The potential impact of the Draft Preservation and Development of Agricultural Land Framework Bill on land use and planning laws

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ABSTRACT

The South African regulatory framework on spatial planning, land use, land use management and land development is set out in the *Spatial Planning and Land Use Management Act* 16 of 2013 (*SPLUMA*). All land use planning legislation has to be consistent with its provisions. The *SLUMA* designate a municipality as the authoriser of all land use planning applications in South Africa. On the other hand, the *Subdivision of Agricultural Land Act* 70 of 1970 (*SALA)* bestows such authority on the Minister responsible for agriculture. Recently the Department of Agriculture, Forestry and Fisheries published the *Draft Preservation and Development of Agricultural Land Framework Bill* (DAFF Draft Bill). The DAFF *Draft Bill* proposes to repeal *SALA* in whole. The DAFF *Draft Bill* proposes for an agricultural land regulatory mechanism or system that takes in the input of all the three spheres of government in the process of agricultural land use and planning authorisation.

In particular, the study focus on the possible changes or alterations that the DAFF *Draft Bill* will introduce to the current South African land use and planning jurisprudence in respect of the regulation of agricultural land use and planning in the event that it is enacted in its current form. Based on the Constitutional Court's jurisprudence on the definition and scope of "municipal planning" and the substance of section 33(1) of *SPLUMA*, the study argues that the DAFF *Draft Bill* is susceptible to both statutory and constitutional challenges in so far as the local government exclusive constitutional municipal planning functional area is concerned. This study concludes by recommending that certain clauses of the DAFF *Draft Bill* be revised accordingly to reconcile with section 33(1) of *SPLUMA* and the constitutional imperative in respect of the functional area of municipal planning.

Keywords: land use; planning law; agricultural land; subdivision of land; rezoning; municipal planning

OPSOMMING

Die Suid-Afrikaanse regulatoriese raamwerk rakende ruimtelike beplanning, grondgebruik, die bestuur van grondgebruik en grondontwikkeling word in die *Wet op Ruimtelike Beplanning en Grondgebruikbestuur* 16 van 2013 (*Spatial Planning and Land Use Management Act* (*SPLUMA*)) uiteengesit. Alle grondgebruikbeplanningswetgewing moet in ooreenstemming met die bepalings daarvan wees. *SPLUMA* identifiseer munisipaliteite as die aangewese liggaam om aansoeke rakende grondgebruiks-beplanning in Suid-Afrika te magtig. Aan die ander kant verleen die *Wet op die Onderverdeling van Landbougrond* 70 van 1970 (*Subdivision of Agricultural Land Act* (*SALA*)) sodanige magtiging aan die Minister van Landbou. Onlangs het die Departement van Landbou, Bosbou en Vissery die *Draft Preservation and Development of Agricultural Land Framework Bill* (die konsepwetsontwerp) gepubliseer. Die konsepwetsontwerp stel voor om *SALA* in geheel te herroep. Ook word 'n gereguleerde meganisme (of stelsel) vir landbougrond in die konsepwetsontwerp voorgestel wat die insette van al drie vlakke van regering in alle besluitnemingsprosesse oor die volhoubare gebruik van landbougrond en landboubeplanning in ag moet word.

Hierdie studie fokus spesifiek op die moontlike veranderings of wysigings wat die konsepwetsontwerp (indien in sy huidige formaat goedgekeur word) binne die huidige Suid-Afrikaanse grondgebruik- en beplanningsregsraamwerk te weeg sal bring met verwysing na die regulering van die gebruik en beplanning van landbougrond. Gebaseer op die Konstitusionele Hof se uitsprake rakende die definisie en omvang van "munisipale beplanning" en die inhoud van artikel 33(1) van *SPLUMA*, argumenteer hierdie studie dat die konsepwetsontwerp vatbaar is vir beide statutêre en grondwetlike uitdaging vir sover dit die eksklusiewe funksionele area van munisipale beplanning van plaaslike regerings betref. Die studie sluit af deur aan te beveel dat sekere klousules van die konsepwetsontwerp hersien moet word ten einde te voldoen aan artikel 33(1) van *SPLUMA* asook aan die grondwetlike imperatief rakende die funksionele area van munisipale beplanning.

Sleutelwoorde: grondgebruik; beplanningsreg; landbougrond, onderverdeling van grond, hersonering; munisipale beplanning

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LIST OF ABBREVIATIONS

CARA	Conservation of Agricultural Resources Act 43 of 1983
CCR	Constitutional Court Review
CJLC	Commonwealth Journal of Local Government
DFA	Development Facilitation Act 67 of 1995
DAFF	Department of Agriculture, Forestry and Fisheries
LGMDA	Local Government: Municipal Demarcation Act 27 of 1998
IDP	Integrated Development Plan
IRFA	Intergovernmental Relations Framework Act 13 of 2005
JJS	Journal for Juridical Science
LUPA	Western Cape Land Use Planning Act 3 of 2014
LUPO	Land-use Planning Ordinance 15 of 1985
PELJ	Potchefstroom Electronic Law Journal
SCA	Supreme Court of Appeal
SDF	Spatial Development Framework
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
SALA	Subdivision of Agricultural Land Act 70 of 1970
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
LGMSA	Local Government: Municipal Systems Act 32 of 2000

1 Introduction

1.1 Contextualisation and problem statement

The South African landscape is characterised by a "scarcity of high potential agricultural land".[1] One of the threats to this scarce resource is an increase in the demand for land that can be used for non-agricultural uses such as mining and the construction of infrastructure and industries.[2] There is an alarming development in South Africa whereby prime agricultural land that ought to be used for food production is being converted to urban land uses that are not related to agriculture.[3] This situation will present a number of problems, for instance, problems of food insecurity since food production is contingent on the availability of viable agricultural land.[4] For this reason, unless the conversion of prime agricultural land to other agriculturally uneconomic land uses is rigorously regulated, food production will be adversely affected.[5] Therefore the protection and preservation of agricultural land should be treated as a matter of national interest.[6]

The South African government has a constitutional obligation in terms of section 27(1)(b) and (2) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) to take reasonable legislative and other measures (within its available resources) to achieve the progressive realisation of everyone's right to have access to

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1 Preamble of the *White Paper on Agriculture* 1995; A statistical spatial evaluation conducted by the Department of Agriculture, Forestry and Fisheries (hereinafter DAFF) in 2011 indicate that vast areas of agricultural land has been converted to non-agricultural developments. See DAFF *Draft Policy Document on the Preservation and Development of Agricultural land* 8 (hereinafter DAFF *Draft Policy Document* 10. Though the title on the document refers to a "Discussion Document", the DAFF refers to this document (in both Gen Not 210 in GG 38545 of 13 March 2015 as well as on their website at http://www.daff.gov.za/daffweb3/Home/aid/299) as a draft policy document.

2 Kloppers 2014 *PELJ* 710.

3 For instance, in big cities such as Cape Town, much of the prime agricultural land within the urban edge is rapidly being converted to urban land uses. See Geyer *et al* 2011 *MDM* 41-42.

4 Goal five of the "critical agricultural policy goals" as listed in the *White Paper on Agriculture,* is to see that agricultural production is based on the sustainable use of the natural agricultural and water resources. See *White Paper on Agriculture* 1995 1.

5 The preservation and sustainable use of agricultural land is a positive indicator for agricultural productivity. See DAFF *Draft Policy Document* 8; The foreword of *the White Paper on Spatial Planning, Land Use Management and Land Development GG* 22473 of 20 July 2001 states that land is the basis of food.

6 Section 52(1)(b) of the *Spatial Planning and Land Use Management Act* 16 of 2013 states that a development application affecting food security is to be treated as a development affecting the national interest.

sufficient food and water.[7] *Subdivision of Agricultural Land Act* 70 of 1970 (hereafter *SALA*) could be described as a legislative initiative on par with the aforesaid constitutional objectives.[8] Moreover, the DAFF recently published both a discussion document and bill focused on the preservation and development of agricultural land.[9] They are respectively titled the: (a) DAFF *Draft Policy Document*; and (b) the DAFF *Draft Preservation and Development of Agricultural Land Framework Bill*[10] (hereafter the DAFF *Draft Bill*).

DAFF *Draft Policy Document* provides that in order to facilitate agricultural production it is vital to formulate policies, laws and regulations conducive to sustainable agricultural development.[11] Hence it is not surprising that the DAFF *Draft Bill* proposes the use of land use and planning mechanisms in the preservation of prime agricultural land.[12] Under clause 13, the DAFF *Draft Bill* provides the procedure that should be followed before agricultural land can be rezoned. Moreover the DAFF *Draft Bill* deals with issues of water use licensing, rehabilitation of land, the processes of land use change and assessment of the impact of land use changes on land.[13] More importantly it seeks to separate prime agricultural land into two categories, namely high potential cropping land and medium potential agricultural land.[14] Moreover the DAFF *Draft Bill* proposes processes that have to be followed before high potential cropping land and medium potential agricultural land can be subdivided and rezoned.[15] The aim is to ensure that prime agricultural land is protected from non-agricultural developments and uses that

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7 As entrenched in s 27(1)(b) of the *Constitution*.

8 While it is true that *SALA* was promulgated long before the *Constitution* came into existence, its purpose makes it a perfect match of legislation referred to in s 27(2). The purpose of *SALA* is to prevent the atomisation of agricultural land into small uneconomic subdivisions. See section 2.5.1 of this study.

9 See Gen Not 210 in GG 38545 of 13 March 2015 as well as DAFF 2015 http://www.daff.gov.za/daffweb3/Home/aid/299.

10 DAFF *Draft Preservation and Development of Agricultural Land Framework Bill* [B XX-2014].

11 DAFF *Draft Policy Document* 8.

12 DAFF *Draft Bill* clause 2. See section 3.3.2 of this study.

13 See clauses 13(4) and 17 of the DAFF *Draft Bill* respectively.

14 Clauses 5 and 29 of the DAFF *Draft Bill* deal with subdivision and rezoning applications on high potential cropping land and medium potential agricultural land respectively; Clause 1 of the DAFF *Draft Bill* defines both "high potential cropping land" and "medium potential agricultural land". See section 3.4.1 of this study.

15 DAFF *Draft Bill* chapter 2.

are detrimental to the sustainability of prime agricultural land.[16] Based on the above synopsis, it is clear that the proposed provisions of the DAFF *Draft Bill*, aimed at the preservation of prime agricultural land through the use of planning law mechanisms, will have implications on the land use planning legislation of South Africa.

South African planning law jurisprudence indicates that the concepts of "subdivision" and rezoning of land fall within the ambit of municipal planning,[17] which itself is a concept familiar in the land use and planning law circles.[18] Based on this information, it is apparent that the DAFF *Draft Bill* and DAFF *Draft Policy Document* subscribe to the application of land use and planning law mechanisms to regulate the use of prime agricultural land. The proposed application of planning mechanisms on agricultural land invites a number of questions such as whether agricultural land is a subject of municipal planning, and if so, how will the application of municipal planning components on agricultural land modify the current law on land use and planning?[19]

The South African land use and planning framework is currently set out in the *Spatial Planning and Land Use Management Act* 16 of 2013 (hereafter *SPLUMA*).[20] All land development applications in South Africa are governed by the provisions of *SPLUMA*,[21] and are decided on by local government structures.[22] *SPLUMA* prohibits the operation of any Act on spatial planning, land use, land use management and land development in a manner inconsistent with its provisions.[23] This effectively cancels out all other provincial planning legislation enacted not based on what is envisaged by *SPLUMA*.[24] Only the Western Cape Province has so far enacted a new provincial planning legislation, namely

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16 Part IV of the DAFF *Draft Bill* makes provision for the use of agricultural land.

17 Olivier and Williams 2010 *JJS* 110; See section 2.3.2 of this study.

18 See section 2.2.2 of this study.

19 The modern day constitutional division of planning powers and functional areas in general is at the heart of this inquiry. See section 2.4.1 of this study.

20 *SPLUMA* enacts a new set of land use planning principles, norms and standards in South Africa. The background to as well as the relevant provisions of *SPLUMA* will be addressed in section 2.4.6 of this study.

21 Section 2(1) states that the provisions of *SPLUMA* apply to the entire area of South Africa. S 2(2) thereof gives *SPLUMA* supremacy over any other law that may be inconsistent with it.

22 Section 33(1) of *SPLUMA* states that all land development applications must be submitted to a municipality.

23 *SPLUMA* section 2(2).

24 Van Wyk 2016 *PELJ* 21.

the *Western Cape Land Use Planning Act* 3 of 2014 (hereafter *LUPA*),[25] to substitutes all the old order planning framework in the province.[26] Van Wyk states that though new provincial planning legislation may be enacted in line with *SPLUMA*, *SPLUMA* is crafted in such a way that it lays down the foundation for municipalities to prepare municipal planning by-laws.[27] The rationale here might be that since *SPLUMA* reserves administrative land use planning matters to the local level of government it is only prudent that it be constructed in such manner that it enables municipalities to draft their own municipal planning by-laws that will assist them in carrying out their mandate under *SPLUMA*.[28] This approach to land use planning regulation will remedy the defects that were encountered when applying the provisions of the old order provincial planning legislation such as *Land Use Planning Ordinance* 15 of 1985 (hereafter the *LUPO*).[29] *LUPO* was a piece of pre-constitutional provincial legislation that was administered by the provincial government of the Western Cape.[30] *LUPO* required that land use matters, such as rezoning and land use departure, be applied for at a municipality.[31] More importantly *LUPO* created reciprocally connected land use governance by local and

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25 It came into operation on 1 July 2015 in the City of Cape Town in terms of *Provincial Notice* 9/2015.

26 In as much as *SPLUMA* sets a new regulatory framework for planning and land use management in South Africa it could only repeal national legislation dealing with planning and land use management since it is national legislation. Therefore, where necessary, adjustments need to be made by the provincial legislature ensure that provincial land use planning legislation is in line with *SPLUMA*. Hence the on-going overhaul of the provincial land use planning legislation in the provinces wherein old order provincial legislation is being repealed to make way for new land use planning provincial legislation. See section 2.4.5 of this study.

27 Van Wyk 2016 *PELJ* 22; The power of a municipality to make and administer by-laws for the administration of matters which it has the right to administer is entrenched in the *Constitution*. See section 156(2) of the *Constitution*; *Stalwo*-case para 16; Van Wyk 2012 *PELJ* 291.

28 This is in line with section 156(1)(b) and (4) of the *Constitution* which favours giving more duties to local government in line with the institutional subsidiarity principle. See section 2.4.3 of this study.

29 *LUPA* repealed *LUPO* in whole in the Western Cape Province, it is only for exemplary and historical purposes in this study. See Section 77 of *LUPA* and the Schedule thereto; The application of *LUPO* in other provinces also seems to have been overtaken by the new planning framework legislation *SPLUMA* which in section 2(2) prohibits the application of any legislation containing planning and land use systems that are contrary to the provisions of *SPLUMA*. *LUPO* being old order legislation is surely a victim of this prohibition; Van Wyk 2016 *PELJ* 21; *LUPO* was a piece of pre-constitutional provincial legislation that was administered by the provincial government of the Western Cape. See GN 115 in GG 15813 of 17 June 1994; *Arun Property Development (Pty) Ltd City of Cape Town* [2014] ZACC 37 para 2.

30 See GN 115 in GG 15813 of 17 June 1994; *Arun Property Development (Pty) Ltd City of Cape Town* [2014] ZACC 37 para 2.

31 Section 16 *LUPO*.

provincial governments,[32] something that *SPLUMA* has now reversed by granting municipalities full administrative duties when it comes to land development applications.[33]

The purpose of land use and planning legislation is to control and regulate the use of land,[34] including agricultural land. The nexus between legislation dealing with land use, planning laws and agricultural land has already been addressed by the courts.[35] However, since the DAFF *Draft Bill* proposes to bring substantial changes in the utilisation of agricultural land for non-agricultural purposes, it is instructive to investigate how the DAFF *Draft Bill* will impact on the current land use and planning laws of South Africa.

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32 Section 44 of *LUPO* established a right of appeal to the concerned provincial minister against every planning decisions made by a municipal council. In terms of s 44(2) of *LUPO*, any decision that was to be reached on appeal was to be deemed to have been made by the relevant municipal council. In *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 20 the Constitutional Court recognised that the provincial government's broad controlling function on municipal authority enables the provincial government to assess the outcome of municipal planning processes. See section 2.4.2 of this study; In *Habitat Council v Provincial Minister of Local Government, Western* Cape 2013 6 SA 113 (WCC) para 28 Judge Davis pointed out that s 44 of *LUPO* is unconstitutional and invalid in that it creates a situation whereby the appeals to the province concerning decisions made by a municipality, even where the decision has falls squarely within the ambit of municipal functional area, would be substituted by the provincial body's decision.

33 See section 33 of *SPLUMA*.

34 *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) para 18; See section 2.2.2 of this study.

35 See for example *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC); *Minister of Mineral Resources v Swartland Municipality* (CCT 102/11) [2012] ZACC 8; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC) para 129. See also section 2.2 of this study. In *Minister of Mineral Resources v Swartland Municipality* (CCT 102/11) [2012] ZACC 8 the Constitutional Court had to decide whether a mining company operating on land zoned as agricultural land is bound to first apply for land use authorisation before commencing with its operations. The Constitutional Court held that any departure from the zoned land use purpose should be duly authorised in terms of the applicable law, which was at that stage *LUPO*. The Constitutional Court has ruled in the past that the *Subdivision of Agricultural land Act* 70 of 1970 (hereafter *SALA*), has implications on land use planning matters. *SALA* came into force on 2 January 1971 (See Proc No 329 in GG 2950 of 18 December 1970). See section 2.5.1 of this study for a detailed discussion on *SALA*.

1.2 Research question

To what extent will the *Draft Preservation and Development of Agricultural Land Framework Bill* impact on the existing land use and planning frameworks that deal with the use of agricultural land in South Africa?[36]

1.3 Research methodology

This study is mainly based on a desktop study of relevant textbooks, law journals, legislation, case law and electronic sources. Primary and secondary sources relating to the concepts of subdivision and rezoning, as well as the authorising authorities and the application processes that have to be followed will be critically analysed to support the conclusions and recommendations that will be made. The DAFF *Draft Bill* and the applicable land use and planning frameworks will form an integral part of this study.

1.4 Study outline

The study will be conducted in five sections including the present which is an introductory section. Section two reflects on the historical constitutional developments that lead to the attainment of original constitutional powers by municipalities. More importantly it examines various legislative frameworks dealing with matters of subdivision and rezoning with the aim of identifying the appropriate sphere of government that has the power to decide on applications of subdivision and rezoning. The section also addresses the uncertainty caused by the wall-to-wall municipalities, especially the issue of the planning competence of municipalities on agricultural land.

Section three discusses the DAFF *Draft Bill* from a planning law perspective. The discussion is centred around the given definition of "agricultural land" in the DAFF *Draft Bill* and the implications of this definition on the municipal planning powers of

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[36] The DAFF *Draft Bill* will be administered by the DAFF which is a national department (see clause 3 of the DAFF *Draft Bill*), whereas the subdivision and rezoning of land are local government matters. See section 2.3.3 of this study. It is worth noting that what the DAFF *Draft Bill* proposes is to make use of land use and planning concepts to regulate the use of agricultural land which historically has always been situated outside the municipal boundaries. The only land used for agricultural purposes that municipal planning components could apply to is the farm lands found on the urban edges. It will be interesting to see what the investigation will reveal regarding the applicability of these two extremes.

municipalities. This section also covers the administrative issues regarding the institutions that the DAFF *Draft Bill* identifies and assigns to approve the subdivision and rezoning of prime agricultural land. More importantly the section discusses the intergovernmental authorisation model for the processing of subdivision and rezoning applications posed by the DAFF *Draft Bill*. Section three also examines the different land classes that are posed by the DAFF *Draft Bill*.

Section four is concerned with the implications that the DAFF *Draft Bill* could have on the current land use and planning laws should it be enactment in its current form. The discussion in this section revolves around the constitutional interests of the three spheres of government with regard to the governance of agricultural land in relation to the functional areas of agriculture and planning. The section reflects on the separate roles that would be played by the three spheres with regard to the subdivision and rezoning of agricultural land decision making in the event that the DAFF *Draft Bill* comes into force in its current format. At the heart of the discussion in this section is the subdivision and rezoning of agricultural land dual authorisation process that will be introduced by the DAFF *Draft Bill*.

Section five lays down the conclusions and recommendations of the study.

2 Current land use and planning legal frameworks

2.1 Introduction

A survey of the current land use and planning legal frameworks applicable to the use of agricultural land is indispensable to the investigation of the possible dimensions that the DAFF *Draft Bill* can bring to the existing South African land use and planning laws. Accordingly, the current section surveys the land use and planning legal frameworks that apply to the use and planning of agricultural land. The section commences with a survey of the inextricable relationship that exists between the planning discipline and the functional area of agriculture with land use as the common denominator linking the two.[37] In the same breath, arguments are advanced on how the concepts "land use",

[37] See section 2.2 of this study.

"planning" and "agriculture" relate to the constitutional right to have access to sufficient food and water.[38] Lastly the section discuss in more detail the current land use and planning legal frameworks applicable to agricultural land.[39]

2.2 Definitions

It is important to first outline the concepts "land use"[40] and "planning law"[41] as understood in the South African planning law circles and how these concepts feature in the control and regulation of agricultural land.[42]

2.2.1 "Land use"

The meaning of the phrase "land use" is easy to presume; land use means the use of land. However, leading planning law scholars such as Charlton and Van Wyk have in the past opted to define "land use" as referring to land use management and land use planning.[43] Fortunately, there is now a statute in place defining the phrase. In terms of section 1(1) of the *SPLUMA*, "land use" means the purpose for which land is or may be used lawfully for in terms of a land use scheme, existing scheme or in terms of any other authorisation, permit or consent issued by a competent authority. This includes any land use conditions attached to such land use purpose.

2.2.2 "Planning law"

While it may be said that the concept "land use" is self-explanatory, the meaning of "planning law" is not so straightforward.[44] In order to understand the phrase "planning law", it is imperative to first determine the meaning of the word "planning". The *Constitution* makes reference to planning but it does not define what planning means or rather the exact content of the word as used in connection with the prefixes "regional",

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38 See s 27(1)(b) of the *Constitution*. See section 2.2.3 of this study.
39 See sections 2.4 and 2.5 of this study.
40 See section 2.2.1 of this study.
41 See section 2.2.2 of this study.
42 See section 2.2.4 of this study for the definition of "agricultural land".
43 See Charlton *The State of Land Use Management in South Africa: Programme Second Economy Strategy: Addressing Inequality and Economic Marginalisation* 3. See also Van Wyk 2007 *LDD* 59.
44 See Van Wyk *Planning Law* 9. The author, therein, acknowledges this view as advanced by Garner and Gravells *Introduction to planning law in Western Europe* 1.

"municipal" and "provincial" as referred to in Schedules 4 and 5 of the *Constitution*.[45] It however needs to be noted that the preface to the *White Paper on Spatial Planning, Land Use Management and Land Development* GG 22473 of 20 July 2001 (hereafter *White Paper on Land Use*) provides that planning has over the years crystallised as a mechanism for land resources management.[46]

The South African courts have been instrumental in evolving the jurisprudence of planning law.[47] In the minority judgment in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd*[48] (hereafter *Stalwo*-case) Judge Zak Yacoob, defined "planning" as:

> Planning entails land use and is inextricably connected to every functional area that concerns the use of land. There is probably not a single functional area in the Constitution that can be carried out without land.[49]

Although this statement by Judge Yacoob is not definitive *per se* on the content of planning, it does give a hint of what the concept entails.[50] It is from this understanding that the Supreme Court of Appeal in *City of Johannesburg Municipality v Gauteng Development Tribunal*[51] (hereafter *Gauteng Development Tribunal* (SCA)-case), after analysing the historical usage of the word "planning", came to the conclusion that

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45 Van Wyk 2010 *PELJ* 288; See Schedules 4 and 5 of the *Constitution*.

46 *White Paper on Land Use* was introduced to pave the way for the renewed approach advocating for integrated planning for sustainable management of land resources in South Africa. See Foreword of *White Paper on Land Use.*

47 This is evidenced by a plethora court decisions dealing with the field of planning law, for instance the 2009 Constitutional Court minority decision in *Stalwo*-case; as well as the 2010 landmark Constitutional Court decision in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) that declared chapters V and VI of the *Development Facilitation Act* 67 of 1995 unconstitutional. See also *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC) and *Minister for Mineral Resources v Swartland Municipality* 2012 ZACC wherein it was clarified that land use authorisations are the sole responsibilities of the local sphere of government. See also the recent decision in *Ministry of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 ZACC wherein the Constitutional Court reiterated that, because of being allocated the municipal planning function, municipalities have the exclusive administrative power over all zoning and subdivision decisions.

48 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 1 SA 337 (CC). The case deals with the division of functions between the three spheres of government on matters of land use management. See section 2.3.1 of this study.

49 *Stalwo*-case para 128.

50 The statement is also demonstrative of the intrinsic connection that exists between the concepts "planning" and "land use".

51 *City Johannesburg Municipality v Gauteng Development Tribunal* 2010 2 SA 554 (SCA).

"planning" in the context of the planning law discipline relates to the control and regulation of the use of land.[52]

Since the word "planning" is included in the wording of all the planning functional areas listed in Schedules 4 and 5 of the *Constitution*, the term has to be interpreted distinctively but consistently throughout all the functional areas in the *Constitution*.

Planning does not change meaning when used in connection with any of the functional areas listed in the above mentioned Schedules of the *Constitution*.[53] For instance, when "planning" is used with the prefix "municipal" it relates to the control of the use of land in relation to municipal planning. The prefixes only serve to identify the sphere to which it is used in relation to. Hence Judge Jafta in *City of Johannesburg Municipality v Gauteng Development Tribunal*[54] (hereafter *Gauteng Development Tribunal* (CC)-case), agreed with the ruling in *Gauteng Development Tribunal* (SCA)-case that municipal planning is concerned with planning issues that are intra-municipal such as zoning, rezoning of land and associated subdivision of land or township establishment.[55]

Based on the above discussions, it is concluded that "planning" in the context of this study would include all the mechanisms used to control and manage the use of land.

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52 The court observed the fact that the word "planning" is well established terminology in the English-speaking world which when used in layman's terms can have a misleading connotation to that attached to it in the planning law circles. See *Gauteng Development Tribunal* (SCA)-case paras 31-40.

53 *Habitat Council v Provincial Minister of Local Government, Western Cape* 2013 6 SA 113 (WCC) para 13.

54 *City of Johannesburg Municipality v Gauteng Development Tribunal* 2010 6 SA (CC). The issue that had to be determined by the court was which sphere of government has the power to approve developments in municipalities. This issue was raised in the Constitutional Court following the Supreme Court of Appeal's ruling that the MEC for local government, environment and development planning had no power to exercise administrative powers in relation to municipal planning matters. The Constitutional Court ruled that municipal planning matters are the business of municipalities and provincial bodies have no power to deal with the administration of such matters.

55 *Gauteng Development Tribunal* (CC)-case para 8; Van Wyk 2012 *PELJ* 297,298; Subdivision and rezoning of land concepts are legal mechanisms used to control and regulate the use of land. See Van Wyk 2010 *PELJ* para 222; The terms "subdivision of land" and "township establishment" principally mean one and the same thing, save to show that "township establishment" is more of a general term. See Van Wyk 2016 *PELJ* 2.

The next question to consider is: "what is planning law"? It follows from the above discussion and the common understanding of the word "law",[56] that "planning" when used with the prefix "law" is that area of the law that regulates the control and management of land use. According to Van Wyk,[57] "planning law" means:

> …that area of law that provides for the creation of a sustainable spatial planning framework as well as for the management of land use and land development with the purpose of ensuring the health, safety and welfare of society as a whole, while taking account of overarching interests such as the environment and transport.

Reference can also be made to the minority judgment delivered by Judge Yacoob[58] in the *Stalwo-case* where it was indicated that planning law is concerned with the zoning and subdivision of land. The court made it a point that planning law was not introduced into South African law for the first time by the *Constitution*.[59]

2.2.3 Agriculture and access to sufficient food

Before deliberating on what constitutes agricultural land,[60] it is important to first discuss the word "agriculture", and its relevance to section 27 of the *Constitution*.

The *White Paper on Agriculture* (1995) provides that agriculture involves the:

> sustainable and productive utilisation of natural resources and other inputs by people for plant and/or animal production purposes, either for own consumption or for marketing.[61]

In *Rapulo Investments CC v Minister of Agriculture, Forestry and Fisheries*,[62] the court was called upon to review the decision of the Minister of Agriculture, Forestry and

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56 The law is a discipline concerned with the regulation, of either or both society and the general environment. See Van Wyk *Planning law* 12.

57 Van Wyk *Planning Law* 10.

58 See 2.3.1 of this study.

59 Planning legislation such as *LUPO* was applicable in some parts of South Africa long before the Constitution came into existence; *Stalwo*-case para 131.

60 See section 2.2.4 of this study.

61 *White Paper on Agriculture* 1995 para 1; Natural resources used for agricultural purposes are commonly referred to as natural agricultural resources. S 1 of the *Conservation of Agricultural Resources* Act 43 of 1983 defines "natural agricultural resources" as the soil, the water resources and the vegetation.

62 *Rapulo Investment CC v Minister of Agriculture, Forestry and Fisheries* (unreported) case number 65007/2012 of 7 February 2014.

Fisheries (hereafter the Minister)[63] for refusing to grant consent to the subdivision of the portion of land that was situated in an agricultural area. Evidence showed that there was some trout breeding, fishing, and stabling and riding of horses in the area. The applicants claimed that in as much as the land was situated in an agricultural area, it has lost its agricultural economic value hence it is no longer used for agricultural activities. Before dealing with the main arguments, the court firstly referred to the meaning of "agriculture", namely:

> …in the June 2013 service issue of Dictionary of legal words and phrases compiled by judge R.D. Claassen, 'agriculture' is defined as the 'science and art of cultivating the soil, including the gathering of crops, and the rearing of live-stock…'.[64]

In summary, this means that agriculture entails the use of land for the production of crops and or rearing of live-stock. The practice of agriculture speaks, amongst other things, to the constitutional right of everyone to have access to sufficient food.[65] The relevant parts of section 27 read:

> (1) Everyone has the right to have access to- … (b) sufficient food and water; … (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

With reference to the above quoted definition of "agriculture", it is argued that there is a causal relationship between the production of food and the duty imposed on the state to progressively realise the right of everyone to have access to sufficient food. The inference being drawn is that food sufficiency or food security is a product of good agricultural performance.[66]

In order to ensure that the agricultural sector is protected, the *Constitution* enjoins the state to utilise legislative and other measures to realise the right to have access to

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63 For the purposes of this study, "Minister" means the Minister of Agriculture, Forestry and Fisheries and the Minister of Agriculture (as referred to under the *Subdivision of Agricultural Land Act* 70 of 1970).

64 Para 63.

65 Section 27(1) of the *Constitution*.

66 See Olivier *et al* 2010 *PELJ* 137; The *Declaration of the World Summit on Food Security* (Rome, 16-18 November 2009), footnote 1 thereof, defined "food security" as existing when "all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life."

sufficient food.[67] Therefore the state of affairs on land used to produce food is important, after all land is the base on which most functional areas listed in Schedules 4 and 5 of the *Constitution* are carried out.[68] Recent legislative developments and policy documents in South Africa drive for the prioritisation of agricultural land protection because agriculture is a matter of national interest.[69] Viable agricultural production and the legislative protection of agricultural land are key factors to the realisation of the right to have access to sufficient food enshrined in the Bill of Rights.[70] Hence the legislative measures taken by the state to realise the right to have access to sufficient food are inclined to securing sustainability of the land suitable for agriculture.

At this juncture, it is important to give a brief outline of what constitutes agricultural land in legal terms.

2.2.4 "Agricultural land"

The legal definition of "agricultural land" can be traced as far back as 1970 when *SALA* was enacted.[71] *SALA* defines "agricultural land" as any land within the territory of South Africa except certain excluded categories of land.[72] The excluded categories of land include land situated in the area jurisdiction of a municipal council, city council, town council, village council, village management board, village management council, local board, health board or health committee, including land owned by the state.

The problem with this definition is that it effectively excludes from the protection of *SALA* a wide array of farm land that is still being used for farming purposes on the

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67 S 27(2) of the *Constitution*.

68 In the *Stalwo* case para 128, Judge Yacoob stated that there is no single functional area in the *Constitution* that can be carried out without land.

69 *SPLUMA*'s development principle on spatial sustainability call for a vigorous protection of prime agricultural land through the spatial planning and land use management systems. See s 7 of *SPLUMA*; *SPLUMA* s 52 (1). See section 2.4.6 of this study; The *National Agricultural Policy Action Plan,* published by the Ministry of Agriculture, Forestry and Fisheries on 17 October 2014, provides that it is the state's aim to ensure an equitable, productive, competitive, profitable and sustainable agriculture, forestry and fisheries sector; Vision 2030 of the *National Development Plan* (NDP) envisage the inclusivity and integration of rural areas, through successful land reform, job creation and poverty alleviation. It places agriculture as the driving force behind its vision.

70 The Preamble of the *White Paper on Agriculture* of 1995, acknowledges the fact that South African prime agricultural land is very scarce.

71 See section 1.1 of this study.

72 S 1 of *SALA*; See section 3.3.1 of this study for the proposed definition of "agricultural land" for purposes of the DAFF *Draft Bill*.

urban edges[73] of municipalities irrespective of the particular land's agricultural productivity.[74] This can, for instance, hamper the state's obligation to realise the right of access to sufficient food because there is plenty of prime agricultural land on the urban edges of municipalities that the definition excludes from what is to be regarded as agricultural land. The ripple effect of this exclusion is that such land cannot be afforded the same protection given to agricultural land merely because of its jurisdictional positioning.[75]

This definition was amended in 1993 as a response to changes that were brought about by the *Local Government Transition Act* 209 of 1993 (hereafter the *Transition Act*).[76] The effect of the *Transition Act* was that its definition of "transitional council" created uncertainty about the status of agricultural land that was to fall within the transitional councils' demarcations. The question was whether such land would still be regarded as agricultural land since it now falls within the areas excluded from the definition of agricultural land as provided for in *SALA*.[77] This uncertainty boiled down to the fact that the definition of agricultural land segregated agricultural land from all other land based on territorial positioning.[78] In response to this conundrum, a proviso was inserted in *SALA* to amend the definition of "agricultural land" as follows:

> Provided that land situated in the area jurisdiction of a transitional council as defined in section 1 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), which

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73 An urban edge is a delineation drawn on the peripheries of a municipal boundary. Its purpose is to indicate the land use conversion between urban and rural land use. See *Shelplett 47 (Pty) Ltd v MEC for Environmental Affairs & Development Planning and Another* 2012 3 SA 441 (WCC) para 25.

74 *SALA* is concerned with the subdivision and use of agricultural land in the country. See section 2.5.1 of this study.

75 It should be noted, however, that *SALA* does leave it to the discretion of the Minister to extend the application of *SALA* to any other land excluded in the definition of agricultural land. See s 1(f) of *SALA*.

76 S 1(1)(XV) of the *Transition Act* defined "transition council" as including a local government coordinating committee, a transitional local council and a transitional metropolitan council for the pre-interim phase, and a transitional local council and a transitional metropolitan council for the interim phase.

77 The territorial definition of agricultural land brings into question the appropriateness of the definition, that is, the conclusion that a particular land is agricultural productive can only be arrived at thorough the subjective study of the land in question. It cannot simply be determined by the territory positioning of the land.

78 See section 2.2.4 of this study.

immediately prior to the first election of the members of such transitional council was classified as agricultural land, shall remain classified as such;....[79]

The problem with this definition is that it effectively excludes a wide array of farmland situated on the peri-urban areas from agricultural land, and this means such lands, irrespective of their agricultural productivity, are left out of the protection afforded by *SALA* to agricultural land.[80] This can possibly hamper the state's obligation to realise the right of access to sufficient food since it means there are masses of agriculturally economical lands on the peri-urban areas of municipalities excluded from what constitutes agricultural land. The effect of this is that such land cannot be afforded the same protection given to agricultural land irrespective of its productivity level owing to its jurisdictional or geographical location. The definition of "agricultural land" as proposed in both the DAFF *Draft Policy Document* and DAFF *Draft Bill* will remedy this mischief in so far as they classify any land with an agricultural purpose as agricultural land irrespective of its geographical placement, save for where such land is excluded from agricultural land.[81] However *SALA* does give the Minister responsible for agriculture the discretion to include such land in the definition of "agriculture" for the purposes of *SALA*.[82]

2.3 Agriculture and planning intersections

The agricultural production entails the use of land,[83] whilst planning entails the regulation of land use.[84] Because of this interrelationship between agriculture and planning, linked by their relation to land use, it is highly likely that legislation concerned with one of the two will also have implications on the other.[85] This formed the dictum of

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79 See the proviso at the end of the definition of agricultural land in s 1 of *SALA*.

80 It is common cause that *SALA* is mainly concerned with the subdivision and use of agricultural land. See section 2.5.1 of this study.

81 See sections 3.2.3 and 3.3.1 of this study respectively.

82 In terms of s 1(f) of *SALA,* the Minister responsible for agriculture can declare any of the excluded land from the definition of agricultural land as agricultural land, by issuing a notice to that effect in the Gazette; Van Wyk 2009 *SAPR* 553.

83 See sections 2.2.3 of this study.

84 See sections 2.2.2 of this study.

85 Under the current constitutional dispensation, "municipal planning" is a local government mater and "agriculture" is a functional area of concurrent national and provincial legislative competence. The dilemma created by this structure is whether the placement of agriculture under Schedules 4A is intended to stripe local authorities of municipal planning powers concerning agricultural land within the municipal jurisdiction. See section 2.4 of this study for further discussion.

the minority judgment in the *Stalwo*-case which put much emphasis on the overlapping and interrelated nature of agriculture and planning as two functional areas concerned with the use of land.[86] Judge Yacoob made the following observation:

> Agriculture is a concurrent national and provincial legislative competence. The functional area of agriculture cannot be said to exist in a hermetically sealed compartment…. 'Planning entails land use and is inextricably connected to every functional area that concerns the use of land'. There is probably not a single functional area in the Constitution that can be carried out without land. Land use planning must be done at three levels at least: provincial planning, regional planning and municipal planning.[87]

Moreover, Judge Yacoob emphasised that though *SALA* might be perceived as legislation dealing with the functional area of agriculture it is in fact a piece of planning legislation focused on issues of zoning and subdivision.[88] The case is discussed in more depth below.[89]

2.3.1 Wary Holding (Pty) Ltd v Stalwo (Pty) Ltd

The *Stalwo*-case was concerned with an agreement for sale of a subdivided portion of farm land between the applicant and the respondent.[90] Arguments raised in the case were to the effect that the land in question is agricultural land; therefore it can only be subdivided upon authorisation by the Minister in line with the relevant provision of *SALA*.[91] The majority decision of the Constitutional Court agreed with this line of argument.[92]

However it is the minority decision that this study is concerned with.[93] The minority judgment questioned the authority of the Minister to authorise subdivision of

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86 See section 2.3.1 of this study.
87 Para 128.
88 Para 120; Van Wyk 2009 *SAPR* 555; Van Wyk 2012 *PELJ* 294; The view that *SALA*'s principal focus is to operate as a piece of planning legislation was first stated in the *White Paper on South African Land Policy* 1997 para 3.14.
89 See section 2.3.1 of this study.
90 The discussion will only focus on the judgment of the Constitutional Court.
91 See s 3 of *SALA*.
92 Para 87.
93 It should however be noted that the split judgement of the Constitutional Court reflects different visions of local government and the competences of the three spheres of government with regards to the functional areas of 'Agriculture' and 'Municipal Planning'.

agricultural land under the current constitutional dispensation.[94] The argument was based on the fact that, since the adoption of the wall-to-wall municipal boundaries, agricultural land now falls within the jurisdiction of municipalities and therefore, through their municipal planning powers, they have the power to decide on its subdivision.[95]

The dispute surrounded a proviso that was inserted by *Proclamation* R100 of 1995 in GG 16785 that amended the definition of "agricultural land" in *SALA* by extending it to transitional councils.[96] The court saw this as rather a genius move by the state mainly intended to ensure that the *status quo* of agricultural land in those areas does not change despite the land in the area falling directly under municipal control. The majority judgment cautioned that the effect of the proviso would not dry out when the transitional councils make way for extended municipalities.[97] The majority judgment concluded that despite the positioning of agricultural land within the jurisdictional area of municipalities, the Minister should remain as the authorising authority for the subdivision of agricultural land as per section 3 of *SALA*. The court reasoned that it is a misconception to argue that agricultural land situated in the municipal areas has lost its title as agricultural land. The court's reasoning was informed by the fact that the general rule in *SALA* is that all land is agricultural land and municipal land is the exception thereto, and therefore the proviso acts as an exception to the exception.[98]

Relevant to this study is the dissenting judgment of Judge Yacoob that looked at the matter strictly from the planning law perspective. In writing for the minority, the Judge emphasised that as far as *SALA* deals with subdivision and rezoning as components of planning, it is effectively concerned not with agriculture but with the functional area of planning.[99] The minority decision held that the retention of this power by the DAFF through the Minister is at odds with the constitutional division of planning powers because subdivision of agricultural land is a matter for municipal planning which is a

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94 Para 126.
95 Para 127,132.
96 Section 1 of the *Transitional Act* defines 'transitional council' as including a local government co-ordinating committee, a transitional local council and a transitional metropolitan council for the interim phase.
97 Para 81.
98 Para 82.
99 Para 129.

municipal functional area.[100] Meaning the municipal planning powers enable them to perform the subdivision and rezoning task on any land within their jurisdiction. It was pointed out in the minority judgment that the reason why municipalities could not authorise subdivisions and zoning of land in the past, is because they lacked capacity to do so.[101]

This position has now changed because today permanent municipalities, with clear structures, have been established and assigned *Constitutional* municipal planning powers.[102] They can therefore effectively carryout the zoning and subdivision of agricultural land which without a doubt are municipal planning components.[103] Van Wyk, in commenting the municipal planning powers that continue to be exercised by the Minister following the proviso that was inserted by *Proclamation* R100 of 1995 in GG 16785 that in *SALA* and the implications of the constitutional municipal planning powers that municipalities enjoy today, argues that the purpose of the proviso has now been achieved, therefore subdivision and rezoning of land decisions ought to be left out to the appropriate functionary which is local government.[104] Based on the above arguments, it can be said that the approval of zoning and subdivision applications on agricultural land by the national Minister of Agriculture is nothing less than an intrusion into the municipal planning turf of municipalities.[105]

Since the functional area of municipal planning formed the gist of Judge Yacoob's views, it is instructive to discuss the term "municipal planning".

2.3.2 Municipal planning

Municipal planning is listed as an exclusive municipal competence in Schedule 4 Part B of the *Constitution*. The legal definition of municipal planning is found mostly in the

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100 Para 128,131.

101 Para 125. The minority judgment explained therein that the purpose of the proviso was to ensure that the subdivision of agricultural land is carried out by the Minister only during the transitional period up until the appropriate sphere of government, meant to exercise land use planning decisions, is empowered to exercise the powers accordingly.

102 See section 2.3.2 of this study.

103 Para 126,129; Van Wyk 2009 *SAPR* 555; See section 2.3.2 of this study.

104 Van Wyk 2009 *SAPR* 554,555.

105 Van Wyk 2009 *SAPR* 560; See 2.3.2 of this study.

relevant policies and court decisions.[106] The *White Paper on Land Use* defines municipal planning as "planning by municipal government for the more effective management of its functions".[107] The courts seem to be in consensus that planning at the municipal level includes the processes of subdivision and zoning of land.[108] In the past few years the courts have analysed and interpreted what could have been the envisaged constitutional meaning of "municipal planning". The Constitutional Court in *Gauteng Development Tribunal* (CC)-case interrogated the meaning and composition of the term municipal planning.[109] Judge Jafta, in defining "municipal planning", indicated that it must be assumed that when the Constitutional drafters opted to use "planning" in the municipal context, they aspired that it be given its common meaning which includes the control and regulation of the use of land.[110]

According to Humby,[111] two conclusions flowed from the meaning attached to municipal planning in *Gauteng Development Tribunal* (CC)-case. Firstly, municipal planning includes the control and regulation of the use of land situated within the jurisdictional area of a municipality.[112] Secondly, the national and provincial spheres of government cannot by legislation usurp the executive municipal powers of local government because all the three spheres of government are distinct though interconnected.[113] Therefore municipal planning matters of the control and regulation of the use of land

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106 *SPLUMA*, being the main spatial planning and land use management framework legislation in South Africa, does not define "municipal planning" but rather state that municipal planning consists of integrated development plans, spatial development framework and other components of integrated development plans, and lastly control and regulation of land use. See s 5(1) of *SPLUMA*.

107 Para 5.1.

108 *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 ZACC 9 para 19; *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 para 59; Judge Ponnan JA, in *Gauteng Development Tribunal* (SCA)-case para 11, held that in terms of the Constitution, rezoning and subdivision matters are the exclusive competence of municipalities; In terms of s 156(1)(a) of the Constitution, municipalities have the executive and administrative authority in respect of the local government functional areas listed in Part B of Schedules 4 and Part B of Schedules 5. Municipal planning appears in Part B of Schedules 4; Van Wyk 2009 *SAPR* 557,558,559,560.

109 Paras 49,57.

110 Para 57.

111 Humby 2012 *SAPL* 630.

112 *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) 71D-E; Van Wyk 2012 *PELJ* 298,299.

113 *Gauteng Development Tribunal* (CC)-case para 57; *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) para 26; Olivier, Williams and Badenhorst 2012 *PELJ* 544.

ought to be administered exclusively at the local government level under the ambit of municipal planning.

2.3.3 Municipal planning tools

In addition to their constitutional mandate of municipal planning,[114] municipalities are mandated to authorise land use applications in terms of *SPLUMA*.[115] There are traditionally two sub-disciplines of planning that a municipality use in carrying out its planning functions, namely land use planning and changes in the use of land.[116]

Land use planning involves municipal policy and regulatory plans.[117] In *Gauteng Development Tribunal* (SCA)-case a town planning scheme was pointed out as one of the regulatory plans that a municipality can use to regulate the use of its municipal land.[118] Integrated development plans (hereafter IDPs) and spatial development frameworks (SDFs) are typical municipal land use management instruments that guide development at the municipal level.[119] Together these components form a set of municipal tools used to control and regulate the use of land.[120] On the other hand, change in the use of land concerns control measures placed to guide changes to the use of land. For instance, the procedure that has to be followed before land can be subdivided.[121] This use of municipal planning regulatory tools to regulate land, which includes agricultural land, signals the overlap and interconnection between the

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114 See 2.2.3 of this study.
115 See section 2.4.6 of this study.
116 Van Wyk 2010 *PELJ* 222.
117 This can include the establishment, by a municipality, of town planning schemes. These are tools used by the municipality to regulate land use.
118 Para 6; A town planning scheme is used by a municipality as its municipal land use regulatory tool. See *Gauteng Development Tribunal* (SCA)-case para 7.
119 Section 26(e) of the *Local Government: Municipal Systems Act* 32 of 2000 stipulates that an IDP must include the SDF with standard guidelines for a land use system for the municipality. The SDF is generally understood in the planning discipline to be a tool or framework that seeks to guide the municipality in its land use regulation so as to give effect to the goals and objectives set in the municipal IDP.
120 Gauteng Development Tribunal (SCA)-case para 6.
121 Van Wyk 2010 *PELJ* 222.

constitutional functional areas of agriculture and planning.[122] The constitutional ramifications of the functional areas of agriculture and planning are discussed below.[123]

2.4 Agriculture and planning functional areas

The DAFF *Draft Bill* is set to introduce a new agricultural land regulation system in South Africa. The question of its potential impact on land use and planning law revolves around the constitutional functional areas of agriculture and planning. It is therefore necessary to give a brief outline of the evolution and constitutional governance of the functional areas of agriculture and planning.

2.4.1 Constitutional framework

Following the inception of a constitutional democracy in South Africa,[124] the *Constitution* introduced a model of government that has three spheres, namely national, provincial and local spheres.[125] Each of these spheres is assigned legislative and administrative powers with regard to the government functional areas listed in Schedules 4 and 5 of the *Constitution*. Relevant to this study, "agriculture" is earmarked as the exclusive national and provincial area of competence in Schedule 4 Part A. Whilst the "planning" function is sliced into three facets, "regional planning and development", "provincial planning" and "municipal planning" with each sphere having its own are of competence in at least one of these three planning components.[126]

An unembroidered reading of the *Constitution* brings confusion about the content of each of the above mentioned planning functions. The courts have played an important

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122 See section 4.4.2 of this study.

123 See section 2.4.1 of this study.

124 The Constitution was promulgated on 18 December 1996 and came into effect on 4 February 1997. See Croome *Taxpayers' Rights in South Africa* 8; *Ex parte Chairperson of the Constitutional Assembly in re: Certification of the Constitution of the Republic of South Africa (First Certification Judgment)* 1996 4 SA 744 (CC).

125 In terms of section 40(1) of the *Constitution*, the South African government is constituted as national, provincial and local spheres of government. The three spheres are characterised as being distinctive, interdependent and interrelated.

126 The planning functions are listed in Schedules 4 and 5 of the *Constitution*. Regional planning and development is listed in Schedule 4 Part A as a concurrent area of the national and provincial spheres. Provincial planning appears in Schedule 5 Part A as an exclusive provincial functional area, and lastly municipal planning is listed in Part B of Schedule 5 as an exclusive local government function.

role in this regard. The Constitutional Court in the *Gauteng Development Tribunal* (CC)-case shared some light on the meaning of these planning functions. The court indicated that the content of each of the planning functions is determined by the name used in relation to each, in the sense that the prefix used to each planning functional area identifies the scope and sphere to which such a functional area belongs.[127] For instance, the functional area of municipal planning is concerned with municipal land use and planning. Judge Jafta in the *Gauteng Development Tribunal* (CC)-case, reflecting on the decision of the Supreme Court of Appeal in *Gauteng Development Tribunal* (SCA)-case, interpreted municipal planning to refer to land use control and regulation, "includes the zoning of land and establishment of townships".[128] In *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council*[129] (hereafter *Habitat Council*-case) the court in setting out the content of the planning competence of municipalities held that decisions on rezoning and subdivision of land, irrespective of the size of the land concerned, are within the competence of local government.[130]

From the above discussion indicates that agriculture is a functional area of competence for both national and provincial governments. On the other hand the functional area of municipal planning, bestows on to municipalities the power to regulate and control the use of municipal land of which agricultural land is a constituent of. This makes municipalities the principal role players in the regulation of land use. It is therefore necessary to briefly discuss the evolution of local government in the pre-constitutional democracy and its place in the modern day constitutional scenery.[131]

2.4.2 Government structure pre-constitutional democracy

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127 *Gauteng Development Tribunal* (CC)-case para 55,57.

128 *Gauteng Development Tribunal* (SCA)-case para 8; Township establishment in South African planning law circles can be described as the process of setting aside undeveloped land for development. See Van Wyk *Planning law* 182; *White Paper on land use* uses the terms "land use management" and "land development" which basically concern land use change and land use management respectively.

129 2014 ZACC 9.

130 Para 19; *Stalwo*-case para 120.

131 In terms of s 156(1)(a) of the *Constitution* it is very clear that the executive and administrative matters concerning municipal planning should be exercised exclusively by municipalities.

Before 1994, South Africa used a hierarchical system of governance governing its then four provinces (the Transvaal, Orange Free State, Natal and the Cape) which were established under the then Union of South Africa in 1910.[132] Only the national and provincial governments enjoyed constitutionally entrenched powers and functions. The source of local authorities' functions and powers emanated solely from provincial legislation.[133] Hence they acted as subordinates to the provincial bodies.[134] The jurisdictional area of local authorities constituted of only municipal areas, whilst agricultural land was situated outside these areas. Rural, agricultural land and peri-urban areas were located outside these areas. Put in a different way, local authorities then lacked the semi-autonomous status that they currently enjoy following the inception of the *Constitution*.[135]

In 1993, the *Transition Act* introduced the first step in the establishment of the new structure to local government.[136] As part of the transitional arrangements, it extended the local authorities' jurisdiction into areas that were previously excluded. This meant that all agricultural land would now be under the local government jurisdictional demarcations. It is this situation that necessitated the amendment of the definition of "agricultural land" in *SALA* by Proclamation R100 in GG 16785 of 31 October 1995.[137] The transitional developments were also influenced to a larger extent by the *Interim Constitution* which paved the way for the new local government dispensation.[138]

2.4.3 Constitutional democracy

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132 The Union of South Africa was created on the 31st May 1910 by an Act of the British colonial parliament cited as the *South African Act* of 1909. The long title of the *South African Act* of 1909 read as follows "An Act to constitute the Union of South Africa"; It should be noted that since 1961 South Africa was (and still is) a republic.

133 For example, ss 16(1) and 25(1) of *LUPO* give municipalities the power to approve rezoning and subdivision applications but the final decision on the matters vests with the provincial Minister.

134 De Visser 2009 *CJLG* 9.

135 Constitutionally speaking local government, as it is the case with other spheres of government, has distinct status. Notwithstanding the fact that national and provincial governments have the constitutional sanction to regulate municipalities in the exercise of their executive authority, the *Constitution* demands that local government be distinct, interdependent and interrelated to the other spheres of government. See ss 40(1) and 155(7) of the *Constitution*.

136 The long title of the *Transition Act* highlights that it serves the purpose of introducing the first phase of the restructuring of local government.

137 See section 2.3.1 of this study. The understanding was that Proc R100 in GG 16785 of 31 October 1995 will ensure that agricultural land remains to be exclusively controlled by the Minister.

138 Section 174 of the *Interim Constitution* made provision for the establishment of local government.

With the dawn of the *Constitution*,[139] the structure of government underwent a substantive revolution. In particular, the government structure was re-arranged to constitute national, provincial and local spheres of government.[140] Each sphere is assigned legislative and executive competences in relation to the listed functional areas under schedule 4 and 5 of the *Constitution*. The *Constitution* seems to favour giving to local government as much power as is practically possible. Provision is made for the compulsory assignment of national and provincial powers that necessarily relate to local government.[141]

The principles of co-operative government in chapter 3 of the Constitution serve the purpose of ensuring proper functioning of this structure of government.[142] Relevant to the focus of this study, the *Constitution* introduced wall-to-wall municipalities,[143] and assigned municipal planning to be a rubric of local government.[144] Hence local government is the rightful sphere of government with power to regulate and control the use of municipal land, agricultural land included.[145]

At this juncture it is important to survey the local government legislative sources for municipal planning.

2.4.4 Local government framework

The new local government system is implemented through three main pieces of legislation, namely *Local Government: Municipal Demarcation Act* 27 of 1998 (hereafter *LGMDA*), the *Local Government: Municipal Structures Act* 117 of 1998 (hereafter

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139 See section 2.4.1 of this study.

140 Section 40(1) of the *Constitution*.

141 Section 156(1) (b) and (4) of the *Constitution*; *Stalwo*-case para 16; *Maccsand (Pty) Ltd v City of Cape Town* 2011 6 SA 633 (SCA) para 12; Van Wyk 2012 *PELJ* 291; Thornton-Dibb *Local Government and the protection of the environment: An analysis of the functional areas of 'Municipal Planning' and 'Environment'* 27; Section 156 of the *Constitution* is a reflection of the principle of institutional subsidiarity which means that governance should take place as close as possible to the people. Amongst the three spheres of government, local government is the closest to the people. See De Visser 2010 *Stell LR* 90; Du Plessis and Van de Berg 2014 *Stell LR* 586.

142 See s 40(2) of the *Constitution*.

143 Section 151(1) of the *Constitution*.

144 Schedule 4 B of the *Constitution*.

145 See section 2.3.2 of this study.

Structures Act) and the *Local Government: Municipal Systems Act* 32 of 2000 (hereafter *LGMSA*). The relevant provisions of this legislation will be discussed below.

(a) *LGMDA*

LGMDA makes provision for the establishment of the Municipal Demarcation Board which, amongst other things, is tasked to implement the idea of wall-to-wall municipalities as envisaged in section 151(1) of the *Constitution*.[146] It is the duty of the Municipal Demarcation Board to determine municipal boundaries.[147] The placement of agricultural land within the realm of municipal planning comes as a result of the municipal boundary demarcations done by the Municipal Demarcation Board.

(b) *Structures Act*

Structures Act sets up the criteria and categorisation for the establishment of municipalities, and defines the manner in which municipalities are established. It is for this reason that planning law experts have suggested that the promulgation of the *Structures Act* has activated the wall-to-wall municipal jurisdictions envisaged in the *Constitution*.[148] This effectively creates uncertainty about the continued application of *SALA* in so far as it grants the Minister the leverage to control subdivision of agricultural land, a function that is solely part of the municipal planning of municipalities.[149]

(c) *LGMSA*

LGMSA, to some extent, makes provision for the role of a municipality in the regulation and control of land within its jurisdiction. Over and above the constitutional obligations and land use and planning powers that municipalities have in terms of the *Constitution*, *LGMSA* requires each municipality to have an IDP in place which will guide development

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146 The long title to *LGMDA* states that the purpose of this act is to provide for criteria and procedure for the determination of municipal boundaries by an independent authority. That independent authority is established by s 2 as the Municipal Demarcation Board.

147 Section 4 to *LGMDA* states that the function of the Municipal Demarcation Board is to determine municipal boundaries; s 21 provides *inter alia* that the Municipal Demarcation Board must determine municipal boundaries; *Stalwo*-case para 17.

148 Section 151(1) of the *Constitution*.

149 Van Wyk 2009 *SAPR* 545; See also 2.5 below.

in its area.[150] It is through the adoption of this policy plan that the municipality will be able to regulate and control the use of land within is territory.[151]

More of interest to this study, chapter 2 of *LGMSA* recognises the link between the management of land use and the right to food security. It provides that it is the duty of the municipal council to contribute to the progressive realisation of the right to have access to food.[152] This responsibility can be realised through the protection of land suitable for agricultural production.[153]

2.4.5 Local government specific planning competence

The reality is that the legal frameworks applicable to planning and land use management systems are still set out in old order laws, such as *Town-planning and Townships Ordinance* 15 of 1986 (T),[154] *Townships Ordinance* 9 of 1968 (O), *Black Communities Development* Act 4/1984 (R1897)[155] and *Black Administration* Act 38/1927 (GN R1886/1888).[156] However, following constitutional developments, provinces have embarked on revising the provincial planning legislation to conform to the current constitutional dispensation.[157] It is even more important to do so following the coming

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150 Chapter 2 of *LGMSA* sets out the mandates of municipal councils. S 25(1) makes it a requirement that municipal councils prepare and adopt an IDP for their respective areas; Section 1 of *LGMSA* defines an IDP as a plan envisaged in s 25. From an inclusive reading of s 25, an IDP can be described as a statutory plan with objectives and strategies constituting functions to be undertaken by the municipality.

151 See 2.3.3 of this study.

152 In terms of s 4(2)(j) thereof the council of a municipality has the duty to contribute, amongst other things, to the progressive realisation of the constitutional right to have access to sufficient food and water.

153 As already pointed out elsewhere in this study, agriculture is essential to food production. See section 2.2.3 of this study.

154 Applicable in Gauteng, Limpopo and Mpumalanga provinces.

155 Applicable in Gauteng, Limpopo and Mpumalanga provinces.

156 Applicable in Limpopo and Mpumalanga provinces.

157 *Kwazulu-Natal Spatial Planning and Land Use Management Bill* 2015, *Limpopo Spatial Planning and Land Use Management Bill* 2012, *Province of Gauteng Planning and Development Bill Draft* 2012 all seek to introduce a new provincial legislative system of land use development and planning by repealing the old order provincial land use and planning frameworks. In the Western Cape Province, the *Western Cape Land Use Planning Act* 3 of 2014 has been promulgated. It however might need revision if it does not comply with SPLUMA.

into operation of *SPLUMA*, which is the framework legislation for spatial planning and land use management in South Africa.[158] *SPLUMA* will be subsequently discussed.

2.4.6 Spatial Planning and Land Use Management Act 16 of 2013

1 July 2015 became a significant date in the land use and planning legal fraternity of South Africa as it marked the introduction of the long overdue spatial planning and land use management framework that replaced the *Development Facilitation Act* 67 of 1995 (hereafter *DFA*).[159] *SPLUMA* was promulgated in terms of Proclamation R26 in GG 38828 of 23 April 2015. It effectively introduced a new spatial planning and land use management framework in South Africa.[160] The implementation of *SPLUMA* vests in local government.[161] Signs for its preparation were seen back in 2001 when the *White Paper on Land Use* was published following the findings of the 1997 Development and Planning Commission which conducted a study on planning legislation in South Africa with the aim of coming up with a new system of planning and land use in South Africa.[162] The declared purpose of *SPLUMA* is to provide a clear and consistent planning and land use management framework applicable to the entire area of South Africa.[163] *SPLUMA* sets out principles, norms and standards for planning land use management.[164] Its principle of "spatial sustainability" requires that the spatial planning and land use management systems priorities the protection of prime and unique agricultural land.[165]

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158 See section 2.4.6 of this study; In terms of s 2(2) of *SPLUMA* no legislation shall suggest a parallel system of land use and planning inconsistent with *SPLUMA*.

159 In *Gauteng Development Tribunal* (CC)-case the Constitutional Court declared chapters V and VI of the *DFA* as unconstitutional hence there was a need to fill the lacuna.

160 Schedule 3 of *SPLUMA* repeals the whole of the *DFA* and s 2(2) of *SPLUMA* effectively makes *SPLUMA* the principal land use and planning legislation in South Africa.

161 All land development applications have to be submitted to the municipality as the authority of first instance to be determined by the Municipal Planning Tribunal. See chapter 6 part A and B of *SPLUMA*. In terms of s 52(7) of *SPLUMA*, even if a land development application affects national interest it still has to be presented to the Municipal Planning Tribunal before it is referred for determination by the Minister of Rural Development and Land Reform.

162 Retief and Cilliers "Land-use management and planning" 563,566. The findings of the Commission led to the *Green Paper on Planning and Development* of 1999 which was succeeded by the *White Paper on Land Use* which has been used as a guide to South African spatial planning land use management until *SPLUMA* came into effect.

163 The objectives are set out in *SPLUMA* chapter 1 s 3.

164 Section 2(1) of *SPLUMA* states that it is applicable throughout South Africa and chapter 2 thereof sets out the development principles and norms and standards applicable in regulating the use and development of land.

165 Section 7(b)(ii).

A municipality is the authority of first instance for all land development applications.[166] A Municipal Planning Tribunal established by a municipality has the duty to decide on the applications.[167] It also has the authority to authorise land use changes which includes the establishment of a township[168] and consolidation of land, including land used for agricultural purposes.[169] *SPLUMA* defines the phrase "agricultural purposes" to mean:

> …purposes normally or otherwise reasonably associated with the use of land for agricultural activities, including the use of land for structures, buildings and dwelling units reasonably necessary for or related to the use of the land for agricultural activities;….[170]

It can be deduced from this definition that *SPLUMA* indeed confers on municipalities the authority to determine the use to which agricultural land can be put to.[171]

This is quite an interesting development; it exposes the conflict that exists between section 3 of *SALA* and section 33 of *SPLUMA*. The former confers the power to authorise subdivisions on agricultural land on the Minister responsible for agriculture and the latter confers that power on municipalities. The position before the demarcation of municipal boundaries has always been clear and unproblematic in that agricultural land then was situated outside the urban divide as per the definition of agricultural land in *SALA*.[172] The same cannot be said since the implementation of the wall-to-wall municipal boundaries demarcations which has effectively placed agricultural land in the jurisdiction of municipalities.[173]

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166 S 33(1) of *SPLUMA*.
167 S 40(4) of *SPLUMA*.
168 A "township" is defined in section 1 of *SPLUMA* as "an area of land divided into evern, and may include public places and roads indicated as such on a general plan".
169 S 41 of *SPLUMA*.
170 Schedule 2 definitions. Use of land for agricultural purposes is listed therein as one of the uses to which land can be put to.
171 The subdivision and rezoning of agricultural land processes cannot be divorced from the activities which a municipality is given power to determine under s 33(1) of *SPLUMA* because they both relate to the use of land. See section 2.3.2 of this study.
172 See section 2.2.4 of this study.
173 See section 2.4.4 of this study.

The role of local government in the regulation and control of agricultural land is reflective in some of the land management principles enshrined in *SPLUMA*.[174] In particular, the principle of spatial sustainability, which applies to "spatial planning, land development and land use management…."[175] This principle directs that protection of prime and unique agricultural land should be a top priority on the agenda in the land management and development systems.[176]

It is clear by now that planning and land use management systems, such as subdivision and rezoning of land, are components of municipal planning.[177] It can therefore be contended that in terms of the principle of spatial sustainability it is the responsibility of the municipality to protect agricultural land in performing its municipal planning duties.[178] However, *SPLUMA* directs that where a land development application affects the national interest it must, after being lodged and considered by the relevant municipality, be lodged with the Minister of Rural Development and Land Reform to contribute to the decision making process.[179] In all probability such an application includes the application for development on agricultural land.[180] This is a clear duplication of functions and an infiltration of the municipal planning functions of a

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174 When looking at the scope of municipal planning it is clear that municipalities carry out the core undertakings pronounced in *SPLUMA*.

175 Section 7 of *SPLUMA*.

176 Section 7(b)(ii) of *SPLUMA*.

177 See section 2.3.1 of this study; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council* 2014 5 BCLR 591 (CC) paras 13,19.

178 The principle of spatial sustainability enshrined in s 7(b)(ii) imposes a responsibility on any Municipal Planning Tribunal, as the authority making decisions on the use and development of land to priorities the protection of agricultural land in the execution of its duties stipulated in s 41(1) of *SPLUMA*; The *SPLUMA* principle of spatial sustainability is applicable to all state organs and authorities charged with the implementation of legislation regulating the use and development of land. See s 6(1) of *SPLUMA*.

179 Section 52(5) of *SPLUMA*; Section 1 of *SPLUMA* makes it clear that reference to the "Minister" in *SPLUMA* refers to the Minister of Rural Development and Land Reform.

180 Section 52(1)(b) and (c) of *SPLUMA*; Under the glossary of terms in the DAFF *Draft Policy Document*, food security is defined as a situation where all people have access to sufficient, safe and nutritious food. The definition runs very closely to the wording used in stating the right to have access to sufficient food in s 27(1)(b) of the *Constitution*; Food security is in most cases used in connection with agricultural production. See *Rapulo Investment CC v Minister of Agriculture, Forestry and Fisheries* (unreported) case number 65007/2012 of 7 February 2014 para 40; Pienaar 2014 *PELJ* 648,666; Matlala 2014 *PELJ* 838.

municipality in so far as the involvement of the Minister of Rural Development and Land Reform extends to administrative issues of municipal land use.[181]

The next section discusses the place of local government structures in the control and regulation of agricultural land.

2.5 Control and regulation of agricultural land: Subdivision of Agricultural Land Act 70 of 1979

Agricultural land in South Africa is still regulated by old order legislation,[182] namely *SALA*.[183] The relevant part of Schedule 6 reads:

> 2. (1) All law that was in force when the new Constitution took effect, continues in force, subject to- (a) any amendment or repeal; and (b) consistency with the new Constitution.

SALA prohibits, in the national interest,[184] the subdivision of agricultural land and the use thereof unless sanctioned by the Minister.[185] To date *SALA* is still the applicable national legislation regulating agricultural land subdivisions and other matters resulting there from.[186] The importance of *SALA* to this study cannot be ignored; DAFF *Draft Bill,* which forms the basis of this study, contains land use planning provisions that are identical to those of *SALA* and it also seeks to repeal *SALA*.[187] Hence an examination of

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181 Section 156(1) of the *Constitution*; S 52(1) of *SPLUMA* provides that a land development application that impacts on any of the following should be referred to the Minister of Rural Development and Land Reform: (a) a functional area of the national sphere, (b) critical national policy objectives including food security and (c) use of land for a purpose reserved for the national sphere; S 52(7) make it clear that notwithstanding the fact that another authority other than the Municipal Planning Tribunal has the authority to make the decision for a land development application affecting national interest, the application still has to first be lodged and considered by the municipality in terms of s 33(1).

182 See section 1.1 of this study for the definition of an "old order legislation".

183 See section 2.2.4 of this study.

184 DAFF *Draft Policy Document* para 8.3.1.

185 Section 3(a) of *SALA*; In *Tuckers Land and Development Corporation (Pty) Ltd v Truter* 1984 2 SA 150 (SWA) paras 153H-154A, it was described as "one of the wisest pieces of legislation on the statute book" because it actually managed to limit, in the national interest, property rights of agricultural land owners.

186 See section 1.1 of this study.

187 The regulation of the subdivision of agricultural land is the common denominator with regard to the purpose of *SALA* and the DAFF *Draft Bill*.

the relevant provisions of *SALA*, especially those that informed its classification as a piece of planning legislation, merits discussion.[188]

2.5.1 Purpose of SALA

The purpose of *SALA* is "to control the subdivision and, in connection therewith, the use of agricultural land".[189] *SALA* does not only control the subdivision of agricultural land, it also controls matters such as property transfers, lease agreements, sale or advertisement in so far as such activities concern agricultural land.[190]

Government policy, case law and Steytler, expressed some interesting views on the purpose of *SALA,* especially the view that the purpose of *SALA* is to prevent the fragmentation of agricultural land into small uneconomic units and to prevent agricultural land from being swallowed up by township establishments.[191] In the *Stalwo*-case, the Constitutional Court had the following to say:

> The purpose of Agricultural Land Act has been identified as a measure by which the legislature sought in the national interest to prevent the fragmentation of agricultural land into small uneconomic units.[192]

Olivier and Williams[193] are of the view that *SALA* was enacted as a precaution by the legislature to shield agricultural land against the threat of subdivision and changes in land use; change from agricultural land use to non-agricultural land use. As indicated elsewhere in this study,[194] the practice of controlling the subdivision of land through legislative means is a planning law matter. It is therefore no surprise that it is viewed as legislation concerned with agriculture but dealing with issues of planning law.[195] The

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188 The *White Paper on Agriculture* 1995 gave an indication that *SALA* is a piece of planning legislation; *Stalwo*-case para 129.

189 Long title to *SALA*; *Adlem v Arlow* 2013 3 SA 1 (SCA) para 12.

190 Section 3(b),(e).

191 *White Paper on South African Land Policy* 1997 para 3.14; *Stalwo*-case para 13; Steytler 2009 *CCR* 429.

192 Para 13; *SALA* was abbreviated to "Agricultural land Act" in the *Stalwo*-case. See *Stalwo*-case para 2.

193 Olivier and Williams 2012 *JJS* 132.

194 See section 2.3.2 of this study.

195 Van Wyk 2009 *SAPR* 547.

minority judgment in the *Stalwo*-case per Judge Yacoob[196] made the same observation, wherein the judge opined that:

> ...to the extent that the Act is concerned with zoning, subdivision and sale of land, it is not concerned with agriculture but with the functional area of planning.

In the recent decision by the Gauteng High Court in *Blue Crane Country Estate (Pty) Ltd v The National Minister of Agriculture, Forestry and Fisheries* (hereafter the *Crane-case*), Judge Pretorius,[197] in explaining the purpose of *SALA,* quoted the old judgment of *Van De Bijl v Louw*,[198] where it was held as follows:

> The purpose of the Act is manifest; its object is to prevent the sub-division of economic units of farming land into non-viable (uneconomic) sub-units or smaller units… and for this reason Parliament has very wisely put a stop to unrestricted fragmentation of arable land. The Act in the interest of national welfare, effects a drastic curtailment of previous common-law rights of landowners in a certain category to carve their properties into units as small as they choose, and is undoubtedly one of the wisest pieces of legislation on the statute book.

The legislature endorsed the requirement of the written consent of the Minister as a condition precedent before agricultural land is developed based on the misplaced notion that agricultural land would be better protected by the Minister.[199] Judge Yacoob, in expressing his criticism on this notion, states that this does not only undermine the role, importance and ability of municipal structures and the provincial and national legislature but also "overstates the importance and competence of the executive head".[200]

The legislative measures that control the use to which agricultural land can be put to are intended to guard against the fragmentation of agricultural land into small uneconomic units.[201] In the *Blue Crane*-case the court confirmed that the Minister in determining agricultural land subdivision applications should base its decision on real

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196 Para 129.

197 *Blue Crane Country Estate (Pty) Ltd v The National Minister of Agriculture, Forestry and Fisheries* (unreported) case number 3925/2014 of 23 March 2015 para 10 (hereafter *Blue Crane*-case).

198 *Van Der Bijl v Louw* 1974 2 SA 493 (CPD) 499 C-E.

199 Stalwo-case para 138,139; See section 2.5.1 of this study.

200 *Stalwo*-case para 139.

201 The permission to subdivide is given only if the authorising authority is of the genuine view that the proposed subdivision is not going to have a negative effect on the agricultural land subject matter of the subdivision.

evidence indicating whether or not agricultural land in question is still viable for food production.[202]

The reservation of agriculture as an area of national interest is used to justify the leeway given to the national sphere of government to intrude and exercise an administrative municipal function of subdivision and rezoning of agricultural land. This is contrary to the constitutional imperative that each sphere of government must "not assume any power or function except those conferred on them in terms of the Constitution".[203] It is only a municipality that has the constitutional executive authority and the right to administer land use matters under its municipal planning wing.[204] Therefore vesting of the power to authorise the use of agricultural land in the Minister by *SALA* does not only contradict the constitutional division of planning powers,[205] but also abnegates the scope of the municipal planning.[206] In *Gauteng Development Tribunal* (CC)-case the Constitutional Court was faced with a similar situation in which a provincial legislation made it possible for a provincial body to veto the land use decisions of a municipality. Judge Jafta[207] made the following remarks:

> The legislative authority in respect of matters listed in Part B of schedule 4 vests in the national and provincial spheres concurrently, while the legislative authority over matters listed in Part B of schedule 5 vests in the provincial sphere exclusively. But the national and provincial spheres cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs.

Another controversial factor about *SALA* is the position represented by section 2 which seeks to prohibit the enlargement of other areas not forming part of agricultural land into the area of agricultural land, namely:

> Subject to the provisions of section 2- … (f) no area of jurisdiction, local area, development area, peri-urban area or other area referred to in paragraph (a) or (b) of the definition of 'agricultural land' in section 1, shall be established on, or enlarged so as to include, any land which is agricultural land;…[208]

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202 See *Blue Crane*-case paras 28,37.
203 S 41(1)(f) of the *Constitution*.
204 See section 2.3.2 of this study; In terms of s 156(1)(a) of the *Constitution* it is the municipality which has the executive authority and right to administer matters listed in schedule 4 Part B.
205 See section 2.4.1 of this study.
206 *Stalwo*-case para 131;See section 2.3.2 of this study.
207 Para 61.
208 Section 3(f).

The implications of this provision on the wall-to-wall municipalities envisaged in the *Constitution,* raises questions about the constitutionality of the provision itself.[209] In support of the effect of section 2 of *SALA*, the court in *Kotze v Minister van Landbou*[210] emphasised that, in order to endorse the intention of the legislature, agricultural land should mean what it meant when *SALA* was enacted; agricultural land be identified by being located outside the areas excluded in the *SALA* definition.[211] On the contrary, the *Stalwo*-case pointed out that section 2 of *SALA* is not definitive of what constitutes agricultural land.[212] The court based its reasoning on the fact that according to paragraph (a) of the definition of agricultural land in *SALA*, the Minister has the discretion to declare any land as "agricultural land".

2.5.2 Target zone of SALA

It is important to note that the mischief that *SALA* must remedy is not necessarily the prohibition of all subdivisions of agricultural land and the connected encroachment into agricultural land that threatens its viability. *SALA* has specific zones of agricultural land that it applies to.[213] This is a turning interpretation that was espoused by the Supreme Court of Appeal in *Adelm v Arlow* (hereafter *Adelm*-case).[214] The court in the *Adelm*-case made reference to *Tuckers Land and Development Corporation (Pty) Ltd v Truter*[215] and agreed that the basic original object and purpose of *SALA*, has always been to prevent the subdivision of agricultural land into uneconomic portions.

In the *Blue Crane*-case the court pointed out that the imposition of the requirement of written consent by the Minister as a condition precedent for subdivision, was aimed at avoiding subdivision of agricultural land into uneconomic units.[216] The court pronounced that the standard test for the Minister in deciding on a subdivision application is

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209 See section 2.4.3 of this study.
210 *Kotze v Minister van Landbou* 2003 1 SA 445 (T).
211 See *Stalwo v Wary Holding*s [2007] SCA 133 (RSA) para 20.
212 Para 33.
213 It applies to all land in South Africa except in areas excluded as constituting agricultural land as per the definition of agricultural land. See section 2.2.4 of this study.
214 *Adlem v Arlow* 2013 3 SA 1 (SCA).
215 *Tuckers Land and Development Corporation (Pty) Ltd v Truter* 1984 2 SA 150 (SWA) 153G-H and 154B-C as quoted in *Adlem v Arlow* 2013 3 SA 1 (SCA) para 9.
216 *Blue Crane*-case para 11, 12.

whether a new development node[217] following from the subdivision will impact negatively on food production or not.[218] The duty of the Minister is to consider the appropriateness of the subdivision from an agricultural angle and not a planning angle *per se*. The court held that it is not for the Minister to take into consideration land use and development issues; the Minister's approval of a subdivision has to be informed by the question "whether or not the sub-division of the land would lead to the creation of uneconomic units".[219] The point that the court was driving home, is that the Minister's inquiry has to be focused on determining whether agricultural land that is proposed to be subdivided still has the potential to be farmed economically.[220]

This interpretation of the role of the Minister regarding *SALA* subdivisions adds up to the opinion that was advanced by Judge Yacoob in the *Stalwo*-case that it will be against the constitutional spirit to allow the Minister to perform administrative planning powers that ought to be performed by municipalities in line with constitutional division of powers.[221] Apart from the fact that agriculture is a concurrent national and provincial functional area, the understanding is that the DAFF is well equipped to know what is best for agriculture hence the Minister of Agriculture, Forestry and Fisheries has to decide on the use of agricultural land.[222] Be that as it may, this does not erase the fact that the regulation of agricultural land use involves the functional area of municipal planning which is constitutionally assigned to local government.[223]

2.6 Conclusion

The aim of this section was mainly to discuss the current land use and planning frameworks in connection with the use of land for agriculture. It was identified that the main areas of focus for this study will be agriculture and planning. Hence a survey into

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217 The word "node" is a common term used by the DAFF to refer to a development created either being a township development or residential development, on land designated for agricultural uses. See *Rapulo Investment CC v Minister of Agriculture, Forestry and Fisheries* (unreported) case number 65007/2012 of 7 February 2014 para 24.

218 Para 26.

219 Para 26.

220 Para 25.

221 See section 2.3.2 of this study.

222 Van Wyk 2009 *SAPR* 560; *Frantz Repealing the Subdivision of Agricultural Land Act: A constitutional analysis* 22, 29.

223 See section 2.3.2 of this study.

the constitutional distribution of power in relation to the functional areas of agriculture and planning was done. This exercise revealed that agriculture is a concurrent national and provincial functional area and it is regulated by the national government through the DAFF. Moreover planning is dispensed into four facets, namely "regional planning and development", "urban and rural development", "provincial planning" and "municipal planning". The section emphasised that, amongst these categories of planning, it is municipal planning that is concerned with the regulation and control of the use of land, agricultural land included. Furthermore, it was indicated that since planning entails land use, and agriculture is conventionally practiced on land, it is highly likely that legislation dealing with one can have implications on the other. *SALA* was used as an example to demonstrate this fact.

The study revealed that *SPLUMA* sets the tone for the spatial land use and planning dispensations in South Africa and it identifies municipalities as the appropriate body to deal with land development applications, which necessarily include developments on agricultural land since municipal affairs are no longer limited to towns and old municipal boundaries, they now cover the whole territory of South Africa.

It was indicated that municipal planning powers of municipalities and the fact that agriculture and planning are controlled by different spheres of government, cause a dilemma about the appropriate authority to deal with planning functions on agricultural land. The minority decision in *Stalwo*-case and the decision in the *Blue Crane*-case gave important views on why the continued approval of agricultural land use applications by the Minister is in appropriate in light of the constitutional allocation of planning functional areas. It is argued in this section that the continued authorisation of land use planning matters on agricultural land that is today entirely situated on municipal land by the Minister responsible for agriculture undermines the municipal planning powers of a municipality. Municipal planning was discussed in more detail mainly because the passages in the DAFF *Draft Bill* that relate to planning law, address the municipal planning components of subdivision and rezoning.[224] In view of the fact that the DAFF *Draft Bill* is destined to repeal *SALA*, it was important to discuss *SALA* and its bearing on

[224] See section 3 of this study.

planning law matters. *SALA* was also used to demonstrate the influence that agricultural legislation can have on land use planning matters.

In view of the fact that the discussion in this section showed that regulation and control of agricultural land through the provisions of *SALA* face a number of challenges (ranging from its definition of agriculture to the implications of the constitutional municipal planning function on the statutory power of the Minister to decide on matters of subdivision and rezoning of agricultural land), it is important that the DAFF *Draft Bill*, as the proposed legislative replacement of *SALA,* be subsequently discussed. The relevant provisions of the DAFF *Draft Bill*, especially its clauses that relate to agriculture and planning, and its planning law features, will accordingly be discussed in section three.

3 Analysis of the *Draft Preservation and Development of Agricultural Land Framework Bill*

3.1 Introduction

This section surveys the proposed modernised system of forward planning and land use management procedures proposed in the DAFF *Draft Bill* and how they are linked to the broader field of land use and planning.[225] It also discusses the DAFF *Draft Bill* clauses on subdivision and change in the use of agricultural land and the specific authorities proposed to authorise agricultural land use applications.[226]

3.2 Historical background

Before analysing the DAFF *Draft Bill*, it is important to survey the relevant policy documents that informed the drafting of the DAFF *Draft Bill*.[227]

3.2.1 White Paper on Agriculture

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225 See section 3.3.3 of this study.
226 See section 3.4 of this study.
227 Green and White papers generally inform what is to be contained in the subsequent legislation. The legislature is guided by policy documents in drafting Bills.

The first national agricultural policy framework under the democratic rule in South Africa was published in 1995 as the *White Paper on Agriculture* 1995 (hereafter *White Paper on Agriculture*).[228] Preamble to the *White Paper on Agriculture* acknowledges that high potential agricultural land is very scarce yet non-agricultural demand to use the said land is escalating. The *White Paper on Agriculture* recognises that sustainable utilisation of land suitable for agriculture, is a necessary support measure for acceptable levels of food production to meet the economic needs of the country and for community empowerment.[229] The Preamble recognises that there is a thin line separating agricultural and economic policies. Hence it proposed a new vision for agriculture that is focused on:

> [a] highly efficient and economically viable market-directed farming sector, characterised by a wide range of farm size, which will be regarded as the economic and social pivot of rural South Africa and which will influence the rest of the economy and society.[230]

It can be deduced from this vision that there is a need to barricade the use of agricultural land against activities unrelated to agriculture.

The developments brought about by the *White Paper on Agriculture* were followed by government's proposed policy programme on "Land Care" in 1999.[231] The focus of the programme was to put measures in place that will help modify the conservation of natural resources such as land, water and vegetation in the country.[232] This is where the protection and preservation of agricultural land comes in, since agriculture relays heavily on the availability of suitable agricultural land.[233] It is therefore understandable why the new policy proposed placement of restrictive measures on the use of land

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228 It was prepared by the then Department of Agriculture under the instruction of the then Minister of Agriculture Dr AI van Niekerk. See the Preface of the *White Paper on Agriculture*, 1995.

229 See the Preamble of the *White Paper on Agriculture*; para 1 of the *White Paper on Agriculture* defines the concept "sustainable agriculture" as reference to farming systems which are productive, economically viable and environmentally sound over time.

230 See Preamble of the White Paper on Agriculture.

231 *Land Care* South Africa 1999.

232 *Land Care* South Africa para 1.

233 See section 2.2.3 of this study.

suitable for agricultural production.[234] The restrictions would serve a greater purpose of ensuring that land needed for food production remains unscathed.

3.2.2 Draft Sustainable Utilisation of Agricultural Resources Bill

The pending repeal of *SALA* was triggered by the understanding that *SALA* failed to achieve its declared objective of conserving agricultural land and ensuring its optimal use.[235] In response to this concern, the *Draft Sustainable Utilisation of Agricultural Resources Bill* of 2003 (hereafter the *Resources Bill*) was promulgated.[236] The *Resources Bill* had three major objectives that it was intended to provide for, namely the optimum productivity and sustainable utilisation of natural agricultural resources,[237] the control of weeds and invader plants, and lastly the control of subdivision and change of agricultural land use.[238] In relation to the latter object, the aim of the *Resources Bill* was to control what it termed "prime agricultural land" and "unique agricultural land".[239]

Some of the objects of the *Resources Bill* are similar to those of *SALA*.[240] This similarity did not come as a surprise since the latter was intended to remedy the defects in the former. It can be inferred from this scenario that had *SALA* been repealed (as intended) and the *Resources Bill* promulgated, the purpose and spirit of *SALA* would have survived under a different piece of legislation. Nonetheless and surprisingly so, the *Resources Bill* is silent on the repeal or amendment of *SALA* save for the repeal of

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234 Van Wyk 2009 *SAPR* 550.

235 DAFF *Draft Policy Document* 38.

236 It should be said that the *Resources Bill* was never presented in parliament, and in 2006 it was revisited and published in a modified version as the *Sustainable Utilisation of Agricultural Resources Bill* of 2006. The new version aimed to merge *SALA* and the *Conservation of Agricultural Resources Act* 43 of 1983 (hereafter *CARA*).

237 Section 1 of *CARA* defines "natural agricultural resources" as the soil, water sources and any other vegetation other than weeds and invader plants.

238 See clause 3 for the objects of the *Resources Bill*.

239 The definitions clause of the *Resources Bill* defines prime agricultural land as "…the best available agricultural land that is best suited to, and capable of, consistently producing acceptable yields of a wide range of crops such as food, feed forage, fibre and oilseed, with acceptable expenditure of energy and economic resources, and minimal damage to the environment". Moreover it defines "unique agricultural land" as "…agricultural land that can be used for high value produce and is important to agriculture due to a specific combination of location, climate or natural resource properties, that make it highly suited for production when managed with sound farming or conservation methods, including agricultural land of local importance where it is useful and environmentally sound to encourage continued agricultural production, even if it is not used for producing specific high-value produce; and wetlands".

240 See clause 3(c) of the *Resources Bill* and section 2.5.2 of this study.

CARA.[241] In contrast to *SALA*, the *Resources Bill* was intended to be applicable to any area where there are agricultural resources.[242]

Though the *Resources Bill* was never presented in parliament, it was later revisited and revised in 2007, after it was extensively discussed in the proceedings of the National Land Summit.[243] Following the discussion, alterations to its contents were recommended but it was never enacted into law; ever since it was modified to accommodate the recommendations made by the National Land Summit no further progress was made to transform it into law.

As a result of the failure to enact the *Resources Bill,* most of the policy advancements made in the *White Paper on Agriculture* 1995 lack a legislative force. Much reliance is still placed on *SALA* which itself has been criticised for protecting the interests of the farmers who own large farms at the expense of the disadvantaged landless majority.[244] In addition, the precept that subdivided portions of agricultural land are uneconomical has never been substantiated with concrete evidence. The DAFF *Draft Policy Document* accompanied by the DAFF *Draft Bill* seeks to address most of the matters that formed the scope of the *Resources Bill*. The contents of both documents touch on land use and planning law issues, most of which are likely to change the *status quo* regarding the land use and planning authorisation procedures in relation to agricultural land. The DAFF *Draft Policy Document* and the DAFF *Draft Bill* are discussed below.

3.2.3 Draft Policy Document on the Preservation and Development of Agricultural Land

In 2013, as a build up to the promulgation of a new legislative framework to regulate agricultural land, the DAFF drafted the DAFF *Draft Policy Document*. As opposed to *SALA*, the definition of "agricultural land" in the DAFF *Draft Policy Document* has a much wider scope, namely:

> …any land which is or may be used for the production of biomass that provides food, fodder, fibre, fuel, timber and other biotic material for human use, either directly or

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241 See schedule to the *Resources Bill*.

242 Clause 2 of the *Resources Bill*; It is an obvious fact that *SALA* is applicable on land that qualifies as agricultural land. See section 2.5.1 of this study.

243 Strydom and King *Environmental Management in South Africa* 332.

244 Frantz *Repealing the Subdivision of Agricultural Land Act: A constitutional analysis* 74.

> through animal husbandry including aquaculture and inland and coastal fisheries or any other agricultural purpose, excluding land which the Minister, after consultation with other relevant Ministers and MEC's concerned, excludes by means of a notice in the Gazette.[245]

According to this definition, any land that has an agricultural purpose qualifies as agricultural land, unless there is an exclusion of that particular land from agricultural land.

The aim of the DAFF *Draft Policy Document* is:

> …to protect and preserve agricultural land and its productive use in order to ensure national and household food security, ensure that agricultural land remains available and viable for agricultural development, ensure sustainable development of the agricultural sector, maintain and increase rural employment, ensure a reduction in poverty levels and a sustained improvement in quality of life, and increase agricultural production and contribution of agriculture to the Gross Domestic Product (GDP).[246]

This is a reconciliation and reaction to address the problems pertaining to the enormous amount of pressure exerted on already limited prime agricultural land in South Africa.[247] In its problem statement, the DAFF *Draft Policy Document* acknowledges that lack of a coercive and integrated national regulatory system for the protection and preservation of agricultural land, at all levels of government, leaves the loss of prime agricultural land to non-agricultural developments unbridled.[248] Given the importance of agricultural productions, to both society and the economy of the country, it is important that the problem be addressed in order to ensure optimal use of prime agricultural land.[249]

The DAFF *Draft Policy Document* states that the need for a new national framework to protect agricultural land comes as a result of the weakness of *SALA* to conserve and ensure maximisation of the productivity of agricultural land.[250] Apart from the fact that the designation of the authorising authority for the subdivision of agricultural land by

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245 See item 2 of the glossary of terms in the DAFF *Draft Policy Document*.

246 DAFF *Draft Policy Document* para 1.

247 DAFF *Draft Policy Document* para 3(d) state that the change in land use of agricultural land to other forms of development such as urban expansion, mining, tourism, infrastructure, to name a few, are more often than not incompatible with food productivity.

248 DAFF *Draft Policy Document* para 3.

249 DAFF *Draft Policy Document* para 3; Collett 2013 www.ee.co.za/wp-content/uploads/2014/05/Annelize-Collett.

250 DAFF *Draft Policy Document* 26.

SALA diverges from the constitutional allocation of planning functional areas,[251] the DAFF *Draft Policy Document* states that *SALA* failed to meet its desired objectives of preserving prime agricultural land and ensuring its positive utilisation.[252]

The DAFF *Draft Bill,* as the proposed national framework for the regulation and control of agricultural land, is discussed below.

3.3 Draft Preservation and Development of Agricultural Land Framework Bill

3.3.1 Introduction to the DAFF *Draft Bill*

The DAFF *Draft Bill* is the proposed new regulatory framework for agricultural land which the DAFF *Draft Policy Document* was paving the way for.[253] Similar to *SALA*,[254] the DAFF *Draft Bill* defines "agricultural land" as a residual category however in this case the omitted portions of land are: (a) a proclaimed township; (b) land that is the subject matter of a township establishment application done before or after the coming into operation of the DAFF *Draft Bill*; (c) land that was legitimately zoned for non-agricultural purposes before the commencement of the DAFF *Draft Bill*; and (d) lastly, land excluded through a notice in the Gazette by the Minister responsible for agriculture in consultation with the other relevant Ministries and concerned provincial MECs.[255]

Furthermore the DAFF *Draft Bill* will attempt to introduce a coordinated approach that recognises the contribution of each sphere of government in the regulation of

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251 See section 2.5.1 of this study.

252 DAFF *Draft Policy Document* para 8.3.1.

253 *SALA* does not provide for rezoning of agricultural land, it only states that its aim is to control subdivision of agricultural land. Hence rezoning processes of agricultural land have always been done through the relevant provincial legislation which empowers local authorities to decide on rezoning of land. This is evident in a number of cases wherein reference was made to agricultural land zoned in terms of the *LUPO*. See *Stalwo*-case para 3; *GillyFrost 54 (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality* (unreported) case number 1099/2013 of 28 July 2015 para 3; see section 2.5.2 of this study. The written consent of the Minister is a condition precedent for the subdivision of agricultural land.

254 In terms of s 1(a) of *SALA,* land situated in the area jurisdiction of local authorities does not qualify as agricultural land. See section 2.2.4 of this study.

255 See clause 1 (item 5) of the DAFF *Draft Bill*; Clause 4 thereof makes it clear that the DAFF *Draft Bill* will apply "to agricultural land and farming systems". Therefore its application will go beyond the agricultural land demarcations as they stand under *SALA*. It will safeguard large tracts of farm land on the urban edges from non-agricultural related developments.

agricultural land.[256] In terms of the DAFF *Draft Bill* the custodianship of agricultural land will be the responsibility of the DAFF.[257] It is proposed that the DAFF, acting through the Minister of Agriculture, Forestry and Fisheries, will have the authority to make the final determinations on applications to subdivide and rezone agricultural land.[258] At the provincial level, the Intergovernmental Committee on the Preservation and Development of Agricultural Land (hereafter Intergovernmental Committee) and the provincial MECs will play a support role to the DAFF in its governance of agricultural land.[259]

In its quest to regulate high potential cropping land and medium potential agricultural land, on local government level, the DAFF *Draft Bill* proposes a modernised definition of agricultural land that is in line with the contemporary municipal boundary demarcations.[260] This will effectively give local authorities the power to decide on subdivisions and rezoning of such agricultural land in accordance with section 33 of *SPLUMA*.[261] It is trite that municipalities are the proper authorities to sanction subdivisions and rezoning of municipal land under the current constitutional dispensation.[262] When *SPLUMA* came into operation, it confirmed this position.[263] It can therefore be predicted that the proposition, by the DAFF *Draft Bill*, to retain the Minister as the authorising authority for the subdivision and rezoning of agricultural land will not only be in direct conflict with *SPLUMA* but also be susceptible to constitutional

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256 Each of the three spheres of government has a direct constitutional interest to the regulation of agricultural land. The source of their respective interests is the constitutional allocation of the functional areas of "Agriculture" and "Municipal planning" which themselves are related to the regulation of agricultural land. See section 2.3 of this study.

257 Clause 3(1).

258 Clause 3(2).

259 Clause 3(2) and (3).

260 *SALA* defined "agricultural land" in line with the then local authorities' jurisdictional areas in that it restricted agricultural land to areas outside the reach of the then local authorities' jurisdictional demarcations. See section 2.2.4 of this study; Similar to *SALA*, the DAFF *Draft Bill* defines "agricultural land" as a residual category but in this case the omitted portions of land are a proclaimed township, land that is a subject matter of a township establishment application done before or after the coming into operation of the DAFF *Draft Bill*. Land that was legitimately zoned for non-agricultural purposes before the commencement of the DAFF *Draft Bill* and lastly land excluded through a notice in the Gazette by the Minister after consulting with the other relevant Ministers and concerned provincial MECs. See clause 1 (item 5) of the DAFF *Draft Bill*.

261 See section 2.4.6 of this study; Frantz Repealing the Subdivision of Agricultural Land Act: A constitutional analysis 13.

262 See sections 2.3.1 and 2.4.6 of this study.

263 Sections 33 and 52 of *SPLUMA* effectively make a municipality the body of first instance with regard to decisions concerning land use and planning.

challenges.[264] From the constitutional side of things, this will present a challenge since the DAFF *Draft Bill* seeks to create surrogate land use and planning powers that go against what is envisaged in the *Constitution*.[265]

The proposed objects as well as the land use and planning authorisation procedures proposed by the DAFF *Draft Bill* are discussed below.[266]

3.3.2 Proposed objects of the DAFF *Draft Bill*

The objects of the DAFF *Draft Bill* are listed in clause 2 thereof.[267] Relevant to this study are, firstly, the object to regulate the subdivision and rezoning of prime agricultural

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264 See section 2.4.6 of this study.

265 The *Constitution* assigns municipal planning powers to local government. Planning of land use falls within the ambit of municipal planning. See section 2.3.2 of this study.

266 Due to the scope of this study the discussions will focus mainly on land use and planning law issues.

267 Clause 2 provide that the objects of the DAFF *Draft Bill* are to: "(a) regulate the subdivision, rezoning and protection of agricultural land; (b) preserve and develop agricultural land by – (i) encouraging – (aa) farming on agricultural land in collaboration with other role players; and (bb) provincial and local government to enable and promote the use of agricultural land for farming purposes and compatible uses in their policies, legislation, Integrated Development Plans, Spatial Development Frameworks and other relevant administrative frameworks and procedures; (ii) discouraging or prohibiting – (aa) land uses unrelated to agriculture from taking place on agricultural land, including urban and other non-agricultural developments that are likely to create conflict with established or proposed Protected Agricultural Areas; and (bb) subdivision and rezoning of agricultural land that results in fragmentation of farming systems, reduced agricultural productivity and land degradation; (iii) encouraging the mitigation of lost productive capacity of agricultural land if permanent impacts cannot be avoided and arise from development; and (iv) promoting and encouraging long-term, viable farming units from an economic, environmental and social perspective; (c) implement a uniform, coordinated, cross-cutting national framework, including national norms and standards for the submission, consideration and approval or rejection of applications for the subdivision or rezoning of agricultural land to ensure coordinated, intergovernmental relations; (d) build capacity in all three levels of government with regard to the consideration and execution of rezoning applications; (e) ensure the sustainable use of the natural agricultural resources and maintain the agricultural landscape through the prohibition or discouragement of land use changes from agriculture to other forms of development; (f) establish a framework that, in appropriate cases, facilitates concurrent land uses on agricultural land, such as renewable energy projects, without jeopardising long-term food security and natural resource integrity; (g) protect the right to farm and to strengthen the rights of farmers to protect and manage agricultural land; (h) establish formal structures at local, provincial and national levels to provide a basis for participation and to ensure transparency in, and accountability for, land use decisions that affect the availability and sustainable use of agricultural land; (i) ensure that a minimum threshold of high potential cropping land available for agricultural production purposes is determined by the Department so as to maintain and increase food production and the potential productivity of the land concerned; (j) demarcate Protected Agricultural Areas to ensure that high potential and best available agricultural land are protected against non-agricultural land uses in order to promote long-term agricultural production; (k) encourage well-functioning intergovernmental relations and establish intergovernmental dispute resolution mechanisms; and (l) establish an incentive-based regulatory regime that is linked to enforcement to actively promote the preservation and optimal agricultural use of agricultural land for agricultural production."

land,[268] and secondly, the object to protect prime agricultural land.[269] It is deduced from these objects that, like *SALA*, the DAFF *Draft Bill* will seek to regulate agricultural land by restraining the use of land use planning instruments of subdivision and rezoning on agricultural land.

3.3.3 Land use and planning processes

It can be deduced from the objectives of the DAFF *Draft Bill,* set out in clause 2 thereof, that forward planning[270] and development control[271] are at the heart of its suggested land use and planning management strategy. They are the major processes for land use and planning.[272] The DAFF *Draft Bill* makes reference to subdivision, rezoning and administrative instruments such as IDPs and SDFs.[273] These instruments are used in the land use and planning discipline, either under forward planning or development control.[274] The DAFF *Draft Bill* will be applicable to "all agricultural land and farming systems".[275] It is therefore instructive to briefly discuss the likely implications that these land use and planning processes will have in the case that the DAFF *Draft Bill* is enacted in its current form. With the jurisdiction of municipalities now encompassing agricultural land,[276] and in view of the fact that currently municipal land use and planning instruments, such as town planning and land use schemes, generally do not accommodate agricultural land and related activities, it is important to survey how these instruments will be utilised.

3.3.4 Forward planning

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268 Clause 2(a).
269 Clause 2(b)(ii)(aa).
270 It is a planning discipline tool also referred to as plan creation, planning of land use, or integrated development planning.
271 Also known as land use management, or the management of change to the use of land.
272 Van Wyk 2007 *LDD* 59.
273 See section 2.3.3 of this study.
274 Forward planning is concerned with the sustainability aspects of the use of land and development control is concerned with the processes employed to control the nature and extent of developments.
275 These include land used for commercial, smallholder and subsistence farming either irrespective of it being privately owned, state, public or communal land. See Clause 4(1)(a)(i),(ii) of the DAFF *Draft Bill*.
276 See section 2.4.3 of this study.

Van Wyk[277] is of the opinion that forward planning as a planning discipline, can either be in the form of policy plans or regulatory frameworks. Forward planning mechanisms are directed towards the sustainable use of land. In order to advance the preservation of agricultural land in South Africa, the DAFF *Draft Bill* persuades that the provincial and local spheres of government incorporate into their policies and legal frameworks measures that will ensure that agricultural land is used for its intended purpose and other related purposes that can exist in harmony with it.[278] The necessary implication is that provincial and local government will have to map out the measures in their SDFs,[279] IDPs, zoning schemes and land use management plans respectively.[280] Provincial laws and municipal by-laws can also be utilised to guard against the use of agricultural land for non-agricultural purposes.[281]

3.3.5 Development control

The DAFF *Draft Bill* makes provision for the management of changes to the use of agricultural land. The DAFF *Draft Bill* principally opposes the rezoning and related subdivision of high potential cropping land in favour of non-agricultural developments.[282] Subdivision and rezoning applications may however be approved provided they do not pose a threat to the sustainable use of the land for agricultural purposes.[283] In cases where subdivision and rezoning is allowed and the developments thereon negatively affect the land in question, mitigation measures will have to be employed.[284] The DAFF *Draft Bill* makes provision that an application concerning rezoning of agricultural land that is identified as high potential cropping land may only be given sanctioned if it

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277 Van Wyk 2007 *LDD* 59. She states that forward planning policy plans includes planning administrative frameworks such as IDPs and SDFs.

278 Clause 2(b)(i)(bb).

279 Section 12 of *SPLUMA* makes it mandatory for all spheres of government to prepare SDFs and participate in planning and land use management processes concerning each other.

280 SDFs and IDPs are policies, while zoning schemes and land use management plans are regulatory frameworks. See Van Wyk 2010 *PELJ* para 5.2; Chapter 5 of the *LGMSA* makes provision for municipal IDPs.

281 Clause 1 definitions of the DAFF *Draft Bill*, defines "agricultural purposes" as any use of land that is related to agricultural activities which would include the use of land for structures, buildings and dwelling units whose use is related to agricultural activities. This definition is identical to the one given under *SPLUMA*. See section 2.4.6 of this study.

282 Clauses 5 and 6 respectively.

283 Clause 2(b)(ii)(aa) and (bb).

284 Clause 16.

relates to either land reform[285] or there are existing exceptional circumstances warranting the approval of the application by the intergovernmental committee.[286]

3.4 Agricultural land: intergovernmental use authorisation

All three levels of government will have a role to play in the authorisation for the subdivision and rezoning of high cropping land and medium potential agricultural land.[287] The Intergovernmental Committee will have as its mandate the task to promote and facilitate good relations between the three spheres in the execution of their individual but interrelated agricultural land preservation responsibilities.[288] The DAFF *Draft Bill* proposes a streamlined procedure for the subdivision and rezoning of agricultural land.[289] The DAFF *Draft Bill* can be criticised in this regard for seeking to impose an unnecessarily prolonged and unjustified heavy regulation system of authorisation.

Since the authorisation process for the subdivision and rezoning of agricultural land differs depending on the particular category of agricultural land being dealt with, it is instructive to first briefly discuss the proposed categorise of agricultural land before delving into the discussion on the proposed land use authorisation procedure.

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285 In the context of South Africa, land reform is a programme aimed at addressing land distribution inequality in the country. The programme is made up of three pillars, namely, land restitution, land redistribution and tenure security. The land reform programme was adopted in South Africa as a matter of national interest to remedy the effects of the racially discriminatory laws and practices which existed during the greater part of the twentieth century. The focus of the programme is on land ownership since there was extreme inequality in land ownership amongst the citizens as a result of the discriminatory laws. See Kloppers and Pienaar 2014 *PELJ* para 677.

286 Clause 5; Clause 86(1) lists authorities that constitute an intergovernmental committee.

287 See chapter 2 Parts I and II of the DAFF *Draft Bill*.

288 In terms of clause 83(2) of the DAFF *Draft Bill* the Intergovernmental Committee will function in line with the *Intergovernmental Relations Framework* Act 13 of 2005; See section 4.4.3 of this study; Members of the Intergovernmental Committee are listed in clause 86(1). It is composed of national Ministers, deputy Ministers and the provincial MEC in whose jurisdiction the land subject matter of the application is situate. No member from the local sphere of government appears in the list despite the fact that it is to deal with land use applications, a function that is constitutionally reserved for the local sphere of government.

289 The proposed general application process, as contained in chapter 2 of the DAFF *Draft Bill,* is that the application will first be made to the provincial authorities who before deciding on it will consult the municipality of the area concerned. The municipality will then check with the concerned stakeholders if any. For instance, if the land in question is part of communal land, the traditional authority of the area will be consulted. It is only then that the provincial authorities will forward the application to the DAFF for consideration by the Intergovernmental committee which will then hand it to the Minister to make the final decision. See chapter 2 of the DAFF *Draft Bill*.

3.4.1 Agricultural land categorisation

The DAFF *Draft Bill* only makes provision for the subdivision and rezoning of land categorised as high potential cropping land and medium potential agricultural land. The categorisation is done on the basis of the particular land capability. This is evident from the manner in which the two categories of agricultural land are defined in the DAFF *Draft Bill*. The definitions dictate the required agricultural standards for land to be regarded as high potential cropping land or medium potential agricultural land. According to the DAFF *Draft Bill*, "high potential cropping land":

> (a) means land best suited to, and capable of, consistently producing acceptable levels of goods and services for a wide range of agricultural enterprises in a sustainable manner, taking into consideration expenditure of energy and economic resources; and (b) includes – (i) land capability class 1 land; (ii) land capability class 11 land; (iii) land capability class 111 land; (iv) unique agricultural land; (v) irrigated land; and (vi) land suitable for irrigation;...medium potential agricultural land means all land available for agricultural production purposes – (a) excluding high potential cropping land; and (b) including land capability classes 1V, V, V1, V11 and V111 land;....[290]

The DAFF *Draft Bill* will mainly regulate two categories of agricultural land, namely agricultural land that has the best combination of characteristics to make it agriculturally productive and "normal" agricultural land that is productive.

The DAFF *Draft Bill*s proposed land use authorisation process is subsequently discussed.

3.4.2 Intergovernmental land use authorisation

The DAFF *Draft Bill* provides responsibilities for each of the three spheres of government in relation to the subdivision and rezoning of high potential cropping land and medium potential agricultural land.[291] The difference between the two categories of agricultural land is that subdivision of high potential cropping land will generally be forbidden unless exceptional circumstances exist in which case the approving authority will be the Minister.[292] The rezoning thereof, and any related subdivision, will be approved by the Intergovernmental Committee on condition that exceptional

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290 Clause 1.
291 Clauses 5, 6 of the DAFF *Draft Bill*.
292 Clause 5 read with clause 12(4).

circumstances exist.[293] In the same vein, the subdivision and rezoning of medium potential agricultural land will be prohibited except in a case where the provincial MEC finds it fitting to approve the subdivision and rezoning.[294] The input of the municipality in this case will be limited to making recommendations to the provincial department.[295] For instance, once the application has been submitted to the relevant provincial department, a municipality will be given a copy together with supporting documents thereof.[296] A municipality in considering the application has to reflect on its administrative planning frameworks and if the application relates to communal land consult with the traditional governance structures of the area.[297]

It is important to outline the specific roles of each sphere of government:

(a) National sphere

The DAFF, through the national Minister, will be the principal role player in the management of rezoning or subdivision of agricultural land.[298] The DAFF *Draft Bill* seeks to create institutions at the national level to assist in the decision making process, namely the National Internal Technical Committee,[299] an Agricultural Land National Advisory Committee,[300] an Intergovernmental Committee on the Preservation and Development of Agricultural Land[301] and an Agricultural Review Board. The latter will review the applications made to the Minister, the provincial MEC or the Intergovernmental Committee.

(b) Provincial sphere

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293 Clause 6 read with clause 12(5); In terms of clause 7 the application will be submitted to the provincial department of the area concerned.
294 Clause 29 read with clause 36(8).
295 Clause 34.
296 Clause 34(a).
297 Clause 34(2).
298 Clause 3(2).
299 Its main role will be to make suggestions to the Minister in relation to applications made.
300 Its role will be to evaluate provincial agriculture sector plans and determine the need of establishing schemes to promote optimal land use.
301 One of its roles will be to work on applications for the rezoning of high potential cropping land and the protection of medium potential agricultural land.

Provinces will have the responsibility to establish clear systems of planning and development of agricultural land and ensure the optimal use of agricultural land.[302] This will include the establishment of a Provincial Internal Technical Committee whose responsibility will be to make recommendations on subdivision and rezoning applications and advice municipalities on the use of agricultural land.[303] The provision that recommendations and advise will have to be obtained from a provincial institution is an indication that the DAFF *Draft Bill* is determined to create an intergovernmental partnership system in matters of subdivision and rezoning of agricultural land.

(c) Local sphere

Each municipality, as part of its IDP processes, will be inclined to align its SDFs to accommodate all agricultural land, allot land for agricultural production and participate and make recommendations for the rezoning and subdivision of medium potential agricultural land.[304] In carrying out the above responsibilities, a municipality will have to act in line with a list of factors that will be published in the Government Gazette by the Minister after consulting with the provincial MECs and South African Local Government Association.[305] In the light of section 155(7) of the *Constitution* which envisages that national and provincial governments have the power to see to the effective performance by municipalities of their planning duties, the listed factors will act as guidelines for the exercise by the municipality of its above stated functions.[306]

3.5 Intergovernmental relations and the doctrine of cooperative governance

The DAFF *Draft Bill* seeks to create a uniform and coordinated intergovernmental application procedure pertaining to land use and planning systems on agricultural land.[307] It is the object of the DAFF *Draft Bill* to create intergovernmental formal structures at all levels of government to facilitate transparency and accountability on

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302 Clause 140(1).
303 Clause 140(2).
304 Clause 142.
305 Clause 143.
306 *Habitat*-case para 20.
307 Clause 2(c) and (h) respectively.

land use decisions that could adversely affect agricultural land. Unlike *SALA* which gives the national sphere of government monopoly over the control of matters concerning agricultural land, the DAFF *Draft Bill* makes provision that the provincial and local government adopt or include in their legislative and policy frameworks measures that cultivate the suited use and reservation of agricultural land for farming purposes.[308] The national, provincial and local spheres will all give an input in the approval of development applications on agricultural land.[309]

The participation of different spheres, though for different purposes, on a similar application process presents an inevitable overlap of powers that will most probably be a fertile ground for disputes. The chapter 3 principles of co-operative government and intergovernmental relations enshrined in the *Constitution* will be vital in such circumstances. Co-operation and coordination on governance functions that are trans-boundary in nature stem directly from the constitutional clause on principles of co-operative government.[310] Application of the principles of cooperative governance and intergovernmental relations will be necessary in this case to extirpate possible tensions that might be caused by the intergovernmental authorisation arrangement in the DAFF *Draft Bill*.[311] In its chapter 7 the DAFF *Draft Bill* realises the significance of the principles of co-operative government and intergovernmental relations to the proposed system of a multi-governmental processing of subdivision and rezoning of high potential cropping land and medium potential agricultural land applications. It will impose a duty on the organs of state to avoid resorting to litigation whenever there is a dispute between

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308 Clause 2(b)(i) of the DAFF *Draft Bill* makes reference to IDPs and SDFs as the administrative instruments that local government and provincial government respectively can employ in the promotion of the use of agricultural land for agricultural purposes; IDPs and SDFs are elements of municipal planning and provincial planning respectively. See ss 5(1)(a) and 5(2)(a) of *SPLUMA*.

309 In terms of clause 12, for example, in the processing of applications on high potential cropping land once the application is received and appraised by the land use official of the concerned provincial department, who has to take into account the inputs and recommendations from the relevant municipal council, will be submitted to the National Internal Technical Committee which will make recommendations to the Minister of Agriculture, Forestry and Fisheries or intergovernmental committee, as the case maybe, for approval.

310 Section 41 of the *Constitution*.

311 Du Plessis 2008 *SAPL* 109,110.

them originating from the exercise of their powers sourced from the provisions of the DAFF *Draft Bill*.[312]

This is similar to the constitutional responsibility placed on all spheres and organs of state to avoid from legal proceedings against one another.[313] Nonetheless the avoidance of such disputes from a local government perspective might prove unavoidable. It has already been discussed elsewhere in this study that the subdivision and rezoning of any land is a matter for municipal planning.[314] Therefore the exercise of such a function by any other sphere of government other than the local sphere would be an unacceptable creation of a surrogate municipal planning function for provinces and the national government. After all it is a constitutional imperative that a sphere of government must exercise its given powers in a way that does not intrude into the functional areas of another sphere of government.[315]

In *Maccsand (Pty) Ltd v City of Cape Town* (hereafter *Maccsand*-case)[316] the court laid down the position that the exercise of a constitutional function allocated to a specific sphere of government by another sphere would be regarded as constituting an unconstitutional usurpation of powers of one sphere by another.[317] Therefore, *in casu*, national and provincial spheres, when making agricultural land use determinations, would be usurping the land use and planning powers reserved for municipalities.

3.6 Conclusion

This section discussed the historical background and objectives of the DAFF *Draft Bill*. It also showed that the given definition of agricultural land in the DAFF *Draft Bill* draws inspiration from the municipal boundaries transformation that has taken place since the inception of the democratic rule in South Africa. It was shown that the major objectives of the DAFF *Draft Bill* are to regulate, protect, preserve and develop agricultural land and that the control of the processes of subdivision and rezoning of agricultural land are

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312 Clause 133.
313 Section 41(1)(h)(vi) of the *Constitution*.
314 See section 2.4.3 of this study.
315 Section 41(1)(g) of the *Constitution*.
316 *Maccsand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC).
317 Para 47; See section 4.4.2 of this study.

key to meeting these objectives. Secondly, it was shown that the provincial and local spheres of government incorporate into their legislative and policy frameworks measures that will ensure the use of agricultural land for agricultural related purposes and sustainable use of the land.

More importantly it was demonstrated how the DAFF *Draft Bill* sets out the authorisation procedure for the subdivision and rezoning of prime agricultural land. The DAFF *Draft Bill* intends to protect South Africa's dwindling agricultural lands from non-agricultural developments by controlling the subdivision and rezoning of agricultural land. Moreover, it is clear from the discussion that the DAFF *Draft Bill* integrates, into the regulatory system of agricultural land, land use and planning concepts of forward planning and development control. This section also highlighted the crucial role that will be played by the constitutional principles of co-operative government in the proposed intergovernmental agricultural land use authorisation process.[318] Lastly the section showed the statutory and constitutional challenges that the model of agricultural land regulation proposed by the DAFF *Draft Bill* could face if it is enacted in its current form.

The following section discusses the possible impact that the DAFF *Draft Bill* will have on the existing land use and planning frameworks applicable to agricultural land in South Africa.

4 DAFF *Draft Bill*: Competences of the spheres of government on agricultural land use authorisations

4.1 Introduction

In section two the various current legal instruments applicable to the regulation and control of the use of agricultural land were analysed. The scope and relevance of municipal planning on land use issues on agricultural land were discussed. The historical background and objects of the DAFF *Draft Bill* were discussed under section three of this study.[319] The main aim of section three was to survey the approach of the DAFF *Draft Bill* in identifying agricultural land and how this transacts with municipal planning.

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318 See section 3.5 of this study.
319 See section 3.3.2 of this study.

In the present section the implications of the DAFF *Draft Bill* on the current land use and planning framework, to be more specific, agricultural land use authorisations, are discussed.

4.2 Constitutional interests

The DAFF *Draft Bill* recognises that each of the three spheres of government has a role to play in the regulation of agricultural land.[320] This flows from the fact that each of the spheres is allocated either "agriculture" or "municipal planning" as its functional area,[321] and it is difficult to divorce the two functional areas from agricultural land use regulation.[322] As Judge Yacoob[323] once stated: "planning entails land use and is inextricably connected to every functional area that concerns the use of land".

The DAFF *Draft Bill* will have a sway on agriculture and municipal planning. These are functional areas that are of categorical constitutional interest to the three spheres of government respectively. National and provincial spheres of government have a constitutional interest in relation to agriculture, and local government has a constitutional interest in relation to municipal planning.[324]

It is important to survey how these constitutional interests inter play in the context of the regulation of agricultural land in line with the empowering legal frameworks and what the DAFF *Draft Bill* proposes.

4.2.1 Municipal agricultural land

The fact that the *Constitution* allocates municipal planning, solely, to local government makes municipalities the rightful decision makers when it comes to municipal planning subjects such as subdivision and rezoning applications.[325] Constitutional Court jurisprudence shows that the executive municipal powers of a municipality can only be

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320 See section 3.4.2 of this study.
321 See section 2.4.1 of this study.
322 See section 2.3 of this study.
323 *Stalwo*-case para 128.
324 See section 2.4.1 of this study
325 See section 2.3.2 of this study; *Habitat*-case para 23.

constrained by legislation to the extent that the *Constitution* permits.[326] It is evident therefore that the *Constitution* does not permit a direct exercise of the executive and administrative municipal planning powers by either the national or provincial government as proposed by the DAFF *Draft Bill*.

Over and above the implications of the wall-to-wall municipal jurisdictional boundaries, the adoption of the definition of agricultural land proposed in the DAFF *Draft Bill*, in the event that it is enacted in its current form, will cement the understanding that agricultural land in South Africa is no longer defined by territorial boundaries but by the agricultural viability of the land in question. It makes it constitutionally untenable to suggest that the exclusive municipal planning powers of municipalities concerning the subdivision and rezoning land apply to all land within their jurisdiction safe for agricultural land.[327] This puts to question the aptness of the proposed executive roles of the national and provincial governments in the authorisation processes of the subdivision and rezoning of agricultural land by the DAFF *Draft Bill*. More so when it is already established that:

> …the national and provincial spheres of government cannot and do not have the power to exercise executive municipal powers or the right to administer municipal affairs.[328]

The autonomy of a municipality can never be compromised. The constitutional oversight powers that the national and provincial governments have over municipalities, in cases where there is ineffective performance, are only limited to the taking of regulatory measures to influence performance, and not the actual usurpation of the municipal functions.[329] The intervention will only be transitory.[330] However it cannot be

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326 *City of Cape Town v Robertson* 2005 2 SA 323 (CC) para 60.

327 It should be borne in mind that municipalities are no longer mere creatures of statute with only delegate powers. Since the inception of a constitutional democracy, municipalities have transformed into autonomous bodies that hold original and constitutionally engrained powers to administer their own affairs and enjoy the same privilege with the other two spheres of government not to have their functional areas intruded by other spheres and organs of state. See ss 40 and 41(1)(g) of the *Constitution*.

328 Van Wyk 2012 *PELJ* 299; *City of Cape Town v Maccsand (Pty) Ltd* 2010 6 SA 63 (WCC) 71D-E.

329 See s 155(7) of the *Constitution*; *Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 373.

330 *Gauteng Development Tribunal* (CC)-case para 44.

denied that the envisage control over municipal legislation by national and provincial governments could affect the mode of administration of local government matters.[331]

4.2.2 National and provincial governments' municipal regulation

The only constitutional interests or roles that the national and provincial governments have in relation to municipal planning powers of municipalities are that of oversight and support roles.[332] In the *Gauteng Development Tribunal (CC)*-case the Constitutional Court held that the effect of section 155(7) of the *Constitution* is that the national or provincial spheres of government cannot, through their legislative powers to regulate the executive authority of municipalities, give to themselves the executive municipal powers to exercise functions reserved for municipalities.[333] In the *Habitat*-case*,* the Constitutional Court had to resolve a matter that concerned an attempt by the provincial sphere of government to exercise the subdivision and rezoning powers of local government. The argument raised by the provincial government was that, even though matters of rezoning and subdivision of agricultural land are matters to be dealt with at the municipal level, under circumstances where they have province-wide implications the province can exercise them. The court needed to determine the implications of section 155(7) of the *Constitution*. The court emphasised that regulation of local government powers by the national and provincial spheres of government referred to in section 155(7) of the *Constitution* should be understood to mean the:

> … creating of norms and guidelines for the exercise of a power or the performance of a function itself. It does not mean the usurpation of the power or the performance of the function itself.[334]

The regulation of the executive authority of municipalities is done through statutory measures dealing with matters such as national standards, minimum requirements and monitoring procedures.[335] For instance, the adoption of national and provincial SDFs prepared in terms of *SPLUMA* that will guide municipal planning and development

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331 Mettler 2003 *LDD* 223.
332 Section 155(2),(7) of the *Constitution*.
333 Para 59.
334 Para 22; *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) paras 372,373.
335 Freedman 2014 *PELJ* 571.

decisions.[336] These measures do not necessarily permit the regulating authority to seize and make decisions that ought to be made by a municipality.[337]

In light of the above arguments it is clear that the proposition by the DAFF *Draft Bill* to create an intergovernmental land use authorisation process in relation to the subdivision and rezoning of high potential cropping land and medium potential agricultural land will meet serious constitutional challenges regarding its attempt to compromise the exclusive municipal planning powers of a municipality. The position would be different if the national and provincial spheres of government would adhere to the system of government envisaged in the *Constitution* where there is a division of functions, duties and powers amongst the three spheres of government.[338] Therefore when the national and provincial spheres deal with agricultural land, they have to concern themselves with their allocated functional area of agriculture, and not traverse into the municipal functional area of municipal planning which involves issues of subdivision and rezoning *per se*.[339]

This then invites the inquiry into the role that ought to be played by the national and provincial spheres in relation to the regulation of agricultural land.

4.3 Identifying and separating the roles

The previous paragraphs identified the constitutional hitches that come with the idea of having the national and provincial governments at the heart of the subdivision and

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336 Section 12(1)(d) and s 12(2)(b); S 24 of the *National Environmental Management Act* 107 of 1998 give the right to national and provincial governments to identify activities that cannot commence without prior authorisation, this can include activities such as township establishments which are the business of municipalities.

337 The decision of Judge Cameron in the *Habitat Council*-case para 27 pronounced that the oversight power of a Province cannot not entail appellate oversight powers of the decisions of a municipality but the promotion of the development of local government capacity to enable them to effectively perform their mandates; See s 155(b) of the *Constitution*.

338 See Schedule 4 and 5 of the *Constitution*; Olivier and Williams 2012 *JJS* 118; See section 2.4.1 of this study.

339 Clause 13 is to bestow the discretion to authorise the rezoning and subdivision of high potential cropping land on the Intergovernmental Committee. In similar fashion clause 29 is to leave the approval of the application for the rezoning and subdivision of medium potential agricultural land to the concerned provincial MEC.

rezoning of agricultural land decision-making cluster.[340] It is therefore instructive to identify and separate the roles of the three spheres in the subdivision and rezoning of agricultural land.

4.3.1 Institutional regulatory complexities

The raison d'être for not leaving out the subdivision and rezoning of agricultural land to municipalities, as the rightful functionaries thereof,[341] flows from the understanding that the preservation of prime agricultural land through land use and planning mechanisms involves agriculture which can best be dealt with by the DAFF.[342] The reasons advanced for the statutory power given to the Minister to determine land use and planning administrative powers in relation to agricultural land has been that the protection of agricultural land is a matter that is in the national interest; it can best be dealt with at level of national government.[343] The understanding is that the national government can better understand what is in the best interest of agriculture. Hence the DAFF, through the Minister, has to be accorded wide-ranging powers to regulate and control the use of agricultural land.[344] This argument makes sense if one considers that agriculture is a functional area of concurrent national and provincial legislative competence. However it falters when considering it from a planning law perspective since issues of land use are part of municipal planning.[345] To accord the subdivision and rezoning responsibilities to either the national or the provincial authorities will be tantamount to negating the constitutional division of functional areas.[346]

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340 The DAFF *Draft Bill* proposes for a system of agricultural land regulation that enables all three spheres of government to make an input. Regulation under *SALA* vested primarily with the Minister.

341 See section 2.3.2 of this study.

342 See section 2.5.2 of this study.

343 The same reasoning can apply in relation to the involvement of the provincial sphere especially since "agriculture" is a concurrent national and provincial functional area of competence. See section 2.3 of this study.

344 *SALA* reserves the determination of subdivision of agricultural land to the Minister. The DAFF *Draft Bill* is to bestow onto the Intergovernmental Committee and MECs the power to make final decisions on applications concerning the subdivision and rezoning of prime agricultural land.

345 See section 2.3.2 of this study.

346 In the *Gauteng Development Tribunal* (CC)-case para 53 Judge Jafta cautioned that the government planning powers are allocated according to what is "appropriate to each sphere"; *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 51.

The third respondent in the *Stalwo*-case argued that the preservation of the Minister power over agricultural land aims to ensure the fulfilment of the constitutional duty of the state to realise the right to have access to food and ensure access to land.[347] This is despite the fact that in this regard *SALA* clearly goes against the constitutional imperative that it is a municipality which has the executive authority in respect of and the right to administer municipal planning.[348] Similarly, in the case of the DAFF *Draft Bill* the Intergovernmental Committee and the MECs, in exercising their proposed powers under clauses 13 and 29 of the DAFF *Draft Bill* respectively will obviously lack the authority to make their determinations based on municipal planning issues as they are constitutional prerogatives reserved for municipalities.[349]

It seems the only way out of this dilemma is to ascertain what the purpose of the national and provincial spheres ought to be when making decisions on the subdivision and rezoning of prime agricultural land. Their roles have to be narrowly demarcated to avoid the overreach of municipal planning functions.[350] This can understandably be confusing because of the inherent overlap between the functional areas of agriculture and planning.[351]

4.3.2 Intergovernmental Committee and provincial MEC

As previously indicated,[352] the objects of the DAFF *Draft Bill* will be to preserve high potential cropping land and medium potential agricultural land by preventing the subdivision and rezoning thereof which will affect the economic value of the concerned land. The value of the land is based on its contribution to the supply of food and its rating on the land capability classes as stipulated in the definitions of high potential cropping land and medium potential agricultural land.[353] If the DAFF *Draft Bill* is enacted in its current form, the proposed Intergovernmental Committee and the MEC in

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347 Para 110.
348 Section 156(1)(a) of the *Constitution*.
349 See section 2.3.2 of this study.
350 The Intergovernmental Committee and the provincial MECs are institutions of the national and provincial government. Their intended roles as stipulated in the DAFF *Draft Bill* will represent the respective spheres of government that they belong to. See section 3.4.2 of this study.
351 See section 2.3 of this study.
352 See section 3.3.2 of this study.
353 See section 1.1 of this study.

approving the applications concerning the rezoning and associated subdivision of high potential cropping land and medium potential agricultural land, respectively, will have to make their determinations in line with the objects of the DAFF *Draft Bill*. The Intergovernmental Committee and the MECs in exercising their proposed powers under clauses 13 and 29 of the DAFF *Draft Bill* respectively will lack the authority to make their determinations based on municipal planning issues as they are constitutional prerogatives reserved for municipalities.

4.4 Dual authorisation and overlap of functions

The DAFF *Draft Bill* seeks, *inter alia,* to implement a joined intergovernmental authorisation for the subdivision of high potential cropping land and medium potential agricultural land.[354] The system proposed in the DAFF *Draft Bill* will create surrogate powers for the national and provincial governments to authorise land use applications.[355] Moreover, the involvement of the three spheres of government in the regulation of agricultural land use might be a fertile ground for the overlap of powers.

The implications of dual authorisation and overlap of functions in agricultural land regulation are discussed below.

4.4.1 Dual authorisation

It has been mentioned elsewhere in this study that,[356] in terms of *SPLUMA*, land development applications must be lodged with the municipality. Where authorisation is also required in terms of any other legislation in relation to the same land use application, such authorisation has to be obtained.[357] *In casu*, that other legislation will

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354 See section 3.5 of this study; Both the Intergovernmental Committee and the provincial MEC will have to consult and or receive inputs from the concerned government departments, municipalities and interested and affected parties before making their decisions. See clauses 10, 11, 14, 34, 35 and 37 of the DAFF *Draft Bill*.

355 See sections 2.3.2 and 3.3 of this study.

356 See section 2.4.6 of this study; In terms of s 41(1) and (2) of *SPLUMA,* a land development application lodged with a municipality for determination by the Municipal Planning Tribunal, includes amongst others an application for change of land use, township establishment and subdivision of land, to mention a few.

357 Section 33(2) of *SPLUMA*; The legislator must have inserted this provision in anticipation for a situation whereby a given land use application would involve an activity that is listed as requiring environmental authorisation in terms of the relevant environmental legislation, for example. Should

be the DAFF *Draft Bill* upon its enactment. Recent planning case law lay bare that dual authorisations by different authorities executing different mandates is not obscure despite the fact that it may lead to proscription of a decision made by one authority by the other.[358]

The DAFF *Draft Bill* proposes its own land use authorisation with regard to rezoning and subdivision of agricultural land.[359] This will create a dual agricultural land use authorisation conundrum.[360] More so since the DAFF *Draft Bill* will give the Minister the final say on matters of prime agricultural land subdivision and rezoning, whereas *SPLUMA* recognises municipalities as the rightful authorisers in that regard.[361] It has been argued elsewhere in this study that the executive land use planning powers dwell within the ambit of municipalities as part of their municipal planning functions.[362] That being the case, the land use authorisation process suggested by the DAFF *Draft Bill* will not only present the possibility of an overlap of functions but will also runs very close to allowing the usurpation of municipal planning functions of local government by the national and provincial governments state organs.

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such a case arise, both *SPLUMA* and *National Environmental Management Act* 107 of 1998 (hereafter *NEMA*) as the framework legislation for land use management and environment respectively make it possible for the relevant authorising authority to issue an aligned or integrated authorisation. In particular, s 30(3) of *SPLUMA* provides that an authorisation issued in terms of any other legislation may be regarded as authorisation in terms of *SPLUMA* provided that it meets all the requirements set out in *SPLUMA*. In the case of *NEMA*, s 24L(2) thereof states that an integrated environmental authorisation may be issued on condition that the provisions of *NEMA* and the other law have been complied with; Local government is not only co-responsible with provincial and national government to play a role in the overall scheme of environmental protection and management in South Africa but it is also mandated to promote a safe and healthy environment. See s 24 read with s 7(2) of the *Constitution*, and s 152(1)(d) of the *Constitution*; *RA Le Sueur v eThekwini Municiplity* (9714/11) [2013] ZAKZPHC 6 para 20; Du Plessis and Van der Berg 2014 *Stell LR* 592; Therefore it is expected that a municipality when dealing with land use applications should be considerate of environmental implications of the proposed land use. It is therefore argued that a land use authorisation by a municipality should also be based on what is desirable for the environment. However Du Plessis and Van der Berg, when referring to a concern earlier raised by Freedman, point out that a clear interpretation of which environmental matters can be dealt with under the municipal planning wing is still needed. See Du Plessis and Van der Berg 2014 *Stell LR* 593.

358 *Gauteng Development Tribunal* (*SCA*)-case para 34; *Maccsand*-case para 43; Humby 2012 *SAPL* 632.

359 See section 3.3 of this study.

360 The application of the DAFF *Draft Bill* and *SPLUMA* on what for present purposes can be referred to as "municipal agricultural land" is going to create a dual authorisation system with regard to the use of agricultural land.

361 See section 2.4.6 of this study.

362 See section 2.3.2 of this study.

4.4.2 Overlap of functions and the doctrine of usurpation

Dual authorisation with regard to agricultural land discussed above, will be an indication that there are competing interests or overlap of functions concerning the regulations of the use of agricultural land. Therefore, if not managed accordingly, the whole process will be a fertile ground for usurpation of powers of one sphere by the other.[363]

The Constitutional Court has in the past indicated that there is nothing malevolent about an overlap of functions more so when each functionary operates firmly within its mandated functional area.[364] The overlap is inevitable because before a developer can commence with the land use activity, all the required approvals must be obtained, meaning the different functionaries must, in line with their empowering legislation, ensure that the developer has complied with all the legislative requirements before authorising the activity.[365]

In casu, the Intergovernmental Committee and MEC will be making their determinations from an agricultural point of view in line with the DAFF *Draft Bill* whereas a municipality will be looking at things from a land use and planning perspective through the empowering provisions of *SPLUMA* and the relevant provincial planning legislation and

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363 Recent case law that interrogated the powers of the different spheres of government in regard to the functional areas listed in Schedules 4 and 5 the *Constitution* all point to the fact that the regulatory overlap between the three spheres of government when executing their different but related mandates concerning the functional areas listed in the *Constitution* is very complex. See ; *RA Le Sueur v eThekwini Municipality* (9714/11) [2013] ZAKZPHC 6 para 20; Du Plessis and Van der Berg 2014 *Stell LR* 593.

364 Maccsand-case para 48; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC para 93; See section 4.4.3 of this study.

365 Olivier and Williams *JJS* 127; This is an indication that land use planning processes are very fragmented and complicate because apart from obtaining a land use authorisation, an applicant for land use might also need other authorisations such as environmental authorisations, water use licences, mining rights and permits, waste licences and an approval to commence a listed strategic integrated project in terms of the provisions of the *Infrastructure Development Act* 13 of 2014, for example. For each of these cases, different functionaries within the three spheres of government will be responsible to carry out their individual functionaries and this will automatically result in overlap of functions; The Constitutional Court made it clear in *Maccsand*-case that the granting of a right in terms of one legislation does not cancel out the application of the other involved legislation. Judge Jafta made it a point, therein, that it is in this type of cases where spheres of government should adhere to their constitutional obligation to cooperate with one another in mutual trust and good faith and to co-ordinate actions taken with one another. See *Maccsand*-case para 48; Section 41(1)(h)(iv) of the *Constitution*; See section 4.4.3 of this study.

by-laws.[366] In as much as the implementation of the determinations made by each body, regarding the decision whether to subdivide or rezone agricultural land, are interdependent one cannot be used as a proxy of another. Each exercise has its own intended purpose. In support in this reasoning, the Constitutional Court in the *Maccsand*-case pronounced that where two spheres of government exercise their functions and it happens that those functions overlap that does not make either act an impermissible intrusion into the functions of another.[367] The reasoning of the court here is based on the understanding that spheres of government operate in an interrelated system of governance.[368] The Constitutional Court warned that any understanding to the contrary would likely invite what can be described as an incongruous attempt by some to eliminate the function of one sphere at the expense of another. The point the court was making is that overlaps of functions are not impermissible and do not constitute an illegal veto of the powers of one sphere by another since each sphere approaches the matter from an independent standpoint.

The facts of the *Maccsand*-case are set out in brief as follows:[369] In 2007 the Minister for Mineral Resources, pursuant to its powers contained in the *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereafter *MPRDA*), granted the *Maccsand*-case a mining right and a mining permit in respect of dunes situated on a piece of land owned by the City of Cape Town.[370] The dunes were zoned as "public open space" and "rural" in terms of *LUPO*. This means the land had to be rezoned before it could be utilised for mining activities. In defiance of this, Maccsand (Pty) Ltd commenced mining operations without having the dunes rezoned. This provoked a land use dispute between the City of Cape Town and Maccsand (Pty) Ltd. The City of Cape Town was of the view that Maccsand (Pty) Ltd failed to comply with *LUPO*. Maccsand (Pty) Ltd, backed by the Minister of Mineral Resources, argued that the issuing of the mining right

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366 In this way not only will adherence to the cooperative governance and intergovernmental relations rule that no sphere should intrude into the functional area of another be achieved, but also the worry that municipalities lack expertise to decide what will be the best use of agricultural land will no longer be a cause of concern because even if a municipality authorises the use of land classified as high potential cropping land or medium potential agricultural land, the prerequisite to get authorisation from the Intergovernmental Committee or MEC will be a safety net.

367 Para 48; *Stalwo*-case para 80.

368 Para 43.

369 For the purposes of this study, only parts of the decision relevant to this study are discussed.

370 The mining right and permit were issued in terms of ss 23(1) and 27 of the *MPRDA* respectively.

and permit rendered it unnecessary to acquire land use authorisation by applying for the rezoning of the area by the municipality concerned in terms *LUPO*. Their arguments were premised on the view that since mining is a national sphere functional area, the constitutional imperative that one sphere of government, being the local government in this case, cannot interfere with the exercise of power by another sphere of government bars land use authorisation by the local sphere because the application is done for mining purposes.[371] They argued that *LUPO* is not applicable to land proposed to be used for mining because it regulates land use matters related to municipal functions.[372]

The issue before the court was whether being granted a mining permit exempts one from obtaining authorisation in terms of *LUPO*?

The Constitutional Court dismissed the appeal of Maccsand (Pty) Ltd and concluded that the *MPRDA* and *LUPO* serve different purposes, the former governs mining and the latter governs land use.[373] The court made it clear that the overlap is a result of the fact that mining occurs on land and the court held that neither does that overlap mean that the application of *MPRDA* has the effect of displacing the application of *LUPO* nor does it attract the intrusion of a functional area of one sphere by the other as each sphere will be exercising a power within its own competence.[374]

In the same vein, the DAFF *Draft Bill,* being the proposed legislation to regulate agricultural land, will have implications on both "Agriculture" and "Municipal planning", they cannot be divorced from its intended purpose. Agriculture takes place on agricultural land. On the other hand, the regulation of agricultural land will involve the use of municipal planning apparatus of subdivision and rezoning of land.[375] The *Maccsand*-case demonstrates that this overlap cannot be used as justification for one sphere to encroach into the functional area of another. Even if planning cuts across all functional areas concerned with the use of land, the autonomy or distinctiveness of the

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371 Olivier, Williams and Badenhorst 2012 *PELJ* 552.
372 *Maccsand*-case para 24.
373 Para 46.
374 Para 47.
375 See section 2.3 of this study.

spheres of government has to be upheld.[376] Support for this argument can be found in the majority decision of the *Stalwo*-case where the court emphasised that irrespective of the overlap that may occur there is nothing wrong when two spheres of control coexist in respect of subdivision of agricultural land.[377] The court pointed out that each sphere would be acting based on its own constitutional and policy considerations.[378]

4.4.3 Cooperative governance and intergovernmental relations

At this juncture it is important to turn to the mechanisms that can be employed to ease any conflicts that might result from the overlap of functional areas. Where there is an overlap there could be a situation whereby the implementation of one decision depends on the other and this could cause uncertainty since each authorising authority would feel that it has acted within its powers. Humby is of the view that such a dilemma can be resolved through cooperation between the decision makers.[379] That cooperation can be achieved through the use of the principles of cooperative government and intergovernmental relations envisaged in chapter 3 of the *Constitution*.[380] In writing for the majority, Judge Ngcono summarised the importance of the constitutional principles of cooperative government where there are prospects of overlap and conflict in decision making in the following words:

> Our Constitution does not sanction a state of normative anarchy which may arise where potentially conflicting principles are juxtaposed. It requires those who enforce and implement the Constitution to find a balance between potentially conflicting principles. It is founded on the notion of proportionality which enables this balance to be achieved.[381]

The chapter 3 principles are designed to guide all spheres of government and their organs in the exercise of their respective power and functions.[382] The aim is to ensure

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376 See section 2.4.1 of this study.

377 Reference is made only to subdivision and not rezoning because the court was making this comment in relation to the provisions of *SALA*.

378 Para 80.

379 Humbly 2012 *SAPL* 633.

380 See s 41(1) of the *Constitution*.

381 *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province* [2007] ZACC para 93.

382 Dickovick *Decentralisation and Recentralisation in the Developing World: Comparative Studies from Africa and Latin America* 132. The principles of cooperative government, listed under s 41(1) of the Constitution reflect a clear expression by the Constitution that the three spheres are no longer

that they act in a proper manner. The relevant parts of section 41 of the *Constitution* provide that all spheres of government and their respective organs of state must:

> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and (h) co-operate with one another in mutual trust and good faith by … (iii) informing one another of, and consulting one another on, matters of common interest; (iv) coordinating their actions and legislation with one another….

In line with section 41(2) of the *Constitution*, the *Intergovernmental Relations Framework Act* 13 of 2005 (hereafter *IRFA*) was passed in terms of section 41(2) of the *Constitution* to determine the manner in which the three spheres of government should liaise with each other when performing their functions.[383] The *IRFA* implements the chapter 3 principles of the *Constitution*. Therefore it is important that all spheres of government and organs of state adhere to its provisions, especially when the spheres are dealing with matters that are of common interest but approached from different ends.[384]

The preamble of the *IRFA* prescribes that all spheres of government work as a joint and coherent system. This can be achieved when there is a concerted effort by all stakeholders to inter-communicate their decisions, especially those that cut across functional areas that are different yet interrelated. Agriculture and planning are typical examples of such functional areas. The DAFF *Draft Bill* recognises the importance of upholding good intergovernmental relations when conducting the business of preserving agricultural land. Presumably, therefore, the stakeholders who will derive their mandate from the DAFF *Draft Bill* will have to adhere to the principles of corporative government and intergovernmental relations best practices enshrined in the *Constitution* and the *IRFA* respectively.[385] In this way, there will be some coordination of decisions taken in terms of the provisions of the DAFF *Draft Bill*.

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arranged hierarchically in tiers hence they each need to adhere to cooperative governance principles in conducting their respective functions.

383 See long title to the *IRFA*.

384 See section 3.5 of this study.

385 For instance, in terms of Clause 82 of the DAFF *Draft Bill* it will be the mandate of the Intergovernmental Committee to ensure practice of good intergovernmental relations during the application of the DAFF *Draft Bill*.

4.4 Conclusion

It is inferred from the discussion above that the implications of the DAFF *Draft Bill* on land use and planning will be related to matters of subdivision and rezoning.

The DAFF *Draft Bill* gives a wider definition to "agricultural land" that cuts across previously excluded areas in the definition of agricultural land given by *SALA*.[386] There are two possible narratives that will arise from the definition: (a) it will mean that the tracts of prime agricultural farms on the urban edges will be under the protection of the DAFF *Draft Bill*; and (b) it will be a confirmation that municipalities are the rightful decision makers when it comes to applications for the subdivision and rezoning any land within their borders, agricultural land included.

As indicated above,[387] the DAFF *Draft Bill* proposes to assign land use planning roles to the Intergovernmental Committee and the provincial MECs. It is argued in this section that this will create dual authorisation with regard to subdivision and rezoning applications on agricultural land. Moreover it was indicated that any dual authorisation regarding the use of agricultural land will not have any legal predicaments since each decision will be made on its own unique considerations; one will be conducted from the point of view of agriculture whilst the latter will be concerned with planning issues. The importance of the adherence to the principles of cooperative government and intergovernmental relations in the proposed land use planning authorisation by the DAFF *Draft Bill* formed the crux of the discussions in this section.

5 Conclusion and recommendations

5.1 Introduction

The primary aim of this study was to address the research question as posed in section 1.2, namely: To what extent will the *Draft Preservation and Development of Agricultural Land Framework Bill* impact on the existing land use and planning frameworks that deal with the use of agricultural land in South Africa?

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386 See sections 2.2.4 and 3.3 of this study.
387 See section 3.3 of this study.

The problem statement and research question are set out in section one. Section two discusses the South African land use and planning legal frameworks relevant to this study. The study showed that *SPLUMA,* as the main planning legislative framework in South Africa, directs that municipalities are the main role players concerning matters of land use authorisation and planning within their respective jurisdictions. Based on the wall-to-wall municipal demarcations, it was argued that the functional area of municipal planning gives municipalities the ticket to govern land use planning matters on any land including agricultural land. Section three revealed that the wide definition of agricultural land proposed in the DAFF *Draft Bill* will enable municipalities to regulate land use planning matters as envisaged in the *Constitution*.

Section four analysed the legal frameworks discussed in sections two and three. The discussion pointed out that the DAFF *Draft Bill* will introduce a dual authorisation application with regard to applications for the subdivision and rezoning of prime agricultural land. With reference to the *locus classicus* case of the *Maccsand*-case and other related cases it was argued that an overlap of functions of the different spheres of government in agricultural land use authorisations is permissible and would not necessary translate to usurpation of powers, provided the process is properly managed. The rationale being that the different functionaries within the three spheres of government have different functions, duties and powers bestowed on them by different legislation serving differing purposes.

The study pointed out that the problem of dual authorisation is attributable to the uncoordinated legislative requirements that are involved in a land use application processes. However it was established that the principles of corporative governance and intergovernmental relations can be better utilised to absorb any possible conflicts. Coordination of the different legislative requirements and procedures applicable to the process of authorising agricultural land use is key to shake-off any administrative conflicts that might arise during the authorisation process.

5.2 Concluding remarks

The study explained that although "agriculture" and "municipal planning" are controlled by different spheres of government they are interlinked; they both involve the use of

land. It therefore follows that notwithstanding the fact that the DAFF *Draft Bill* is proposed legislation aimed at addressing matters related to the functional area of agriculture, it will most probably have implications on land use and planning laws. Hence it is no surprise that the DAFF *Draft Bill* employs land planning mechanisms of subdivision and rezoning as primary tools to preserve and protect prime agricultural land. This presents an overlap between the functional areas of agriculture and planning, in particular municipal planning, which are governed by the national, provincial and local spheres of government respectively. The overlap is permissible because it does not lead to intrusion by one sphere into the field of another since each sphere has its own objects and do not serve each others' purpose despite operating on the same turf. Additionally, the principles of corporative government and intergovernmental relations can be employed to curb the potential disputes that maybe ignited by the overlap of powers.

The study revealed that the land planning mechanisms of subdivision and rezoning from a municipal planning perspective are regulated by *SPLUMA* that makes the determination of such matters the responsibility of a municipality. On the other hand the DAFF *Draft Bill* seeks to use these mechanisms to preserve and protect high potential cropping land and medium potential agricultural land. The study indicated that the determination of subdivision and rezoning applications from a municipal planning perspective in line with the provisions of *SPLUMA* and, subdivision and rezoning from an agricultural perspective as proposed in the DAFF *Draft Bill* will present divergent approaches. A municipality will be making determinations from a municipal planning perspective in line with *SPLUMA*. On the other hand determinations under the proposed DAFF *Draft Bill* will be made from an agricultural perspective. The principles of corporative government and intergovernmental relations will guard against any intrusions.

5.3 Recommendations

In view of the fact that the DAFF *Draft Bill* proposes to entrust the Minister and the relevant provincial MEC respectively with the power to approve the subdivision and rezoning of prime agricultural land, the roles of these bodies have to be set out and

separated in other to avoid duplication of functions. It is recommended that the DAFF *Draft Bill* be amended so that its provisions concerning land use and planning run in conformity with the provisions of *SPLUMA* as the main statute that prescribes the manner in which land use planning matters should be managed and regulated in South Africa in terms of section 2(2) thereof.

Moreover, with reference to the valuable nature of agricultural land to food security and its complimentary presences to the constitutional right to have access to food, it is important that municipalities be empowered with expertise on how to conduct their municipal planning powers of subdivision and rezoning in a manner that upholds the set standards for the preservation of agricultural land. The implications of section 27 of the *Constitution* on, municipalities should also be read into the situation. In terms of section 7 of the *Constitution* the obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights makes municipalities a joined guardian of agricultural land.

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