For:

PROVINCIAL GOVERNMENT OF THE WESTERN CAPE

DEPARTMENT OF LOCAL GOVERNMENT

Re:

THE OVERSIGHT FUNCTION OF PROVINCES WITH REGARD TO LOCAL GOVERNMENT

OPINION

For:

State Attorney

Cape Town

(Mr L Golding)

GEOFF BUDLENDER SC

Chambers

Cape Town

22 June 2021

INTRODUCTION

1. Local government is an autonomous sphere of government, with its powers derived from the Constitution. Provinces however have an obligation to monitor, support and regulate municipalities in the manner set out in ss 154(1), 155(6) and 155(7) of the Constitution.

2. The relationship between provincial and local governments is further regulated by the various national statutes dealing with local government.

3. There are different views with regard to the extent to which municipalities are required to cooperate with, report to and provide information to provincial government. This has arisen particularly when members of the Provincial Parliament put questions to a Provincial Minister relating to local government matters or the affairs of a municipality, and the information required to answer the questions is not in the possession of the Provincial Government or Provincial Minister. Some municipalities have become unwilling to respond to such requests for information.

4. Further, the provincial Department of Local Government has prepared a framework to facilitate interface between a municipality and the province, to coordinate and align development priorities and objectives between different spheres of government and to align municipal integrated development plans with national and provincial development plans. A municipality has indicated that notwithstanding its obligation and willingness to cooperate with the province, a measure of separation of powers and autonomy must be

ensured. The municipality will therefore not necessarily follow the provincial framework if it does not suit the municipality.

5. I have been asked to advise on the following matters:

5.1. The relationship between local government and the provincial government is governed by legislation. Does the provincial government have an oversight power over local government that extends beyond what is specifically provided for in legislation (i.e. beyond monitoring, supporting and regulating, and submitting of reports as specifically provided for in legislation)? If so, what does such an oversight power entail?

5.2. Other than where legislation specifically requires municipalities to submit reports to provincial government on local government matters, are municipalities required to submit reports or information to, or account to, provincial government?

5.3. To what extent, if any, can the provincial government issue instructions to municipalities, and to what extent, if any, are municipalities required to comply with such instructions?

5.4. In what circumstances can the Provincial Minister for Local Government request municipalities to provide information required by the Provincial Minister to respond to a parliamentary question, and to what extent are municipalities obliged to provide such information?

5.5. Can the Provincial Parliament or any of its committees request or instruct a municipality (through one of its functionaries) to appear before it, and to what extent is the municipality (through its functionaries) obliged to comply with such request or instruction?

5.6. Does the Provincial Parliament or any of its committees have oversight power over local government, and if so, to what extent?

THE CONSTITUTIONAL FRAMEWORK

6. The framework for the relationship between provincial and local governments is determined by the Constitution.

7. A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.[1] The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.[2]

8. Section 155(6) however states that a provincial government must, by legislative or other measures,

> *(a) provide for the monitoring and support of local government in the province; and*

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[1] Section 151(3).
[2] Section 151(4).

(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

9. And s 155(7) provides that the national government (subject to s 44) and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Part B of Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in s 156(1).[3]

10. The foundational principle which underlies the structure of the Constitution in this regard has been explained as follows by the Constitutional Court:

> *[60] The Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision of government in which the sphere of local government is interdependent, 'inviolable and possesses the constitutional latitude within which to define and express its unique character' subject to constraints permissible under our Constitution. A municipality under the Constitution is not a mere creature of statute, otherwise moribund, save if imbued with power by provincial or national legislation. A municipality enjoys 'original' and constitutionally entrenched powers, functions, rights and duties that*

[3] Section 156(1) provides that a municipality has executive authority in respect of, and the right to administer, the local government matters listed in Schedule 4 Part B and Schedule 5 Part B, and any other matter assigned to it by national or provincial legislation.

may be qualified or constrained by law and only to the extent the Constitution permits.[4]

11. The Constitutional Court has explained the nature of the s 155(7) regulatory power of the national and provincial governments as follows:

> *[22] It follows that 'regulating' in s 155(7) means creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial governments in order 'to see to the effective performance by municipalities of their functions'. The constitutional scheme does not envisage the province employing appellate power over municipalities' exercise of their planning functions.*[5]

and

> *[34] At first blush this provision may be read as authorising the national and provincial spheres to exercise the executive authority of municipalities. But when carefully read it does not. What s 155(7) means is that the national and provincial spheres may exercise their legislative and executive powers to enable municipalities to exercise their own powers and perform their own functions. Therefore, the exercise of legislative and executive authority by these spheres is*

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[4] *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) at para [60].
[5] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) para [22].

limited to capacitating municipalities to manage their own affairs and regulating how this must be done. It does not mean that the national sphere may itself take over and exercise the executive authority of a municipality. [6]

12. In the first Certification judgment[7] the Court had to consider the extent and nature of the provincial power in respect of municipalities in the Constitutional text which had been approved by the Constitutional Assembly.[8] One of the challenges raised to the certification of the Constitution was that the powers and functions of the provinces were substantially less than and inferior to the powers and functions of the provinces in the interim Constitution.

13. The Court referred to s 139(2) of the text, which was headed *"Provincial supervision of local government"*, and dealt with the circumstances in which the provincial government could intervene in the affairs of a municipality.

14. The Court noted that

14.1. section 155(2)(b) of the text provided that provincial legislation could provide for the monitoring and support of local government in that province;

14.2. section 155(3)(a) granted a provincial government legislative and executive power *"to monitor the local government matters listed in Schedules 4 and 5"*; and

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[6] *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC) para [34].
[7] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,* 1996 (4) SA 744 (CC).
[8] The Constitutional text approved by the Constitutional Assembly. It could not come into effect unless and until the Constitutional Court had certified that it was consistent with the Constitutional Principles contained in the interim Constitution.

14.3. section 155(3)(b) granted provincial and national government the legislative and executive authority *"to see to the effective performance by municipalities of their functions in respect of those matters, by regulating the exercise of municipalities' executive authority"*.

15. The Court commented as follows in this regard:

> *[367] As we understand these provisions, they have the consequence that the ambit of provincial powers and functions in respect of local government is largely confined to the supervision, monitoring and support of municipalities.*

16. The Court then analysed those powers and functions as follows:

16.1. The provincial supervisory function was fully captured by s 139 of the text. In this context, *"supervision"* meant a process of provincial review of the actions of local government *"so as to measure the fulfilment by local government of executive obligations conferred by statute, and a process of implementation of corrective measures should [local government] fall short of this obligation"*. *"Supervision"* was utilised alongside *"intervene"* to designate the power of one level of government to intrude on the functional terrain of another. The active exercise of that power was made conditional on specific circumstances and was constrained by specific procedures.[9]

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[9] Para [370].

16.2. The Court explained the purpose and extent of the monitoring power: *"The monitoring power is more properly described as the antecedent or underlying power from which the provincial power to support, promote and supervise [local government] emerges. Textually, the word 'monitor' either appears alongside 'support' or is made subject to provisions in which the support, promotional and supervisory roles are adumbrated. In its various textual forms 'monitor' corresponds to 'observe', 'keep under review' and the like. In this sense it does not represent a substantial power in itself, certainly not a power to control [local government] affairs, but has reference to other, broader powers of supervision and control."*[10]

16.3. Importantly, for present purposes, is the extent of the monitoring power: *"We do not interpret the monitoring power as bestowing additional or residual powers of provincial intrusion on the domain of [local government], beyond perhaps the power to measure or test at intervals [local government] compliance with national and provincial legislative directives or with the [constitutional text]itself."*[11]

16.4. The constitutional text sought to realise a structure for local government that on the one hand revealed a concern for the autonomy and integrity of local government, and prescribed a hands-off relationship between local and other levels of government; and on the other, acknowledged the requirement that higher levels of government monitor local government functioning and intervene where such

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[10] Para [372].
[11] Para [373].

functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands-on component of the relationship.[12]

17. Those observations continue to apply to the Constitution in the form in which it was finally adopted. I note in this regard that the Constitution as finally adopted no longer refers in s 139 to provincial *"supervision"* of local government, as the text did; it now refers to provincial *"intervention"* in local government. The word *"supervision"* no longer appears.

18. In *City of Cape Town v Premier, Western Cape and Others*,[13] a Full Bench of the Cape Provincial Division (consisting of two Judges from outside the province for the purposes of this particular case) held that one of the manners in which the Provincial Government of the Western Cape exercises its monitoring, support and oversight powers over the City is by exercising its powers under s 106(1) of the Local Government: Municipal Systems Act[14] which empowers the MEC to question or investigate *"maladministration, fraud, corruption or other serious malpractice"*. That power does not, however, exhaust the provincial monitoring powers.[15]

19. Against that background, I now turn to the specific questions on which I have been asked to advise.

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[12] Para [373].
[13] 2008 (6) SA 345 (C).
[14] Act 32 of 2000.
[15] Para [52].

THE SPECIFIC QUESTIONS

The nature of the oversight power of a provincial government

20. As the Constitutional Court made clear in the passages in the Certification judgment which I have quoted above, the monitoring power creates the mechanism through which the province is to exercise its supervisory power and function. The supervisory function is fully captured by s 139 of the Constitution.

21. The monitoring and oversight power enables the province to measure or assess a municipality's compliance with national and provincial legislative directives or with the Constitution itself, which in turn enables the province to decide whether to undertake a s 139 intervention, and if so, what form that intervention should take.

22. It follows that the province does not have a generalised oversight power. The monitoring and oversight functions of the province are directed to enabling a provincial government to carry out the supporting, promoting and supervisory functions set out in the Constitution, and to determine compliance by local government with its executive obligations in terms of the Constitution itself or in terms of national provincial legislation which is authorised by the Constitution.

23. A provincial government does not have a generalised oversight role over local government that extends beyond what is specifically provided for in s 139 of the Constitution or other legislation. The Constitution takes, as its starting point, a concern for the autonomy and integrity of local governments.

The obligation of municipalities to submit reports to provincial governments on local government matters

24. Municipalities may be required to submit reports or information to provincial governments in two circumstances:

24.1. The first circumstance is where the reports are necessary to enable the provincial government to perform the monitoring and supervisory function which I have described above. National and provincial governments are entitled to require information to enable them to *"measure or test at intervals compliance with national and provincial legislative directives"*.[16]

24.2. The second circumstance is where competent national or provincial legislation requires it. This is usually in order to enable the national and provincial spheres to carry out their own functions effectively. An obvious example here is the need for provincial governments to provide National Treasury with relevant financial information. As is noted in my instructions, the Local Government: Municipal Structures Act 117 of 1998, The Local Government: Municipal Systems Act 32 of 2000 and the Local Government Municipal Finance Management Act 56 of 2003 all require municipalities to submit reports to provincial government on specified matters.

25. There is no general obligation on municipalities, outside these circumstances. to provide reports to provinces, or to account to provinces.

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[16] Certification judgment para [373].

The issuing of instructions by provincial government to municipalities

26. As I have noted, the foundation of the constitutional relationship between local government and the other two spheres of government is respect for the autonomy and integrity of local government. This however does not mean a totally hands-off approach. The Constitution recognises the need for monitoring, supervision and intervention in appropriate circumstances.

27. Provincial government only has the power to issue instructions to local government to the extent that this is provided in legislation, usually where it is needed for the performance of its own constitutional functions. One of those functions is monitoring and intervention, as I have described.

28. There is no general power on the part of provinces to issue instructions to municipalities. Where such a power is alleged, it must be located in the Constitution or in national or provincial legislation. The power is very limited.

29. This does not mean that local government is not under an obligation to cooperate with provincial government. Chapter 3 of the Constitution deals with Cooperative Government. It records that the government is constituted as national, provincial and local spheres of governments *"which are distinctive, interdependent and inter-related"*.[17] All spheres of government must observe and adhere to the principles in Chapter 3 of the

[17] Section 40(1).

Constitution, and must conduct their activities within the parameters provided by that Chapter.[18]

30. The principles of cooperative government and inter-governmental relations include that all spheres of government, and all organs of state within each sphere, must:

30.1. respect the constitutional status, institutions, powers and functions of government in the other spheres;[19]

30.2. 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;[20]

30.3. cooperate with one another in mutual trust and good faith, *inter alia* by assisting and supporting one another;[21]

30.4. inform one another of, and consult one another on, matters of common interest;[22] and

30.5. coordinate their actions and legislation with one another.[23]

31. The manner of giving effect to this is not through the issuing of unilateral instructions by one sphere to another. It is through processes of cooperation. If an organ of state in a

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[18] Section 40(2).
[19] Section 41(1)(e).
[20] Section 41(1)(g).
[21] Section 41(1)(h)(ii).
[22] Section 41(1)(h)(iii).
[23] Section 41(h)(iv).

sphere of government does not act in the cooperative manner required by s 41 of the Constitution, the remedy of the other sphere of government is not to issue an instruction: it is to initiate the dispute resolution processes which are provided for in the Intergovernmental Relations Framework Act 13 of 2005.

32. In my opinion, it is inconsistent with the notion of cooperative government for an organ of state in one sphere to issue an *"instruction"* to an organ of state in another sphere of government, unless that is authorised by the Constitution or by competent legislation.

Information required to enable the Provincial Minister to respond to a parliamentary question

33. The Provincial Minister is, from time to time, asked questions in the Provincial Parliament relating to a municipality or municipalities. The question is how he should respond to them.

34. The starting point is to recognise that the Minister is not required to collect and maintain comprehensive information as to the activities of each of the municipalities in the province. The Minister can reasonably be expected to collect and retain information which national or provincial legislation requires municipalities to provide to the province. For the rest, the information the Minister may collect is information to enable the province to *"measure or test at intervals compliance"* with national and provincial legislative directives or with the Constitutional itself.[24]

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[24] *Certification* judgment para [373].

35. In order for the Provincial Minister and the Provincial Government to decide whether to initiate a provincial intervention in a municipality in terms of s 139 of the Constitution, they must of course have information as to whether the municipality in question *"cannot or does not fulfil an executive obligation in terms of the Constitution or legislation"*.[25] This does not mean that the Provincial Minister can or must keep a running tally of what each municipality has done and is doing in order to fulfil each of its executive obligations in terms of the Constitution or legislation. That would go way beyond the function of the Provincial Government. However, where there is or may be reason to believe that a municipality is not fulfilling an executive obligation in terms of the Constitution or legislation, the Provincial Minister may enquire into whether that is indeed the case, request the relevant information from the municipality, and then consider whether an intervention should be initiated, and if so, what the nature of that intervention should be.

36. It follows that the Provincial Minister has no general and continuing duty to collect information in respect of all municipalities and their performance of all of their obligations.

37. Where a member of the Provincial Parliament asks a question in Parliament and the Provincial Minister does not have the relevant information, it is open to him or her to answer that the Provincial Government does not have this information and that it may be requested from the municipality. Alternatively, the Provincial Minister may choose to request it from the municipality concerned, explaining that this has been requested by a member of the Provincial Parliament.

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[25] Section 139(1).

38. Where a municipality receives such a request for information from the Provincial Minister, it is not under an obligation to provide the information.

39. Members of the Executive Council of a province are accountable collectively and individually to the legislature for the exercise of their *"powers"* and the performance of their *"functions"*.[26] It is not a *"function"* of a Provincial Minister to keep a comprehensive record of the activities of each municipality. As explained by the Constitutional Court in the first Certification judgment, it is not within the *"power"* of the province or the Provincial Minister to do so. No obligation to collect and maintain comprehensive records of this kind can be inferred from the fact that the province has the power to intervene in terms of s 139 when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation.

40. Mayors and Municipal Managers are accountable to the Municipal Council for the exercise of their duties. Municipal Councils are accountable to their electorate for the exercise of their duties. None of them has a general duty of accountability to the province or to the Provincial Parliament.

Requiring functionaries of a municipality to appear before the Provincial Parliament or one of its committees

41. A Provincial Parliament has two functions: a legislative function and an oversight function.

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[26] Section 133(2).

42. The legislative authority of a provincial legislature exists in the power to pass or amend a provincial constitution; and to pass legislation with regard to any matter within a functional area listed in Schedule 4 or 5, any matter outside those functional areas that is expressly assigned to the province by national legislation, and any matter for which the provincial constitution envisages the enactment of provincial legislation.[27]

43. In addition, a provincial legislature may recommend to the National Assembly legislation concerning any matter outside the authority of that legislature, or in respect of which an Act of Parliament prevails over a provincial law.[28] This power is related to the legislative function. It is potentially very wide in its scope, because it is not limited to functional areas in respect of which the province has constitutional competence.

44. In the exercise of its oversight functions, a provincial legislature must provide for mechanisms to ensure that all provincial executive organs of state in the province are accountable to it;[29] and to maintain oversight of the exercise of provincial executive authority in the province, including the implementation of legislation, and any provincial organ of state.[30]

45. It follows that the oversight function of a provincial legislature is limited to matters falling within the powers of provincial executive authority and provincial organs of state. It has no oversight function in respect of the exercise of national executive authority, or national organs of state.

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[27] Section 104(1).
[28] Section 104(5).
[29] Section 114(2)(a).
[30] Section 114(2).

46. The same approach applies in general to provincial oversight in respect of municipalities. Subject to the provisions of the Constitution or national or provincial legislation with regard to oversight, which I have discussed above, a provincial legislature has no oversight function in respect of the exercise of municipal executive authority in the province, or a municipal organ of state.

47. Section 115 of the Constitution creates a mechanism through which provincial legislatures may obtain information. A provincial legislature or any of its committees may –

> *"(a) summon <u>any</u> person to appear before it to give evidence on oath or affirmation, or to produce documents;*
>
> *(b) require <u>any</u> person or provincial institution to report to it;*
>
> *(c) compel, in terms of provincial legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and*
>
> *(d) receive petitions, representations or submissions from any interested persons or institutions".*[31]

48. I have emphasised the word *"any"*, to stress the wide ambit of this power.

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[31] Section 115.

49. The s 115 power is, however, not unlimited. The power is conferred upon provincial legislatures and their committees in order to enable them to perform their constitutional functions. If the power is used for a different purpose, it is used for a purpose other than that for which it was conferred, and the purported exercise of the power is liable to be set aside by a court.

50. The power is thus limited to matters which are related to the functions of the provincial legislature. Thus, for example, I do not think a provincial legislature could summon the Minister of Defence to appear before it or one of its committees and answer questions and provide information with regard to defence matters, unless they impinged on the exercise of provincial executive authority in the province or by a provincial organ of state, or were a national matter on which the provincial legislature or its committee was considering making a recommendation to the National Assembly. For the same reason, the power does not extend to enquiries into the private affairs of individuals in the province, which are unrelated to the legislative or executive oversight functions of the provincial legislature. And by the same logic, the power does not apply to a functionary of a municipality in relation to a matter which falls outside the legislative or executive oversight functions of the provincial legislature.

51. I would emphasise that, in my opinion, a court will not lightly intervene to set aside the purported exercise of that power by a provincial legislature or one of its committees. However, where the purported exercise of the power is challenged, the provincial legislature or its committee will have to explain why that information was required to enable the provincial legislature to perform its legislative or oversight function.

Does the Provincial Parliament or any of its committees have oversight power over local government?

52. It follows from what I have said above that the Provincial Parliament and its committees do not have a general oversight function over local government. Their power is limited to matters which fall within their oversight function described in s 114(2)(b), namely to maintain oversight of the exercise of provincial executive authority in the province, including the implementation of legislation; and any provincial organ of state.

53. It is conceivable that the Provincial Parliament or one of its committees might wish to obtain information from a municipality in order to enable it to determine whether the Provincial Government or the Provincial Minister have satisfactorily exercised their power to carry out an intervention in terms of s 139 of the Constitution. The purpose of such an enquiry would be to carry out oversight of the exercise of provincial executive authority. One of the means of investigating this would be to consider the facts with regard to a particular municipality, which might justify or require a provincial intervention in terms of s 139 of the Constitution.

54. The committee could legitimately request the municipality to provide the relevant information in this regard. If it failed to provide the information, its functionaries could be required to appear before the relevant committee to do so.

Coordination and co-operation with regard to planning

55. Finally, I comment on the question of co-ordination and co-operation with regard to planning, which is raised in my instructions although no specific question is asked in this regard.

56. Municipal planning is a local government function listed in Schedule 4 Part B of the Constitution. This means that a municipality has executive authority in respect of, and the right to administer, municipal planning. A provincial government has competence in respect of municipal planning *"to the extent set out in s 155(6)(a) and (7)"*. This refers to the monitoring, support and oversight functions, and also to the power to see to the effective performance by municipalities of this function, by regulating the exercise by municipalities of their executive authority referred to in s 156(1). As I have noted, the exercise of legislative and executive authority by provinces in this regard is limited to capacitating municipalities to manage their own affairs and regulating how this must be done. It does not mean that a province may itself take over and exercise the executive authority of a municipality.

57. To the extent that there is overlap between municipal and provincial planning, two points need to be made:

57.1. First, the Constitutional Court has made clear that the functions are different. The Court has held that while the Constitution confers planning responsibilities on each

of the spheres of government, those are different planning responsibilities, based on *"what is appropriate to each sphere"*.[32]

57.2. Second, any overlap of functions is to be dealt with as follows:

> *[35] The construction that was adopted by the court below and by Rabie J, and that was advanced before us by counsel for the respondents, all proceed by inferential reasoning from the proposition that the functions with which we are now concerned are embraced by the concept of 'development' (a functional area that falls within the concurrent legislative authority of national and provincial government) and thus, by inference, fall to be excluded from the functional area 'municipal planning'. That line of reasoning seems to me to approach the matter the wrong way round.*
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> *[36] It is to be expected that the powers that are vested in government at national level will be described in the broadest of terms, that the powers that are vested in provincial government will be expressed in narrower terms, and that the powers that are vested in municipalities will be expressed in the narrowest terms of all. To reason inferentially with the broader expression as the starting point is bound to denude the narrower expression of any meaning and by so doing to invert the clear constitutional intention of devolving powers on local government.*[33]

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[32] *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC), para [46].

[33] *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (2) SA 554 (SCA). The Constitutional Court endorsed this approach in *Habitat Council* (footnote 5 above) at para [13] fn 19.

58. The correct approach in determining the ambit of the functional areas of the respective spheres is therefore first to determine the powers vested in municipalities: both the national and provincial powers exclude the powers listed in Schedule 4 Part B, which have already been *"carved out"* for municipalities.

59. Thus, where a matter falls within the scope of *"municipal planning"*, the function of municipalities in this regard is not reduced by the fact that *"planning"* functions also fall within the scope of provincial governments. A municipality is entitled to take the position that while it will cooperate with the province in the coordination and alignment of planning, there is a measure of constitutional separation of powers and autonomy. A municipality will therefore not be legally obliged to follow the provincial framework if it impinges on the municipality's exercise of its municipal planning function.

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