose on areas with significant mineral deposits.[1076] Where encroachment is inevitable, measures should be adopted to mitigate the negative impact.[1077] In the mining context, this may include phased

[1067] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 60; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 56.
[1068] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 66-68; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 62.
[1069] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 61; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 57.
[1070] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 61; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 57.
[1071] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 13; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 166-171.
[1072] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 150.
[1073] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 13.
[1074] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 13-14, 150.
[1075] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 185; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 218.
[1076] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 45, 158; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 178.
[1077] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 45.

development – as mineral resources are exhausted in a specific area, development can commence as sections of the mining operations move elsewhere. Dune mining is the dominant mining activity in the Municipality.[1078] This makes phased development particularly useful and will be beneficial to both the mining company and the developing entity. For mining companies, future development of the land reduces the need for certain aspects of rehabilitation, for example, the re-establishing of vegetation. In turn, the developing entity will be spared the cost of clearing the site of vegetation before development can commence.

The SDF highlights mining and beneficiation as priority sectors for economic growth and creating employment opportunities.[1079] Mining operations also result in further investment benefits for the municipality. For example, Richards Bay Minerals is investing in some infrastructure projects as part of its planned mining activities at Zulti South.[1080]

Mining is not only an asset to the municipality. The SDF acknowledges that mining also poses risks to the environment and future development. For example, the dune forests situated in northern Umlalazi and at the southern estuary will be largely removed by dune mining.[1081] Dune mining also threatens the hydrological dynamics at Lake Cubhu.[1082] Furthermore, mining-related issues are of concern for future expansion of the Richards Bay port. The dotted red line in the below figure delineates the proposed area for expansion of the port.

[1078] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 87, 145.
[1079] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 44; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 41.
[1080] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 197; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 229.
[1081] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 98; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 97.
[1082] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 100; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 99.

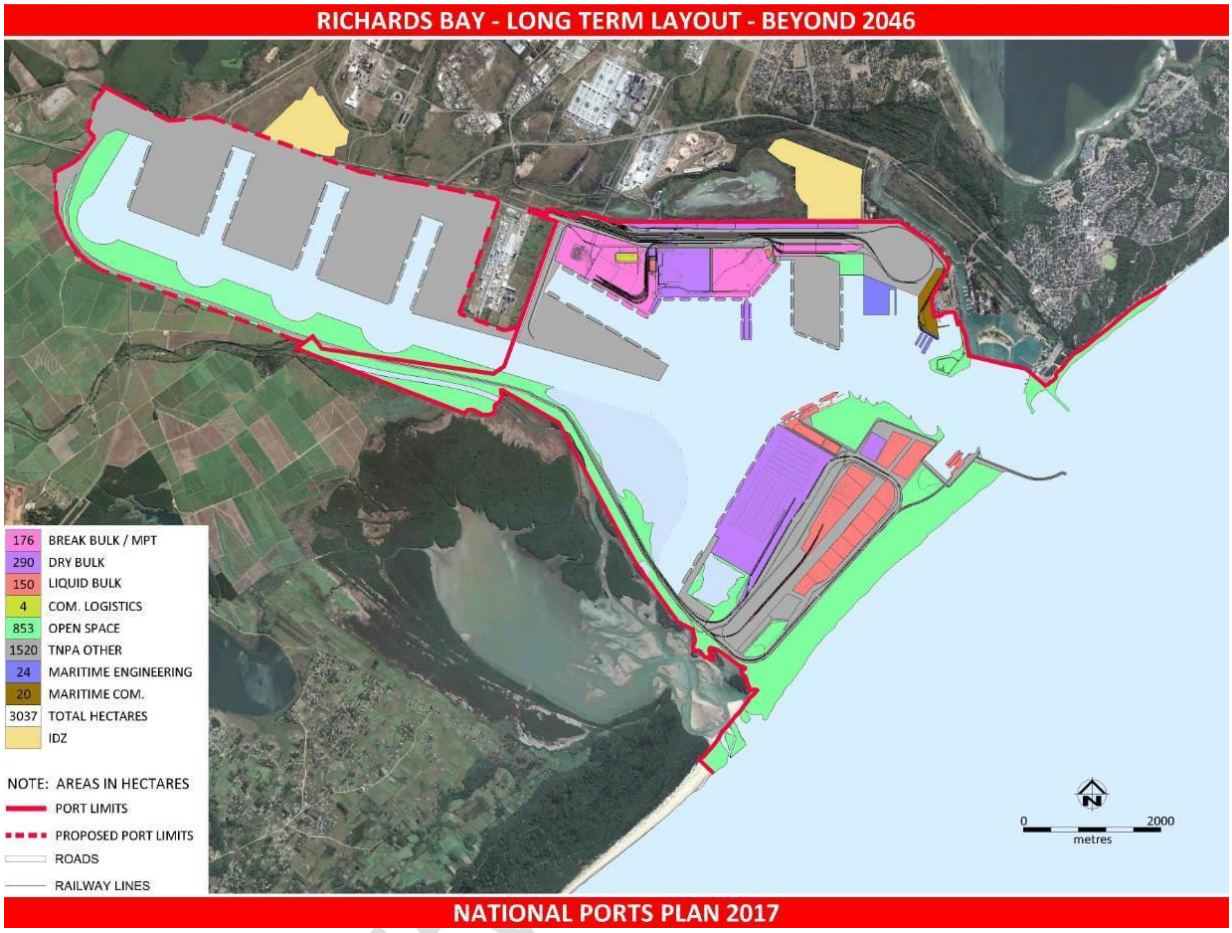

Figure 17: Long-term Expansion Plans for Port of Richards Bay[1083]

Slimes dams from mining operations in the Hillendale and Bayside areas pose a challenge to the proposed port expansion.[1084] The presence of these dams presents environmental risks and challenges for the expansion of the port in these areas.[1085]

In summary, it is noteworthy that mineral beneficiation is much more prevalent in uMhlathuze than in the other two study areas. Therefore, beneficiation is included in the municipality's local economic development implementation plan.[1086] The municipality's development strategy includes attracting beneficiation projects to the area, which boost the local economy and assist with job creation.

[1083] Transnet National Ports Authority *National Ports Plan - 2017 Update* 2-19.
[1084] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 90; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 88.
[1085] uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022* (2017) 90; uMhlathuze Municipality *Spatial Development Framework 2017/2018-2021/2022: First Review* (05-2018) 88.
[1086] uMhlathuze Local Municipality *Five Year IDP 2017/2018 - 2021/2022* (DMS 1197374) 244.

5. Conclusion

This chapter highlights the importance of IDPs and SDFs as planning instruments for municipalities when addressing mining activities within their jurisdictions. These instruments, both in its drafting and implementation phases, provide ample opportunity for intergovernmental collaboration. This is especially true for consultation between municipalities and the DMR. Unfortunately, these opportunities are not always utilised to its full potential. Legislative and regulatory uncertainty, as highlighted throughout this chapter, is a further point of concern.

The examination of the three case-study municipalities reveals that there is no single, correct approach for municipalities to address mining activities in their IPDs and SDFs. These differing approaches are not surprising considering the different contexts of each municipality and the role that mining plays in each of the regions. Every municipality's planning instruments must be tailored to suit the local context and address the specific circumstances and needs of that municipality.

The next chapter interrogates how the policies contained in the three municipality's IDPs and SDFs find application in their respective land use schemes. Chapter 7 also examines each municipality's application procedures for rezoning to change the use of the land where mining activities are proposed.

Chapter 7: Mining in Municipal Land Use Schemes and Rezoning of Land

1. Introduction

Following the discussion of municipal integrated development plans and spatial development frameworks in the previous chapter, the focus of this chapter turns to the third element of municipal planning, namely, land use schemes.[1087] It investigates how municipalities in the three case-study areas address mining activities in their respective land use schemes. The chapter also focuses on rezoning application procedures, where the land must be rezoned to allow mining activities.

2. Land Use Scheme

The term "land use scheme" used in SPLUMA replaces the term "town planning scheme" that was used in many old-order provincial planning legislation.[1088] A municipality regulates the use of land within its jurisdiction through its land use scheme.[1089] The use of any piece of land is restricted to the purpose provided for in a municipality's land use scheme.[1090] A scheme must include zoning categories of permitted land uses.[1091] SPLUMA provides a list of potential land use purposes.[1092] Mining is included in this list.[1093]

[1087] Spatial Planning and Land Use Management Act, s 5(1).
[1088] See, for example, s 7 of the Cape Land Use Planning Ordinance 15 of 1985, s 23 of the Free State Townships Ordinance 9 of 1969, s 1 of the Natal Town Planning Ordinance 27 of 1949, and ss 18-22 of the Transvaal Town-Planning and Townships Ordinance 15 of 1986. For a discussion of the different terms used in this context, see Van Wyk *Planning Law* 278-279. See also Laubscher et al *SPLUMA: A Practical Guide* 33-34. See also fns 1112 and 1128 below. In other parts of the world, terms such as territorial management plan, land use plan, zoning scheme, planning scheme, and local development plan is used.
[1089] Definition of "land use scheme" in SPLUMA, s 1.
[1090] SPLUMA, s 26(2)(a). Pending the adoption of a land use scheme in a specific municipality jurisdiction, the land can be used for the purpose set out in the town planning scheme or for the same lawful purpose immediately before the enactment of SPLUMA. See SPLUMA, s 26(2)(b)-(c) and (3).
[1091] SPLUMA, s 24(2)(a).
[1092] SPLUMA, ss 1-2 of Sch 2.
[1093] SPLUMA, ss 1-2 of Sch 2. "Mining purposes" is defined as "purposes normally or otherwise reasonably associated with the use of land for mining".

Every municipality must adopt a single land use scheme for all the land situated in its jurisdiction by 30 June 2020.[1094] The land use scheme consists of a zoning map reflecting the permitted land use in each zone.[1095] It also includes regulations on the development of land and a register of amendments to the land use scheme.[1096] Therefore, whenever a municipality approves a rezoning application, the register must be updated to record the amendment to the land use scheme and depict all the conditions that may be applicable to the rezoning.[1097]

SPLUMA prescribes that a municipality must review its land use scheme every five years.[1098] The purpose of these revisions is to keep pace with and implement the provisions of the municipality's spatial development framework and integrated development plan.[1099] To further this objective, the land use scheme must incentivise development that aligns with the spatial development framework.[1100] In addition, the land use scheme must promote national and provincial policies.[1101]

To ensure alignment with national and provincial policies relating to land use management, one would expect that the municipality must consult with national and provincial departments when drafting its land use scheme. While consultation with organs of state regarding the content of a municipality's land use scheme is not explicitly addressed in SPLUMA,[1102] this obligation can be inferred from SPLUMA's general provisions dealing with intergovernmental consultation.[1103] SPLUMA prescribes that municipalities must consult with other organs of state on *any activity* that requires approval in terms of SPLUMA.[1104] The adoption of a land use scheme qualifies as such

[1094] SPLUMA, s 24(1) provides that the scheme must be implemented within five years of SPLUMA's commencement. SPLUMA commenced on 1 July 2015. (Proclaimed by GN 26 in *GG* 38828 dated 27-05-2015).
[1095] SPLUMA, s 25(2)(b).
[1096] SPLUMA, s 25(2)(a) and (c).
[1097] Laubscher et al *SPLUMA: A Practical Guide* 150.
[1098] SPLUMA, s 27(1).
[1099] SPLUMA, s 24(2)(g), read with s 25(1).
[1100] SPLUMA, s 24(2)(e).
[1101] SPLUMA, s 24(2)(f). One example of a national policy is the optimal exploitation of South Africa's mineral resources – see ss 17(1)(a), 23(1)(a) and (b), 27(1)(a) and 51(1) of the Mineral and Petroleum Resources Development Act ("MPRDA").
[1102] SPLUMA, s 24(1) only specifically refers to consultation with the public.
[1103] SPLUMA, s 29.
[1104] SPLUMA, s 29(1). For a discussion of this provision in SPLUMA, see Laubscher et al *SPLUMA: A Practical Guide* 160-165.

an activity.[1105] Therefore, the Department of Mineral Resources (DMR) will have an opportunity to give input on a municipality's land use scheme.

The importance of input from the DMR on a municipality's land use scheme needs further examination. A municipality may not have all the required information to provide for mining as a permitted land use in terms of its land use scheme. Municipalities may not be cognisant of every active (or potential) mining site in its jurisdiction. This can be due to several factors. Before the enactment of SPLUMA, not all areas were subject to a land use scheme.[1106] Where mining is carried on in these previously excluded areas, municipalities may not be aware that the land is being used for that purpose. Furthermore, until the *Maccsand*-decision in 2012,[1107] it was accepted that once a mining right has been issued,[1108] the right holder could commence mining activities without requiring any further authorisations.[1109] Therefore, old town planning schemes may not necessarily indicate where land is being used for mining purposes, as it was accepted that the municipality's consent for such use was not required. Given this historical context, a municipality may be heavily reliant on the DMR to provide information on the location of existing or potential mining sites, for inclusion in the municipality's land use scheme.

3. Land Use Schemes in Case Study Areas

This section examines how the land use schemes of the three case study areas (City of Cape Town Municipality, Sol Plaatje Municipality and uMhlathuze Municipality) address mining as a land use. For each municipality, the applicable provincial and local government planning legislation is identified. This section investigates what provision is made in the legislation and the land use scheme itself for intergovernmental input in the mining context.

[1105] SPLUMA, s 29(1) read with s 5(1).
[1106] SPLUMA, s 24(2)(a) changes this by prescribing that land use schemes must include areas that were previously excluded.
[1107] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC). See Section 3 of Chapter 2 for a discussion of the case.
[1108] By the Minister of Mineral Resources.
[1109] This was also the argument of the Minister of Mineral Resources in *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC).

3.1 City of Cape Town Municipality

Planning law in the City of Cape Town Municipality is governed by SPLUMA, at national level; the Western Cape Land Use Planning Act (LUPA),[1110] at provincial level; and the City of Cape Town Municipal Planning By-Law ("the Cape Town By-Law"),[1111] at local government level. LUPA and the Cape Town By-Law do not follow the phrase "land use scheme", as used in SPLUMA.[1112] Instead, it refers to "zoning scheme". For consistency, the term "land use scheme" is used in this chapter. However, it should be read to include "zoning scheme", as referred to in LUPA and the Cape Town By-Law.

Mandated by SPLUMA,[1113] LUPA provides guidelines for municipalities in the Western Cape to prepare their respective land use schemes.[1114] LUPA identifies the purpose of a land use scheme, namely, to ensure organised development.[1115] The land use scheme also regulates land use rights and development restrictions.[1116] LUPA reiterates many of the provisions contained in SPLUMA. For example, LUPA confirms that every municipality must have a land use scheme that covers all land in its jurisdiction.[1117]

Similar to SPLUMA, LUPA determines that each land use scheme must provide for the zoning of land, a zoning register and a zoning map.[1118] A zoning register is used to record consent uses and departures from the land use scheme.[1119] The zoning map records the zoning of all land parcels within the jurisdiction of the municipality.[1120] It also records any rezoning of land and amendments to the zoning register.[1121]

The following discussion indicates how LUPA's requirements relating to land use schemes are implemented in the municipal planning by-law of the City of Cape Town.

[1110] Western Cape Land Use Planning Act was assented to on 31 March 2014 and came into operation in the City of Cape Town on 1 July 2015. PN 99 in *Western Cape Provincial Gazette Extraordinary* 7250 of 07-04-2014; Proc 9 in *Western Cape Provincial Gazette* 7410 of 26-06-2015. The implementation of ss 22(4), 25, 26, 27, 28(c) and 66(4)(c) of LUPA was delayed until 25 April 2016.
[1111] The City of Cape Town *Municipal Planning By-Law, 2015* (Proc 11 in *Western Cape Provincial Gazette Extraordinary* 7413 of 29-06-2015) came into operation on 1 July 2015.
[1112] See fn 1088 above.
[1113] SPLUMA, s 10 read with Sch 1.
[1114] LUPA, ss 22-35.
[1115] LUPA, s 23(a).
[1116] LUPA, s 23(b).
[1117] LUPA, s 22(1). Compare with SPLUMA, s 24(1).
[1118] LUPA, s 24. Compare with SPLUMA, s 25(2).
[1119] LUPA, s 24(c).
[1120] LUPA, s 24(d)(i).
[1121] LUPA, s 24(d)(ii).

The Cape Town By-Law came into operation on 1 July 2015.[1122] It echoes the provisions of SPLUMA and LUPA that the use or development of land in contravention of the land use scheme is prohibited unless approval has been granted for such use.[1123] Therefore, if proposed mining activities are not in line with the Cape Town's land use scheme, it is necessary to rezone[1124] the land or to apply for a departure[1125] or consent use[1126] to use the land as proposed.[1127]

Cape Town's land use scheme[1128] consists of a development management scheme,[1129] a zoning map[1130] and a zoning register.[1131] The object of the development management scheme is, inter alia, to regulate land use, to facilitate the implementation of the land-use planning principles,[1132] to ensure the efficient and sustainable use of land, and to protect sensitive environmental areas.[1133] The City's development management scheme divides the various zoning designations into categories and sets out the rules that are applicable to each zoning category.[1134] Every zoning category lists certain primary uses, which indicate that the property can be put to those particular uses without obtaining any further approval from the City.[1135] Some categories list certain additional use rights and/or consent uses, which are applicable to the land. Additional use rights refer to permitted additional uses, for which no consent is required, but which is subject

[1122] Proc 11 in *Western Cape Provincial Gazette Extraordinary* 7413 of 29-06-2015.
[1123] Cape Town By-Law, ss 35(2) and 133(1)(a)(ii)-(iii); SPLUMA, ss 32(2)(a) and 58(1)(b)-(c); LUPA, s 30 read with s 74(4).
[1124] Section 1 of LUPA defines "rezoning" as "an amendment […] of a zoning scheme in order to effect a change of zoning in relation to a particular portion of land to another zoning provided for in the zoning scheme".
[1125] Section 1 of LUPA defines "departure" as "an altered development parameter granted on a permanent basis or a right to utilise land for a purpose granted on a temporary basis".
[1126] Section 1 of LUPA defines "consent use" as "a land use permitted in terms of a particular zoning with the approval of a municipality".
[1127] LUPA, s 35(1) of LUPA. See section 5.1 below for a discussion of the City of Cape Town's rezoning procedures.
[1128] Cape Town By-Law, s 25. In line with LUPA, the Cape Town By-Law also uses the phrase "zoning scheme", instead of SPLUMA's "land use scheme". See footnotes 1088 and 1114 above. For consistency, the term "land use scheme" is used in this chapter. However, it should be read to include zoning scheme, as referred to in the Cape Town By-Law and LUPA.
[1129] Cape Town By-Law, ss 26-27.
[1130] Cape Town By-Law, ss 28-31.
[1131] Cape Town By-Law, ss 25, 33.
[1132] Both SPLUMA and LUPA refer to land-use planning principles, which are categorised under five specific themes. These are spatial justice, spatial sustainability, efficiency, good administration and spatial resilience. See SPLUMA, s 7 and LUPA, s 59(1) – (5). Although LUPA organises the categories slightly differently from SPLUMA, the content of the principles are almost identical. See discussion at Section 3.2 of Chapter 4 above.
[1133] Cape Town By-Law, s 26(1).
[1134] See Sch 3 to the Cape Town By-Law.
[1135] Definition of "primary use" in Item 1, read with Item 10 of Sch 3 of the Cape Town By-Law.

to certain conditions of use.[1136] Consent uses refer to uses that are allowed on the land, but only with the City's consent.[1137] The figure below illustrates the different use rights that may be applicable to a piece of land in the City of Cape Town.

Figure 18: Use Rights and Restrictions Applicable to Land in the City of Cape Town

None of the zoning categories contained in Cape Town's development management scheme lists mining as a primary use or additional use right. Instead, mining is listed as a consent use under "agricultural zoning" and "rural zoning", as can be seen from the figure below.[1138] Therefore, it will always be necessary to apply to the City to use any piece of land for mining purposes.

[1136] Definition of "additional use right" in Item 1, read with Item 11 of Sch 3 of the Cape Town By-Law.
[1137] Definition of "consent use" in Item 1, read with Item 13 of Sch 3 of the Cape Town By-Law.
[1138] Table A, read with Items 108(c) and 112(c) of Sch 3 of the Cape Town By-Law.

AGRICULTURAL, RURAL AND LIMITED USE ZONINGS	MAX FLOOR SPACE	COVERAGE	MAXIMUM HEIGHT ABOVE BASE LEVEL		BUILDING LINES		STREET CENTRELINE SETBACK	OTHER PROVISIONS
			To wallplate	To top of roof	Street boundary	Common boundaries		
AGRICULTURAL ZONING (AG) **PRIMARY USES** Agriculture, intensive horticulture, dwelling house, riding stables, environmental conservation use, environmental facilities, rooftop base telecommunication station and additional use rights **ADDITIONAL USE RIGHTS** Second dwelling and home occupation or bed and breakfast establishment or home child care **CONSENT USES** Additional dwelling units, guest house, hotel, tourist accommodation, tourist facilities, intensive animal farming, harvesting of natural resources, mine, utility service, freestanding base telecommunication station, wind turbine infrastructure, aqua- culture, animal care centre, farm shop, agriculture industry veterinary practice and renewable energy structure	1 500 m² for all dwelling units 100 m² for farm shop Refer to item 109(a)	N/a	9,0 m for dwelling house Refer to item 109(d)	11,0 m for dwelling house 12,0 m for agricultural buildings other than dwelling house Refer to item 109(d)	> 20 ha : 30,0 m ≤ 20 ha : 15,0 m Refer to item 109(b)	> 20 ha : 30,0 m ≤ 20 ha : 15,0 m Refer to item 109(b)	N/a	Parking Minimum subdivision size Agricultural industry Second dwelling and additional dwelling units
RURAL ZONING (RU) **PRIMARY USES** Dwelling house, agriculture and additional use rights **ADDITIONAL USE RIGHTS** Second dwelling and home occupation or bed and breakfast establishment or home child care **CONSENT USES** Guest house, tourist accommodation, tourist facilities, harvesting of natural resources, mine, rooftop base telecommunication station, freestanding base telecommunication station, wind turbine infrastructure, aqua-culture, intensive animal farming, intensive horticulture, riding stables, animal care centre, farm shop, agricultural industry and veterinary practice	1 500 m² for all buildings 100 m² for farm shop Refer to item 113(a)	40% Refer to item 113(b)	9,0 m Refer to item 113(e)	11,0 m Refer to item 113(e)	10,0 m Refer to item 113(c)	5,0 m Refer to item 113(c)	N/a	Parking Minimum subdivision size Agricultural industry Second dwelling

Figure 19: Extract from City of Cape Town's Summary of Zonings and Development Rules[1139]

[1139] Table A in Item 20 of Sch 3 of the Cape Town By-Law (emphasis added by author).

If the specific piece of land is already zoned as agricultural or rural, a "consent use" application will be necessary before mining can commence. Alternatively, if the land has any other zoning, a rezoning application to agricultural or rural zoning will be required. Such an application must be lodged in combination with a consent use application, as referred to above.

When compared to the prevalence of other land uses, mining has a relatively low incidence in the City of Cape Town.[1140] Given this fact, it is not surprising that mining is not designated as a potential primary land use. Listing it as a consent use is justifiable under the circumstances.

The zoning of each land unit within the City's jurisdiction is depicted on the City's zoning map.[1141] The zoning map constitutes the City's record of every piece of land.[1142] Whenever a use right[1143] has been granted or has lapsed, the zoning map must be updated.[1144] For this purpose, the Cape Town By-Law allows for the zoning map to be retained in electronic format, which is available on the City's website.[1145] All decisions by the City relating to, *inter alia*, rezoning, departures and consents, must be recorded in the zoning register.[1146] The public can inspect the zoning map and zoning register at one of the City's district offices.[1147] The below figure is an extract from the City of Cape Town's zoning map. The large, light green triangle at the bottom of the figure represents the dune area in Macassar where sand is being mined.[1148] As illustrated by the map legend, this land is zoned as "Agricultural".

[1140] Council for Geoscience, Western Cape Regional Office *Mineral Commodities in the Western Cape Province, South Africa* 1; Duxburys "Structure Plan for Mining in the Cape Metropolitan Area and Portions of West Coast and Winelands Areas" *City of Cape Town* 20. Also see discussion in Section 2.1 of Chapter 5 above.
[1141] Cape Town By-Law, s 28(1)(a), read with Item 8(2) of Sch 3.
[1142] Cape Town By-Law, s 31(1).
[1143] Section 1 of the Cape Town By-Law defines "use right" as "the right to use that land in accordance with its zoning, a departure consent use, condition of approval or any other approval granted in respect of the rights to use the land".
[1144] Cape Town By-Law, s 28(1)(c).
[1145] Cape Town By-Law, ss 28(2)(c) and 33(1). See City of Cape Town "Online Zoning Viewer" *City of Cape Town* <http://emap.capetown.gov.za/EGISPbdm/> (accessed 28-08-2018).
[1146] Cape Town By-Law, s 32(1)(i) – (iii).
[1147] Cape Town By-Law, s 33(2).
[1148] For an aerial view of the area and a discussion of these mining activities, see Section 4.1 of Chapter 6 above.

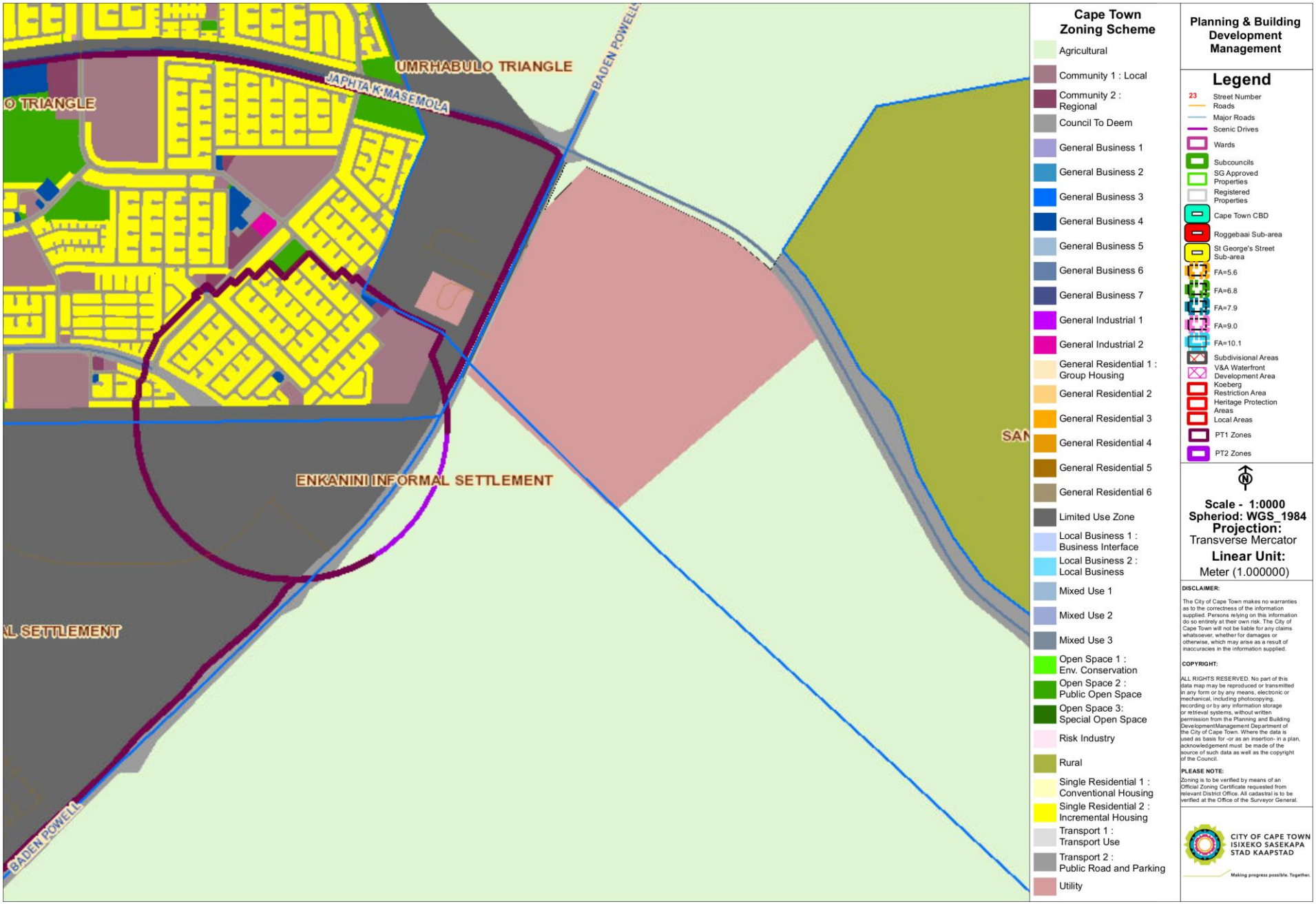

Figure 20: Extract from City of Cape Town's Zoning Map[1149]

[1149] City of Cape Town "Online Zoning Viewer" *City of Cape Town*.

The fact that the City's zoning map is so easily accessible makes a land portion's zoning information readily available. This provides an important opportunity for intergovernmental co-operation between the DMR and the City of Cape Town Municipality. It is very easy for the DMR to consult the map when considering a mining right application. The DMR is able to ascertain what the current zoning regulations are for a specific piece of land located within the jurisdiction of the City of Cape Town, as well as the zoning of surrounding land parcels. If the land is not appropriately zoned to allow for mining activities, the DMR can commence a consultation process with the City of Cape Town as to the likelihood of a successful rezoning application. Pre-emptive intergovernmental co-operation initiatives of this nature accord with the provisions in the Constitution,[1150] IRFA,[1151] SPLUMA[1152] and LUPA.[1153] Where rezoning is required, the procedure in the Cape Town By-Law is to be followed prior to the commencement of mining operations.[1154]

3.2 Sol Plaatje Municipality

As stated in Chapter 5,[1155] planning legislation applicable to Sol Plaatje dates from both the pre- and post-SPLUMA era. At provincial level, the Northern Cape Planning and Development Act ("the NCPDA")[1156] came into force on 1 June 2000 - therefore, before SPLUMA.[1157] At local government level, the Sol Plaatje Local Municipality Land Use Management By-Law, 2015 ("the Sol Plaatje By-Law") commenced on 21 September 2015 – therefore, after SPLUMA.[1158] The Sol Plaatje By-Law must be read with the Sol Plaatje Land Use Management Scheme,[1159] which is contained in a separate document.[1160]

[1150] Chapter 3 of the Constitution sets out principles for the promotion of co-operative government. In terms of Sections 40 and 41 of the Constitution all spheres of government are obliged to adhere to these principles. See discussion in Section 4 of Chapter 2 above.
[1151] Intergovernmental Relations Framework Act, s 5. See discussion in Section 5.2 of Chapter 2 above.
[1152] SPLUMA, ss 29 and 30. See discussion in Section 3.3 of Chapter 4 above.
[1153] LUPA, s 59, read with s 67.
[1154] See discussion in Section 5.1 below.
[1155] Section 3.2 of Chapter 5 above.
[1156] Act 7 of 1998.
[1157] SPLUMA commenced on 1 July 2015.
[1158] Sol Plaatje Local Municipality *Land Use Management By-Law, 2015* (GN 139 in *Northern Cape Provincial Gazette Extraordinary* 1955 of 21-09-2015).
[1159] Sol Plaatje Municipality *Integrated Land Use Management Scheme* (Proc 8 in *Northern Cape Provincial Gazette* 1547 of 03-10-2011).
[1160] This contrasts with the situation in the City of Cape Town. The City's land use scheme is incorporated in its Planning By-Law. See discussion at Section 3.1 above.

The NCPDA uses the term “zoning scheme”, not “land use scheme”. The Sol Plaatje By-Law uses the terms “zoning scheme”, “land use scheme”, “land use management scheme” and “town planning scheme” interchangeably. As stated in Section 3.1 above, this Chapter uses the term “land use scheme” for consistency.

The NCPDA requires every municipality in the Northern Cape Province to prepare and implement a land use scheme.[1161] The purpose of the scheme is to assign and explain the development rights applicable to each land parcel.[1162] Even though it predates SPLUMA, the NCPDA sets out the same requisite components for a land use scheme.[1163] The first is a zoning map; second, regulations setting out land use categories and restrictions; and third, a register to record changes in the designated land use.[1164]

Sol Plaatje’s Land Use Scheme was drafted in 2008 and promulgated in 2011.[1165] Therefore, it predates SPLUMA and the municipality’s By-Law, but it was promulgated after the commencement of the NCPDA.[1166] Similar to SPLUMA and the NCPDA, the Sol Plaatje By-Law prohibits the use of land that contravenes the municipality’s land use scheme, without municipal approval.[1167]

Sol Plaatje’s Land Use Scheme provides for 24 types of use zones that may apply to land.[1168] Each use zone lists certain primary uses, indicating land uses that do not

[1161] NCPDA, s 36(1).
[1162] NCPDA, s 37(2).
[1163] NCPDA, s 38.
[1164] NCPDA, s 38(1)-(3).
[1165] Sol Plaatje Municipality *Integrated Land Use Management Scheme* (Proc 8 in *Northern Cape Provincial Gazette* 1547 of 03-10-2011).
[1166] SPLUMA commenced on 1 July 2015; the Sol Plaatje By-Law commenced on 21 September 2015; and the NCPDA commenced on 1 June 2000.
[1167] SPLUMA, ss 32(2)(a) and 58(1)(b)-(c); NCPDA, ss 66(2)(a)(iii), 66(2)(b) and 78(1)(b); Sol Plaatje By-Law, ss 60(1)(c) and 60(2). Interestingly, the penalties imposed by these three legislative instruments for contravention of the land use scheme do not correspond. SPLUMA provides for imprisonment of a maximum period of twenty years or a fine (or both) calculated in accordance with the Adjustment of Fines Act 101 of 1991. (See SPLUMA, ss 58(1)(b)-(c) and 58(2).) The NCPDA prescribes a maximum fine of R50 000 or five years imprisonment (or both). (See NCPDA, ss 66(2)(a)(iii), 66(2)(b) and 78(1)(b).) The Sol Plaatje By-Law distinguishes between penalties for landowners and other users of land. It provides that “any person” using land contrary to the land use scheme is subject to a fine of R2 000. (See Sol Plaatje By-Law, s 60(1)(c) read with the fine schedules in Sch 2.) Landowners allowing their land to be used in contravention of the land use scheme may be fined or imprisoned for a maximum period of twenty years (or both). (See Sol Plaatje By-Law, s 60(2).)
[1168] Sol Plaatje Land Use Scheme, Table C in cl 14.4. These use zones are: Residential 1, Residential 2, Residential 3, Business 1, Business 2, Business 3, Commercial, Industrial, Institutional, Educational, Amusement, Municipal, Agricultural, Public Garage, Parking, Public Open Space, Private Open Space, Cemetery, Aerodrome, Government Railways, Existing Public Road, Mining, and Special.

require any further approval from the municipality.[1169] Some use zones list secondary use rights applicable to the land.[1170] Secondary use rights refer to permitted additional uses, which require the municipality's consent. Finally, each use zone specifies certain prohibited land uses.[1171] The figure below illustrates the different use rights that may apply to a piece of land in the Sol Plaatje Municipality.

Figure 21: Use Rights and Restrictions Applicable to Land in the Sol Plaatje Municipality

Contrary to the City of Cape Town, Sol Plaatje's Land Use Scheme has a use zone specifically catering for mining as a primary land use right.[1172] This is not surprising, given that mining activities are much more prevalent in the Sol Plaatje Municipality.[1173] Mining is not listed as a secondary use right under any of the other use zones.[1174] Therefore, unless the land is zoned for mining, a rezoning application will be required before mining activities can commence.[1175]

Mining activities conducted in accordance with a mining permit is a possible exception to the abovementioned statement. The Minister of Mineral Resources may issue a mining permit when two conditions are met.[1176] First, the mining area must be limited to

[1169] Sol Plaatje Land Use Scheme, column (3) of Table C of cl 14.4.
[1170] Sol Plaatje Land Use Scheme, column (4) of Table C of cl 14.4.
[1171] Sol Plaatje Land Use Scheme, column (5) of Table C of cl 14.4.
[1172] Sol Plaatje Land Use Scheme, use zone 23 in Table C of cl 14.4. Mining is not listed as a secondary use right under any of the other use zones.
[1173] See discussion in Section 3.1 of Chapter 5 above.
[1174] Sol Plaatje Land Use Scheme, Table C of cl 14.4.
[1175] The Sol Plaatje Land Use Scheme, cl 5 defines "mining" as "land and buildings, that under the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002) and any amendments thereof, are used or designated for mining and / or exploitation of minerals, or for which purpose a permit has been issued under the fore-mentioned Act and includes such uses directly related and appurtenant to the use of the land and buildings for mining purposes and for the purposes of this Scheme mining shall include quarrying".
[1176] MPRDA, s 27(1).

a maximum size of five hectares.[1177] Second, and more import for current purposes, it must be possible to mine the specific mineral optimally within a period of two years.[1178] The Sol Plaatje Land Use Scheme provides that the municipality may consent to the temporary use of land for a purpose not otherwise permitted in terms of the 24 use zones.[1179] Such temporary use is limited to two years and may be subject to conditions imposed by the municipality.[1180]

Therefore, temporary land use rights may provide a solution to small-scale miners holding mining permits.[1181] They could obtain consent from the municipality to use the land for mining purposes for two years, thereby eliminating the need to apply for the rezoning of land.

Notably, the Sol Plaatje Land Use Scheme contains the following provision:

> "Without prejudice to any powers of the Municipality derived from any law, or to the remainder of this Scheme, nothing in the foregoing provisions of this Scheme, shall be construed as prohibiting or restricting the […] exploration of minerals on any land not included in a confirmed township."[1182]

This provision ("the Clause 15 provision") raises three important issues, each of which should be analysed separately. First, it must be acknowledged that the Sol Plaatje Land Use Scheme predates the *Maccsand* judgment.[1183] Prior to this judgment, it was accepted that once a mining right has been issued, the right holder could commence mining activities without requiring any further authorisations.[1184] However, in *Maccsand* the Constitutional Court ruled that a mining right cannot be exercised until the land is appropriately zoned to allow such activities.[1185] It is conceivable that the Clause 15

[1177] MPRDA, s 27(1)(b).
[1178] MPRDA, s 27(1)(a).
[1179] Sol Plaatje Land Use Scheme, cl 16.1.
[1180] Sol Plaatje Land Use Scheme, cls 16.1.1 – 16.1.2.
[1181] For a more detailed discussion of small-scale or informal mining in the Sol Plaatje Municipality, see Section 3.1 of Chapter 5 above.
[1182] Sol Plaatje Land Use Scheme, cl 15.1.1.
[1183] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC). This judgment was handed down in April 2012, while the Sol Plaatje Land Use Scheme was promulgated in October 2011. See Proc 8 in *Northern Cape Provincial Gazette* 1547 of 03-10-2011.
[1184] This was also the argument of the Minister of Mineral Resources in the Constitutional Court case *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC).
[1185] Or the necessary departure from the zoning scheme has been obtained from the local authority. See *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) paras 48, 51. See also *Minister for Mineral*

provision in Sol Plaatje's Land Use Scheme is a remnant of the pre-*Maccsand* notion and should, therefore, now be disregarded.

However, if one accepts that Clause 15 remains valid, its meaning must be analysed. The second issue for examination is the interpretation of "exploration of minerals", as used in the Clause 15 provision. "Exploration of Minerals" is a contradictory term. In terms of the Mineral and Petroleum Resources Development Act ("MPRDA"),[1186] "exploration" relates to petroleum, not minerals.[1187] The equivalent term applicable to minerals is "prospecting".[1188] Prospecting refers to the act of searching for minerals to determine the extent of the mineral deposit and whether a mining operation would be economically viable.[1189] Prospecting is to be distinguished from mining – the latter concept entails the extraction of minerals from the soil for economic gain.[1190] Due to the ambiguous nature of the phrase "exploration of minerals", it is unclear whether the intention was for the Clause 15 provision to apply to prospecting activities only, thereby excluding mining activities. Such an interpretation would mean that one can exercise a prospecting right, regardless of the zoning of the land. When viable mineral deposits are discovered during the prospecting phase and a mining right is subsequently obtained, rezoning of the land may be required if it is not already zoned for mining.

The third issue raised by the Clause 15 provision is that the application of this provision is limited to land falling outside formal townships. The Land Use Scheme describes a township as land that is divided into portions to be used for residential, business and industrial purposes, with the individual portions being connected by streets.[1191] It appears that the Clause 15 provision should be interpreted to mean that exploration of minerals can take place on agricultural and other land falling outside formal townships, without first applying to the municipality for rezoning of such land.

Resources v Swartland Municipality 2012 7 BCLR 712 (CC) para 12. For a discussion of these judgments, see Section 3 of Chapter 2 above.

[1186] Mineral and Petroleum Resources Development Act.

[1187] See definition of "exploration right" in section 1 of the MPRDA, read with sections 79-82.

[1188] See definition of "prospecting" in section 1 of the MPRDA, read with sections 16-19.

[1189] Definition of "prospecting" in section 1 of the MPRDA.

[1190] Definition of "mine" and "mining area" in section 1 of the MPRDA.

[1191] Sol Plaatje Land Use Scheme, cl 5 defines "township" as "any land laid out or divided into or developed as sites for residential, business or industrial purposes or similar purposes where such sites are arranged in such a manner as to be intersected or connected by or to abut on any street, and a site or street shall for the purposes of this definition include a right of way or any site or street which has not been surveyed or which is only notional in character".

As stated above, one of the components of a municipality's land use scheme is the zoning map. The use zone of each land parcel within Sol Plaatje's jurisdiction is depicted on its zoning map. Similar to the City of Cape Town, the zoning map is available online. However, it is accessed through the Francis Baard District Municipality's website,[1192] not through Sol Plaatje Municipality's own website.[1193] The below figure is an extract from Sol Plaatje's zoning map. The large green shape in the middle of the figure represents the unrehabilitated mine dumps at Colville in Kimberley.[1194] As illustrated by the map legend, this land is zoned as "Public Open Space". The two brown shapes at the top and bottom of the figure, respectively, are areas zoned as "Mining".

[1192] Francis Baard District Municipality "Sol Plaatje View" *Francis Baard District Municipality* <http://gis2.mhpgeospace.co.za/FBDMLANDcadSOL/> (accessed 01-09-2018).

[1193] Sol Plaatje Municipality "Home" (2016) *Sol Plaatje Municipality* <http://www.solplaatje.org.za/Pages/Home.aspx> (accessed 01-09-2018).

[1194] For an aerial view of the area and a discussion of these mining activities, see Section 4.1 of Chapter 6 above.

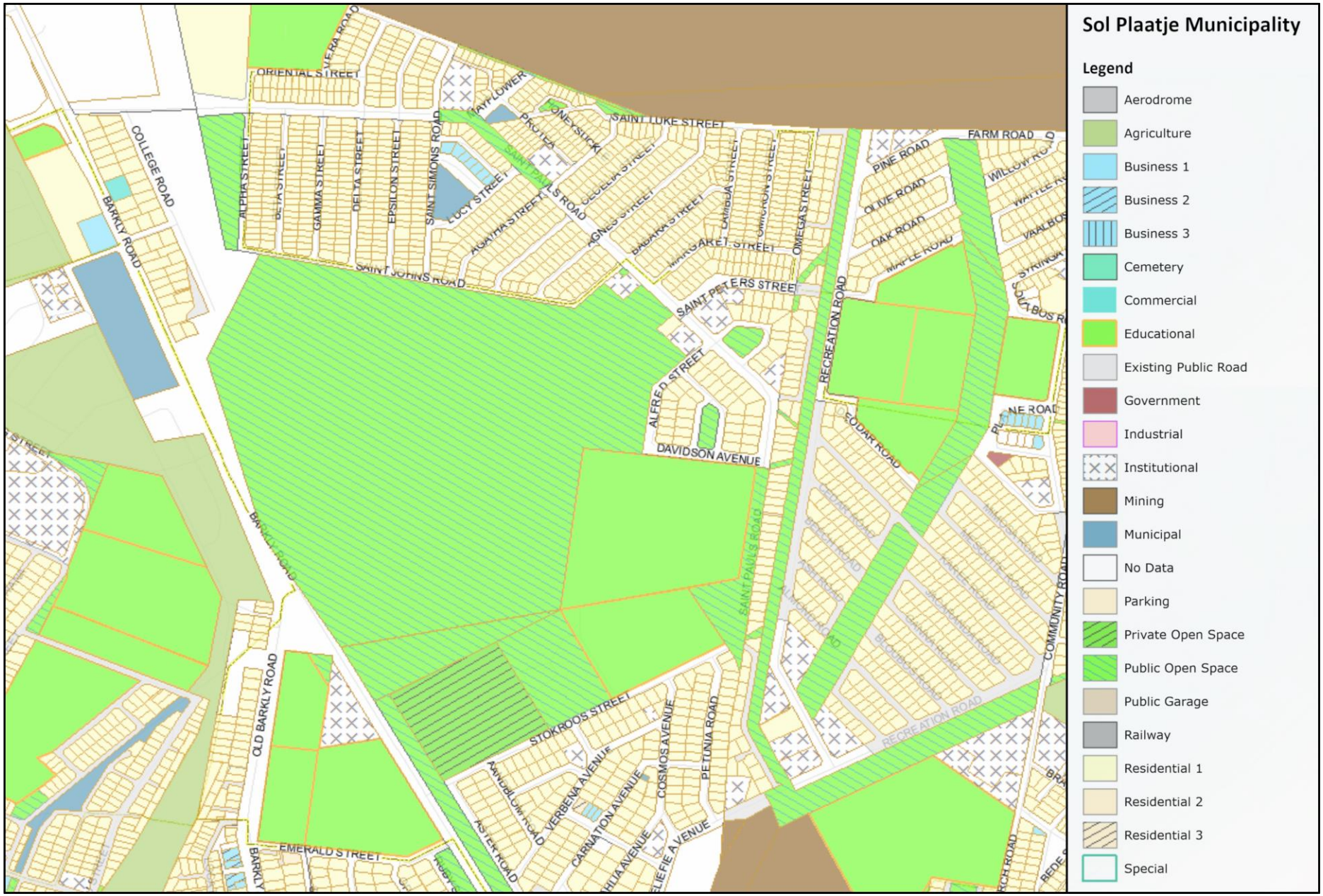

Figure 22: Extract from Sol Plaatje's Zoning Map[1195]

[1195] Francis Baard District Municipality "Sol Plaatje View" *Francis Baard District Municipality*.

3.3 uMhlathuze Municipality

Planning law in the uMhlathuze Municipality is governed by SPLUMA at national level, the KwaZulu-Natal Planning and Development Act[1196] at provincial level, and the uMhlathuze Municipality Spatial Planning and Land Use Management By-Law[1197] at local government level. For brevity, this Chapter refers to the two last-mentioned legislative instruments as "the KwaZulu-Natal Planning Act" and "the uMhlathuze By-Law", respectively. The uMhlathuze By-Law follows SPMULA's terminology of "land use scheme". The KwaZulu-Natal Planning Act, which predates SPLUMA, uses the term "scheme".

SPLUMA requires every municipality to implement a single land use scheme for all the land situated in its jurisdiction by 30 June 2020.[1198] In contrast, the KwaZulu-Natal Planning Act provides for all municipalities in the province to implement a scheme by 30 April 2015.[1199] The uMhlathuze Municipality implemented its current land use scheme on 7 January 2014, which scheme was updated on 25 June 2015.[1200] Therefore, the municipality complied with the deadlines contained in both SPLUMA and the KwaZulu-Natal Planning Act, respectively.[1201] Whereas SPLUMA provides for a municipality to review its land use scheme at least every five years,[1202] the KwaZulu-Natal Planning Act states that the scheme must be reviewed within six months of adopting a new integrated development plan.[1203] The uMhlathuze By-Law provides for the two pieces of legislation to be read together by recording both of these legislative

[1196] KwaZulu-Natal Planning and Development Act.
[1197] uMhlathuze Spatial Planning and Land Use Management By-Law, 2017 (MN 93 in *KwaZulu-Natal Provincial Gazette Extraordinary* 1853 of 14-07-2017).
[1198] Section 24(1) of SPLUMA provides that the scheme must be implemented within five years of SPLUMA's commencement; SPLUMA commenced on 1 July 2015.
[1199] Section 4(1) of the KwaZulu-Natal Planning and Development Act provides that all municipalities must adopt a scheme within five years of commencement of the Act; the Act's date of commencement was 1 May 2010. Section 2(2) of SPLUMA provides that other legislation may not provide measures on spatial planning and land use that are inconsistent with SPLUMA. It is unclear whether the abovementioned disparity qualifies as an inconsistent and alternative measure, which would render the specific provisions in the KwaZulu-Natal Planning Act invalid. If the interpretation of invalidity is correct, municipalities in KwaZulu-Natal are afforded some additional time to implement its land use schemes.
[1200] See uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014) s 1.5.2. (Note that the document's title refers to "Regulations". However, the content of the document uses the term "sections". This Chapter follows the wording in the document, i.e. "sections".) The uMhlathuze By-Law refers to the deadline imposed by SPLUMA, as opposed to the one referred to in the KwaZulu-Natal Planning Act – see s 22(1) of the By-Law.
[1201] See also uMhlathuze Land Use Scheme, cl 1.1.4.
[1202] SPMULA, s 27(1).
[1203] KwaZulu-Natal Planning Act, s 7.

requirements.[1204] Therefore, its land use scheme must be reviewed at least every five years and within six months of adopting a new integrated development plan.[1205]

In line with SPLUMA,[1206] the uMhlathuze's Land Use Scheme Regulations determine that the municipality's land use scheme shall comprise three components.[1207] These are the Scheme Regulations, the Scheme Map and a Register recording all amendments to the land use scheme.[1208]

The uMhlathuze By-law provides for land use activities in areas within the municipality's jurisdiction that fall outside the land use scheme.[1209] This is noteworthy for two reasons. First, SPLUMA specifically requires that land use schemes must include all land situated within a municipality's jurisdiction.[1210] Second, the By-law was published after the implementation of the municipality's land use scheme, which explicitly states that it applies to all erven (i.e. demarcated land parcels) in the jurisdiction of the municipality.[1211] It appears that the sections in the By-law dealing with areas outside the land use scheme contravene the provisions in SPLUMA and contradicts the municipality's own land use scheme. This contradiction can be explained when one considers that uMhlathuze's municipal boundaries changed on 3 August 2016 to include a portion of the neighbouring Ntambanana Local Municipality.[1212] When examining uMhlathuze's zoning map, it is evident that zoning must still be assigned to the newly incorporated area, which has not yet been included in uMhlathuze's land use

[1204] uMhlathuze By-Law, s 25(1).
[1205] uMhlathuze By-Law, s 25(1).
[1206] SPLUMA, s 25(2).
[1207] uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014), s 1.2.3 (a)-(c).
[1208] uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014), s 1.2.3 (a)-(c).
[1209] See, for example, s 20(3) and Sch 2 of the uMhlathuze By-Law.
[1210] SPLUMA, s 24(1).
[1211] Section 1.2.2.1 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014) confirms that the scheme applies to all *erven* within its jurisdiction. It excludes land that is subject to the Subdivision of Agricultural Land Act 70 of 1970. "Erven" is the plural form of "erf". Section 5.1 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014) defines "erf" as "any piece of land registered in the deeds registry as an erf, lot, plot, stand or farm and includes a portion of an erf, lot, plot or stand".
[1212] The municipal boundaries were redetermined in terms of s 21 of the Local Government: Municipal Demarcation Act and took effect with the Local Government Elections held on 3 August 2016. See KwaZulu-Natal Provincial Department of Cooperative Governance and Traditional Affairs *Notice in terms of Section 12 of the Local Government: Municipal Structures Act, 1998: Repeal and Replacement of Establishment Notice for the King Cetshwayo District Municipality (DC28) and the uMfolozi (KZN281), uMhlathuze (KZN282), uMlalazi (KZN284), Mthonjaneni (KZN285) and Nkandla (KZN286) Local Municipalities; and the Disestablishment of Ntambanana Local Municipality (KZN283)* (PN 138 in *KwaZulu-Natal Provincial Gazette* 1708 of 28-07-2016); Electoral Commission of South Africa *2016 Local Government Elections Report*; Main (ed) *Local Government Handbook* 113.

scheme.[1213] These areas are depicted in brown at the top of the following figure. At the bottom of the figure, is a large strip of land (depicted by the dotted brown area) that is zoned for Quarrying and Mining. This specific zoning designation is discussed in more detail below.

[1213] uMhlathuze Municipality "uMhlathuze Municipality Viewer: LUMS Zoning" *uMhlathuze Municipality* <http://gis.umhlathuze.gov.za/flexviewers/lums/> (accessed 23-09-2018).

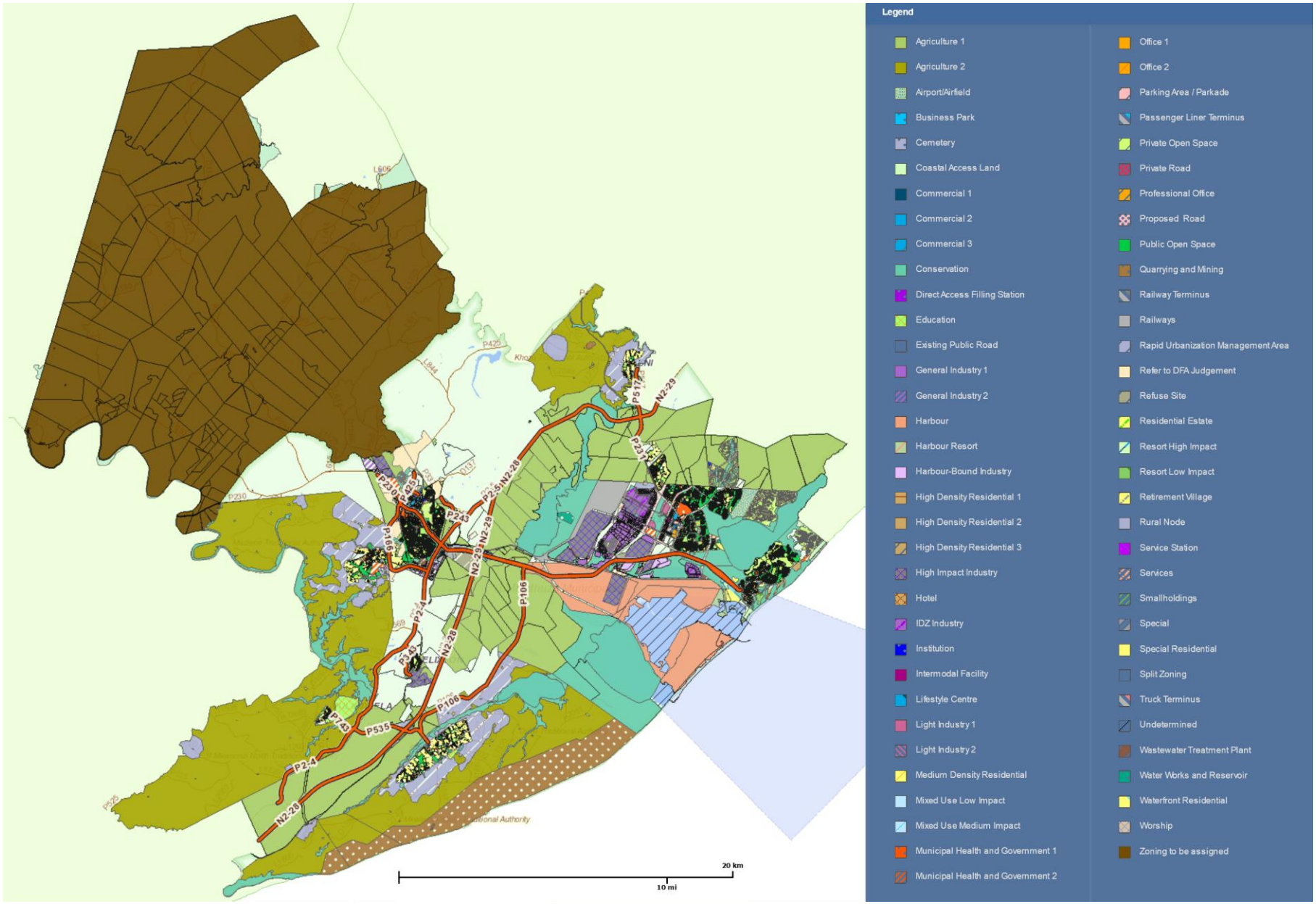

Figure 23: Extract from uMhlathuze's Zoning Map[1214]

[1214] uMhlathuze Municipality "uMhlathuze Municipality Viewer: LUMS Zoning" *uMhlathuze Municipality*.

As with the two other case-study municipalities, the uMhlathuze By-Law prohibits the use of land that contravenes its land use scheme.[1215] Failure to adhere to this provision constitutes an offence by the user, attracting personal liability for members in the case of corporate bodies.[1216] Once convicted, the offending user is liable for a maximum fine of one million Rand or imprisonment for a maximum period of one year or both.[1217] Importantly, a landowner permitting the unlawful land use on its land can also be found guilty of an offence if it fails to take reasonable steps to stop such use.[1218] This can create potential difficulties for the landowner where a third party commences mining operations on the land contrary to the designated land use. The onus is on the landowner to take steps to prevent this illegal use if to avoid conviction.

uMhlathuze has a very intricate set of land use zones, as illustrated by the figure below. The land use scheme is divided into two zone components, namely, urban and rural.[1219] The two zone components are each subdivided into zone categories.[1220] In turn, the zone categories are divided into use zones. The rural component only has one category, which is subdivided into five use zones. The urban component has thirteen categories with a total of 59 use zones.

[1215] uMhlathuze By-Law, ss 20(2), 81(1)(b). The respective by-law provisions of the City of Cape Town and Sol Plaatje are referred to at fns 11231123 and 1167 above.
[1216] uMhlathuze By-Law, s 81(1)(a) and (b), read with s 81(3).
[1217] uMhlathuze By-Law, s 81(5). This section specifically excludes applicability of the conviction penalties to properties zoned for residential purposes. The reason for this exclusion is unclear. It appears that any land use other than residential on properties zoned as such does not attract any penalty. The penalties for contravention of the land use scheme imposed by uMhlathuze's By-Law do not correspond with those imposed by the KwaZulu-Natal Planning Act and SPLUMA. SPLUMA provides for imprisonment of a maximum period of twenty years or a fine (or both) calculated in accordance with the Adjustment of Fines Act 101 of 1991. (See SPLUMA, ss 58(1)(b)-(c) and 58(2).) The KwaZulu-Natal Planning Act prescribes a maximum period of imprisonment of five years, a fine or both. (See s 75(2).)
[1218] uMhlathuze By-Law, s 81(2).
[1219] uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014), s 1.2.2.5, read with ss 2.1 and 2.2.
[1220] uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014), s 2.1.1 – 2.2.13.

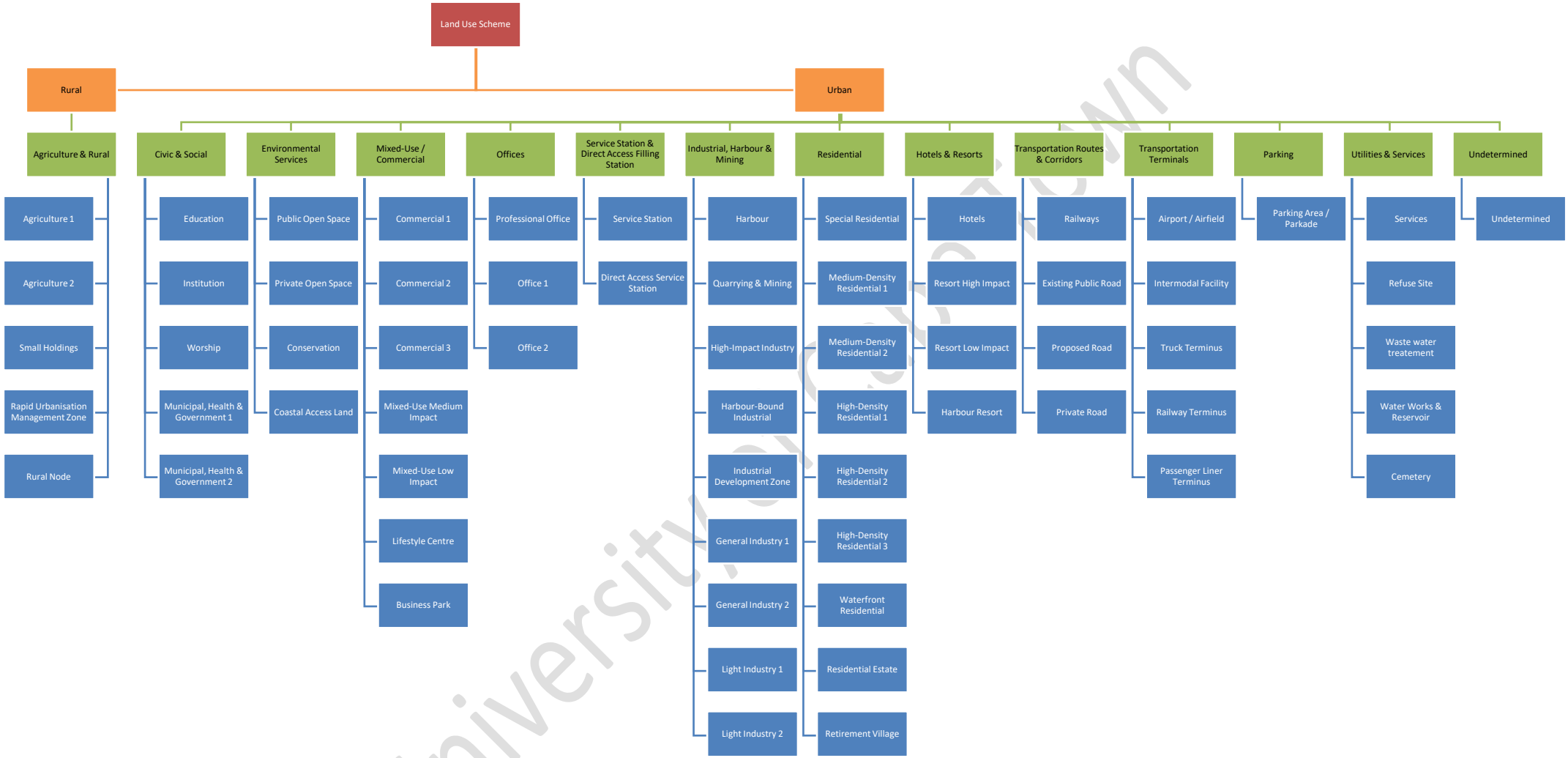

Figure 24: Land Use Zones of the uMhlathuze Municipality[1221]

[1221] Deduction from uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014) ss 2.1 and 2.2.

Similar to the City of Cape Town and Sol Plaatje Municipalities, specific use rights and restrictions apply to each of the use zones in the uMhlathuze Land Use Scheme. Every use zone lists certain "free entry uses", "formal authority uses", "consent uses" and prohibited uses".[1222] "Free entry uses" refer to permitted land uses where no further consent or authority is required from the municipality. To use a property for a purpose listed as a "formal authority use", one must first follow a formal procedure prescribed by the municipality.[1223] The Land Use Scheme distinguishes between "formal authority uses" and "consent uses". For "consent uses", one requires municipal approval following a "Special Consent" procedure.[1224] The practical difference between "formal authority uses" and "consent uses" is difficult to discern. It appears that the difference lies in the procedure to be followed.[1225] However, the uMhlathuze Land Use Scheme provides sparse detail about the content of these procedures. The final category is "prohibited uses", which describe uses that are explicitly prohibited.[1226] The difference between the four types of use rights or restrictions is illustrated in the figure below.

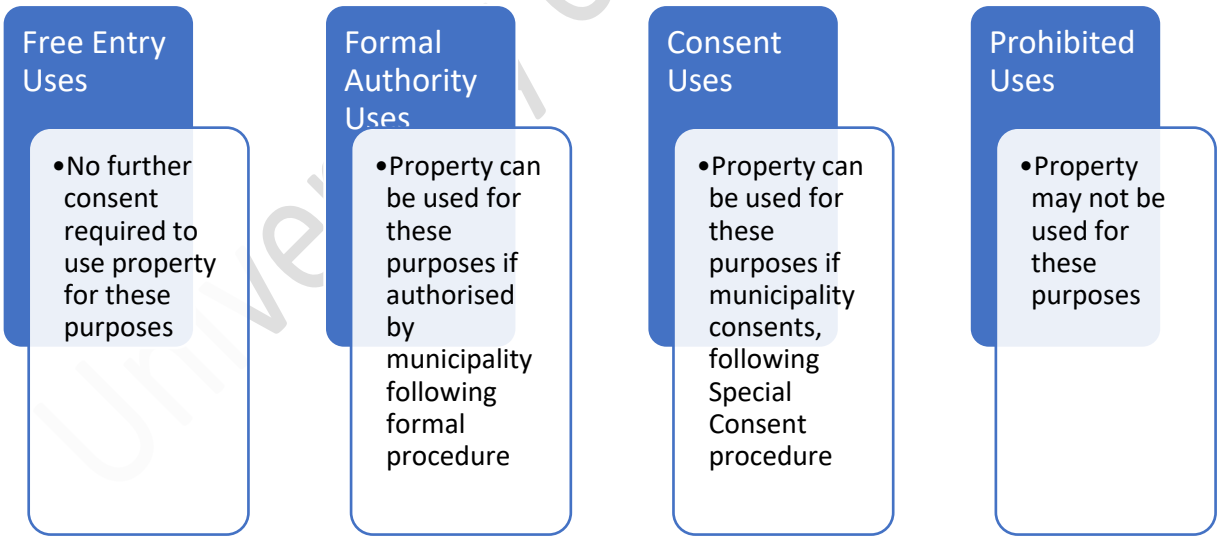

Figure 25: Use Rights and Restrictions Applicable to Land in the uMhlathuze Municipality[1227]

[1222] uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014), s 1.2.1.2.
[1223] uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014), s 1.2.1.2, read with s 1.9.4. See also the definition of "consent" in s 1 of the uMhlathuze By-Law, and the definition of "formal authority" in s 1 of Sch 3 to the By-Law.
[1224] uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014), s 1.2.1.2, read with s 1.9.5. See also the definition of "consent" in s 1 of the uMhlathuze By-Law and Sch 3 to the By-Law, as well as s 8 of Sch 3.
[1225] Compare procedures set out in s 1.9.4 and 1.9.5 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1226] uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014), s 1.2.1.2.
[1227] uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014), s 1.2.1.2.

uMhlathuze's land use scheme uses the term "extractive" to denote mining and related activities. This includes "extracting, mining, winning or quarrying of raw materials".[1228] It also caters for buildings used as crushing plants for mineral ore, stones, gravel, etc.[1229] However, extractive activities do not include smelting processes – these processes are categorised under "High-Impact Industry", as discussed below. Extractive activities are listed as "free entry uses" (i.e. not requiring any additional consent) under two zoning categories, namely, "Quarrying and Mining"[1230] and "High-Impact Industry".[1231] In addition, it is listed as "Consent Uses" under three zone categories. These are "Agriculture 1",[1232] "Harbour"[1233] and "General Industry 1".[1234] As consent use, it is possible to apply for municipal consent (in terms of the Special Consent procedure) to use land falling within these zone categories for extractive purposes.

Land situated in the zone category of Quarrying and Mining can be used for the extractive activities described above, as well as other business activities essential for the operation of the mine. This includes mining offices, warehouses and training facilities.[1235] uMhlathuze's land use scheme promotes sustainable mining activities by also allowing land zoned for Quarrying and Mining to be used for conservation purposes and accommodating waste-treatment and recycling centres.[1236] These additional uses assist mining companies to implement a continuous land-rehabilitation plan. Rehabilitation efforts can commence as soon as the mining operations start, instead of delaying it until the end of the mine's productive life.

[1228] See definition of "Industry – Extractive" in s 5.2 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1229] See definition of "Industry – Extractive" in s 5.2 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1230] See description of Zone Category: Quarrying and Mining in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1231] See description of Zone Category: High-Impact Industry in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1232] See description of Zone Category: Agriculture 1 in s 2.1.1 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1233] See description of Zone Category: Harbour in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1234] See description of Zone Category: General Industry 1 in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1235] See description of Zone Category: Quarrying and Mining in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1236] See description of Zone Category: Quarrying and Mining in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).

In addition to permitting the extraction of minerals, the "High-Impact Industry" zone category is also of particular importance for mineral beneficiation. It is aimed at manufacturing activities that may cause considerable air pollution, noise, odours and truck traffic.[1237] It also accommodates the storing of hazardous and noxious materials.[1238] By isolating these high-impact industries from other manufacturing operations, the negative effects on neighbouring businesses can be minimised.

Two other zoning designations are relevant to the mining industry, particularly for the beneficiation of minerals and the export of raw and processed minerals. These categories are "Harbour-Bound Industrial" and "Industrial Development Zone Industry".[1239] Both of these zoning categories focuses on land use activities related to exporting and beneficiation of products.

Chapter six above highlights uMhlathuze's strategic importance for mineral extraction, transport of raw and processed minerals and mineral beneficiation.[1240] The municipality's land use scheme caters for all three of these key areas of the mining industry by providing for dedicated zoning categories dealing with each of these land uses.

4. Rezoning or Change of Land Use

Following the above discussion of land use schemes, the focus in this section is on changing the designated land use. As is pointed out in all the case-study areas, a mining right holder who commences mining activities on a piece of land in contravention of the permitted land use is guilty of an offence.[1241] Therefore, mining activities cannot commence until the land is appropriately zoned to allow for mining.[1242]

[1237] See description of Zone Category: High-Impact Industry in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1238] See description of Zone Category: High-Impact Industry in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1239] uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014), s 2.2.6.
[1240] See discussion in Section 4.3 of Chapter 6.
[1241] SPLUMA, s 58(1)(b) states that the use of land in contravention of the permitted land use is an offence. Section 58(1)(c) also states that to alter the form or function of land without approval in terms of SPLUMA is an offence. This offence is punishable by imprisonment for up to twenty years or a fine (or both) calculated in accordance with the Adjustment of Fines Act 101 of 1991. By designating this transgression as an offence, this provision aids the enforceability of municipal land use and zoning scheme regulations.
[1242] *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) and *Minister for Mineral Resources v Swartland Municipality* 2012 7 BCLR 712 (CC).

4.1 Rezoning in terms of SPLUMA

Rezoning or the change of land use or any deviation from the land use scheme qualifies as "land development" under SPLUMA.[1243] For brevity and ease of reference only rezoning applications as a subcategory of "land development" are discussed in this section. The same principles apply to applications for change of land use or deviation from the land use scheme.

SPLUMA mandates municipalities to regulate certain matters pertaining to rezoning applications. As a minimum, municipalities should determine the following in their by-laws: the format of rezoning applications;[1244] the place or manner for submission of these applications;[1245] the fees payable;[1246] the applicable timeframes of each phase of the application process;[1247] the format and level of public and intergovernmental participation;[1248] site inspection procedures, if applicable;[1249] and procedures for dealing with incomplete applications.[1250]

If no timeframes have been determined by provincial legislation or municipal by-laws, the timeframes set out in SPLUMA regulations will apply.[1251] SPLUMA provides for three phases of the rezoning application process. As the illustration below shows, these are: (i) the administrative phase, (ii) the consideration phase and (iii) the decision phase.[1252]

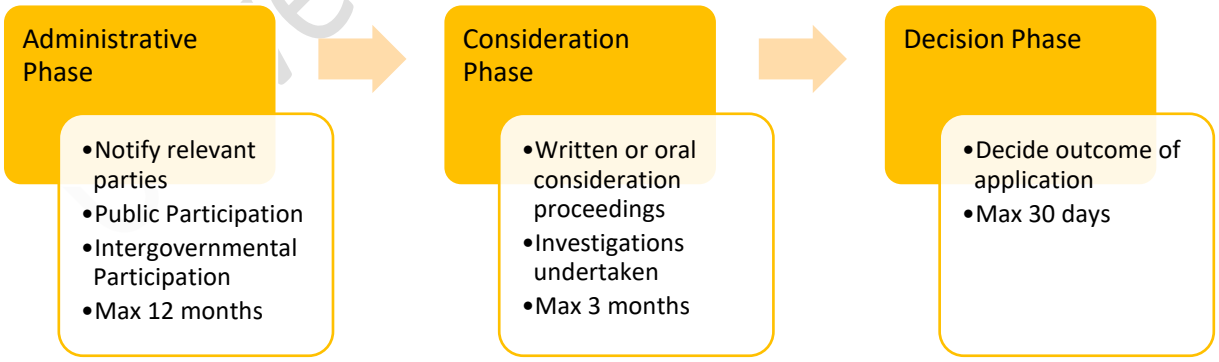

Figure 26: SPLUMA Timeframe for Rezoning Applications

[1243] Definition of "land development" in s 1 of SPLUMA.
[1244] SPLUMA, reg 14(1)(a). GN R 239 in *GG* 38594 of 23-03-2015.
[1245] SPLUMA, reg 14(1)(h). If no place of submission is determined by the municipality, the application should be submitted to the Municipal Manager (SPLUMA, reg 14(2)).
[1246] SPLUMA, reg 14(1)(b).
[1247] SPLUMA, reg 14(1)(c).
[1248] SPLUMA, reg 14(1)(d) and (e).
[1249] SPLUMA, reg 14(1)(f).
[1250] SPLUMA, reg 14(1)(i).
[1251] SPLUMA, reg 16(1).
[1252] SPLUMA, reg 16(2).

Once a complete rezoning application is submitted, the administrative phase commences.[1253] This phase may not exceed twelve months.[1254] It consists of notices to relevant parties, and the public and intergovernmental participation processes.[1255] If an organ of state is required to comment on any application and fails to do so timeously, it is deemed that the relevant state organ has no objections against the application.[1256] Conversely, a rezoning application will be deemed to be refused should an applicant not comply with any request of municipal officials to act or supply the required information.[1257] After public and intergovernmental participation processes have been completed the application is referred to the relevant official for consideration,[1258] whereupon the consideration phase commences.

The consideration phase may not exceed three months.[1259] During this phase, the application is considered, whether in written or oral format.[1260] When considering rezoning applications, the municipality must adhere to the development principles set out in SPLUMA.[1261] The Municipal Planning Tribunal,[1262] alternatively an official employed at the municipality, is responsible for considering rezoning applications.[1263] Each municipality must determine which category of land use applications should be considered by the Municipal Planning Tribunal or authorised official, respectively.[1264] If any investigations are required, it will also be undertaken during the consideration phase.[1265]

[1253] SPLUMA, reg 16(3).
[1254] SPLUMA, reg 16(3).
[1255] SPLUMA, reg 16(6).
[1256] SPLUMA, reg 16(10). Such failure may be reported to the executive authority of that organ of state.
[1257] SPLUMA, reg 16(9).
[1258] SPLUMA, reg 16(6).
[1259] SPLUMA, reg 16(4).
[1260] SPLUMA, reg 16(7).
[1261] SPLUMA, s 42(1)(a) read with s 7. See s 3.2 in Chapter 4 above for more details. If the land to be rezoned falls within a heritage area, the municipality must also consider the impact of the proposed activities on the heritage resource. See s 31(7) of the National Heritage Resources Act 25 of 1999. Also see fn 348 in Chapter 3 above for a reference to the relevance of this Act during the mining right application process. A more detailed discussion of these requirements falls outside the scope of this research. See Van Wyk *Planning Law* 403-404 for a discussion of heritage areas in the planning context; and Dale et al *South African Mineral and Petroleum Law* App-262 – App-266.
[1262] SPLUMA, s 35(1). Municipal Planning Tribunals consist of full-time municipal officials and appointed non-municipal persons with spatial planning, land use management and land development experience. (SPLUMA, s 36(1).) The requirements relating to the number, designation, knowledge and experience of these officials are determined by each municipality. (SPLUMA, reg 3(1).)
[1263] SPLUMA, s 35(2) read with reg 15.
[1264] SPLUMA, reg 15.
[1265] SPLUMA, reg 16(7).

The decision phase must be concluded within 30 days from the conclusion of the consideration phase.[1266] If the relevant municipal officials do not comply with the timeframes set out in SPLUMA, the rezoning applicant can report the undue delay to the municipal manager.[1267] In turn, the municipal manager will report it to the municipal council[1268] and the mayor.[1269]

4.2 Constitutional Shortcomings of SPLUMA's Rezoning Provisions

SPLUMA recognises that municipalities are the authority of first instance in rezoning applications.[1270] As such, all rezoning applications should be submitted to the municipality in whose jurisdiction the land in question is located. However, SPLUMA determines that rezoning applications that significantly affect land use for a purpose falling within the functional area of national government must be referred to the Minister of Rural Development and Land Reform.[1271] After such a referral, the Minister may decide to join the application as a party thereto, or to insist that the application be referred to the Minister for decision.[1272] It is at this point that SPLUMA is at odds with the constitutional allocation of powers.

This contradiction is significant for this thesis. Mining falls within the exclusive competence of national government.[1273] Under SPLUMA, it appears that all rezoning applications for mining purposes should also be referred to the Minister of Rural Development and Land Reform. When exercising its functions in terms of this provision, the Minister must consult with the Minister of Mineral Resources.[1274] The referral to the

[1266] SPLUMA, reg 16(5).
[1267] Regulation 1 of SPLUMA defines a municipal manager is "a person appointed in terms of section 54A of the Municipal Systems Act".
[1268] Section 1 of SPLUMA defines municipal council as "a Municipal Council referred to in section 157 of the Constitution".
[1269] SPLUMA, reg 16(8).
[1270] SPLUMA, s 33(1). See also Constitution, Part B of Sch 4; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19.
[1271] SPLUMA, s 52(1)(c).
[1272] SPLUMA, s 52(5).
[1273] For a detailed discussion, see Section 5.1 in Chapter 2 above. Many other functions of national government will be impacted by this provision, for example national and international airports, energy, water, prisons, telecommunication, etc. As these functions are not specifically referred to in Sch 4 or 5 of the Constitution, they fall under the exclusive competence of national government. Section 52(1)(c) of SPLUMA also includes concurrent functions of national and provincial government, for example agriculture, health services, environment, education, housing, public transport, tourism, etc. These functions are listed in Part A of Sch 4 of the Constitution. See also Laubscher et al *SPLUMA: A Practical Guide* 275-276.
[1274] SPLUMA, s 9(4).

Minister of Rural Development and Land Reform does not mean that the rezoning application process will bypass the relevant municipality. SPLUMA specifically states that the rezoning application should still be lodged with and considered by the municipality as the authority of first instance.[1275]

The meaning and purpose of the referral provision is unclear and needs further analysis. Does it mean that the municipality must decide the application in consultation with the Minister or *vice versa*? Does the referral provision grant the Minister the power to dictate to the municipality or to override the municipality's decision to approve or reject such a rezoning application? Is the provision intended as a review or appeal process? Or is it intended to constitute an additional approval at the level of national government? Alternatively, is the purpose of the provision merely to allow the Minister to provide comments and input to the municipality when the municipality makes the decision?

SPLUMA requires the Minister to publish criteria for the implementation of this provision before exercising any powers granted in terms thereof.[1276] To date, no such criteria have been published. Currently, one has the untenable situation where all rezoning applications for mining purposes must[1277] be referred to the Minister, but the Minister does not have any powers to act in terms of this provision.

To analyse the Minister's envisaged powers in terms of this provision, one must address each of the above-mentioned possibilities in turn. Perhaps the easiest possibility to dispense with is that the provision intends to provide the Minister with the opportunity to comment or give input to the municipality. Before deciding any application for rezoning of land, a municipality must allow an intergovernmental participation process.[1278] Therefore, the Minister already has an opportunity to comment or give input and an additional provision requiring the referral of certain applications for this purpose is superfluous.

[1275] SPLUMA, ss 33(1) and 52(7).
[1276] SPLUMA, s 52(6). These criteria should include the types of land development applications that are affected by these provisions. Section 54(1)(g) further states that the Minister may prescribe procedures for the lodging of applications contemplated in s 52.
[1277] SPLUMA, s 52(1) uses the word "must", not "may".
[1278] SPLUMA, reg 14(1)(e). See also Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* 64.

As stated earlier, SPLUMA recognises that a municipality is the authority of first instance to consider rezoning applications.[1279] It is conceivable that the referral provision aims to allow the Minister to review or consider an appeal against the municipality's decision. However, this interpretation can also be dispensed with. SPLUMA provides for municipalities to determine their own appeal procedures.[1280] Appeals against decisions of a municipal planning tribunal will be heard by the municipality's executive authority or an external body or institution designated by the municipality to hear appeals.[1281] The Minister does not have the power to hear an appeal against a municipality's decision. As confirmed by the Constitutional Court, this will be beyond the scope of the constitutional powers allocated to national government in the planning context.[1282] Only local government has authority over municipality planning.[1283]

The remaining possible interpretations of the referral provision can be dispensed with in a similar vein. The Minister has no authority to dictate to municipalities how rezoning applications should be decided, nor can the Minister override a municipality's decision.[1284] The same can be said for forcing municipalities to make decisions *in consultation with* the Minister. This is to be distinguished from *after consultation with*. In the former case, the municipality and the Minister will make the decision jointly in consultation with each other. In the latter case, the municipality remains the deciding authority, but it considers input received from the Minister. Only the latter scenario is constitutionally acceptable. Any alternative will constitute unlawful interference by the Minister with the functional areas of local government.

Provided that the specific rezoning application falls within the ambit of municipal planning,[1285] it can be argued that the Minister will encroach on local government powers if he overrules a municipality's decision. This argument also applies to an

[1279] SPLUMA, ss 33(1) and 52(7).
[1280] SPLUMA, s 51 and reg 20.
[1281] SPLUMA, s 51(2) and (6), reg 20.
[1282] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19; *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Appeal Tribunal* 2016 3 SA 160 (CC) paras 22-31; *Pieterse NO v Lephalale Local Municipality* 2017 2 BCLR 233 (CC) paras 8-10; *Merafong City v Anglogold Ashanti Ltd* 2017 2 SA 211 (CC) para 171.
[1283] See discussion in Section 2 of Chapter 4 above.
[1284] The Western Cape Government has expressed its concern in this regard to the national Department of Rural Development and Land Reform. See Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* 64-65.
[1285] For a discussion of the content of 'municipal planning', see Section 2 in Chapter 4 above.

interpretation that the provision envisages an additional consent at the level of national government. As long as the application does not venture into the terrains of regional[1286] or provincial[1287] planning, the municipality has exclusive executive competence over rezoning matters.[1288] The Constitutional Court has stated explicitly that "all municipal planning decisions that encompass zoning […], *no matter how big*, lie within the competence of municipalities" (emphasis added).[1289]

SPLUMA provides ample opportunity for the Minister to comment and give input on rezoning applications received by the municipality. However, the final decision must remain with the municipality, without interference by other spheres of government. Previous iterations of the Spatial Planning and Land Use Management Bill violated the constitutional division of powers, as allocated to the three spheres of government. This was one of the main causes for the lengthy delays in the enactment of SPLUMA.[1290] The referral provision mentioned above appears to be a legacy of this constitutional struggle. The practical implementation and implications of this provision in SPLUMA remain to be seen. The following subsections discuss the rezoning provisions of the planning by-laws of the three case-study municipalities.

5. Rezoning in Case Study Areas

The below discussion gives an overview of the land use application process applicable to each case-study area where the zoning of the proposed mining site does not allow mining as a land use activity. The purpose of the discussion is threefold. First, it aims to

[1286] This functional area falls under the concurrent legislative competence of national and provincial governments – Part A of Sch 4 of the Constitution.
[1287] This functional area falls under the exclusive legislative competence of provincial government – Part A of Sch 5 of the Constitution.
[1288] Constitution, Part B of Sch 4. In *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19, the Constitutional Court confirmed the power of national and provincial government to grant their own additional approvals. For a discussion of how the Western Cape Government safeguards its powers over regional and provincial planning through section 53 of LUPA, see Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* 60-71. For an argument cautioning against unlimited power of local government over municipal planning matters, see in general, Humby (2015) *Journal of South African Law*.
[1289] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19. See also *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) paras 54-57.
[1290] Oranje M & Berrisford S "Planning Law Reform and Change in Post-Apartheid South Africa" in Hartmann T and Needham B (eds) *Planning By Law and Property Rights Reconsidered* (2012) 55 58; Van Wyk J & Oranje M "The Post-1994 South African Spatial Planning System and Bill of Rights: A Meaningful and Mutually Beneficial Fit?" (2014) 13 *Planning Theory* 349 356.

highlight provisions allowing for input from other departments and spheres of government. Such input can facilitate better intergovernmental cooperation. Second, it is important to determine the documentary requirements when submitting a land use application, for reasons that are explained below. Third, examining the different steps of the land use application process aids in identifying where this process overlaps with the prescribed procedure when applying for a mining right.[1291] Identification of overlaps and duplication may support the development of more streamlined and efficient processes. Therefore, instead of examining each municipality's procedure in detail, the discussion will be limited to the above aspects.

5.1 City of Cape Town Municipality

From the outset, LUPA (applicable provincial legislation) recognises the constitutional principle that land use planning falls within the competence of municipalities.[1292] It confirms that municipalities in the Western Cape Province must regulate procedures for the receipt, consideration and determination of land use applications.[1293] The Cape Town By-Law sets out twenty types of applications that a person can make in respect of land within the City's jurisdiction.[1294] Rezoning and consent-use applications are of central importance to this study.

A consent-use application is aimed at approval to use the land for a permitted use in terms of a particular zoning.[1295] This permission may be granted for a specific period or permanently.[1296] This type of application will be appropriate where mining activities are proposed on land currently zoned as agricultural or rural, as these two zoning designations list mining as a consent use.[1297] A rezoning application refers to an

[1291] For a discussion of the mining right application process, see Sections 2 and 3 in Chapter 3 above.
[1292] LUPA, s 2(1), read with s 156 and Part B of Sch 4 of the Constitution. See also *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) para 19.
[1293] LUPA, s 2(2)(b).
[1294] Section 42(a)–(u) of the Cape Town By-Law refers to applications for rezoning of land, permanent departures, temporary departures, subdivision of land, subdivision in phases, consolidation of land, amendment, deletion or suspension of restrictive conditions, consent use, amendment, deletion or addition of conditions, extension of approval period, amendment or cancellation of subdivisional or general plan, permission relating to conditions of application, determination of a zoning or other matters, correction of zoning map, alteration of street name or number, determination of administrative penalty, exemption of subdivision from approval, any other applications.
[1295] Definition of "consent use" in s 1 of the Cape Town By-Law.
[1296] Cape Town By-Law, s 46.
[1297] Cape Town By-Law, Table A of Chapter 4, read with Items 108(c) and 112(c) of Sch 3. See also Section 3.1 above.

application to change the designated use of a specific land unit.[1298] A rezoning application may be required for a mining project on any land unit within the City's jurisdiction that is not zoned as agricultural or rural.[1299] Applications for both rezoning and consent use are categorized as land use applications and the main elements of the respective application processes are the same.[1300] For brevity, this discussion only refers to rezoning applications. The below figure illustrates the sequence of the City of Cape Town's rezoning application process.

[1298] Definition of "rezoning" in s 1 of Cape Town By-Law.
[1299] In the case of agricultural or rural zoning, a consent use application will be more appropriate, as discussed in Section 3.1 above.
[1300] Definition of "land use application" s 1 of LUPA, read with s 35.

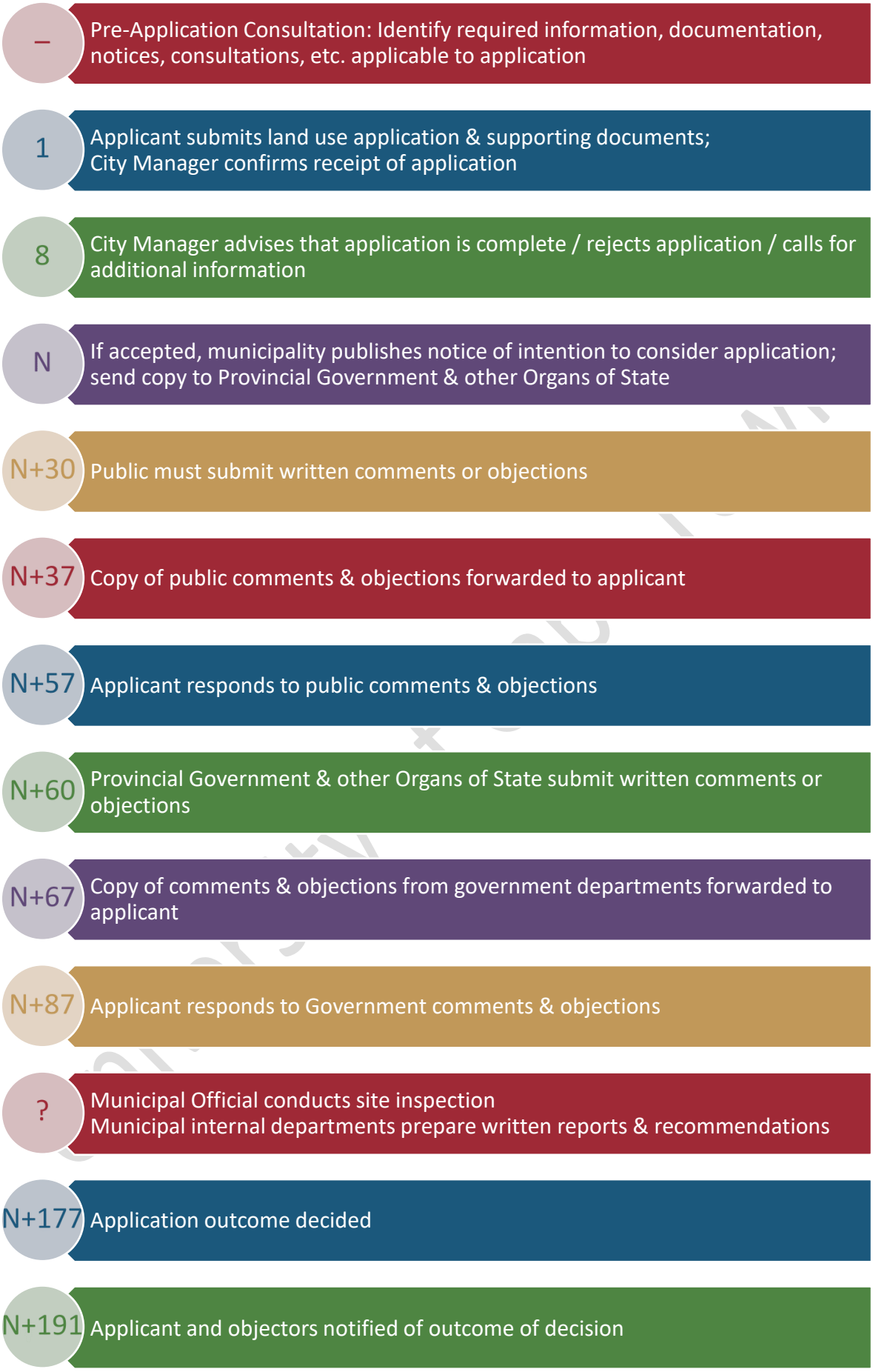

Figure 27: City of Cape Town Rezoning Application Process[1301]

[1301] Summary of provisions in ss 70-105 of the Cape Town By-Law. The numbers in the circles on the left of the figure denotes the number of days. "N" is a placeholder, as the Cape Town By-Law does not specify the number of days within which the notice must be published.

The Cape Town By-Law provides for pre-application consultation. Before submitting a rezoning application, an applicant may be required to consult with a City official.[1302] The purpose of the pre-application consultation is, inter alia, to identify the information to be submitted during the application, the nature of notices to the public, investigations that may be necessary, engineering services that may be required, and possible consultations with other organs of state.[1303] Where a pre-application consultation is required, but the applicant does not comply, the City must refuse to accept the rezoning application.[1304]

The pre-application consultation requirement is especially important for rezoning applications for mining purposes. Applications of this nature are considerably more complicated and involved than some other rezoning applications. For example, an application for rezoning from Single Residential Zoning 1 to Single Residential Zoning 2 may be required where an applicant intends to erect a second dwelling on his property.[1305] Such a rezoning application will not be as complex as one where mining activities are envisioned. Mining activities will have potentially significant impacts on the environment, water supply, electricity requirements, road infrastructure, noise levels, air quality, housing needs, etc. Therefore, it is understandable that many additional investigations and consultation processes will be required for a rezoning application where mining operations are proposed. These additional requirements can be identified during the pre-application consultation process.

When examining the City of Cape Town's documentary requirements of a rezoning application,[1306] it is notable that the applicant need not include a copy of the mining right issued by the DMR. This is very significant. It implies that it is not necessary to delay the rezoning application until such time as the DMR has issued the mining right – the respective application processes can run concurrently. By allowing for the two processes to run in parallel, the Cape Town By-Law facilitates a significant time saving for a prospective mining company.

[1302] Cape Town By-Law, s 70(1).
[1303] Cape Town By-Law, s 70(1)(a) – (i).
[1304] Cape Town By-Law, s 73(1)(a).
[1305] Cape Town By-Law, Table A of Chapter 4, read with Items 21 and 26 of Sch 3.
[1306] For a full list of required documentation and information to accompany the rezoning application, see s 71(1)(a)–(l) of the Cape Town By-Law.

If the City accepts the rezoning application, notice of its intention to consider the application must be given.[1307] The notice must reflect the details of the applicant and the owner, if they are two different parties.[1308] It must also contain a description and address of the land unit, the purpose of the application, and where the details of the application can be inspected.[1309] The notice invites comments on or objections to the application.[1310] The procedure and due date for comments and objections are also reflected on the notice.[1311]

Notice of all rezoning applications must be published in the media in at least two official languages frequently spoken in the area.[1312] In this case, media can refer to a newspaper circulating in the area or a radio broadcast covering the municipal area.[1313] If the City deems these forms of publication to be insufficient, the City can also cause the notice to be given by other means considered more effective.[1314] This can include, for example, announcements in the community through loudspeakers, publications on websites, community notice boards, and social media.[1315]

It can be argued that the abovementioned methods of notice are far more effective at reaching the intended audience than the methods prescribed in section 10 of the MPRDA relating to mining right applications.[1316] Section 10 notices for comments by interested and affected parties are advertised on a public notice board at the Regional Manager's office;[1317] published in the provincial gazette,[1318] local or national newspaper;[1319] or displayed at the magistrate's court of the district in which the land is located.[1320]

[1307] The Cape Town By-Law provides for publication of the notice in the media, personal notice to selected parties, notice to the Provincial Government, as well as other Organs of State. See Cape Town By-Law, ss 79, 81-82, 86-87.
[1308] Cape Town By-Law, s 80(1)(a).
[1309] Cape Town By-Law, s 80(1)(b) – (d).
[1310] Cape Town By-Law, ss 80(1)(e), 86(1), 87(1).
[1311] Cape Town By-Law, ss 80(1)(f) – (h), 86(2), 87(1).
[1312] Cape Town By-Law, ss 79(2) and 81, read with s 43 of LUPA.
[1313] Cape Town By-Law, s 81(1), read with s 21 of the Local Government: Municipal Systems Act.
[1314] Cape Town By-Law, s 81(3)(b).
[1315] Cape Town By-Law, s 81(3)(b).
[1316] For a full discussion, see Section 3.2 of Chapter 3 above.
[1317] MPRDA, reg 3(2).
[1318] MPRDA, reg 3(3)(a).
[1319] MPRDA, reg 3(3)(c).
[1320] MPRDA, reg 3(3)(b).

The fact that the mining right application to the DMR and the rezoning application to the City of Cape Town can run concurrently, as suggested above, may provide further time saving for the prospective mining company. If the DMR and the City of Cape Town can co-ordinate their application processes, they may agree to a combined consultation process. Doing so will eliminate unnecessary duplication. SPLUMA allows for such co-ordination. It mandates municipalities to liaise with an organ of state that is responsible for regulating another aspect of the same activity.[1321] The purpose is to co-ordinate their respective legislative requirements and eliminate unnecessary duplication.[1322] The prospective mining company can comply with the consultation requirements of both application processes simultaneously.

Where a rezoning application relates to agricultural land or land used for conservation purposes, the City must also notify the Western Cape Provincial Government's relevant department head and request comments on the application.[1323] The City cannot continue with the determination of the application until the Provincial Government has commented, or 60 days have passed since the notice to the department head and no comments have been received.[1324] This is a prime example of legislatively prescribed co-operative government. Many newly proposed mining activities are likely to relate to agricultural or conservation land, which will trigger the application of this provision.

The Western Cape Provincial Government's involvement in land use for mining purposes can also be triggered by provisions of LUPA. LUPA draws a distinction between land *use* applications and land *development* applications. A land use application is made to a municipality, while a land development application is made to the head of the provincial department responsible for land use planning ("Head of Department").[1325]

LUPA lists a few characteristics of applications that qualify as land development applications.[1326] Two of these are relevant to this discussion. First, any development

[1321] SPLUMA, s 29(1). Also see discussion at Section 3.3 in Chapter 4 above.
[1322] SPLUMA, s 29(1).
[1323] Cape Town By-Law, s 86(1)(b).
[1324] Cape Town By-Law, s 86(2).
[1325] Definition of "land use application" and "land development application", read with definition of "Head of Department" in LUPA, s 1. See also LUPA, ss 2(2)(b) and 3(3).
[1326] LUPA, s 53(1) and reg 10(1). For a discussion of the context that led to the inclusion of the concept of land development applications in s 53 of LUPA, see Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* 60-71.

that "will have a substantial effect on the orderly, co-ordinated or harmonious development of a region" is a land development application.[1327] A "region" is defined as an area comprising more than one municipality.[1328] Whether a development has a "substantial effect" will be determined by the scale of the intended land use or the compounding impact of multiple developments.[1329] By their very nature, mining operations typically operate on a large scale. Multiple mining development sites in close proximity to each other are also very common, due to natural rock formations that concentrate mineral deposits in specific areas. Therefore, wherever proposed mining operations straddle municipal boundaries or impact a cross-boundary region, LUPA requires provincial land development approval.

Second, any development that will have a substantial impact on agriculture or that is proposed on cultivated or irrigated agricultural land is a land development application requiring provincial approval.[1330] As the City of Cape Town only allows mining as a consent use on land that is zoned for agriculture or rural,[1331] it is conceivable that a number of proposed mining operations within the City's jurisdiction will have a substantial impact on agriculture. Therefore, these proposed operations will qualify as land development applications, as contemplated in LUPA. The impact on mining will be cemented if a proposed amendment to the LUPA regulations, recently published for public comment, is accepted.[1332] In terms of this proposed amendment, all prospecting,

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[1327] LUPA, s 53(1) and (2). See also *Intercape Ferreira Mainliner (Pty) Ltd v Minister of Home Affairs* 2010 5 SA 367 (WCC) paras 104-105, 164-165; Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* 67-68.

[1328] LUPA, s 1 defines "region" as "a geographical area consisting of the municipal areas, or parts of the municipal areas, of—

(a) more than one local municipality; or

(b) a metropolitan municipality and one or more adjoining local municipalities".

Also see Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* 67.

[1329] LUPA, s 53(1)(i) and (ii); Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* 67.

[1330] LUPA, s 53(1)(c) and Western Cape Land Use Planning Regulations, 2015 (PN 203 in *Western Cape: Provincial Gazette Extraordinary* 7412 of 26-06-2016), reg 10(1)(b). The cultivation or irrigation must have occurred during the ten-year period preceding the land development application. See also reg 7(a) of the Western Cape Land Use Planning Regulations, 2015: Draft Amendment, 2018 (PN 34 in Western Cape Provincial Gazette Extraordinary 7892 of 06-03-2018), which proposes to apply this provision to any development on agricultural land, as described, larger than 2 000m^2. Note that agriculture falls under the concurrent powers of national and provincial government – see Sch 4, Part A of the Constitution.

[1331] Cape Town By-Law, Table A, read with Items 108(c) and 112(c) of Sch 3. See discussion in Section 3.1 above.

[1332] Western Cape Land Use Planning Regulations, 2015: Draft Amendment, 2018 (PN 34 in Western Cape Provincial Gazette Extraordinary 7892 of 06-03-2018).

mining and quarrying activities on one hectare or more of agricultural land will require a land development application.[1333]

As stated earlier, land development applications are submitted to the provincial Head of Department for approval.[1334] From the preceding discussion, it appears that this will affect the majority of proposed mining operations within the jurisdiction of the City of Cape Town. The practical implications for a mining right holder in the Western Cape are that two planning-related applications are required – a land use application to the City of Cape Town and a land development application to the provincial Head of Department.[1335]

LUPA allows for certain exemptions from the abovementioned provisions.[1336] A land development application will not be required if the proposed development complies with and is specifically provided for in the municipality's spatial development framework.[1337] For example, if a specific mining operation is already included in the municipality's spatial development framework, the mining right holder need not obtain approval of a land development application from the Head of Department. Presumably, this is because the provincial planning department has an opportunity to give input when a municipality's spatial development framework is drafted.[1338] The City of Cape Town's spatial development framework, discussed in Chapter 6, only refers to specific mining operations around the Macassar dunes.[1339] Any mining activities to be conducted elsewhere within the City's jurisdiction would not comply with the requirements of LUPA's exemption. Therefore, an additional land development consent from the provincial Head of Department would be required for these operations.[1340]

[1333] Reg 7(b) of the Western Cape Land Use Planning Regulations, 2015: Draft Amendment, 2018 (PN 34 in Western Cape Provincial Gazette Extraordinary 7892 of 06-03-2018).
[1334] See fn 1325 above.
[1335] LUPA, s 53(5) and (6) provides that approval by the municipality does not negate the need for approval by the Head of Department and *vice versa*. See also Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* 63, 66.
[1336] LUPA, s 53(3) and reg 10(2). See also Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* 77.
[1337] LUPA, s 53(3)(a) and reg 10(2)(b)(i) and (c)(i).
[1338] SPLUMA, s 12(2)(a) provides that national government and the relevant provincial must give input when a municipality's SDF is drafted to ensure consistent and co-ordinated SDFs.
[1339] See Section 4.1 in Chapter 6 above.
[1340] In Western Cape Government: Department of Environmental Affairs and Development Planning *Land Use Planning Law Reform in the Western Cape: The Road to Transformation* 63 it is acknowledged that

The criteria to be applied for the consideration of a municipal land use application and a provincial land development application are the same.[1341] Given that the same criteria are used, one would expect that the municipality and the Head of Department will come to the same decision in respect of the two applications relating to the same proposed mining project. If this is the case, it raises the question as to what the purpose of a parallel application to the Head of Department is. Conversely, if it is acceptable for the two applications to have two different outcomes, what are the implications for the mining right holder? Will the right holder be prohibited from commencing mining activities where the municipality approved the land use application, but the Head of Department denied the land development application? The Constitutional Court has emphasised repeatedly that it is acceptable for different spheres of government to regulate different aspects of the same activity, as they exercise their powers from different perspectives.[1342]

This overlap between municipal and provincial planning functions highlights the importance of intergovernmental co-operation. The situation calls for co-operation between the City of Cape Town and the Western Cape provincial department responsible for land use planning. In addition, there must be co-operation between the planning departments of these two spheres of government and the DMR.

In this regard, LUPA contains specific provisions relating to co-ordination and procedural alignment.[1343] The municipality, the Head of Department and other organs of state responsible for administering activities that also require approval in terms of other legislation must co-ordinate their respective application procedures.[1344] The purpose is to avoid duplication in these different processes. To achieve this purpose, these departments can conclude a written agreement, which can provide for integrated approvals.[1345] As discussed above, in the mining context, the land use application to the

instances may arise where two authorisations are required – one each from local government and provincial government.

[1341] Compare LUPA, ss 49 and 55 respectively. The criteria are as follows: the applicable spatial development frameworks and structure plans; the land use planning principles contained in s 59 of LUPA; and the desirability of the proposed project.

[1342] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) para 85; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) paras 80, 128; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 55; and *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 47.

[1343] LUPA, s 67.

[1344] LUPA, s 67(1)(a).

[1345] LUPA, s 67(1)(b) and (2). This provision in LUPA echoes a similar provision in SPLUMA, s 29(2), read with reg 17(1). See discussion in Section 3.3 of Chapter 4 above.

municipality and the land development application to the Head of Department will inevitably lead to duplication. An agreement between the City of Cape Town and the provincial planning department is imperative to avoid unnecessary application duplications and project delays.

In terms of SPLUMA, provincial planning legislation must aim to build capacity at local government level.[1346] LUPA complies with this mandate by compelling the Provincial Minister[1347] to assist municipalities in the performance of land-use planning functions.[1348] This support can take the form of training and technical support or the drafting of model municipal policies and by-laws.[1349]

5.2 Sol Plaatje Municipality

Where a prospective mining site in the Sol Plaatje Municipality is not zoned for mining, a rezoning application to the municipality is required. [1350] Contrary to the provisions of the Cape Town By-Law, the Sol Plaatje By-Law does not provide for pre-application consultation between the municipality and the rezoning applicant. Once an application is submitted, the municipality may call for additional information or documentation, if necessary.[1351]

The Sol Plaatje By-Law provides that a rezoning application must be accompanied by proof that the requirements of other legislation regulating the same activity have been complied with.[1352] Therefore, the rezoning application must include a copy of the mining right. As the mining right is a prerequisite for the rezoning application, the two application processes cannot run concurrently, as is the case in the City of Cape Town. The below figure illustrates the sequence of the Sol Plaatje rezoning application process.

[1346] SPLUMA, s 10(6.
[1347] Section 1 of LUPA defines “Provincial Minister” as the “Provincial Minister responsible for land-use planning”. At present, this is the Western Cape’s Minister of Local Government, Environmental Affairs and Development Planning.
[1348] LUPA, s 3(7).
[1349] LUPA, s 3(7)(b) and (d).
[1350] Sol Plaatje Land Use Scheme, use zone 23 in Table C of cl 14.4 lists mining as a primary use right. Mining is not listed as a secondary use right under any of the other use zones. Consent use applications are, therefore, not applicable to proposed mining activities. See discussion in Section 3.2 above.
[1351] Sol Plaatje By-Law, s 27(1)(b).
[1352] Sol Plaaatje By-Law, s 23(1)(j).

Figure 28: Sol Plaatje Rezoning Application Process[1353]

[1353] Summary of provisions in ss 22-44 of Sol Plaatje By-Law. The numbers in the circles on the left of the figure denotes the number of days. "N" is a placeholder, as the Sol Plaatje By-Law does not specify the number of days within which the notice must be published.

The Sol-Plaatje By-Law allows for input from national and provincial government when the municipality considers land development applications.[1354] The By-Law requires that the relevant national and provincial departments be approached for comment on any development application that is of national interest.[1355] This accords with provisions in SPLUMA, which states that municipalities must consult any other organ of state that regulates activities also requiring approval in terms of SPLUMA.[1356]

At first glance, this provision in the Sol-Plaatje By-Law is a good example of intergovernmental relations, as it provides for sectoral input from other government departments. However, the provision does not clarify the extent to which the comments from national and provincial government are binding on the municipality. It is uncertain whether these referral provisions grant the departments and Minister respectively the power to override a municipality's decision to approve or reject a rezoning application.

The section continues by stating that if section 52 of SPLUMA is applicable, the owner can apply for rezoning in terms of SPLUMA.[1357] As discussed above,[1358] section 52 of SPLUMA provides that rezoning applications that significantly affect land use for a purpose falling within the functional area of national government should be referred to the Minister of Rural Development and Land Reform.[1359] Mining falls within the exclusive competence of national government and is, therefore, affected by these provisions in the Sol Plaatje By-Law and SPLUMA.[1360] These provisions in SPLUMA and the Sol-Plaatje By-Law are problematic and significant in the mining context.

[1354] Sol Plaatje By-Law, s 4(3). (Note: due to a drafting error, the By-Law contains two sections numbered as 4(3). This reference refers to the second section so numbered.) In terms of s 1 of SPLUMA "land development" includes the change of land use or deviation from the use of the land permitted in terms of the land use scheme.
[1355] Sol Plaatje By-Law, s 4(3). (Note: due to a drafting error, the By-Law contains two sections numbered as 4(3). This reference refers to the second section so numbered.)
[1356] SPLUMA, s 29(1).
[1357] Sol Plaatje By-Law, s 4(4). (Note: due to a drafting error, the By-Law contains two sections numbered as 4(4). This reference refers to the second section so numbered.)
[1358] See discussion in Section 4.2 above.
[1359] SPLUMA, s 52(1)(c).
[1360] See discussions in Section 4.1 of Chapter 2 and Section 4.2 above.

Provided that the specific application falls within the ambit of municipal planning,[1361] it can be argued that the comments of the DMR[1362] and the decision of the Minister of Rural Development and Land Reform[1363] should be non-binding. In the spirit of co-operative government,[1364] the municipality should approach these departments for input and their comments should be given serious consideration. Indeed, national and provincial policies to facilitate optimal exploitation of South Africa's mineral resources, which is of crucial importance to the national and regional economy, should weigh heavily in a municipality's decision. However, the final decision on whether the rezoning application is approved or not should remain with the municipality. The national and provincial departments will encroach on local government powers if they impose their will on the municipality.[1365]

The By-Law also provides for input from other government departments, thereby complying with the requirements of sectoral input. However, the provisions for sectoral input should be interpreted carefully, as argued above, to prevent usurpation of municipal powers by other spheres of government.

To achieve spatial sustainability, the Sol Plaatje By-Law allows the municipality to impose certain conditions when approving rezoning applications.[1366] For example, these conditions can include provision for infrastructure and other services; cession of land to the municipality for public open spaces or road construction; payment of money instead of providing infrastructure or transfer of land; agriculture conservation; biodiversity protection and management; provision for housing and social infrastructure; and energy efficiency.[1367]

In the context of mining, many of the abovementioned conditions will normally be addressed in a mining right applicant's social and labour plan, as required in terms of

[1361] SPLUMA, s 1 defines "municipal planning" as "the control and regulation of the use of land within the municipal area". In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) para 57 the Constitutional Court confirmed that municipal planning also includes the zoning of land. See Section 2 of Chapter 4 above for a full discussion.
[1362] As required in terms of s 4(3) of the Sol Plaatje By-Law. (Note: due to a drafting error, the By-Law contains two sections numbered as 4(3). This reference refers to the second section so numbered.)
[1363] As referred to in s 52 of SPLUMA.
[1364] As required by Chapter 3 of the Constitution and the Intergovernmental Relations Framework Act.
[1365] See discussions in Section 5.1 of Chapter 2 and Section 4.2 above.
[1366] Sol Plaatje By-Law, s 47(1).
[1367] Sol Plaatje By-Law, s 47(2).

the MPRDA.[1368] Where issues such as new infrastructure, municipal services, agricultural conservation and environmental protection are applicable, the abovementioned provisions in the By-Law will be of particular relevance for mining right applicants requiring rezoning of the land. The Sol Plaatje By-Law requires that the protection of prime agricultural land and environmentally sensitive areas be considered when approving rezoning applications.[1369] It also makes provision for applicants to contribute financially or to build infrastructure, thereby covering current and future costs of necessary infrastructure and social services related to the proposed mining activities.[1370]

Following the public consultation process and comments received from other government departments, the rezoning applicant must respond to any comments and objections received.[1371] The application, together with all objections and responses thereto, must be assessed by the municipality in writing.[1372] This is done by an employee of the municipality or a contracted registered professional with the required knowledge and experience.[1373] The purpose of the assessment is to make a recommendation to the decision maker regarding the approval or refusal of the application.[1374] If the municipality does not have an employee with the necessary knowledge and experience and the municipality cannot afford the services of a registered professional, the municipality must use the provincial or national government's technical advisors.[1375]

This provision in the Sol Plaatje By-Law is an excellent example of intergovernmental co-operation. Where the local government lacks financial or technical capacity, the By-Law provides for assistance from national or provincial government. This is of particular relevance in the mining context. Due to its technical complexity and impact on various aspects of municipal planning,[1376] rezoning applications for mining purposes require particular expertise on the part of the professional who will assess the application.

[1368] MPRDA, regs 10(1)(g) and 42(1), prescribed Form D of Annexure I. See also s 1.4(a) of the Department of Mineral Resources *Revised Social and Labour Plan Guideline* (10-2010) 6. See discussion in Section 4 in Chapter 3 above.
[1369] Sol Plaatje By-Law, s 47(2)(f) and (g).
[1370] Sol Plaatje By-Law, s 47(2).
[1371] Sol Plaatje By-Law, s 39.
[1372] Sol Plaatje By-Law, s 40(1).
[1373] Sol Plaatje By-Law, s 40(1).
[1374] Sol Plaatje By-Law, s 40(1).
[1375] Sol Plaatje By-Law, s 40(1).
[1376] For example, environmental considerations, road and storm-water infrastructure, water and electricity supply, labour and housing needs, social services, and building and structural requirements.

Financial and technical assistance from the provincial or national government ensures an efficient and cost-effective process and the optimised use of existing resources.

Of concern, however, is the short timeframe within which the required assessment must be completed. Fourteen days[1377] seem insufficient for a referral of an application to a provincial or national technical advisor, assessment of the application, compiling the written recommendation and returning same to the decision maker. In contrast to this short timeframe, the decision maker has 120 days to decide the outcome of the application.[1378] This period seems to be disproportionately long. Legislative revision is necessary to correct this shortcoming.

5.3 uMhlathuze Municipality

In uMhlathuze Municipality, a rezoning application is required for a proposed mining project on land that is not zoned either as "Quarrying and Mining"[1379] or "High-Impact Industry".[1380] Alternatively, a consent use application is required for mining on land zoned as "Agriculture 1",[1381] "Harbour"[1382] or "General Industry 1".[1383] For purposes of this discussion, reference will be made only to rezoning applications. However, the same will apply to consent use applications.

The uMhlathuze By-Law entitles the municipality to insist on proof that approval required in terms of other legislation has already been obtained prior to submission of a rezoning application.[1384] Representatives of the municipality advised that this power is always

[1377] Sol Plaatje By-Law, s 40(1).
[1378] Sol Plaatje By-Law, s 41(1). The 120 days is calculated from either: (a) the last day of submission of comments and objections where no such comments or objections were received, (b) the last day of the applicant's response to any comments or objections that were received; (c) the last day of submission of additional information requested; (d) within an extended period agreed to between the municipality and the applicant. See s 41(1)(a) – (d) of the Sol Plaatje By-Law. Subsection 1(b) and (c) again contains references to incorrect or non-existent sections. It is assumed that the reference in s 41(1)(b) to s 40(2) and (3) should refer to s 39(2) and (3). s 41(1)(c) refers to a non-existent s 40(5). It is assumed that this should refer to s 39(6).
[1379] Description of Zone Category: Quarrying and Mining in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1380] Description of Zone Category: High-Impact Industry in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014). See discussion in Section 3.3 above.
[1381] Description of Zone Category: Agriculture 1 in s 2.1.1 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1382] Description of Zone Category: Harbour in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014).
[1383] Description of Zone Category: General Industry 1 in s 2.2.6 of the uMhlathuze Local Municipality *Land Use Scheme Regulations* (2014). See discussion in Section 3.3 above.
[1384] uMhlathuze By-Law, Item 1(5) of Part A of Sch 5.

exercised in the case of proposed mining activities.[1385] Therefore, contrary to the City of Cape Town and similar to Sol Plaatje, prospective mining companies in uMhlathuze cannot take advantage of concurrent application processes for mining rights and rezoning. The DMR must grant the mining right before the application for rezoning can be submitted to the municipality. The below figure illustrates the sequence of the uMhlathuze Municipality's rezoning application process.

[1385] Joint interview with four officials in the Spatial and Environmental Planning Department of the uMhlathuze Municipality, 18 July 2017.

Figure 29: uMhlathuze Rezoning Application Process[1386]

[1386] uMhlathuze By-Law, Items 1-21 of Part A of Sch 5.

A rezoning application must be accompanied by proof that the application has been circulated to other organs of state.[1387] This raises two issues, namely, the organs of state that should be consulted, as well as the timing of such consultation. The below discussion addresses these two issues in turn.

Similar to the City of Cape Town, but contrary to Sol Plaatje, the uMhlathuze By-Law provides for pre-application consultation between the applicant and the municipality.[1388] One of the purposes of this consultation is to identify the state organs and other stakeholders that should be consulted prior to submission of the application.[1389] The pre-application meeting with the municipality is entirely voluntary for the applicant and, therefore, not a precondition of the application itself.[1390] However, failure to identify the relevant organs of state to be consulted will be detrimental to the application. Prior consultation with organs of state affected by the application is mandatory.[1391] When lodging the application for rezoning with the municipality, the applicant must include proof that the application has been circulated to other organs of state.[1392] Furthermore, the municipality may determine that the application is incomplete if it is not accompanied by comments from organs of state consulted prior to lodging the application.[1393] Representatives from the municipality have indicated that an issued mining right will serve as sufficient proof that the applicant has consulted with the DMR.[1394]

The uMhlathuze By-Law allows an organ of state to refuse to comment on a rezoning application if that state organ administers another application process required for the same activity.[1395] This clearly applies in the mining context. The DMR, who is responsible for administering mining right applications, may refuse to comment on a rezoning application to use land for mining purposes. Such refusal would be problematic for two reasons. First, the DMR is in a unique position to provide information that may

[1387] uMhlathuze By-Law, Item 2(1)(g) of Part A of Sch 5.
[1388] uMhlathuze By-Law, Item 1 of Part A of Sch 5.
[1389] uMhlathuze By-Law, Item 1(1)(c) of Part A of Sch 5.
[1390] uMhlathuze By-Law, Item 1(1) of Part A of Sch 5 states that the applicant *may* consult with the municipality prior to submission of the application.
[1391] Section 33(1) of the uMhlathuze By-Law provides that the applicant must consult with these organs of state before submitting the application.
[1392] uMhlathuze By-Law, Item 2(1)(g) of Part A of Sch 5.
[1393] uMhlathuze By-Law, s 33(3).
[1394] Joint interview with four officials in the Spatial and Environmental Planning Department of the uMhlathuze Municipality, 18 July 2017.
[1395] uMhlathuze By-Law, s 33(2).

be relevant when the municipality considers a rezoning application for mining purposes. For example, the DMR can highlight where a proposed mining operation has strategic importance for the mining industry due to the quality, quantity or rarity of the mineral to be mined. Without this input from the DMR, the municipality will not have all the relevant information to make an informed decision regarding the optimum use of the land. Second, without the DMR's comments, the municipality may deem the rezoning application incomplete.[1396]

At first glance, the uMhlathuze By-Law provides some relief in this regard. It allows the municipality to proceed with the application process, even in the absence of certain comments from relevant organs of state.[1397] However, upon closer inspection, it is apparent that this concession in the By-Law does not apply to the abovementioned example concerning the DMR. The concession does not apply where the relevant organ of state refuses to comment because it administers another application process that is required for the same activity.[1398] This conundrum places the rezoning applicant in a very difficult position – the DMR may legitimately refuse to comment on the rezoning application, while the municipality may legitimately refuse to accept such application without the DMR's comments.

The uMhlatuze By-Law contains certain provisions dealing with additional notice of the application to organs of state. It provides that any organ of state that has "jurisdiction in the matter" must be notified of the application.[1399] The By-Law does not state what will constitute having jurisdiction; it also does not specify when such notice must be given. The location in the By-Law of this notice requirement may provide an answer to the second question. The requirement appears after provisions dealing with the lodging and acceptance of the application, as well as requirements addressing notices for public participation.[1400] Therefore, one can deduce that the notice to other organs of state should be sent after the application is accepted as complete.

[1396] uMhlathuze By-Law, s 33(3).
[1397] uMhlathuze By-Law, s 33(4).
[1398] uMhlathuze By-Law, s 33(4)(b).
[1399] uMhlathuze By-Law, Item 11(1)(c) of Part A of Sch 5.
[1400] uMhlathuze By-Law, Items 2-10 of Part A of Sch 5.

The By-Law also does not specify the content of the notice – only that it should be in writing.[1401] Furthermore, the By-Law is silent on the action that the said organ of state may take upon receipt of the notice. It is unclear whether the organ of state is entitled to comment on or oppose the rezoning application at this stage. In contrast, the provisions relating to the pre-application consultation with the organs of state specifically entitle the organ of state to provide comments to the applicant.[1402] It is possible that the drafters of the By-Law intended for the sections addressing notice to organs of state to be read with the requirements dealing with notices to the public.[1403] The provisions dealing with notices to the public specify the content of such notices and confirm how the public may respond.[1404] However, in the absence of explicit direction to read these sections together, provisions in the By-Law for notice to organs of state is vague and ambiguous.

The purpose of the notice to organs of state after submission of the application is unclear. If the municipality requires proof that the proposed application has been circulated to organs of state before accepting the application,[1405] further notice of the application to the organs of state seems superfluous. This is especially true in the absence of specific provisions entitling the organs of state to comment on or oppose the application following receipt of the notice. It appears that the requirement for a second notice to organs of state during the application process itself is merely a box-ticking exercise to comply with the provisions of SPLUMA.[1406]

The uMhlathuze By-Law further provides that applications for municipal planning approval that "affects the national interest" must also be served on the Minister of Rural Development and Land Reform.[1407] This provision must be read with section 52(1) and (2) of SPLUMA, discussed above.[1408] It is clear that all applications for rezoning of land for mining purposes must be referred to the Minister of Rural Development and Land

[1401] See heading to Item 11(1) of Part A of Sch 5 of the uMhlathuze By-Law.
[1402] uMhlathuze By-Law, s 33.
[1403] Set out in Item 9 of Part A of Sch 5 of the uMhathuze By-Law.
[1404] Set out in Item 9 of Part A of Sch 5 of the uMhathuze By-Law.
[1405] uMhlathuze By-Law, Item 2(1)(g) of Part A of Sch 5.
[1406] SPLUMA provides that intergovernmental participation will take place during the administrative phase of the application process, which commences once a completed application has been received. See SPLUMA, reg 16(3).
[1407] uMhlathuze By-Law, Item 6 of Part A of Sch 5, read with s 52(1) and (2) of SPLUMA, as well as the definition of 'Minister' in s 1 of SPLUMA.
[1408] See wording of Item 6 of Part A of Sch 5 of the uMhlathuze By-Law. See also Section 4.2 above.

Reform in terms of the provisions of the By-Law. As argued above,[1409] to avoid exceeding the limits of the Minister's constitutionally allocated powers, these provisions must be interpreted narrowly.

The municipality may also identify other specific parties who have an interest in the application and who should be notified by the applicant.[1410] This provision creates an opportunity for co-operation between the municipality and the DMR. During the mining right application process, the applicant must consult with interested and affected parties.[1411] It is to be expected that the parties who are affected by the mining right application will also be affected by the rezoning application. Therefore, the DMR and the municipality should co-ordinate their efforts to identify the parties who should be notified of the applications under their respective jurisdictions.

6. Conclusion

The different contexts of the three case-study municipalities are clearly reflected in their divergent approaches to addressing land use for mining purposes. In the City of Cape Town, where mining is less prevalent, the land use scheme does not provide for mining as a primary land use right. Instead, it is listed as a consent use, requiring municipal consent. This contrasts with the situation in Sol Plaatje and uMhlathuze where mining activities are more predominant. Both of these municipalities designate mining as a primary land use right. In addition, uMhlathuze provides for mining as a consent use in other zoning designations as well. The significance of the mineral beneficiation industry in uMhlathuze is also reflected in its land use scheme.

While the rezoning application procedures of the three case-study municipalities share similar features, the timeframes and specific procedural requirements differ.[1412]

[1409] See discussion in Section 4.2 above.
[1410] uMhlathuze By-Law, Item 11(2) of Part A of Sch 5.
[1411] MPRDA, ss 10 and 22(4)(b). See discussion in Section 3.2 and 3.3 of Chapter 3 above.
[1412] For a detailed discussion of the three municipalities' procedural requirements, see Sections 5.1, 5.2 and 5.3 above.

Figure 30: Extract from Rezoning Application Processes of the City of Cape Town, Sol Plaatje and uMhlathuze Municipalities[1413]

[1413] See more detailed illustrations and discussion of application processes of the City of Town, Sol Plaatje and uMhlathuze Municipalities in Sections 5.1, 5.2 and 5.3 respectively.

As can be seen from the above figure, the City of Cape Town's application process spans at least 200 days, excluding any time spent during the pre-application process.[1414] This compares to the Sol Plaatje application process of at least 273 days[1415] and the uMhlathuze process of 316 days, which timeframe also excludes pre-application consultation.[1416] Commencement of the consultation periods also varies from municipality to municipality. For example, in the City of Cape Town and Sol Plaatje Municipalities, the consultation process can start as early as eight days after a complete rezoning application is submitted for consideration.[1417] However, in uMhlathuze, the consultation process can commence anywhere from 51 days to 121 days after a complete application is received.[1418] The 51-day provision will apply where the municipality initiates the public participation process.[1419] If the rezoning applicant initiates this process, the 121-day provision applies.[1420]

Furthermore, the apparent innocuous issue of supporting documents that must accompany the rezoning application can have significant consequences on attempts to streamline rezoning and mining right application processes. As illustrated above, requiring a mining right as a supporting document when a rezoning application is submitted can have a substantial impact on whether the rezoning and mining right application processes can run concurrently or whether the former should follow the

[1414] Based on total number of days in terms of provisions in ss 70-105 of the Cape Town By-Law. This timeframe will increase where additional information is required from the applicant, where there is a delay in advertising the notice of intention to consider the application or where an extension of any timeframe is agreed upon between the City and the applicant.

[1415] Based on total number of days in terms of provisions in ss 22-44 of Sol Plaatje By-Law. This timeframe will increase where there is a delay in advertising the notice of intention to consider the application or where an extension of any timeframe is agreed upon between the municipality and the applicant.

[1416] Based on total number of days in terms of provisions in Items 1-21 of Part A of Sch 5 of the uMhlathuze By-Law. This timeframe will increase where additional information is required from the applicant or where an extension of any timeframe is agreed upon between the municipality and the applicant.

[1417] This can be deduced from provisions in the respective By-Laws stating that the municipality must notify the applicant that the application is complete within seven days after receipt of the complete application – see s 74(b) of the Cape Town By-Law, and s 29 of the Sol Plaatje By-Law. After the notice of acceptance of the application, the consultation process commences – see s 79 of the Cape Town By-Law; ss 31 and 32 in the Sol Plaatje By-Law. Also see the respective discussions in Sections 5.1 and 5.2 above.

[1418] Item 3(2) of Part A of Sch 5 of the uMhlathuze By-Law states that the application will be regarded as complete 30 days after receipt thereof if the municipality does not call for further information. The municipality must give notice of the public participation process 21 days after the application is complete (i.e. 51 days after receipt of the application) – see Item 8(1) and 9(1) of Sch 5 of the uMhlathuze By-Law. Alternatively, the applicant can give notice of the public participation process, which notice must be given 90 days after the application is complete – see Item 9(2) of Sch 5 of the uMhlathuze By-Law. Also see the discussion in Section 5.3 above.

[1419] uMhlathuze By-Law, Item 8(1) and 9(1) of Part A of Sch 5.

[1420] uMhlathuze By-Law, Item 9(2) of Part A of Sch 5.

latter. The City of Cape Town's documentary requirements allow for concurrent processes, whereas Sol Plaatje and uMhlathuze's rezoning process can only commence once the mining right has been awarded.

The rezoning application procedures of all three municipalities highlight the importance of intergovernmental relations. In one way or another, the rezoning procedures of each of the municipalities overlap with planning applications or procedures governed by their respective provincial governments or a national department. In some instances, this overlap may amount to constitutional infringement. In others, it underscores the need for collaboration to streamline processes to lessen the administrative burden on mining right holders applying for permission to use land for mining purposes.

Notwithstanding the progress brought about with the enactment of SPLUMA,[1421] the Act has certain distinct problems. It demonstrates a worrying tendency to undermine local government powers and functions relating to municipal planning. Through SPLUMA's provisions, provincial and national levels of government are authorised to encroach upon this functional area of local government. This contravenes the provisions of the Constitution.[1422]

[1421] Refer to discussion in Sections 3.1 and 3.2 in Chapter 4 above.
[1422] See discussion in Section 4.2 of Chapter 7 above.

Chapter 8: Conclusion

1. Introduction

This dissertation set out to determine how alignment of the respective processes of obtaining a mining right and land use approval can provide for better co-operation between the Department of Mineral Resources (DMR) and municipalities.[1423] Two sub-questions served to assist this inquiry: First, how municipalities currently regulate land use for mining purposes; and second, whether municipal rezoning procedures should be incorporated into the application process for mining rights.

This Chapter provides some reflections on the first question, of how mining as land use is regulated by municipalities. These reflections are based on the analysis in Chapters 6 and 7 of the legislative provisions and rezoning application procedures of the three case-study municipalities. The options for co-ordination of application procedures for mining rights and rezoning, respectively, also remain to be considered. Finally, in attempting to answer the second question, this Chapter provides some concluding remarks on legislative shortcomings and co-operation between the DMR and municipalities.

2. Reflections on Municipal Regulation of Mining as Land Use

Land use for mining purposes poses a particular challenge to municipalities.[1424] Despite the mining industry's potential as a vital source of employment and local economic growth, it competes with other crucial industries and services for the limited land that is available. In regulating the use of land within their jurisdictions, municipalities must find a balance between making identified land available for mineral extraction, while reserving sufficient land for other uses such as housing, infrastructure, commerce, agriculture, environmental protection, etc. The examination of municipal

[1423] See Section 3 in Chapter 1 above.
[1424] See Section 1 in Chapter 6 above.

land use regulations revealed that there is no one-size-fits-all solution to find this balance.[1425]

Municipalities across the country operate in diverse contexts.[1426] Some municipalities face pervasive challenges, including capacity constraints, unemployment, slow economic growth, housing shortages, ageing infrastructure, urbanisation, poor living conditions, environmental threats, etc. Other challenges are more unique, for example unrehabilitated, disused mining land or a declining mining industry, which was previously the main employer and driver of the local economy. It is not only the challenges that contribute to municipal diversity, but also assets and resources. Some municipalities enjoy spectacular scenery that can fuel the local tourism industry. Others have an abundance of fertile soil to support food production and thriving agriculture.

Because of the contextual diversity, it is appropriate for different municipalities to approach mining as a land use in different ways. The prevalence of mining activities in a specific area determines the level of focus or prioritisation that mining should enjoy in the municipality's planning instruments. Where mining rarely takes place, municipalities can justify a case-by-case approach to mining as a land use. However, in areas where mining is prominent, municipal policies must be tailored to address mining activities specifically.

The three case-study municipalities aptly demonstrate this point. For example, in the City of Cape Town, where mining activities are less prevalent, mining is disregarded in the municipality's Integrated Development Plan.[1427] Furthermore, instead of having a dedicated use zone that provides for mining as a primary land use, Cape Town's Land Use Scheme lists mining as a consent use under other zoning categories.[1428] The position in the City of Cape Town contrasts with those in Sol Plaatje and uMhlathuze. Acknowledging the important role of mining in these municipalities, both municipalities address mining in much more detail in their respective Integrated Development

[1425] See Section 5 in Chapter 6. When attempting to find this balance, municipalities must be guided by the development principles and norms and standards set out in section 4(b) and 6-8 of SPLUMA. For a discussion of these principles, norms and standards, see Section 3.2 of Chapter 4 above.
[1426] See Chapter 5 in general.
[1427] See Section 4.1 in Chapter 6.
[1428] See Section 3.1 in Chapter 7.

Plans.[1429] In addition, both municipalities have a use zone providing for mining as a primary land use.[1430]

Where a piece of land's zoning does not allow mining as land use, a rezoning application is required.[1431] The research highlighted differences in the rezoning application procedures of the three case-study municipalities.[1432] First, different timeframes apply to their respective applications procedures.[1433] Second, their requirements relating to supporting documents to accompany the application differ.[1434] The documentary requirements have significant implications for when a rezoning application can be submitted to the municipality. In the case of the City of Cape Town, the rezoning application can be submitted to the municipality when the mining right application is submitted to the DMR.[1435] However, in Sol Plaatje and uMhlathuze, the rezoning application process can only commence once the mining right has been awarded.[1436] This follows from the requirement of both these municipal by-laws that the mining right must be submitted as a supporting document with the rezoning application.

The dissimilarity in municipal rezoning application processes poses a challenge to the co-ordination of application procedures for mining rights and rezoning of land. This is a matter that deserves attention. The next section presents some options in this regard.

3. Options for Co-ordination of Application Processes

The One Environmental System was implemented in reaction to the inefficient legislative scheme requiring a multiplicity of authorisations by three government departments following separate and uncoordinated application processes.[1437] This system co-ordinates the application processes for a mining right, environmental authorisation and water use licence in respect of a proposed mining operation. The Departments of Mineral Resources, Environmental Affairs, and Water and Sanitation

[1429] See Sections 4.2 and 4.3 respectively in Chapter 6.
[1430] See Sections 3.2 and 3.3 respectively in Chapter 7.
[1431] See Section 5 in Chapter 7.
[1432] See Section 5 in Chapter 7.
[1433] See figures 27-29 in Sections 5.1, 5.2 and 5.3 respectively of Chapter 7 above.
[1434] See discussion in Sections 5.1 – 5.3 respectively of Chapter 7 above.
[1435] See Section 5.1 in Chapter 7.
[1436] See Sections 5.2 and 5.3 in Chapter 7.
[1437] See Section 7.3 in Chapter 2.

have also agreed to a fixed timeframe of 300 days for the respective application processes.[1438]

One of the aims of this dissertation is to determine whether municipal rezoning procedures should be incorporated into the application process for mining rights.[1439] The practical merits of such incorporation are evident: it will streamline application processes and provide a more cohesive solution to current bureaucratic delays.[1440] However, the implementation of an integrated application process poses some challenges, as alluded to throughout this dissertation. Considering these challenges, the below discussion highlights three options for the co-ordination of application processes.

3.1 Option One: Mandatory Process Integration

The first option involves the mandatory, wholesale incorporation of the rezoning application process into the mining right application process. This option is similar to the model presented by the One Environmental System, referred to above.[1441] Where rezoning of land is necessary for a proposed mining project, the rezoning application will be submitted to the relevant municipality simultaneously with the submission of applications for a mining right, an environmental authorisation and water use licence.[1442] The municipality will be required to abide by the 300-day timeframe for the application process, as agreed to for purposes of the One Environmental System.

Of the three options discussed, this one is the most extreme. Buy-in from all municipalities across South Africa will be required to make this a viable option. For this fully-integrated option to become the prescribed application process, participation by all municipalities will be mandatory. Therefore, it will also apply to municipalities where mining is a very rare occurrence.

[1438] Department of Environmental Affairs "One Environmental System for Mining Industry to Commence on 8 December 2014" *Department of Environmental Affairs*. See also National Water Act, Reg 3(6) of *Water Use Licence Application and Appeals Regulations* (GN R 267 in *GG* 40713 of 24-03-2017).
[1439] See Section 3 in Chapter 1.
[1440] Doing so will promote the constitutional principle of efficient administration. See Section 2 of Chapter 2 above.
[1441] Section 3 of Chapter 8.
[1442] The mining right application and the application for environmental authorisation of submitted to the DMR. The application for a water use licence is submitted to the Department of Water and Sanitation. See discussion of the One Environmental System in Section 7.3 in Chapter 2.

The implication for municipalities will be significant under this option. The prescribed 300-day timeframe will have the most substantial impact. SPLUMA provides for maximum timeframes to apply to land development applications where provincial legislation or municipal by-laws do not contain timeframes.[1443] These timeframes amount to a total of sixteen months or approximately 485 days. This is a far cry from the 300 days applicable to the current One Environmental System. Even where a municipality's zoning application process complies with the timeframe set by SPLUMA, it may run afoul of the 300-day timeframe of the One Environmental System. If this is the case, the municipality will be required to draft tailor-made application procedures that apply only to rezoning for mining purposes. This is a huge and onerous undertaking, especially for municipalities where mining activities are a rare occurrence.

uMhlathuze can be used as an example to illustrate this point. The municipality's current rezoning application process spans over approximately 316 days.[1444] This period excludes any time spent on pre-application consultation between the municipality and the applicant. If the option for mandatory process integration is implemented, uMhlathuze will have to amend its rezoning application procedures to comply with the restricted timeframe requirements set out in the One Environmental System.

The total number of days allowed for the application process is not the only stumbling block to complete process integration. One of the motivating factors for such integration is to eliminate duplication of requirements in the different application processes.[1445] Public consultation can be used as an example. Both the mining right application process[1446] and the rezoning application process[1447] provide for mandated consultation with parties and organs of state affected by the proposed mining activities. An integrated process can take advantage of a joint consultation period, where interested and affected parties are apprised of the details of both the mining right and rezoning

[1443] Spatial Planning and Land Use Management Act, Reg 16(1). See discussion in Section 4.1 of Chapter 7 above.
[1444] See Section 5.3 in Chapter 7 above.
[1445] Thereby promoting the constitutional principle of efficient administration. See Section 2 in Chapter 2 above.
[1446]Mineral and Petroleum Resources Development Act, ss 10 and 22(4)(b), read with reg 3. See discussion in Section 3 of Chapter 3 above.
[1447] Regulations 14(1)(d) and (e) of SPLUMA. See discussion in Section 4.1 of Chapter 7 above.

applications. This will eliminate costly and time-consuming duplication in consultation processes. However, to do so, the mining right and rezoning application processes must be synchronised in respect of the point at which consultation takes place, as well as the duration of such a consultation period.

At present, the MPRDA provides for consultation to commence 28 days after an accepted application was submitted to the Regional Manager.[1448] The consultation period can be as long as 180 days, being the point at which the mining right applicant must submit a report on the outcome of the consultation process.[1449]

For rezoning applications, there is no fixed day when consultation starts. As explained in Chapter 7,[1450] the commencement of the consultation period varies from municipality to municipality. For example, in the City of Cape Town and Sol Plaatje Municipalities, consultation can commence as early as eight days after a complete rezoning application is submitted for consideration.[1451] However, in uMhlathuze, the consultation process starts either 51 days or 121 days after a complete application is received, depending on who initiates the process.[1452]

In all three case-study municipalities, the public consultation process lasts a minimum of 30 days.[1453] The City of Cape Town and Sol Plaatje By-Laws provide for an

[1448] MPRDA, s 22(2) and (4). See Discussion in Section 2 of Chapter 3 above.
[1449] MPRDA, s 22(4)(b). See discussion in Section 3 of Chapter 3 above.
[1450] See Section 6 of Chapter 7 above.
[1451] This can be deduced from provisions in the respective By-Laws stating that the municipality must notify the applicant that the application is complete within seven days after receipt of the complete application – see s 74(b) of the City of Cape Town *Municipal Planning By-Law, 2015* (Proc 11 in *Western Cape Provincial Gazette Extraordinary* 7413 of 29-06-2015); s 29 of the Sol Plaatje Local Municipality *Land Use Management By-Law, 2015* (GN 139 in *Northern Cape Provincial Gazette Extraordinary* 1955 of 21-09-2015). After the notice of acceptance of the application, the consultation process commences – see s 79 of the Cape Town By-Law; ss 31 and 32 in the Sol Plaatje By-Law. Also see discussion in Section 6 of Chapter 7.
[1452] uMhlathuze Spatial Planning and Land Use Management By-Law, 2017 (MN 93 in *KwaZulu-Natal Provincial Gazette Extraordinary* 1853 of 14-07-2017), Item 3(2) of Part A of Sch 5 states that the application will be regarded as complete 30 days after receipt thereof if the municipality does not call for further information. The municipality must give notice of the public participation process 21 days after the application is complete (i.e. 51 days after receipt of the application) – see Item 8(1) and 9(1) of Part A of Sch 5 of the uMhlathuze By-Law. Alternatively, the applicant can give notice of the public participation process, which notice must be given 90 days after the application is complete – see Item 9(2) of Part A of Sch 5 of the uMhlathuze By-Law. Also see the discussion in Section 6 of Chapter 7 above.
[1453] Section 81(f) of the Cape Town By-Law; Section 33(1)(h) of the Sol Plaatje By-Law; Item 9(4) of Sch 5 of the uMhlathuze By-Law.

additional 30 days for comments from organs of state.[1454] All of these timeframes contrast with the maximum of 180 days provided for consultation in the MPRDA, as referred to above.[1455]

As these examples illustrate, it will require considerable effort on the part of municipalities to redraft rezoning application procedures to align with the timeframes set in the MPRDA. This will place an enormous strain on (often under-capacitated) municipalities, especially in areas where mining activities are not prevalent enough to justify the administrative burden. These considerations make the option of mandatory process integration less viable and appealing.

3.2 Option Two: Selective Process Alignment

To alleviate the burden on municipalities who will derive little benefit from mandatory process integration, another option is to allow selective process alignment. In terms of this option, an individual municipality can decide for itself whether to align its rezoning application process with the mining right application process of the MPRDA. Municipalities in areas of prolific mining operations may justify the administrative effort of drafting a tailor-made application process that will apply to the rezoning of land for mining purposes within their jurisdictions. Other municipalities will be exempt from this process alignment.

This option can be implemented by using the provisions in Section 30 of SPLUMA.[1456] It provides that a municipality and another organ of state that regulates the same activity may exercise their respective powers jointly.[1457] This can be done by way of separate authorisations.[1458] Alternatively, the DMR and the municipality may issue one, integrated authorisation.[1459] In the latter instance, both institutions must still comply with all relevant legislative requirements.[1460]

[1454] Section 36(1) of the Sol Plaatje By-Law
[1455] See fn 14491449 above.
[1456] Also see discussion in Section 3.3 of Chapter 4 above.
[1457] SPLUMA, s 30(1).
[1458] SPLUMA, s 30(1)(a).
[1459] SPLUMA, s 30(1).
[1460] SPLUMA, s 30(2).

The condition that each institution must fulfil its own legislative requirements is of paramount importance to ensure the constitutional sustainability of this scheme. For example, the municipality and the DMR cannot agree that the DMR will usurp the functions of the municipality by deciding the outcome of the rezoning application on the municipality's behalf. This will amount to an unconstitutional appropriation of municipal powers by the DMR.[1461] Therefore, even if they agree to issue one, integrated authorisation, the DMR must decide the outcome of the mining right component and the municipality must determine the rezoning component of the authorisation. Furthermore, the DMR and the municipality must come to their respective decisions based on the criteria set out in the legislation applicable to their different spheres of authority.[1462]

To implement the option of selective process alignment, the DMR will have to conclude individual co-operation agreements with every municipality that elects to partake in this scheme. Furthermore, the terms of each agreement will have to be individually negotiated. The option of mandatory process integration discussed above in Section 3.1 implies a significant administrative burden on all municipalities to prepare tailor-made application procedures for rezoning of land for mining purposes. Conversely, the option of selective process alignment discussed in this Section requires substantial effort on the part of the DMR to engage with every municipality wanting to implement this option.

Many of the considerations relevant to Option One would be just as applicable to Option Two. This is especially true for issues relating to timeframes. Where the municipality and the DMR agree to exercise their respective powers jointly, the municipality may have to adjust the timeframes of its standard rezoning application procedure to align with those set in the MPRDA.

One significant drawback of Option Two is that it will lead to complete divergence in application procedures, depending on where the proposed mine is situated. The nature of the mining right application procedure will be dictated by the municipal jurisdiction

[1461] Such appropriation will violate the principle of rule of law. See discussion in Sections 2 and 8 of Chapter 2.
[1462] Such compliance will align with the constitutional principle of just administrative action. See Section 2 of Chapter 2 above. Also see discussion in Section 3.3 of Chapter 4 above.

within which the mine falls. In areas where the municipality and the DMR have concluded an agreement to exercise their powers jointly, a mining right applicant will need to follow a specific type of joint application procedure. This application will differ from that applicable to a proposed mining project situated in an area where the municipality and the DMR have not entered into a co-operation agreement. In the latter case, the applicant will submit two separate applications – one each to the DMR and the municipality respectively. These diverging application procedures for the same activity, issued by the same institution (DMR), will undermine uniformity across the country.[1463]

An even bigger problem would arise where a proposed mining project straddles a boundary between two municipalities where the one municipality has concluded a co-operation agreement with the DMR and the other has not. This will lead to a situation where the rezoning of only a portion of the mining area is decided simultaneously with the awarding of the mining right, while the rezoning of the remaining portion is decided through a separate process. The DMR's application procedures will have to cater for these situations.

Alternatively, the DMR can take a more pragmatic approach. The DMR may insist that neighbouring municipalities each conclude a co-operation agreement with the DMR based on geological similarity or where known mineral deposits are located across municipal boundaries. Should the one municipality choose not to conclude such an agreement, the DMR may refuse to conclude an agreement with the neighbouring municipality. These circumstances emphasise the importance of intergovernmental relations, both horizontally and vertically.[1464] Horizontal relations apply to the relationship between the neighbouring municipalities; vertical relations are relevant between the DMR and both neighbouring municipalities.[1465]

[1463] It may also have a negative impact on the constitutional principle of just administrative action. See Section 2 in Chapter 2 above.

[1464] Watts "Conceptual Issues" in *Intergovernmental Relations* 26; Levy N & Tapscott C "Intergovernmental Relations in South Africa: The Challenges of Co-operative Government" in Levy N and Tapscott C (eds) 1 17-18; Woolman & Roux "Co-operative Government" in *Constitutional Law 1*14.7; Van Wyk *Planning Law* 144.

[1465] For a discussion of the horizontal and vertical dimensions of intergovernmental relations, see Section 4 of Chapter 2 above.

3.3 Option Three: Parallel Application Processes

This option will require the least amount of administrative effort for the DMR and municipalities, while still providing significant benefits in shortening application timeframes.[1466] It will entail separate applications to be submitted to the DMR and the municipality, respectively – as is the current position. The aim would be to allow these application procedures to run in parallel. By moving away from consecutive application processes to processes running concurrently, the DMR and municipalities can drastically shorten application timeframes.

Some municipalities' rezoning application procedures already allow for this parallel approach. For example, there is nothing prohibiting an applicant who proposes mining activities in the City of Cape Town from submitting a rezoning application to the municipality simultaneously with submission of a mining right application to the DMR.[1467] Although these processes will run completely separately, they can run simultaneously.

This contrasts with the position in Sol Plaatje and uMhalthuze Municipalities. The By-Laws of both of these municipalities provide that the rezoning application must be accompanied by approvals from other organs of state where the proposed activity requires such approval.[1468] In the case of mining activities, a mining right issued by the DMR is required. Therefore, when an application for rezoning of land for mining purposes is submitted to Sol Plaatje or uMhlathuze, it must be accompanied by the mining right. This implies that the respective application processes for mining rights and rezoning of land cannot run concurrently in Sol Plaatje and uMhlathuze. The mining company must first obtain the mining right before an application for rezoning is submitted.

[1466] It therefore promotes the constitutional principle of efficient administration. See Section 2 of Chapter 2.

[1467] See discussion at Section 5.1 of Chapter 7 above.

[1468] S 23(1)(j) of the Sol Plaatje By-Law states that the application must include proof that required authorisations in terms of other legislation have been obtained. The provisions dealing with pre-application consultation in Item 1(2) of Sch 5 of the uMhalthuze By-Law requires the applicant to obtain approvals required from other organs of state, which may be necessary to determine the rezoning application. Also see the respective discussions at Sections 5.2 and 5.3 of Chapter 7 above.

To implement Option Three in these municipalities will necessitate an amendment of their documentary requirements applicable to rezoning applications. Changing the documentary requirements of an application process should be a relatively simple undertaking. There may also be a legal justification for doing so. It is not the municipality's responsibility to ensure that mining companies are in possession of a mining right before commencing mining activities. The municipality's mandate is limited to the regulation of land use in this instance.[1469] Whether the applicant is already in possession of a mining right should not have any bearing on the municipality's decision to allow rezoning of the land or not.

Some of the challenges relating to timeframe alignment, raised with Option One above, may also be relevant with Option Three. However, even if the timeframes of the mining right application and the rezoning application do not align, the mere fact that these processes are running concurrently will result in a significant reduction in the overall timeframe of obtaining these authorisations. If the administrative burden associated with implementing Options One or Two prove insurmountable, Option Three is a viable alternative to address lengthy and cumbersome application processes. It will provide significant relief to prospective mining companies frustrated with bureaucracy in the mining industry. Option Three can achieve this result without compromising the integrity of the constitutional allocation of powers to different spheres of government.[1470]

4. Legislative Shortcomings

In addition to the procedural changes proposed in Section 3 above, other legislative amendments will assist to facilitate greater process alignment and better co-operation between the DMR and planning authorities. These amendments have been highlighted throughout this thesis. This section serves as a summary of the proposed amendments. The summary is also illustrated in table format in Annexure 5.

Perhaps the most pressing legislative shortcoming is the absence of provisions in the MPRDA addressing co-operative government and intergovernmental relations.[1471]

[1469] See the discussion of the constitutional allocation of powers in Section 5 of Chapter 2 above.
[1470] See discussion in Section 5 of Chapter 2 above.
[1471] See discussion in Section 7.3 of Chapter 2.

This is untenable in an industry that impacts on the duties of so many different government departments.[1472] The establishment of Regional Mining Development and Environmental Committees is a promising proposal in this regard. [1473] The committees will consist of representatives from national, provincial and local government departments, each having expertise in mining and environmental matters.[1474] Once implemented, municipalities can use this valuable opportunity to provide input on the local context of proposed mining sites.

Another shortcoming of the MPRDA is the absence of prescribed consultation procedures.[1475] It also lacks provisions specifically addressing consultation with municipalities as interested and affected parties. These provisions should be tailored for municipal consultation, as municipal interests are clearly distinguishable from those of landowners, local communities or other interested and affected parties.[1476] Furthermore, the MPRDA should provide for mandatory written notice to the relevant municipality when the DMR receives a mining right application.[1477]

The MPRDA or regulations to the Act should give more details regarding alignment between a mining right applicant's social and labour plan and the municipality's integrated development plan.[1478] It should also clarify the DMR's role in facilitating such alignment, as well as the municipality's role in monitoring the implementation of the social and labour plan.

[1472] For example, the Departments of Mineral Resources, Environmental Affairs, Water and Sanitation, Rural Development and Land Reform, Human Settlements, Labour, Social Development, Economic Development, Trade and Industry, and Planning, Monitoring and Evaluation. These are all departments on national government level. Municipalities across the country should be added to this list.

[1473] Mineral and Petroleum Resources Development Amendment Bill B 15D—2013, cl 7. See discussion in Section 3.2 in Chapter 3 above.

[1474] 2013 Amendment Bill, cl 7.

[1475] Regulations dealing with consultation processes are envisaged in s 22 of the MPRDA. However, these regulations are not forthcoming. Instead, one has to rely on the Consultation Guidelines issued by the DMR. Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown). See discussion in Section 3 of Chapter 3 above.

[1476] See discussion in Section 3 of Chapter 3 above.

[1477] The option of such a notice is referred to in Department of Mineral Resources *Guideline for Consultation with Communities and Interested and Affected Parties – As Required in terms of Section 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the MPRDA* (date unknown) 5-6. However, it should be made mandatory in the provisions of the MPRDA or the regulations thereto.

[1478] See discussion in Section 4 of Chapter 3 above.

This thesis has also identified certain legislative shortcomings from a spatial-planning perspective. To date, the Minister of Rural Development and Land Reform has failed to prescribe norms and standards for land development across the country, as required in terms of SPLUMA.[1479] Criteria for the implementation of section 52 of SPLUMA are also not forthcoming.[1480] Section 52 requires rezoning applications that significantly affect land use for a purpose falling within the functional area of national government to be referred to the Minister of Rural Development and Land Reform.[1481] Chapter 7 above raised concerns regarding the constitutional validity of this provision.[1482] Similar concerns apply to SPLUMA's inroads into local government's authority over the functional area of "municipal planning".[1483]

5. Concluding Remarks: DMR and Municipal Co-operation

Interviews conducted with municipal officials during the case studies revealed the need for more constructive intergovernmental communication and processes that are better aligned.[1484] Government systems and processes are incompatible for the cross-sharing of information with counterparts in the DMR. This hampers effective co-operation and collaboration between the DMR and municipalities.

More effective intergovernmental collaboration will facilitate greater alignment between the policies of the DMR and municipalities. It is very inefficient to regard the application processes for a mining right and land use in complete isolation. A more cohesive approach is necessary.

However, as Section 3.1 above highlights,[1485] a completely integrated application process comes with its own challenges and pitfalls. Where one system must cater to multiple and diverging issues, it creates the risk that important, tailor-made provisions contained in individual pieces of legislation and policies give way in favour of more generally applicable provisions. This can easily deteriorate into the relaxation of

[1479] SPLUMA, s 8(1). See discussion in Section 3.2 of Chapter 4.
[1480] SPLUMA, s 52(6). These criteria should include the types of land development applications that are affected by these provisions. Section 54(1)(g) further states that the Minister may prescribe procedures for the lodging of applications contemplated in s 52. See discussion in Section 4.2 of Chapter 7 above.
[1481] SPLUMA, s 52(1)(c).
[1482] See Section 4.2 in Chapter 7 above.
[1483] SPLUMA, s 5(1)(c). See discussion in Section 2 of Chapter 4 above.
[1484] See fn 240 under Section 5.3 of Chapter 2 above.
[1485] Section 3.1 of Chapter 8.

requirements and standards. To combat this drift, it is imperative that each government institution retains legislative and executive authority over their respective constitutional powers – DMR over mining activities, and municipalities over land use issues.

A well-documented challenge is the lack of capacity at municipal level.[1486] However, the authority over land use planning for mining purposes should not be withheld from municipalities due to lack of capacity. As Christmas and De Visser point out: "[C]apacity cannot emerge without the granting of authority".[1487] Instead, where capacity is lacking, municipalities should receive support from national and provincial government.[1488] This support can take the form of financial and technical assistance and training.[1489]

As Chapter 2 highlights,[1490] the complex problems associated with poor intergovernmental relations cannot be addressed by increased capacity, better legal structures and improved procedures alone. Instead, to solve these problems, a political culture of co-operation between different spheres and departments of government is essential. It requires mutual trust and a willingness of government officials to co-operate with one another.

[1486] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 (CC) paras 26-27; *Executive Council, Western Cape v Minister of Provincial Affairs & Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of SA* 2000 1 SA 661 (CC) para 17; National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 45-46; National Planning Commission *Diagnostic Overview* (2011) 19, 24; Department of Cooperative Governance and Traditional Affairs *State of Local Government in South Africa: Overview Report* (2009) 4-5; De Visser *Developmental Local Government* 238-239; Bekink *Principles of South African Local Government Law* 284; Community Law Centre, University of the Western Cape *Paper I: Developmental Local Government: Determining Appropriate Functions and Powers* (06-2007) 18; Scheepers LA *An Institutional Capacity Model of Municipalities in South Africa* Doctor of Philosophy Thesis University of Stellenbosch (2015) 4; Meyer TC & Le Roux E "Capacity Building for Effective Municipal Environmental Management in South Africa" in Mander U, et al. (eds) *The Sustainable City IV: Urban Regeneration and Sustainability* (2006) 445 453; Christmas A & De Visser J "Bridging the Gap between Theory and Practice: Reviewing the Functions and Powers of Local Government in South Africa" (2009) 2 *Commonwealth Journal of Local Governance* 107 110; South African Cities Network *Sol Plaatje Municipality* 10; Sol Plaatje Municipality *Integrated Development Plan - IDP (2017 – 2022)* 7; Sol Plaatje Municipality *Integrated Development Plan: IDP Review 2017/18* 14, 15, 23.

[1487] Christmas & De Visser (2009) *Commonwealth Journal of Local Governance* 116. See also Community Law Centre, University of the Western Cape *Paper I: Developmental Local Government: Determining Appropriate Functions and Powers* 4, 11.

[1488] Constitution of the Republic of South Africa, 1996, s 154(1); SPLUMA, ss 9(2) & 10(5)-(6); National Planning Commission *National Development Plan 2030: Our Future - Make It Work* (2011) 410, 437; Department of Provincial and Local Government *The Intergovernmental Relations Audit: Towards a Culture of Co-operative Government* (1999) 7; De Visser J & Steytler N "Confronting the State of Local Government: The 2013 Constitutional Court Decisions" VI *Constitutional Court Review* 1 21; Humby (2013) *South African Journal on Human Rights* 665.

[1489] Section 40(1) of the Sol Plaatje By-Law; Laubscher et al *SPLUMA: A Practical Guide* 100, 110.

[1490] See Section 8 of Chapter 2 above.

In 1998, the White Paper on Local Government recognized that local government serves as a "point of integration and co-ordination for the programmes of other spheres of government".[1491] This is also true in the mining context. Municipalities play a crucial role in the establishing, managing and closing of mining operations. Unfortunately, this role is often undervalued. As the focus of this dissertation is on land use for mining purposes, the research is largely limited to the initial phases of establishing a mining operation. However, the municipality's role extends to further phases of mining projects, as alluded to above. Further research is necessary to determine the role of municipalities during the life of mining operations and during the mine closure phase. It is critical to understand the role of municipalities in the mining processes and in particular where their ability or inability to enforce and monitor legal compliance impacts on the lives of local communities.

"The goal, then, is not collaboration for its own sake, or at the expense of important policy interests. The goal is co-operation and collaboration as a means to achieve more coherent public policy and more effective service delivery."

Institute on Governance
Trampling the Turf: Enhancing Collaboration in the Public Service of Canada
(03-04-1996) 4.

[1491] Department of Constitutional Development *The White Paper on Local Government* (GN 423 in *GG* 18739 of 13-03-1998) xi. See also De Visser *Developmental Local Government* 219.

Annexure 1

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Dear Ms Van Schalkwyk

Re: Clearance Process for L0010/2016: "Managing the Relationship between Land Use Planning and Mining: Cooperative Government and the Mineral and Petroleum Resources Development Act"

Thank you for your application. The Faculty's Research Ethics Committee very much appreciates the considerable effort put into the documentation.

This study has been carefully considered and all ethical issues have been adequately addressed.

Ethics clearance is granted with effect from **08 June 2016 for 12 months** subject to renewal for another 12 months. Please note that any material changes to the proposal will need to be cleared as an amendment.

With best wishes,

pp
Associate Professor Julie Berg
RED: CHAIRPERSON

Annexure 1: Law Faculty Research Ethics Committee - Clearance (L0010/2016)

Annexure 2

Faculty of Law

Research Ethics Committee

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Dear Ms Van Schalkwyk

I am pleased to inform you that your request for an extension to your already cleared ethics application was reviewed by the committee and was thereto approved.

Please note, that renewal is with effect from **24 May 2017** for a period of 12 months only.

A reminder that any material changes to the proposal will need to be cleared as an amendment.

Reference number L0010/2016: "Managing the Relationship between Land Use Planning and Mining: Cooperative Government and the Mineral and Petroleum Resources Development Act"

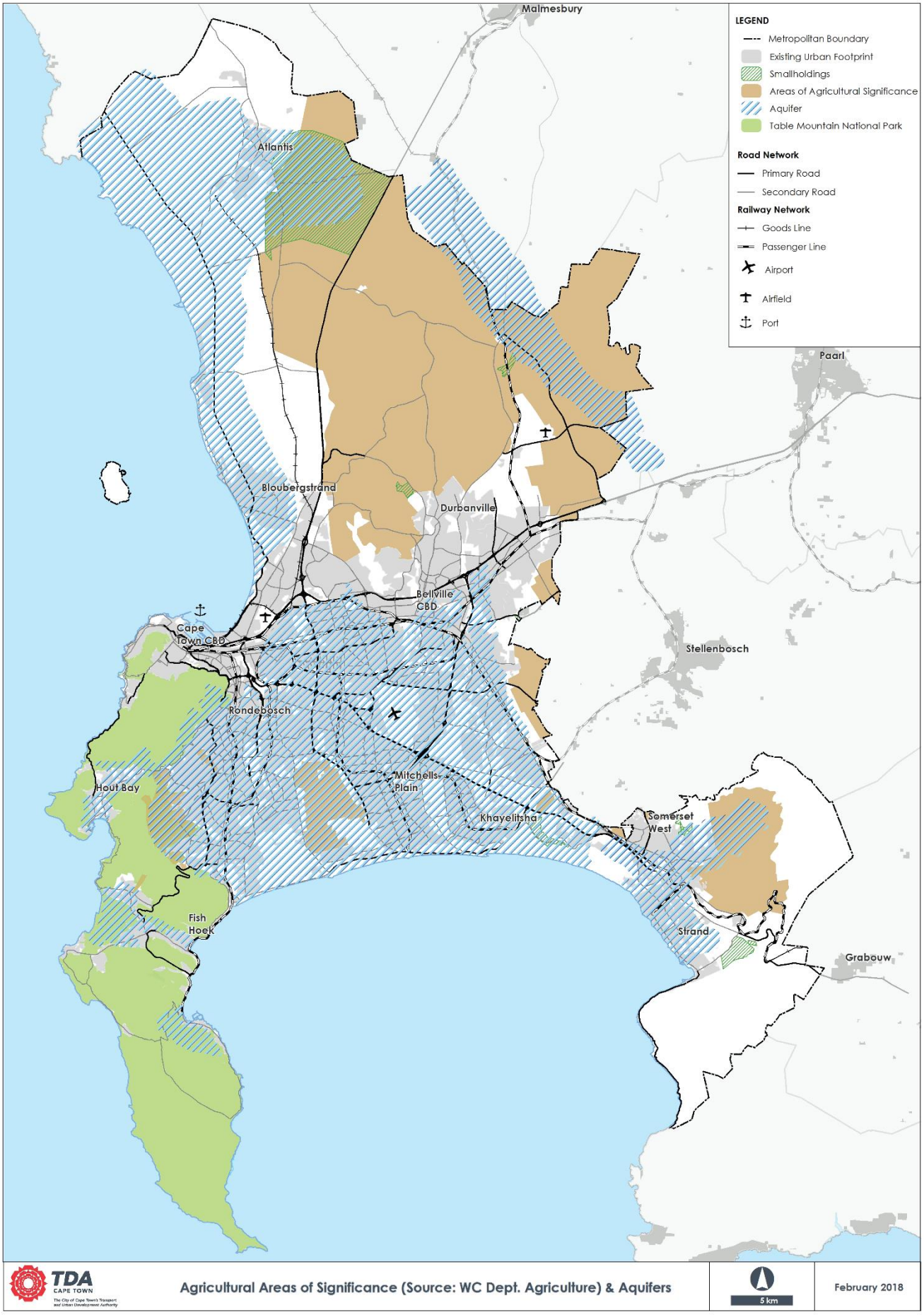
With best wishes,

pp

Associate Professor Julie Berg
REC: CHAIRPERSON

Annexure 2: Law Faculty Research Ethics Committee – Renewal (L0010/2016)

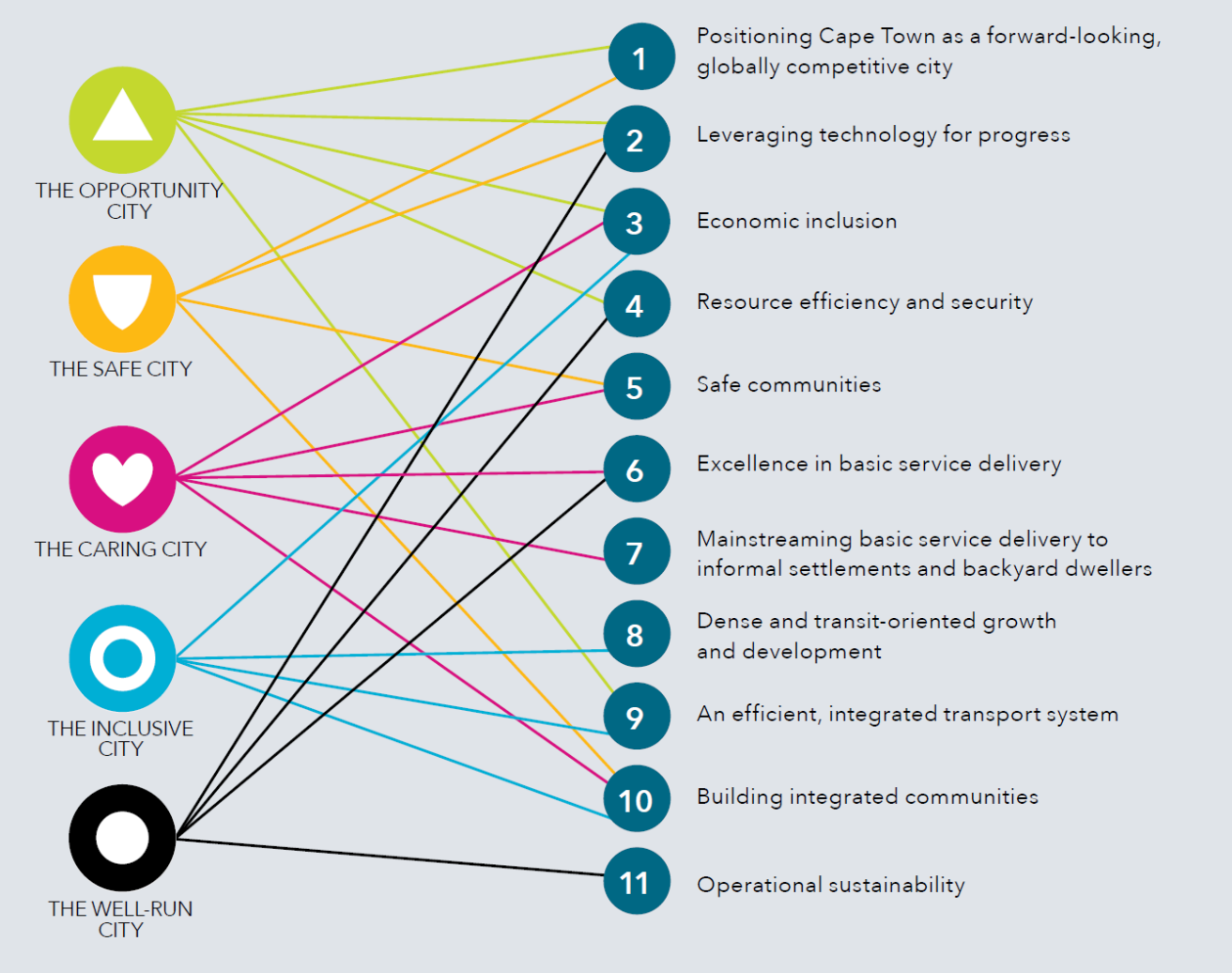
Annexure 3



Annexure 3: City of Cape Town - Agricultural Areas of Significance and Aquifers[1492]

[1492] Map 5c in City of Cape Town *Municipal Spatial Development Framework: Review 2017* (25-04-2018) 70.

Annexure 4



Annexure 4: Transversal Alignment Between Five Strategic Focus Areas and Eleven Priorities of the City of Cape Town's IDP[1493]

[1493] The City of Cape Town *Five-Year Integrated Development Plan (July 2017-June 2022)* 33.

Annexure 5

MPRDA Shortcomings	Proposed Changes
Lack of provisions relating to co-operative government / intergovernmental relations	Include specific provisions mandating consultation, co-operation and collaboration between DMR and other organs of state, especially municipalities
Lack of prescribed procedures for consultation between the applicant and interested and affected parties	MPRDA / regulations must prescribe the procedure for consultation with interested and affected parties
Lack of prescribed procedures for consultation between applicant and municipality	MPRDA / regulations must prescribe a tailor-made procedure for consultation with the municipality
No specific requirement of written notice to the municipality when the DMR receives an application for a mining right	Provide for compulsory written notice to the municipality when the DMR receives a mining right application
Lack of provisions detailing alignment between mining right applicant's social and labour plan (SLP) and the municipality's integrated development plan (IDP)	MPRDA / regulations must provide more detail on the alignment between the mining right applicant's SLP and the municipality's IDP
No provision relating to DMR's role in facilitating alignment between SLP and IDP	DMR's role in facilitating such alignment, as well as the municipality's role in monitoring the implementation of the social and labour plan.

SPLUMA Shortcomings	Proposed Changes
Lack of norms and standards for land development	Minister to prescribe norms and standards, as required in terms of s 8(1)
Lack of criteria for implementation of s 52 dealing with development applications that affect the national interest	Minister to prescribe criteria for the implementation of s 52, as required in terms of s 52(6)
Mandatory referral of certain land development applications to Minister (s 52) violates constitutional allocation of powers	Scope of s 52 should be limited to exclude applications that fall under the exclusive competence of local government
Limitation of the meaning of 'municipal planning' in s 5(1)(c) is at odds with interpretation by Constitutional Court in *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 4 SA 437 (CC) paras 18-19	S 5(1)(c) to be amended to align with Constitutional Court's interpretation of 'municipal planning'

Shortcomings of Sol Plaatje Local Municipality Land Use Management By-Law, 2015	Proposed Changes
Several drafting errors	See detailed comments in Section 3.2 of Chapter 5 (pp 116ff)
S 23(1)(j) states that the rezoning application must include proof that required authorisations in terms of other legislation have been obtained	To enable the rezoning application process to run in parallel with mining right application process, s 23(1)(j) should be amended to remove the requirement for proof that mining right has been awarded.

Shortcomings of uMhlathuze Spatial Planning and Land Use Management By-Law, 2017	Proposed Changes
Item 1(2) of Sch 5 states that, during the pre-application consultation phase, rezoning applicant must obtain approvals required from other organs of state, which may be necessary to determine the rezoning application	To enable the rezoning application process to run in parallel with mining right application process, Item 1(2) of Sch 5 should be amended to remove the requirement for proof that the applicant must first obtain a mining right

Annexure 5: Summary of Legislative Shortcomings and Proposed Changes[1494]

[1494] See more detailed discussion in Section 4 of Chapter 8 above.

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