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Vidamemoria Heritage Consultants

Attn: Quahnita Samie

**LEGAL REVIEW OF THE IMPLEMENTATION OF THE
NATIONAL HERITAGE RESOURCES ACT 25 OF 1999 IN THE WESTERN CAPE**

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I INTRODUCTION

1. This legal review forms part of a report by Vidamemoria Heritage Consultants for the Department of Economic Development and Tourism (DEDAT) of the Western Cape Province (the Province). The main conclusions of this review will be briefly summarised in the report. This is pursuant to a tender by DEDAT in collaboration with Heritage Western Cape (HWC).
2. The narrowed scope of this legal review is to focus on certain sections of the National Heritage Resources Act, Act No. 25 of 1999 (the Act), to try to streamline application processes around general

protections, in particular section 34 permit applications to alter or demolish structures older than 60 years. The background motivation includes finding ways to increase efficiency and effectiveness in the management of heritage resources in the Western Cape Province (the Province) in regard to a permit application system seen as cumbersome and ultimately a hindrance to capital investment.

3. As a result, this is by no means a comprehensive review of the implementation of the Act, although many aspects of the Act are touched on. An attempt has been made to keep the legal discourse that inevitably accompanies research to a minimum, and rather to link the legal views with practical solutions.

II ISSUES IDENTIFIED

4. My instructions are that the Department of Cultural Affairs and Sport (DCAS) and HWC, which is the provincial heritage resources authority in terms of the Act, have in the past considered a regulatory review in respect of HWC's statutory functions of conserving and managing heritage resources in the Western Cape Province, and in doing so highlighted various issues. In addition, a consultation process was also followed by Vidamemoria as part of this process around perceived issues and views related to the implementation of the Act and management of heritage resources in the Province, and these are dealt with in the report and are not repeated here. However, they have informed this review and are at times referred to.
5. The Province is aware that it could pass provincial legislation implementing its own heritage management system in relation to provincial heritage matters,¹ which would prevail over the Act in the event of a conflict in relation to matters in the Province's exclusive area of legislative competence.² However, the scope of this review is limited to working within the Act in its current form.

III THE OVERALL SCHEME OF THE ACT

6. Included in the overall scheme of the Act in regard to management of heritage resources is the assignment of functions to the three spheres of government: national level functions are the responsibility of the South African Heritage Resources Agency (SAHRA), provincial level functions are the responsibility of provincial heritage resources authorities and local level functions are the

¹ 'Provincial cultural matters' are a functional area of exclusive provincial legislative competence in Part A of Schedule 5 of the Constitution, read with s104 of the Constitution.

² Section 57 of the Act: "Without prejudice to the provisions of this Act, in any province which has enacted legislation for the establishment of a provincial heritage resources authority and the management of heritage resources at provincial level, the provisions of such legislation must, as far as they relate to provincial areas of competence, take precedence over the equivalent provisions of this Act." However, this is subject to the Constitution (see sections 146 – 150 in particular) and the jurisprudence that the courts have developed as to what constitutes a conflict and how it should be resolved. See Chaskalson et al, *Constitutional Law of South Africa*, Juta, parts 3, 4, 14, 15, 16, 19, 22. See further below.

responsibility of local authorities.³ Identification and management of Grade I heritage resources is the responsibility of SAHRA, Grade II of provincial heritage resources authorities, and Grade III of local authorities,⁴ all of these heritage resources falling within the national estate.⁵ The respective grading of heritage resources is assessed in terms of their being of special national cultural significance (Grade I), significant within a province or region (Grade II), or other heritage resources worthy of conservation (Grade III).⁶

7. Integral to finding solutions to the aforementioned difficulties is an understanding of the legislative competence of the three spheres of government.

IV FUNCTIONAL AREAS OF LEGISLATIVE COMPETENCE

8. The Constitution⁷ confers legislative authority on each of the three spheres of government, national, provincial and local, with reference to specified functional areas of legislative competence,⁸ recognising the concepts of concurrent and exclusive legislative competence, as well as the extension of powers reasonably necessary for or incidental to those powers or functions,⁹ and the assignment by national and provincial governments of their powers to municipalities in appropriate circumstances (see below).¹⁰
9. ‘Cultural matters’ are a functional area of concurrent national and provincial legislative competence in Part A of Schedule 4 to the Constitution, and ‘Provincial cultural matters’ are a functional area of exclusive provincial competence in Part A of Schedule 5.¹¹ There is no reference to local or municipal cultural matters in the Parts B to Schedules 4 and 5 of the Constitution, which set out certain powers of municipalities, but the Constitution does require national and provincial government to assign to municipalities, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-
 - (a) that matter would most effectively be administered locally; and
 - (b) the municipality has the capacity to administer it.¹²
10. ‘Regional planning and development’ is listed in Part A of Schedule 4 (concurrent national and provincial competence), and ‘Provincial planning’ in Part A of Schedule 5 (exclusive provincial

³ Section 8(1). The “three-tier system of management of heritage resources” refers to the three-tiered grades of the heritage resources to be managed by the three spheres of government.

⁴ Section 7(1).

⁵ As defined in section 3.

⁶ Section 7(1)(a).

⁷ The Constitution of the Republic of South Africa, 1996.

⁸ Sections 43, 44, 104 and 156 respectively, read with Schedules 4 and 5, of the Constitution.

⁹ Sections 44(3), 104(4) and 156 (5).

¹⁰ Section 156(4).

¹¹ Read with sections 43, 44 and 104 of the Constitution.

¹² Section 156(4).

competence). ‘Municipal planning’ falls in Part B of Schedule 4, meaning that municipalities have executive authority in respect of, and the right to administer, municipal planning matters,¹³ may make by-laws concerning municipal planning matters,¹⁴ and have the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.¹⁵

Overlap of legislative competences

11. The Constitutional Court made it clear back in 1999 that concurrent competences in Schedule 4 could overlap with exclusive competences in Schedule 5. In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*¹⁶ the court stated (all underlining in quotes in this review is added unless otherwise specified):

‘The list of exclusive competences in Schedule 5 must therefore be given meaning within the context of the constitutional scheme that accords Parliament extensive power encompassing "any matter" excluding only the provincial exclusive competences. The wide ambit of the functional competences concurrently accorded the national legislature by Schedule 4 creates the potential for overlap, not merely with the provinces' concurrent legislative powers in Schedule 4, but with their exclusive competences set out in Schedule 5. Examples of concurrent Schedule 4 competences which could overlap with Schedule 5 competences include "trade" and "liquor licences"; "environment" and "provincial planning"; "cultural matters" and "provincial cultural matters" as well as "libraries other than national libraries"; and "road traffic regulation" and "provincial roads and traffic."¹⁷

12. In *City of Cape Town and Another v Robertson and Another*¹⁸ the Constitutional Court held that a municipality derives original powers from the Constitution:

‘A municipality enjoys “original” and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits.’¹⁹ (Footnotes omitted.)

13. In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*²⁰ the Constitutional Court held that the exercise of municipal powers in respect of land could co-exist with the national Minister’s control by

¹³ Section 156(1).

¹⁴ Section 156(2).

¹⁵ Section 156(5).

¹⁶ (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999).

¹⁷ At para 47.

¹⁸ [2004] ZACC 21; 2005 (2) SA 323 (CC).

¹⁹ At para 60.

²⁰ (CCT78/07) [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) (25 July 2008).

way of executive oversight,²¹ each having its own perspective, even if the one may in effect veto the other:

“There is no reason why the two spheres of control cannot co-exist even if they overlap and even if, in respect of the approval of subdivision of ‘agricultural land’, the one may in effect veto the decision of the other. It should be borne in mind that the one sphere of control operates from a municipal perspective and the other from a national perspective, each having its own constitutional and policy considerations.”²²

14. In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*²³ the Constitutional Court stated that although there is no clear-cut separation between competencies, provincial planning does not include municipal planning:

‘It is, however, true that the functional areas allocated to the various spheres of government are not contained in hermetically sealed compartments. But that notwithstanding, they remain distinct from one another. This is the position even in respect of functional areas that share the same wording like roads, planning, sport and others. The distinctiveness lies in the level at which a particular power is exercised. For example, the provinces exercise powers relating to “provincial roads” whereas municipalities have authority over “municipal roads”. The prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other spheres. In the example just given, the functional area of “provincial roads” does not include “municipal roads”. In the same vein, “provincial planning” and “regional planning and development” do not include “municipal planning”.’²⁴

15. In *Maccsand (Pty) Ltd v City of Cape Town*²⁵ the Constitutional Court, in holding that mining requires appropriate zoning as well as other statutory permissions, commented that although the exercise of powers between spheres may overlap, each sphere exercises powers within its own competence:

‘The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into

²¹ At para 69.

²² At para 80.

²³ [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC).

²⁴ At para 57

²⁵ 2012 (4) SA 181 (CC) [2012] PER 61.

the functional area of another. Each sphere would be exercising power within its own competence.²⁶

16. In *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Other*²⁷ the Constitutional Court confirmed that provincial planning powers do not usurp the municipal planning powers of local government:

‘This Court’s jurisprudence quite clearly establishes that: (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved; (c) while the Constitution confers planning responsibilities on each of the spheres of government, those are different planning responsibilities, based on ‘what is appropriate to each sphere’; (d) “planning” in the context of municipal affairs is a term which has assumed a particular, well established meaning *which includes the zoning of land and the establishment of townships*’ (emphasis added [by the Court]); and (e) the provincial competence for ‘urban and rural development’ is not wide enough to include powers that form part of “municipal planning”.²⁸ (Footnotes omitted.)

17. In *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others*²⁹ the Constitutional Court held that section 44 of the Land Use Planning Ordinance,³⁰ allowing a right of appeal to the province, was constitutionally invalid. It stated,

“All municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities.”³¹

18. The Court held further that a province’s power of ‘regulating’ local authorities in section 155(7) of the Constitution means creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself.³² Consequently, the Constitution envisages, subject only to the oversight and support role of national and provincial government, and to the planning powers vested in them, that parochial interests should prevail in subdivision and zoning decisions.³³

²⁶ At para 47.

²⁷ [2013] ZACC 39; 2014 (1) SA 521 (CC) at para 46.

²⁸ At paras 30-47.

²⁹ [2014] ZACC 9.

³⁰ Ordinance 15 of 1985.

³¹ At para 19.

³² At para 22.

³³ At para 23. Provincial oversight can be replaced by intervention in terms of section 139 of the Constitution when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation.

19. This approach was followed in *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others*,³⁴ where the Constitutional Court held that planning appeals are a municipal competence and the provisions of section 45 of the KwaZulu-Natal Planning and Development Act 6 of 2008, which allowed an appeal to the provincial appeal tribunal if the land situated outside the area of a scheme, was constitutionally invalid.
20. Similarly, in *Pieterse NO and another v Lephalale Local Municipality and others*,³⁵ the Constitutional Court ruled that section 139 of the Town-planning and Townships Ordinance 15 of 1986 (Transvaal) was inconsistent with the Constitution and invalid because it allowed for provincial interference in a municipality's exclusive, constitutionally enshrined domain by giving appellate powers over its planning competences to the provincial government. The court stated unequivocally:

‘The functional areas conferred on provinces, whether concurrently or exclusively, cannot be construed to include components of municipal planning. That would run counter to the scheme of the Constitution, particularly its provisions that safeguard the autonomy of Municipalities and insulate them from interference by the other spheres.’³⁶
21. More recently, in *Telkom SA SOC Limited v City of Cape Town and Another*,³⁷ the City’s zoning competence came under scrutiny where it overlapped with Telkom’s powers in respect of the rollout of national telecommunication infrastructure. The Court confirmed the exclusive competence of a local authority in respect of zoning. It also confirmed that for a conflict to arise, the two pieces of legislation must be incapable of operating alongside each other. In other words, they must be mutually exclusive. If they are reasonably capable of co-existing, conflict as envisaged in section 156(3) of the Constitution would not have arisen.³⁸ Section 156(3) provides that a by-law that conflicts with national or provincial legislation is invalid, subject to section 151(4), which provides that the national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. Section 154(1) provides that the national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
22. The relevant conclusions one can draw from this are that:

- 22.1 the three spheres of government may have overlapping legislative competence in regard to matters in Schedules 4 and 5 of the Constitution;

³⁴ (CCT114/15) [2016] ZACC 2; 2016 (4) BCLR 469 (CC); 2016 (3) SA 160 (CC) (29 January 2016).

³⁵ 2017 (2) BCLR 233 (CC)

³⁶ At para 13.

³⁷ [2020] ZACC 15.

³⁸ At para 33.

- 22.2 local authorities have original legislative competence in respect of all the components of municipal planning and this power may not be usurped by provinces;
- 22.3 provincial and national legislation can provide executive oversight and norms and guidelines for local authorities in respect of the competences of local authorities; and
- 22.4 for a conflict to arise, the two pieces of legislation must be mutually exclusive and incapable of operating alongside each other.

Planning, environment and heritage competences

23. In *Le Sueur v Ethekwini Municipality*³⁹ the High Court held that although 'environment' is listed in Part A of Schedule 4 and is not listed in Part B of Schedules 4 or 5, it is a matter that falls within municipal planning:

‘It is clear that both at the time that the Constitution was enacted and since then Municipalities have been allocated by national legislation and provincial legislation and policies, a legislative and executive mandate with respect to environmental matters, placing such matters squarely within the concept of municipal planning.’⁴⁰

24. The court went further to explain that certain heritage-related matters are also regarded as environmental matters:

‘[31] Section 40(2) of the Town Planning Ordinance passed in 1949 recognised that schemes shall deal with matters referred to in the Schedule to the Ordinance [which is] headed "matters to be dealt with by schemes" and includes as item 15 the following:

"The preservation or conservation of buildings or other objects of architectural, historic or artistic interest and places of natural interest or beauty."

The last aspect thereof, clearly relates to environmental matters. It is correctly pointed out by the first respondent that other courts have recognised the provisions of schemes containing conservation controls. In *Port Edward Town Board v Kay* the Court characterised a zoning of "conservation reserve" as a "legally enforceable encumbrance relating to the property" (at 681(i)) with the purpose being "nature conservation" (at 682(b)).

³⁹ 2013 ZAKZPHC 6 (30 January 2013). This case is regarded as correctly decided in line with the approach of the Constitutional Court and is likely to be followed in the Western Cape Province.

⁴⁰ At para 22.

[32] In the Cape, the Land-Use Planning Ordinance, 1985 and the Town Planning Schemes passed pursuant to that ordinance have been held to constitute statutory provisions concerned with the protection of the environment in *Hangklip Environmental Action Group v MEC for Agriculture, Environmental Affairs and Development Planning, Western Cape*.⁴¹

25. The environmental right in section 24 of the Constitution gives everyone the right, among other things, to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures. Section 39(2) of the Constitution provides: ‘When interpreting any legislation ... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

NEMA

26. The primary statute giving effect to this constitutional environmental right, the National Environmental Management Act, Act No. 107 of 1998 (NEMA), includes culture in the definition of ‘environment’ in section 1,⁴² and includes cultural heritage in integrated environmental management in sections 23 and 24.⁴³ The principles in section 2 of NEMA guide the interpretation, administration and implementation of NEMA and any other law concerned with the protection or management of the environment, and serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of NEMA or any statutory provision concerning the protection of the environment.⁴⁴ This would include relevant decisions taken, for example, in terms of the National Heritage Resources Act, the Mineral and Petroleum Resources Development Act, Act No. 28 of 2002, the Spatial Planning and Land Use Management Act, Act No. 16 of 2013, the Western Cape Land Use Planning Act 3 of 2014, and the Local Government: Municipal Systems Act, Act No. 32 of 2000, the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and any by-law. In terms of section 152(1) of the Constitution the objects of local government include the provision of services to communities in a sustainable manner and promoting a safe and healthy environment.

27. Section 2 of NEMA includes the following principles:

⁴¹ Footnotes omitted.

⁴² "environment" means the surroundings within which humans exist and that are made up of

(i) the land, water and atmosphere of the earth;

(ii) microorganisms, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and

(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing;

⁴³ Section 23(2)(b) states: ‘The general objective of integrated environmental management is to:...

(b) identify, predict and evaluate the actual and potential impact on the environment, socioeconomic conditions and cultural heritage ...’

⁴⁴ Section 2(1)(b)-(c).

- 27.1 ‘Sustainable development requires the consideration of all relevant factors including that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;’⁴⁵
- 27.2 ‘The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.’⁴⁶
- 27.3 ‘The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.’

28. This dovetails with the objects of local government in section 152 of the Constitution

- (c) to promote social and economic development;*⁴⁷
(d) to promote a safe and healthy environment.

and the duty of all spheres of government to be development-oriented, in terms of section 193.

29. The Bill of Rights includes the right to administrative action that is lawful, reasonable and procedurally fair.⁴⁸ The primary statute giving effect to this right is PAJA.
30. HWC and municipalities are bound, in terms of section 24 of the Constitution, section 2 of NEMA, and the Act itself, to promote sustainable development, which involves social, economic and environmental sustainability, which includes heritage conservation. The Act encapsulates the principles of sustainable development contained in section 2 of NEMA in the general principles for heritage resource management in section 5 of the Act:

- ‘(6) Policy, administrative practice and legislation must promote the integration of heritage resources conservation in urban and rural planning and social and economic development.
- (7) The identification, assessment and management of the heritage resources of South Africa must— ...
- b) take account of material or cultural heritage value and involve the least possible alteration or loss of it; ...

⁴⁵ Section 2(4)(a)(iii) of NEMA.

⁴⁶ Section 2(4)(i).

⁴⁷ See also section 153.

⁴⁸ Section 33 of the Constitution.

(d) contribute to social and economic development;’

31. Historically, municipalities have identified and managed heritage zones and protected certain heritage resources through their town planning schemes, and in this sense heritage was previously a municipal planning matter. They could also previously make by-laws regarding certain heritage matters in terms of the old National Monuments Act.⁴⁹
32. As mentioned above, Schedule 4 to the Constitution in Part A lists ‘cultural matters’ as an area of concurrent national and provincial legislative competence, and Schedule 5 in Part A lists ‘provincial cultural matters’ as an area of exclusive provincial legislative competence; while Part B of Schedule 4 lists ‘municipal planning’ as a local government matter, it makes no mention of municipal cultural matters. However, the concept of ‘cultural matters’, and indeed, the definition of heritage resources in the Act, is so wide that it includes in its ambit certain municipal planning components, such as heritage areas. As we have seen, functional areas do not exist in hermetically sealed compartments; they overlap. Just as ‘environment’ is a Schedule 4 Part A matter, yet it is included in municipal planning, so it is with ‘cultural matters’: they overlap with municipal planning and, to that extent, are a municipal competence.
33. Certain heritage matters would not fall within a municipal planning competence, such as the movable objects referred to in section 3(2)(l) of the Act, unless they are preserved on site. However, places, townscapes, landscapes, sites, and graves and burial grounds referred to in section 3(2) could fall within a municipal planning competence since they may be affected by spatial planning and land use. The heritage component of municipal planning is therefore broad.
34. The conclusions one can draw from this are that:
 - 34.1 municipal planning includes environmental and heritage considerations insofar as they relate to land use and planning;
 - 34.2 local authorities can therefore include in their planning by-laws provisions regulating heritage matters that are related to municipal planning;
 - 34.3 the heritage component of municipal planning is broad;
 - 34.4 decision-makers taking decisions that relate to planning and heritage matters need to consider the Bill of Rights as well as the principles in section 2 of NEMA;
 - 34.5 the principle of sustainable development requires the consideration of social, economic and environmental factors, including cultural heritage, in decision-making.

⁴⁹ Section 18(2) of Act 28 of 1969, now repealed.

V IMPLICATIONS FOR THE NHRA

35. While the Act contains far-reaching substantive provisions in achieving what it set out to do - to promote good management of the national estate, and to enable and encourage communities to nurture and conserve their legacy so that it may be bequeathed to future generations⁵⁰ - it is not clear that it was drafted with the awareness, which we now possess with the benefit of hindsight informed by court decisions, that ‘cultural matters’ fall within the original town planning legislative competence of local authorities. Thus, municipalities cannot be required to obtain provincial consent in order to exercise that competence. Furthermore, although grade III heritage resources are of a lower grade of significance than grades I and II, it does not follow that the management of heritage resources of a higher grade of significance imputes to those management authorities a higher level of legal competence than those that manage lower grade heritage resources. On the contrary, local authorities have the sole competence to manage municipal planning, together with its heritage component, and this may not be usurped by provincial or national governments.
36. The drafters of the Act may have had in mind when it comes to assigning functions to local authorities both the lack of explicit assignment of ‘cultural matters’ to municipalities in Schedules 4 and 5 of the Constitution, as discussed above, and that section 156 of the Constitution provides for two sorts of assignment:

156 Powers and functions of municipalities

- (1) A municipality has executive authority in respect of, and has the right to administer-*
(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
(b) any other matter assigned to it by national or provincial legislation.
...
(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-
(a) that matter would most effectively be administered locally; and
(b) the municipality has the capacity to administer it.
...

37. Thus, an assignment to a municipality of matters outside its Schedule 4 and Schedule 5 constitutional competence may take place by legislation, or by agreement if the municipality has the capacity. Despite this, legislative competence is an original power, not an assigned power.

⁵⁰ Preamble to the Act.

38. Section 7(1) of the Act sets out the basis for the system of grading of heritage resources and requires a local authority to use it to assess the significance of Grade III heritage resources. This is an assignment⁵¹ by legislation as contemplated in section 156(1)(b) of the Constitution, assigning to local authorities the competence to assess and grade heritage resources.
39. However, section 8(6)(a) of the Act purports to limit that statutory assignment on the basis of capacity. It states:

“8(6) A provincial heritage resources authority or a local authority shall not perform any function in terms of this Act or any other law for the management of heritage resources unless it is competent to do so. The capacity of a provincial heritage resources authority or local authority shall be assessed...”

(Please note that legislation quoted in this review is italicised, words defined in the legislation are not italicised, and all underlining is added.)

‘competent’, ‘capacity’ and ‘deem’

40. Here the word ‘is competent’ appears to mean ‘has the capacity’. The drafters of the Act used the word ‘competence’ in its various forms sometimes to mean legal authority and sometimes to mean capacity or skill, which can be confusing. For example, section 8(3) refers to ‘provincial competence’, which is the former (legal authority), whereas section 18 provides for appointing a competent person to a committee, which means the latter (capacity or skill). The prohibition on performing any function by an authority unless it is ‘competent to do so’ in the context of section 8(6), together with the assessment of capacity, appears to mean the latter (capacity or skill). Section 8(6)(c) requires a local authority to apply to a provincial heritage resources authority to assess its competence (meaning capacity or skill). Section 8(6)(b) requires a ‘higher level’ authority to perform the functions of a local authority that ‘does not have the capacity or is not competent to perform a specific function for which it is responsible’. The word ‘competent’ here must also mean capacity or skill, since local authorities will as a matter of law, in terms of section 156(1)(b) of the Constitution, have the original legal competence to perform responsibilities which the Act purports to assign to them.
41. Similarly, the word ‘deem’ in its various forms is sometimes used in the Act in the ordinary sense of judging or considering something, and at other times with the meaning of the legal fiction, to treat something in a particular way when in fact it is not that way. Thus, in section 35(5)(c), deeming mitigation to be necessary is an example of the former (considering it to be necessary), whereas in section 58(13) a permit under the old Act being deemed to be a permit under the Act is an example of the latter (a legal fiction).

⁵¹ And is referred to as such in section 10(1).

42. The combination of these words in section 8(3), that a province is responsible for the management of Grade II heritage resources, which are ‘deemed to be a provincial competence’, and in section 8(4), that a local authority is responsible for managing Grade III heritage resources ‘deemed to fall within their competence in terms of this Act’, adds to the confusion. In section 8 the word ‘deemed’ should be read to mean ‘considered’, and this follows assessment of capacity. There are no deeming clauses in the Act within the legal meaning (a legal fiction), that is, that regard a local authority competent to identify and manage grade III heritage resources when in fact it is not competent to do so.
43. The scheme of the Act is therefore provisionally to assign certain administrative functions to local authorities, subject to their having the capacity to carry them out, and relies upon a capacity assessment mechanism in order to confer on local authorities the responsibility for managing heritage resources in terms of the Act. It also assigns to them the power to make heritage by-laws subject to the agreement of the province⁵² and provides for delegation of authority to them by agreement⁵³ (see below).
44. One needs to view this in the light of the legal power a local authority has arising from its original legislative and administrative competence in respect of municipal planning, including its heritage and environmental components. Local authorities derive that competence not from the Act but from the Constitution. Thus, local authorities may have regard to the principles in the Act and make use of the section 7 grading criteria, and HWC’s grading policy, without purporting to be acting in terms of the Act. In other words, local authorities can protect Grade III heritage resources in terms of their own planning by-laws (see below) without assignment, delegation or agreement in terms of the Act.
45. Furthermore, the constitutional validity of a purported statutory assignment by the Act of a power that a municipality already has in terms of the Constitution is questionable, although the constitutional validity of the Act has not been challenged in court as yet. The Act therefore needs to be implemented as though it is valid, and needs to be interpreted in a way that avoids conflicts with municipal by-laws.
46. In order to understand the implications of this on the implementation of the Act one first has to understand the provisions of the relevant municipal planning by-laws. This review will consider, as an example, the provisions of the City of Cape Town Municipal Planning By-law.

⁵² Section 54.

⁵³ Section 26(1)(f).

VI THE CITY OF CAPE TOWN MUNICIPAL PLANNING BY-LAW (MPBL)

47. The City of Cape Town includes Heritage Protection Overlay Zones (HPOZ's) in the Development Management Scheme (DMS) that forms a part of the MPBL,⁵⁴ which it is entitled to do since municipal planning is an area of legislative competence for local authorities in terms of Part B of Schedule 5 to the Constitution.⁵⁵ The by-law also empowers the City to protect any 'heritage place', defined as follows:

*'heritage place' means a property, site, area, region, structure, group of structures, open space, public square, street, park, field or natural feature that is worthy of conservation due to its heritage value;*⁵⁶

48. One can immediately recognise in this definition the overlap between the MPBL and the Act. A 'heritage place' would include a 'structure' or 'place' as defined in the Act, and would fall within the definition of 'heritage resource' as defined in the Act. It is necessarily wide in order to ensure that all heritage resources are conserved. In other words, if one would consider a particular area, for example, to be a 'heritage place', it is extremely likely that one would also consider it to be a 'heritage resource', and vice versa. The MPBL gives 'heritage area' the same meaning as in the Act.⁵⁷ Heritage places are protected by the general HPOZ conditions⁵⁸ (see further below) and the City may add specific provisions to a heritage place or heritage area protected as a HPOZ.⁵⁹
49. HPOZ's are dealt with in Chapter 20 of the DMS, and are intended to provide mechanisms for designating localised development management rules to deal with heritage concerns. The by-law makes it clear that it is designed to comply with the City's duties in terms of the Act, and also goes beyond the Act:

"The HPO makes provision for the protection of heritage places entered on the heritage register maintained by the provincial heritage resources authority, and for the protection of heritage areas as provided for in terms of the National Heritage Resources Act. It also provides a mechanism for the protection of heritage places the City considers to be

⁵⁴ The City of Cape Town Municipal Planning By-law, PG 7414 of 29 June 2015, as amended, Schedule 3 of which is the City of Cape Town Development Management Scheme.

⁵⁵ See above. Cultural matters are a functional area of concurrent national and provincial legislative competence in Part A of Schedule 4, and provincial cultural matters are a functional area of exclusive provincial competence in Part A of Schedule 5. However, there is a practical overlap between planning and heritage.

⁵⁶ Section 1 of Schedule 3 does not conflict with the Act since there is no such definition in the Act.

⁵⁷ Section 1 of the DMS in Schedule 3 to the MPBL: 'heritage area' has the same meaning as described in section 31 of the National Heritage Resources Act.

⁵⁸ Section 62 of the DMS.

⁵⁹ Section 163 of the DMS. It appears that these special provisions for HPOZ's are still awaited.

*conservation-worthy in terms of its heritage strategies. The HPO enables the designation of such heritage places and heritage areas on the zoning map.*⁶⁰

50. As discussed above, the City has original competence to legislate in respect of municipal planning matters, including its heritage components. It also potentially has powers in terms of the Act. The by-law is passed in terms of the City's original powers, but it also seeks to comply with the Act at the same time to the extent that this may be or become appropriate if the Act is fully implemented.

51. The City's powers in the Act in this regard are explicit. In regard to heritage registers, section 30(5) of the Act, (which is subject to section 8(6), which prohibits a local authority from performing any function under the Act unless it has the capacity) provides:

*"30(5) At the time of the compilation or revision of a town or regional planning scheme or a spatial development plan, or at any other time of its choosing, or at the initiative of a provincial heritage resources authority where in the opinion of a provincial heritage resources authority the need exists, a planning authority shall compile an inventory of the heritage resources which fall within its area of jurisdiction and submit such inventory to the relevant provincial heritage resources authority, which shall list in the heritage register those heritage resources which fulfil the assessment criteria under subsection (1)."*⁶¹

52. I understand that the City has submitted its inventory to HWC, who is supposed to have verified that the heritage resources on the City's inventory fulfil the assessment criteria in section 30(1),⁶² and publish the register in terms of section 30. Section 30(11) requires a local authority thereafter to "make provision for the protection of such place through the provisions of its planning scheme or by-laws under this Act".

53. Since there is no register as yet, the 'heritage places' on the City's inventory are not protected in terms of section 30 of the Act but are protected in terms of the HPOZ's in the MPBL.

54. In regard to heritage areas, section 31(1) of the Act, likewise subject to section 8(6), requires that:

"A planning authority must at the time of revision of a town or regional planning scheme, or the compilation or revision of a spatial plan, or at the initiative of the provincial heritage resources authority where in the opinion of the provincial heritage resources

⁶⁰ Part 1 of Chapter 20 of the DMS.

⁶¹ A local authority is a "planning authority" as defined in section 1 of the Act: "planning authority" means an office of the State, including a province, a local authority or a regional authority, which is invested with a physical planning capacity.

⁶² Section 30(1) provides: "A provincial heritage resources authority must compile and maintain a heritage register listing the heritage resources in the province which it considers to be conservation-worthy in terms of the heritage assessment criteria set out in section 3 (3) and prescribed under section 7."

authority *the need exists, investigate the need for the designation of heritage areas to protect any place of environmental or cultural interest.*”

55. The City might have investigated the need for heritage areas and come to the view that its HPOZ’s suffice and/or could double as heritage areas. The DMS does deem heritage areas to be HPOZ’s (see below). Section 31(5) of the Act then empowers a local authority to gazette the heritage area:

“A local authority may, by notice in the Provincial Gazette, designate any area or land to be a heritage area on the grounds of its environmental or cultural interest or the presence of heritage resources, provided that prior to such designation it shall consult—

(a) the provincial heritage resources authority; and

(b) owners of property in the area and any affected community,”

56. The City consulted widely in regard to the MPBL and it may have met these consultation requirements since the MPBL followed a public participation process. Assuming it has done so, or does so in the future, the City would, subject to section 8(6), be entitled to designate its HPOZ’s as heritage areas by a notice in the Provincial Gazette.⁶³

57. Section 31(7) of the Act states:

“A local authority must provide for the protection of a heritage area through the provisions of its planning scheme or by-laws under this Act, provided that any such protective provisions shall be jointly approved by the provincial heritage resources authority, the provincial planning authority and the local authority ...”

58. Since HWC and DEA&DP have not approved the HPOZ’s as protected areas, they are not protected in terms of section 31 of the Act, but they nevertheless are protected in terms of the MPBL.

59. The DMS deems any heritage places on HWC’s register in terms of section 30 of the Act or in a designated area in terms of section 31 of the Act to have HPOZ zoning:

159 Deemed Heritage Protection Overlay Zones

The following heritage places are deemed to have Heritage Protection Overlay zonings and shall be subject to the provisions of this overlay zoning:

⁶³ Since the public participation was not expressly pursuant to the Act, it would be prudent for the City to consult in terms of the Act.

- (a) any heritage place that has been entered into the register of heritage resources maintained by the provincial heritage resources authority in accordance with the National Heritage Resources Act;*
- (b) any heritage place that has been designated a heritage area in accordance with the National Heritage Resources Act;*

60. The fact that no section 30 register or section 31 designation has taken place means that the deeming clause in section 159 of the DMS has not taken effect. This does not affect the protection of heritage places in terms of the MPBL.
61. The City's general protections for HPOZ's require the City's approval for activities therein, and may also apply special conditions. Section 162 of the DMS provides:

162 General provisions: Heritage Protection Overlay Zoning

(1) Unless exempted, the following activities affecting a place or an area protected as a Heritage Protection Overlay zone require the approval of the City:

- (a) any alteration, including any action affecting the structure, appearance or physical properties of a heritage place, whether by way of structural or other works, by painting, plastering or other decoration or any other means;*
- (b) any development, including any physical intervention, excavation, or action other than those caused by natural forces, which may in any way result in a change to the appearance or physical nature of a heritage place, or influence its stability and future well-being, including –*
 - (i) construction, alteration, demolition, removal or change of use of a heritage place or a structure at a heritage place;*
 - (ii) carrying out any works on or over or under a heritage place;*
 - (iii) subdivision or consolidation of land comprising a heritage place, including the structures or airspace of a heritage place;*
 - (iv) any change to the natural or existing condition or topography of land; and*
 - (v) any permanent removal or destruction of trees, or removal of vegetation or topsoil;*
- (c) addition of any new structure;*
- (d) partial demolition of a structure;*
- (e) alteration to or removal of any historical landscape or any landscape feature, including boundary hedges and mature plantings; or addition or removal of or alteration to hard landscape surfaces, street furniture or signage;*
- (f) any below-ground excavation.*

(2) The City may exempt a specific activity or schedule of activities in a geographic area which has been protected as a heritage protection overlay zone from the requirements of sub-item (1).

62. The City's approval for an activity in a heritage protection overlay zone as referred to in item 162(1) of the DMS does not exempt an applicant or owner from obtaining other required approvals,⁶⁴ which means that the Act must still be complied with. It does, however, add a layer of local authority heritage management to provincial heritage resources management in respect of heritage resources.
63. The MPBL also provides for environmental overlay zones,⁶⁵ likewise requiring approval from the City for such activities, which also adds a layer of management to that provided by the Act.
64. In considering applications in terms of the MPBL the City needs to take the Act and NEMA and any other relevant laws into consideration, and particularly the identification of heritage resources and their significance and the principles of heritage resources management in terms of section 3, 5 and 7 of the Act. The purpose of a DMS includes implementation of policies and principles in terms of national and provincial legislation, as well as sustainable use and the protection of the environment.⁶⁶ The criteria for deciding applications include not only relevant criteria contemplated in the development management scheme, but also other considerations prescribed in relevant national or provincial legislation including, in regard to desirability, the impact on safety, health and well-being of the surrounding community, impact on heritage, and impact on the biophysical environment.⁶⁷
65. Among the relevant statutes to be considered are SPLUMA and LUPA, as well as the Intergovernmental Relations Framework Act 13 of 2005 (IRFA). National and provincial government need to be consulted by a local authority when making planning legislation, and if alleged conflicts arising from their respective competences arise, the dispute must be resolved.
66. The City's MPBL and the Act can be brought further into alignment if the machinery of the Act is implemented. The City and the Province are obliged to seek to achieve the objects of the IRFA, which, in practical terms, includes avoiding legislative conflicts,⁶⁸ and there are ways doing this, as suggested below. If, despite efforts in terms of the IRFA to resolve disputes, an alleged conflict is taken to court, a court is likely to interpret the statutes in such a way as to avoid a conflict, in other words, to attempt to interpret them as being reasonably able to co-exist. Despite this, if a true conflict exists, one of the abiding principles a court is likely to adhere to is that a provincial government cannot usurp the powers of a municipality to make by-laws relating to municipal planning matters.

⁶⁴ Section 163(2) of the DMS. Section 7(1)(a) of the National Building Regulations and Building Standards Act 103 of 1977 provides that a local authority can approve buildings plans if it is satisfied that the application in question complies with the requirements of that Act and any other applicable law.

⁶⁵ Part 2 of Chapter 20 of the DMS.

⁶⁶ MPBL section 26(1).

⁶⁷ MPBL section 99.

⁶⁸ Section 40(1) (a) of IRFA requires all organs of state must make every reasonable effort to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions.

67. Unless and until any provision in the Act is declared constitutionally invalid, it is to be regarded as valid and binding. Its implementation should be directed at among others, giving effect to the constitutional competence of local authorities.
68. While the City's by-law manages heritage resources within its jurisdiction, at the moment HWC's powers under the Act represent another layer of heritage resource management. The City's MPBL and the Act can be brought further into alignment if the machinery of the Act is implemented and in this way the duplication of management functions can be significantly reduced.

VII IMPLEMENTING THE MACHINERY OF THE ACT

69. A reason why HWC is over-burdened with the management of both Grade II and Grade III heritage resources is due to the failure fully to implement the machinery of the Act so as to enable local authorities who have the capacity to do so to manage Grade III heritage resources. The reasons appear to be many, including the lack of resources. The scope of this report allows a limited examination of the implementation of the machinery of the Act.
70. One option for HWC is to take steps to implement the machinery of the Act in order to reduce its burden of heritage resources management in the province. These steps would be aimed at fulfilling the conditional assignment of powers to local authorities in terms of the Act and may include, but are not limited to:
- 70.1 enabling local authorities to fulfil their duties generally under the Act in terms of section 8(6) read with 24(1)(i) – (k);
 - 70.2 publishing a heritage register in terms of section 30;
 - 70.3 designating heritage areas in terms of section 31;
 - 70.4 granting exemptions in terms of sections 34(3), 38(9) and/or 48(3);
 - 70.5 delegating authority in terms of section 26(1)(g); and
 - 70.6 fulfilling duties imposed on HWC in terms of the Act, such as prescribing policy in terms of section 6(2), prescribing heritage assessment criteria in terms of section 7(2), issuing procedural regulations or guidelines that comply with section 10 read with PAJA; maintain databases on heritage resources in terms of section 24(1)(f), and co-operate with private

bodies in the management of heritage resources owned by the State in terms of section 25(2)(f).

A record of the national estate

71. The scheme of the Act includes having all heritage resources in the national estate assessed, graded and recorded.⁶⁹ The inventories from local authorities (including Grade III heritage resources) and the registers from provinces (including Grade II heritage resources) would be collected by SAHRA and added to its database together with its list of Grade I heritage resources. That would effectively facilitate the identification and management of all known heritage resources. Those formally protected,⁷⁰ by declaration as Grade I or II heritage resources in terms of section 27, those declared protected areas in terms of section 28, those provisional declarations in terms of section 29, those in heritage registers in terms of section 30, those in heritage areas in terms of section 31, those declared heritage objects in terms of section 32, and those deemed to be heritage resources in terms of section 58(11), would be recorded.
72. A problem experienced is that local authorities often do not have the capacity (skills available to them) for heritage resources management,⁷¹ and this requires provincial authorities such as HWC perform their functions⁷² and prevents provincial authorities from delegating or completing the assignment of powers to local authorities.⁷³ This is exacerbated by funding constraints on HWC and the resultant impacts on the management of heritage resources in the province.
73. Some local authorities do have the capacity (meaning skills) but not many have applied to HWC for the assessment of its competence (meaning skills).⁷⁴ Capacity assessment criteria have not been prescribed by the Minister,⁷⁵ and HWC, possibly as a result of this, has not prescribed the manner in which a local authority may make such an application.⁷⁶ The absence of promulgation of criteria by the Minister or of procedures by HWC does not legally prevent HWC from developing its own

⁶⁹ Section 39(1) requires SAHRA to compile a data base of all heritage resources in the national estate. Its online data base, SAHRIS, was designed with this in mind. The Act also contemplates the addition of heritage resources that are discovered, such as ship wrecks, archaeological and palaeontological resources and meteorites.

⁷⁰ In terms of Part 1 of Chapter 3 of the Act:

⁷¹ The details of which local authorities do qualify as having the capacity are not known to the writer.

⁷² Or another local authority, such as a district municipality. Section 8(6)(b) provides: '(b) If an authority at provincial or local level does not have the capacity or is not competent to perform a specific function for which it is responsible under this section, that function shall be performed on an agency basis by an authority at a higher level or a competent authority on the same level.' SAHRA experiences the same problem and has to issue section 34 permits and give section 38 approvals for Grade I heritage resources where provinces do not have the capacity to do so – which is all except Kwa-Zulu Natal and the Western Cape.

⁷³ Powers are delegated by a province to a local authority in terms of section 26(1)(g), by agreement with the local authority.

⁷⁴ As required by section 8(6)(c).

⁷⁵ In terms of section 8(6)(a).

⁷⁶ Section 8(6)(c).

assessment criteria and assessing a local authority who wishes to be assessed,⁷⁷ provided they comply with the minimum criteria in section 8(6) of the Act,⁷⁸ read with NEMA. The management of heritage resources, not unlike planning and integrated environmental management, includes decision-making based on the principles of sustainable development, which involves polycentric and inter-disciplinary decisions, requiring the associated skill sets.

74. The drafters of the Act also envisaged that conservation bodies and other authorities and bodies would participate in the management of heritage resources and would step forward, with the necessary resources and capacity, and enter into heritage agreements⁷⁹ and accept delegations of powers to manage heritage resources.⁸⁰ Examples of this are few and far between and there remains a general lack of heritage resource management capacity and funding.
75. As indicated, the Act's machinery not being implemented is HWC's failure to compile and maintain a heritage register of heritage resources in the Province that it considers conservation-worthy⁸¹ in terms of the assessment criteria in section 3 and prescribed in terms of section 7.⁸² It is supposed to include both Grade II and Grade III heritage resources in the register, the latter deriving from inventories of the heritage resources assessed and compiled by local authorities which fall within their areas of jurisdiction after they have been verified by HWC as fulfilling the assessment criteria.⁸³
76. One of the criticisms levelled at the Act is that the legislative mandate is not accompanied by the budgetary wherewithal. However, none of the spheres of government can lawfully simply ignore their statutory mandates, which should be considered as part of their financial planning. The Act, for example, places a clear duty upon provincial heritage resources authorities to establish the process for compiling a register, and once this is done, places an equally clear duty on local authorities to compile their inventories.
77. The City of Cape Town is among the local authorities who have compiled such a list. However, since there is no register, it has not been included in one. The City of Cape Town has been assessed as having the capacity to manage Grade III heritage resources.⁸⁴

⁷⁷ As per the principle in *Minister of Defence v SANDU* (514/2013)[2014] ZASCA 102 (28 August 2014) at paras 11-13.

⁷⁸ The availability of adequate staff, expertise, experience and administrative systems. In terms of section 8(6)(d), HWC must re-assess capacity of, and review the assumption of functions and powers by, a local authority at least every two years.

⁷⁹ In terms of section 42.

⁸⁰ In terms of section 26(1)(e), (f) and (g).

⁸¹ Section 30(1), which must be Gazetted in terms of section 30(2).

⁸² SAHRA prescribed the grading assessment criteria in GN R548 of 2 June 2000 as amended, regulation 43.

⁸³ Section 30(5).

⁸⁴ According to the HWC website. And confirmed by HWC officials.

Publishing a Heritage Register in terms of section 30

78. A heritage register for the Western Cape Province could be published, starting with the heritage resources which are deemed by the Act to be provincial heritage resources sites,⁸⁵ those which HWC has graded or formally protected, and those on local authority inventories (once reviewed). It would be a work in progress, to be added to over time, which is anticipated by the Act.
79. HWC would first have to prescribe⁸⁶ the procedure and information required for—
(a) the nomination of a resource for listing in a heritage register; and
(b) the compilation of an inventory of heritage resources by a local authority.⁸⁷
80. Although SAHRA has not regulated sub-categories of grading, HWC may, but is not obliged to, gazette the sub-categories IIIa, IIIb and IIIc it has adopted as policy after consultation with SAHRA⁸⁸ and following due process. A process of advertisement and consultation would need to be refined so as to include all affected parties and communities in the province, and include a process for consultation with the owner of a heritage resource.⁸⁹ If HWC elects not to elevate its sub-grades to regulated policy, local authorities have the option of doing so in terms of their by-laws, or of simply utilising HWC's policy on grading.
81. In order for a local authority to compile an inventory in terms of section 30(5) it must first be assessed by HWC as having the capacity to do so in terms of section 8(6). As indicated above, in the absence of criteria promulgated by the Minister HWC can devise its own assessment criteria and process subject to the minimum requirements in the Act. However, in order to *require* a local authority to apply for assessment, as a local authority is required to do in terms of section 8(6)(c), HWC would first have to prescribe the manner of applying in the gazette, as contemplated in that section.
82. Once the inventory is submitted to HWC it may approve it after following the consultation process envisaged in section 30(6)-(7).
83. Once the statutory processes have been followed and its inventory is compiled and accepted, a local authority is required to make provision in its town planning scheme or by-laws for the protection of places in a heritage register that are in its area, and the protective provisions must in terms of section

⁸⁵ Ex-national monuments and conservation areas under the old act, in terms of section 58(11).

⁸⁶ "prescribe" means prescribe by regulation – section 1 of the Act.

⁸⁷ Section 30(4). This is an important step in the process in order to promote consistency in the composition of the heritage register. The Draft Regulations Relating to the Consultation Process for Listing Heritage Resources in the Heritage Register and for the Designation of Heritage Areas, 2017 in Provincial Gazette Extraordinary 7860 of 12 January 2018 do not purport to provide such procedure and information. HWC must consult with local authorities on the regulations, among others in terms of section 36 of the IRFA.

⁸⁸ As envisaged in section 30(3)(c). HWC makes use of the sub-grades, so this step is vital.

⁸⁹ Section 30(7) – (8).

30(11) be approved by the provincial heritage resources authority⁹⁰ and provincial planning authority. As we have seen in the case of the City of Cape Town, they have already done this to some extent in the MPBL, although it is not a by-law promulgated in terms of the Act. Given its original legislative competence, it is questionable whether the City could be forced by court order to seek the Province's approval for its MPBL and promulgate it as a by-law in terms of the Act.⁹¹ However, a local authority could be required in terms of section 30(11) to make provision in its town planning scheme for the protection of places in its area of jurisdiction and entered into the register, and gazette such protections once HWC and the province's planning authority have approved the protective provisions.

84. An advantage of a register is that it would enable HWC to give permit exemptions related to the area covered by the register (see below).
85. HWC would also have the option of delegating to a local authority any permitting powers in respect of heritage resources in a register (see below).

Designation of heritage areas in terms of section 31

86. The main thrust of section 31 is to get local authorities, when revising a town planning scheme, to investigate the need for the designation of heritage areas to protect any place of environmental or cultural interest, to submit them to the provincial heritage resources authority, consult with that authority and the owners, and designate a heritage area in the Provincial Gazette.⁹² However, where local authorities do not do so, the provincial heritage resources authority may initiate a process to designate a heritage area in the Provincial Gazette.⁹³
87. Section 31(7) requires a local authority to provide for the protection of a heritage area in its planning by-laws, and the protective provisions must be jointly approved by the provincial heritage resources authority⁹⁴ and provincial planning authority.
88. An advantage of a heritage area designation is that it would enable HWC to give permit exemptions in the heritage area (see below).
89. The City of Cape Town may be requested to designate its HPOZ's as protected areas in the Provincial Gazette in terms of section 31(5), in which case the protections in the MPBL would apply in terms

⁹⁰ Also required by section 54(1)(d).

⁹¹ In terms of section 45 of IRFA no government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of Chapter 4 of IRFA were unsuccessful.

⁹² Sections 31(1) and (5) of the Act.

⁹³ Section 31(2)-(4).

⁹⁴ Section 54(1)(e) also requires this.

of the Act once provincial planning has approved. Prior consultation with HWC, property owners and any affected community is required. This would enable HWC to grant exemptions, for example, from the requirement to obtain a section 34(1) permits (alteration or demolition) in respect of structures in the heritage area. If the City declines, HWC may gazette them, in terms of section 31(4).

90. Section 31(7)(a) requires the special consent of a local authority for any alteration or development affecting a heritage area. The local authority effectively gives this when considering a development application in terms of its planning by-laws, and would need to be give it in terms of the Act as well.
91. HWC would also have the option of delegating to a local authority any permitting powers in respect of heritage resources in a heritage area.

VIII EXEMPTIONS

92. Three exemptions by HWC are investigated in this part:
 - (i) in terms of section 34(3), from obtaining a permit in terms of section 34(1) to alter or demolish a structure older than 60 years;
 - (ii) in terms of section 48(3), from obtaining a permit in terms of section 48 in respect of actions affecting any heritage resource protected by HWC in terms of Chapter II of the Act (sections 27 – 47); and
 - (iii) in terms of section 38(9), from complying with section 38 in respect of development triggered by section 38(1).
93. An exemption must follow a lawful and fair procedure and be published in the Provincial Gazette. A decision to grant an exemption is subject to appeals in terms of the Act.⁹⁵ An exemption decision must consider all relevant considerations, including that any conservation-worthy heritage resources affected thereby are adequately protected. In addition to any other considerations, each type of exemption has its own criteria.

Section 34(3) exemptions

94. Section 34(1) is a broad general protection and provides:

⁹⁵ First one may appeal to the HWC Council in terms of section 49(1) of the Act read with PN 336 of 2002 (PG 5937 of 25 October 2002), and from there appeal to the MEC for Cultural Affairs and Sport in terms of section 49(2) of the Act.

34. Structures.—(1) No person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority.

95. Section 34(3) provides:

(3) “The provincial heritage resources authority may at its discretion, by notice in the Provincial Gazette, make an exemption from the requirements of subsection (1) within a defined geographical area, or for certain defined categories of site within a defined geographical area, provided that it is satisfied that heritage resources falling into the defined area or category have been identified and are adequately provided for in terms of the provisions of Part 1 of this Chapter.”

96. The two internal requirements for a section 34(3) exemption are:

- (i) Within a defined geographical area (which may add categories of site therein, and “site” is defined as including any structures or objects thereon)⁹⁶; and
- (ii) Any heritage resources in that area are adequately protected in terms of Part 1 of Chapter II, which refers to the formal protections:
 - Formal declarations in terms of section 27;
 - Declaration of protected areas in terms of section 28;
 - Provisional protection in terms of section 29;
 - Heritage Register in terms of section 30;
 - Heritage area in terms of section 31;
 - Heritage object in terms of section 32.

97. Section 34 exemptions, may, subject to appropriate conditions, may granted in respect of:

- all structures older than 60 years in a defined geographical area that do not fall within the definition of ‘heritage resource’; (the definition of ‘heritage resource’ is discussed below;)
- all structures older than 60 years that do fall within the definition of ‘heritage resource’ but are not considered conservation worthy; or

⁹⁶ In section 1: “site” means any area of land, including land covered by water, and including any structures or objects thereon.

- all structures older than 60 years despite having been graded, to the extent specified in the exemption.

98. What is envisaged in section 34(3) is a general exemption in respect of a geographical area, or categories of site within a geographical area. The exemption is subject to the proviso that HWC is satisfied that any heritage resources in the defined geographical area are adequately protected by formal protections. The formal protections of heritage resources in the defined geographical area in question would need, among other things, to identify all heritage resources in that area that are conservation-worthy. The Act envisages that a section 34(3) exemption would apply to structures listed in a heritage register in terms of section 30 or falling within a heritage area in terms of section 31, the formal protections removing the need for the general protection.
99. All structures not identified as conservation-worthy in the geographical area specified in the exemption are included in the structures that may be exempted. An owner of a structure in the defined geographical area would need to check the database of formal protections to ensure their structure is not formally protected. If the structure is not formally protected and falls within the defined geographical area, the owner should then check if the structure falls within any defined categories within the area in order to ascertain whether the exemption applies to their property.
100. Exemptions can also be tailored to suit the site or area in question, and can be partial exemptions, eg, from requiring a permit to paint a structure older than 60 years that is a formally protected heritage resource, and provisions can be added to safeguard any specific heritage resources.
101. In the case of formal declarations in terms of section 27, declarations of protected areas in terms of section 28, and provisional protections in terms of section 29, the owner should easily be able to verify if their property is exempted since each formal protection would itself define a geographical area. In the case of heritage objects formally protected in terms of section 32, if the object is identified as being in a defined geographical area, the owner would likewise be able to check the database.
102. When it comes to formal protection by means of a heritage register in terms of section 30, or a heritage area in terms of section 31, the defined geographical area may be a particular area or district of a local authority. The protection given to heritage resources in terms of sections 30 and 31 must be by means of the planning scheme or by-laws of the local authority to which HWC and the province's planning authority have agreed and which have been promulgated in terms of the Act.⁹⁷
103. The proviso regarding protection assumes due diligence in respect of all areas covered by formal protections, so that no conservation-worthy structures fall through the catch-net of the general protection in section 34.

⁹⁷ Sections 30(11) and 31(7).

Section 48(3) exemptions

104. Section 48(3) states:

“A heritage resources authority may at its discretion, in respect of any heritage resource protected by it in terms of the provisions of Chapter II, by notice in the Gazette or the Provincial Gazette, as the case may be, grant an exemption from the requirement to obtain a permit from it for such activities or class of activities by such persons or class of persons in such circumstances as are specified in the notice.”

105. Section 48 falls in Chapter III (General Provisions) and is the empowering section for issuing all permits in terms of the Act. Section 48(3) must, however, be read with any other sections that empower HWC to grant exemptions, such as section 34(3), discussed above.

106. The two internal requirements for a section 48(3) exemption applicable to HWC are:

- (i) The exemption is in respect of a heritage resource protected by HWC in terms of Chapter II, which includes formal and general protections. (See the list below.)
- (ii) The notice must specify the activities or class of activities, persons or class of persons, and applicable circumstances.⁹⁸

107. A section 48(3) exemption may be given by HWC for the following permit requirements:

107.1 Alteration⁹⁹ of grade II heritage sites, in terms of section 27(18). The exemption would be specific to the site.

107.2 Reproduction of a grade II heritage sites for profit, in terms of section 27(23)(b).

107.3 Alteration of a provisionally protected heritage resource, in terms of section 29(10). The exemption would be specific to the heritage resource.

107.4 Alteration or demolition of a structure older than 60 years, in terms of section 34(1). The exemption would be specific to the structure.¹⁰⁰

⁹⁸ Depending on the facts of any particular exemption, it would seem that the internal requirements of section 34(3) for an exemption might suffice and not require adding this requirement, but where practicable this requirement should also be specified in the exemption notice.

⁹⁹ See the definition of ‘alter’ above.

¹⁰⁰ Extra requirements apply to these permits in terms of section 35(4) and (5).

107.5 Alteration or demolition of any heritage resource in a heritage area declared in terms of section 30;

107.6 Alteration, destruction etc of an archaeological or palaeontological site or any meteorite, in terms of section 35(4). The exemption would be specific to the site or meteorite.

107.7 Alteration of any grave or burial ground older than 60 years, in terms of section 36(3). The exemption would be specific to the grave or burial ground.

108. Whereas a section 34(3) exemption may be granted in respect of any structure or part of a structure which is older than 60 years, whether or not it is a heritage resource, a section 48(3) exemption only applies to heritage resources included in the previous paragraph. (Refer to the discussion of section 34(1) permits below and what constitutes a heritage resource.) This means that HWC must be satisfied that any conservation-worthy heritage resources would be protected despite the exemption.

Section 38(9) exemptions

109. Section 38 contains a general protection triggered by development thresholds, and sets out a process requiring a heritage impact assessment where appropriate to inform a decision by the relevant heritage resources authority whether the development may proceed, and if so, on what conditions.¹⁰¹ HWC currently receives all these applications except if a formally protected grade I heritage resource is affected,¹⁰² and has the power to approve the development; however, if the proposed development triggers a NEMA listed activity, HWC becomes a commenting authority to the NEMA competent authority.¹⁰³ Compliance with the heritage requirements imposed under section 38 exempts a person from the other general protections in Part 2 of Chapter II.¹⁰⁴ Exemption in terms of section 38(9) would not simultaneously exempt a person from other applicable general protections.

110. Section 38(9) provides:

(9) The provincial heritage resources authority, with the approval of the MEC, may, by notice in the Provincial Gazette, exempt from the requirements of this section any place specified in the notice.

111. There are two internal qualifying requirements for a section 38(9) exemption:

¹⁰¹ Sections 38(1) – (6).

¹⁰² Section 38(7).

¹⁰³ Section 38(8).

¹⁰⁴ Section 38(10). Part II comprises sections 33 to 38.

- (i) HWC must obtain the approval of the MEC, defined in section 1 of the Act as follows:

“MEC”, unless otherwise stated and insofar as a provision of this Act is applicable in or in respect of a province, means the member of the executive council of a province responsible for cultural matters;¹⁰⁵

- (ii) The exemptions applies to a ‘place’, which is broadly defined:

“place” includes—

- (a) a site, area or region;*
- (b) a building or other structure which may include equipment, furniture, fittings and articles associated with or connected with such building or other structure;*
- (c) a group of buildings or other structures which may include equipment, furniture, fittings and articles associated with or connected with such group of buildings or other structures;*
- (d) an open space, including a public square, street or park; and*
- (e) in relation to the management of a place, includes the immediate surroundings of a place;*

112. This exemption could be used where HWC is satisfied that any development triggered by section 38(1):

112.1 will occur in a place where only heritage resources which are already formally protected by HWC in terms of Part 1 of Chapter II will be affected and are sufficiently protected;

112.2 will occur in a place where any conservation worthy heritage resources have been identified and adequate protections are in place; and/or

112.3 will occur in a place where there are no conservation-worthy heritage resources.

113. The exemption could be given for identified places in advance of any proposed developments, for example, an industrial or enterprise development zone, an urban renewal precinct, a greenfield development area, a suburb or district, and so on.

114. An exemption decision might be motivated on the basis that the City by-laws sufficiently protect any heritage resources at the place defined in the notice. The rationality of that decision would depend

¹⁰⁵ Section 1 of the Act. In the Western Cape, this is the Minister of Cultural Affairs and Sport.

on, among others, the protection afforded by the by-laws, whether or not they were by-laws approved by the province in terms of the Act.

IX DELEGATIONS

115. Both internal (to HWC officials) and external delegations of authority are permitted by the Act. This part investigates the possibility of certain external delegations by HWC to local authorities or registered heritage organisations in order to reduce the administrative burden of managing heritage resources on HWC.
116. The powers to delegate are contained in section 26 of the Act, the relevant parts of which are:

26. Delegation of functions or powers of heritage resources authorities.—

(1) Subject to subsection (3), the Minister or MEC, as the case may be, may make regulations to enable a heritage resources authority to delegate in writing any of its functions or powers under this Act to all or any of the following:

(a) to (f) ... [not relevant here]

(g) in the case of a provincial heritage resources authority, a local authority or any other body which is competent to perform such functions, by agreement with such authority or body.

(2) A power delegated under subsection (1), when exercised by the delegate, shall for the purposes of this Act be deemed to be exercised by the heritage resources authority concerned: Provided that a delegate shall be held accountable to the heritage resources authority for all actions performed by him, her or it during the period of delegation.

(3) A heritage resources authority may not delegate power to do any of the following:

(a) Delegate any of its functions or powers under this section;

(b) make a recommendation to the Minister or MEC in terms of this Act;

(c) borrow money under section 21 (5) (a)

(d) acquire or dispose of real property under section 21 (5) (b) or (c); or

(e) adopt any statement of general policy or conservation management plan under section 47.

(4) A delegation under this section shall be revocable at will and no such delegation shall prevent the exercise of any power by the heritage resources authority: Provided that ...”
[not relevant to HWC]

117. The MEC has already made the regulations required in section 26(1) for delegations,¹⁰⁶ which provide:

11. Delegation of functions and powers of Heritage Western Cape.—

(1) To enable Heritage Western Cape to perform its functions and exercise its powers under the Act, it may, by resolution of the Council of Heritage Western Cape, delegate any of its functions or powers to any or all of the following:

- (a) any member of the Council of Heritage Western Cape;*
- (b) a committee or any member of a committee;*
- (c) a designated staff member employed in the provincial department;*
- (d) a heritage inspector as envisaged in section 50 of the Act;*
- (e) a local authority which is competent to perform such functions, by agreement with such local authority; and*
- (f) specified office bearers or members of a conservation body registered with Heritage Western Cape in terms of section 25 (1) (b) and which are competent to perform such functions.*

(2) The delegation referred to in sub-regulation (1)—

- (a) must be in writing and must clearly state the functions and powers delegated in terms of the regulations, any conditions attached to the delegation, and the period of the delegation; and*
- (b) may only be revoked in writing.*

(3) Heritage Western Cape may, by written agreement, provide financial or other resources to a person or body so delegated to allow such person or body to perform the delegated function or power.

118. The decision to delegate must be by resolution of the HWC council, but does not have to be gazetted. As an administrative decision it is subject to PAJA and therefore should follow a process of public consultation, and is subject to appeal to the MEC.¹⁰⁷ The power to delegate itself may not be delegated.¹⁰⁸

119. The internal requirements are:

¹⁰⁶ Regulation 11 in PN 336 of 2002 (PG 5937 of 25 October 2002).

¹⁰⁷ In terms of section 49(2) of the Act.

¹⁰⁸ Section 26(3)(a).

- (i) The delegate must be a local authority or a registered heritage organisation;¹⁰⁹
- (ii) the delegate must agree to the delegation;¹¹⁰
- (iii) the delegate must have the necessary competence (meaning capacity and skills);
- (iv) the delegation must be in writing;
- (v) it must clearly state the functions and powers delegated in terms of the regulations;
- (vi) it must set out any conditions attached to the delegation;
- (vii) it must specify the period of the delegation; and
- (viii) it may only be revoked in writing.

120. Any of HWC's powers under the Act may be delegated except those prohibited in terms of section 36(3)(a). As discussed above, the word 'competent' in section 26(1)(g) and regulation 11 refers to skills capacity as contemplated in section 8. The agreement of the delegate body or person is required. An appeal against a decision of the delegate local authority will lie to HWC,¹¹¹ who will thus retain a measure of control of the controversial matters. An internal appeal in terms of section 62 of the Municipal Systems Act 32 of 2000 against a decision by a local authority functionary acting under delegated authority in terms of section 26 of the Act is, on the face of it, not applicable since the delegation by HWC is not by a 'delegating authority' as defined in the Municipal Systems Act. However, an appeal in terms of section 49(1) could be declared constitutionally invalid (following the principle in the *Habitat Council* case referred to above) if the delegated power relates to a municipal planning matter (such as structures that are neither Grade I or Grade II heritage resources), which case a court could be at large to 'read down' into the Municipal Systems Act the right to appeal such a decision, or require appropriate amendments to the respective acts. However, the Act remains valid unless and until declared otherwise by a competent court of law.
121. Ways in which HWC could reduce the likelihood of constitutional challenges against this exercise of its powers under the Act to manage, through its appeal jurisdiction, Grade III heritage resources which fall within the ambit of municipal planning, include either delegating the appeal function to a municipality, or by way of appropriate exemptions. Other ways could include resolving a dispute that arises via the IRFA or by some other means, or anticipating and avoiding disputes by entering into agreements with local authorities in terms of the Act.
122. A decision in terms of section 26(4) to revoke a delegation to a body would be an administrative decision subject to PAJA and would require a fair process and must be lawful, rational and reasonable. The phrase 'at will' in this context means that HWC has unfettered discretion. The envisaged delegation agreement may set out the process for prior consultation and also establish

¹⁰⁹ Section 26(1)(g) says "local authority or any other body". Although regulation 11(1)(f) refers to specified office bearers or members, this does not comply with the Act. The agreement may specify the office bearers or members who will carry out the delegation to the body.

¹¹⁰ This is required by section 26(1)(g), although not specified in respect of officials or members registered conservation bodies in regulation 11(1)(f).

¹¹¹ Section 49(1) of the Act read with section 26(2).

guidelines for the exercise of the discretion to revoke, but may not fetter the discretion of HWC. The delegate body or person would have the right to appeal against the decision to revoke the delegation.

123. The agreement would presumably address matters including (and this list is by no means exhaustive):
 - 123.1 The extent of the delegated powers, which may include issuing permits in terms of sections 34(1), making decisions and comments in terms of section 38, and granting exemptions in terms of sections 34(3), 38(9) and 48(3) of the Act.
 - 123.2 Any sub-categories of Grade III heritage resources in respect of which such powers are delegated.
 - 123.3 Administrative processes for considering applications.
 - 123.4 The identity of the person or persons who will exercise the powers delegated on behalf of the delegate, or the composition of decision-making committees and qualifications of members.
 - 123.5 Guidelines for identifying, assessing and grading heritage resources.
 - 123.6 Guidelines for deciding applications.
 - 123.7 Relevant policy considerations.
 - 123.8 Co-ordination of decisions taken in terms of the Act and a local authority's by-laws.
124. As with any delegation, the decision to delegate relies on the trust the delegator has in the skills and capacity of the delegate to exercise the power lawfully and in accordance with applicable laws and policy. Prime candidates for delegation would be decisions in regard to Grade III heritage resources, or perhaps ones of lesser significance, and to decide whether or not a structure older than 60 years is a heritage resource. This would include the power to assess the significance and grading.
125. As stated above, the delegation might include issuing permits in terms of sections 34(1), making decisions and comments in terms of section 38, and granting exemptions in terms of sections 34(3), 38(9) and 48(3) of the Act.
126. Such delegations make more sense if a heritage register has been published listing the heritage resources affected by the delegation, or heritage areas have been designated within which the delegation will apply. In the case of the City of Cape Town, the delegation might apply to the

HPOZ's, and more specific conditions could apply in respect of each delegation, such as (and this list is generic and by no means exhaustive):

- (i) to issue section 34(1) permits, subject to any specific exclusions of identified structures or areas or grade of structures;
- (ii) to take decisions in respect of developments triggered by section 38(1) and generally to exercise powers in terms of section 38 including requiring heritage impact assessments,¹¹² subject to any specific exclusions of areas or identified heritage resources or grades of heritage resources;
- (iii) to make comments on any NEMA applications in terms of section 38, subject to any specific exclusions of areas or identified heritage resources or grades of heritage resources;
- (iv) to issue section 48(3) permits, subject to any specific exclusions of types of permits or identified areas or heritage resources or grades of heritage resources; or
- (v) to grant any of the exemptions that HWC could grant under the Act.

127. Where a heritage organisation has particular knowledge of a specific area, the power to decide similar applications for that area could be delegated.
128. It would be possible to have a parent delegation agreement with another body, and thereafter to enter into ad hoc delegation agreements related to specific applications or types of application.

X INTERPRETATION

129. The definitions in the Act, which is national legislation and regarded as original legislation passed in terms of powers contained in the Constitution,¹¹³ can only be amended by an amending act of parliament and cannot be amended by regulations issued in terms of the Act, which is delegated legislation. Regulations are interpreted in the light of the empowering act and in the event of a conflict, the Act prevails. The provincial authorities are thus required to operate in terms of the Act in its current form.
130. Thus, one has to work with the definitions and phrases that cause difficulty, such as 'alter', 'heritage resource' and 'change the nature of a site'. The best one can do is issue a guideline on how to interpret the Act. These definitions will be considered in the context of section 34.

¹¹² Which a municipality can in any event require when applying its planning by-law, in terms of section 38(8).

¹¹³ See Cora Hoexter, *Administrative Law in South Africa* 2ed 51.

Section 34 permits, ‘alter’ and ‘heritage resource’

131. The general protection in section 34 has proved burdensome to HWC. Section 34(1) provides (with words defined in the Act italicised):

‘Structures.—(1) No person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority.’

132. In the absence of any exemption, HWC has no option other than to consider and approve (with or without conditions) or refuse a permit application if section 34 is triggered.¹¹⁴

Step 1 for section 34 permits : check for section 34 triggers

133. The need for a section 34 permit is triggered by the following relatively objective jurisdictional facts: if a structure or part thereof older than 60 years is to be altered or demolished.

134. The definition of ‘alter’ is intentionally wide:

‘alter’ means any action affecting the structure, appearance or physical properties of a place or object, whether by way of structural or other works, by painting, plastering or other decoration or any other means;

135. The word ‘alter’ is used in the Act to trigger permit requirements.¹¹⁵ It is purposefully wide and it is difficult to imagine any practical limitation to the ordinary meaning of the word.

136. The word ‘structure’ is equally widely defined, as follows, and applies to immovable property:

‘structure’ means any building, works, device or other facility made by people and which is fixed to land, and includes any fixtures, fittings and equipment associated therewith; ’

137. Section 34 is thus triggered if a structure or part thereof older than 60 years will be altered or demolished within the meaning of the Act. A person wishing to alter or demolish such a structure must apply for a permit. On receipt of the application, confirming that section 34 is triggered does not require any specialist heritage expertise and can be taken at an administrative level.

¹¹⁴ In the case of refusal, consideration must be given to formal protection of the structure in terms of Part I, in terms of section 34(2). This does not mean that formal protection will necessarily follow. Formal protection could include entering the structure on the heritage register in terms of section 30.

¹¹⁵ In the formal protections in sections 27(18), 28(3), 29(10), and 32(13), and the general protections in sections 34(1), 35(4)(a), 35(5), and 36(3)(a) and (b).

138. As can be seen, the trigger contains no reference to heritage resources or significance. The catch-net is broad so that no potentially valuable heritage resources are destroyed without a permit. It can be narrowed by means of exemptions (see below) and the machinery of the Act is designed to spread the burden of management among heritage resources authorities at provincial and local levels.
139. The permit application process is regulated,¹¹⁶ and must be made to HWC as the provincial heritage resources authority¹¹⁷ on the appropriate form on the HWC website,¹¹⁸ accompanied by the information specified, which includes details and photographs, plans, diagrams and a motivation, and comments.¹¹⁹ HWC uses a checklist on its website for the information.
140. All section 34 applications submitted to HWC are considered by the monthly Heritage Officers Meeting (HOMS), who can request further information,¹²⁰ decide that no heritage resources will be affected, grant a section 34 permit, or refer the application the Built Environment and Landscapes Committee (BELCom) for decision within 60 days excluding any time required by the applicant to conduct additional studies or obtain information required by Heritage Western Cape.¹²¹
141. A screening process is adopted, and applications are screened to establish:
- 141.1 whether section 34 is triggered - if not, no permit is required;
 - 141.2 whether a heritage resource will be affected - if not, the permit can be granted;
and
 - 141.3 if a heritage resource will be affected, what significance it has, and how it should best be managed.
142. The question of whether a heritage resource is affected or not raises the question of the type of heritage resource and its significance, and requires a level of heritage expertise.

¹¹⁶ HWC regulations in terms of section 25(2)(h) read with section 48(1) published under PN 298 of 2003 (PG 6061 of 29 August 2003) as amended by PN 114 of 2015 (PG 7378 of 17 April 2015).

¹¹⁷ The definition of 'heritage resource authority' is: "heritage resources authority" means the South African Heritage Resources Agency, established in terms of section 11, or, insofar as this Act is applicable in or in respect of a province, a provincial heritage resources authority;

¹¹⁸ The forms are prescribed in the HWC regulations under PN 17 of 2019 (PG 8049 of 22 February 2019). There are also guidelines issued (See Notice 3 of 2021).

¹¹⁹ Section 48(1) includes a list of information that can be required.

¹²⁰ Although incomplete application can be accepted in circumstances described in regulation 3(8).

¹²¹ Regulation 3(2).

Step 2 for section 34 permits: heritage resource and significance

143. ‘heritage resource’ is defined in the Act as follows, and contains a few defined terms which appear below:

‘heritage resource’ means any place or object of cultural significance.

144. ‘Object’ refers to movable property and is unlikely to be relevant to section 34.¹²² ‘Place’ is widely defined and includes a structure, fixtures and fittings, as well as an area around a structure:

‘place’ includes—

- (a) a site, area or region;*
- (b) a building or other structure which may include equipment, furniture, fittings and articles associated with or connected with such building or other structure;*
- (c) a group of buildings or other structures which may include equipment, furniture, fittings and articles associated with or connected with such group of buildings or other structures;*
- (d) an open space, including a public square, street or park; and*
- (e) in relation to the management of a place, includes the immediate surroundings of a place;*

145. The word ‘site’ is defined as follows:

‘site’ means any area of land, including land covered by water, and including any structures or objects thereon; ’

146. A ‘site’ does not necessarily equate to a registered cadastral unit.¹²³ The definition of ‘place’, quoted above, is broad and is potentially larger than the site itself, and can include an area or region. The demolition of a building older than 60 years with no inherent cultural significance may, in terms of decided court cases, affect the heritage resources in the surrounding area, and the decision to issue a permit requires that attention be given to the management of those heritage resources, which may be

¹²² “object” means any movable property of cultural significance which may be protected in terms of any provisions of this Act, including—

- (a) any archaeological artefact;
- (b) palaeontological and rare geological specimens;
- (c) meteorites; and
- (d) other objects referred to in section 3;

¹²³ A ‘site’ does not necessarily coincide with surveyed erf boundaries, but means ‘an area of ground where the development or other activity is in fact taking place’ - *Bryer NO and Others v Heritage Western Cape* (16392/2017) [2018] ZAWCHC 67 (11 June 2018) at para 41.

protected by conditions of approval of a demolition permit.¹²⁴ Judicial interpretations of the Act could only be changed by subsequent court decisions or statutory amendment to the Act, or possibly via a provincial statute, but not by subordinate legislation such as a provincial regulation, or by policy or administrative practice.

147. ‘**Cultural significance**’ is defined as follows:

‘cultural significance’ means aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance;’

148. Ascertaining whether a structure (which is a ‘place’) has cultural significance involves the exercise of discretion after examining the facts of each permit application. If it does have cultural significance, then it is a ‘heritage resource’ and is part of the **national estate** defined in section 3 of the Act. Each application should contain sufficient information to determine whether or not the structure is a heritage resource. The starting point is whether any of the factors listed in section 3(3) of the Act applies, which provides:

‘3(3) Without limiting the generality of subsections (1) and (2), a place or object is to be considered part of the national estate if it has cultural significance or other special value because of—

- (a) its importance in the community, or pattern of South Africa’s history;*
- (b) its possession of uncommon, rare or endangered aspects of South Africa’s natural or cultural heritage;*
- (c) its potential to yield information that will contribute to an understanding of South Africa’s natural or cultural heritage;*
- (d) its importance in demonstrating the principal characteristics of a particular class of South Africa’s natural or cultural places or objects;*
- (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;*
- (f) its importance in demonstrating a high degree of creative or technical achievement at a particular period;*
- (g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;*
- (h) its strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa; and*
- (i) sites of significance relating to the history of slavery in South Africa.’*

¹²⁴ *Qualidental Laboratories v Heritage Western Cape* [2007] SCA 170 (RSA); *Gees v Provincial Minister of Cultural affairs and Sport, Western Cape and Others* (974/2015) [2016] ZASCA 136; 2017 (1) SA 1 (SCA) (29 September 2016).

149. Thus, the question becomes, does the place have aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance or other special value with reference to the considerations in (a) to (i) above. The type of significance may include intrinsic, comparative and contextual significance, which any prescribed assessment criteria must be used to assess.¹²⁵ Prescribed assessment criteria include, in the case of a site, if it contributes to the environmental quality or cultural significance of a larger area which fulfils the criteria in section 3(3).¹²⁶
150. For example, the alteration of a structure older than 60 years will require a section 34 permit because of its potential effect on the following heritage resource:
- it possesses uncommon, rare or endangered aspects of South Africa's natural heritage (section 3(3)(b) of the Act)
 - which is of intrinsic (section 7 of the Act) aesthetic and scientific significance (definition of cultural significance in section 1 of the Act), and
 - because of the environmental quality of the area surrounding the structure (national regulation 43(3)).
151. Thus far we have only established whether a permit is required or not, based on the question of whether the structure has cultural significance, not whether or not it should be granted. HWC has published on its website slightly more detailed assessment criteria consistent with section 3(3).¹²⁷ HWC could add to them, particularly criteria for assessing an alteration where a potential heritage resource referred to in section 3(3), with reference to each sub-paragraph in that section, would not be considered to have any cultural significance and therefore not be considered a heritage resource, and could add examples.¹²⁸
152. The next question is whether it should be granted or not, and if so, on what conditions. Things brings us to grading and levels of significance.

Decision-making considerations and criteria

153. Permits are issued in terms of section 48, but the basis on which they must be considered are found elsewhere in the Act. HWC is obliged to consider section 5 (General Principles for Heritage Management) and section 6 (Principles for Management of Heritage Resources), as well as all other relevant policy and legislation. The focus is on the sustainable management of heritage resources.

¹²⁵ Section 7(1).

¹²⁶ SAHRA grading criteria – regulation 43(3)(b) in GN R548 of 2000 as amended by GN 694 of 30 May 2003.

¹²⁷ Policy 2.3.6 titled "Grading: Purpose and Management Implications" approved by HWC Council on 16 March 2016.

¹²⁸ The City of Cape Town's approach in including a Grade IV 'not conservation-worthy' is noted - see its clarification document 'GRADE III HERITAGE RESOURCES' (Environmental and Heritage Management, November 2015.) This draws a distinction between things that do not fall within the definition of heritage resources, and those that do but are not conservation-worthy despite having some cultural significance.

154. Not all heritage resources are necessarily conservation-worthy. Section 7(1) makes it clear that the national estate only comprises places and objects that are graded because they are worthy of conservation, and section 39(1) only requires an inventory to be kept of heritage resources worthy of conservation.
155. Therefore, some heritage resources are not worthy of conservation and need not be conserved although, by definition, they are places or objects of cultural significance. Whether or how they should be conserved depends on their significance or grade, and the relative costs and benefits of their protection.¹²⁹ This echoes the requirement of sustainable development to consider social, economic and environmental factors.¹³⁰
156. Decision-makers have to take into account all relevant considerations, which include the circumstances of the case, the provisions of the Act, the provisions of the Bill of Rights and other legislation such as NEMA and by-laws, relevant policies and guidelines, and submissions by interested and affected parties. Importantly, the decision must be governed by the principle of sustainable development, and take into account social, economic and environmental considerations.
157. To recap, the process for assessing a section 34 permit application described above may be summarized in the following questions:
- Is the structure older than 60 years? If not, no permit is required.
 - Will it be ‘altered’ as defined? If not, no permit is required.
 - Will the alteration affect a heritage resource? If not, the permit can be granted unconditionally.
 - Is the heritage resource conservation-worthy? If not, the permit can be granted unconditionally.
 - If the heritage resource is conservation-worthy, are the objects of the Act, in the context of all relevant policy and legislation, best promoted by granting or refusing the permit? Grading and assessment must take place.
 - If the permit is granted, what conditions, if any, should be imposed? Reference is made to section 49(2) and the relevant case law.¹³¹

¹²⁹ This is reflected in the language of section 7(1).

¹³⁰ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* (CCT67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); ; 2007 (6) SA 4 (CC) (7 June 2007) at para 59.

¹³¹ *Qualidental Laboratories v Heritage Western Cape* [2007] SCA 170 (RSA); *Gees v Provincial Minister of Cultural affairs and Sport, Western Cape and Others* (974/2015) [2016] ZASCA 136; 2017 (1) SA 1 (SCA) (29 September 2016).

158. This intricate process is unavoidable, such is the diversity of heritage resources in the national estate and the nature of the discretion that has to be exercised in terms of the Act. A guideline could be considered to assist decision-makers.

‘change the character of a site’

159. A further interpretational issue is encountered regarding the meaning of the phrase ‘change the character of a site’ in section 38(1)(c) of the Act. Section 38, as we have seen, is triggered by larger scale developments defined in section 38(1), which, if heritage resources will be affected, either requires HWC’s permission or, if a NEMA process is followed, HWC’s comment.
160. The context of the phrase in section 38 of the Act is:

‘38(1) Subject to the provisions of subsections (7), (8) and (9), any person who intends to undertake a development categorised as— ...

(c) any development or other activity which will change the character of a site—

(i) exceeding 5 000m² in extent; or

(ii) involving three or more existing erven or subdivisions thereof; or

(iii) involving three or more erven or divisions thereof which have been consolidated within the past five years; or

(iv) the costs of which will exceed a sum set in terms of regulations by SAHRA or a provincial heritage resources authority; ...

must at the very earliest stages of initiating such a development, notify the responsible heritage resource authority and furnish it with details regarding the location, nature and extent of the proposed development.’

161. The word ‘development’ is widely defined in section 1 of the Act, as follows:

“development” means any physical intervention, excavation, or action, other than those caused by natural forces, which may in the opinion of a heritage authority in any way result in a change to the nature, appearance or physical nature of a place, or influence its stability and future wellbeing, including—

(a) construction, alteration, demolition, removal or change of use of a place or a structure at a place;

(b) carrying out any works on or over or under a place;

(c) subdivision or consolidation of land comprising, a place, including the structures or airspace of a place;

(d) constructing or putting up for display signs or hoardings;

(e) any change to the natural or existing condition or topography of land; and

(f) any removal or destruction of trees, or removal of vegetation or topsoil;

162. Not all ‘developments’ are included in the ambit of section 38(1)(c), only those that will change the character of the site. In order to establish the ordinary meaning of the word ‘character’ one refers to dictionary definitions of the word, which essentially boil down to the following:

- the distinguishing nature of something;
- the particular combination of things about a place, esp. things you cannot see, that make that place different from others;
- all the qualities and features that make places different from others.¹³²

163. In forming an opinion whether or not a development or other activity will change the character of a place, the decision-maker should first identify what the character of the place is: those qualities or features that distinguish it from other places. Only if the character will change is section 38(1)(c) triggered. How these distinguishing features will change or not change must then be described in the reasons for the decision.

164. All distinguishing qualities and features are relevant, including but not limited to those that might give it cultural significance. Once the section is triggered, then the heritage resources authority has 14 days to determine whether heritage resources will be affected.¹³³ The notification of the proposed development needs to contain sufficient information to take this decision.¹³⁴

¹³² <https://www.merriam-webster.com/dictionary/character;> <https://www.dictionary.com/browse/character;> <https://www.thefreedictionary.com/character;> <https://dictionary.cambridge.org/dictionary/english/character> .

¹³³ Section 38(2).

¹³⁴ Hence the NID form.

165. A guideline on the interpretation of section 38(1) could be issued.

XI POLICY, REGULATIONS AND NOTICES

166. The Act envisages that the heritage resources management functions of HWC are carried out by both legislative and administrative measures. The legislative measures it carries out by way of regulations and notices in the Provincial Gazette, and administrative measures it carries out by way of policy and other measures, some of which must be gazetted.

167. Section 5(3) states:

5(3) Laws, procedures and administrative practices must—

- (a) be clear and generally available to those affected thereby;*
- (b) in addition to serving as regulatory measures, also provide guidance and information to those affected thereby; and*
- (c) give further content to the fundamental rights set out in the Constitution.*

168. Section 5(6) states:

5(6) Policy, administrative practice and legislation must promote the integration of heritage resources conservation in urban and rural planning and social and economic development.

169. The power to make regulations is given in section 59 and the power to publish notices is given in section 52, which HWC must publish in the Provincial Gazette. Some policy must be gazetted and some may be gazetted or may simply be published.

169.1 HWC may, in terms of section 30(2), by notice in the Provincial Gazette, list a heritage resource in a heritage register or amend or delete an entry in a heritage register.¹³⁵ If a heritage register is published, it must be in the Provincial Gazette.

169.2 HWC may, in terms of section 31(4), by notice in the Provincial Gazette, designate a place as a heritage area, unless a local authority has done so in terms of section 30(5).

¹³⁵ While section 30(4) obliges HWC to prescribe certain procedures and information for this, its effect may only be directory, not peremptory. See Cora Hoexter, *Administrative Law in South Africa* 2ed 49.

- 169.3 HWC may grant exemptions in terms of sections 34(3), 38(9) and 48(3), but if it does it must be by notice in the Provincial Gazette.
- 169.4 HWC may, in terms of section 7(2), prescribe detailed heritage assessment criteria, consistent with the criteria set out in section 3 (3), for the assessment of Grade II and Grade III heritage resources in the province. It may do this by way of regulation if it chooses to ‘prescribe’ the criteria,¹³⁶ but it may also publish such criteria as administrative policy.
- 169.5 HWC may, in terms of section 48(1), prescribe the manner in which an application is made to it for any permit in terms of this Act and other requirements for permit applications. If it does so, it must be by way of regulation.¹³⁷ HWC has accordingly made regulations regarding permit applications,¹³⁸ forms on which they made by made,¹³⁹ and fees payable.¹⁴⁰
- 169.6 HWC may, in terms of section 25(2)(h), make regulations relating to any matter which it considers to be necessary or expedient to prescribe in order to fulfil its functions and implement its powers and duties under the Act. If it does, such regulations must be made in terms of section 59.
- 169.7 A local authority may, in terms of section 54, make by-laws regulating, among other things, a heritage area and a place in a heritage register.
- 169.8 HWC may, in terms of section 6(2), prescribe any principles for heritage resources management in addition to, but not inconsistent with, the principles set out in section 5 or prescribed by SAHRA under subsection 6(1). If it chooses to ‘prescribe’ such principles they must be gazetted in terms of section 59 read with section 47, but it may also publish such principles as administrative policy.
170. Apart from those instances specified above, it appears that HWC may adopt policies and procedures as part of its administrative practices. HWC may, in terms of section 25(2)(b), publish, or by any other means make available or distribute in any form, or cause to be published or distributed, any knowledge and information relating to the national estate and any of its functions or activities. Such publications do not have to be gazetted.

¹³⁶ Section 1: “prescribe” means prescribed by regulation.

¹³⁷ Section 1: “prescribe” means prescribed by regulation.

¹³⁸ Regulations Made by Heritage Western Cape in Terms of Section 25(2)(h) Published under PN 298 of 2003 (PG 6061 of 29 August 2003) as amended by PN 114 of 2015 (PG 7378 of 17 April 2015).

¹³⁹ Heritage Western Cape: Heritage Forms Published under PN 17 of 2019 (PG 8049 of 22 February 2019).

¹⁴⁰ Fees (Heritage Western Cape) Regulations, 2016 Published under PN 143 of 2016 (PG 7608 of 21 April 2016).

171. HWC may, in terms of section 6(2)(c), publish for general information provincial policy relating to heritage resources management or any aspect thereof which is consistent with the principles set out in section 5 or prescribed under section 6(1) or 6(2). Section 47(1)(a) says that a provincial heritage resources authority must adopt statements of general policy for the management of all heritage resources owned or controlled by it or vested in it. Section 47(4) says that it must make regulations to provide for a process of consultation prior to making such policy. The process for this has been prescribed,¹⁴¹ which also requires an adoption notice to be published in the Provincial Gazette and the policy to be made available on its website, among other places.¹⁴²
172. HWC has published many of its policies and procedures on its website. One of them relates to grading criteria and sub-grades IIIa, IIIb and IIIc.¹⁴³ It appears that no adoption notice in respect of these policies has been gazetted.
173. HWC could add to its policies:
- guidelines for interpreting and applying sections 34 and 38;
 - guidelines for decision-making taking into account the relevant provisions of the Act and NEMA;
 - an explanatory document aimed at promoting consistency in decision-making, outlining main categories of decisions, giving examples;
 - a guideline for compiling reports to HWC committees, including the criteria and elements of the decision, motivations, and relevant considerations including social, economic and environmental considerations.

XII FAIR PUBLIC PARTICIPATION PROCEDURES AND COMPLIANCE WITH PAJA

174. In terms of section 33(1) of the Constitution, everyone has the right to administrative action that is lawful, reasonable and procedurally fair. PAJA gives effect to that right, and section 4 of PAJA sets out the requirements of fair procedure that affects the public, and provides that they may be departed from if it is reasonable and justifiable in the circumstances.¹⁴⁴

¹⁴¹ The Regulations (Heritage Western Cape) on the Process for Publication of Statements of General Policy and Conservation Management Plans, 2015, PN 324 of 2015 (PG 7497 of 24 September 2015) (as corrected by PN 347 of 2015 (PG 7510 of 16 October 2015)).

¹⁴² Regulation 6.

¹⁴³ Policy document 2.3.6 titled "Grading: Purpose and Management Implications" Approved by HWC Council on 16 March 2016.

¹⁴⁴ PAJA, section 4(4)(a).

175. HWC does have public consultation guidelines¹⁴⁵ as well as draft regulations for public consultation, which also serve as guidelines.¹⁴⁶ leaving it to the applicant in any case to follow a lawful procedure. These guidelines have not been tested in court, although the High Court has confirmed the applicability of PAJA to heritage processes in terms of the Act.¹⁴⁷
176. The national estate is a matter of public interest, and particular applications to HWC usually affect some communities more than others, depending on numerous factors. So diverse are the types of heritage resources protected by the Act and the identity of the communities likely to be affected that it is difficult to be very precise about how to notify affected persons and communities and to enable them to participate to the extent required by law.
177. Furthermore, it would be difficult to exclude a member of the public from participating in any decision if they regard themselves as an interested party. The Act makes appeals to the MEC available to anybody who wishes to appeal,¹⁴⁸ and the HWC regulations gives the right of appeal to any persons and bodies with a bona fide interest in or, are affected by, a decision. Section 10(2) of the Act gives the right of appearance at a meeting to a person who may be affected by a decision taken. Although an argument could be made that only persons whose rights are materially and adversely affected by a decision have the right to receive notice,¹⁴⁹ given the nature of heritage rights and interests and the intention of the Act to make appeals open to ‘any person’, it remains to be seen if any restrictions may legitimately be placed on the right to receive notice.
178. Section 4 of PAJA offers the choice between a public enquiry, a notice and comment procedure, or both. HWC has elected the notice and comment procedure, which is appropriate. Section 4(3) states:

4. Administrative action affecting public.—

(3) If an administrator decides to follow a notice and comment procedure, the administrator must—

- (a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;*
- (b) consider any comments received;*
- (c) decide whether or not to take the administrative action, with or without changes;*
and

¹⁴⁵ Dated June 2019, published on its website under ‘Policy’, document 2.6.1.

¹⁴⁶ Public consultation required for public participation for applications made in terms of the NHRA, P.N. 42/2018 dated 16 March 2018.

¹⁴⁷ *Piketberg Local Heritage Authority and Another v Liebco Vleishandelaars (Edms) Beperk*, WCHC (unreported) case no. 1103/2016 dated 18 May 2016. In this case the court reviewed and set aside a demolition permit because the provisions of sections 3 and 4 of PAJA were not complied with.

¹⁴⁸ Section 49(2).

¹⁴⁹ As, for example, in *Joseph and Others v City of Johannesburg and Others* 2010(3) BCLR 212 (CC).

(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1) (a) to (e), (2) and (3).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.

179. Chapter 2 of the administrative procedure regulations in terms of PAJA¹⁵⁰ must be complied with if the notice and comment procedure is chosen,¹⁵¹ which is the advised route. Thus, unless HWC departs from the need to take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them on the grounds that such departure is reasonable and justifiable,¹⁵² the detailed provisions of the regulations must be complied with. HWC may propose a limited number of circumstances in which a departure may be justified, or confer a discretion to decide upon a departure in appropriate circumstances.

180. To the extent to which the HWC guidelines may fall short of the requirements of the PAJA regulations, the latter must be complied with. The current situation, with two different guidelines in place, calls for a consolidated guideline that is amended to include the following requirements in the PAJA regulations:

180.1 if the decision potentially affects persons throughout the province, and not just in a local area, then the notice must also appear in the Provincial Gazette;¹⁵³

180.2 the notice must be in at least two official languages, taking account of the language preferences in the area concerned;¹⁵⁴

180.3 provision must be made for special needs of members of specific communities who may be affected;¹⁵⁵

¹⁵⁰ GNR.1022 of 31 July 2002: Regulations on fair administrative procedures, as amended.

¹⁵¹ Regulation 17.

¹⁵² In terms of section 4(4)(a) read with sections 4(3)(a) and 4(4)(b).

¹⁵³ Regulation 18(b) read with 18(c).

¹⁵⁴ Regulation 19.

¹⁵⁵ Regulation 20.

180.4 the notice must contain sufficient information to enable people to submit meaningful comments, provided that a newspaper notice may contain only a concise statement of the proposed administrative action together with details of where further information can be obtained;¹⁵⁶

180.5 the notice must caution that comments received after the closing date may be disregarded.¹⁵⁷

181. A notice and comment process should permit use of now widely available technology by use of data messages such as email, disclosure of and access to all information pertaining to an application, for example on the applicant's website, for the duration of the process and a limited time thereafter, for example, 6 months. HWC should make available on its website all decisions and minutes, searchable at least by case reference number, and preferably also by committee, erf number, address, owner, project name or type of application and other relevant key words. HWC should also keep a copy (electronic or otherwise, depending on Departmental policy) of all relevant information on each file.
182. Section 10(2) of the Act requires meetings at which decisions are taken to be open to the public and a person who may be affected by a decision has the right of appearance at the meeting, subject to a matter being declared confidential. The agenda and minutes must be available for public scrutiny.
183. The right of appearance includes the right to be represented and a reasonable opportunity to make representations. Since the right to make representations will already have been granted through a notice and comment period, the opportunity to make further representation may be appropriately curtailed in the circumstances.
184. The chair of the meeting may take reasonable measures in respect of the proceedings. Although the meeting is not a 'public enquiry' in terms of section 4(2) of PAJA, the following aspects of the PAJA regulations applicable to public enquiries could be employed at HWC meetings by the chair:

184.1 regulate public access, including access of the media, to the place where the hearing is held;

184.2 prevent and control misconduct by members of the public attending the hearing;

184.3 provide for the voluntary searching of any person, and, where appropriate, for the refusal of entry to, or the removal of any person from the place where that hearing is held; and

¹⁵⁶ Regulation 18(3)(a) and (4).

¹⁵⁷ Regulation 18(2)(b).

184.4 order a member of the public, including the media, to leave the place where that hearing is held if that person does not observe a directive of or conform to the procedures determined by the chair.¹⁵⁸

185. The procedures determined by the chair should, depending on the circumstances, be sufficient to allow a person the right to be heard (*audi alteram partem*). This might, unless there are exceptional circumstances, only be a short time in which to make oral representations, considering that a notice and comment period has been made available, irrespective of whether the person has taken advantage of that opportunity to comment.

XIII SYNTHESIS AND CONCLUSION

186. HWC has options open to it to reduce its workload, and they mostly involve letting local authorities with the requisite capacity such as the City of Cape Town manage some or all grade III heritage resources. It fits within the schemes of both the Constitution and the Act, and it requires HWC to let local authorities manage grade III heritage resources under the broad mandate of sustainable development.
187. A province is required by section 156(4) of the Constitution to assign a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, to local authorities where that matter would most effectively be administered locally, and the municipality has the capacity to administer it. This would include Grade III heritage resources, in respect of which local authorities in any event have original legislative competence insofar as they relate to municipal planning, in terms of the Constitution.

Option 1 - exemptions

188. The City already has the MPBL in place with its HPOZs and, when deciding development applications for development on property covered by an HPOZ, is already considering the impact on heritage resources and imposing conditions on any development that is approved. Additional decisions in terms of the Act (sections 34(1) and 38(4)) represent an extra layer of approval and red tape for developers.
189. HWC could in terms of section 38(9) exempt property owners from needing to comply with section 38 for properties in the City's HPOZs in respect of any development requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or

¹⁵⁸ PAJA regulation 15(2)-(3).

II heritage resources in terms of the Act. This refers to larger scale developments that trigger section 38. All that would be required in the MEC's approval and for the exemption to be gazetted. The City would be responsible for the identification, assessment and protection of grade III heritage resources affected by the development.

190. HWC could in terms of section 34(3) exempt property owners from needing to obtain permits in terms of section 34(1) to alter, demolish etc any structure older than 60 years in the City's HPOZs in respect of any development requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act.
191. This would first require HWC to publish a heritage register in terms of section 30, which would require HWC to:
- prescribe in terms of section 30(4) the procedure and information required for—
 - (a) the nomination of a resource for listing in a heritage register; and
 - (b) the compilation of an inventory of heritage resources by a local authority.
 - confirm the assessments by local authorities, including the City, of heritage resources on inventories they have submitted to HWC;
 - include all grade II and grade III heritage resources in the province
 - follow a public participation process including consultation with the owner.¹⁵⁹
192. HWC could in terms of section 48(3) exempt property owners from needing to obtain special consent of the City in terms of section 31(7)(a) in respect of any alteration or development in an HPOZ requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act.
193. This would first require the City upon request to gazette its HPOZs as heritage areas in terms of section 31(5). If such consent is not obtained, HWC may gazette the HPOZs as heritage areas in terms of section 31(4) after first proposing this to the City in terms of section 30(2).

¹⁵⁹ Before doing this HWC would need to ascertain the necessary steps to follow. These might include:

1. List heritage resources formally protected or deemed formally protected by HWC.
2. Request local authorities to submit updated inventories. (Section 30(5))
3. Invite any persons to submit inventories for the register (Section 30(6)).
4. Where necessary establish or verify grading of inventories received.
5. Add heritage resources on inventories of local authorities to the list.
6. Add World Heritage Sites that are not formally protected.
7. Add any Protected Areas in terms of NEMPAA that are heritage resources and are not Grade I or on the list.
8. Add any other sites from surveys conducted after verifying grading.

194. The City could survey and demarcate any other geographic area, and grant the aforementioned exemptions in respect of such area, with any exceptions as may be necessary.

Option 2 - delegations

195. HWC could in terms of section 26 delegate to the City the power to take decisions in terms of section 38(4), and/or to comment in terms of section 38(8), on development applications in respect of properties in the City's HPOZ's requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act. This would first require the City's agreement, and the delegation would need to be gazetted after submitting it for public comment.
196. HWC could in terms of section 26 delegate to the City the power in terms of section 48(2) to issue permits in terms of section 34(1) to alter, demolish etc any structure older than 60 years in the City's HPOZ's in respect of any development requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act. This would first require the gazetting of a heritage register as described above, and require the City's agreement, and the delegation would need to be gazetted after submitting it for public comment.
197. HWC and the MEC could in terms of section 26 delegate to the City the power to exempt property owners in terms of section 38(9) from needing to comply with section 38 for properties in the City's HPOZs in respect of any development requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act. This would require the City's agreement, and the delegation would need to be gazetted after submitting it for public comment.
198. HWC could in terms of section 26 delegate to the City the power to grant exemptions in terms of sections 34(4), 38(9) and 48(3) from permit requirements or from needing to obtain special consent of the City in terms of section 31(7)(a) in respect of any alteration or development in an HPOZ requiring approval in terms of the MPBL, with the exception of those heritage resources graded or formally protected as grade I or II heritage resources in terms of the Act. This would first require the HPOZ to be gazetted as a heritage area, as described above, and require the City's agreement, and the delegation would need to be gazetted after submitting it for public comment.
199. The City could survey and demarcate any other geographic area, and delegate to the City the aforementioned powers in respect of such area, with any exceptions as may be necessary.

Option 3: a combination of exemptions and delegations

200. HWC could discuss with the City a suitable combination of the aforementioned exemptions and delegations, possibly relating to different areas and categories of heritage resources, and possibly starting off in a limited fashion.

Option 4: Public participation procedures

201. In order to create more certainty and confidence in its processes, HWC could consolidate its policy guideline on public participation and its draft regulations on public consultation by, among other things, including the following requirements contained in the PAJA regulations:
- 201.1 if the decision potentially affects persons throughout the province, and not just in a local area, then the notice must also appear in the Provincial Gazette;
 - 201.2 the notice must be in at least two official languages, taking account of the language preferences in the area concerned;
 - 201.3 provision must be made for special needs of members of specific communities who may be affected;
 - 201.4 the notice must contain sufficient information to enable people to submit meaningful comments, provided that a newspaper notice may contain only a concise statement of the proposed administrative action together with details of where further information can be obtained;
 - 201.5 the notice must caution that comments received after the closing date may be disregarded.
202. The options open to HWC mentioned above depend on its willingness to devote the necessary resources to implementing the machinery of the Act more fully. The systematic identification and protection of heritage resources is a key element to distribution of functions between the three spheres of government. Given the problems facing HWC, this would appear to be a worthwhile allocation of resources.
203. The primary focus of this legal review is to provide the Province with legal options relating to the implementation of the Act. The suggestions as to how to do that practically are naturally subject to

and must be informed by the knowledge and experience of the officials charged with implementing the Act.

Yours faithfully

A handwritten signature in black ink, appearing to read "P. Kantor". The signature is written in a cursive style with a large, stylized initial "P" and "K".

Peter Kantor