

RHIZOME MANAGEMENT SERVICES



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REPUBLIC OF SOUTH AFRICA

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Land Use Management Bill Regulatory Impact Review Process: Background Technical Assignments

Development Facilitation Act (DFA) Review

Final Presentation to the Reference Group

07 March 2010

Version 1.0

Contents

- 1. Background & Terms of Reference**
2. Project Approach
3. Background to the Introduction of the DFA
4. Establishment and Utilisation of the DFA
5. Assessing the DFA
6. Conclusions

Background

Land Use Management Bill Regulatory Impact Review

- The **Presidency**, the **Second Economy Strategy Project (TIPS)** and **Urban LandMark** has been supporting a Regulatory Impact Assessment process in respect of the Land Use Management Bill.
- In September 2008, the Land Use Management Bill was withdrawn by the South African Parliament, thus removing the need for an immediate Regulatory Impact Assessment
- The work was refocused to provide a resource document and roadmap for an interdepartmental **Reference Group** that will provide leadership to a process of drafting new land use management legislation within a bigger process of re-imagining the planning system as a whole.
- The Reference Group recommended that a number of technical assignments be undertaken as soon as possible – one of which was a **review of the Development Facilitation Act**
- Accordingly a project team comprising Rhizome Management Services, Gemey Abrahams and Ivan Pauw and Partners was appointed to undertake the work.

Terms of Reference (1/2)

The purpose of the assignment was to undertake a review of the Development Facilitation Act (DFA) including an assessment of its effectiveness and key concerns as well as the formulation of policy implications and reform recommendations.

More specifically the study aimed at understanding...

1. **Levels of adoption and key concerns** relating to the adoption of the DFA from the perspective of various role players including government, the private sector and NGOs.
2. The **administrative requirements/costs** or otherwise imposed on municipalities and provinces.
3. An **assessment of key conflicts between the DFA and Ordinances** as well as the impact of the arbitrage opportunities created through the dual approach.
4. The **developmental outcomes of the DFA** in particular with respect to housing and related social outcomes in particular its impact on spatial patterns and integration issues.
5. An **assessment of the original legislative intentions against current practice** and outcomes since 1995 including an assessment of any negative economic and / or social impacts noted.

Terms of Reference (2/2)

In undertaking the research we also explored a range of views in respect of ...

- a) **Understanding the origins and context of the DFA:** what were its initial intentions given the circumstances at the time
- b) **What are respondents overall impression of the DFA's performance:** a general off-the-cuff upfront impression
- c) **Legal aspects/provisions in the DFA:** explore and note any specific provisions in law that work well, are unique, meet needs of new South Africa (usually take respondent through chapter by chapter to get their responses)
- d) **Procedural aspects of the DFA:** explore the procedural routes and requirements of the DFA and get an understanding of what works well and what is not. Understanding whether these are inherent in the DFA or applicable to other legislation too.
- e) **Financial aspects:** try to get inputs on actual costs of a DFA applicant, over its whole process, for different actors. Try to get an understanding of how this would compare with other legislation.
- f) **Social and developmental outcomes:** to enquire from respondents whether they felt that the DFA has any impact on transforming the development arena. Has it promoted integration and alignment, has it contributed to improving lives and added value to the economy. Has the DFA developmental paradigm even been understood?
- g) **Conclusions and recommendations:** respondents were asked about the DFA in the current land use management context and whether the DFA or parts of it are worth retaining, amending or repealing.

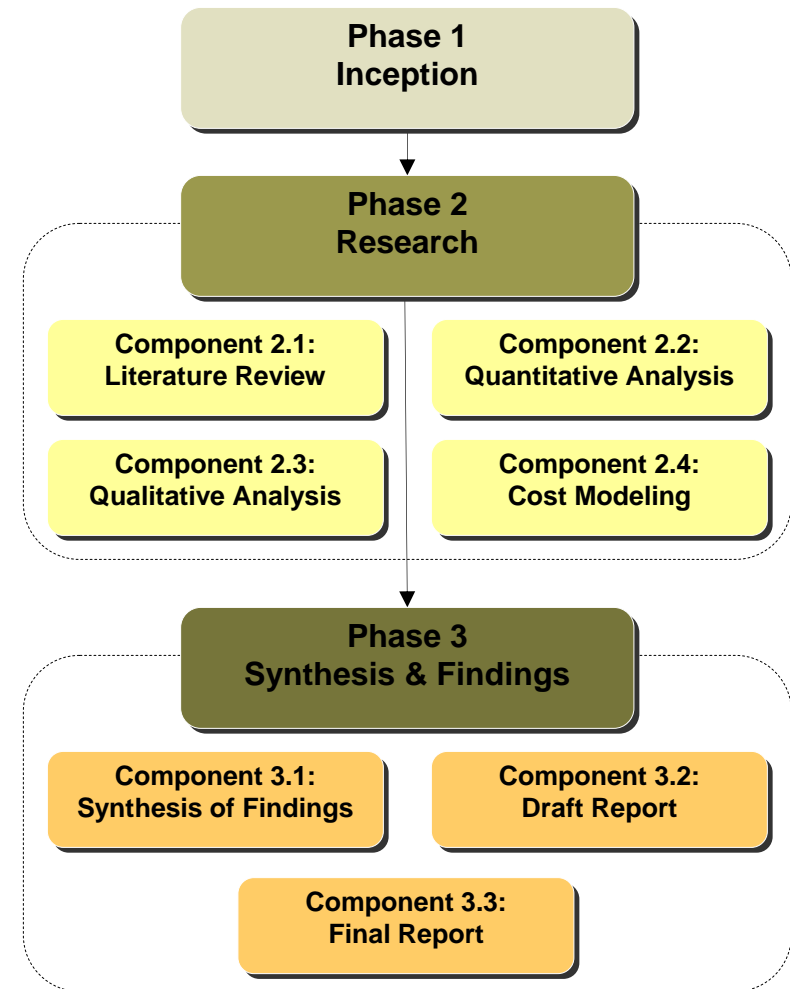
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Project Approach Overview

The overall approach comprises three phases of work ...

- Phase 1: Inception – *completed*
- Phase 2: Research – *completed* – includes:
 - Literature review
 - Quantitative analysis
 - Qualitative analysis
 - Cost modelling*
- Phase 3: Synthesis & Findings – *underway* – includes:
 - Synthesis of findings
 - Draft report
 - Final report



* Limited – see discussion further below

Project Status

Interviews

A total of 67 people and some 28 different organisations have been interviewed....

- Original drafting team
 - Gauteng (Tribunal and Officials)
 - KwaZulu-Natal (Tribunal and Officials)
 - North West (Tribunal and Officials)
 - Limpopo (Tribunal and Officials)
 - Mpumalanga (Tribunal and Officials)
 - Department of Rural Development & Land Reform
 - National Treasury
 - Department of Environmental Affairs
 - Department of Human Settlements
 - Department of Agriculture
 - Department of Cooperative Governance & Traditional Affairs
 - Chief Surveyor General
 - Registrar of Deeds
 - Gauteng Department of Housing
 - Gauteng Department Agriculture, Conservation and Environment
 - Gauteng Department of Economic Development
 - KwaZulu-Natal Department of Transport
 - City of Tshwane
 - City of Johannesburg Metropolitan Municipality
 - eThekweni Metropolitan Municipality
 - eThekweni Transport Authority
 - SALGA
 - SAPOA
 - Private sector professionals
- Interview not secured:*
- Eastern Cape

Data Review

Obtaining data in respect of applications as well as costs has been challenging ...

- Limited data available of varying quality
- No systems appear to exist (with exception of KZN) to track applications electronically – general paper-based / manual
 - Eastern Cape
 - Data set from 1999 to 2009
 - Gauteng
 - Data set from 1999 to 2009
 - KwaZulu Natal
 - Data set 1998 to 2009
 - Limpopo
 - Data set for 2006 & 2008 only
 - Mpumalanga
 - Data set for 2000 to 2009, excluding 2005, 2007 & 2008
 - North West
 - Data set from 2002 to 2009
 - Records pre-2002 were in Mafikeng and hand-over to Potchefstroom was incomplete
- Data has been collected in the period October – November 2009. Many provinces have been conducting Tribunals to process current applications and address backlogs in the same period, the results of which are not included in these data sets and analysis.

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Background to the Introduction of the DFA

Background

Purpose of the Development Facilitation Act 67 of 1995 ...

- To introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land.

The Act comprises eight chapters:

- Chapter 1: Sets out **general principles for land development and conflict resolution**
- Chapter 2: Sets out the functions and operating procedures for the **Development and Planning Commission**
- Chapter 3: Sets out the functions and operating procedures for the **Development Tribunals**
- Chapter 4: Sets out the body responsible, subject matter and effect of the **land development objectives**
- Chapter 5: Outlines the **land development procedures excluding** procedures relating to the development of **small scale farming**
- Chapter 6: Outlines the **land development procedures including** procedures relating to the **development of small scale farming**
- Chapter 7: Covers **land tenure matters**
- Chapter 8 : Covers **general provisions**

Background to the Introduction of the DFA

Intentions behind the legislation and continued relevance

The DFA was developed as interim legislation in a specific period of SA history to address a specific purpose ...

In 1994, democratic SA state inherited a set of land use management procedures that reflected the priorities of apartheid spatial planning:

- Apartheid cities that reflected **racially based planning** and were based on a political economy in which development for some occurred at the expense of the majority
- Land use management characterised with a **high degree of legal and procedural complexity** (ordinances, LEFTE etc) – different laws and different decision making structures and procedures
- The **interim Constitution** came into being whereby laws that were in place continued to apply in respect of their original areas of application – subject to repeal or amendment. This led to extraordinarily complex results .



Background to the Introduction of the DFA

Intentions behind the legislation and continued relevance

The jurisdictional and institutional complexity was detrimental to reconstruction and development ...

- With the introduction of the RDP and new housing policy there was a need for:
 - Urgent, short term development solutions
 - Common procedures which could apply nationally
 - Fast track processes to expedite development
 - Principles that would guide the future direction of land development administration, policy and law

- Accordingly the DFA was developed:
 - A number of national government departments cooperated
 - 2 year process
 - Strong link with the National Housing Forum

Background to the Introduction of the DFA

Intentions behind the legislation and continued relevance

Key Issues & Lessons to Note ...

- The reasons behind the DFA relate to the broader complexity:
 - Cutting through complex mosaic of old laws where these still apply and frustrate development, having something strong while apartheid development laws being repealed.
 - Was not only about RDP housing ...
- ***But does that complexity still exist today? Yes and exacerbated by the poor capacity in municipalities.***

So, DFA reminds us that:

- there are some areas (former homelands) where there is no other legislation applicable
- at times and under certain circumstances we do need to uplift legislation to effect development (Act 70 of 70)
- municipal capacity is weak outside of metros and large cities so what is needed to bring investment into these areas
- it was interim but never updated or aligned to new constitution – does this still apply?

Background to the Introduction of the DFA

Conclusions

- **The overall purpose of the DFA was to have in place a strong piece of legislation that would facilitate development, while apartheid development laws were being repealed.** With local governments undergoing major transformation from illegitimacy, decision-making needed to be independent.
- **Importantly the primary legislative intent of the DFA was not only low-income / RDP housing development as is often claimed.** Instead the legislation aimed at providing a more rational and uniform basis for land use management and decision making within a context of conflicting laws and limited municipal capacity. The primary intent was development in its broadest sense.
- The findings of the literature review as well as the research undertaken during this assignment suggest that **the complexity that the DFA was developed to address, still exists today and is further exacerbated by poor capacity in municipalities** to plan for and take decisions around land development. **An argument could be made that given weak municipal capacity outside of metropolitan areas and large cities, the DFA (or similar legislation) is still needed to bring investment into these areas.**

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Establishment and Utilisation of the DFA

Establishment of the DFA

DFA has been implemented nationally but not all provinces and municipalities are applying it and some components are no longer relevant

...

- Tribunals and procedures
 - 22 December 1995 DFA came into operation
 - Gauteng Development Tribunal established and first hearing held July 1997
 - Tribunals for KwaZulu Natal, Limpopo, Mpumalanga and North West established
 - Eastern Cape in 2005
 - No tribunals established in Western Cape, Northern Cape and Free State
 - 30 August 2000 Regulations came into force
 - Acceptance by Municipalities variable
- Development and planning commissions
 - National Development and Planning Commission established in September 1997
 - Drafted Green Paper on planning
 - Closed on 31 March 2000
 - KZN established provincial Development and Planning Commission which is still operational
- Land development objectives
 - All municipalities are required to develop LDOs - this has occurred in some municipalities
 - Now replaced by IDPs - this creates some confusion

Provinces using the DFA:

- 1. Eastern Cape**
- 2. Gauteng**
- 3. KwaZulu-Natal**
- 4. Limpopo**
- 5. Mpumalanga**
- 6. North West**

Establishment and Utilisation of the DFA

Acceptance of the DFA

Acceptance of the DFA within Municipalities is variable and in some cases is being challenged ... for example a study of five metropolitan and large cities in South Africa found that only three entertain the DFA and within these the following applies

- **City of Johannesburg (COJ):**

- Majority of the town planning applications to the CoJ are dealt with in terms of the Town Planning and Townships Ordinance (1985), and the remainder are processed in terms of either the Less Formal Townships Establishment Act (LFTEA, 1991) or the DFA, 1995
- Typically LFTEA has been used in applications for subsidised low-income housing projects, and the DFA for large-scale private developments.
- Main impact of the DFA applications has been the provision of sprawling residential developments on the outskirts of the urban area with little concern for related services and facilities or the carrying capacity of existing infrastructure networks
- Until recently ongoing municipal institutional restructuring resulted in chaotic and burdensome bureaucratic procedures, and as a result developers turned to the DFA procedures as it offered an easier alternative to hasten the approval process of their development applications – circumvented policies ... meant that many of the City's major land decisions have been taken by the Gauteng Planning Tribunal.
- CoJ is currently challenging the DFA's authority over the municipal competence of land use management in a landmark court case

Establishment and Utilisation of the DFA

Acceptance of the DFA

For example a study of five metropolitan and large cities in South Africa found that only three entertain the DFA and within these the following applies

- **eThekwini:**

- LFTEA is most commonly used for low income housing although it is regarded as time consuming while the DFA is used on more complex projects with objections.
- However, the city has a court case pending against the constitutionality of the DFA which is often preferred by private developers. The KZN Town Planning Ordinance no. 27 of 1949 is used in infill projects where there are town planning schemes.

- **Buffalo City:** Remains dependent upon pre 1994 legislation - five core pieces are implemented

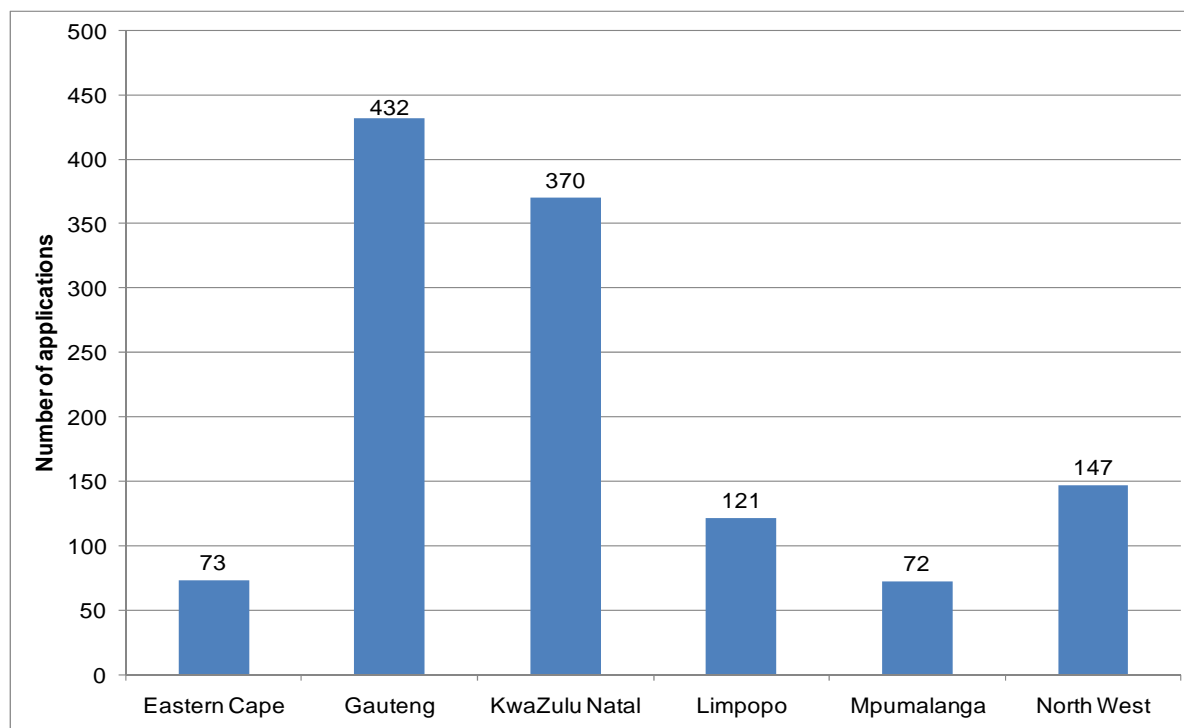
- LFTEA 113 of 1991, which is dominant for low income housing
- Black Communities Development Act 4 of 1984 Regulation 1897
- Development Facilitation Act
- Proclamation 293
- Cape Land Use Planning Ordinance 15 of 1985 (LUPO)
- Ciskei Land Use regulation Act 15 of 1987

Establishment and Utilisation of the DFA

National DFA Utilisation

On the basis of an extrapolation from the available data, an estimated 1200 to 1500 applications have been submitted to DFA Tribunals across the country since 1997. (The data collected and shown in the graph below only accounts for 1183 of these applications.)

- The most active provinces have been Gauteng and KwaZulu-Natal and more recently North West province.
- Notable is the sharp increase in DFA utilisation in the last two to three years - appears that part of the reason is the increasing difficulty of securing applications through weak and under-capacitated municipalities.



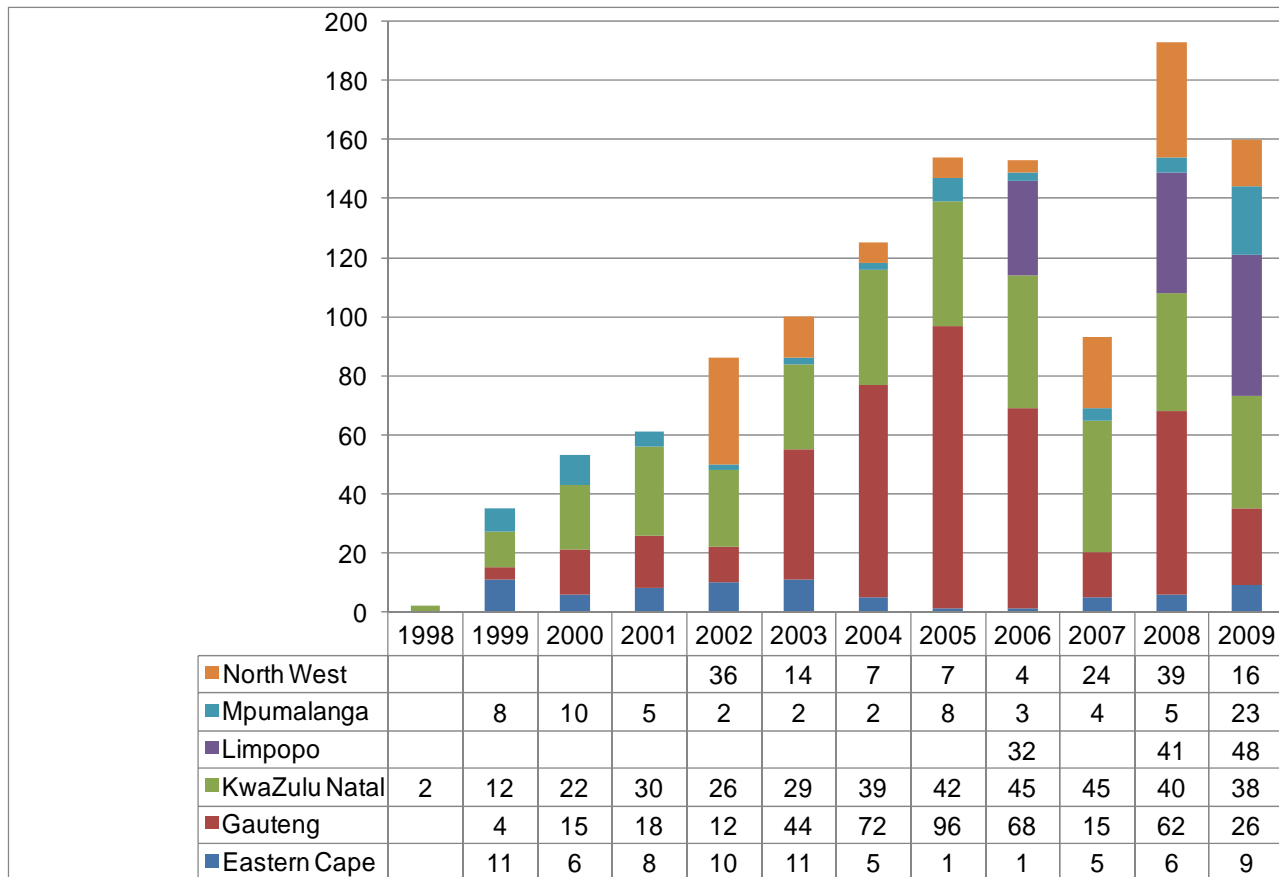
Total number of DFA applications Processed 1998 – 2009*

* Note: Limpopo data includes only 2006 & 2008 applications; Mpumalanga data for 2005, 2007 and 2008 are incomplete

Establishment and Utilisation of the DFA

National DFA Utilisation

- The general trend indicates an increasing number of applications each year.
- There was a slight dip in 2006 caused mainly by a decrease in applications in Gauteng. This was due to the City of Johannesburg embarking on a court case against the Gauteng Development Tribunal “(GDT) and developers fearing that their applications would not be processed. This trend continued into 2007 and was exacerbated by a hiatus in the re-appointment of Tribunal members in Gauteng.

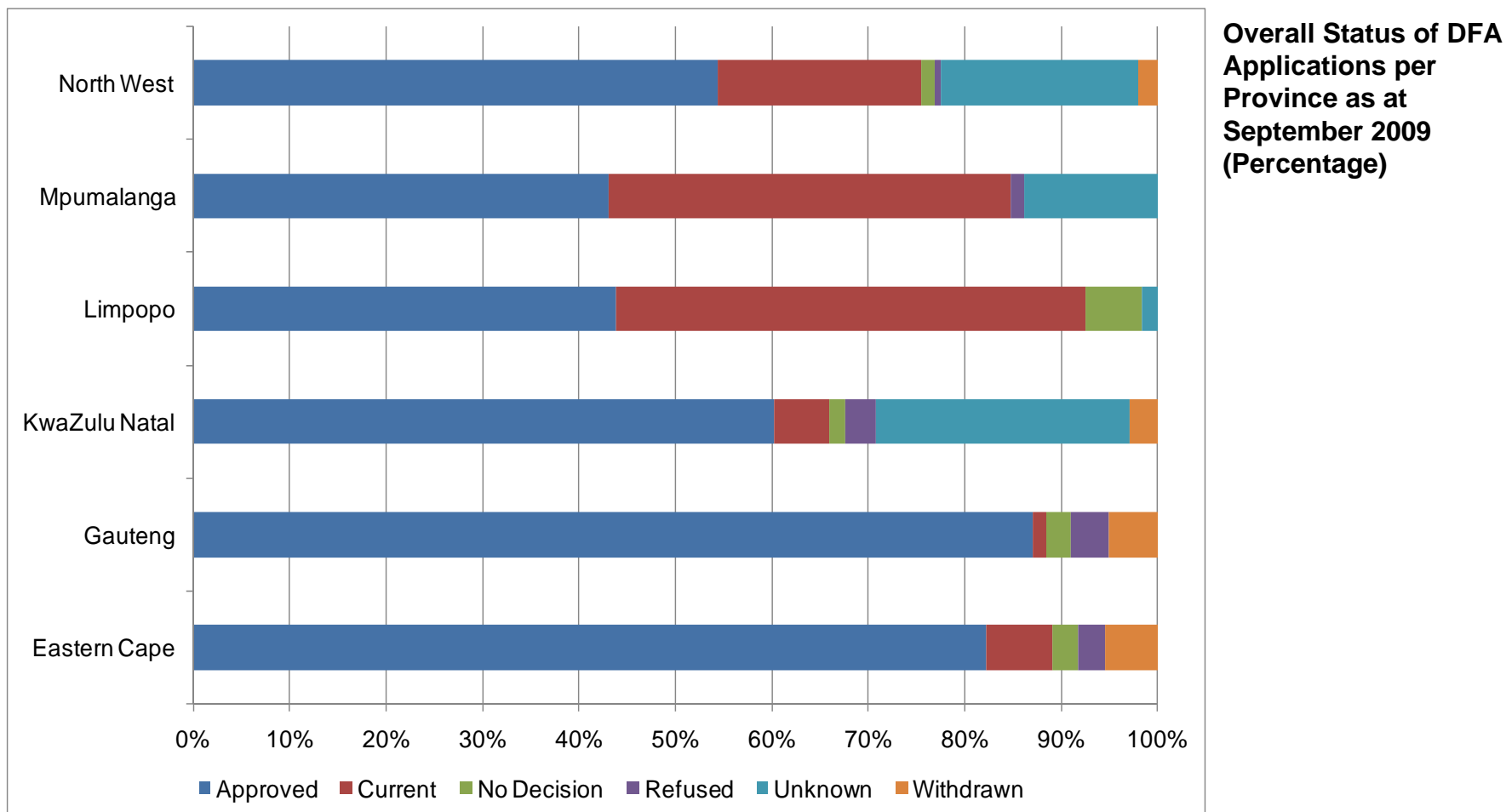


Total Number of DFA Applications by Province as at September 2009

Establishment and Utilisation of the DFA

National DFA Utilisation

- Of the applications received across the provinces a significant portion are approved. In the provinces where a high percentage of unknowns are recorded, as show below, this can be attributed to Tribunals having backlogs or where documentation of the status of the applications is incomplete.

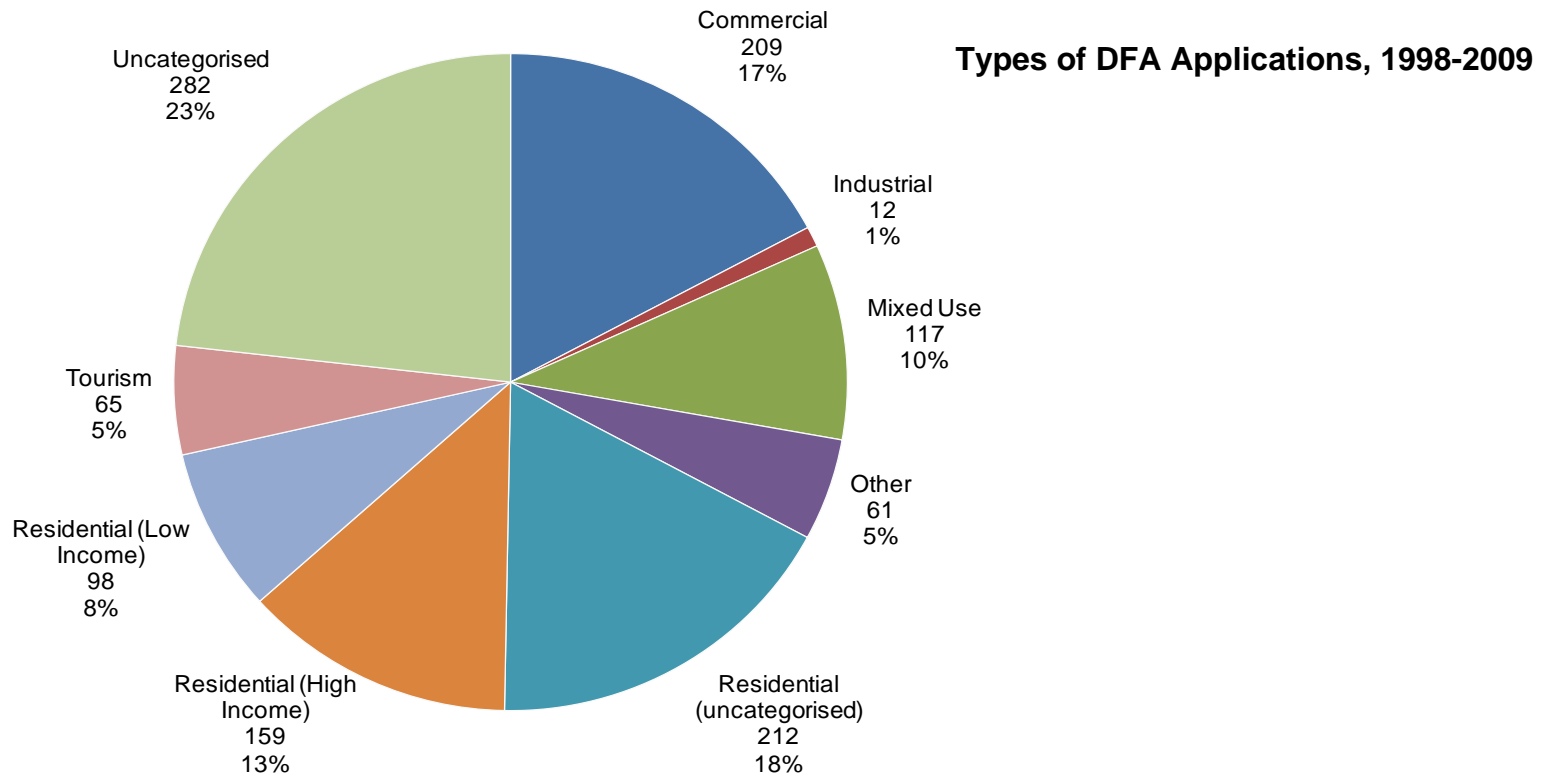


Establishment and Utilisation of the DFA

National DFA Utilisation

While many applications could not be categorized (given the quality of the data), clearly the DFA is used for different types of applications and not just RDP housing (the GDT for instance has contributed significantly to commercial applications).

- Since its inception the DFA has been utilised predominantly for residential development, including low and high-income accommodation, as well as mixed use developments.

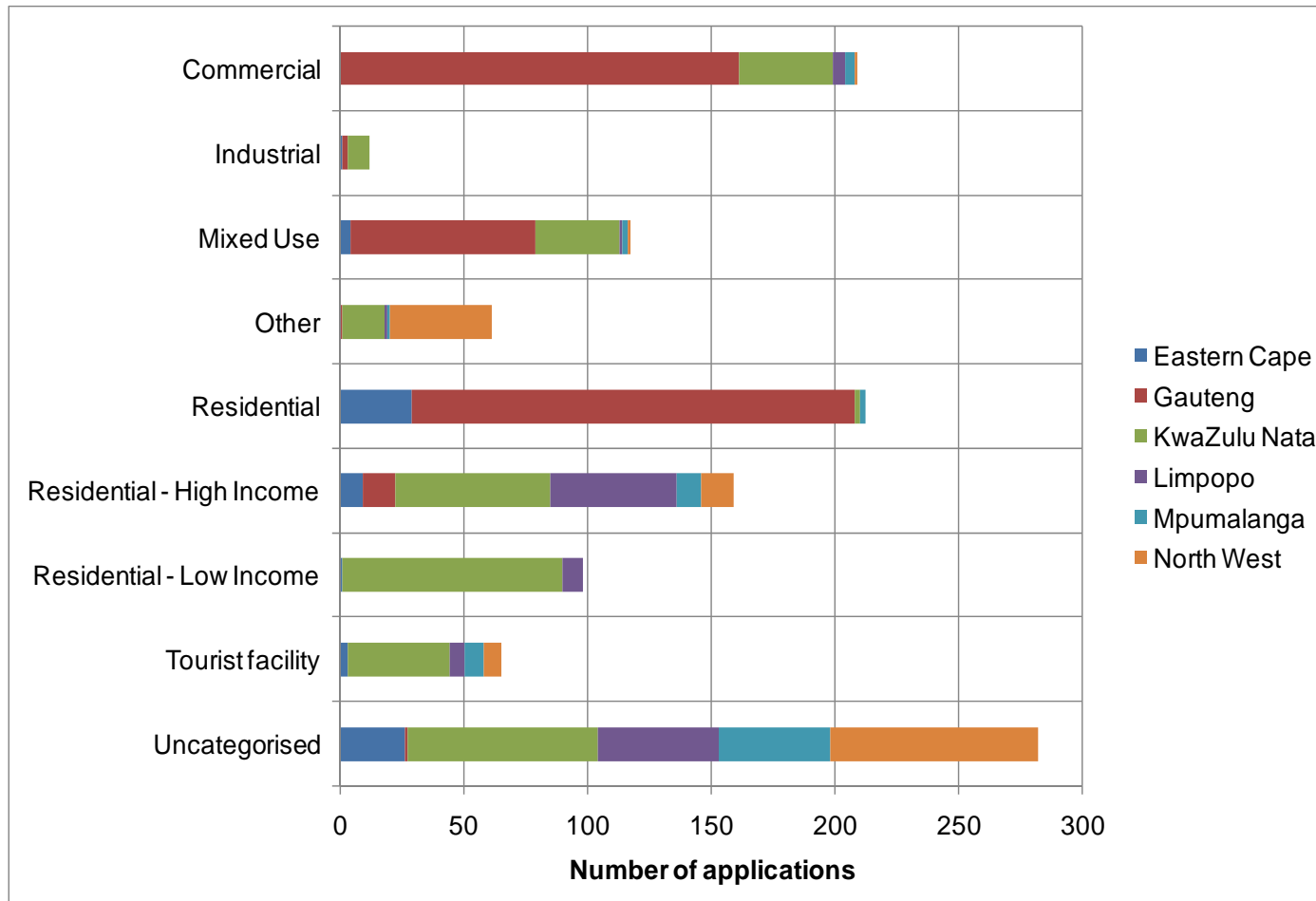


Establishment and Utilisation of the DFA

National DFA Utilisation

Looking at the data from a provincial perspective it is again evident that the DFA is used mostly for residential development across the provinces.

However equally noticeable is the utilisation of the DFA for commercial developments (mainly in Gauteng) as well as tourist facilities (especially in KwaZulu-Natal).



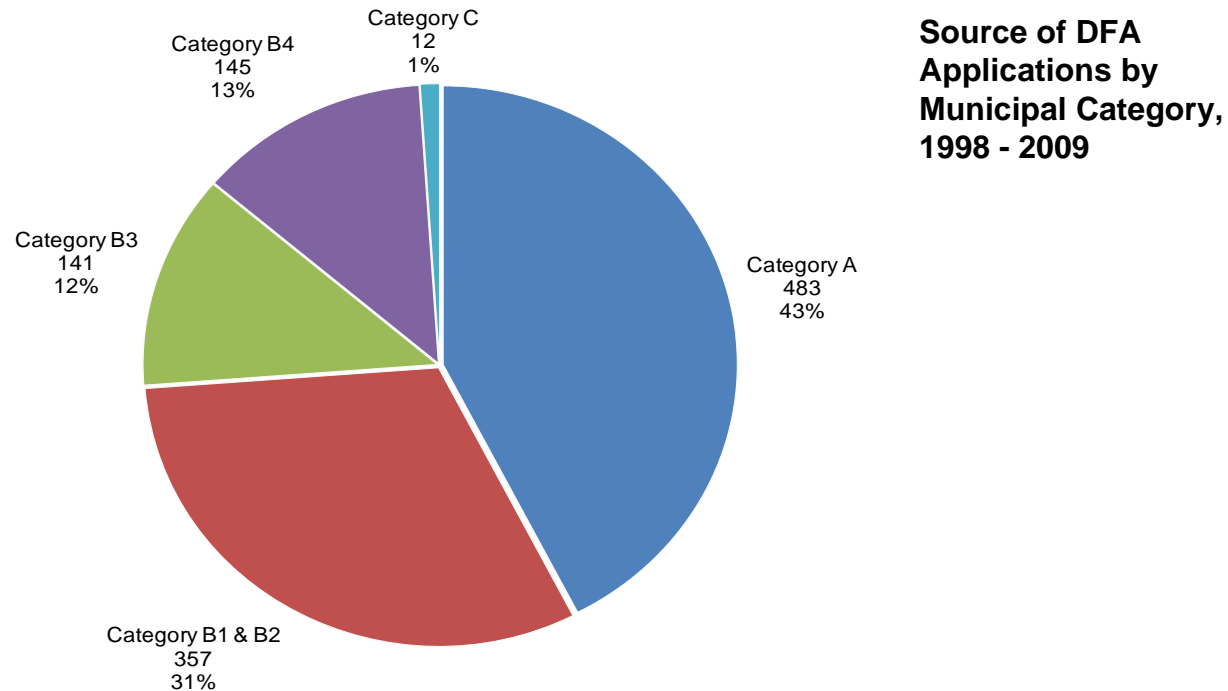
Types of DFA applications per province

- Current view regarding the DFA as primarily a mechanism for high-income lifestyle estate development appears to be misplaced.
- What the data does not reveal (but is evident in the underlying documentation and interviews) is that many of the applications are very significant / large in respect of investment levels and often comprise complex planning requirements (for instance multiple sub-divisions, consolidations, removal of restrictions etc. across a number of parcels of land).

Establishment and Utilisation of the DFA

National DFA Utilisation

The data has been analysed in respect of municipal categories utilising CoGTA's municipal categorisation schema: Category A: Metropolitan municipalities; Category B: Local municipalities and Category C: District municipalities.



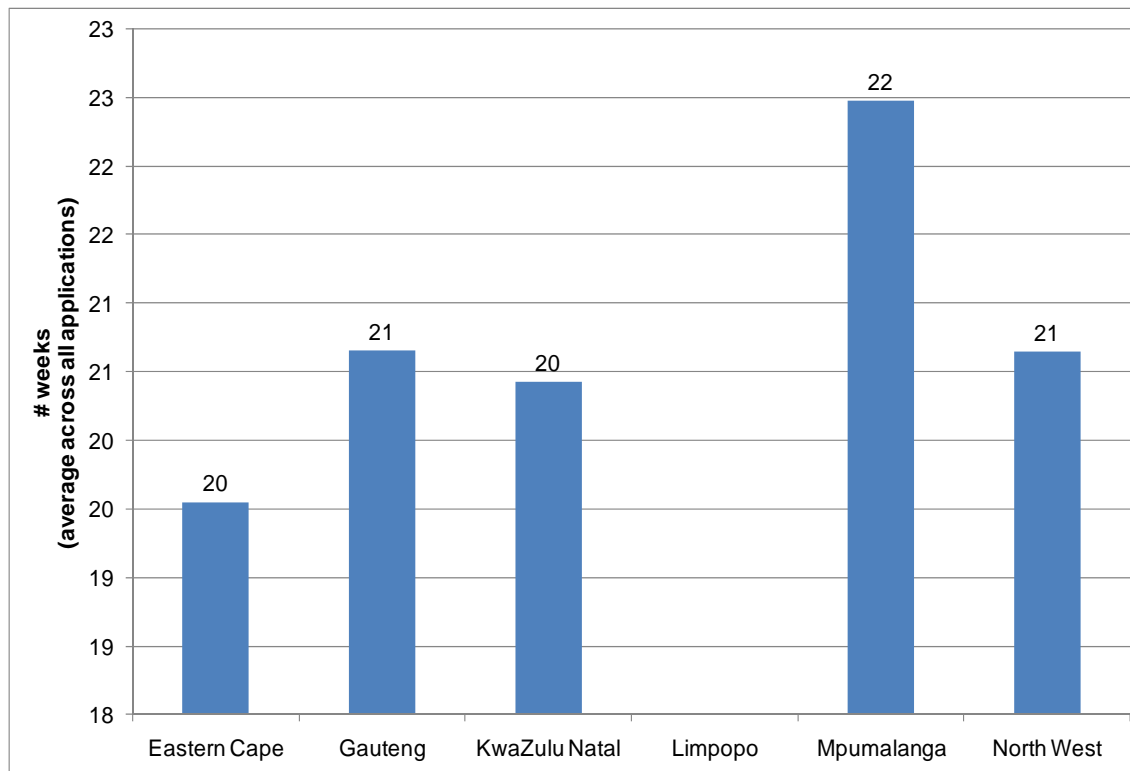
- Evident in the figure above is that for the applications for which sufficient data was available, 43% originate in the metropolitan municipalities, a further 56% from Category B municipalities and 1% from Category C municipalities.
- Important to note is that 25% of all application come from Category B3 and B4 municipalities which represent local municipalities in predominately rural and former homeland areas. This comprises some 286 applications. The interviews with practitioners and officials suggest strongly that many of these are important developments from an economic perspective in these areas, and would not have been possible without the DFA.

Establishment and Utilisation of the DFA

National DFA Utilisation

The data also show that the DFA has introduced a degree of rigour into the decision-making process as can be seen by the average time an application spends in a DFA tribunal.

- As can be seen in the figure below, on average the applications process is around 20 weeks (five months) in the provinces (noting that there is insufficient information to analyse Limpopo).
- There does not seem to be a correlation between the number of applications and the average time taken to reach a decision – Gauteng that has seen the majority of applications (36% of all applications nationally) but takes the same average time as North West that has had 12% of the total national DFA applications over the same time period.



**Average
Application
Process Times
(Number of Weeks)**

Establishment and Utilisation of the DFA

Conclusions on DFA Utilisation

- The available data indicates that **DFA adoption across the country has been uneven and utilisation very differential.**
- Overall the **number of DFA applications has been relatively small but growing** in recent years – mostly likely as a response to increasing municipal capacity constraints. It appears that the DFA serves a useful purpose in smaller municipalities that do not have capacity in respect of processing land development decisions.
- By far the largest numbers of applications have occurred in Gauteng and KwaZulu-Natal. Although the data is inconclusive, it would appear that the nature of the residential developments is a mix of low-income as well as high-income developments - however **it is clear that the DFA has not primarily or only been used to develop high-income lifestyle estates.**
- Commercial development is dominant in Gauteng only. As is evident in the provincial data analysis below the **DFA has been important as a stimulus to development in smaller and rural municipalities.**
- **Overall the DFA process is efficient and on average applications take about 20 weeks.** This is primarily a function of a regulated process (stipulated time frames) but equally the requirement that applications are supported with the full planning and regulatory approval and reports (for instance EIA's, etc.).

Establishment and Utilisation of the DFA

Comparison of the DFA to other land development legislation

There are three main land development legal routes in South Africa namely the Provincial Ordinances, the DFA and LFTEA.

The key legislation is the DFA and Ordinances and the main differences between them relate to:

- Preparation of documentation/information
- Pre-hearing
- Normative vs control oriented systems
- Method of taking decisions
- Level of decision making
- Guidance
- Dealing with special/difficult land use regulatory challenges
- Dealing with “multiple” applications
- Setting aside other legislation
- Public participation
- Time frame

Establishment and Utilisation of the DFA

Advantages and Disadvantages of the Ordinance and DFA Processes

	DFA	Ordinance
Advantages	<ul style="list-style-type: none"> - DFA has more adherence to timeframes and time taken to make a decision is faster than the Ordinance - Decisions are taken by professionals and are usually well thought through - All stakeholders can participate and are given a fair hearing - In the DFA procedure, a single application can deal with several different development matters. - Allows good public participation where all parties get to state their case openly - Hearings have been held in deep rural areas with local interpreters and poor communities participating - Has provided a level of national uniformity - Provides a solution to upgrading informal settlements and delivering tenure in former homeland areas - In many Municipalities structures that traditionally dealt with Ordinance applications have crumbled and are nonexistent. The DFA provides a mechanism to facilitate development in these areas. 	<ul style="list-style-type: none"> - An Ordinance application allows various reports to be submitted during the approval process which can reduce risk for the applicant - Well suited to simple straightforward applications - Ordinances have been in operation since the early 1900s and the approach is therefore well understood by officials and has been tested and procedures are fine-tuned and familiar
Disadvantages	<ul style="list-style-type: none"> - DFA carries higher risks to developers as a full application must be submitted initially - Delays are common post-approval - The Tribunal process is time consuming and costly in terms of human capacity. - Procedures are complex so many Officials and planning practitioners find them too difficult to apply - Municipal and government departments find the comment period too short to give adequate or coordinate comments. - There is insufficient expertise which undermines the ability of the DFA to be applied at scale. - Some feel the tribunal process is too legalistic requiring attorneys and advocates to be present 	<ul style="list-style-type: none"> - The submission of various reports during the approval process can cause delays - Obtaining comments from other government departments and departments within a municipality is increasingly experiencing delays and few adhere to set timeframes for commenting. This frustrates developers and extends the process. - Not able to deal with complex developmental matters which must be addressed through a number of separate applications which often must be made in sequence which increases delays and costs even further - No national uniformity with procedural differences across Provinces

Establishment and Utilisation of the DFA

DFA versus Ordinance Application Volumes

It was difficult to obtain accurate information pertaining to the number of applications made through an Ordinance (and considered at municipal sphere) to compare with the DFA ...

The project attempted to access ordinance data from local authorities as well as Provincial offices with limited success. Data was obtained from Gauteng Province and North West Province.

- The Ordinance 14,000 applications were received in Gauteng Province in 2008 compared to the 62 DFA applications in that province in the same year

Category	Number of Applications
Rezoning	5,000
Township Establishment	3,000
Consent Use	4,000
Subdivision / Consolidation	2,000
Total	14,000

- The North West Provincial Department received 146 applications in the 2008 against 27 DFA applications
- While the data is limited, they do suggest that the DFA volumes across the country are very small in comparison to Ordinance applications.
- However the qualitative evidence indicates that many of the DFA applications are for significant developments whereas the majority of typical Ordinance applications comprise smaller transactions such as servitudes, re-zonings, building line restrictions removal, etc.

Establishment and Utilisation of the DFA

Cost comparison between the DFA and Ordinance

Cost comparisons (from the perspective of the applicant) of similar application types (complexity and scale being most important) reveal little by way of cost difference ...

EXPERT	TOWNSHIP (TOWNSHIP APPROVAL & PROCLAMATION ONLY) - 500 ERVEN		REZONING - 2 HECTARE PORTION OF LAND FROM "RESIDENTIAL 1" TO "COMMERCIAL" AND A SUBDIVISION AND SUSPENSION OF CERTAIN CONDITIONS	
	DFA	ORDINANCE	DFA	ORDINANCE
TOWN PLANNING *1	R 400,000.00	R 375,000.00	R 125,000.00	R 88,000.00
GEOTECHNICAL*2	R 18,000.00	R 35,000.00	n/a	n/a
LAND SURVEYOR	R 555,000.00	R 550,000.00	R 22,000.00	R 22,000.00
CONVEYANCER	R 32,000.00	R 20,000.00	R 16,000.00	R 16,000.00
ENVIRONMENTAL*3	R 60,000.00	R 60,000.00	R 30,000.00	R 30,000.00
CIVIL ENGINEER*5	R 55,000.00	R 30,000.00	R 30,000.00	R 20,000.00
TRAFFIC ENGINEER*4	R 55,000.00	R 55,000.00	R 30,000.00	R 30,000.00
ELECTRICAL ENGINEER*5	R 45,000.00	R 25,000.00	R 35,000.00	R 35,000.00
LEGAL*6	R 70,000.00	R 105,000.00	R 60,000.00	R 105,000.00
OTHER				
TOTAL	R 1,290,000.00	R 1,255,000.00	R 348,000.00	R 346,000.00

All amounts are VAT Exclusive and not based on Fee Scales

Note:

*1 = Assumes Unopposed Application that conforms to IDP/SDF

*2 Phase 1 only for DFA - "Full" Geotech for Ordinance

*3 Similar Process

*4 Municipalities' requirements are similar

*5 For reports and assessments required for Township Establishment Process & Rezoning only - "Upfront" work for DFA is more comprehensive

*6 Assumes application for removal of restrictions i.t.o. Removal of Restrictions Act (84/1967) for Ordinance applications (all Provinces excluding Gauteng)

- As shown in the table the cost from the perspective of the applicant of undertaking similar application types, reveals that the overall cost of both processes is actually similar. However the key difference is that the costs are loaded **up front at the start of the process** in respect of the DFA. In respect of the Ordinance the cost is spread out over the process and depending on requirements there is an opportunity that it may not be required.

Establishment and Utilisation of the DFA

Cost comparison between the DFA and Ordinance

Most public sector respondents interviewed did not feel that the DFA placed a bigger administrative burden on the public entity than the Ordinance with the exception of the following:

- Some municipalities felt that due to the fact that the DFA is becoming more legalistic there is an increasing need to have legal representation which does add to the cost.
- Further that an application fee is charged in respect of the Ordinance which does not occur in respect of the DFA

Some respondents felt that the Tribunal process does require a higher cost in terms of capacity than does the Ordinance.

On the basis of the above it is concluded that the DFA and Ordinance from the perspective of the applicant, have similar costs with the difference being that in the DFA the cost is incurred up front, whereas with the Ordinance it is incurred during the process.

From the perspective of a public entity it does appear that the DFA could be more expensive in terms of legal fees and human capacity. In addition some of the costs of reviewing applications are offset in the case of the Ordinance due to the charging of an application fee. This does not occur in respect of the DFA.

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Assessing the DFA

Positive features of the DFA

The DFA introduced a completely new system of spatial planning and land development into South Africa.

- It established a **different approach to land use and urban development** that is based on a normative, rather than prescriptive, approach to managing land use change and is aimed at eliminating the old restrictive and control based methods of the past .
- The DFA began a trend in South African legislation of **prescribing substantive principles** to be taken into account in any decisions made in respect of a particular application.
- It **identified the potential to influence the outcome of land use and land development decisions** in such a way that reverses or shifts current thinking and trends .
- The DFA **introduced a choice to developers** between the existing (old order) legislation and the possibility of using the land development procedures as set out in the DFA as an alternative.
- The DFA was not promulgated only to cater for the fast tracking of land development, but also as a **solution to an extremely complex legal situation** that presented itself when the boundaries for the nine new Provinces were drawn in terms of the Interim Constitution .

Assessing the DFA

Positive and negative features of the DFA

Positive

- Independent decision making
- Ineffective Municipalities
- Formalising existing settlements
- Speedy development
- Participation and coordination
- One stop shop
- Environmentally sensitive

Negative

- Legislative competence
- Municipal jurisdiction
- High income developments
- Complexity
- Procedural shortcomings

Assessing the DFA

Summary of qualitative interviews

1. **DFA extremely innovative** and ambitious piece of legislation
2. **Introduced at a specific time in SA's history to address key issues in the environment** – these concerns still remain relevant
3. **Extremely successful in changing how people think and operate**
4. **DFA has delivered development in rural and other marginal areas**
5. **Both the DFA and the Ordinances have useful** components
6. **DFA has many aspects that should not be discarded** as they can make a valuable contribution any new LUM framework ...
 - General development principles
 - Inclusion of independent experts in planning decision-making bodies
 - Mechanisms to handle complex applications
 - Include a pre-hearing procedure
 - Provision for key documentation/expert reports up front

Assessing the DFA

Respondent Recommendations (1/6)

Respondents were asked what recommendations they would make regarding the future of the DFA. They were asked that, given the context of the LUMB and what South Africa needs at this time, what would they suggest is the way forward from here.

The responses can be categorized into two broad categories:

- **Option 1: retain the DFA but make some amendments to it** (in essence a partial repeal)
- **Option 2: repeal the whole DFA.** This then led to three general options:
 - **Option 2a: repeal and put in place a new national land use management bill** that applies across the entire country, is comprehensive and contains many of the “good” DFA provisions;
 - **Option 2b: repeal and introduce guiding or framework legislation at national sphere and allow Provinces to implement their own Provincial planning legislation** in addition;
 - **Option 2c: repeal and have no national planning legislation** and the Provinces will implement their own Provincial legislation.

Assessing the DFA

Respondent Recommendations (2/6)

Option 1: Retain the DFA but amend it

- DFA is necessary, if not essential, is positive and appropriate for South Africa
- Requires some improvements to bring it “up to date” and in line with the new Constitution
- Is well written law, is easy to follow and the regulations are adequate.
- Provides an alternative route for developers who would otherwise be constrained in making an application via the Ordinance or other less rigorous legislation (LFTEA or PPA).
- The types of amendments that were suggested included:
 - improving certain legal clauses to avoid any mis-interpretations;
 - substituting the Land Development Objectives for the IDP’s and SDFs
 - clarifying the powers of the Designated Officers;
 - extending some of the commentary time periods – municipalities and government departments cannot provide co-ordinated comments within 21 days;
 - introduce improved provisions for the post-approval processes;
 - including a chapter or provision for “smaller” applications that have less onerous requirements (but are none-the-less complex);
 - provide clarity on the environmental aspects covered in the DFA and now duplicated in some respects in NEMA as it is more recent law;
 - introduce application fees;
 - prescribe what applications can use the DFA;
 - the introduction of the monitoring of compliance with conditions of establishment etc.
 - the introduction of obligatory requirements for the applicant to provide information on the application in relation to the SDF, surrounding developments and plans – ensure it is in line with municipal and other policies etc;
 - include more qualifying circumstances under which an application may lapse.

Assessing the DFA

Respondent Recommendations (3/6)

Option 2: Repeal the DFA ...

- **Option 2a - Repeal but put in place a new unitary land use management act that is comprehensive and includes all the desirable elements of the DFA:**
 - Recommended because of the introduction of the new constitution post the DFA being promulgated and because it is “outdated” as other laws have been introduced since, that supercede some of the DFA’s provisions or make them confusing.
 - Virtually all respondents noted that the positive aspects of the DFA must be included in new national legislation
 - Most respondents in this overall category are supportive of greater autonomy to the local sphere of government but with Provinces playing a key role in appeals.
 - Aspects (provisions or at least the concept) of the DFA that must be included in any new land use management Act, include:
 - independent and professional expertise in decision making
 - provision of guiding, developmental principles or some mechanism to promote stronger spatial integration;
 - allowing an amended version of the application to be approved at the behest of the decision-making authority, where appropriate;
 - include provisions that allow for multiple procedures for complex applications – having a “one stop” application procedure;
 - setting down clear timeframes and adhering to these;
 - ensuring that all necessary information is provided up front in an application, so that a decision can be taken once-off;

Assessing the DFA

Respondent Recommendations (4/6)

- **Option 2a - Repeal but put in place a new unitary land use management act that is comprehensive and includes all the desirable elements of the DFA:**
 - Aspects (provisions or at least the concept) of the DFA that must be included in any new land use management Act, include:
 - the strong emphasis on public participation and allowing all parties a fair opportunity to present their case;
 - provision for the uplifting of certain dilatory laws, but to be exercised with caution and in a consultative way (most respondents thought this power was useful in the DFA but cautioned against any abuse of it and its possible unconstitutionality);
 - provisions for non-statutory development and delivery of secure tenure;
 - dispute resolution provisions;
 - retaining the concept of a pre-hearing or a mechanism to ensure that all procedural aspects are ironed out before the hearing or decision;
 - setting out the development procedure and requirements over the whole lifetime of the application (DFA is weak on the post-approval procedures whereas the Ordinances are stronger on this);
 - clear and precise regulations to accompany the new act;
 - direction on the specific roles and responsibilities of all spheres of government;
 - a need for better integration of land use management legislation and IDPs (governed by MSA) and both these aspects need to be covered in one law. The law should also give direction to Provincial planning (Provincial IDPs);
 - provision for the establishment of a national planning commission (DFA set up a Commission which prepared a Planning Green Paper);

Assessing the DFA

Respondent Recommendations (5/6)

- **Option 2a - Repeal but put in place a new unitary land use management act that is comprehensive and includes all the desirable elements of the DFA:**
 - Some additional requirements raised by a minority of respondents and not included in the DFA:
 - include environmental and transport aspects;
 - include clarity on the role of policies in decision-making;
 - penalties for non-compliance;
 - inclusion of specific provisions where registered planners must be involved in application recommendations or decisions

- **Option 2b – Repeal the DFA and introduce a new national act which is broad, framework legislation, Provinces to have their own comprehensive Ordinances**
 - Suggested by those who feel that Provinces should be responsible for land use management legislation but, in the interests of consistency across the country, national “norms and standards” should be provided by the national sphere.
 - Most respondents in this category were Provincial Departments and municipalities who wish to see land use management decisions taken at the lowest sphere (local). Provinces, however, see a strong role for themselves.
 - Overriding view that the Provincial Ordinances, when revised, should also contain many of the positive aspects of the DFA, in particular aspects such as clear timeframes etc.

Assessing the DFA

Respondent Recommendations (6/6)

- **Option 2b – Repeal the DFA and introduce a new national act which is broad, framework legislation, Provinces to have their own comprehensive Ordinances**
 - Some comments relating to processes that a national sphere of government should play in this regard, in particular:
 - national sphere should publish a Green Paper which will guide the Provinces in the drafting of their land use planning Acts. It would also clarify the respective roles of each sphere of government and outline what each Province must include in their legislation.
 - direction should be given to Provinces when drafting their new Provincial Acts to specifically include the positive aspects of the DFA;
 - there is a role for national sphere to get all Provinces with new Provincial planning legislation to come together and share and discuss their Provincial legislation so that important lessons can be learnt and more national consistency obtained;
- **Option 2c – Repeal the DFA and leave it up to Provinces to introduce updated Provincial Planning Acts:**
 - Not a common view – primarily metros

Other actions suggested ...

- Draft the new legislation in the same way that the DFA was drafted
- Address capacity constraints
- Obtain constitutional clarity (amend if necessary)

Contents

1. Background & Terms of Reference
2. Project Approach
3. Background to the Introduction of the DFA
4. Establishment and Utilisation of the DFA
5. Assessing the DFA
- 6. Conclusions**

Conclusions (1/3)

The DFA was an extremely innovative and ambitious piece of legislation that was introduced at a specific time in South Africa's history to address key issues within the environment.

- In this regard it was extremely successful in changing how people thought about legislation and land development.
- It introduced new methods of thinking and operating.
- In addition the DFA has delivered a wide range of developments in both metropolitan and rural and other marginal areas.
- The DFA is structured in a manner that allows public participation and access to the process by the poor.

In comparison to the Ordinances both have useful components.

- It would appear that the DFA is best suited to more complex developmental issues and offers significant opportunities for informal settlement development and to developed townships where township establishment has not yet occurred.
- The Ordinances appear to be more useful in straightforward applications.

Conclusions (2/3)

Given the above the DFA was at all times intended to be transitional legislation. While some components of the Act remain useful there are others that have become outdated and are no longer relevant.

- There was general consensus among the respondents interviewed that the DFA should be repealed and replaced with new national legislation.
- However that this legislation should retain the positive components of the DFA in particular:
 - The general development principles
 - Inclusion of independent experts in planning decision-making bodies
 - A pre-hearing procedure
 - Provision for key documentation/expert reports up front
 - Specified time frames that are enforced
 - Inclusion of public participation in a hearing process
 - The ability to deal with complex development issues in one application
 - The ability to deal with tenure issues
 - Clear and directive regulations.
- In addition it would appear that in developing such legislation there should be recognition that different mechanisms are needed to handle complex and straightforward applications.

Conclusions (3/3)

While it is important to resolve the constitutionality of planning functions, the lack of planning capacity has implications for a new land use management system.

- An important national skills base had been developed through the DFA and can be applied nationally.
- Many of the constraints that were evident at the time of drafting the DFA (mainly in relation to complex apartheid legislation and local government capacity) are still present and even deepening (capacity constraints).

*Most importantly what is evident on the basis of the review undertaken is that currently in South Africa **poor strategic planning is occurring in respect of land development.***

- Accordingly once-off development decisions made in terms of single applications are happening within a context where there is no overall vision for a town or city.
- While some respondents criticized the DFA for not achieving spatial restructuring, others pointed to the problem lying in the broader planning system.
- At present, integrated development planning and spatial development frameworks are governed under the Municipal Systems Act, whereas development procedures fall under the DFA or Provincial Ordinances. The DFA tried to bridge policy and strategic planning with procedural planning through the Land Development Objectives and principles, so that there would be an integrated planning system.

In addition, a key learning from the DFA is that the process applied in developing new legislation is critical. This process needs to be highly participatory and consultative, allowing the opportunity for all stakeholders to express their views. In addition the development of the legislation should occur within a context of