



PAPER I: DEVELOPMENTAL LOCAL GOVERNMENT: DETERMINING APPROPRIATE FUNCTIONS AND POWERS

Local Government Project
Community Law Centre
University of the Western Cape
June 2007



CAGE Project

The Local Government Project at the Community Law Centre is conducting research on the reconfiguration of the state in order to achieve a rational model for service delivery and development. Funding was contributed by the Conflict and Governance Facility (CAGE), a project of National Treasury, which is funded by the European Union under the European Programme for Reconstruction and Development. The Austrian Development Cooperation, the Ford Foundation, the Charles Stewart Mott Foundation, the Good Governance Learning Network (GGLN) and the Interchurch Organisation for Development Cooperation (ICCO) provided additional funding for this research project.

CONTENTS

| | |
|---|-----------|
| EXECUTIVE SUMMARY | 4 |
| Developmental local government: Determining appropriate functions and powers | 6 |
| 1 INTRODUCTION..... | 6 |
| 1.1 Powers of local government..... | 6 |
| 1.2 Original legislative powers | 7 |
| 1.3 Assignment, delegation and agency..... | 7 |
| 1.3.1 Assignment | 7 |
| 1.3.2 Delegation..... | 8 |
| 1.3.3 Agency | 8 |
| 2 LOCAL GOVERNMENT’S DEVELOPMENTAL MANDATE..... | 8 |
| 3 PROBLEM STATEMENT: THE MISMATCH BETWEEN DEVELOPMENTAL LOCAL GOVERNMENT AND THE SCHEDULES | 9 |
| 3.1 Introduction..... | 9 |
| 3.2 Concept of developmental local government not followed through..... | 10 |
| 3.3 Creeping decentralisation..... | 11 |
| 3.4 Lack of appreciation for provincial oversight role | 12 |
| 3.4.1 National and provincial oversight Schedule 4B and 5B | 12 |
| 3.4.3 Provincial oversight currently too limited in scope? | 14 |
| 4 AVAILABLE INSTRUMENTS FOR RECONNECTING DEVELOPMENTAL LOCAL GOVERNMENT WITH THE SCHEDULES | 14 |
| 4.1 Revisiting the Schedules | 14 |
| 4.1.1 Manner in which competencies are listed..... | 14 |
| 4.2 Adjusting functions and powers through assignment | 16 |
| 4.2.1 Assignment through legislation | 16 |
| 4.2.2 Assignment through an executive act | 16 |
| 4.2.3 Consultation procedures: | 17 |
| 4.2.4 Funding and capacity building to accompany the assignment..... | 17 |
| 5 INDICATORS FOR DECENTRALISATION..... | 17 |
| 5.1 Introduction..... | 17 |
| 5.2 Indicators..... | 18 |
| 5.2.1 Degree to which economies of scale can be obtained at a higher level | 18 |
| 5.2.2 Degree to which the function produces spill-over effects | 18 |
| 5.2.3 Degree to which capacity to execute the function is present..... | 18 |
| 5.2.4 Degree to which intersectoral coordination is required | 18 |
| 5.2.5 Degree to which grass roots community participation is required | 19 |

| | | |
|----------|--|-----------|
| 5.2.6 | Degree to which the function adds to policy control over the built environment | 19 |
| 6 | MEASURING THE DISTRIBUTION OF FUNCTIONS AGAINST THE INDICATORS..... | 20 |
| 6.1 | Focus on high-impact functions..... | 20 |
| 6.2 | Housing..... | 21 |
| 6.2.1 | Introduction..... | 21 |
| 6.2.2 | Applying the criteria to housing | 22 |
| 6.2.3 | Solution 1: Housing goes to Schedule 4A | 24 |
| 6.2.4 | Solution 2: assignment..... | 25 |
| 7 | PROBLEMS AROUND THE INTERPRETATION OF LOCAL GOVERNMENT COMPETENCIES..... | 29 |
| 7.1 | Public transport..... | 29 |
| 7.2 | Land use planning..... | 30 |
| 7.3 | Local economic development | 31 |
| | References..... | 34 |

EXECUTIVE SUMMARY

Six years have passed since the new local government dispensation in South Africa was established. In view of the upcoming 2009 elections and the key policy decisions which need to be made, there has been a recent drive to review the success of local government in meeting its constitutional obligations to citizens. Key to such a review is evaluating the extent to which the powers and functions designated to local government enable it to effectively and efficiently meet its developmental mandate.

A review of the “original” functions and powers of local government found in Schedule 4B and 5B reveals a mismatch between the notion of developmental government and its powers. Furthermore, additional powers transferred to local government by means of assignment, delegation and agency do not provide it with the necessary policy making and financial authority to deliver in critical impact areas. The Schedules should therefore represent the ‘primary constitutional expression’ of municipal instruments, providing local government with the necessary flexibility and capacity to find localised solutions in meeting its service delivery mandates.

The submission argues that fears around a lack of capacity, fragmentation of services and standards are largely overstated as the devolution of powers and functions to local government do not minimise the already existing, substantial oversight powers of national and provincial government. In addition, local government capacity is unlikely to emerge in the absence of the appropriate authority to perform the function.

In keeping with the principle of subsidiarity expressed in the Constitution, this submission argues that those functions which have the most immediate developmental impact on citizens should be performed by local government.

The submission identifies six key indicators which may be used as a guide in determining which functions are best performed at a local level. The six indicators evaluate (1) the degree to which economies of scale can be obtained at a higher level, (2) the degree of spill-over effects of a function, (3) necessary capacity, (4) degree of intersectoral coordination, (5) degree of grass roots community participation required and (6) the degree of policy control over the built environment .

The submission does not attempt to apply these indicators to all government functions, but focuses rather on a few “high impact” functions, namely housing, transport, land use planning and local economic development. In doing so, the submission makes an important distinction between interpreting the ambit of a Schedule 4B/5B competency and identifying in which Schedule it is best placed.

With regard to the last aspect, it is suggested that the housing function should be moved to Schedule 4B so as to afford municipalities authority over this function within parameters set by national and provincial government.

With respect to public transport, the submission argues that the municipal competency ‘Municipal Transport’ should be interpreted so as to afford significant policy control to local government over public transport, with metropolitan municipalities as the immediate recipients of such authority. District municipalities can then receive the public transport authority via section 84(1) of the Municipal Structures Act.

The submission advocates strongly that legislation be passed to clarify the role of local government in land use planning which is not only alive to, but speaks to the need for local government control over the built environment.

Finally in evaluating the function of local economic development, the submission highlights the current confusion around the role of local government in respect of this function and the lack of appropriate funding to perform the function. The submission suggests that the answer to the problems around recognition and funding is not to include LED as a functional area in Schedule 4B or 5B. Rather, the solution is dependent on an appropriate incentive for municipalities to carry the operational parts of the LED function through revenue generation.

DEVELOPMENTAL LOCAL GOVERNMENT: DETERMINING APPROPRIATE FUNCTIONS AND POWERS¹

1 INTRODUCTION

1.1 Powers of local government

The final Constitution² saw a significant change in the status of local government from that of merely an administrative arm of national and provincial government, to an equal partner in governance.³ This decentralised governance model designates specific powers and functions to each sphere of government, which, are enjoined to work together “to secure the well-being of the people of the Republic”.⁴

As appropriate as such a vehicle for co-operative governance may seem within a democratic context, having three spheres of government operating each with a degree of autonomy makes for complex relationships which may also impact on the effectiveness and efficiency of government. As a relatively new sphere, local government is not only faced with the challenge of establishing its autonomy, but also contends with the inherited legacies of apartheid such as the seemingly insurmountable back-logs in service delivery.⁵

In addition, while the governance philosophy of “Bhato phele” or “people first” is the impetus of all government action, local government arguably has the most immediate developmental mandate to realise the ideal physical environment for the communities it serves.⁶ This mandate is in keeping with the established principle of subsidiarity which advocates that “public responsibilities should be exercised by those elected authorities who are closest to the people”.⁷ It is the purpose of this submission to evaluate whether the powers and functions designated to local government enable it to effectively and efficiently meet this developmental mandate six years after the new local government dispensation was first established.

It will be argued that, in this respect, there are significant shortcomings in the manner in which the Constitution distributes powers and functions between spheres of government. It will also be argued that there are significant shortcomings in the

¹ The research conducted in support of this submission was made possible by the Conflict & Governance Facility (EU). The Austrian Development Cooperation, the Ford Foundation, the Charles Steward Mott Foundation and the Interchurch Organisation for Development Cooperation (ICCO) provided additional funding for this research project.

² Constitution of the Republic of South Africa, 1996.

³ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (12) BCLR 1458 (CC) at para 26.

⁴ S 41(1)(b) Constitution.

⁵ For a history of local government in South Africa see De Visser: 2005, 57-72.

⁶ Ss 152 and 153 Constitution. For the developmental outcomes of local government, see White Paper on Local Government: 1998, 22. The Constitution obliges a municipality to “structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community”. See para 2 below for a full discussion on the developmental mandate of local government.

⁷ Item 26 Draft guidelines on Decentralization and the Strengthening of Local Authorities HSP/GC/21/2/L.3.

manner in which the allocation of powers and functions to local government is interpreted and implemented.

1.2 Original legislative powers

Schedules 4B and 5B of the Constitution contain lists of functional areas that are the responsibility of local government. The Constitution provides municipalities with the necessary legislative and executive powers to administer and fulfil these functions.⁸ These powers constitute the most significant source of local government's powers and are referred to as the 'original' powers of local government because they are sourced directly from the Constitution. As such, these powers are safeguarded and may not be removed or amended by ordinary statutes or provincial acts. Any amendment would therefore have to be effected by amending the Constitution itself.

1.3 Assignment, delegation and agency

Local government may also derive powers through acts of assignment, delegation and agency. A useful tool for distinguishing between the three types of transferring powers these confer is to make a distinction between "authority" versus "service provider" roles.⁹

The "authority" role confers statutory responsibility for a function. This includes responsibility for policy development, planning to ensure that the function is undertaken effectively, monitoring of execution, control of funds, legislation (by-laws), regulation, and ownership of assets. A municipality performing the authority role takes full responsibility for exercising the powers necessary to fulfil the function. As such, the exercise of the authority role attracts funds directly from national treasury.¹⁰

The "service provider" role on the other hand, is primarily concerned with delivery to end-users and implementation. A municipality fulfilling the service provider role does not assume full responsibility for the role and is therefore accountable to (and constrained by) other organs of state in fulfilling this function. The financial responsibility for fulfilling this role is generally retained by the transferring organ.¹¹

1.3.1 Assignment

Assignment entails the transfer of authority to local government over a function or competence that falls outside of its Schedule 4B and 5B functional areas. An assignment, as will be elaborated on further, may take the form of a legislative or executive assignment of authority. Assignments can be "general assignments", where the function is transferred to local governments across the whole country, or "specific assignments" where only specific municipalities are assigned the function. Key to the choice for strong developmentally oriented municipalities, the Constitution makes the assignment of a Schedule 4A or 5A matter to a municipality by national and provincial government compulsory, if the matter would be most effectively administered locally and the municipality has the capacity to administer it.¹²

⁸ Ss 156(a) and 156(2) Constitution.

⁹ See, for example IDASA- Budget Information Services: 2005, 2.

¹⁰ De Visser: 2005, 148.

¹¹ De Visser: 2005, 148.

¹² S 156(4) Constitution.

1.3.2 Delegation

Section 238(b) of the Constitution provides that an executive organ of state in any sphere of government may delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state. This is subject to the condition that the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed. Delegation is generally used as a mechanism to transfer service provider responsibility. Municipalities are therefore accountable to the delegating authority and are bound to perform the delegated functions within the framework set in the legislation and by the delegating authority. A delegation may be revoked at any time.

1.3.3 Agency

Section 238(a) of the Constitution also makes provision for agency relationships between organs of state. In the context of agency, a municipality acts as the agent of another executive organ of state (the principal). The terms of this relationship are regulated within the framework of an agency agreement, and the same legal rules applicable to the legal relationship between agent and principal are applicable in this context.¹³ As such, the municipality acts in the name of and on behalf of the principal, and binds the principle in any decision taken within its mandate. The municipality is therefore constrained to act within the parameters of the agency agreement. Agency arrangements are usually concluded on an annual basis, by agreement, and with a full funding of the mandate. An agency agreement may be cancelled at any time.

This report is concerned with the roles and responsibilities of the three spheres, and not with the manner in which a particular sphere discharges its responsibilities for operational aspects. Therefore, delegation and agency are not relevant because they do not transfer the authority role. They make no room for policy initiation or creativity on the part of municipalities to develop localised strategies to meet its developmental mandate.

2 LOCAL GOVERNMENT'S DEVELOPMENTAL MANDATE

Much has been written about the content of developmental local government. One of the most effective and apt descriptions of developmental local government can still be found in the White Paper on Local Government, 1998 (White Paper). In terms of the White Paper, the notion of developmental local government is comprised of four basic characteristics:

1. Maximising economic growth and social development: local government is instructed to exercise its powers and functions in a way that has a maximum impact on economic growth and social development of communities.
2. Integrating and coordinating: local government integrates and coordinates developmental activities of other state and non-state agents in the municipal area.

¹³ S 2(d) ii Guidelines on Allocation of Additional Powers and Functions to Municipalities (Assignment and Delegation Guidelines): 2007.

3. Democratic development: public participation: local government becomes the vehicle through which citizens work to achieve their vision of the kind of place in which they wish to live.
4. Leading and learning: municipalities must build social capital, stimulate the finding of local solutions for increased sustainability and stimulate local political leadership.

It is suggested that these four characteristics are not only fundamental to giving content to local government's developmental mandate but that they are also very useful in interpreting Constitutional and statutory provisions that deal with local government.

3 PROBLEM STATEMENT: THE MISMATCH BETWEEN DEVELOPMENTAL LOCAL GOVERNMENT AND THE SCHEDULES

3.1 Introduction

The functional competences of local government should reflect the constitutional vision of developmental local government as outlined in the White Paper. The decentralised developmental strategy can only work if the institutional framework for local government gives expression thereto. Part of this expression must be the allocation of powers and functions that are relevant to the developmental mandate of local government.

Before the 1996 Constitution, there was enormous variety in the functions performed by municipalities. A municipality's functions depended on, amongst other things, the institutional framework of the various local government ordinances, the administration's capacity and which racial group it was supposed to serve. The Schedules 4B and 5B that appeared in the 1996 Constitution mostly listed functions that (most) municipalities were already performing with some additions (such as child care facilities and air pollution). Some functions were removed from local government by the Constitution. For example, prior to the 1996 Constitution, municipalities in the Cape Province were responsible for libraries. The Constitution now allocates this to provinces.¹⁴

The problem is that the current local government functions do not enable it to make the maximum social and economic impact envisaged by the Constitution and the White Paper. There is a growing concern in government about this mismatch between the notion of developmental local government and the powers of local government.¹⁵ At a Special President's Coordinating Council (PCC) Workshop held on 14 December 2001, the PCC resolved to commence an appraisal of Schedules 4 and 5. Finance Minister Trevor Manuel, when addressing the National Council of Province's Intergovernmental Relations (IGR) Summit in 2007 made an appeal for an 'objective

¹⁴ See, for example, Ajam K. "No new library books until province takes over" *Cape Times*, 20 February 2002.

¹⁵ Palmer Development Group: 2004, 41.

look' at whether the current configuration of powers and functions, including the constitutional aspects, is appropriate.¹⁶

It needs no argument that the Schedules are not meant to be an all-inclusive and exhaustive list of local government functions. As stated before, powers and functions can be added through assignment, delegation and agency. Many reports show that, in real terms, many functions and responsibilities are transferred from central and provincial governments to local government. International literature and experience suggests that decentralisation initiatives are most successful if they are implemented 'incrementally',¹⁷ which thus seems to be taking place. What, then, is the problem? Is there a need to be concerned with the content of Schedules 4B and 5B if indeed functions are being transferred to local government?

It is submitted that incremental decentralisation should not mean that there is a series of isolated policy decisions that each provide an opportunity to review the end objective. International experience again suggests that this approach results in retention of power at the centre.¹⁸ Translated to the mismatch between the Schedules and the developmental objective, this suggests that the Schedules should represent the 'primary constitutional expression' of municipal instruments towards achieving developmental objects. This 'primary constitutional expression' can then be complemented and refined by incremental decentralisation that does not detract or deviate materially from the vision enunciated in the Constitution. This approach is also in line with the role and function of the Constitution, which is a 'blue print' or 'transformative' Constitution, aimed at guiding transformation rather than capturing and safeguarding the results of transformation.

The mismatch between the Schedules and the notion of developmental local government results in two problems, namely (1) that the concept of developmental local government is not followed through and (2) 'creeping' decentralisation.

3.2 Concept of developmental local government not followed through

First, municipalities are impeded in achieving the developmental objectives they are responsible for as they lack policy making and financial authority on critical impact areas. It will be argued that this is the case, particularly with regard to the housing function. Whether or not this is the case with regard to local economic development will also be dealt with in this submission.

¹⁶ Trevor Manuel, MP, "Co-operative governance and intergovernmental fiscal relations" Address at the National Council of Provinces (NCOP) Summit (Cape Town: 3 May 2007).

¹⁷ See, for example, Robinson: 2007.

¹⁸ Until recently the Indian Constitution, for example, provided for a list of permissible local government functions. State legislation determined which of those functions were to be devolved and to which tier of local government. The result was that devolution, being at the will of state legislatures and executives, was slow. Recent constitutional amendments have however resulted in the decentralization of power and authority to the grassroots level. Despite this, villages are still dependent on the higher levels of government for financial support. The national government in turn, provides a development framework and guidelines, and is generally responsible for ensuring that development happens and that the needs of the people are met. See, Portfolio Committee on Provincial and Local: 2007.

3.3 Creeping decentralisation

The second problem resulting from the mismatch is the emergence of forms and methods of decentralisation that are not in line with either the vision or the prescripts of the Constitution (or both). As will be outlined below, the Constitution and the Municipal Systems Act¹⁹ outline a procedure for the transfer of functions to local government.

Virtually all national sectors acknowledge the importance of local government and thus engage municipalities. This engagement, however, is almost never done in the form of the devolution mechanism provided for in the Constitution and augmented by the Municipal Systems Act (i.e. assignment). It is nearly always done in the form of instruments such as delegation, agency, *sui generis* instruments that apply within the sector only, such as accreditation (housing) or the simple identification of a responsibility in statute or policy. There is a progressive delegation of functions to municipalities by a range of national departments as envisaged in various white papers, and also a wide range of functions where creeping delegation can be seen. In both these latter cases the function is being envisaged but often without concomitant transfer of funds, or allocation of a capacity-building mechanism.²⁰

One key consequence of the fragmented sector-based efforts at decentralisation is that, despite the existence of ‘tied grants’, agency agreements and funding arrangements, municipalities often end up bearing the hidden overhead costs associated with the function. This is because the protection against unfunded mandates (see below at paragraph 4.2.4), offered by the Municipal Systems Act, is not applicable to the instruments used.

The vision of the Constitution and the White Paper on local government is that of a strong local government, supported by a firm subsidiarity principle and original powers. In other words, municipalities enjoy strong policy making power (within national and provincial parameters) and Schedule 4A and 5A functions that are best performed at local level are assigned.

The approach of sector-based decentralisation is often different. The ‘Municipal Health Care’ example is a case in point. The curative, preventative and promotive health care aspects of health care were first ‘secured’ in Schedule 4A through the application of a narrow definition and then filtered down again through a means of transferring power that is akin to deconcentration. Despite the sound policy arguments that exist in support of this approach, it ultimately represents a pursuit for command and control. The recognition of an ‘original’ municipal power over the curative, preventative and promotive aspects is regarded as a hazardous policy.

The question that arises is: what are the reasons that impel this type of command and control approach that is prevalent across many sectors? If the answer centres around municipal capacity, a nuanced view on this capacity problem needs to be followed that takes into account (1) that (the appropriate kind of) capacity is unlikely to emerge without the existence of authority and (2) the potential that exists (and will be

¹⁹ Act 32 of 2000.

²⁰ Palmer Development Group: 2004, 43.

enhanced in a single public service) in relocation of capacity from provincial departments to municipalities.

If, on the other hand, the answer centres around the dangers of fragmentation and loss of control over national and provincial minimum standards, the retort would be that the strength and potential of provincial and national oversight powers over Schedule 4B/5B and over assigned powers is unappreciated. Central and provincial governments owe it to the constitutional vision of developmental local government to first exhaust and appreciate their constitutionally secured oversight powers over local government before resorting to command and control approaches.²¹ This will be elaborated upon in the follow paragraph.

3.4 Lack of appreciation for provincial oversight role

As stated above some of the arguments against assignment revolve around the perceived dangers of fragmentation and loss of control over national and provincial minimum standards. While it is true that local government has original legislative and executive powers over Schedule 4B and 5B matters, these are not exclusive to local government. A municipality's "right to govern on its own initiative, the local government affairs of its community" is made subject to 'national and provincial legislation as provided for in the Constitution'.²² Section 155 (7) of the Constitution furthermore provides that "national government subject to section 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 Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1)." The Constitution therefore creates a clear duty and power of national and provincial oversight over the exercise of municipal power.

3.4.1 National and provincial oversight Schedule 4B and 5B

3.4.1.1 National Powers

As seen above, section 155(7) of the Constitution confers the power on national government to "regulate" the exercise by municipalities of their executive authority. The term "regulating" in the context of section 155(7) of the Constitution was interpreted by the Constitutional Court to mean "a broad managing or controlling rather than direct authorisation function".²³

This relates to the framework within which local government must exercise these powers. In other words, the regulatory power enables national government (and also provincial government) to set essential national standards, minimum requirements, monitoring procedures etc. This arrangement empowers local government with the necessary flexibility to pursue localised solutions in fulfilling its developmental mandate, while ensuring that implementation takes place within a framework which maintains fundamental standards and does not compromise the rights of citizens.

²¹ Palmer Development Group: 2004, 5.

²² S 151 (3) Constitution.

²³ *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para 377.

3.4.1.2 Provincial Powers:

The sources of provincial power to legislate in Schedule 4B matters can be found in section 155(6)(a) and section 155(7) of the Constitution. Section 155(6)(a) of the Constitution outlines the duty for provincial government to monitor and support local government in its jurisdiction. This duty encompasses legislative measures that are aimed at either establishing a monitoring framework or impacting on the manner in which local government administers such matters. Supporting the argument that provincial and national oversight powers over Schedule 4B/5B and over assigned powers, are not weak, the Constitutional Court, in the *First Certification* case held that:

“the legislative and executive powers to support [local government] are...not insubstantial. Such powers can be employed by provincial governments to strengthen existing [local government] structures, powers and functions and to prevent a decline or degeneration of such structures, powers and functions... Taken together, these competences are considerable and facilitate a measure of provincial government control over the manner in which municipalities administer those matters in part B of (...) [Schedules] 4 and 5. This control is not purely administrative. It could encompass control over municipal legislation to the extent that such legislation impacts on the manner of administering local government matters”²⁴

As can be seen from above, the legislative powers of national and provincial government with regard to Schedule 4B and 5B matters, sourced directly from the Constitution, are substantial and potentially powerful tools in the hands of national and provincial government.

In addition, while the framework for provincial and national monitoring and standard setting is set out in the Constitution, the Systems Act consolidates and elaborates on these functions.²⁵ Section 108 of the Systems Act in particular, empowers the Minister to establish essential standards and minimum standards for any matter assigned to municipalities.

3.4.2 Intervention

Section 139 (1) of the Constitution provides a final safety-net for national and provincial standard setting. Section 139(1) provides that “When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation.” For intervention to be constitutionally valid, the provincial government must determine that the municipality has either failed to or is incapable of performing one of its executive obligations. Once that threshold is met however, the section provides direction on what steps may be taken by the province when it intervenes. Intervention is a useful remedy that allows the provincial government to intervene to fulfil a specific function which the municipality is unable to fulfil due to a failure or inadequacy on the part of the Municipal Council.

It is therefore clear that national and provincial governments already have strong oversight roles over the listed competencies of local government. This duty extends to

²⁴ *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para 371.

²⁵ Ss 105-108 Municipal Systems Act.

regulating functions which were previously theirs and which they have assigned to municipalities.²⁶

3.4.3 Provincial oversight currently too limited in scope?

Related to the lack of appreciation of the provincial and national oversight powers is the lack of appreciation of the functional scope of provincial oversight. It is readily accepted that provincial governments do not have water services or electricity services functions. This is despite the fact that provincial governments have the authority, in terms of Schedule 4B, read with section 155(7) of the Constitution, to oversee municipal performance on these issues. The functional evolution in these sectors has been that provincial governments are not involved in these functions, which is contrary to what the Constitution permits. It is suggested that the Constitution even envisages a provincial role in these functions. This can be deduced from the fact that provincial governments are expected to monitor, support and intervene into local governments. The anomaly that is thus created is that provincial governments fulfil a primary ‘hands on’ support role for local government but have not built up capacity to engage with water and electricity functions. This has contributed to the fragmentation of support and monitoring roles across spheres of government. There is therefore a need to identify and clarify a provincial oversight role that (1) does not impede the realisation of a developmental local government and (2) does not exclude certain functions that are part of provincial authority.

4 AVAILABLE INSTRUMENTS FOR RECONNECTING DEVELOPMENTAL LOCAL GOVERNMENT WITH THE SCHEDULES

A solution to any mismatch between the notion of developmental local government and the content of Schedules 4B and 5B can be found in:

- (a) revisiting the content of Schedule 4B and 5B: and/or
- (b) adjusting local government’s functions and powers through assignment.

4.1 Revisiting the Schedules

Revisiting the content of Schedule 4B and 5B can only be done by constitutional amendment. Amending the Constitution may be construed as a heavy-handed and drastic measure. It may also be considered to be a premature intervention in view of the capacity constraints experienced by different municipalities. However, as outlined and for the reasons mentioned above, there is a need to secure a ‘primary constitutional expression’ of the instruments for developmental local government in the Schedules.

4.1.1 Manner in which competencies are listed

It is submitted that, aside from the precise content of the Schedules, there is a need to revisit the manner in which this constitutional expression is framed, in other words, what the nature of the competencies in the Schedules should be. Arguments have been raised about the fragmentation of competencies and the lack of clustering. Even a cursory analysis of the Schedules reveals a strange mix of competencies. Some functional areas are just limited in scope (e.g. dog licences, fencing). Others are also

²⁶ Palmer Development Group: 2004, 5.

limited in type of activity (e.g. licensing and control of undertakings that sell food to the public, trading regulations). There are competencies that are broad public services (e.g. municipal health services) while there are also competencies that are broad but not necessarily a public service (local tourism).

There have been arguments for more broadly formulated competencies. The use of broad plenary powers, such as ‘local government affairs’ or ‘development of and service delivery to the municipal community’ is not uncommon. On the positive end of the scale, this approach in the Schedules would enable a holistic interpretation, linked to the constitutional objects of developmental local government. This approach, however, is not advisable in the South African context as it would ultimately contradict the commitment to strong and developmental local government. This is because the protection afforded to local government by such broad, enabling phrases is significantly less than the protection afforded by the inclusion of more narrowly defined competencies (similar to the current style of the Schedules). Broad, plenary powers such as ‘local government affairs’ will always overlap substantially with functional areas of central and provincial government. International experience shows that central and provincial governments will interpret the overlap to their advantage and produce legislation on topics that could have been dealt with by local government. Municipalities thus have to continuously defend their interpretation of the plenary power and will ultimately lose substantial ground.²⁷

There already is evidence of a drive towards transforming aspects of local government’s autonomous competencies into assigned or delegated power. Where local government’s competencies are formulated broadly, without any inherent definitive qualities, a narrow interpretation is preferred by central and provincial governments as was the case in the ‘Municipal Health Care’ example.

It is suggested that, in order to minimise the danger of central and provincial appropriation of autonomous municipal powers, Schedules 4B and 5B should be drafted in precisely defined competencies.

This approach will assist to avoid intergovernmental tension over overlapping competencies. It will facilitate the establishment of a ‘hierarchy’ of competences. When a local government competency overlaps with one of the functional areas of Schedules 4A or 5A, a well described local government functional area can then easily be defined first, leaving the residual areas to central and/or provincial government. This approach is already being used in allocating power among district and local municipalities in section 84 of the Municipal Structures Act. The districts’ powers are defined in section 84(1), leaving the remainder of Schedules 4B and 5B functional areas to local municipalities.

²⁷ For example, the Dutch Constitution describes the autonomous powers of municipalities by providing that they can regulate and administer their own ‘household’, i.e. their own affairs within their jurisdiction. This autonomous part is complemented by assigned powers, exercised on the basis of national legislation. Over the last four decades, the central government appropriated, through legislation, most aspects of the autonomous plenary powers and ‘handed it back’ through assignment. As a result of decades of hollowing out autonomy, local government in the Netherlands now operates mostly on the basis of assigned powers.

There appears to be no need for a radical departure from the manner in which local government competencies are listed. However, the need for clearer competencies has been repeatedly expressed as the current competencies are difficult to interpret. Two suggestions are made here. It may be advisable to cluster local government competencies around central themes such as ‘basic services’, ‘land use’, ‘recreation and tourism’ etc. In addition, it is suggested that the description of a functional area should deal with the following:

- (a) It should describe the subject matter of the functional area (whether it is a thing, a place, a social or natural phenomenon, or a service);
- (b) It should describe the activity (or activities) by which a municipality may realise the objects of local government in respect of the subject matter. The terms ‘regulate’, ‘operate’, ‘control’, ‘manage’ etc. come to mind; and
- (c) It should provide specific qualifications in respect of either the subject matter or the activities. An example can be found in the current Schedule 4B, which lists ‘water and sanitation services *limited to potable water supply systems and domestic waste-water and sewage disposal systems*’.

4.2 Adjusting functions and powers through assignment

An intervention which constitutes a less drastic measure than constitutional amendment is that of assignment. The Guidelines on Allocation of Additional Powers and Functions to Municipalities²⁸ (Assignment Guidelines) issued by the Department of Provincial and Local Government, provide guidance as to how these instruments should be effectively utilised. Similar to exercising original powers, a municipality performing an assigned function takes full responsibility for exercising the powers incidental to the function. After a function has been properly assigned, individual instructions can no longer be issued by the assigning organ, and the municipality exercises its discretion and is accountable for executing the function.

4.2.1 Assignment through legislation

An assignment, as discussed above may take the form of a legislative or executive assignment of authority. In terms of sections 44(1)(a)(iii) and 104(1)(c) of the Constitution, national or provincial legislatures can assign legislative powers to municipal councils. Assignment in this context conveys discretion on municipalities to exercise their legislative powers in respect of an assigned power that does not fall within its competences as outlined in Schedules 4B and 5B. National parliament and provincial parliament may assign any of the powers within its competence in terms of an assigning Act. The assignment is valid for as long as the assigning Act is in existence. Parliament or the Provincial Legislature can at any time revoke the assignment by revoking the assigning Act.

4.2.2 Assignment through an executive act

Sections 99 and 126 of the Constitution allow Cabinet members and provincial MECs to assign executive powers to municipal councils. The assignment must be consistent with the Act in terms of which the relevant power or function is exercised or

²⁸ The Guidelines on Allocation of Additional Powers & Functions to Municipalities (Assignment and Delegation Guidelines) were released as part of a toolkit on intergovernmental relations at the National Council of Provinces (NCOP) Summit (Cape Town: 3 May 2007).

performed.²⁹ This mode of assignment differs from the previous assignments in that it concerns executive powers only and no legislative powers. Second, it entails compulsion; the assignment of executive power allocates a duty to do something. This is why it must be concluded by means of an agreement with a specific municipality. At the same time, a municipality cannot be compelled to accept the assignment of such powers and functions.³⁰ The conclusion of an agreement also means that the assignment is terminated when either one of the parties withdraws from the agreement.³¹

4.2.3 Consultation procedures:

A national minister initiating an assignment by way of an Act of Parliament to municipalities in general, or to any category of municipalities must within a reasonable time before the Bill is introduced in Parliament go through a procedure of consultation with various stakeholders. This procedure is in addition to the constitutional requirement that the Bill be published for public comment in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations and the requirement in the Intergovernmental Fiscal Relations Act that the Local Government Budget Forum be consulted.³² Similar requirements bind an MEC initiating an assignment by way of a provincial Act.³³ These constitute safeguards to ensure that assignments are well placed and that national and provincial minimum standards are not compromised in the process due to a lack of capacity or funding.

4.2.4 Funding and capacity building to accompany the assignment

Where an assignment imposes a duty with financial implications on the municipalities concerned, and this duty falls outside Schedule 4B and 5B, section 10A of the Systems Act is applicable. This provision instructs the national minister, MEC or other organ of state initiating an assignment to take appropriate steps to ensure sufficient funding, and capacity building initiatives as may be needed, for the performance of the assigned function or power by the municipalities concerned. This is intended to protect municipalities from unfunded mandates.

5 INDICATORS FOR DECENTRALISATION

5.1 Introduction

Having described the developmental mandate, the mismatch between the mandate and the powers as well as the instruments available for intervention, the question is then: what powers and functions are best performed at local government level? A number of indicators emerge from national and international literature on decentralisation. These indicators are useful to determine at what level a particular function should be performed.

²⁹ Ss 99(b) and 126(b) Constitution.

³⁰ See items 9(2), 10(3) and 11(2) Assignment and Delegation Guidelines.

³¹ See item 9(4) Assignment and Delegation Guidelines.

³² S 154(2) Constitution; S 6(b) Intergovernmental Fiscal Relations Act 99 of 1997.

³³ S 154(2) Constitution; S 6(b) Intergovernmental Fiscal Relations Act 99 of 1997.

They are complemented and attenuated by generic aspects such as the history and context of local government. In the South African case, this refers specifically to the special developmental role of local government, the need to redress the legacy of apartheid as well as the political culture within which local government operates. In addition, any application of these indicators must take place against the backdrop of the principle of subsidiarity, which states that governance should be located as close to citizens as possible. This is because the principle is entrenched in section 156(4) of the Constitution.

The indicators are highlighted and elaborated on in the paragraphs below.

5.2 Indicators

5.2.1 Degree to which economies of scale can be obtained at a higher level

If there are significant efficiency gains to be had from performing a function at a supra-municipal level, this is an argument against decentralisation.

5.2.2 Degree to which the function produces spill-over effects

If the provision of a service has significant spill-over effects, whereby residents from outside the jurisdiction make extensive use of or benefit from the service, this an argument against decentralisation.³⁴ Classical examples are ‘network’ services, such as highways and telecommunications.

5.2.3 Degree to which capacity to execute the function is present

It is often argued that capacity should inform, if not dictate, the outcome of such a review. Inasmuch as capacity is indeed an important factor, it is argued here that a principled and conceptual approach towards the ideal distribution of powers is necessary. Even though the challenges around local government capacity are tremendous, to permit capacity to dictate the outcome of such a review would be counterproductive. Firstly, undue emphasis on capacity as an impediment to devolution can result in a “chicken-and-egg” dilemma: capacity is not developed as long as the function is absent. Secondly, the capacity argument is attenuated by the notion that, on a properly executed devolution scheme, resources and finances follow the function.

5.2.4 Degree to which intersectoral coordination is required

Another indicator that has been put forward relates to the extent to which intersectoral coordination is key to the performance of the function. It is then argued that all government service delivery comes together in the municipal area, making local government the ideal coordinating agency. National and provincial functions are exercised by line departments that each have their own political master, despite the fact that they operate in collectives (or clusters). Municipalities, on the other hand, are by definition multi-sectoral delivery agents.

³⁴ Prud’Homme: 1994, 28.

This assessment may be true insofar as the municipal council has executive authority thereby creating integrative potential. It is suggested, however, that in large municipalities, the challenges of coordination across departments are similarly daunting. Municipalities often ensure the alignment of political and administrative structures, resulting in the creation of line departments, overseen by specific executive committee members or a mayoral committee member in charge of dedicated council committees.

The indicator may, however, have real value in that multi-sectoral and multi-sphere integration is to be achieved through the IDP.

5.2.5 Degree to which grass roots community participation is required

Building on the theory of fiscal efficiency and the principle of subsidiarity, a strong and often used indicator is the extent to which citizen participation is an essential part of the function. The indicator on the extent of participation required is fundamental but needs to be refined and further substantiated in the South African context.

Firstly, it is the ultimate essence of both the subsidiary principle of section 156(4) of the Constitution and the notion of developmental local government. Secondly, the concept of public participation must be refined for it to be useful as an indicator. There are only very few government functions that require no public input whatsoever, which could render the indicator meaningless. However, the type of engagement required may differ. For example, decision making on company taxation, import duties or school curricula require a kind of engagement that is different from the engagement required for decision making on renaming streets and building public amenities such as play parks. It may thus be useful to distinguish between four levels of community participation that vary significantly in intensity, namely:

- (a) transparency;
- (b) petitions, complaints and demonstration;
- (c) consultation; and
- (d) 'joint' decision making, i.e. communities contributing to decision making.

It is evident that, as the intensity of the required engagement increases, local government becomes best placed to perform the function. The level of grass roots participation required should thus be a key indicator for where a function is to be placed.

5.2.6 Degree to which the function adds to policy control over the built environment

It is submitted that, in addition to the abovementioned generic indicators, a specific indicator is emerging in the South African context. As shown earlier, the developmental role of local government centres around (1) economic growth (2) coordinating developmental actors in the municipal area (3) being a vehicle for realising the ideal physical place and (4) leading and learning. It is suggested here that three of the four characteristics of developmental local government point towards a need for significant policy control over the built environment.

5.2.6.1 Economic growth

Economic growth envisaged by developmental local government is not state-led growth but growth facilitated by the state providing necessary infrastructure.

The key elements of that infrastructure are:

1. people's infrastructure (proximity to personnel);
2. skills infrastructure (availability of skills);
3. financial infrastructure (currency, banking);
4. telecommunications infrastructure;
5. roads (+ ports) infrastructure;
6. energy infrastructure;
7. regulatory environment (tax, labour law); and
8. location (land, building, sanitation).

Local government is the prime actor in 1 and 8.

Local government plays an important, but not the primary role in 5, 6 and 7 (through property tax).

Local government plays a very limited role in 2, 3, 4.

This sliding scale coincides with the relationship with the physical built environment. In other words, the more the function has to do with the physical environment, the more intense local government's involvement is.

In the *State of the Cities Report 2006* this link was formulated as follows:

“Local government is (...) responsible for livelihoods contextualised within the framework of built environment functions: municipalities are responsible for basic service provision and the creation of an enabling environment for the growth of business enterprises.”³⁵

5.2.6.2 Coordinating development actors

Coordinating developmental actors in the municipal area is directly linked to the municipality's jurisdiction over a locality. The coordinating role is twofold, namely to (1) coordinate what happens where in the municipality and (2) influence, on the basis of the experience of the locality, the policy decisions to be taken elsewhere. The first role again relates directly to the municipality's control over the built environment.

5.2.6.3 Realising the ideal physical space

If realising the ideal physical space is a key developmental objective, it points towards the importance of significant policy influence over the built environment.

6 MEASURING THE DISTRIBUTION OF FUNCTIONS AGAINST THE INDICATORS

6.1 Focus on high-impact functions

As argued before and analysed in detail in various reports, there is an interest and drive across many sectors towards transferring functions to local government. However, this report does not attempt to review the entire spectrum of government functions for 'decentralisability' to local government. Instead, it attempts to revive the notion of developmental local government in the constitutional distribution of powers.

³⁵ South African Cities Network: 2006, 5-23.

A number of 'high impact' functional areas are therefore selected. The argument is that a revisit of the distribution of powers in these areas would reconnect the notion of developmental local government with the constitutional division of powers. Further decentralisation may (or may not) follow but ultimately will not have a bearing on the primary constitutional expression of developmental local government. Another argument for this limitation is that a large scale intervention, attempting to cover all possible areas and refine all aspects would be great in theory but most probably disastrous in practice. Maximum developmental impact can be obtained through revisiting the division of roles in respect of functions that matter the most. It is suggested that two functional areas have this maximum impact, namely housing and local economic development.

6.2 Housing

6.2.1 Introduction

Housing is a Schedule 4A function, which means that it is a concurrent function shared by national and provincial government. The reality of housing delivery is, however, that it is an integrated function performed by all three spheres of government who each perform specific roles.

The National Housing Code sets out the key functions of national government in housing which includes, but is not limited to:

- (a) Determining national policy, including norms and standards, in respect of housing development;
- (b) Setting broad national housing delivery goals; facilitating the setting of provincial housing delivery goals and; where appropriate, facilitating the setting of housing delivery goals of a municipality;
- (c) Monitoring the performance of the housing sector against housing delivery goals and performance indicators, in co- operation with every MEC;
- (d) Assisting provinces to develop their administrative capacity;
- (e) Supporting and strengthening the capacity of municipalities to manage their own affairs, to exercise their powers and perform their duties in respect of housing development;
- (f) Promoting consultation on matters regarding housing development between national government and representatives of civil society, the sectors and sub-sectors, supplying or financing housing goods and services, provincial government and municipalities and any other stakeholder in housing development, and
- (g) Promoting effective communication in respect of housing development.³⁶

The provincial role in housing has been described as encompassing the following:

- (a) Determining policy and legislation;
- (b) Coordinating housing development in the province;
- (c) Supporting municipal capacity;
- (d) Intervention;
- (e) Multi-year planning of national and provincial housing programmes;
- (f) Accreditation; and

³⁶ Part 2, Chapter 2 National Housing Code.

(g) Monitoring accredited municipalities.

In practice, however, provinces are also involved as housing developers where municipalities lack the capacity to manage the subcontracting of housing construction.

Municipalities can be involved in housing in two ways: as developers or as entities accredited to administer national housing programmes. When municipalities act as developers, they apply to the MEC for Housing for the housing subsidy. It has been suggested that the role of a municipality is then determined by the MEC approving or disapproving specific projects. In practice, however, municipalities are using the very limited scope and authority that they have to engage in a range of activities related to housing, including:

- (a) identification of housing projects and setting up criteria for the development of such land, including the target income group;
- (b) identification of beneficiaries to receive low income housing;
- (c) acting as a developer of housing projects in the face of waning private sector interest;
- (d) providing internal infrastructure for housing projects; and
- (e) owning and renting housing for low income households.

6.2.2 *Applying the criteria to housing*

There have been various reports, studies but also political statements that call for a revisit of the location of authority over housing at provincial level.³⁷ Finance Minister Trevor Manuel, for example, highlighted housing as an example of a function that may need to be revisited.³⁸ This report seeks to unpack the reasons for this argument by applying the indicators, referred to above, to the housing function.

6.2.2.1 Economies of scale/ spill-over effects

The provision of housing is a localised function that does not produce significant spill-over effects. Also, there are no significant economies of scale involved in the provision of this service.

6.2.2.2 Degree to which intersectoral coordination is needed

The degree to which intersectoral coordination is needed is paramount in relation to the housing function. The housing function, by its very nature is an integrating activity. In the words of the Constitutional Court, housing:

“entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling.”³⁹

³⁷ Palmer Development Group: 2004, 23.

³⁸ Trevor Manuel, MP, *Co-operative governance and intergovernmental fiscal relations*, Address at the National Council of Provinces (NCOP) Summit (Cape Town: 3 May 2007).

³⁹ *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 at para. 35.

Housing includes planning, land administration, housing recipient identification, and delivery of a package of services, development facilitation and the provision of the house itself.⁴⁰ It goes beyond saying that municipal functions that are ancillary to housing, such as water, electricity and sanitation cannot be planned for in isolation by municipalities. There are also many hidden co-ordination issues. For example, if national government affords funding for the upgrade of services that are ancillary to housing, such as water and sanitation upgrades, this in effect results in a housing upgrade which may disregard the province's waiting list. The Development Action Group (a non-governmental organisation which works in the housing sector) describes the extent to which coordination is lacking in current housing initiatives in that:

“Dominant practice focuses on the physical delivery of houses underpinned by greenfields-type engineering-driven development practice by big delivery arrangements. Social delivery programmes are added afterwards, if not at all”.⁴¹

After all the funding streams, multi-sectoral plans and delineation of responsibilities are put in place and the time has come for the physical erection of a structure, any failures in coordination will be brutally exposed. At that time, the municipality is usually the only role-player left at the scene. The municipality then bears the brunt of residents' unhappiness and is often ridiculed for 'passing the buck' when it is argued that other levels of government are involved. It is suggested that the devolution of the housing function to local government should go a long way towards picking up these coordination issues where they matter and enhancing local accountability for the housing function.

6.2.2.3 Degree to which grass-roots participation is needed

Community participation in the provision of the housing function is essential. The kind of community participation that is required for a successful housing project is the high-intensity kind. Housing is perhaps one of the most 'vulnerable' functions in the sense that top-down provision of the function will result in disgruntled residents using the many opportunities they have to hamper successful implementation. Community concerns and opinions about location, schooling, safety, structure, subsidy criteria etc. must be taken into consideration, requiring the highest possible degree of citizen involvement.

6.2.2.4 Degree to which the function adds to policy control over the built environment

The *State of the Cities Report 2006* identifies a lack of appreciation for the built-environment criterion. It remarks that:

“the built environment, particular, while primarily the responsibility of local government, is often dependent on both the provincial and national sphere. This gives rise to fragmentation, potential duplication and confusion about responsibilities.”⁴²

⁴⁰ Palmer Development Group: 2004, 23.

⁴¹ Houston, A, Long-term vision needed to truly solve our housing problems, *Cape Argus*, 24 May 2006.

⁴² South African Cities Network: 2006, 5-23.

Key to this criticism is the lack of municipal authority over the housing function and housing funds.⁴³ There is a strong argument that the devolution of responsibility and funding over the housing function will improve control over the built-environment function. The fact that a large portion of housing subsidies are channelled from national government, via provinces, to private developers, thereby by-passing municipalities, is not conducive to holistic delivery of the built environment function.

There is thus a robust argument to be made out in favour of devolving housing to local government. This submission continues by outlining the two available instruments for devolution, namely (1) housing as a functional area goes to Schedule 4A or (2) housing is assigned to local government.

6.2.3 *Solution 1: Housing goes to Schedule 4A*

The above review of the housing function along the indicators for decentralisation suggests that the housing function should be devolved to local government. This can be effected through the relocation of the housing function from Schedule 4A to Schedule 4B. Naturally, such a constitutional amendment would mean a serious alteration to the current configuration of the state. There does, however, appear to be readiness to at least take the issue up for consideration. Finance Minister Trevor Manuel remarked that “[i]f the final outcome of such debates requires amendments to the schedules of our Constitution, then we have to respond to such challenges maturely”.⁴⁴

Also, the strength and potential of provincial oversight powers over Schedule 4B powers is a critical factor that should be taken into consideration in the discussion over the location of housing. The loss of provincial oversight and adherence to minimum standards cannot be an argument. In fact, it is submitted that the seven provincial roles identified above⁴⁵ can be exercised by a province, even if the housing function were to be listed in Schedule 4B. The fact that a competency is an ‘original’ local government competency does not mean that the provincial government cannot regulate, coordinate, set minimum standards, monitor, intervene etc. The necessary supervisory legislative framework would remain firmly in the hands of provincial and national government through the application of section 155(7) and 155(6)(a). In that sense, it could even be argued that the relocation of housing from Schedule 4A to Schedule 4B reflects the vision espoused in the Housing Act and the Housing Code,⁴⁶ which do not envisage national or provincial governments as implementing agencies.

A problem would arise in relation to the provincial performance of the housing delivery function for municipalities that lack the capacity to perform the function. This is an activity that is necessary at this juncture in time, considering capacity constraints in local government, but may become constitutionally complex after a relocation of the function to Schedule 4B. A solution must then be found in the conclusion of agency agreements between low capacity municipalities and provincial housing departments.

⁴³ South African Cities Network: 2006, 5-25.

⁴⁴ Trevor Manuel, MP, *Co-operative governance and intergovernmental fiscal relations*, Address at the National Council of Provinces (NCOP) Summit (Cape Town: 3 May 2007).

⁴⁵ See para 6.2.1 above.

⁴⁶ The National Housing Code recognises the need for local priority setting in regard to housing. It states that municipal IDPs direct housing development initiatives.

6.2.4 *Solution 2: assignment*

The devolution can also be effected within the parameters of the Constitution. As indicated before, a mechanism exists for the transfer of the housing function to municipalities in the form of accreditation. Accreditation means that the accredited municipality becomes the recipient of the national housing subsidy allocations and assumes significant decision making authority. An accredited municipality may approve applications for individual subsidy applications or project subsidies, depending on the level of accreditation.

Level One Accreditation involves the administration of non-credit linked individual subsidies. This is the simplest form of accreditation as subsidies are dealt with in a straightforward manner on an individual basis.

Level Two Accreditation may be obtained in respect of non-credit linked individual subsidies, project-linked subsidies, project-linked and individual consolidation subsidies, institutional subsidies, and the management of the payouts of residual amounts of non-credit linked subsidies and individual consolidation subsidies. This form of accreditation requires more sophisticated administrative systems to deal with the complexities of the various subsidy mechanisms.

6.2.4.1 Capacity requirements for accreditation:

The requirements for accreditation are outlined in the National Housing Code.⁴⁷ Accreditation is not a suitable mechanism for the devolution of the housing function to local government. Notwithstanding the fact that in practice very few, if any, municipalities have been accredited,⁴⁸ the exclusionary nature of the process means that certain municipalities are enabled to perform the housing function in a manner that facilitates its developmental mandate, while others are completely excluded from the opportunity until they are able to meet the requirements of accreditation. There is therefore a disproportionate benefit for citizens who are the beneficiaries of housing initiatives within the jurisdiction of municipalities which have been accredited. It is a mechanism that can be likened to a “white elephant”, very rarely seen, possibly nice to look at, but with no immediate benefit for citizens.

The difficulties encountered in the accreditation process represent the first hurdle that municipalities have to overcome even before leaving the starting blocks. One such challenge relates to a lack of understanding of the application process⁴⁹ and the arguably high threshold requirements for accreditation. For example the “proven track record” requirement stipulates that “the Council’s proven track record of initiatives and involvement in housing provision and/or community development in its area of jurisdiction will be a recommendation”. In respect of capacity, it is a pre-requisite that the municipality should have “financial, administrative, professional and technological capacity to fulfil its housing responsibilities and to administer the National Housing Programmes.” It is difficult to conceive of many municipalities who

⁴⁷ Part 2, Chapter 2 National Housing Code.

⁴⁸ South African Local Government Association, Conference Paper Working Group Four: 2007, 112.

⁴⁹ Resolutions of the KwaZulu-Natal Housing Summit : 2005.

currently have that level of infrastructure. As argued above, the appropriate kind of capacity is unlikely to emerge without the existence of authority.

The procedures for accreditation are as follows:

- (a) A municipality makes an application for accreditation in the manner and form specified by the MEC.
- (b) The MEC appropriately evaluates the capacity of the applicant to administer the national housing programme(s).
- (c) If the MEC is satisfied that the municipality complies with criteria for accreditation (as sketched above) then the MEC approves the application subject to any directions consistent with national policy.
- (d) If the MEC rejects the application, full reasons are provided to the municipality.
- (e) After approval of the accreditation application, the MEC concludes an agreement with the municipality that defines:
 - powers, duties, functions and responsibilities assigned to municipality.
 - financing arrangements.
 - minimum capacity specification.
 - performance standards.
 - reporting standards.
 - agency fee to be paid by the Provincial Housing Development Board to the municipality for administering each and every subsidy application of subsidy beneficiaries. This fee will be a uniform national fee determined by the Minister of Housing and will be the same as the fee payable to lenders in terms of Chapter 4 of Part 3 of the Code.
- (f) The rights of the MEC in the event of the municipality breaching obligations.

6.2.4.2 Accreditation does not amount to devolution

The framework within which accreditation takes place bears a remarkable similarity to delegation. There is no permanency in respect of the transfer of powers and municipalities are bound by the terms of the agreement concluded with the MEC. The rigid reporting requirements demonstrate the inflexible working parameters for accredited municipalities, in that:

“Any particular MEC who accredits any particular municipality will require that municipality to ensure that it meets the accreditation criteria as set out herein at all times, whilst it exercises any particular delegated functions...

The MEC in question will be entitled to cancel the agreement between it and the municipality and will accordingly be entitled to cancel the municipality’s accreditation, if the municipality fails to continue to comply with the terms and conditions of the agreement.”⁵⁰

⁵⁰ Item 3.7, Part 2, Chapter 2 National Housing Code.

The key differences between assignment and accreditation can be summarised as follows:

| Assignment | Accreditation |
|--|--|
| Assignment denotes full authority over the function. | Only confers control over one of the aspects or functions of the national housing programme. |
| While the national and provincial legislature does not give up its legislative powers through assignment, assignment is considered to be more or less permanent. | Accreditation may, subject to review by the MEC, be revoked. This decision falls squarely within the discretion of the MEC. |
| Assignment is subject to the procedures outlined in the Systems Act and the Financial and Fiscal Amendment Act, 2003. | The accreditation process is not subject to the procedures for assignment as outlined in the Systems Act and the Financial and Fiscal Amendment Act, 2003. This implies that funding arrangements in the accreditation process are not as rigorous, which may leave room for municipalities having to bear ancillary costs in fulfilling its functions |
| Full control over funds and budgeting is exercised. | The provincial accounting officer retains control of funds transferred. |
| No rigid reporting requirements at regular intervals to the assigning authority | Reporting requirements and conditions are determined by the MEC. |

6.2.4.3 Accreditation an unfunded mandate?

A critical challenge around accreditation is the perception that an application for accreditation is an application for an unfunded mandate. If a municipality applies for accreditation and becomes accredited, it would have to take over the administrative function on its operating budget. There is no guarantee in the accreditation structure that the administrative costs associated with processing housing subsidy allocations will be included in the cost structure.⁵¹

6.2.4.4 Player/referee problem

Section 9(2)(b) of the Housing Act provides that:

“If a municipality has been accredited under section 10(2) to administer national housing programmes in terms of which a housing development project is being planned and executed, such a municipality may not act as a developer, unless such project has been approved by the relevant housing development board.”

This means that in practice, where a municipality wants to be involved in housing development, it must decide whether it will take on the role of a developer in housing development, or administer one or more national housing programmes, as the Act

⁵¹ Palmer Development Group: 2004, 42.

does not allow a municipality to be both accredited and a developer at the same time without the necessary approval.⁵²

This creates an anomaly in areas where there is insufficient capacity amongst developers in the area to implement housing projects or where there is waning private sector interest in low cost housing developments. An outcome of municipal impact assessments conducted by SALGA in the province of KwaZulu-Natal in 2005 revealed that funding constraints in municipalities contribute to waning private sector interest. It was found that “over the years, the profit margins in the industry end up being reduced to an extent that it is not attractive for the industry stakeholders, hence the decline in participation of major construction companies in the lower end of the housing market.”

6.2.4.5 Accreditation hollows out provincial housing subsidy

Another disincentive on the part of provincial departments for accreditation is the removal of significant parts of provincial budgets to municipalities. For example, eThekweni’s application for accreditation, would (if it had been approved) reportedly have resulted in a reduction of the provincial housing subsidy budget by 60%.

6.2.4.6 Way forward with regard to assignment

Earlier, the submission made an argument for the devolution of housing to local government by means of an amendment to Schedule 4.

However, it has also been shown that devolution is possible within the parameters of the Constitution. It must be stated again, though, that this option would not respond to the need to reconnect the Schedules 4B and 5B with the notion of developmental local government. It would not result in an improved ‘constitutional expression’ of this fundamental and unique feature of local government.

If the housing function is to be devolved within the parameters of the Constitution, it cannot be done within the parameters of the current Housing Act. It should be done within the parameters of the Constitutional design for assignment, which is augmented by the provisions and procedures of the Municipal Systems Act. It is suggested here, in line with suggestions made elsewhere, that a two pronged approach be followed.

First, housing should be assigned to the six metropolitan municipalities. The metropolitan municipalities are an identifiable group of municipalities that not only have the capacity to receive the function but are also in urgent need of authority over the function in order to be able to realise integrated urban governance.

Second, housing should be assigned, on an incremental basis, to local municipalities. A general assignment may be unrealistic in that it would include the transfer of the housing function to municipalities that do not have the capacity to perform the function. Individual assignments, which are executed in line with the Constitution and the prescripts of the Municipal Systems Act should be followed in the incremental devolution of housing to local municipalities.

⁵² Finance and Fiscal Commission: 2007, 30.

Provincial governments should thus relinquish control over the housing function to metropolitan municipalities and engage in a concerted effort to devolve the function to local municipalities. They should regard their activities as housing developers as being of an interim nature and strive towards minimising this role. This should be done in favour of a provincial role that focuses on high level, strategic oversight, comprising of regulation, coordination, monitoring and intervention.

7 PROBLEMS AROUND THE INTERPRETATION OF LOCAL GOVERNMENT COMPETENCIES

There are critical functional areas related to housing that are possibly as problematic as the housing function itself. This submission deals with them in a different way. This is because the problem is not necessarily related to the absence of a reference to them in the Schedules but rather in the lack of clarity about what they mean and authorise municipalities to undertake.

7.1 Public transport

Firstly, there is overwhelming evidence that a critical connection exists between authority over housing and public transport. This linkage is particularly pertinent with regard to urbanised settings where integrated delivery of housing and public transport is vital to the creation of liveable, attractive cities.

Public transport is generally provided by road, rail or air. It has been suggested to divide the various aspects of authority over these forms of public transport into the following:

- (a) regulating public transport;
- (b) subsidising public transport;
- (c) planning for public transport;
- (d) providing public transport infrastructure; and
- (e) operating public transport.

There is considerable confusion related to the sharing of these functions across three spheres, particularly with regard to road and rail transport. For example, the regulation, subsidisation, planning for and provision of passenger transport by rail is assumed to be a national function with the ownership of both rail infrastructure and the rail operator residing with national government. However, the Gauteng provincial government initiating a monorail between Soweto and Johannesburg, shows that this national exclusive authority is not necessarily taken for granted. There is also no constitutional basis for the exclusion of local government from any authority over railways transport that begins and ends within a municipal boundary.

‘Municipal public transport’ is listed as a municipal competency but there is no clarity on what it authorises municipalities to do. In terms of the Municipal Structures Act, district municipalities have the authority to ‘regulate passenger transport services’ and municipalities are required by the National Land Transport Transition Act⁵³ to produce Transport Plans. However, the reviews of reality in public transport planning and delivery show a picture of fragmentation. Very few municipalities plan for transport, the division of transport responsibilities between district and local

⁵³ Act 22 of 2000.

municipalities is confusing and many in local government are arguing that transport planning is an unfunded mandate while the national government argues that it is part of the IDP process. There thus appears to a general state of confusion with regard to authority over transport.

The example of the Gauteng monorail also bears testimony to the quest within large urban settings for policy control over the 'built environment'. It has been recommended that metropolitan municipalities should be afforded significant authority over all aspects of public road and rail transport, so as to ensure integrated urban governance and safeguarding the necessary linkages with housing, spatial planning and municipal roads.

Public transport issues and needs vary greatly with the size and specifics of municipalities. With regard to secondary cities and smaller local municipalities, the issue is less pertinent. Public transport issues mostly relate to commuting between municipalities, which creates externalities and spill-over effects that require authority to be at a higher level. It is suggested that the authority over issues falling within the domain of 'municipal public transport' should then be exercised at district level.

The above can be dealt with in a way that stays within the parameters of the Constitution. The municipal competency 'Municipal Transport' should be interpreted so as to afford significant policy control to local government over public transport. Metropolitan municipalities are the immediate recipients of such authority whilst district municipalities can receive the public transport authority via section 84(1) of the Municipal Structures Act. Section 84(1) may then be amended so as to extend the district authority beyond the regulation of passenger transport services to include other aspects of the transport authority listed above.

7.2 Land use planning

The second interpretational problem relates to the role of local government in land use planning which is a critical component of the broader housing function. 'Municipal planning' is listed in Schedule 4B and it is generally accepted to include land use planning. However, in the absence of national legislation on land use planning, the precise content of the competency remains undefined. This is giving rise to great uncertainty and a situation where municipal land use planning is conducted in terms of ordinances that stem from the pre-1994 era.

A recent High Court judgment has added to the confusion by refusing to see land use planning as a municipal competency that is protected by its inclusion in Schedule 4B.⁵⁴ The provincial intrusion into land use planning through the Development Facilitation Act was thus permitted.

The current lack of direction on the role of local government in planning is proving harmful to local government implementing its developmental mandate. It is of paramount importance that the vision expounded in the White Paper on Spatial Planning and Land Use Management⁵⁵ is followed through and that legislation is

⁵⁴ *Basson and Others v City of Johannesburg Metropolitan Municipality and Others & Eskom Pension and Provident Fund v City of Johannesburg Metropolitan Municipality and Others* 2005 JDR 1273 (T).

⁵⁵ White Paper on Spatial Planning and Land Use Management, Wise Land Use: 2001.

passed with a role for local government in land use planning that is alive to the need for local government control over the built environment.

7.3 Local economic development

Despite the fact that ‘local economic development’ is part of the local government parlance, there is considerable confusion about local government’s role in economic development. In his Chairperson’s Report to the SALGA National Conference, Cllr Amos Masondo remarked:

“as a deliverable, local economic development is still not as clearly defined as our other mandates. A fairly homogenous understanding of the concept within our municipalities must be inculcated as a common view of economic development so that it can help us to better measure our progress or lack thereof.”⁵⁶

Within the economic development sector, a key complaint is that local politicians neglect their role in local economic development.⁵⁷ It is suggested there that the two phenomena are linked. In other words, confusion over the precise content of the local economic development mandate has led to a hands-off approach by politicians who may support the establishment of an administrative structure dedicated to local economic development but are uncertain as to what the political ramifications or interests are. The fact that there is no mention in Schedule 4B or 5B of local economic development may have added to this problem.⁵⁸ The absence of the function in the schedules has resulted in it being viewed as an unfunded mandate.⁵⁹ Rather than issues of authority, indeed the main problem with regard to the LED function is the uncertainty with regard to the fiscal arrangements in the form of intergovernmental allocations and/or revenue generating measures that support or augment the function. The Department of Provincial and Local Government supports the pursuit of the formal recognition and funding of the LED function of municipalities.⁶⁰ However, it qualifies this by arguing that municipalities should draw on resources “locked in a range of different government support instruments”, such as Sector Education and Training Authorities (SETAs), Small Enterprise Development Agency and non-governmental support.⁶¹ The issue of operational or hidden costs associated with the function then remains not dealt with. The argument probably is that municipalities do not necessarily have to run programmes but should focus on identifying opportunities and building partnerships. However, even without municipalities running business training courses or operating souvenir factories, considerable municipal resources still need to be dedicated to make the LED function a reality. The assumption thus remains that municipalities will fund the long list of activities mentioned in the *Policy*

⁵⁶South African Local Government Association, “Cllr Amos Masondo, Chairperson’s Report”: 2007, 15.

⁵⁷ South African Local Government Association, “Commission Three: Economic Growth and Development”: 2007, 96.

⁵⁸ Palmer Development Group: 2004, 15.

⁵⁹ Department of Provincial and Local Government: 2005, 9.

⁶⁰ Department of Provincial and Local Government: 2005, 9.

⁶¹ Department of Provincial and Local Government: 2005, 9.

*Guidelines for Implementing Local Economic Development (LED Guidelines)*⁶² from their own revenue.

The *LED Guidelines* make it clear that LED is about identifying opportunities, building partnerships, harnessing local resources, influencing municipal policy, building skills etc. For municipalities, the problem with this approach may be that it does not necessarily create the level of clarity they are looking for as LED is at risk of being ‘everything and anything’. An attempt at defining the function may result in three basic components of LED (derived from the *LED Guidelines*) namely (1) creating an ideal environment for investment, (2) targeting ‘good’ enterprises⁶³ with public sector support and (3) supporting ‘good’ enterprises through procurement.

It was already argued that municipalities pursue the creation of an ideal environment for investment mostly through their built environment functions. The third component, supporting ‘good’ enterprises through procurement does not require a specific legal or constitutional mandate. What remains is the provision of public sector support for ‘good’ enterprises. There has been an argument that business support in the form of advice, financial assistance and business promotions (the second component) should not be or become a local government function as it is primarily national government’s responsibility. Even though it is apposite to protect local government from taking on too many responsibilities the ‘leading and learning’ aspect of developmental local government points towards inclusion of these activities under the local economic development theme.

The question is whether the function would necessarily benefit from an inclusion in Schedule 4B or 5B of such a function.

If the programme finances related to this function are indeed to be found elsewhere, as the *LED Guidelines* argue, it may be realistic to expect municipalities to bear the operational costs. However, this is realistic only if the municipality itself stands to receive significant returns from increased economic activity through increased revenue generation. The current revenue generating measures at the disposal of municipalities do not necessarily guarantee a municipality a return on increased economic activity, which is immediate enough to provide the incentive for bearing LED costs. The late RSC levy may have been such a revenue generating measure. Property rates and service charges are only a secondary spin-off in this respect. It is therefore argued that the discussion on the formal recognition of the LED function is inextricably linked with the question as to what future taxing powers municipalities will be able to impose.

The creation of a competency ‘economic development’ or ‘local economic development’ in Schedule 4A or 5A would not be useful if it is inserted in the current set of competencies in the Schedules. The addition of a competency ‘local economic development’ will only add further confusion as it would create another type of competency that overlaps with other local government competencies.

⁶² Aside from generic business environment related issues, it includes issues such as organising networks, keeping a database, marketing etc. which require very direct municipal action and resources.

⁶³ An enterprise would be ‘good’ if it creates jobs, is environmentally sustainable, promotes social development and is in line with broad based black empowerment principles. See *LED Guidelines: 2005*, 5.

The answer to the problems around recognition and funding is then solely dependent on an appropriate incentive for municipalities to carry the operational parts of the LED function through revenue generation and sourcing programme financing elsewhere, as envisaged in the *LED Guidelines*.

References:

De Visser, J. (2005) *Developmental local government– a case study of South Africa* (Antwerp: Intersentia).

Department of Housing (2000) *The National Housing Code* (Pretoria: Department of Housing) (<http://www.housing.gov.za>), accessed 18 May 2007).

Department of Housing KwaZulu-Natal (2005) *Resolutions of the KwaZulu-Natal Housing Summit (2005) held on the 23rd & 24th March 2005, Coastlands Conference Centre, Durban* (<<http://www.kznhousing.gov.za/conference/kzn>> , accessed 14 May 2007).

Department of Provincial and Local Government (2007) *Guidelines on Allocation of Additional Powers and Functions to Municipalities* (Pretoria: Department of Provincial and Local Government).

Department of Provincial and Local Government (2005) *Robust & Inclusive Municipal Economies, Policy Guidelines for Implementing Local Economic Development in South Africa* (Pretoria: Department of Provincial and Local Government).

Finance and Fiscal Commission (2007) *Assessment of the institutional and funding framework for housing delivery in South Africa” Submission for the Division of Revenue 2006/7* (Pretoria: Finance and Fiscal Commission) (<<http://www.ffc.co.zza/docs/submissions/dor.2006>>, accessed 20 May 2007).

Governing Council of the United Nations Human Settlements Programme (2007) *Draft guidelines on Decentralization and the Strengthening of Local Authorities HSP/GC/21/2/L.3.* (<<http://www.unhabitat.org/downloads>> accessed, 18 May 2007).

IDASA- Budget Information Services (2005) *Local Government Responsibilities Budget Brief No. 153* (Cape Town: IDASA).

Ministry of Agriculture and Land Affairs (2001) *White Paper on Spatial Planning and Land Use Management, Wise Land Use* (Pretoria: Ministry of Agriculture and Land Affairs).

Ministry for Provincial Affairs and Constitutional Development (1998) *The White Paper on Local Government*, (Pretoria: Department of Constitutional Development).

Palmer Development Group (2004) *Local Government Powers and Functions* (Cape Town: IDASA.).

Portfolio Committee on Provincial and Local Government (2007) *Report on an International Oversight Visit to Kerala, India.* (Pretoria: Department of Constitutional Development)(<<http://www.pmg.org.za/docs/2007/comreports/070305plocalreport.htm>>, accessed 14 May 07).

Prud'Homme, R. (1994) *On the dangers of decentralisation* (Washington D.C: Worldbank).

Robinson, M. (2007) "Introduction: Decentralising Service Delivery? Evidence and Policy Implications" in *IDS Bulletin* Volume 38 Number 1, January 2007.

South African Local Government Association (2007) *SALGA National Conference 2007 22nd- 26th April 2007* (<[http: www.salga.net](http://www.salga.net)>).

South African Cities Network (2006) *State of the Cities Report 2006* (Pretoria: South African Cities Network).