

**Improving local-level government accountability -
a study of the government's accountability within the land use
planning and development context in the Western Cape**

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Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the owner of the copyright thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Date: 24 March 2010

ABSTRACT:

This thesis considers the veracity, within the land use planning and development context in the Western Cape, of the claim that South Africa has a constitution that gave us *accountable government*¹. The study necessitates consideration of the meaning of terms such as accountability and sustainable planning and development.

There is a dearth of South African literature on government accountability. The main focus of the literature from abroad is on elections as a mechanism for achieving government accountability, to the exclusion of other issues and with a distinct disregard for legal questions. Much of the available overseas literature draws on the descriptive models of how democratic accountability should work. The writers seemingly have little interest in moving beyond the descriptive. The available body of literature is static in nature as little theoretical development in the field of government accountability has taken place for decades. This thesis argues that, as a result, the literature from abroad on accountability is of limited value in South African context.

Accountability has an important role to play in curbing the abuse of public power and for maintaining conditions of peace and stability. Central concerns with the study are to assess the current measure of government accountability within the stated context and to establish whether the existing system for achieving effective government accountability is adequate.

The research commences with thorough literature and law reviews, supplemented by the development of a questionnaire on accountability in the land use planning and development field. The assessment of the current measure of government accountability in the context of land use planning and development is supplemented by the views of people active in that field. Those views are pieced together from the results obtained from questionnaires and personal observations. The findings are that government is presently not regarded as accountable in the field of study.

This thesis demonstrates how difficult it is to achieve effective government

¹ Skjelten, 2006: 11

accountability - in particular, towards the local population - and how ineffective the current accountability mechanisms are for this purpose. It argues that the challenges facing South Africans in this regard are complex and that everyone is required to accept responsibility as the actual agents of accountability, to make accountability work as a personal concern and a matter of individual responsibility.

This thesis reflects on the need for new accountability mechanisms and calls for a radical reform of the current approach to government accountability. It *inter alia* recommends that the reform should involve the establishment of a new structure empowered to enquire into the merits of decisions taken by public authorities. On the basis of this discussion, the thesis concludes by advocating specific steps required to improve government accountability at the local-level within land use planning and development context.

OPSOMMING:

Hierdie tesis oorweeg die geldigheid, binne die konteks van grondgebruik beplanning en ontwikkeling in die Wes-Kaap, van die aanspraak dat Suid-Afrika 'n grondwet het wat vir ons 'n *verantwoordbare regering* gegee het. Dit noodsaak oorweging van die betekenis van uitdrukkings soos verantwoordbaarheid en volhoubare beplanning en ontwikkeling.

Bykans doodse stilte heers oor regeringsverantwoordbaarheid in die Suid-Afrikaanse literatuur. In buitelandse literatuur val die klem hoofsaaklik op verkiesings as meganisme om regeringsverantwoordbaarheid te bewerkstellig, met uitsluiting van ander kwessies en 'n besliste verontagsaming van regspraak. Baie van die beskikbare oorsese literatuur steun op die beskrywende benadering van hoe demokratiese verantwoordbaarheid behoort te werk. Die skrywers het oënskynlik min belang daarin om meer as beskrywend te wees. Die beskikbare literatuur is staties van aard aangesien vir dekades min teoretiese ontwikkeling op die gebied van regeringsverantwoordbaarheid plaasgevind het. Hierdie tesis argumenteer dat, ten gevolge, die buitelandse literatuur oor verantwoordbaarheid van beperkte waarde is in Suid-Afrikaanse konteks.

Verantwoordbaarheid het 'n belangrike rol om te vervul in die beperking van misbruik van openbare mag en vir die instandhouding van toestande vir vrede en stabiliteit. Sentraal tot hierdie studie staan pogings om te bepaal wat die huidige stand van regeringsverantwoordbaarheid is binne die vermelde konteks en om vas te stel of die bestaande stelsel vir bereiking van verantwoordbare regering voldoende is.

Die navorsing begin met deeglike literatuur en regsresensies, aangevul deur die ontwikkeling van 'n vraeboek oor verantwoordbaarheid in die veld van grondgebruik beplanning en ontwikkeling. Die huidige stand van regeringsverantwoordbaarheid binne die konteks van grondgebruik beplanning en ontwikkeling is aangevul deur die sienings van persone wat aktief is in daardie veld. Daardie sienings is saamgestel vanuit resultate wat bekom is uit vraeboë en eie waarnemings. Die bevindinge is dat die regering in die algemeen tans nie as verantwoordbaar beskou word nie.

Hierdie tesis toon aan hoe moeilik dit is om effektiewe verantwoordbaarheid van die regering te bereik - in die besonder teenoor die plaaslike bevolking - en hoe ontoereikend die huidige meganismes vir hierdie doel is. Dit argumenteer dat die uitdagings wat Suid-Afrika in hierdie verband in die gesig staar, kompleks is en dat van elkeen verwag word om verantwoordelikheid te aanvaar as die werklike agente van verantwoordbaarheid om verantwoordbaarheid as 'n persoonlike aangeleentheid en 'n saak van individuele verantwoordelikheid te laat werk.

Hierdie tesis besin oor die behoefte aan nuwe verantwoordbaarheidsmeganismes en bepleit 'n radikale hervorming van die huidige benadering tot verantwoordbaarheid van die regering. Dit word onder andere aanbeveel dat as deel van hervorming 'n nuwe struktuur voorsien moet word wat gemagtig sal wees om ondersoek in te stel na die meriete van die besluite wat deur die publieke owerhede geneem is. Op grond van hierdie bespreking eindig die tesis deur voorspraak te maak vir bepaalde stappe wat nodig is om die regering se verantwoordbaarheid op die plaaslike vlak te verbeter binne die konteks van grondgebruik beplanning en ontwikkeling.

LIST OF ABBREVIATIONS AND ACRONYMS

- BBBEE - Broad based black economic empowerment.
- CC - Constitutional Court.
- DEADP - Department of Environmental Affairs and Development Planning.
- DFA - The Development Facilitation Act, No. 67 of 1995.
- IDP - Integrated Development Plan.
- LED - Local Economic Empowerment.
- LUPO - The Western Cape Land Use Planning Ordinance, No 15 of 1985.
- MFMA - The Local Government: Municipal Finance Management Act, No. 56 of 2003.
- MSA - The Local Government: Municipal Systems Act, No. 32 of 2000.
- NEMA - The National Environmental Management Act, No. 107 of 1998.
- NGOs - Non-governmental organisations.
- NHRA - The National Heritage Resources Act, No. 25 of 1999.
- NSDP - The National Spatial Development Perspective, 2003.
- PAIA - The Promotion of Access to Information Act, No. 2 of 2000.
- PAJA - The Promotion of Administrative Justice Act, No.3 of 2000.
- PCAS - The Policy Co-ordination and Advisory Services in the Presidency.
- PDA - The Western Cape Planning and Development Act, No. 7 of 1999.
- PSDF - Provincial Government Western Cape "Provincial Spatial Development Framework", 2005.
- SCA - Supreme Court of Appeal.

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This work is dedicated to my mother Maria Martha Du Plessis, a continuous source of inspiration in my life.

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CHAPTER 1: INTRODUCTION

1.1 AN OVERVIEW

This thesis is concerned with accountability within a democratic system of government, more particularly with vertical government accountability of appointed administrators and elected representatives towards the public. It focuses more narrowly on their democratic and legal accountability in land use planning and development context within the Western Cape.

Democratic and legal accountability within this context are concerned with whether and how government may be obliged to answer to the electorate or a court for government's acts or omissions. Land use planning is the purposive activity of working out in advance a detailed scheme for land use management and the accomplishment of land use objectives. Land use management, in turn involves, amongst other things, the investigation of potential impacts of land use development proposals on the receiving built, natural and cultural environments, the assessment of those impacts and the granting or withholding of approval for the proposed activities. Land use development is concerned with the construction of something physical on land or the conversion of the use of land to another purpose.

Land use planning and development have to take place in a dense and complex legislative setting. The authorities are required to exercise their functions and perform their duties within the applicable statutory framework. A myriad of legislation relating to planning and development existed at the advent of South Africa's new constitutional dispensation. Pre-constitutional laws that continue to apply in the field of study *inter alia* include the Land Use Planning Ordinance (No. 15 of 1985, known as "LUPO"), the Removal of Restrictions Act (No. 84 of 1967), the Subdivision of Agricultural Land Act (No. 70 of 1970), the National Building Regulations and the Buildings Standards Act (No. 103 of 1977). Zoning schemes (i.e. legislation that is peculiar to a specific municipal area aimed at regulating land uses and which generally also stipulates applicable land use parameters such as height restrictions and building lines) apply in addition to the national and provincial legislation.

National and provincial legislative competences in terms of the South African Constitution (RSA, 1996) include "regional planning and development", "environment" and "municipal

planning”, whilst “provincial planning” is an area of exclusive provincial legislative competence². Those legislative powers relate to undefined areas of competence and the lack of definition is likely to give rise to practical problems. The national, provincial and municipal legislatures exercise their legislative competences within the land use planning and development context without any attempt to coordinate their legislative actions. The lack of coordination amongst legislatures has created a legislative environment which is not conducive for the promotion of socio economic development. Processes, for example, are duplicated. A person may have more than one right of appeal on the same set of facts under different laws. The various appeals that one may lodge in those circumstances are not dealt with concurrently by the authorities, but successively, causing extensive delays with the final determination of applications. No effective mechanism exists with which a member of the public may force the three spheres of government to co-operate in respect of their legislative or other functions or to speed up decision-making.

Post-Constitution laws have been added to the long list of legislation that applies in the field of study, contributing to the complexity of the situation. Currently the legislative setting entwines pre-constitutional national, provincial and municipal legislation, the legislation straddling the transition to the Constitution, and the post-Constitution laws. Our legal system displays a dualism or split personality observed as a result of the continued survival of pre-democracy legislation. Roodt (2001: 474) points out that some older statutes are sometimes inconsistent with constitutional guarantees or create institutional obstacles to legal accountability. There exists a need for further legal reform if socio-economic development is to be promoted. Legislation that discriminates against people on the basis of their race should be repealed. Even if a difficult task, state structures should be transformed and de-racialised as proposed by Davids and Maphunye (2005: 62).

The post-Constitution laws have been adopted to achieve many different purposes. The Local Government: Municipal Systems Act, No. 32 of 2000, the Promotion of Access to Information Act, No. 2 of 2000 and the Promotion of Administrative Justice Act, No.3 of 2000 aim, for example, to restructure local government and to promote accountability. Two of the main purposes of the Development Facilitation Act, No. 67 of 1995 (the “DFA”) are “to introduce

² See Schedule 4 and 5 respectively to the South African Constitution (RSA, 1996).

extraordinary measures to facilitate and speed up the implementation and reconstruction and development programmes and projects” and “to lay down general principles governing land development throughout the Republic”. In terms of section 2 of the DFA, the general principles set out in section 3 of that Act, apply to the actions of a local government bodies in South Africa and shall serve to guide the administration of any structure plan or zoning scheme. In terms of the DFA those principles also serve as guidelines by reference to which any competent authority shall exercise any discretion or take any decision in terms of any law dealing with land development. Included amongst those principles are that administrative practice should promote efficient and integrated land developments in that they optimize the use of existing resources, discourage the phenomenon of “urban sprawl” in urban areas and contribute to the development of more compact towns and cities. A more detailed discussion of the methods, statutory devices and available mechanisms employed in legislation to promote and enforce accountability has been provided in Chapter 3. There clearly is no shortage of legislation that applies in the field of study, yet that legislation is ineffective. For example, although all three spheres of government should be held responsible for addressing the growing housing backlog, it is primarily the local authorities with their insufficient funds and shortages of competent staff that are by law required to address the problem.

The exercise of legislative competences by the three spheres of government within land use planning and development context aimed at introducing more effective legislation has not gone smoothly to date. In the municipal sphere, a number of factors frustrated attempts to revise existing municipal legislation during the last sixteen years of local government transition. For example, an attempt to revise the Strand Zoning Scheme (originally adopted in 1947) was halted when the Strand, Somerset West and other municipalities combined to form the Helderberg Transitional Council. Each of those municipalities had their own zoning schemes before the combination of the municipal areas. In some other areas situated within the boundaries of the Helderberg Transitional Council, zoning schemes did not apply (e.g. the regional services council areas such as Macassar and Sir Lowry’s Pass and the historical “Black townships” such as Llwandle and Nomzamo). In places such as Macassar and Sir Lowry’s Pass regulations applied which were made under section 8 of LUPO as “default” zoning schemes. In places such as Llwandle and Nomzamo the regulations that were made under the Black Communities Development Act, No. 4 of 1984, performed the same function.

The Helderberg Transitional Council soon realised that the different standards laid down in various zoning schemes and regulations applicable in different areas within the new municipal boundaries were no longer appropriate. It commissioned the consolidation and rationalisation of those schemes and regulations and subsequently approved a new consolidated zoning scheme. Before it could obtain the final approval of the competent provincial authority of the new scheme, the Helderberg Transitional Council was disestablished and its area was incorporated into yet a larger area known as the City of Cape Town. A fresh attempt has been underway for the past six or seven years to consolidate and rationalise the many zoning schemes that apply in various areas within the City's boundaries. However, at the time of writing of this thesis the outdated 1947 scheme still applied and was still enforced by the City of Cape Town within the erstwhile municipal boundaries of the Strand municipality. The same is true for the zoning schemes of the other former substructures within the city of Cape Town.

In the Western Cape attempts to introduce a new piece of provincial legislation that would have replaced LUPO as an interim Act - while a more comprehensive Act could be written - survived seven provincial ministers of planning. The researcher was the co-author of the law that was to become the Western Cape Planning and Development Act, No. 7 of 1999 (the "PDA"). It was eventually approved by one of a line of provincial Premiers, but before it could be implemented, there was a change in political leadership and the finalized Act was never implemented. A new professional team was appointed to write a new provincial law on planning and development, trying to integrate planning, environmental and heritage legislation. The new provincial legislative effort lost steam along the way and was abandoned for reasons unknown. Fresh attempts are currently underway to revive and update the PDA, which by now is 10 years old. In the national sphere the so-called "Land Use Bill" which has been in the offing for nearly a decade, was yet again placed on the back-burner during 2008, which some see as a blessing in disguise.

In instances where national government managed to pass legislation, the validity of some laws were subsequently challenged successfully in court. For example, on 22 September 2009 the Supreme Court of Appeal declared chapters V and VI of the DFA that purports to confer authority on provincial development tribunals equivalent to that of local authorities to be invalid (*City of Johannesburg v Gauteng Development Tribunal (335/08) [2009] ZASCA*

106). However, the obligation of competent authorities to exercise any discretion or take any decision in terms of any law dealing with land development by reference to the principles contained in chapter I of the DFA was not affected by the judgment.

The national, provincial and municipal spheres of government are charged by law with many responsibilities. The decisions of the authorities to permit the use of land for specific development projects must balance the needs of the people, their economic development opportunities and the availability of natural resources in a manner that will facilitate the achievement of development goals and objectives without harm to natural resources and systems (see “sustainable planning” and “sustainable development” in glossary). Amongst the government responsibilities are developmental duties and the requirement that local authorities should undertake integrated development planning (see sections 153 of the South African Constitution and section 25 of the MSA). The legislatures have not placed a duty on the national and provincial spheres of government to undertake pro-active planning. As a result those two spheres of government cannot be held to account if they fail to undertake such planning. No effective mechanisms exist in terms of which members of the public can force them to undertake land use planning.

Rather than undertake land use planning, the authorities seem to concentrate their efforts on the adoption of policies to clarify legislation and to provide guidelines within which the implementation of laws has to take place. Examples of such policies are the National Spatial Development Perspective (NSDP) and the Provincial Spatial Development Framework (PSDF). The NSDP was produced by the Presidency and endorsed by Cabinet in March 2003 (PCAS, 2004) without first following a process of public participation. It provided an initial interpretation of the potential of different localities and sectors, but not a definitive measure. It required provincial strategies and municipal plans to provide rigorous assessments of provincial and local development potential. An updated version of the NSDP (2006) was released during June 2007 (PCAS, 2007). It was intended to focus government action and to provide a platform for greater alignment and coordination across the three spheres of government. In the Western Cape, the provincial government adopted the PSDF during November 2005, and it was recently approved as a Structure Plan in terms of LUPO. It called, amongst other things, for a tight urban edge to be drawn around all towns and cities in the

province to restrict the outward growth of urban settlements until such time as density targets have been achieved.

The adoption of government policy is by itself insufficient to correct the wrongs of the past. Zoning schemes have, for example, been a contributing factor to urban sprawl over past decades. This is due to the outdatedness of these schemes and the planning ideals of former times that these schemes were originally based on, such as low densities (the Garden Cities model) and high rise buildings surrounded by open space (Le Corbusier's Radiant City), as discussed in the Draft Green Paper on Planning and Development of 1999. Zoning schemes generally lay down the maximum permissible bulk (i.e. floor factor) and coverage (i.e. the maximum size of the footprint of the building) as land use restrictions. A permissible bulk factor of say 0,8 would translate into a maximum permissible floor area of a building (excluding balconies and other listed items) of 800 m² if the plot size was 1000 m². The permissible bulk and coverage factors may impact negatively on the achievement of higher density targets. Policy can in itself not amend legislation, but requires a legislative act. The amendment of the applicable legislation (e.g. zoning schemes) may be required to achieve statutory and government policy objectives (e.g. to promote "socio and economic" and "sustainable land use" development).

Whilst government policies are an essential component of land use planning, it would be wrong to liken those policies to land use planning. Government policies in the field of study (e.g. the NSDP and the PSDF) do not provide a detailed scheme worked out in advance for land use management or the accomplishment of land use objectives. Those policies generally lack implementation plans and are not linked to funding arrangements. In the absence of clear measurable policy targets, usually no attempt is made to measure the success of those policies. Pieterse (2006: 289) is convinced, based on his field research in Cape Town, "that policy intentions as expressed in planning frameworks, are bound to remain paper-ideas whilst established patterns of organisational (and spatial) practice continues". Muller (2009: 31) argues that pro-active, rational or technical planning "is an important part of negotiating and inventing the future". This thesis argues that pro-active land use planning is required to convert the thinking encountered in government policies into practical measures for achieving policy objectives. However, pro-active land use planning is mostly encountered

in the literature, but is an extremely rare occurrence in the Western Cape and the rest of the country, although it seems that this is now busy changing.

The enforced pre-democracy spatial development process in the Western Cape resulted in racialised segregated urban and economic spaces. It marginalised the vast majority of the province's population spatially and economically. It was within that environment that a dream was created leading up to the first democratic elections in South Africa; a dream of a *Better Life for All*. It captured the imagination of the many millions of residents who before, have been socially and otherwise marginalised. It also captured the imagination of many of the privileged minority who, before, almost exclusive enjoyed the spoils of the country's bounty. Soon after the induction of our first democratically elected national government, the Legislator was tasked to translate the electoral dream into legislation. New legislation³ followed, encapsulating promises in legal format and more particularly, some as fundamental rights.

Socio-economic development is generally regarded as the passport to reduced poverty, reduced inequality and improved social well-being. It holds promise to correct some wrongs of the past. Land use development (i.e. physical township establishment and rural development) can potentially make a major contribution to socio-economic development. However, patterns of production and consumption associated with urbanisation may seriously jeopardize the continued existence of a safe, healthy, clean and diverse environment. Limits to physical growth and a balance between human life and the environment are therefore essential. Pro-active land use planning is a pre-requisite for achieving the best results with socio-economic development and environmental management objectives. Such planning may serve to change the way in which local authorities operate, to exercise development control, guide capital investment programs and to evaluate development proposals in terms of desirability. It may also serve to contribute to remaking urban and rural communities in ways that will reverse the negative apartheid heritage, promote integrated land development and balance the competing needs for socio-economic development and environmental protection.

The Legislator put the public sector at the heart of the challenge to reduce poverty and promote sustainable development for the benefit of all South Africans. The key-role that

³ E.g. the National Environmental Management Act, No. 107 of 1998 (NEMA) and the Promotion of Access to Information Act, No. 2 of 2000 (PAIA).

government has to play in this regard includes the promotion of the public interest within the legal framework, *inter alia* by passing legislation, undertaking planning, performing regulatory functions in respect of land use planning and development and ensuring lawful, reasonable and fair administrative government practices. The keystone of this legal construct is accountability (i.e. being obliged to answer to an authority for one's own acts or omissions and sometimes for the conduct of others). The government bodies and their public administrations responsible for giving effect to the laws of South Africa are required to be accountable. So, for example, section 152(1) of the South African Constitution stipulates as an objective of local government that it should provide democratic and accountable government for local communities. It is a basic value and principle in terms of section 195(1) of the South African Constitution that the public administration must be accountable.

An effective system of government accountability in the public arena can provide a reasonable assurance that public power will not be abused and, where such abuse would occur, that corrective action and redress are reasonably easy to achieve. On the other hand rising unemployment, growing poverty and inequality coupled with an ineffective system of government accountability carry with it the threat of 'self-help' and socio-political instability. Unanswerable government may lead to unstable conditions endangering the democracy. Without accountability as an essential ingredient our democratic principles may be of little relevance and our fundamental rights little more than a literary fantasy. It is evident from media coverage that the manner in which the public sector uses public power and impacts daily on the quality of life of the people of this country is a matter of increasing concern.

At the heart of this thesis lies the question whether the mechanisms and processes (e.g. elections and judicial processes) available to members of the general public to enforce government accountability in respect of its statutory land use planning and management obligations, are adequate. This thesis is about government accountability in terms of the South African laws that apply within the field of land use planning and development in the Western Cape. It critically examines the issue of government accountability within that context. The emphasis is on local government, the sphere of government that is regarded as the closest to the people, the one that is required to deliver services and has as an objective

to promote socio and economic development. The accountability of the other two spheres of government is also briefly considered, but in more general terms.

1.2 MOTIVATION FOR THE STUDY

Accountability is both an important philosophical and practical issue of our day, yet has not received any noteworthy attention either in the South African literature or daily government practices. Whilst a wealth of literature has been published on sustainable planning and development, accountability has almost disappeared from the academic horizon.

The researcher joined local government as an administrative assistant during 1975 and was initially employed in a section responsible for "works and planning", mainly active in the field of property acquisitions for authority purposes. The sudden resignation of a person in charge of the low cost housing section resulted in his transfer to that section during 1976. It was his first real introduction to the fascinating world of land use planning and development. He was soon to discover that this wonderful new world was fraught with difficulties. Complex legal requirements and processes that had to be complied with, emotions ran high from time to time and clashes between the "have's" and the "have not's" were at the order of the day. The researcher attempted to be a relatively neutral observer and as such to listen to most if not all sides of the story and came to realise that the legal and administrative system within which the land use planning and development processes had to take place, was far from perfect. Often objectors believed that they were being ignored by their elected representatives. Often those who were in dire need of basic accommodation believed that the very same councillors (elected by objectors only), were unsympathetic and in no hurry to get on with the job.

The researcher subsequently worked for two other local authorities and resigned during 1987 to join the legal fraternity as an article clerk with a firm of attorneys. Whilst serving his articles he was elected as a part time non-party-political municipal councillor. Councillorship enabled him to discover the planning and development field from a completely different perspective. This time around he had to contend with angry applicants and their professional consultants on the one side and sometimes even angrier objectors and their legal advisors on the other side. In the middle were a bunch of frustrated municipal officials. Subsequently as a practicing attorney and township developer, the researcher in his regular encounters with government

witnessed many incidents that smacked of the abuse of public power or failure to act as required by law on the part of government. Usually such action would go unchallenged, often because no effective mechanisms existed to challenge the abuses. It was also at this stage that the prominent role that politicians sometimes play in the planning and development processes became more evident to the researcher.

The most striking feature of all the researcher's experiences in the field of study since 1976 pertain to the inadequacy of the available mechanisms that should ensure government accountability and the inability of the authorities to promote socio and economic development. Based on his experience the researcher regards Skjelten's claim (2006. 11) "[w]e succeeded in making a constitution *that gave us ... an accountable government - ...*" at best as partially correct only. The road to achieving government accountability is indeed difficult. It is argued that the mere existence of the present very progressive South African Constitution does not *give* us accountable government. In order to ensure a reasonable measure of government accountability effective mechanisms are at the very least required to achieve that state of affairs. The realisation that the researcher's perceptions in this regard may not be an accurate reflection of the actual state of affairs coupled with the desire to make a positive contribution to the improvement of the situation, were amongst the driving forces for this research.

As a first step the researcher undertook exploratory research of the available literature to improve his knowledge on the subject of government accountability. It also served to ensure that he would avoid repeating research previously undertaken. Although he has been in legal practice since 1987, the idea of government accountability has never featured prominently in research or work previously undertaken by him. The literature review undertaken provided valuable insights, but proved to be inadequate by itself. For these reasons the researcher also undertook exploratory research of the South African case law as well as the numerous pieces of legislation and the legal rules and principles which may potentially have an impact on government accountability, all to improve his knowledge on the subject. The results of the literature and law reviews are reflected in chapters 2 and 3 respectively. The aim with those chapters was to provide a solid theoretical and practical foundation for the assessment of the

government's accountability. The literature and law reviews were also considered necessary to assist with the selection of appropriate supplementary research questions.

Having completed the literature and law reviews, the researcher entered into the further methodological dimension of the study where he was concerned with the question: How do I attain knowledge on the subject from the perspective of the people actively involved in the land use planning and development field? The researcher supplemented his research by obtaining the views of persons active in the field of land use planning and development within the Western Cape on how accountable the three spheres of government are within the field of study. The researcher regards the opinions obtained from respondents as secondary to the findings made in terms of the literature and law reviews, but nevertheless as a reasonably clear indicator that government accountability within the field of study and the mechanisms supposed to obtain such accountability, are inadequate.

The respondents included development applicants, government officials and professional consultants. The researcher's emphasis was on obtaining the perspectives of people experienced in land use and development matters that are actively involved in that field on a daily ongoing basis. As a result, for example, town planners with a limited number of years experience, those who carried on other types of business to supplement their income from town planning and non-principals in private practice were not considered for inclusion into the target group. Part-time developers and members of the marginalised communities and objectors did not satisfy the above criteria and were also not considered for inclusion in the target group. Municipal councillors and other elected politicians were specifically excluded from the sampling frame as they were the object of the research and because the researcher had serious misgivings about the validity of responses that would be obtained from them. The researcher estimates that the number of persons that may have satisfied the above selection criteria may have been in the order of 150 persons. He managed to identify a core group of 47 persons as potential members of the target group. The perspectives of respondents are a view pieced together from the results obtained from questionnaires and personal observations. Chapter 4 aims to show how the researcher developed a theoretical framework within which the supplementary research was undertaken.

This study aims to make a contribution to the improvement of government accountability in the field of land use planning and development by adding to the existing body of knowledge on the subject, by identifying the weaknesses in the current system and by recommending specific steps to be taken to improve government accountability.

1.3 EXAMPLES OF PROBLEMS

An introductory overview was provided in par 1 of the legislative and policy framework within which the complex planning and development system in the Western Cape has to function. It is against that background that this part provides three examples of problems that ordinary people have experienced in relation to government accountability in the context of the field of study. The aim is to contextualise the researcher's pragmatic approach to the field of study.

1.3.1 Example No. 1

Mr X⁴ purchased as an investment a number of beach-front erven and then consolidated them to achieve a saving on availability charges (a form of taxation payable in respect of undeveloped erven). When market conditions improved he applied to re-subdivide the consolidated erf to achieve the exact same situation that existed immediately prior to consolidation.

Crudely stated section 36(1) of LUPO stipulates that applications for subdivision, rezoning and departures "...shall be refused solely on grounds of the lack of desirability ..." taking into consideration the effect that the proposal might have on existing rights concerned. [My own emphasis]. The LUPO provision seeks to restrict the grounds on which applications may be refused. The word "desirability" is not defined in LUPO, but the applicable provincial directives state that it relates to the compatibility of the proposed development with the character of the area.

The legislative framework within which applications of this nature must be considered remained the same at all relevant times. The applicant expected the approval of the re-subdivision to be a mere formality and problem-free, *inter alia* as most of the neighbouring

⁴ The researcher has refrained from using real names in some of the examples to protect the privacy of the individuals concerned. As the third example discussed in 1.3.3 relates to reported court cases, it was not considered necessary to do the same in respect thereof.

landowners acquired their properties before the consolidation took place and must have accepted the subdivision as previously approved. The application was first refused, but on appeal approved by the municipality. However, more onerous building lines (i.e. the distances from the erf boundaries within which no building work may be undertaken) were imposed in respect of the subdivided erf than those that applied originally, leaving a smaller area that could be developed. The result was that a much larger area of the property had to be kept free of any building work. However, the more onerous building lines with which the applicant was required to comply, were not made applicable to any of the other remaining undeveloped erven in the residential estate concerned.

1.3.2 Example No. 2

The consolidated zoning scheme which the Helderberg Transitional Council approved to *inter alia* replace the applicable 1947 zoning scheme discussed in par 1.1, provided for an increase of the bulk factor of erven in a certain area from 1.6 to 3.2. It is generally recognised that outdated zoning schemes often promote urban forms no longer seen as desirable. In addition local government is required in terms of the DFA and provincial policy directives to promote land development that optimizes the use of existing resources and contribute to the development of more compact towns and cities. Although the Helderberg Transitional Council failed to obtain provincial approval of the consolidated scheme as mentioned above, one might have expected the City of Cape Town (that succeeded the transitional council) to be amenable to favourably consider applications for relaxing the 1947 bulk factor restriction.

Two owners of erven situated roughly 100 m apart in the same road within the Strand in which the increased 3.2 bulk factor would have applied if the provincial government would have approved the consolidated zoning scheme, intended erecting blocks of apartments on their respective properties. They applied for departures from the applicable bulk restriction of 1.6 as set out in the 1947 Strand Zoning Scheme. The applications were advertised and no-one objected to the first application. A neighbour objected to the second application.

A municipal official approved a bulk factor of 2.6 under delegated authority for the unopposed application. The municipal committee that considered the opposed application refused an increase in the same bulk factor that applied from 1.6 to 2.1 in respect of the second

application. An appeal against the refusal was subsequently lodged. The municipal appeal committee dismissed the appeal, decided to enforce the 1947 zoning scheme and disregarded the DFA principle calling for the promotion of more compact cities. A subsequent appeal to the provincial government against the decision of the municipal appeal committee was upheld and the departure applied for, was approved. It took more than two years to achieve that result. During the month of September 2009 a notice board was erected on the property concerned, confirming that it will be sold in liquidation. The favourable decision of the provincial government could not rescue the “would-be” developer from financial ruin.

1.3.3 Example No. 3⁵

Section 42(2) of LUPO empowers the decision-maker to impose conditions of approval relating to the “cession” of land which is “directly related” to the needs arising from the approval concerned for the provision of engineering services to the property. LUPO fails to specify what norms and standards apply for a determination in this regard or how one is to go about to establish whether more land has been required by the local authority than warranted.

A company lodged land use applications with a municipality for the development of its property. The municipality approved those applications. At the time a regional feeder-collector road with a 32 m road width, that would partially cross a portion of the company’s property, was contemplated by the local authority. Normally a road reserve of 16 m for internal residential roads is regarded as adequate. The company was therefore prepared to give off a 16 m strip of land that would accommodate one half of the regional road, once constructed, as it would also serve to provide access to the company’s property. However, the municipality required as a condition of approval that a 32 m strip of land should be given off to the authority free of compensation for road purposes.

The company knew of many decisions in terms of which our courts have consistently ruled against authorities that attempted to take land without compensation. However, the company decided against lodging an appeal against the above-mentioned condition. It knew from past experience that appeals to the provincial authority could take more than a year to finalise, that an appeal would suspend the approval and that an appeal would imply that whilst the

⁵ Helderberg Park Development (Pty) Ltd v City of Cape Town and Another: Supreme Court of Appeal Case Number 291/07.

company had to continue servicing the development bond, it would not be able to do anything on site for at least a year or more. Although the company did not lodge an appeal in respect of the requirement, it indicated to the municipal officials that the condition was regarded as *ultra vires* and continued with the development in phases. It also instituted action against the municipality in the Cape High Court to obtain compensation for one-half of the area which it was required to make available for the planned external road.

The Cape High Court subsequently upheld the company's claim for compensation for the land concerned. The City of Cape Town appealed to the Supreme Court of Appeal against the decision of the Cape High Court. The SCA *inter alia* (a) reduced the amount of compensation ordered by the court below; and (b) held that, as the company had a choice whether or not to develop and elected to develop, it could not be said that the manner in which the municipality acquired the additional land amounted to expropriation. No mention was made of the fact that the municipality exceeded its powers by requiring more land than that to which it was entitled, without compensation and that the company did not really have a choice not to develop or to first appeal, as these options had very high financial costs. The Constitutional Court refused to hear the matter as "there was no reasonable prospect of success" in challenging the SCA judgment.

In example No. 1 the prospect of Mr X succeeding with an appeal to the provincial government was regarded as slim as "beach front" property owners' smack of exclusivity, a concept not sitting comfortably with those in government. Yet it can hardly be suggested that the onerous building lines imposed in respect of the applicant's property on municipal appeal is fair. Those that have objected to the subdivision were not required to comply with more onerous building lines. That onerous requirement implied a potential violation of the applicant's right to equal treatment. In example 2 the enforcement of the outdated land use restriction combined with the disregard of the DFA principle calling for more compact towns, could not be described as unbounded faith in the rationality of the zoning instrument. Value-free objectivity clearly did not prevail. The appeal to the provincial government regarding the municipal refusal for increased bulk did eventually enjoy success, probably because the proposal would have served to discourage urban sprawl. It was an empty victory, however, as the applicant faced liquidation by the time that a positive decision was taken. In example 3

the company had one option only, namely to accept the refusal of the Constitutional Court to hear the matter.

The results obtained in the three examples are bewildering and serves to discourage development. It falls outside the scope of this thesis to explore the different theoretical approaches and theories⁶ that may potentially explain the confusing decisions. The inconsistency of the authorities in dealing with land use planning applications is clear from those examples. The practical question remains why numerous aggrieved applicants still do not exhaust their internal remedies or approach the courts for relief. Possible reasons for their failure to take such action will become clear from the law review in Chapter 3.

1.4 PROBLEM DEFINITION

The Grootboom Constitutional-case⁷ serves as yet a further example of the type of problems experienced by ordinary people in relation to government accountability in the context of land use planning and development. Many years of government failure to undertake adequate and timeous land use planning and development to cater for the most basic needs of the poor resulted in the appalling conditions under which a large number of people are living in South Africa. Mrs Grootboom was one of a large group of people illegally occupying land earmarked for low-cost housing. They were forcibly evicted from the land, their shacks were bulldozed and burnt and their possessions destroyed. The Cape of Good Hope High Court ordered all three spheres of government immediately to provide them with tents and certain rudimentary services. That decision formed the basis for an appeal to the Constitutional Court, raising the state's obligations under the South African Constitution and concerned questions about the enforceability of fundamental rights. The Constitutional Court judgment that followed made it clear that although the state is required to give effect to those rights, the question is always whether the measures taken by the state to realise the constitutional rights are *reasonable*. The court found that the local authority programme in force at the time fell short of the state's constitutional obligations and ordered the responsible authority to devise and implement a programme that would also provide relief for the people who had not been catered for in the initial local authority programme.

⁶ E.g. the modern and post-modern approaches and complexity theory.

⁷ Grootboom judgment 2001(1) SA 46 (CC).

The Constitutional Court judgment could be regarded as a victory for justice. Yet it was an empty victory for Mrs Grootboom who died eight years after the judgment was handed down, still occupying her shack. The importance of her story is that it raises a critical question about accountability; whether the current mechanisms for achieving effective government accountability are adequate. If not, it may be the Achilles-heel of our new democracy. Meredith gives many examples of the results of unanswerable authority in Africa.⁸ Every reasonable endeavour should be made to avoid a repetition in South Africa.

In the researcher's experience government is often permitted to abuse public power without risk of any challenge from members of the public. It raises the question why members of the public so often are not prepared to do anything in an attempt to curb the abuse of public power. The large number of reported court cases dealing with the abuse of public power may seem to indicate that there is indeed many members of the public that do take up the challenge. The researcher argues that the reported cases only represent the proverbial ears of the hippopotamus. This is so because numerous factors militate against the use of judicial processes to curb the abuse of public power.⁹ The reported court cases do, however, serve to confirm that a significant degree of maladministration exists in government. It raises the further question whether, in the face of maladministration persisting and apparently increasing, the judicial and legal mechanisms available to achieve government accountability should not perhaps be described as materially ineffective and defective.

It is known that a reasonably large measure of dissatisfaction and discontent exist amongst a substantial proportion of the public regarding the manner in which government continues to act or fails to act. In these circumstances one would have expected higher voting percentages in elections. The relatively low voting percentages may indicate that the electorate do not regard elections as an effective mechanism for obtaining government accountability. The more people that regard the existing mechanisms aimed at achieving government accountability as ineffective, the higher the likelihood of non-accountable government.¹⁰ The less accountable government is, the more likely one is to encounter violence and other forms

⁸ Meredith (2005).

⁹ See chapter 3 for a discussion of these factors, such as the high costs of litigation, the complexity of the legislation, principles and other stringent legal requirements that have to be complied with and the unwillingness of the courts to intervene as a result of the doctrine of separation of powers.

¹⁰ See argument of Adejumobi (2000: 11) in 3.5 above.

of 'self-help' to counter the impact of the abuse of public power. Counter-actions may disrupt peace, stability and orderly government processes.¹¹ A healthy democracy requires an environment of peace and stability and an answerable government is unlikely to maintain such conditions of peace and stability. In essence, if government is unanswerable, fundamental rights such as those contained in the Bill of Rights will be unenforceable and meaningless.

1.5 RESEARCH OBJECTIVES

The main objective of this research was to establish what exactly is meant by the constitutional requirements that local government and the public administration should be accountable and more particularly, to explore, describe and explain the available mechanisms for achieving government accountability and to assess the effectiveness and adequacy of those mechanisms. This required thorough literature and law reviews (including a review of the South African case law). These exploratory studies *inter alia* aim (a) to provide an understanding of the accountability requirements found in legislation; (b) to provide an understanding of the available mechanisms for achieving government accountability; (c) to identify the reasons behind the perceived weaknesses of those mechanisms; (d) to describe the key challenges which one is likely to face and the guiding principles one should employ in a quest for improved government accountability; (e) to make suggestions as to solving accountability problems; and (f) to contribute to the existing body of scientific knowledge regarding government accountability.

Secondary objectives of the research are to assess the current state or measure of government accountability within land use planning and development context from the perspectives of people actively involved in the field of study and to test the existing theories and explanations found in the literature.¹²

¹¹ Meredith's overview (2005) of occurrences within Africa over the past fifty years paints a truly horrifying picture where opportunities have invariably been squandered and predatory opportunism combined to create a downward spiral of human suffering and mayhem.

¹² Mouton (1996: 119) refers to it as "embedding" or incorporating one's research into the body of knowledge that is pertinent to the research problem being addressed.

1.6 THEORETICAL FRAMEWORK AND RESEARCH QUESTIONS

Surprising little research has to date been undertaken in South Africa in the field of government accountability. In addition to the vacuum existing in the local literature, the researcher faced three major perplexing questions in considering the research methodology: how to measure the effectiveness of the available mechanisms intended to promote government accountability; how to locate the major weaknesses in the field of government accountability; and how to ensure that the data obtained would be valid and reliable. No objective criteria exist for such an exercise. Even if it did, the analysis might have failed to identify the exact weak points in the system. The researcher settled on the idea of using the perspectives of persons in a target group identified as described above, as the best available indicator of the measure of effectiveness of the available mechanisms for government accountability. In addition the study aimed to locate the major weaknesses in the field of government accountability in order that meaningful recommendations could be made regarding steps to be taken to improve accountability at the local level.

The need for the study arose out of a lack of basic information on the constitutional requirement of government accountability. The research attempted to find answers to the following and related questions - what are the legal requirements relating to government accountability; what are the key mechanisms currently in place to promote government accountability; what is the role of our courts and public participation in the accountability process; are the available mechanisms adequate to ensure a reasonable measure of accountability; if inadequate, what are the main reasons behind the failure of the existing mechanisms; what could be done to overcome those weaknesses and to improve the system of government accountability in planning and development context? The first aim was to become conversant with basic facts and to create a general picture of what accountability is all about, to extend the knowledge base and understanding of government accountability.

1.7 RESEARCH METHODOLOGY

The problems experienced in the field of land use planning and development, as highlighted by the examples discussed above, raised the critical question whether the current mechanisms for achieving effective government accountability were adequate. The research provided a contextual analysis of government accountability in the planning and development

field within the Western Cape. It was therefore subjective and exploratory in nature. For this reason a qualitative (as opposed to a quantitative) approach was used.¹³ The research followed the methodology of first undertaking thorough literature and law reviews, supplemented by the development of a questionnaire.

The literature review firstly involved an attempt to identify all literature concerning government accountability held at the Stellenbosch University Library and available in the electronic media. It was followed by a thorough study of the literature thus identified and a critical assessment of the many opinions expressed by the learned authors concerned. The researcher *inter alia* examined the theoretical models used to describe the mechanics of elections, the purposes that elections supposedly serve and the effects of particular institutional arrangements on voters' control over politicians. The discretion with which elected office-bearers are endowed and the essential role of public participation in the processes of government were explored.

The law review involved the identification and study of the many South African laws applicable in the land use planning and development context in the Western Cape. It was followed by the identification and study of potentially applicable reported judgments handed down by the South African superior courts over the years. The law review included a study of law text books dealing with matters related to government accountability, such as the doctrine of separation of powers, the rules governing the interpretation of laws and justiciability requirements. These matters are discussed in more detail in chapter 3.

Through the literature and law reviews the researcher became more conversant with basic facts relating to government accountability, managed to create a general picture of what government accountability was all about and established what mechanisms were available to achieve such accountability. Those reviews enabled him to locate perceived major weaknesses in the field of government accountability.

Against that background the researcher decided to place reliance on the perspectives of persons active in the field of study to serve as an indicator of the major weaknesses in the

¹³ See Mouton (1996: 35) for a discussion of the two methodological paradigms.

field of government accountability within land use planning and development context. The researcher elected to use a questionnaire as an indirect measuring instrument for purposes of data collection. His choice was motivated by the desire to avoid direct interaction and to create distance between him and the participants in order to hopefully reduce any influence that he otherwise might have exerted on answers provided by participants. A list of characteristics denoted by the concept "accountability" for purposes of measurement was compiled, based on the knowledge gained in the process of the literature and law reviews. This was followed by compilation of a list of questions that were assumed to be elements of the phenomenon called accountability and presenting them to a sample of individuals in a questionnaire, from which the researcher could gain an overall impression.

Since this research provided a contextual analysis of accountability, it was subjective in nature. The data obtained was mainly qualitative in nature. Secondary sources of data included case law and since the researcher was active in the field of study, information obtained from his direct observation in his working environment was used to perform a control function for qualitative data obtained from respondents, not to serve as basis for such findings. The researcher used "content analysis" as the data analysis method, as this was considered to best reflect how government accountability appeared from a 'bottom-up' perspective. Deduction logic was used and the study outcome was expected to be a basic or fundamental one. Further particulars regarding the approach used by the researcher in his supplementary study and the assumptions and limitations that applied in the research, will be discussed in more detail in chapter 4.

1.8 GLOSSARY

Abstract terms, multiple and dissenting perspectives and ideological positions abound in accountability language. Most of the terms that one encounters when exploring the concept of accountability and key concepts for purposes of this thesis (e.g. *planning*, *development* and *sustainability*), are contested concepts. A comprehensive overview of the emergent history, meanings, scope and functions of those concepts is beyond the scope of this thesis. Practical considerations do not allow the luxury of engaging fully with the very many fascinating debates in respect thereof. Suffice to acknowledge that the meanings assigned to the

following words are necessarily incomplete, that it may be regarded as too narrow interpretations, representing a limited perspective and may not be appropriate to all contexts.

As a point of departure the following words and phrases have the following meanings in this thesis, unless the context otherwise indicates.

"*accountability*" means being obliged to answer to an authority for one's own acts or omissions and sometimes for the conduct of others and to "own your results" and "*answerability*" carries the same meaning;¹⁴

"*direct accountability*" means that the agent is obliged to answer to the principal directly for the agent's own acts or omissions and sometimes for the conduct of others serving below the agent in the government (e.g. elected office-bearers are accountable to the legislatures);

"*legal accountability*" means being obliged to answer to a court for one's acts or omissions and may include civil and criminal liability;

"*horizontal accountability*" entails that the democratic institutions or separate public powers of government, respond and render accounts to one another;

"*mediated accountability*" means indirect ways of accomplishing accountability between the agent and the principal, such as via the electoral process;

"*vertical accountability*" refers to the relationship between the principal and the administrator (e.g. between those elected and the electorate or within a particular government hierarchy);

"*administrative action*" generally means any decision taken, or failure to take a decision, by-

¹⁴ Australasian Study of Parliament Group (2006).

- (a) an organ of state, when exercising a power in terms of the South African Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation; or
- (b) a person or body, other than an organ of state, “when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person, and which has a direct, external legal effect”;¹⁵

"*administrator*" means an organ of state or any natural or juristic person taking administrative action¹⁶ in the exercise of public power and includes elected and appointed office bearers (such as ministers and municipal councillors), political structures (such as mayoral committees) and officials;

"*agent*" means the elected candidate, government body and officials in the public administration that must give account to the principal;

"*consent uses*" means land uses which are not primary use rights attaching to a property, but which may in the discretion of the competent authority be permitted;

"*culpability*" means being blameworthy and may include liability for damages;

"*development*" in relation to land use and as used in this thesis in a narrow sense, means to construct something on land or to convert the use of land to another purpose (i.e. physical land use) and may include, as part of a broader concept of development, economic,¹⁷ human,¹⁸ and social¹⁹ development;

"*field of study*" means the field of study of this thesis, namely government's accountability within the land use planning and development context in the Western Cape;

¹⁵ See section 1 of the PAJA for a complete definition covering more than half a page.

¹⁶ As per section 1 of the PAJA.

¹⁷ I.e. the upward movement of an entire social system, which includes both economic and non-economic elements (Seasons.1994: 10).

¹⁸ According to Burkey (1993: 35) development must begin with human (personal) development.

¹⁹ Social development includes investments and services carried out or provided by a community for the mutual benefit of that community, such as health services and facilities.

"*government*" includes the spheres of government, the organs of state within each sphere of government, and the public administration that supports it;

"*jurisdiction*" means a court's competence to adjudicate on and dispose of a matter;

"*organ of state*" means "any department of state or administration in the national, provincial or local sphere of government" or any other functionary or institution "exercising a power or performing a function" in terms of the South African Constitution or a provincial constitution or any other legislation, "but does not include a court or a judicial officer";²⁰

"*planning*" in relation to land use means the purposive activity of working out in advance a detailed scheme for land use management and the accomplishment of land use objectives;

"*planning law*" means the statutory devices employed by the Legislatures to manage and regulate planning and development;²¹

"*principal*" means the authority to which the administrator must give account, which includes all ordinary members of the public;

"*public*" means each and everyone inside the boundaries of South Africa and may even include citizens travelling outside the country, whether singular or plural, whilst "public power" refers to the power of government as provided for in law;²²

"*public administration*" means that part of government which manages public affairs;

"*public power*" means a power which an organ of state may exercise or a function that it may perform in terms of the National Constitution, a provincial constitution or any other legislation;

²⁰ Compare section 239 of the Constitution.

²¹ A term coined by Van Wyk (1999: 81)

²² The term "public" is preferred above "citizen". Citizen denotes a person who has full rights in a state and excludes visitors to the country. Our Constitution distinguishes between a *citizen* (e.g. section 19) and "everyone" or "no one". See fundamental rights in the Bill of Rights.

"*responsibility*" means the sphere or extent of the duty which has been entrusted to one by way of assignment or delegation and refers to the "charter powers entrusted to government" (Dunn, 1999a: 299);

"*rezoning*" the change of the permissible land use from one purpose to another (e.g. from residential to commercial purposes) in terms of legislation such as LUPO;

"spatial planning" refers to comprehensive planning undertaken for the physical organisation of space (i.e. to influence the distribution of people and activities in space) by way of geographical expression to an overall strategy derived from various government policies and directed towards balanced development and includes land use planning;

"*spheres of government*" means the national, provincial and local spheres of government and include all organs of state within each sphere;

"*state*" means the legislatures, the executives, the judiciary and all organs of state, including all the elected office bearers in government and staff in the public administration;

"*sustainable development*" in relation to land use development means efficient and equitable physical land use "within the physical limits of the ecological systems of the earth sustaining it" aimed at making it possible for everyone to acquire the basics of food and improve their quality of life;²³

"*sustainable planning*" means to strike a balance between the many competing interests in the ecological, economical and social fields in a planned manner and to provide a clear pathway or direction in which to move or direct growth or progress that will offer the best chance of achieving sustainable development;

"*zoning*" means a category of provisions stipulating the permissible land uses within that category and "*zoning scheme*" means legislation adopted by the authorities to regulate land uses.

²³ Hattingh, 2001: 6.

1.9 DIFFERENT TYPES OF ACCOUNTABILITY

Many different types of accountability are encountered in the literature, ranging from accountability of pet food companies to accountability in the religious context. This thesis focuses on the category government accountability. Within that category there are many sub-types of accountability, such as democratic, public, political or electoral accountability (which may basically be the same thing), legal accountability and social accountability (see glossary). The differences between the types of accountability are not of much practical significance. They are all important in their own right. The important fact is that effective government accountability is unlikely to be achieved if reliance is placed on one type of accountability mechanism only.

Democratic accountability, to be accomplished via the electoral process, is always mediated and never direct. Mediated accountability may be explained by reference to the relationship between the voters and the elected representatives, that can be described as a multilinked chain of accountability. The elected agents are only indirectly accountable to the principals. In our democracy the elected office-bearers are accountable to the legislatures. The legislatures are in turn accountable to the broader public through elections. Their accountability is at best mediated. If the electoral mechanism of accountability were to be employed when a municipal official has abused public power, it would imply that the aggrieved party would have to wait until the next election to sanction the elected representative for the action of the non-elected official. Overall appointed government officials are then relatively unaccountable to the electorate. This thesis argues that a more direct form of accountability (as opposed to mediated vertical accountability between administrators and members of the public) is essential to make government officials answerable to the public.

A distinction is *inter alia* made between horizontal and vertical accountability. *Horizontal* accountability would include accountability amongst the three spheres of government who, theoretically at least, is supposed to be on the same level. In this thesis the importance of horizontal accountability lies therein that some of the spheres of government have constitutional supervisory rights in respect of other spheres of government (see for example section 155(6) of the South African Constitution). Such accountability also comes into play if,

for example, the national or provincial spheres of government should exceed their limited legislative powers concerning municipal planning. This they would do if they went beyond monitoring and support of local government as contemplated in section 155(6)(a) of the South African Constitution. *Vertical* accountability is first of all the hierarchical types of accountability found in organisations where those in lower positions are answerable to those higher up in the ladder. Ironically the accountability of elected and non-elected administrators to members of the public is also a form of vertical accountability and it is this relationship which is the main focus of this thesis. The accountability required in this relationship is primarily in response to human rights and sustainable land use concerns.

Practical considerations dictated that this thesis has a narrow focus. Firstly it is only concerned with government's accountability in land use planning and development context within the Western Cape. Secondly its main focus is consideration of government accountability from a 'bottom up' perspective, vertical accountability towards the public. Thirdly the focus is primarily, although not exclusively, on the accountability of appointed administrators (as opposed to elected representatives) as they take by far the most number of decisions in the government sphere that impact on the daily lives of people in this country. Obviously government accountability is much wider than that, encompassing major elements such as "horizontal accountability", the procedures and institutional arrangements to induce political representation (e.g. the 'no-confidence' mechanism), the role of checks and balances between government and the parliament (e.g. ministerial accountability) and so forth. These latter issues have either been relegated to the background or have not been discussed at all in order to focus this thesis.

1.10 FURTHER ACCOUNTABILITY MECHANISMS

Accountability mechanisms are not restricted to elections and judicial processes. In law it is for instance possible through administrative measures to promote accountability (e.g. internal appeals) and provision also exists for alternative approaches that may be employed when the formal accountability mechanisms fail (e.g. demonstrations and service delivery protests). A number of state institutions were also established to strengthen constitutional democracy in the Republic, such as the Public Protector and the Electoral Commission. In order to focus this thesis only an overview was provided in Chapter 2 of administrative courts and in Chapter

3 of administrative measures and alternative approaches for attaining government accountability. For the same reason practical constraints dictated only a brief reference to those state institutions in Chapter 3, without detailed examination.

Public participation in government processes is an essential mechanism and ingredient for achieving government accountability within the field of study. The mechanisms provided for achieving government accountability are primarily intended for use by members of the public. The essential role of public participation in the processes of government will be explored in Chapter 2, whilst the different mechanisms provided through legislation for promoting government accountability will be discussed in more detail in Chapter 3.

1.11 THESIS STRUCTURE

This thesis is divided into five chapters, of which this introduction is the first. Each chapter commences with an overview or brief introduction, a description of the purpose of the chapter, followed by a more detailed body and a conclusion.

Chapter 1 provides a brief background to the topic, emphasising the important role of accountability in curbing the abuse of public power. It provides a problem definition and describes the research objective and theoretical framework within which such research had to be undertaken. Examples were given of cases that the researcher regards as typical of everyday experiences of people active in the field of study. Those examples have led to the development of a supplementary study and the identification of gaps in the literature, discussed below. Several research questions were raised and the theoretical framework and research methodology employed in the study were discussed. Chapter 1 incorporates a glossary.

In Chapter 2 a literature review related to the research problem was carried out to illuminate the idea of accountability in general, to provide a solid theoretical foundation for the assessment of the government's accountability in later chapters and to review some of the basic concepts underlying accountability. Practical considerations dictated that this thesis has a narrow focus as described above. Chapter 2 commences with a conceptual analysis of the term "accountability" and explores the notion of accountability with reference to its

philosophical underpinnings. It explores the substance, dimensions and processes of accountability within the context of elections, the essential role of public participation in the processes of government and the limitations to accountability within democratic institutions. Chapter 2 provides a brief overview of administrative courts as employed abroad to obtain a measure of government accountability.

Accountability must take place within a given legal framework. Chapter 3 provides an overview of some of the Constitutional provisions aimed at establishing and strengthening democracy in South Africa. The researcher observed in his literature review that the literature from abroad on accountability shows a distinct disregard for legal questions. To overcome this blindspot the researcher included in chapter 3 an overview of our judicial system and available judicial processes and highlighted some of the more important shortcomings of the court system as an accountability mechanism. This overview was considered necessary for the proper interpretation of the data collected in the study.

Chapter 4 provides further particulars of the researcher's approach to the supplementary study that was undertaken to establish whether others active in the field of study also viewed government as unaccountable within the field of study. Attention was invited to some of the assumptions underlying the research questions, pointing to the existence of limitations that might potentially prevent one from attaining the truth. It describes the actual process of fact-finding involving a target group, provides analyses of the data obtained, describes and discusses the research findings and relates the findings to the literature and law reviews.

Chapter 5 describes the contemporary position of government accountability in the field of study on the basis of insights from practical examples. It explores contextual challenges, such as understanding the complexities of accountability and reflects on the problems of diversity and clashes of interests, in the context of the problems experienced and the difficulties that arise with accountability in the Western Cape. Consideration is given to the changes required to achieve and maintain effective government accountability. Key challenges facing those who wish to achieve a continuous improvement in effective accountability to the local population have been described. Suggestions are put forward in chapter 5 on interventions required for promoting genuine government accountability. The intention is to consider how

practical effect can be given to the right to accountability without the need to rely on social movements and resort to alternative methods. The need for urgent action to improve accountability of all three spheres of government within the stated context was highlighted. This thesis calls for a radical reformation of the current approach to government accountability, involving *inter alia* the establishment of a new structure empowered to enquire into the merits of decisions taken by public authorities. It concludes by recommending a people-driven bottom-up incremental approach for achieving effective government accountability and by making suggestions for future research.

1.12 CONCLUSION

This thesis is concerned with the measure of government accountability within the Western Cape within the context of land use planning and sustainable development, as described above. The main objectives of this Chapter was to introduce the topic of government accountability, to clarify the meaning of some of the concepts encountered when exploring the concept of accountability, to provide the motivation for the study, the problem statement and research objective, to sketch the theoretical framework for the study, to report on research related matters and to describe the structure of the thesis.

CHAPTER 2: LITERATURE REVIEW

2.1 INTRODUCTION

Chapter 1 provided a brief background to the topic of government accountability and emphasised the important role of accountability in curbing the abuse of public power. In this chapter a conceptual analysis of the notion of accountability and a literature review of selected concepts are undertaken to ascertain the current state of knowledge regarding government accountability. It would appear from the literature discussed in this chapter that government accountability is primarily based on democratic accountability through elections, although further methods such as administrative and legislative measures are also employed to achieve government accountability. This chapter examines the theoretical models used to describe the mechanics of elections, the purposes that elections supposedly serve, the effects of particular institutional arrangements on voters' control over politicians and the discretion with which elected office-bearers are endowed. The writer sought to expose the substance of democratic government accountability. Some of the basic concepts and assumptions underlying accountability and the theories are explored to identify potential gaps in research undertaken to date and to frame appropriate research questions.

Internal and external dimensions of government accountability are distinguishable. Elections, the role of parliament, other local dimensions such as revitalising²⁴ and reconfiguring the state institutions and expanding the scope of civil society activities are all internal dimensions of government accountability. Contested elections fall short of being a sufficient condition for accountability (Dunn, 1999a: 334). Engendering accountable governance must take a wider range of transactions than giving or withholding one's vote. Therefore the other internal local dimensions that are germane to evolving accountable government are critical when considering ways and means of improving government accountability. Public participation by the governed in their government is a critical component of government accountability and the cornerstone of democracy. It therefore is an essential ingredient of planning and development (see par 2.4 below). Abroad administrative courts also offer the opportunity for the public to obtain government accountability and a brief overview of those courts will be provided in par

²⁴ It includes law reform, insulation from undue political influence, capacity building, decentralisation and reduction of external control and influences. Adejumobi, 2000:7.

2.6 below. In Chapter 3 the legal framework within which democratic accountability should be accomplished (including the statutory devices employed to promote government accountability) is explored. The statutory devices are supplemented by government policies *inter alia* aimed at promoting transparency, oversight by citizens and pro-active planning, some of which have been discussed in par 1.1.

The external dimensions of accountability include accountability to and of donors, agencies, quasi-autonomous non-governmental organisations and so forth (Adejumobi, 2000: 12; Bouckaert & Peters, 2004: 22; Talbot, 2004: 6). The potential negative impact of those external influences on government accountability warrants consideration as part of developing an overall strategy to improve government accountability. The major emphasis in the literature from abroad on accountability and the narrow focus of this Chapter is on the role of elections as a dominant process to achieve accountability in the public sphere and, to a lesser degree, on administrative courts. In order to focus the thesis the other internal and external dimensions of accountability were therefore not examined.

The examination of the literature aims at understanding what activities or performance government is accountable for, the nature of the citizen's instruments for sanction or reward, and whether or to what extent elections are sufficient to induce government to act in the interests of citizens. Certain gaps in the literature are identified and a number of examples are described that raise particular concerns about government accountability.

2.2 THE NOTION OF DEMOCRATIC ACCOUNTABILITY

This section explores the notion of democratic accountability. According to the literature it is to be achieved via the mechanism of elections. The public power relationship in which accountability is embedded, the meaning of accountability and the related concepts of *responsibility*, *representivity* and *responsiveness* are considered. The notion of accountability is explored with reference to its philosophical underpinnings in political theory. Limitations to accountability within democratic institutions are considered and questions are raised regarding the validity of the theories advanced in the literature.

2.2.1 Meaning of accountability

Three near synonymous terms, *accountability*, *responsibility* and *answerability*, provides a starting point for arriving at an operational definition of "accountability". An examination of the meaning of the concept of accountability essentially requires simultaneous consideration of the meanings of the other two terms. Elster (1999: 255) confirms that these terms are essentially defined through each other. Accountability is also tied up with other concepts such as blame, liability and punishment. Examination of the terms of *responsibility* and *answerability* in turn leads to further terms to be explored, such as the concepts of *representivity* and *responsiveness*. *Responsibility* and *answerability* have been briefly defined in the glossary. A more detailed analysis of the terms *responsibility*, *representivity* and the requirement for *responsiveness* is undertaken in this part.

Accountability is an ambitious yet vague concept with several different and divergent meanings. It defies simple definition. It can serve conflicting agendas and means different things to different people and organisations, depending on their values or the ideological stance adopted. In its most basic sense accountability means to be answerable for one's actions or behaviour (Dunn, 1999a: 298). In a narrow sense it suggests the act of accounting for something, of providing an explanation, reason or justification for something.

"As with all contested concepts, there is a shared core meaning of accountability. It is linked to the meaning of responsibility" (Lakoff & Smith, 2007: 2). It implies that one has a responsibility and may be required to account for one's own conduct or the conduct of others. An administrator who is responsible can be made to answer for not acting in accordance with that responsibility. That is where the commonality ends. Responsibility in turn implies the existence of a power relationship between the one being required to give account and the one to who account is to be given. One could think of accountability in this sense as a relation of power between members of the public and administrators, as an 'interactive game' (Dunn, 1999b : 335).

Accountability is sometimes used synonymously with concepts such as liability and responsibility (Dutch, 1966: 367 par. 917). It is argued here that accountability must also be understood in a broader sense of *liability*, that 'answerability' implicitly includes the idea of

liability. The mere explanation of what went wrong and why would, on its own, be meaningless. An idea contained in the concept of accountability is that, once the account has been given and taken, something can be done if such an account is not satisfactory. This "something" which can be done in respect of unsatisfactory account-giving could, for example, take the form of redress or corrective action. In order to be meaningful, accountability for unsatisfactory account-giving should lead to either avoidance of a repetition of problems and/ or improvement of the situation in respect of which account has been given. This can, for example, be achieved by termination of the culprit's employment contract.

2.2.2 Context: Public power relationship

The specific context within which accountability is embedded qualifies it. In the chosen context accountability is an aspect of governance and relates to problems in both public and private worlds. The specific, narrower focus of this thesis is the exercise of public power by those in positions of authority within the three spheres of government in the field of study.

Democracy is generally recognised as a system through which rulers are elected. The proposition relies on the arguments that democracy is a system that is supposed to bring about rule according to the will of the people because it requires accountable government and that accountability is enforced by elections (Fearon, 1999: 82).

The agency model is dominant in literature concerning democratic accountability.²⁵ In terms of that model accountability is conceived as a relation between two parties, namely the agent and the principal (see glossary). Ferejohn (1999: 134) refers to at least two applications of this model in a democracy; firstly the relationship between the voters and the elected politicians is conceived in principal-agent terms and secondly such a relationship also exists between the executive branch and the legislature. The literature review is concerned with the relationship between voters and the elected politicians, as the agency model does not apply to the relationship between the public administration and the voters. Within the relation between voters and the elected representatives the 'agent' is regarded as being accountable to the 'principal' if the agent is empowered and obliged to act in some way on behalf of the

²⁵ E.g. Ferejohn (1999: 134), Maraval (1999: 155) and Stimson (1999: 199).

principal and the principal is empowered by formal or informal rules to hold the agent effectively liable or reward the agent (Fearon, 1999: 55-6; Dunn, 1999b: 334).

Public power may be exercised in many ways. The promulgation of legislation, the adoption of zoning schemes and the approval or refusal of land use applications serve as examples. Understandably the activities of administrators impact on a daily basis on the quality of the lives of everyone in South Africa, both directly and indirectly. It may take the form of environmental impacts (e.g. approval of insensitive development or failure to impose appropriate conditions of approval to ensure mitigation of negative environmental consequences). It may also take the form of economic impacts (e.g. resulting from the approval of inappropriate development on a neighbouring property) and socio-economic impacts (e.g. job creation resulting from implementation of approved development). In terms of their instruments of control the prior approval of the competent authorities are required for undertaking controlled activities. Those authorities may impose excessively onerous conditions when granting approval that may have dire financial consequences for applicants, if acted upon.

The activities of administrators must also be understood to include *inactivity*,²⁶ in the sense that the failure or refusals to act by those in positions of public authority also constitute "activity". If, for example, an applicant has funded the acquisition of land by raising a loan, the failure of government to process a development application within a reasonable time period will result in the applicant being required to service interest payments on the development bond for an extended period. Such inactivity on the part of government may therefore have dire financial consequences for the applicant.

The exercise of public power may call for the interpretation of applicable legislation, zoning schemes, planning documents and policy directives and usually involves the exercise of discretion. This is especially so when contested applications are assessed and conflicting views have to be evaluated. It would appear from media coverage that people from all walks of life are increasingly concerned as to how well the administrators are using public power

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E.g. section 6(3) of the PAJA provides for the right to apply for judicial review in the event that the authority concerned fails to take a decision within the time period specified in the applicable legislation.

and how wise they exercise discretion in these circumstances. Accountability is at the heart of these concerns.

2.2.3 Responsibility examined

Returning now to the concept of 'responsibility', it is useful to examine the meanings, pre-requisites and implicit requirements in its definition. Basically responsibility implies having to respond when questioned. With responsibility then comes accountability (Lackoff & Smith, 2007: 5). Responsibility itself is contested and has different meanings. In the USA, progressives and conservatives, for example, "mean systematically different things when they use the word" (Lakoff & Smith, 2007: 3). To progressives it would mean social as well as personal responsibility - responsibility for oneself (i.e. personal or individual responsibility) and everyone else who could be harmed by the administrator's action or failure (i.e. social or public responsibility). To conservatives it usually means individual responsibility only. This thesis considers the conservative approach as insufficient for achieving effective government accountability and supports the broader progressive approach.

Empowerment (i.e. the authority to perform certain acts) is a pre-requisite for responsibility. Without such empowerment there is no requirement for action. In the absence of legislation providing anything to the contrary, the accountability of administrators is generally limited, consistent with their direct responsibilities. Administrators are generally not accountable for matters over which they have no authority.²⁷ It is the act of empowerment that establishes the relationship between the administrator and the principal (Burke, 1986 cited by Dunn, 1999a: 299.). Empowerment may take place through instruments of appointment, assignment or delegation of authority. The individual or body that makes such appointment, assignment or delegation of authority (e.g. the municipal council or the legislature) will be the principal in those circumstances.

A further dimension of the concept of responsibility is *acceptance* of the responsibility of the authority granted by the administrator, and discretion to act on that authority. (Dunn, 1999a: 300). Acceptance of responsibility is implicit in the administrator's acceptance of office or appointment. Office bearers are required to manage a complex set of multiple

²⁷ Provision exists for ministers to attract collective and individual responsibility and accountability. See, for example, section 92(1) of the Constitution.

accountabilities²⁸. One must accept, for example, that delegations are essential within government context and that with delegations decision will have to be made by other people lower down in the hierarchy. The delegator nevertheless remains responsible, *inter alia* to insure that procedures are in place that will ensure that the delegates do not make party politically-motivated decisions, requiring delegates to make the bases for decisions transparent and providing for internal challenges of decisions taken under delegated authority. The delegator should not be permitted to disassociate herself from responsibility in respect of matters delegated to sub-ordinates. Real accountability means accepting responsibility for the outcome of your choices. In other words, it means 'owning your results' (Freedman, 2003: 1). The evasion of responsibility and adopting a passive role would imply non-accountability.

Dunn (1999a: 300) argues that accountability seeks to assure that administrators act within the legal framework of their empowerment. Implicit in the definition of 'responsibility' is limitations on the power granted and the manner in which it may be exercised. Such limitations and requirements may come about in various ways. The administrator's powers may be expressly limited in terms of the empowering or applicable legislation, e.g. section 17 of LUPA in respect of rezonings. It may also be expressly limited in terms of the acts of assignment or delegation, e.g. the conditions imposed by the Provincial Administration when local authorities were given delegated authority to decide applications for rezoning (Community Services Branch, 1988). Implicit limitations on the powers of administrators may also be found in the conditional nature of the empowerment (e.g. provisions that make the exercise of the power conditional upon compliance with procedural requirements) or in the South African administrative law.²⁹ If an authority has undertaken pro-active planning and has adopted policies, such planning and policies could potentially create boundaries to powers that have been delegated. Without limitations and accountability the administrator's discretion would be unfettered and could lead to the abuse of public power.

²⁸ The responsibility of administrators for the stewardship of assets is important within accountability context, but it is beyond the scope of this thesis to consider same.

²⁹ E.g. the rules of natural justice. The *audi alteram partem* rule and the administrative law requirement to "apply one's mind" are perhaps the best known examples.

2.2.4 Philosophical underpinnings

The origin of the concept accountability, from a philosophical point of view, is not clear. To a certain extent the theoretical arguments and propositions on which the idea of accountability is based, tend to display links with the social contract theory, a dominant theory in the western tradition of political philosophy. It was popularised by Jean Jacques Rousseau more than two and a half centuries ago. The social contract sees principles of justice as the outcome of a notional social contract among putative equals (Solomon, 1990: 10). The justification for government, according to this theory, is a voluntary agreement among individuals "that each will yield *all* his rights to the community as a whole, and freely submit to *the general will*" (Rousseau, 1762: 378). [Emphasis added]. This thesis makes no attempt to re-invoke the old idea of the social contract. Suffice it to say, as Manin et al (1999: 12) does, that the construction adopted in democratic models of accountability of voters offering the government a contract and so forth, is obviously artificial.

The theoretical link between democracy and accountability passes via elections. Traditionally elections have been regarded as the ultimate instrument intended to secure representivity and continuing government responsiveness³⁰ to the dynamics of public preference on the part of the elected office-bearers. In this view accountability induces representation and responsiveness. Political theory on democratic accountability traditionally relied on *mandate* and *representation* to explain elections as the mechanism through which democratic accountability is enforced. It is based on two propositions (Cheibub & Przeworski, 1999: 222). The first is that accountability of the government to the electorate is the distinguishing factor of democracy as a political regime. The second proposition is that elections are the mechanism for enforcing accountability.

In theory the vote is used in elections for one of two purposes or as a combination of the two. In terms of the literature (Fearon, 1999: 70; Cheibub & Przeworski, 1999: 239; Laver & Shepsle, 1999: 285 & Manin et al, 1999: 44) elections primarily serve to work as a selective device (the "*mandate view*") or as a sanctioning device (the "*accountability view*"). Responsiveness plays a major part in political philosophy. The process begins with interests and values. Theoretically preferences over policies are signalled to politicians though

³⁰ Dahl, 1970 as quoted by Maraval (1999: 155).

elections and other forms of political expression (Manin et al, 1999: 8). If government adopts the preferred policies it is regarded as responsive. The electoral candidates are motivated to produce responsiveness and mould their behaviour to anticipated voter preferences. In the "*mandate view*", an election is a form of control exercised *ex ante*. In terms thereof elections involve prospective voting and voters allegedly think about elections more in terms of selection than sanctioning. In this view, voters use elections to choose good governments (Fearon, 1999: 60). The winning policy platform becomes the mandate of government. According to Manin et al (1999: 29), "elections serve to select good policies or policy-bearing politicians". Government representivity is achieved because good policies or representatives are selected (Cheibub & Przeworski, 1999: 238). Representation is not induced by the fear of electoral sanctions. It is the candidates themselves that enforce the principal-agent relationship in this model (Maraval, 1999: 155).

The emphasis with prospective voting is primarily on what the voter believes the candidate will do once elected (based on statements made and policies proposed in the course of the electoral campaign, rather than on past performance). Voters who use their votes prospectively generally choose on the basis of their observations, although it may include reliance on retrospective information (i.e. the past performance of the incumbent). With retrospective voting, on the other hand, the voter places more emphasis on past performance of the electoral candidate (to sanction or reward) rather than on statements made in the course of the electoral campaign.

The mandate view of accountability entails prospectively an adverse selection problem for the voter: how to avoid electing a bad representative. The sad truth is that there is no way of ensuring prospectively that those elected will act in accordance with voter preferences once in office (Dunn, 1999b: 342; Maraval, 1999: 158). Using the vote prospectively is regarded as costly in terms of voters control over incumbents. Cheibub and Przeworski (1999: 239) argues that the power of the incentives is less for the incumbent if the vote is used prospectively.

In contrast in the pure "*accountability view*" an election is understood in the tradition of democratic theory exclusively as a sanctioning device of political accountability, a form of

control exercised *ex post* (Cheibub & Przeworski, 1999: 225). According to Manin et al (1999: 41) the "... standard view of how electoral accountability operates relies on retrospective voting". In terms of this view voters set performance criteria against which government performance may be evaluated. The voter is enabled to hold the elected politician democratically responsible for past performance and to either sanction the principal with defeat or reward the principal with re-election (Maraval, 1999: 155). Elected office-bearers who desire to retain their positions are fear induced to act in terms of voters preferences. They choose in the public interest in anticipation of judgment of the voters, to ensure positive evaluation at the time of the next election (Manin, 1999: 42).

In the accountability view model a form of "adverse selection" is also at play but in a different sense: the incumbents who strayed are not re-elected (Stimson, 1999: 198). The incumbents are accountable if the probability of them remaining in office decreases the more they stray from voters' preferences. Manin et al (1999:4) and other proponents of democratic theory claim that democracy systematically causes governments to be representative as a result of the continued responsiveness of the government to voter preferences.

Elster (1999: 275) suggests that all political systems rest on a combination of control *ex ante* and accountability *ex post*. This means that voters have one instrument only (namely elections) to achieve two goals, namely to select good government (i.e. the best politicians and policies), and to induce them to act in accordance with voters preferences whilst in office (Ferejohn, 1999: 131). Responsiveness, on this view, is a consequence of interaction with the institutional structure.

The general consensus of opinion appears to be that accountability is critical for effective government and its credibility with the public, with the emphasis being on the promotion of public trust in government. Elster (1999: 276) distinguishes between two further purposes of accountability: *incapacitation* and *deterrence*. Dunn (1999a: 298) in turn argues that the mechanisms that impose accountability ultimately seek to achieve *responsiveness* (i.e. a narrow view adopted from the perspective of electoral accountability). Effective government accountability calls for a broader view. The purpose of accountability includes *redress* and *correction*. The vertical relationship of authority seeks to provide at least some degree of

remedy. Accountability must ultimately focus on the obligation of administrators to the public for explanation and justification of their use of public power

The theories on which the idea of democratic accountability relies, in turn rely on a number of untested assumptions and propositions that often assume without argument or analysis. The theory of representivity, for example, is based on the proposition that politicians are elected because the policies that they support or are likely to support, are representative of the electorate's preferences. The second assumption is that the politicians, once elected, will continue to act in accordance with the electorate's preferences or will adjust their actions to bring it in line with those preferences. Further assumptions include that the elected incumbent will seek re-election; that the voter's choice of a candidate is a rational (not emotional) decision; that those elected would like to be believed *next time around* and that the voters are sufficiently well informed to reach the correct decision. This thesis argues that there is no factual basis for these assumptions as there is no indication in the literature reviewed that the theories are based on empirical evidence. The validity of the apparently untested speculation to the underpinnings of elections as a mechanism to obtain accountability is therefore doubtful. This practical question remains whether the fact that politicians are elected to government is sufficient to cause government to act in a representative manner.

2.3 THE SUBSTANCE OF ACCOUNTABILITY

Dunn (1999b: 331) confirms that accountability is designed to accommodate the fact that in any government rules will always in fact be implemented (or not implemented) by persons. This section seeks to expose the substance of government accountability by asking the following questions: For what is government accountable and to whom? The questions *what* government is required to do, includes a question as to *how* government should do it. Those questions are discussed in turn.

It has traditionally been accepted that government is required to act in the *public interest* or in the best interest of *the people*³¹ or *community*. According to Alexander (2002, as cited by Hillier, 2003: 161) the initial position in Western liberal democracies was that planning has

³¹ See for example Manin (1999: 5) and Alexander, 2002 as cited by Hillier, 2003: 161. Section 42(3) of the South African Constitution provides that Parliament is elected to represent *the people*.

therefore traditionally demonstrated implementation of the broadly utilitarian notion of 'the public interest'. This approach reflects the need for representing the collective interests of the community (Klosterman, 1985: 162). The key concepts of 'public', 'people' and 'community' are, however, not neutral and have been interpreted in many ways over the years. And the fact that the concept of public interest can be interpreted differently has opened up the opportunity for administrators to abuse the term as the façade for the defence of decisions taken in the exercise of public power.

It is generally acknowledged that there is not a single public interest to be served, but a heterogeneous public with many voices and conflicting interests (Campbell & Fainstein, 1996: 10). Furthermore that each group encompasses a host of divergent points of view, "competing vested interests, and splintered subgroups" (Arnstein, 1969: 217) which Healey (1992: 151) argues can only be resolved through power struggle between conflicting forces. Campbell and Fainstein (1996: 7) also confirm that within society at large the values of democracy, equality, and efficiency often clash. Administrators are therefore required to attempt to reconcile the conflicting interests as well as the conflicting goals of economic development, social justice, and environmental protection. All of this leads to recognition that sustainable development does not have a 'one-size-fits-all meaning' and, as Muller (2006: 4) argues, that local meaning for sustainable development should be constructed through a bottom-up learning process and "making connections [between various] ideas and people" .

Individuality should retain a central place in the conception of accountability and the community. Virtually all activity and enterprise takes place in social context, within the community as the primary, basic unit of social life. Communal values determine the norms and expectations that define accountability. Solomons (1990: 100) points out that the word *community* can serve as a euphemism for a sense of enforced group solidarity, an illusory fantasy of "harmonious togetherness". He warns against the danger of a potentially totalitarian image of a coherent, single-minded state, "... one in which our identities are wholly tied up with the community from which we can not escape". Communities are made up of independent and often obstinate individuals, whose membership in that particular community is almost contingent rather than essential. Most of us are also simultaneously members of several communities (e.g. in the neighbourhood and at work) and the character of the

community may well lie in its diversity (Solomons, 1990: 93). The exploration of the community as a major actor in accountable government should therefore start of with the ordinary citizen, the marginalized and oppressed, the rich and the poor, the reader and the researcher. The individual has fundamental rights. This thesis argues that even if the collective of persons should be disinterested in the rights of a particular individual, it should not disqualify that individual to participate in government processes as an individual and to demand accountability on her own. The idea is to locate the elements of accountability within and towards the individual, not on external influences and constraints imposed upon the individual by society.

This thesis now turns to consider the second related question, i.e. *how* government is expected to perform its functions. Traditionally government was required to act within the law and to be *reasonable* and *fair* in the exercise of public power. According to Collins (2004: 558, 1352) 'reasonable' and 'fair' mean, amongst other things, to show sound judgement and to be free from discrimination. This thesis argues that, implicit in those requirements is that administrative decisions should satisfy the requirement of objectivity or *value free* decisions. These requirements relate to the impersonal stance that the decision-maker should adopt in order to arrive at a fair and reasonable decision. The difficulty is that administrative action is not the simple mechanical application of a formula or standard rules that will tell one how to arrive at the correct decision or that apply in all circumstances, a nifty decision-making procedure that will always render the correct results.

Cilliers (1998:122) argues convincingly that all our decisions have an ethical or value-based nature, referring to the inevitable choices that cannot be backed up scientifically or objectively. As there is no final objective or calculable ground for our decisions, we cannot shift responsibility for the decision on to something or someone else. The ethical components encountered in organisations may relate to the values and preferences of the members of the organisation and are often referred to as merely "politics", something separate to the organization's real operation and goals. Cilliers (2000: 29) argues that the political aspects of the interactions in an organization are not something extraneous to the working of that organization, but integral to its working. In other words, the ethical position is not something

imposed on an organisation from outside. It is part of the governance culture, which Healey (2004) calls "deeply embedded cultural assumptions" (see "administrative obstacles" below).

What is reasonable and fair mostly involves the exercise of discretion and consideration of a broad range of aspects, often requiring the weighing of competing interests and may involve internal contradictions and conflicts. It requires judgement, is contextual and not primarily a matter of abstract principle or a postulated ideal state against which the real world should be contrasted. Administrators are required to cope with a multiplicity of discourses – not one single truth, but different perspectives. The planning system is multidimensional and complex, and, by its nature, requires a multi-perspective and holistic approach. When the basic thinking is applied to real people who differ in all sorts of ways, consensus is lacking as to how the different considerations are to be weighed against each other.

Solomons (1990: 211) argues convincingly that no such impersonal stance is humanly possible. Objectivity presupposes some subjective orientation, some framework within which anything matters. The administrator will always have her own set of values. Our sense of what is fair and reasonable begins not with principle but with a feeling. Personal sentiments shall always, to a greater or lesser degree, interfere with the properly dispassionate and impartial workings of reason. In the same vein this thesis argues that it is not possible to comply with the statutory requirement that municipal officials should act *impartially* and treat all people *equally*.³² It is a praiseworthy ideal, nothing more and nothing less. Clear guidelines contained in government policies as to the weight to be attached to competing interests and clear government directives on what should receive preference in terms of government thinking, may go a long way towards reducing the influence of personal sentiments on the part of the decision-maker. Pro-active planning may also make decisions by administrators less *ad hoc*. Overall the mere existence of an independent body exercising supervisory jurisdiction, such as administrative courts discussed in par 2.6 below, may additionally serve to discourage decision-makers to allow their personal sentiments to play too prominent a role in the manner in which they exercise discretion.

³² Item 2(e) of Schedule 2 to the MSA.

What government is required to do in terms of the present South African legislation, should not just be restricted to specific functions and duties entrusted to the authority concerned (e.g. to provide basic municipal services to the community). That which government is required to do, extends beyond the express statutory obligations of government. For example, although the South African laws may not contain express provisions that require the national government to ensure an effective and efficient public administration, it is implicit in the legislation that national government is required to do just that. Without such an administration the spheres of government will not be able to effectively accomplish express statutory objectives set by the Legislatures. Government must therefore be held to account for effective and efficient public sector management, underpinned by strong accountability mechanisms. It must improve all aspects of governance for the fulfilment of statutory obligations and objectives, such as effective service delivery and the promotion of socio-economic development.

The view of democratic accountability encountered in the literature, which emphasises only the relationship between voters and those elected/ to be elected is regarded as too narrow a view. Traditionally it has been accepted that government owes an obligation of accountability to the public. In a rather narrow view, some theorists have required that the elected be made accountable to their constituents. Constituents are only part of the public. It is clear from the wording of *inter alia* the present South African Constitution that *everyone* within the country has certain fundamental rights, which includes visitors and children who may not have voting power. The obligation to be accountable should furthermore not be restricted to the elected only, but should extend to those appointed to the public administration. As appointed officials are not elected, the electoral mechanism is not available to induce them to be accountable. A broader perspective is therefore required in terms of which the elected representatives *and* the appointed officials will be accountable not only to the electorate, but to the broader public.

Democratic accountability implies accountability to the majority. Przeworski (2009: 1) points out that even "... in a direct democracy, decisions of a majority are binding on everyone, including the minority...". It is the majority vote that puts the victorious political party into power. It is therefore the majority that can potentially use the vote effectively to reward or sanction the elected in office by re-election or withholding their support at the next election. It

fails to provide effectively for accountability towards individuals. Although the collective interest may generally be the yard-stick for measurement of government performance, it will be shown that there are instances where individuals (as the building blocks of the democratic society) should "call the shots" and where democratic accountability is ineffective to protect individual rights. At the heart of democratic accountability lies public participation.

2.4 ROLE OF PUBLIC PARTICIPATION IN GOVERNMENT ACCOUNTABILITY

Theron (2005: 119) suggests that public participation is best understood holistically and multidimensionally, as a means of empowering people to have control "over which and how things are done" and a process of building social and human capital.³³ Suffice it to say that it always denotes a continuous ongoing process, usually to identify and satisfy multi-dimensional ever-changing and competing needs and to achieve sometimes conflicting goals.

As public participation of the governed in their government is a critical component of government accountability, the Legislatures have created local factors that are germane to evolving accountable government. They have *inter alia* provided for citizenship and related rights, democratised political power at the local level, expanded the scope of civil society activities and authorised public inquiries (see par 3.3 further on).

Several possible levels of public participation may be distinguished. It may range from manipulation, with a powerless public, where the concept is used as a public relations vehicle by those in power, to a situation where the public has a sufficient degree of public power and control to govern a project (Arnstein, 1969: 218). Accountability begins with the public, not with the government. Dunn (1999b: 334) claims that most of the weight in seeking to secure accountability has to be carried by the vigour of citizen participation and by the scope of rights and liberties open to citizens. Yet writers tend to emphasise the collective, the group, the community, whilst pushing the individual to the background when dealing with concepts such as the public interest and accountability. Theron (2005: 114) states that the "primary unit of participation is a *collective of persons*" who stands in a relationship with the state. This thesis argues that individuality should retain a central place in the conception of accountability and

³³ Also see Burkey (1993: 56), Kok & Gelderblom (1994: 57) and Muller (2006: 12).

public participation. It is first and foremost an individual responsibility, a matter of personal concern for everyone.

Evans (2002: 244) argues that each type of actor (e.g. the individual, the NGO, communities, and so forth) “has a complimentary contribution to make” to the fight for more liveable cities. Social organisations and interest groups do have a prominent role to play in the realisation of government accountability. The features of NGOs theoretically give them a comparative advantage over public and private sector institutions for the promotion of accountability. Those voluntary bodies may potentially resonate the opinions and views of the private sphere and transform the public influences it possesses into communicative power. Given the imperfections of the individual members of the public, it is within organisations that the potential exists for synergies between members that compensate for individual imperfections and where overall effects may transcend the capabilities of individual members. One must, however, guard against over-emphasising their role with the result that the importance of individual involvement becomes obscured. NGOs too have the ability of disempowering people and may purport to speak for communities, whilst in reality they are only mandated by a minority within them. Often a serious limitation of NGOs is their limited self-sustainability due to their dependence on grants.

The public should be the vanguard of government accountability. Passive participation in the sense of being told by government what has already happened or what is going to happen, cannot be equated to public participation. Participation implies active engagement on the part of the public, an interactive relationship with the state not restricted to participation in decision-making only. The public should demand that items be placed on the government agendas for discussion purposes and must influence the willingness of the elected representatives to consider issues and influence the outcome of government action. They should act as the purveyor of democratic values and get representatives to vote in ways responsive to their preferences. The public should act as a watchdog and engage in the evaluation of policy, planning and development proposals and in the process of law-making.³⁴ Finally they should promote responsible behaviour on the part of the elected representatives and demand effectiveness, integrity and accountability and, when required, call the elected

³⁴ The Annual Report of the Constitutional Assembly 1996: 145, referred to by Skjelten (2006: 161).

representatives to account. Thus far, the reality is that most of the state structures do not show a predilection of participatory decision-making in their internal affairs and generally offers little opportunity for public engagement in the process of lawmaking. Often the first chance for participation is in parliament, when minds are already made up and people committed to getting certain laws approved.

Public participation is rife with difficulties. Numerous operational and other obstacles may contribute to ineffective public participation. Johnson (2003, quoted with approval by Theron, 2005: 123) argues that structural, administrative and social obstacles are the three basic categories of obstacles that require careful negotiation. *Structural obstacles* relate to the bureaucratic structure of government. A top-down political system which is prescriptive in nature may be at variance with bottom-up public participation. As Theron (2005: 123) points out, it may even fail to provide adequate opportunity for public participation, leaving members of the public without a "voice".

Administrative obstacles may include the mind-sets and attitudes of government employees. Post-1994 legislation poses a people-centred challenge for particularly local government. Davids and Maphunye (2005: 61) points out that it requires changes in the attitudes of government staff towards issues of public participation. New legislation by itself is not a guarantee that mind-sets and attitudes of government employees will appropriately change. The many government initiatives are therefore constrained by what Healey (2004) calls "deeply embedded cultural assumptions" (governance culture) which provide the implicit norms and values which legitimate (or not) what individual actors do and the way governance processes operate in any context. The control orientated tendency amongst officials to rigidly apply policy may often fail to allow room for public input into or control over the process (Theron, 2005: 123). The tendency of officials to focus on their own dimension of interest or competency may also pose an obstacle in the way of effective accountability.

Values of democracy, equality, and efficiency often clash in a pluralistic society, where people have diverse attitudes, values and often conflicting preferences. *Social obstacles* may also relate to the social capacity required for effective public participation. Social capacity may be lacking for a number of reasons, such as insufficient information and knowledge and lack of

critical ability. Cheibub and Przeworski (1999: 238) confirm that even if “complete information” was available members of the public might still not know enough to be able to evaluate the performance of an elected representative or government official. Evans (2002: 231) points out that the relationship brought about by the role of party politicians to act as intermediary between communities and government can bring with it “divisive and demobilizing side effects”.

Insufficient or excessive levels of participation may also be encountered. Muller (2006:14) and Adejumobi (2000:10) list a number of reasons for this phenomenon. It includes that such measures of participation may be caused by hopelessness or the belief by people that they are unable to influence government decision making, a culture of dependency, poverty, marginalisation, insufficient funds, the low level of trust communities have in government as well as time and literacy problems. Hillier (2003: 157) shows that populist mobilization of public opinion may distort signals to the elected representatives and may "favour networks of articulate, middle-class property owners to the exclusion of the voices of the marginalized". Goudsmit and Blackburn (2001: 589) argue that excessive ‘participationism’ also hold dangers for the public interest and that blind adherence to whatever the local population proposes may endanger the sustainability of local development processes. This is especially so when the local population lacks applicable knowledge and views expressed by its members are based on ignorance. Cullingworth (1997: 134) points out that as the “defence of privilege”, public participation may become a major hurdle in the way of planning and development if not managed properly. Frivolous challenges to applications or decisions of the authorities should be appropriately discouraged. An example of an arrangement used in classical times is a *graphe*, which roughly speaking was a lawsuit in Athenian public matters. "If the accuser failed to obtain a fifth of the vote, he was fined and lost the right to bring similar accusations in the future, a practice deemed necessary to prevent frivolous action" (Elster, 1999: 263).

Pieterse (2006: 285) makes a number of proposals for realising integrated urban development in South Africa. According to him “vibrant city politics” and a substantial “epistemic community” that “generate imaginative ideas about alternative futures” are amongst the key conditions for addressing the structural crises or urban fragmentation. He argues that the

function of an epistemic community is “potentially to influence the on-going deliberations” of democratically elected bodies, not to replace it. The “purpose of the epistemic community is to challenge fundamentally the conventional orthodoxy (the mainstream) about what is possible and impossible in terms of transformative urban development agendas” (Pieterse, 2006: 290). Pieterse (2006: 294) refers with approval to the case which Ayyub Malik makes for the establishment of “deliberative forums to imagine and plot alternative approaches to urban development”. Such forums are intended to foster local spaces of deliberation where citizens will have opportunity to actively participate in shaping their city. This thesis argues that the establishment of deliberative forums as suggested by Malik may make a substantial contribution to the potential influence which the public may exert on government deliberations in planning and development context. These views are based on the work of Jurgen Habermas on the role of debate in the public sphere and on communicative action, which also heavily influenced planning theory.

2.5 LIMITATIONS TO ACCOUNTABILITY WITHIN DEMOCRATIC INSTITUTIONS

Maraval (1999: 157) suggests that democratic accountability depends on “whether voters can discern whether” the agent “is acting in their best interest”, assign responsibility and reward or punish them appropriately. Voter capacity to discern agent performance, to sanction it when necessary and thereby induce agents to render accountable performance, depends on two factors. Firstly, it depends on the institutional mechanism available to voters to select good representatives and punish those that do not perform well (e.g. elections). Secondly, it also depends on the discretion agents have once in office (Laver and Shepsle, 1999: 285).

There are serious limitations to accountability within democratic institutions. Both the selection and sanction models of elections are problematic and to some extent also crucially deficient. Fearon (1999:68) has been found that repeated elections on their own do not work well as mechanisms of accountability, due to formidable problems involved. Institutional factors that impact on voters' control over elected office-bearers, may weaken the threat of electoral sanctions and may serve to reduce the measure of effective accountability that may be achieved and merit special attention. Those factors can roughly be divided into the abovementioned three categories that somewhat overlap (i.e. capacity of voters to discern, monitor and evaluate agent performance, voter ability to assign responsibility and voter

capacity to sanction deviants and to reward those that satisfy). Those factors are *inter alia* a consequence of the complexity of modern government and operate together to limit the effectiveness of government accountability. The researcher has selected the following twelve examples for illustration and analysis.

1. *Capacity to monitor and evaluate*

Voters do not have a mechanism to oblige government to follow mandates, yet they may exercise a measure of control “if they can induce the incumbents to anticipate that they will have to render accounts for their past actions” (Manin et al, 1999: 40). Their measure of success in this regard will depend on their ability to judge government's record retrospectively at election time. In a pure accountability model, the performance of the incumbent potentially represents the entire information available to voters. If they “do not have sufficient information to evaluate” the government's performance, “the threat of not being” re-elected “is insufficient to induce” government “to act in” their “best interest” (Manin et al, 1999: 30).

Voters suffer from an informational disadvantage. It presents a major obstacle to democratic accountability. Overall voter ability to control agent behaviour is extremely limited (Ferejohn, 1999: 134). The elected typically enjoy an immense informational advantage over the voters. Dunn (1999b:335) argues that most voters most of the time cannot and do not know what is going on in the political realm. Manin et al (1999: 43) and Fearon (1999: 68) points out that the calculated manner in which voters are supposed to consider their options is an artifice and that the problems involved in making informed judgements about whether to re-elect are formidable. Government's behaviour can usually only be imperfectly observed. Voters generally lack detailed empirical and theoretical understanding of legislative procedure and politics. Cheibub and Przeworski(1999: 238) argues that even if complete information (i.e. all the relevant facts) was available voters might still not know enough to be able to evaluate the incumbent's performance.

Numerous factors impact directly and indirectly on the ability of voters to know or observe and evaluate the performance of the elected office-bearers. The ability of

voters to do so depends on how open and observable governmental processes are and how well elected office-bearers can shield their actions from outside observation. Elected office-bearers may seek to influence public opinion and hide their actions from public scrutiny. The elected enjoy an informational advantage over voters and can use it to hide their actions and avoid answerability. Poor monitoring implies that shirking of responsibilities has less effect on the incumbent's probability of re-election.

2. *Capacity to sanction deviants*

Elections only work as an instrument for accountability in the hands of the voters for those in government that must be elected (i.e. the party political candidates).

However, appointed government officials are not elected to office by the voting public and do not represent the public, yet they take the bulk of government decisions. The electoral mechanism therefore does not empower the voting public to hold the appointed government officials accountable.

3. *Multiple and heterogeneous principals*

The theoretical models portray the electorate as a unitary actor (Stimson, 1999: 209) or a like-minded group of individuals. In real life the electorate is part of a pluralistic society, people with diverse attitudes and values that do not act as one, but very differently. It may be inherently difficult for multiple and heterogeneous principals to effectively control the elected agents via the mechanism of elections due to their often diverse and conflicting preferences (Fearon, 1999: 56). Diversity and conflict amongst principals open the opportunity for exploitation to the elected agent. The principals may find it difficult or may even be unable to commit to a coordination scheme that would effectively limit such exploitation opportunities to the elected agents (Ferejohn, 1999: 149). Individuals may appear anywhere in the distribution of possible preferences. The sanction and reward functions of elections are only available to the majority of voters. Minorities also have rights. Elections are not an effective mechanism for individuals to enforce accountability.

4. *Clarity of mandates*

During elections parties compete more with images, symbols, and personalities, than with specific policy positions (Maraval, 1999: 167). Suffice it to say that it cannot be seriously suggested that an elected candidate has in one way or the other deviated from the mandate, if nobody seems to know what exactly the mandate is. The suggested mandates are usually void for vagueness and at best notional.

5. *Multidimensional activity*

Governmental action is multidimensional. Government may for example have policies that relate to the environment, housing, health care and property. Voters may want to reject some policies but retain others that they value. Cheibub and Prezerworski (1999: 237) highlights that voters have only one instrument - the vote - to sanction government. Social policies tend to trump economic policies. Even if voters disliked economic policies, they may support the government if they approved of social policies. Maraval (1999: 187) argues that if government knew that voters sympathized more with social policies, the ruling party would probably give more prominence to this dimension of accountability Each and every day many thousands of decisions are made by those in government that affect individual welfare. One cannot control a thousand targets with one instrument - the vote (Manin et al, 1999: 50).

6. *Clarity of responsibility*

Mismanagement may be clear for everyone to see, yet one may be unable to pronounce to whom is to be held to account. "Clarity of responsibility" is a particular concern to enforce accountability as voters must be able to assign clearly the responsibility for government performance and to discern whom to punish. Individual ministers sometimes perform as members of a governmental team in which there may be a sequence of accountability relationships. Generally accountability is obscured under a plural or cabinet executive. Maraval (1999: 47) argues that it tends to conceal faults and destroy responsibility. Dunn (1999b: 336) argues that the relation of accountability holds fully where the elected representatives are liable for their actions in exercising public powers; are predictably identifiable by the voters as agents and are knowably and effectively sanctionable for their public acts.

7. *Proportional representation*

Our national legislation provides for the election of municipal councillors in accordance with a system of proportional representation.³⁵ It intends to ensure that the total number of members elected from every party reflect the relationship between the votes cast for the respective parties. Basically this system works on the basis that political parties each submit a list of the names of their candidates in order of the party's preference. The final decision in such a system rests with the chief electoral officer. She determines "which party candidates are elected by selecting from the party's list, in accordance with that order of preference, the number of candidates that is equal to the number of seats to which the party is entitled".³⁶ Differences of political candidates in terms of general competence, skill, integrity, and so forth becomes irrelevant in a such a system, as voters have little say over candidates. The choice of future municipal councillors, provincial and national representatives is effectively left to party bureaucrats.

8. *Performance criteria*

Consensus amongst principals that the performance of the elected agents should be evaluated does not automatically translate into agreement on performance criteria. Although principals may share an interest in evaluating agent performance, they may and are likely to have conflicting interests over the exact criteria to be employed to evaluate same. In order to be credible, the chosen performance criteria should motivate incumbents optimally to act in a representative manner and to choose a policy as close as possible to the electorate's preferences (Fearon, 1999: 75).

9. *Temporary nature of preferences*

There can be no fixed and final definition of preferences. Even if the electorate was a unitary actor, preferences would not be static due to human nature and changing circumstances. The public may and do have moving ideal points. In the literature reviewed by the researcher the writers generally seemed to ignore this fact in their theoretical models. They proceed on an illusory path of fixed preferences in developing

³⁵ Section 157(3) of the Constitution (RSA, 1996).

³⁶ Item 13(5) of Schedule 1 of the Municipal Structures Act.

their arguments regarding measurement of performance against criteria set by the electorate.

10. *Term limitations*

Term limitations are intended to create turnover of representatives. The enforcement problem has to do with the capacity of voters to sanction or reward politicians effectively. If they are to bear the full impact of their actions, politicians must, first of all, want to be re-elected and know that they may be re-elected (Maraval, 1999: 160). Fearon (1999: 57) argues that if the candidate will be required to vacate office, once elected, at the end of the term due to term limitations or if the elected representative does not intend to stand for re-election, it can be viewed as an election with no expectation of accountability.

11. *Discretion*

The capacity of principals to sanction agents, if necessary, depends amongst other things on the institutional discretion agents have to formulate policies once in office (Laver and Shepsle, 1999: 285). Democratic mandates are never imperative because new contingencies, which can never be fully anticipated at the time of election, will arise once the politician has taken up office (Maraval, 1999: 159). Elected office-bearers are not legally compelled to abide by their electoral platforms in any democratic system. The historical reason for this absence of institutional mechanisms to force compliance was that the legislature should be allowed to deliberate and to have flexibility to cope with changed circumstances. To be able to govern properly, elected office-bearers must be able to act boldly and need a considerable degree of freedom. Their ability to act boldly and effectively in the public interest depends to a large degree on the measure of freedom they have in terms of decision-making (Dunn, 1999b: 340). The available procedures for withdrawing confidence³⁷ are never targeted at the betrayal of promises (Manin et al, 1999: 39).

12. *Real time operation.* Institutions of democratic accountability operate in real time.

Elections are not a regular short-term occurrence. This provides opportunities to avoid

³⁷

See the "no confidence" mechanism of accountability in 3.3.2 below.

electoral responsibility for particular actions for extended periods of time or even indefinitely.

Given all the limitations to accountability within democratic institutions, some of which have been briefly analysed above, it would be futile to expect that elections alone would serve effectively as an instrument of enforcing accountable government. The opinion of the authors mentioned above appears to be that electoral means to control political agents are fairly weak and that repeated elections do not work well as mechanisms of accountability (Fearon, 1999: 68). They recognise and acknowledge that the assertion that democracy induces accountability is at least far too broad (e.g. Cheibub & Przeworski, 1999: 230); that to date the ballot box has regularly failed to reflect the will of the people (e.g. Adejumobi, 2000: 6), and that the control of voters over politicians is at best highly imperfect in most democracies. Elections are not regarded as a sufficient mechanism to insure that governments will perform adequately to maximise citizens' welfare (Manin et al, 1999: 50). The formal electoral apparatus is an impotent instrument of government accountability. It is generally realised that contested elections might still be a necessary condition for accountability, at the same time they are certain to fall some way short of being a sufficient condition (Dunn, 1999b: 334). Adejumobi (2000: 7) and Dunn (1999b: 336) argue convincingly that engendering accountable governance in any democratic country incorporates but transcends the issue of elections.

Manin et al(1999: 50) argues that institutional reform and innovation are needed for improved representation and government accountability. Healey (1992: 143) emphasis that the “technical and administrative machineries created in the past to achieve planning goals have ... compromised the development of a democratic attitude”. According to Manin et al (1999: 51) proportional representation in the 1860s was the last major institutional invention and that, other than that, there has been “almost no institutional creativity” during “the past two hundred years”. He suggests, for example, “accountability agencies” as institutions that would provide citizens with independent information about government. Haggard (quoted with approval by Przeworski, 2009: 8) argues, “[T]he ultimate check on government must come through institutionalized forms of participation”. Gilbert (2009: 2) suggests that the gap between parliaments and citizens could potentially be bridged by the use of constituency offices.

Woltjer (2002: 447) regards the challenge to institutionalise a comprehensive process of participatory planning “which goes beyond representative community action and sporadic participation” as “formidable”.

This thesis considers the proposition that elections are the main mechanism for enforcing accountability as more ideological fiction than palpable political fact. The control of voters over politicians remains highly imperfect and elections alone are not a sufficient mechanism to insure that government will perform in terms of voter preferences (Gilbert, 2009: 1). An assertion that democracy induces accountability would be far too broad. On the contrary, in South Africa legislation permitted floor crossings,³⁸ in terms of which it was legally permissible for elected office-bearers to join forces with opponents whilst in office. The Legislature's condonation of this form of betrayal of the electorate's trust remains unacceptable and may serve as an acknowledgement that the electoral sanction is not regarded as a serious threat by politicians.

2.6 ADMINISTRATIVE COURTS AND TRIBUNALS

Administrative courts that specialise in disputes between private persons and the authorities concerning the exercise of public power have been established in a large number of countries around the world. Amongst the countries that have established such courts are England and Wales, Finland, the Republic of Lithuania, Sweden, Indonesia, Morocco, Estonia, Taiwan, the Netherlands, The United States of America and Australia.³⁹ South Africa has not established administrative courts. Its ordinary superior courts are required to adjudicate disputes between private persons and the authorities concerning the exercise of public power. Judicial review of administrative action in terms of PAJA is often employed to have government decisions set aside. The doctrine of separation of powers and other factors, however, restrict the powers of the South African courts to play a meaningful role in government accountability in South Africa (see par 3.4 further on).

³⁸ Apparently new legislation will be introduced to reverse this situation. At the time of writing this thesis such legislation has not yet been adopted.

³⁹ See respectively www.hmcourts-service.gov.uk/cms/admin.htm, www.oikeus.fi/17598.htm, www.lvat.lt/?item=teismas&lang=3, www.domstol.se/templates/DV_InfoPage_2321.aspx, www.brill.nl/default.aspx?partid=210&pid=20632, www.wipo.int/clea/en/details.jsp?id=2968, www.nc.ee/?id=191, tcb.judicial.gov.tw/en/intro2.asp, doi.wiley.com/10.1111/1467-9930.00102, www.dmvnv.com/admlaw.htm and www.courts.sa.gov.au/courts/district/index.html.

A comprehensive overview of the emergent history and functions of administrative courts in the countries referred to above is beyond the scope of this thesis. Suffice it to say that the administrative courts, being administrative in nature and often not subject to the restrictions that apply to ordinary courts of law, may potentially be more effective to achieve government accountability than ordinary courts. Principles that appear from the examples referred to in the literature (see footnote 39) include that the public body concerned should be able to first seek self-rectification before the matter be heard by the administrative court, that those courts should provide a neutral forum for fair, prompt and objective hearings and should be within the executive branch of government. Examples of measures against which an action may be filed in an administrative court include activities, omissions or delays by the authority to perform actions.

It is beyond the scope of this thesis to explore the vast literature on the use of appeal tribunals. Suffice it to say that the tribunals may potentially function very much in the same manner as administrative courts in authoritatively resolving disputes between private persons and the authorities concerning the exercise of public power.⁴⁰ Appeal tribunals differ from tribunals appointed to make decisions in the place of government, such as the tribunals appointed in terms of the DFA. In the Western Cape a tribunal as contemplated in the DFA was never appointed. The DFA tribunals that have to date functioned in the other provinces of South Africa will in future probably have an insignificant impact in the field of study in view of the September 2009 judgment of the SCA in the *City of Johannesburg v Gauteng Development Tribunal* (335/08) discussed in 1.1 above.

2.7 GAPS IN THE LITERATURE

Accountability is both an important philosophical and practical issue of our day, yet it has not received any noteworthy attention in the South African literature. This in itself is regarded as a gap in the literature. It would appear from a database search that administrative courts, as a mechanism to enforce government accountability, has not received any noteworthy attention in the South African literature.

⁴⁰

See for example www.tribunals.gov.uk for the tribunals service in the United Kingdom and www.aat.gov.au for administrative appeals in Australia.

Whilst some of the notions, claims and objectives (e.g. 'accountability' and the promotion of socio-economic development) encountered in the legislation, government documents and political speeches may be viewed as political aspirations, posturing or just plain propaganda, the strong rhetoric has not managed to accomplish significant change in real terms.⁴¹ Key words such as *accountable government* and the *promotion of socio-economic development*⁴² can be regarded as intending to act like tranquilisers or magic mushrooms, to create expectation and to keep everyone relatively happy or at least hopeful. One would have expected the South African writers to comment on the failure of the legislation and those documents to give any sense of how the objective of accountable government is to be accomplished.

The 'underdeveloped' meaning of words and concepts such as accountability and the promotion of socio-economic development are rarely discussed in government documents. It is left to the readers to interpret government documents in manners that suit their individual agendas. These documents are often written in a manner intended to find the broadest possible acceptance, using emotive language (e.g. 'sweet bits' such as *pro-poor*) to capture the imagination of the Alliance partners and the poor voters, whilst the script-writers intentionally avoid unpacking the meaning thereof. The manner in which South African government documents are written can be regarded as intentional misrepresentations, yet only rarely criticised in the literature.⁴³

The main focus of the literature from abroad is on elections as a mechanism for achieving government accountability, to the exclusion of other issues and with a distinct disregard for legal questions. The authors referred to above have generally adopted a historical and academically polite approach, failing to engage critically with the issues, with resultant repetitive and monotonous renditions that fail to contribute anything noteworthy to the accountability debate. Fearon (1999: 82) remarks that there is surprisingly little to be found in the tradition of democratic theory on exactly how elections are supposed to produce accountable government or on how effective elections may be expected to perform in this regard. Practical suggestions as to how accountability problems could be tackled are rare in

⁴¹ Notably the White Paper on the Transformation of the Public Service (1997).

⁴² One of the objectives of local government mentioned in section 152(1)(b) of the Constitution.

⁴³ See for example Du Toit & Neves, 2007 on "integration".

the literature, hence its sterile nature. The flawed assumptions on which theories rely, generally goes unchallenged in the academic literature reviewed. Symbolic value still appears to be more important than reality (e.g. arguments put forward relating to elections as mechanisms for sanctions). As such the literature from abroad is of little or no significance to those who have to face the daily challenges in the development industry in the Western Cape.

South Africa has some unique legal requirements, which are not dealt with in the literature from abroad. Section 195 of the South African Constitution *inter alia* requires that the public administration shall be governed by democratic principles and shall be accountable. What is meant by this legal requirement? Government employees are not elected but appointed. Clearly elections are not the mechanism by which their accountability would be achieved. The available literature fails to unpack this requirement. Could it be that the Legislature intended a more direct form of accountability to the public?

The success of BBBEE has been questioned and its criticisms are growing.⁴⁴ Suggestions have also been made as to what could be done to improve BBBEE.⁴⁵ A topic apparently not yet researched is whether and, if so, how and to what extent the governing party employs BBBEE to avoid government accountability in economic transactions which benefits the governing party or individual politicians.

Overall one of the most difficult questions remaining is how government accountability can be engendered in South Africa. The available literature, with a few noteworthy exceptions (e.g. Adejumobi, 2000 and Pieterse, 2006), is not helpful in this regard. If the academic writers have in mind to bring about improvement and meaningful change in government accountability, future literature should be more pragmatic.

2.8 SUMMARY

This chapter illuminated the idea of government accountability on the basis of a literature review, exposed the substance of government accountability, and examined elections as a dominant accountability process. Limitations to accountability within democratic institutions were explored and certain gaps in the literature were identified.

⁴⁴ See for example Sartorius & Botha (2008) and the sources to which they refer.

⁴⁵ See for example Andrews (2008).

This thesis argued that in its most basic sense accountability means to be answerable for one's actions or behaviour. It was illustrated that accountability seeks to assure that government acts within the legal framework of its empowerment, that accountability must be perceived as a *process* and that government decisions have an ethical nature which means responsible decision-making. It was argued that democratic accountability, to be accomplished via the electoral process, is always mediated and never direct. It was argued that more direct (as opposed to mediated) vertical accountability between administrators and members of the public is essential if effective government accountability is to be achieved and that, if one were to depend on elections to achieve a reasonable measure of effective government accountability, it is unlikely to materialise. The pivotal continuing role of public participation in government accountability was highlighted.

CHAPTER 3: LAW REVIEW, JUDICIAL & ADMINISTRATIVE PROCESSES

3.1 INTRODUCTION

Accountability, an essential ingredient of democracy, must be accomplished within the democratic framework provided by the legislation of the Republic. This chapter provides an overview of that legal framework. The aim of the law review is to increase knowledge on the subject and to facilitate the interpretation of the data collected in the course of the study. Some of the methods, statutory devices and available mechanisms employed in legislation to promote and enforce accountability are examined. The essential role of public participation in the processes of government was explored. Planning law is used as a backdrop to highlight some of the shortcomings in the legislative endeavour to accomplish vertical government accountability towards the public in land use planning and development context.

3.2 ACCOUNTABILITY WITHIN A DEMOCRATIC SYSTEM

The South African Constitution as the supreme law of the Republic⁴⁶ is the logical point of departure for any exploration of the maze of statutory provisions that apply within this field. It claims that the Republic is a democratic state founded on stipulated values. Those values include the supremacy of the South African Constitution and the rule of law⁴⁷. It also includes "universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".⁴⁸ The Constitution establishes a common South African citizenship and provides for equal entitlement of all such citizens to rights, privileges and benefits of citizenship⁴⁹.

Chapter 2 of the South African Constitution provides a Bill of Rights as the cornerstone of democracy and requires the state to respect, protect, promote and fulfil those rights.⁵⁰ Fundamental constitutional rights considered particularly important for purposes of the research include rights to equality before the law and to demonstrate, to an environment that

⁴⁶ Section 1 of the National Constitution.

⁴⁷ The rule of law basically requires the state to act in accordance with the law (i.e. that the state can only exercise power to the extent permitted by law and must obey the law like everyone else in the country).

⁴⁸ Section 1 of the Constitution.

⁴⁹ Section 3 of the Constitution.

⁵⁰ See section 7(2) of the Constitution and Meyer (1999 par. 354 on p 223 and p 237).

is not harmful to the health of well-being of people in this country, against unlawful or arbitrary deprivation of property, to have access to adequate housing and to information held by the state, and the right to administrative action that is lawful, reasonable and procedurally fair.⁵¹

Government functions are classified into legislative, executive and judicial categories and government is constituted as national, provincial and local spheres. All spheres of government and all organs of state within each sphere are required to provide effective, transparent and accountable government.⁵² The *legislative authority* of the national, provincial and local spheres of government respectively is vested in Parliament, the provincial legislatures and municipal councils.⁵³ The members of the National Assembly (a component of Parliament), the provincial legislatures, and municipal councils have to be elected in terms of an electoral system that is prescribed by national legislation.⁵⁴ The legislative authority of each of those bodies is limited to matters within their respective functional areas.⁵⁵ "Provincial planning" is a functional area of exclusive provincial legislative competence. Both "regional planning and development" and "municipal planning" are concurrent national and provincial legislative competences. Each legislative authority may make and administer laws for the effective administration of matters which they have the right to administer in terms of the South African Constitution.⁵⁶ Those authorities are required to exercise their respective legislative competences and perform their supervisory functions.

The *executive authority* of the Republic is vested in the President, of provinces in the Premiers and of municipalities in the municipal councils.⁵⁷ The Constitution sets out what the exercise of executive authority involves. The executive is required to implement and administer legislation and to adopt policy guidelines which serve to assist decision-makers in the exercise of their discretionary powers. Each municipality has executive authority in respect of and the right to administer *inter alia* municipal planning and building regulations.⁵⁸

⁵¹ Sections 9(1), 17, 24, 25, 26, 27(1)(b), 32(1)(a) and 33 respectively.

⁵² Sections 40(1) and 41(1)(c) of the Constitution respectively.

⁵³ Sections 44, 104 and 156 respectively.

⁵⁴ Section 46(1), 105 and 157 of the South African Constitution, to be read with the provisions of the Electoral Act, No. 73 of 1998 and section 14 of the Constitution of the Western Cape, No. 1 of 1998. Schedules 4 and 5 to the Constitution for the functional areas of legislative competences.

⁵⁵ See for example section 156(2) of the South African Constitution which empowers municipalities to administer the matters listed in Parts B of Schedules 4 and 5 to the Constitution.

⁵⁶ Sections 85(1), 125 and 151(2) of the Constitution respectively.

⁵⁷ Sections 85(1), 125 and 151(2) of the Constitution respectively.

⁵⁸ Section 156(1) *ibid*.

The Legislature targeted the local sphere of government to promote social and economic development. Constitutional objects of local government include that it should "provide democratic and accountable government for local communities" and "promote social and economic development".⁵⁹ The developmental duties of municipalities include that each municipality must "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community".⁶⁰ Local government is required to ensure the provision of services to communities in a sustainable manner, promote a safe and healthy environment, and encourage the involvement of "communities and community organisations" in the matters of local government.⁶¹ The MSA echoes the requirement that the provision of services to the local community should be undertaken in a "financially and environmentally" sustainable manner⁶² and requires that municipalities promote and undertake *development* in the municipality.⁶³

The *judicial authority* of the Republic is vested in our courts. The South African Constitution provides for the institution of a constitutional court charged with over-seeing *inter alia* matters relating to the interpretation, protection and enforcement of the provisions of the Constitution.⁶⁴ Below the Constitutional Court is a structure of superior or high courts. The appellate court exercises appellate jurisdiction and only hears and determines matters brought before it on appeal from other divisions of the supreme or superior courts. Provincial and local divisions of the Supreme Court with inherent jurisdiction were also created. Basically, it means that they may hear and determine any matter brought before them and make orders unlimited as to amount in respect thereof, subject only to statutory and certain common law restrictions. Magistrates' courts, the lowest level of the hierarchy, cannot claim any authority which cannot be found within the four corners of the enabling legislation. They *inter alia* adjudicate on offences brought before them by local authorities in the course of municipal law enforcement.⁶⁵ They have limited criminal and civil jurisdiction and may not undertake the judicial review of a decision taken by an administrator. Such a matter will have to be brought before the High Court.

⁵⁹ Section 152(1)(a) and (c) of the South African Constitution.

⁶⁰ Section 153 of the South African Constitution.

⁶¹ Section 152(1)(b) - (e) *ibid*. Note the emphasis on the collective (the community).

⁶² Section 4(2)(d) *ibid*.

⁶³ Section 4(2)(g) *ibid*.

⁶⁴ *Ibid* sections 166(a) and 167.

⁶⁵ Meyer (1999: 174).

A number of state institutions were established to strengthen constitutional democracy in the Republic, such as the Public Protector and the Electoral Commission. The Public Protector is potentially the most significant of those institutions for purposes of vertical government accountability within land use planning and development context. National⁶⁶ and provincial⁶⁷ legislation were passed to provide for additional powers and functions of a national and a provincial public protector. The national public protector may investigate any conduct in state affairs or in the public administration in any sphere of government,⁶⁸ whilst the activities of the provincial public protector are restricted to affairs of government at provincial level and local authority level.⁶⁹ Both the national and provincial public protector may on own initiative or on receipt specified complaints conduct such investigations. Complaints may relate to any alleged maladministration in connection with government affairs and the public administration, abuse or unjustifiable exercise of power or unfair or undue delay by a person performing a public function, which results in unlawful or improper prejudice to any other person.⁷⁰ Section 182(1)(c) of the South African Constitution empowers the national public protector to take appropriate remedial action. The provincial public protector may only make appropriate recommendations to the relevant public authority.⁷¹

The public administration supports the three spheres of government and is enjoined to be governed by the democratic values and principles enshrined in the Constitution.⁷² Included are that the public administration must be development-orientated and accountable. The public administration fulfils an influential role in daily government practice relating to land use planning and development management as officials take by far the bulk of the decisions within the field of study. Elected representatives only deal with a relatively limited number of land use and development applications in daily practice.

3.3 STATUTORY DEVICES TO PROMOTE ACCOUNTABILITY

Legislation is the sole instrument with which the Legislature can promote accountable and effective government performance. Examples of mechanisms and methods used by the

⁶⁶ The Public Protector Act, No. 23 of 1994 (the "Public Protector Act").

⁶⁷ The Western Cape Provincial Public Protector Law, No. 6 of 1994.

⁶⁸ Section 6(4)(a) of the Public Protector Act.

⁶⁹ Section 4(1)(a)(i) of the Western Cape Provincial Public Protector Law, 1994.

⁷⁰ See section 4 of the Provincial Law and section 6(4) of the Public Protector Act.

⁷¹ Section 4(1)(c)(ii) of the Provincial Law.

⁷² Section 195(1) of the Constitution, echoed in section 19(1) of the MSA.

Legislature to engineer accountability in the three spheres of government include statutory requirements relating to the compulsory establishment of *state institutions* to strengthen constitutional democracy and *elections* to promote accountability. The following nine further examples are considered to be of particular significance for achieving government accountability within the planning and development context and have been selected by the researcher for illustration and analysis. Examples of statutory requirements are provided for each of them.

- 3.3.1 *Providing for sanctions*: The presence of authority able to back up legal imperatives by sanctions which a court will enforce, is required for the regulation of a community and for sustained responsiveness. Sanctions are provided for in all the laws dealing with planning and development and may be imposed via the formal judicial route or in quasi-judicial or purely administrative processes. Sanctions in relation to government accountability may serve to punish, incapacitate, deter, reform or correct, and to redress or provide retribution.⁷³ Civil liability usually involves the payment of a sum of money by the offender to the victim (e.g. for damages suffered). Criminal liability often requires the payment of a fine by the offender to the authorities or imprisonment.
- 3.3.2 *Providing a "no confidence" mechanism of accountability*:⁷⁴ This procedure in parliamentary democracies permits the principals in the legislature to observe and *ex ante* sanction the members of the cabinet who have sufficiently violated expectations so as to make them vulnerable to replacement (Laver & Shepsle, 1999: 295). If such a motion is passed with the required support or if the agent resigns in anticipation of it, the Cabinet or Executive Council (as the case may be) must be reconstituted
- 3.3.3 *Stipulation of values, principles and criteria*: Section 195 of the Constitution stipulates basic values and principles that govern the public administration. Sections 2 and 3 of the DFA enjoins local authorities to promote efficient development in decision-making, to optimise existing resources, to discourage the phenomenon of urban sprawl and (through decision-making) to contribute to the development of more compact towns

⁷³ Compare Elster (1999: 276), Neill (1971) quoted by Solomons (1990. 272) and Solomons (1990. 128).
⁷⁴ Sections 102(1) and 141(1) of the Constitution respectively provide for a vote of no confidence in the Cabinet and a province's Executive Council.

and cities. Section 36(1) of LUPO states that an application for the subdivision and rezoning of land may only be refused on the grounds of "lack of desirability".

- 3.3.4 *Stipulation of obligations:* All three spheres of government (including the public administration) must obey, observe, uphold and maintain the Constitution and all other law of the Republic. Municipalities must comply with the developmental duties discussed above and must determine appropriate lines of internal accountability and reporting for the municipal structures and office bearers.⁷⁵ They must comply with and enforce compliance with their zoning scheme provisions and with conditions of approval imposed under LUPO and must undertake integrated development planning.
- 3.3.5 *Stipulation of performance and behavioural standards:* Specific time periods are stipulated within which certain acts must be performed.⁷⁶ Section 5(1)(b) of the MSA provides that the community is entitled to "prompt" replies to their written enquiries. Performance reporting requirements are stipulated.⁷⁷ Section 237 of the Constitution requires that all constitutional obligations must be performed diligently and without delay. Municipal officials and councillors must comply with their respective codes of conduct.⁷⁸ They may be suspended or removed from office, after investigation, if the provisions of their codes of conduct have been breached. National legislation was enacted to give effect to the constitutional right to administrative action that is lawful, reasonable and procedurally fair. Section 6(2) of the PAJA empowers competent courts to judicially review administrative action if it was procedurally unfair, not authorised or if the administrator acted unreasonably.
- 3.3.6 *Stipulation of transparency requirements:* Open meetings,⁷⁹ mandatory publications,⁸⁰ opportunities for public participation in policy formulation,⁸¹ "notice and comment"

⁷⁵ Section 39(1) of LUPO, section 6(2), 50 and 53(5)(b) of the MSA.

⁷⁶ An administrator must within 90 days after receiving the request, give the person making the request *adequate* reasons in writing for the action (Section 5(2) of the PAJA). A building plan application must be decided within 30 or 60 days (Section 7(1) of the Building Act).

⁷⁷ E.g. Chapter 12 of the MFMA and the councillors' Code of Conduct that require quarterly reports.

⁷⁸ Sections 69 and 54 read with Schedules 1 and 2 to the MSA respectively.

⁷⁹ Section 14(2) of the MFMA requires decisions relating to the sale of municipal capital assets to be taken in meetings *open to the public*. Section 160(7) of the Constitution requires municipal councils to conduct its business in an open manner. It may close its sittings only when it is "reasonable" do so.

⁸⁰ E.g. section 16 of LUPO (i.r.o. advertisement of rezonings) and regulation 18 of the PAJA regulations.

procedures and public inquiries and hearings are required.⁸² The South African Constitution requires the public administration to be accountable.⁸³ The idea of accountability has moved the emphasis from *power* to *decisions* that are justifiable and this shift may result in legal precedent playing a bigger role in future decision-making. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. The public administration must foster transparency by providing the public with timely, accessible and accurate information.⁸⁴ PAIA was enacted to give effect to the fundamental right to information.

3.3.7 *Providing for oversight:* In addition to the Public Protector and other state institutions referred to above, provisions exist for other forms of judicial and legislative oversight of government action or inaction. Despite the apparent autonomy of municipalities, they remain subject to the supervision of the other two spheres of government. The national and provincial spheres of government have the legislative and executive authority to ensure the effective performance by municipalities of their local government functions. This is to be achieved by regulating the exercise by municipalities of their executive authority.⁸⁵ Provincial governments are required, through legislative and other measures, to provide for the monitoring and support of local government in their provinces.⁸⁶ The provincial executive may intervene when a municipality cannot or does not fulfil an executive obligation in terms of legislation.⁸⁷ National and provincial government may not, in the exercise of their powers, compromise or impede a municipality's ability or right to exercise its powers or perform its functions.⁸⁸

3.3.8 *Administrative appeals:* The protection of fundamental rights is not solely the domain of our courts. An array of office-bearers and bodies may perform quasi-judicial functions to cope with the problem of deciding about the appropriate application of laws in the planning and development field. This is necessary as our courts have consistently

⁸¹ E.g. Chapter 4 of the MSA requires public participation in the content and process of drafting an IDP.

⁸² E.g. section 4(1) and (3) of the PAJA and the PAJA regulations.

⁸³ Section 195 of the Constitution.

⁸⁴ Section 33(2) and 195(1)(g) of the Constitution respectively.

⁸⁵ Section 155(7) *ibid.*

⁸⁶ Section 155(6)(a) *ibid.*

⁸⁷ Section 139 *ibid.* Also see, for example, sections 137 and 139 of the MFMA which deals with discretionary and mandatory provincial interventions in municipal financial problems.

⁸⁸ Section 151(4) *ibid.*

refused to consider the *merits* of a case involving the exercise of public power, even in the face of the foolish exercise of discretion.⁸⁹ Applicants and persons whose rights are affected by government decisions have rights of appeal, all aimed at reconsideration of the merits of government decisions. The main purpose of such appeals is often to set aside, correct, prevent or remedy action or failure to act on the part of an administrator. The Legislatures provided an arsenal of appeals such as appeals for decisions taken under delegated authority within the municipal sphere, taken in terms of LUPO, concerning the environment, regarding requests for access to information, relating to heritage resources, and decisions relating to applications for building plan approval.⁹⁰

3.3.8 *Providing for deliberation*: The Guidelines issued by the Minister for Provincial and Local Government (2005) concerning ward committees serve as an example. Section 7(1) restricts membership of a ward committee to a maximum of eleven persons, of which a councillor representing the ward must be a member *and the chairperson*. Section 11(1) stipulates that ward committee meetings are convened by the chairperson. Section 11(2) stipulates the minimum required frequency of such meetings, i.e. at least quarterly (unless the municipality has made rules requiring meetings more often). Those guidelines however do not provide for sufficient control by members of the public and do not create a deliberative platform for matters concerning the national and provincial spheres of government.

3.4 JUDICIAL ENFORCEMENT OF ACCOUNTABILITY

The judiciary has acquired a major role in the mechanisms of government accountability.⁹¹ Judicial review of administrative action is a popular judicial instrument that may assist in achieving government accountability. A court performs two separate functions with judicial reviews. It reviews the legality of the action on the part of the authority and grants an appropriate order if it finds in favour of the applicant. Currently a court's power to review administrative action flows directly from the PAJA and the Constitution itself.⁹² Section 6 of the PAJA provides that any person may institute proceedings in a court or a tribunal for the

⁸⁹ E.g. *Sinovitch v Hercules Municipality* 1946 AD 783.

⁹⁰ Section 44 of LUPO, section 62 of the MSA, section 74 of the Information Act, section 43 of NEMA, section 49 of the Heritage Act and section 9 of the Building Act.

⁹¹ *Maraval* (1999: 162).

⁹² *Pharmaceutical judgment* paras 33 and 34.

judicial review of administrative action. It sets out a number of grounds on which judicial review may be based. Those grounds include that the action was procedurally unfair, was taken for a reason not authorised by the empowering provision, was not rationally connected to the reasons given for it or that the exercise of the power was so unreasonable that no reasonable person could have so exercised the power or performed the function.

The court may judicially review administrative action if the action consists of a failure to take a decision. It was confirmed in the case of *The Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) (at 152A-D) that, if it is alleged that the administrator failed to apply his mind to the relevant issues as required by law, proof is required that the decision was arrived at arbitrarily, as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose and so forth in order to establish review grounds. Proceedings for judicial review must be instituted without reasonable delay and within the time period stipulated by law.

The main purpose of an application for judicial review is often to set aside, correct, prevent or remedy action or failure to act on the part of the authorities. De Waal (2001: 173) argues that the object of awarding a remedy should include vindication of the Constitution and deterrence of future infringements. Competent courts are empowered to grant *appropriate relief*, such as an interdict, a mandamus (an order to compel) or a declaration of rights. It may declare any law or conduct that is inconsistent with the Constitution as invalid⁹³ and may make an order that is *just and equitable*.⁹⁴ An appropriate remedy must mean an effective remedy.

The court has discretion, when setting aside administrative action, to remit the matter for reconsideration by the administrator (with or without directions). Section 8(1)(c) of the Constitution provides that a court may in exceptional cases correct a defect resulting from the administrative action, substitute or vary the administrative action or direct the administrator to pay compensation.⁹⁵ De Waal (2001: 188) argues that good reason exists for the development of damages as a remedy for certain violations of fundamental rights.

⁹³ Section 172(1)(a) of the Constitution.

⁹⁴ Ibid section 172(1)(b). In the Fose judgment it is stated that appropriate relief will in essence be relief that is required to protect and enforce the Constitution.

⁹⁵ Section 8(1)(1)(c) of the PAJA.

A number of factors directly or indirectly restrict the powers of the courts to play a meaningful role in enforcing government accountability and the ability of members of the public to enforce government accountability via our courts (e.g. the limited jurisdiction of Magistrates Courts). Practical constraints only permit a brief examination below of the restrictions flowing from the doctrine of separation of powers, the rules governing the interpretation of laws and justiciability requirements. The affordability problems of litigation which prevent most citizens access to the courts to enforce government accountability is briefly discussed in par 3.7.1.

3.4.1 The *doctrine of separation of powers* serves to prevent the excessive concentration of power in a single person or body. It requires the classification of government functions into three categories (i.e. legislative, executive and judicial) and that each separate function be performed by separate branches of government. It is necessary to briefly refer to the legacy of the previous regime. Dugard *et al* (1992) have shown how discriminatory, repressive and emergency laws have damaged and undermined the reputation of the judiciary and destroyed respect for the law among the majority of the population. Dugard (1992: 28) describes how by 1959 the government had brought the judiciary into line and that "restraint and abstention were to characterise judicial decisions on race and security", whilst the unequal application of certain legislation was made still harsher by judicial interpretations in favour of the executive. The previous government created an environment where officials could undertake any action in the name of law and order and the maintenance of stability. "Given the reluctance of the courts to place effective controls on those responsible for executing the emergency, the abuse of power was rampant and inevitable. Not surprisingly, an already fragile legal system came to be perceived by many South Africans as both impotent and partial". The 'hands-off' approach to government activity by our courts in the pre-Constitution phase⁹⁶ and their failure to use their powers of interpretation and review to support human rights in the previous dispensation provoked severe criticism in academic legal circles.⁹⁷

⁹⁶ See the Sinovitch judgment at 802-803: "The law does not protect the subject against the merely foolish exercise of a discretion by an official, however much such subject suffers thereby".

⁹⁷ E.g. Dugard (1992: 27), Sarkin (1998), Skjelten (2006: 15 and 19) and Forsyth (1985: 144)

Currently a separation of government functions is recognised by vesting the legislative, executive and judicial powers in different bodies⁹⁸, although the separation is not clear at the municipal sphere of government.⁹⁹ Our courts are keenly aware of the need to respect the separation of powers doctrine and to exercise judicial restraint.¹⁰⁰ They have developed mechanisms of self-restraint aimed at preventing them from interfering with the legislative and executive branches of government. Their treatment of administrative decisions with appropriate judicial deference is best understood as appropriate respect for the findings of fact by administrators. It is a conscious determination not to usurp the functions of the administrative agencies and a willingness on the part of our courts to recognise the proper role of the executive within the Constitution.¹⁰¹

3.4.2 *Rules of statutory interpretation:* In statutory law, the legislature's intention is not always proclaimed in clear terms, no matter how carefully words are chosen. Our courts have therefore formulated rules of interpretation to assist whenever it is necessary to ascertain and establish what intention the legislature conveyed by the language used.¹⁰² In the pre-Constitution dispensation it was a golden rule of interpretation that words had to be given their ordinary literal grammatical meaning unless, when so applied, they produced an inconsistency so as to justify the Court in placing upon them some other signification which the court thinks the words will bear.¹⁰³ The Constitution introduced a fresh approach to legal interpretation and requires our courts and tribunals, when interpreting the Bill of Rights and legislation, to promote the values that underlie an open and democratic society and to promote the spirit, purports and objects of the Bill of Rights.¹⁰⁴ On the other hand, this value-based approach to interpretation often means that litigants are in practical reality at risk. They may discover after an expensive court case that their understanding of statutory provisions have been wrong. Such uncertainty discourages litigation.

⁹⁸ Sections 43, 85, 125 and 165 of the South African Constitution.

⁹⁹ Section 151(2) of the Constitution vests municipal councils with both executive and legislative authority. See for example comments made by Madala J in the Nyathi judgment at par 88

¹⁰⁰ See footnote 32 of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA (CC) and par 88 of *Nyathi v MEC for the Department of Health, Gauteng and Others: Constitutional Court Case Number CCT 17/07 [2008] ZACC 8*.

¹⁰¹ See generally Steyn (1981).

¹⁰² *Union Government v Mack* 1917 AD 731 serve as an example.

¹⁰³ *Ibid* sub-sections 39(1) and (2).

¹⁰⁴

3.4.3 *Justiciability requirements* relate to legal standing, ripeness and mootness. The applicant in a legal matter must be able to satisfy the court that she has legal standing.¹⁰⁵ The doctrine of ripeness deals with the timing of a challenge. The business of a court is generally retrospective. It deals with situations that have already ripened. Applicants that approach the court prematurely or with hypothetical concerns will be denied the required remedies. Usually those who seek judicial review must first exhaust the domestic remedies (Baxter, 1984: 720).¹⁰⁶ The doctrine of mootness prevents a court from deciding an issue when it is too late.¹⁰⁷ Even if one were able to overcome the many technical and financial hurdles that stand in the way of litigation, one may find that state liability has been limited or excluded by legislation.¹⁰⁸

This thesis argues that, in addition to law and institutional reform (discussed earlier), a certain measure of judicial liberalism (i.e. the use by the courts of their powers of interpretation and review to support the promotion of socio-economic development and so forth) is required for the improvement of government accountability.

3.5 ALTERNATIVE APPROACHES TO ACHIEVE ACCOUNTABILITY

If the state appears to be beyond legal limits and recourse to law is regarded as futile or is not possible, members of the public may have to employ alternative approaches in an attempt to remedy the situation. Budlender (1988: 152) claims that in those circumstances those who are alienated from the processes of social control tend to exercise their own control and that it is likely to be "at least as arbitrary and brutal as anything they have experienced". This is confirmed by recorded facts in *The Culture of Power in Southern Africa*, where Craig (2003: 27) records the most gruesome of the narratives in which a resident magistrate, an arrogant official, was ritually murdered at a ceremony of authority and fertility in 1880. Other examples of alternative approaches mentioned in the literature include defiance campaigns, mass resistance, boycotts, labour strikes and protests, civil disobedience, political violence,

¹⁰⁵ E.g. a person acting in the "public interest" as contemplated in section 38 of the Constitution.

¹⁰⁶ Section 7(2)(c) of PAJA empowers a court, *in exceptional circumstances* and on application, to exempt a person from the obligation to exhaust internal remedies before instituting proceedings for judicial review, *if* deemed in the interest of justice.

¹⁰⁷ In the JT Publishing judgment the court confirmed the principle that courts should not decide points which are merely abstract, academic or hypothetical.

¹⁰⁸ See the Institution of Legal Proceeding Against Organs of State Act and the State Liability Act.

witchcraft, pickets and demonstrations. Our Bill of Rights contains a right to assemble, demonstrate and picket, peacefully and unarmed and to present petitions.¹⁰⁹ Such counteractions may disrupt peace, stability and orderly government processes. Adejumobi (2000: 11) argues that accountable governance involves a stable, inclusive and popular decision process, that war and conflicts are antithetical to accountable governance and that "accountable governance is possible only in an environment of peace and stability".

3.6 PLANNING LAW AS BACKDROP TO ACCOUNTABILITY

This section provides a brief overview of some of the statutory requirements employed by the Legislatures to manage and regulate planning and development. Various acts, ordinances, regulations and by-laws relating to land use planning and development were in force when the Constitution took effect and continue to be in force.¹¹⁰ Those laws *inter alia* require local government to undertake land use planning, to apply the DFA principles in relation to decisions concerning land use development and to approve or refuse applications for the rezoning or subdivision of land, consent uses and of building plans.¹¹¹ When granting approvals, the authorities may also impose appropriate conditions. Such conditions may *inter alia* include requirements relating to the cession of land or payment of money which is directly related to the needs arising from the approval.¹¹² In addition new laws have been passed as part of the post-democratic legislative endeavour. New activities that require prior approval or authorisation from the competent authorities include those that may potentially impact on cultural heritage resources¹¹³ and the commencement of listed environmental activities.¹¹⁴ The list of legislation referred to is not intended to be exhaustive and merely serves to indicate the variety of applications and approvals required before a single development proposal may commence.

¹⁰⁹ Section 17 of the South African Constitution.

¹¹⁰ Section 2 of Schedule 6 to the Constitution.

¹¹¹ See the structure plan and application requirements in LUPO, the Subdivision of Agricultural Land Act, No. 70 of 1970, the National Building Regulations and Buildings Standard Act, No. 103 of 1977. The DFA principles have been referred to above.

¹¹² E.g. section 42 of LUPO. The "cession of land" as used in that section means "without compensation". The municipality may therefore obtain ownership of portions of an applicant's land required for purposes of public roads without payment of compensation in the stated circumstances.

¹¹³ Section 38 of the National Heritage Resources Act, No 25 of 1999.

¹¹⁴ E.g. excavation within 100m from the high water mark is a listed activity in terms of the 2006 regulations made under NEMA and requires environmental authorisation.

3.7 PERCEIVED WEAKNESSES OF LEGISLATIVE MEASURES

In the elaborate legislative scheme described above the elected legislatures are required to make laws that grant rights, impose obligations and set standards and norms. The executive government bodies are required to implement those laws and comply with their legal obligations. A system of sanctions and awards has been created, the courts are empowered to enforce the laws and provision exists for administrative measures to accomplish accountability. Even if everything else fails, provision exists for alternative measures to promote government accountability (e.g. the rights to assemble and demonstrate).

Notwithstanding the impressive efforts on the part of the Legislatures to provide an effective system of democracy and accountability, this thesis argues that many factors exist that limits the effectiveness of those measures within the land use planning and development context. Three recent examples encountered by the researcher will be used to illustrate some of the many shortcomings in the legislation and the ineffectiveness of the current system of government accountability within the field of research.

3.7.1 *Example number 1.* The first case concerns an attempt by someone who wished to exercise his fundamental right to have access to adequate housing. Municipal policy applies in the area in which he intended erecting his house, in terms of which buildings on farms which may be visible from the village should be discouraged. His application for building plan approval was refused as a result of the rigid application of the municipal policy. A long line of court cases over the years have made it clear that policy may not be treated as a hard and fast rule to be applied invariably in every case and that every case that is presented to the public body for its decision must be considered on its merits. It *inter alia* means that the administrator must take relevant considerations into account¹¹⁵ and should exercise her discretion by making a choice from amongst alternative courses of action. Such choice is expected to be made in a judicious manner.¹¹⁶ If policy guidelines are applied in a manner which excludes the conscientious exercise of the relevant discretion, the court will set those decisions aside on judicial review.¹¹⁷ On the other hand, if the court is satisfied that applications

¹¹⁵ E.g. the Pharmaceutical judgment at par 85.

¹¹⁶ See Baxter (1984: 80) and section 6(2)(f)(ii) of the PAJA.

¹¹⁷ E.g. the Britten v Pope 1916 AD.

have been carefully considered and involved the conscientious exercise of the relevant discretion it will not intervene.¹¹⁸

The refusal was challenged by way of appeal in terms of the MSA. The municipality was informed that blind adherence to policy does not amount to the exercise of a discretion in law. When, after more than a year, no steps have yet been taken to process the appeal a formal complaint was lodged with the Staff Department of the municipality and it was alleged that the responsible official was in breach of the applicable code of conduct. The request for an investigation and disciplinary action against the official was ignored. The subsequent persistent pestering of the municipal officials and letters to the municipal manager and mayor did not solicit prompt replies as required in terms of the MSA. Those letters were met with utter silence.

Part of the problem was that the legislature had failed to clearly specify performance standards (e.g. that the appeal decision should be taken or that enquiries should be answered within a fixed period). It also failed to provide an affordable mechanism to achieve government accountability if the municipality or official would have failed to comply with the stipulated norms and statutory requirements. Judicial review was an option. In terms of section 6 of the PAJA the remedy is available if an authority fails to take a decision within 180 days in circumstances as described above. As the Magistrates Court did not have jurisdiction in the matter, it meant that a High Court application was necessary. If the applicant was required to first exhaust internal remedies, it effectively would have meant a waiting period of at least 180 days before court papers could be issued. The current waiting period in the Cape High Court from date that court papers for judicial review are issued until the matter is finally heard and decided, is two or more years. Effectively therefore it could easily take three or more years only to obtain a decision relating to one's fundamental right to have access to adequate housing. This thesis argues that accountability delayed is accountability denied.

¹¹⁸

See the approach adopted by O'Regan J at par 56 of the Bato Star judgment.

The risks and costs involved in High Court litigation are considerable. Reference was made above to the uncertainty associated with the interpretation of legislation. The manner in which a court will exercise its discretion will impact on the outcome of the court case concerned and generally that will only be known when judgment is handed down. In the researcher's experience the legal costs of a successful litigant in an application for judicial review may amount from R60 000,00 upwards and, if opposed, may amount to more than double that figure. The unsuccessful applicant must usually pay the opponent's taxed legal costs. Effectively therefore affordability problems prevent most citizens access to the courts to enforce government accountability. The applicant in the example given was one of the fortunate few that could afford High Court litigation. If the applicant was prepared to accept the extensive delays involved in litigation and managed to achieve "success" in court, it could have amounted to an empty victory. The setting aside of the municipal decision to refuse the building plan coupled with the normal exercise of judicial restraint and deference, would have meant reconsideration of the application by the municipality and potentially again a refusal.

The public protector was a further possible avenue that the applicant could have pursued. The applicant perceived the role played by the public protectors to be political rather than robust. Joubert (2005:140) confirms that this type of perception is based on the issues covered in the reports of the public protector to date. The applicant elected to wait for the municipal appeal authority's decision, rather than to approach the public protector or a court.

The appeal was dismissed by the municipal appeal authority almost two years after date of lodgement and the reason given for dismissal was that the proposed building would probably or in fact derogate from the value of adjoining property. If the statement was factually correct, it would have been a valid reason for refusal of the building plan in terms of section 7 of the Building Act. In the given set of facts the dwelling would not have been visible from adjoining property and could therefore not have detracted from the value of adjoining property. As stated before, the authority is required by law to provide *adequate* reasons for decisions. The legislation, however, failed to clearly require that the decision-maker should also provide the reasoning to support the

conclusion reached. Without knowing what the reasoning was for the conclusion reached, the applicant was unable to establish whether the decision-maker made an error of law or fact. When asked to judicially review such a decision, a court generally will not enquire into the merits of a case. Even though the reason given was not supported by the facts, the municipality managed to camouflage the real reasons for its refusal of the building plan application by employing words used in the applicable legislation. The person approaching the court for appropriate relief bears the burden of proof. The reasons provided for refusal seemed, at face value, to indicate that the exercise of public power was rationally related to the purpose for which those powers were given. A court probably would have refused to intervene in those circumstances. Effectively, therefore, the applicant was without a remedy. The applicant stated that he has shelved the idea of a residence or further investment in South Africa and that he would rather live and invest in Austria.

3.7.2 *Example number 2.* The second case involved an application for township establishment. The proposal triggered so-called 'listed activities' (in terms of the environmental regulations), had a potential impact on an historical furrow, and required approval of rezoning and subdivision applications. The local authority refused to process the LUPO applications before the outcome was known of the environmental process required under the National Environmental Management Act (NEMA). A full environmental assessment was required before the application for environmental authorisation could be decided. The applicant also had to comply with the requirements of the National Heritage Resources Act. In terms of section 38(8) of that Act the authority empowered to grant authorisation under the environmental legislation is required to take into consideration comments made on behalf of the heritage authority before deciding an application for environmental authorisation. In the given set of facts the heritage authority failed to properly deal with the matter and eventually the frustrated applicant lodged an appeal with the responsible heritage minister. The minister upheld the appeal after many months of delay and provided favourable comment to the environmental authority. After yet further delays, an official acting under delegated authority granted environmental authorisation approximately eighteen months from date of receipt of the application. Objectors then lodged an appeal against

the decision, causing a further delay of almost two years before that appeal was dismissed by the responsible minister. That minister simultaneously approved the rezoning of the property for "subdivisional purposes" as contemplated in section 22 of LUPO. She imposed as a condition of approval that the competent heritage authority should approve of the wording of a servitude to be registered to regulate access to the historic furrow.

The competent heritage authority was requested to approve the wording of the proposed servitude, but failed to properly do so and subsequently also failed to process an appeal which the applicant lodged as a result. The applicant's concerted efforts over approximately two years to obtain the required heritage approval were unsuccessful. The matter was once again submitted to the environmental authority with the request that the condition requiring the approval of the heritage authority be waived. Indications are that, if the request for amendment should eventually be successful, the eventual decision to approve or refuse the application for subdivision will be met by an appeal in terms of LUPO. Such an appeal could add another eighteen months or more to the process.

3.7.3 *Example number 3.* The judgment handed down in *Hayes and Another v Minister of Finance and Development Planning (Western Cape) and Others 2003 (4) SA 598 (C)* serves as a practical example of how judicial restraint may impact on potential development. In the Hayes-matter a provincial minister on appeal approved a land use application against the wishes of the municipality concerned. The approval was set aside by the High Court because the objectors were not informed that the applicant lodged a LUPO appeal with the provincial authority against the municipality's refusal of the application. The matter was referred back to the provincial authority for reconsideration. The provincial authority then duly ensured that the objectors were given proper notice and an opportunity to make further comment before reconsidering the appeal. It subsequently again approved the application. The objectors approached the court for a second time and managed to again obtain an order setting aside the minister's second approval on technical grounds. The applicant for development approval, after several years of effort trying to obtain approval and after having

incurred considerable town planning and legal expenses, decided to shelve the idea of developing the property.

The three examples described above convincingly illustrates that the manner in which the legislation has been written (and the lack of integration of legislation) makes it nigh impossible for local government to effectively promote social and economic development within land use context. Part of the problem is that National and Provincial Legislatures have not provided only one right of appeal on the same set of facts, but several rights of appeal. Any person who intends to obstruct development is therefore able, on the same set of facts, to successively frustrate the process by lodging successive appeals. Even if more than one right of appeal was warranted, a statutory provision that all appeals should be dealt with concurrently and not successively would have contributed to more speedy resolution of disputes. If the Legislature required decisions relating to land use planning and development to be taken by one body representing all the various interests¹¹⁹ it could have expedited finalisation of applications and would have contributed to a more holistic approach to consideration of such applications. This in turn would have positively contributed to the progressive realisation of the fundamental right to have access to adequate housing.

The legislative picture is not entirely bleak. In addition to legislation regarded as making a positive contribution to the promotion of accountability (such as the PAJA and the PAIA), the Legislatures have in recent times also managed to introduce measures that contribute positively to the more effective processing of applications within the field of study. One such a provision is section 38 of the NHRA. It basically provides that the competent heritage authority (which would have been a decision-making authority in ordinary circumstances) becomes a commenting authority if the proposal to which the application relates also requires authorisation under the environmental legislation. In other words, the heritage authority will still be required to comment on the proposal, but only one decision will be taken, namely by the environmental authority.

Certain minimum requirements will have to be complied with to overcome the perceived weaknesses of legislative measures aimed at accomplishing government accountability. This

¹¹⁹ The tribunal contemplated in the DFA partially fulfils such a function. However, no such tribunal has been appointed for the Western Cape.

should be evident from the practical problems experienced by ordinary citizens in land use planning and development context as highlighted in the examples provided in 1.3 and 3.7. This thesis argues that legislative reform is urgently required. It should provide for compulsory co-ordination of the legislative activities of the three spheres of government, oblige the provincial and national spheres of government to undertake land use planning and stipulate specific time periods for the performance of activities. In all instances where statutory obligations are placed on government bodies, effective and affordable mechanisms should be provided for members of the public to enforce prompt compliance. Provision should be made for informal, relatively cheap and fair procedures for challenging the manner in which public power has been exercised, for prompt and objective hearings, and for supervisory bodies that would not be required to remit matters to the relevant authority for reconsideration. Such supervisory bodies should be empowered to enquire into the merits of decision, to annul administrative acts, to substitute the decision of the authority under review, to impose coercive fines and take disciplinary action against offending authorities and their officials.¹²⁰

3.8 SUMMARY

This chapter provided an overview of the legal framework within which government accountability is to be achieved in our democracy. It explored the statutory devices employed to promote accountability, with special emphasis on the role of the judiciary in the process, and included a brief analysis of the alternative approaches that may be employed to achieve government accountability. Planning law was used as a backdrop for purposes of exposing the practical difficulties encountered by applicants in land use planning and development context. Three examples were provided that illuminated the high risks, costs and time delays involved in the application of the available formal remedies.

¹²⁰

See discussion in Part II “Powers of Administrative Courts to Enforce their Decisions” in the General Reports of Congresses of the International Association of Supreme Administrative Jurisdictions (Madrid, 2004) available at www.iasaj.org/publi/doc/congres%20VIII%20va.pdf.

CHAPTER 4: APPROACH TO RESEARCH

4.1 INTRODUCTION

The aim of this chapter is twofold. Firstly, it aims to show in more detail how the researcher approached the supplementary study that was undertaken to establish whether others active in the field of study also viewed government as unaccountable within the land use and planning context. Secondly, it aims to describe the actual process of fact-finding involving a target group, to analyse the data obtained, and to describe and discuss the research findings.

Particulars provided in earlier chapters regarding the approach which the researcher adopted to the research, are not repeated here in any detail. For ease of reference the reader is referred to the following sub-paragraphs above:

- 4.1.1 The problem definition (i.e. whether the current mechanisms for achieving effective government accountability are adequate) - par 1.4.
- 4.1.2 The main research objectives (to establish what exactly is meant by the constitutional requirement that government and the public administration must be accountable *and* to assess the effectiveness and adequacy of the available mechanisms to achieve such accountability) – par 1.5.
- 4.1.3 The theoretical framework and research questions (e.g. what are the available legal requirements and key mechanisms to promote government accountability *and* whether they are adequate to ensure a reasonable measure of accountability) – par 1.6.
- 4.1.4 The research methodology (i.e. first undertaking literature and laws reviews, followed by supplementary research to obtain the views of others active in the field of study on whether they perceive government as unaccountable and whether they regard the available mechanisms for accountability as effective within land use and planning context) – par 1.7.

4.1.5 The target group (e.g. the selection criteria employed to ensure that members of the group would be representative of provincial and local government, professional consultants and developers and would be actively involved and experienced in land use planning and development context) – par 1.2.

A qualitative approach was used in this study to test the level of acceptance of government accountability and the perceived effectiveness of the existing mechanisms within a chosen target group. The unit of analysis for this research involved all three spheres of government (including the public administration) within the land use planning and development context within the Western Cape.

This research concerned the exercise of public power by government within the stated context and more particularly whether government can effectively be held accountable for the manner in which public power is exercised. Three basic questions were raised in this regard. Firstly, whether government could effectively be compelled to answer (i.e. provide an explanation, reason or justification) to members of the public for its acts or omissions. Secondly, in the event of unsatisfactory account-giving, whether an acceptable degree of remedy (e.g. redress and correction) was available. Thirdly, whether government accountability involved a process of social empowerment for the people by incorporation of those for whom decisions are made into the decision making mill.

Based on the researcher's own observations as described earlier he has adopted as an existential hypothesis¹²¹ that government is mostly not accountable within land use planning and development context within the Western Cape and that the available mechanisms for achieving government accountability are ineffective. In doing so, the researcher's bias was placed in the open.

4.2 RESEARCH ASSUMPTIONS AND LIMITATIONS

Various research assumptions and limitations may potentially detract from the validity and reliability of the data obtained. For example, Delpont and Fouché point out (2005: 262) all "qualitative researchers approach their studies with a certain paradigm or world-view, a basic

¹²¹ I.e. "a provisional statement about a certain state of affairs" (Mouton, 1996: 122).

set of beliefs or assumptions that guides their inquiries". Du Toit (2005: 426) argues that the researcher should bring the hidden assumptions and implications that research questions may contain, to light before attempting to provide answers to the questions posed. Through the law review it was shown that the assumptions in the research questions that legal requirements do exist relating to government accountability and that there are mechanisms in place to promote government accountability, were correct.

A comprehensive overview of the assumptions and limitations that could potentially detract from the validity and reliability of the data obtained in the course of the research is beyond the scope of this thesis. Some of those do merit special attention and are briefly examined below.

4.2.1 Research assumptions

This study assumed that respondents are answering the questionnaire truthfully and honestly. To improve the likelihood of this being so, the anonymity of respondents have been assured. In addition reliance was placed, amongst other things, on direct observation of the researcher supplemented with less reactive methods (e.g. the use of case law) with which to compare the answers obtained from respondents. The questionnaire was set in a way that would contribute to a reduction of the likelihood of dishonesty or untruthfulness. Most statements to which informants were required to respond were positively worded (e.g. "adequate land use planning exists") or required confirmation of the factual situation (e.g. "requests for reasons are promptly complied with"). The researcher realised that respondents are more likely to agree with a statement than to disagree with the inverse (see Mouton, 1996: 155).

4.2.2 Potential sources of error

Mouton (2001: 100 - 110) provides a useful summary of the main errors one may encounter in research. A comprehensive overview of potential sources of error that may lead to invalid or unreliable information is beyond the scope of this thesis. Suffice it to say that the attempts of the researcher to overcome or limit problems in this regard included the following:

- (a) The researcher clearly defined what was meant by accountability within the context of the research¹²² and used short and simple specific questions rather than general ones

¹²² See Annexure 1: Pro forma questionnaire.

to avoid problems of ambiguity and abstract concepts. The questions were aimed at establishing facts rather than opinion through formulation that was likely to render such a result.

- (b) Leading questions were avoided. The target group included persons representing government, the private sector and professional consultants who are required to work on both sides of the proverbial fence.
- (c) The researcher discussed the measuring instrument with his supervisor, improved it afterwards before testing it with two town planners who did not form part of the target group, and only then used it in the actual study.
- (d) The researcher placed substantial reliance on relevant case law which by its very nature is non-reactive.¹²³ The researcher employed a questionnaire to create distance between him and the participants to provide less opportunity for his own prejudices, attitudes and beliefs to influence the final data.

4.2.3 Research limitations

This study was subject to a number of limitations. Included amongst those limitations were that the findings were analytic generalizations (as opposed to statistical generalization), that the study was a cross sectional study and all findings were limited to the period of time which is covered by the study analysis and the researcher's inability to find strong supporting literature on all dimensions of government accountability. Further potential limitations included the issue of honesty and truly detailed answers from participants and sociological, ontological and methodological constraints.¹²⁴ Examples of such constraints would be that the researcher, whilst interacting with the social world in the research process, made a number of decisions in the pursuit of valid conclusions that could impact on the validity of the results,¹²⁵ the complexity of human behaviour coupled with the fact that most social actions take place in an open system, and the use of potentially inappropriate methods and techniques. Overall the

¹²³ This is "modification to create a better impression" - per Mouton (1996: 143).

¹²⁴ See Mouton's discussion of these types of constraints (2001: 123).

¹²⁵ See Mouton (1996: 41), Fouche & De Vos (2005:102) and Strydom (2005: 249).

qualitative style of the supplementary research was “situationally constrained” (Fouche & De Vos, 2005:102).

4.3 RESEARCH DESIGN

The aim with this section is to explain how the researcher reached his research questions, why those questions were asked, in what sense they were linked to the research objective and how the research project was executed in order to maximise the validity of the findings. The purpose of undertaking a research design was to enable the researcher to anticipate what the appropriate research decisions should be, aimed at maximising the validity of the eventual results.

Steps taken and tactics employed by the researcher in an attempt to avoid problems relating to the validity and reliability of information included conceptualisation and operationalisation. "Accountability", as a key concept, was clarified by way of definition in the questionnaire. The process of operationalisation included compiling a list of characteristics denoted by the concept "accountability" for purposes of measurement. For construct validity, reliance was *inter alia* placed on knowledge gained in the process of the literature and law reviews. This was followed by compilation of a list of questions that were assumed to be elements of the phenomenon called accountability and presenting them to a sample of individuals in a questionnaire, from which the researcher could gain an overall impression.

A questionnaire was used to obtain standardised data, allowing easy comparison and giving more control over the research process. A copy of the questionnaire is included as Appendix 1. Part I of the questionnaire required respondents to provide some personal information relating to them. In order to encourage the target group to complete the questionnaire and hopefully generate a high response rate, the researcher assured respondents by letter that their responses would be treated as confidential and that they would not be identified in the thesis.

Part II of the questionnaire contains the survey questions. It was designed by grouping all the questions and issues which resulted from the detailed literature review and statutory requirements together. The questions used in the questionnaire were mainly structured,

asking the respondents to make choices among a number of options given by the researcher and were considered to be relatively easier to answer than open-ended questions. The item format was such that each item had to be rated on a six-point-scale. In the second section of Part II eighteen factors were listed that could potentially contribute to the erosion of government accountability. Respondents were required to use a given scale of ratings to indicate what contribution those factors make (if any) to the erosion of government accountability. The item format was such that each item had to be rated on a three-point-scale. In order to give respondents the opportunity for additional comment they were also asked to indicate whether in their opinion there were factors not listed by the researcher that contributed to the erosion of accountability in government and for this purpose a blank lined space was provided.

The third section of Part II was concerned with the time taken by the authorities to finalise processing of listed types of applications and appeals. The aim was *inter alia* to establish whether the authorities complied with the rule of law.¹²⁶ Respondents were asked in the fourth section of Part II to rate the current measure of accountability in the three spheres of government in the specified context, expressed as a percentage. Respondents were also required to motivate their choices made and were invited to make suggestions as to what is required to improve the accountability of the three spheres of government in the field of study generally.

Having compiled a questionnaire, the researcher was faced with the problem of getting a sample that was as representative as possible of the research population (i.e. a collection of individuals all involved in the land use planning and development industry in the Western Cape). The selection criteria as described in par 1.2 (e.g. on-going experience in the field of study over many years) narrowed the potential research population to an estimated 150 persons, of which the researcher managed to identify a core group of 47 persons as members of the target group. The chosen sampling frame included government employees, town planners in private practice and developers. The target group comprised 12 town planners and 1 environmental practitioner in private practice, 8 municipal town planners from various local authorities, 3 senior provincial officials, and 23 developers. All those identified that met

¹²⁶

Discussed in 3.7.1. Statutory time periods apply in some instances within which the authorities are required to perform and failure to comply, would serve to indicate non-compliance with the rule of law.

the criteria described above, were selected to remove the possibility that the researcher's bias would enter into the selection of potential respondents. The inclusion of government officials, private practitioners and developers into the target group was aimed at reaching accurate results covering all sectors. Overall the aim was to obtain a balanced set of data that would enable the researcher to form a more reliable picture of the actual state of affairs regarding government accountability.

Methods employed to increase the likelihood of reliability of data included multiple sources of data collection and direct observation supplemented with less reactive methods (e.g. use of case law). The strategy employed to ensure inferential validity was firstly to obtain a thorough understanding of the relevant theories and their philosophical underpinnings as well the statutory requirements and applicable legal principles; secondly, to use an appropriate technique of analysis for rival findings or explanations.

4.4 DATA COLLECTION

The questionnaire was forwarded by e-mail to the 47 members of the target group. The researcher wished to create a sense of urgency to improve the response rate and as the time required to complete the questionnaire was only approximately 20 minutes, they were afforded a limited period within which to respond. Only a disappointing fifteen completed questionnaires were returned within the time period stipulated (i.e. 31,9%) of which 3 were from municipal planners, 3 from town planners in private practice, 2 from senior provincial officials and 7 from developers.

The researcher contacted those who have failed to respond within the stated time period to ascertain the reasons for the non-completion of their questionnaires. He was given reasons ranging from point blank refusal to participate in research to explanations relating to perceived lack of sufficient knowledge and experience regarding the subject matter. Even through the sample may not be regarded as representative, it provides insight based on the many years of experience of the respondents, and supplements the supporting evidence obtained in the literature and law reviews and the findings of our courts in the case law.

4.5 DATA ANALYSIS AND RESULTS

The results obtained from the questionnaires returned are summarised below. For purposes of the summary the respondents have been classified into three groups, to wit "administrators" (i.e. the 4 **provincial and municipal respondents** indicated with a *), "practitioners" (i.e. the 4 **town planners in private practice** indicated with a *) and "developers" (the 7 **developers** that responded indicated with a *).

4.5.1 Part II of questionnaire - section 1

The respondents were asked to make choices among a number of options given by the researcher. The item format was such that each item had to be rated on a six-point-scale, namely **1 - strongly disagree**; 2 - moderately disagree; 3 - mildly disagree; 4 - mildly agrees; 5 - moderately agrees; and **6 - strongly agrees**.

1	2	3	4	5	6	
*	*	*	*	*		Adequate land use planning exists that may serve as a basis for decision-making in the <i>national</i> sphere of government
*	*	*	*			
*	*	*	*			
	*		*			

1	2	3	4	5	6	
*	*	*	*	*		Adequate land use planning exists that may serve as a basis for decision-making in the <i>provincial</i> sphere of government
*	*		*	*		
*	*		*	*		
				*		
				*		

1	2	3	4	5	6	
*	*	*	*	*		Adequate land use planning exists that may serve as a basis for decision-making in the <i>municipal</i> sphere of government
*	*		*	*		
*	*		*	*		
				*		
				*		

1	2	3	4	5	6	
*	*	*	*	*	*	The authorities are generally <i>responsive</i> to external Stakeholders
*	*	*	*			
*		*				
		*				
		*				
		*				

1	2	3	4	5	6	The authorities generally provide sufficient opportunity for <i>citizen participation</i> in the deliberative process of govt.
*	*		*	*	*	
*	*		*	*	*	
			*	*	*	
				*	*	

1	2	3	4	5	6	Usually citizens are afforded an effective opportunity to confront adverse evidence before a decision is taken
*	*	*	*	*	*	
*	*		*	*		
			*	*		
			*	*		

1	2	3	4	5	6	The authorities generally provide sufficient opportunity for professional consultants' participation in deliberative processes of government
*	*		*	*	*	
*	*		*	*	*	
*			*	*	*	
			*	*	*	

1	2	3	4	5	6	Decisions taken by municipal councillors are usually after <i>debate</i> of agenda items
*	*	*	*	*		
*	*	*	*	*		
*			*	*		
*			*	*		

1	2	3	4	5	6	The authorities usually <i>provide reasons</i> for decisions when informing applicants & objectors of those decisions
*			*	*		
*			*	*		
*			*	*		
			*	*		
			*	*		
			*	*		
			*	*		
			*	*		
			*	*		

1	2	3	4	5	6	It is evident from councillor debates & the reasons given for decisions that the decision-makers are usually fully conversant with all the relevant facts
*	*	*	*	*		
*	*	*				
*		*				
*		*				
*		*				

1	2	3	4	5	6	
*	*		*	*		When authorities are requested to provide reasons for decisions, such requests are <i>promptly</i> complied with
*	*		*			
*	*		*			
*	*		*			
*	*		*			

1	2	3	4	5	6	
*	*	*	*	*		The reasons for decisions given by the authorities include adequate <i>substantiation</i> in support of the decisions
*	*		*			
*	*		*			
	*		*			
	*		*			

1	2	3	4	5	6	
*	*	*	*	*		The reasons for decisions given by the authorities set out the <i>reasoning</i> that has led to the conclusions reached
*	*	*	*	*		
*	*	*	*	*		
*	*	*	*	*		
*	*	*	*	*		

1	2	3	4	5	6	
*	*	*	*	*		The reasons given for decisions are <i>rationally</i> related to the decisions taken
*	*	*	*	*		
*	*	*	*	*		
	*		*			

1	2	3	4	5	6	
*	*	*	*		*	Statutory <i>codes of conduct</i> provide effective means to enforce accountability of officials and councillors
*	*	*				
*		*				
*		*				
*		*				

1	2	3	4	5	6	
*	*	*	*		*	The current methods and existing tools available to <i>monitor</i> the conduct of the authorities are adequate
*	*	*				
*	*	*				
*	*	*				
*	*	*				

1	2	3	4	5	6	Our system of <i>legal</i> accountability (which relies mainly on the Courts and audits in holding the authorities accountable) Is effective
*	*	*		*		
*		*				
*		*				
*		*				
*		*				

1	2	3	4	5	6	Our system of <i>professional</i> accountability (which relies on professional bodies in holding officials accountable) is Effective
*	*	*	*	*		
*	*	*				
*	*	*				
*		*				
*		*				

1	2	3	4	5	6	The current methods available <i>to restrain</i> the authorities from abusing their powers are effective
*	*	*	*	*		
*	*	*				
*		*				
*		*				
*		*				

1	2	3	4	5	6	The current system has adequate corrective mechanisms for citizens to obtain <i>redirection/ correction</i> when government performance is deemed unacceptable
*	*	*	*			
*	*	*	*			
*	*	*				
*	*	*				
*	*	*				

1	2	3	4	5	6	Adequate statutory provisions exists generally for citizens to <i>To impose sanctions</i> on the authorities in cases of manifest misconduct in office
*	*	*	*			
*	*	*				
*	*	*				
*	*	*				
*	*	*				

1	2	3	4	5	6	<i>National</i> and <i>provincial</i> governments ensure the effective performance by municipalities of their municipal planning functions through adequate regulation, monitoring & Support
*	*	*	*			
*	*	*				
*	*	*				
*	*	*				
*	*	*				

4.5.2 Part II of questionnaire - section 2

Respondents were required to use a given scale of ratings to indicate what contribution the following factors made (if any) to the erosion of government accountability. The item format was such that each item had to be rated on a three-point-scale, namely a **low rating ("1")** would indicate little or no contribution whilst a **high rating ("3")** would indicate a major contribution to the erosion of government accountability.

1	2	3	
*	* *	*** ***** ****	The <i>formality</i> of proceedings in our Courts, their <i>remoteness</i> and inaccessibility (high costs of litigation, etc)
1	**** **** *	*** *** *	The restraint practiced by our Courts in examining the substance of decisions
1	* *	*** ***** ****	The long delays before <i>applications</i> are decided
1 *	* *	*** ***** ****	The long delays before <i>appeals</i> are decided
1 *	* *	*** ***** ***	The long delay before <i>cases</i> are decided in Court
1 *	* **	*** ***** ***	Duplicative and wasteful <i>procedures</i> in public administration
1 *	***** **	*** ** *	<i>Fragmented</i> character of service delivery

1 *	2 *	3 **** ***** ****	Absence of <i>performance regime & culture</i>
1 * *	2 * *	3 *** ***** ***	The <i>regulatory burden</i>
1 **	2 * ** ***	3 *** *** *	The <i>complexity</i> of the statutory framework
1 *	2	3 **** ***** ****	Loss of <i>professional capacity</i> (resignations)
1 *	2 ** *	3 **** **** ***	Understaffing
1 *	2 * ** ***	3 *** **** *	Lack of <i>visible qualifications</i>
1 *	2 * ****	3 *** ** ****	Lack of <i>experience, skill and knowledge</i>
1 * *	2 **** ***	3 *** ** *	No <i>demonstrated competence</i> for position to which appointed
1 * *	2 ** ***	3 *** **** *	<i>Lack of will</i> to enforce requirements

1	2	3	Public official <i>immunity</i> from civil suits
*	*	***	
***	**	****	
	*		
1	2	3	Inadequate time, information & resources on part of citizens
***	**	**	
	*	**	
	***	*	

The open-ended question requesting respondents to indicate whether in their opinion there were other factors (i.e. not listed by the researcher) that contributed to the erosion of accountability in government, elicited the following comments:¹²⁷

- "Officials become personal and have vendettas", they are "racist" and suffer from "lack of skills and experience."
- "Pressure and interference from local civic groups, e.g. ... Property Owners' Assoc."
- "Lack of cooperation between departments" and "coordination gap between local and provincial government."
- "Affirmative action, racial discrimination and nepotism."
- "Poor attitude/ mindset of officials - they do not realise the importance of their decisions with respect to economy, jobs, social benefits."
- "Lack of professional ethic when it comes to detail. Sloppy grammar and sloppiness on technicalities reflect sloppy professionalism."¹²⁸
- "The responsibility for decisions taken, or decisions NOT taken, is mostly circumvented by 'making' somebody else responsible for the final 'signature'."
- "Final planning decisions are more influenced by political considerations rather than applying good planning practice. The biggest problem is the politicians. They will disregard norms and standards in pursuit of their own objectives ('I want to leave a legacy') and party political aspirations. It is interesting to note how development applications are manipulated when 'heavy-weights' are part of the BEE component. It is also interesting to note how 'friends' get the inside fat of the buttock."¹²⁹

¹²⁷

The few responses that were in Afrikaans have been translated by the researcher.

¹²⁸

The actual response was much longer, but the portion quoted reflects the general trend of the response.

4.5.3 Part II of questionnaire - section 3

Respondents were required to use a scale of ratings to indicate the time taken by the authorities to finalise processing of listed types of applications and appeals. The item format was such that each item had to be rated on a three-point-scale, indicate the time period taken to finalise the listed applications or appeals, to wit "1" less than 6 months; "2" between 6 and 12 months and "3" more than 12 months.

1	2	3	Rezoning applications
	**	**	
	*	*****	

1	2	3	Subdivision applications
	***	*	
	**	*****	
	***	*	
1	2	3	Departure applications
	***	*	
	**	*****	
*	**	*	
1	2	3	Applications for building plan approvals
**	**	*	
*	*****		

1	2	3	Applications for removal of restrictive title conditions
	****	*****	

1	2	3	Applications for environmental authorisation
	*	***	
	*	*****	
	**	*	
1	2	3	Appeals in terms of the MSA
*	***	****	
*	**	*	

¹²⁹ Only part of the response is quoted, reflecting the gist of a rather lengthy response.

1	2	3	Appeals in terms of LUPO
	*	*****	
	*	*****	

4.5.4 Part II of questionnaire - sections 4 and 5

Respondents were asked in the fourth section of Part II to rate the current measure of accountability in the three spheres of government in the specified context, expressed as a percentage. Ten equal categories each were provided for national, provincial and local government, the first category being from 0% - 10% and the last being from 91% - 100%. The results obtained are summarised below.

National government:

0 - 10%	*****	51 - 60%	***
11 - 20%	***	61 - 70%	*
21 - 30%	*	71 - 100%	
31 - 50%			

Provincial government:

0 - 10%	***	51 - 60%	***
11 - 20%	*	61 - 70%	**
21 - 30%	**	71 - 80%	*
31 - 40%		81 - 100%	
41 - 50%	**		

Municipal government:

0 - 10%	***	51 - 60%	**
11 - 20%	*	61 - 70%	
21 - 30%	**	71 - 80%	***
31 - 40%		81 - 90%	*
41 - 50%	*	91 - 100%	

The request that respondents should motivate their rating of the current measure of accountability of the three spheres of government elicited the following responses (quoted in no particular order).

- "Not one single development that we have undertaken (in the last 5 years) leaves me in any doubt that accountability at all levels of government are at an all time low. The writer is prepared to evidence/ bulk up this statement with examples which are factual & speak for themselves."
- "Better qualified staff with more experience at National and Provincial level, rather than municipal level."
- (In respect of provincial experience) "Their short-notice cancellation of meetings, long waiting period for comment (DWAF) and unwillingness to give feedback on progress of applications (DEADP)."
- (In respect of municipal experience) "Same as above, but only with a better attitude, some departments though have sentiments about a project and are not willing to discuss matters objectively."
- "Provincial government - lack of qualified skills."
- "Municipal government - lack of qualified skills, however, the City of Cape Town is trying to get their act together."
- "Transparency = overboard."
- "The national government's accountability is low. They will only change their position if ordered by court and then the minister is not even reprimanded by cabinet."
- "National government seldom reacts on queries/ notifications with regard to land use applications/ development proposals, if at all."
- "Provincial government seldom, but to a lesser extent than national government, takes responsibility/ accountability for queries/ requests on planning/ development issues/ proposals, especially when the 'enquirer' is the developer and/ or private sector."
- "Municipal government is more accountable/ responsive as the ward councillors are more directly responsible and/ or accessible to the ratepayers/ developers for queries /action and equally then puts direct pressure on the officials in this regard."
- "The whole idea of Spatial Development Frameworks controlled by the MSA and the method in terms of which they are approved, are absurd. It is nothing more than a 'wish

list' where there is no connection between the environment, planning, infrastructure, finances, etc."

4.5.5 Part II of questionnaire - section 6

The following suggestions were put forward by respondents as to what could be done to improve the accountability of the three spheres of government in the land use planning and development context within the Western Cape.

- "Privatise the process with rigorous checks and balances, audits, etc."
- "Incentivise government officials for performance which could be measured by development turnover."
- "Set rigorous time lines for ALL applications with procedures for non-performance (e.g. right to appear at a committee of external officials to gain approval immediately or conversely rejection with specific reasons)."
- "Clarity on all relevant legislation in the planning process and the implementation thereof."
- "Quicker decision-making - even if some mistakes are made."
- "If the public has clarity regarding process and practice, challenging would be easier."
- "Much of the current frustrations with planning and development are linked to infrastructure capacity problems. By simply stating the obvious, i.e. 'that bulk capacity can not accommodate growth' problems will not be solved."
- "Officials and politicians in the planning field must take ownership of challenges. This can be done by: (1) showing willingness to look for solutions; (2) initiating discussions with engineering departments and funding institutions; (3) coordinating initiative on macro level rather than 'project' level."
- "Improve the regulations, ensure that officials have the necessary experience and improve productivity."
- "Officials and politicians are not performance orientated - they are not held accountable if their policies/ interventions fail or if they delay development - or if they waste money - political accountability is poor at National and Provincial level - better at local level (proportional councillors problematic as they are unaccountable)."

- "National level - delegate all planning and development related input and decisions to Provincial level."
- "Provincial level - (1) streamline environmental and planning legislation; (2) form a development and planning decision-making body that take social welfare, job creation, economic growth, poverty alleviation etc into account when making planning decisions, and not only environmental impact considerations; (3) formulate achievable practical development friendly policies with statutory status to guide development that ensures GROWTH; (4) Cultivate a culture of pro-development amongst planning and environmental officials."
- "Local level - (1) Set time limits on processing of applications; (2) Improve level of professional experience and skills; (3) Get political agendas and influences out of decision-making process; (4) Take party politics out of local government."
- "We must stop crawling before the altar of political correctness by blaming the current situation on everything else except the true cause - statutory anti-white and anti-brown discrimination. This statement does not reflect a right-wing view - it comes from someone who saw the political and moral light more than 10 years before FW the Wonderman has his 'mountain-top experience' (which in fact was no mountain-top experience, but simply an attorney changing his plea on behalf of his client from Not guilty to Guilty with extenuating circumstances)."
- "The three major causes of the current service delivery problems in the town planning field can be said to be: (1) Affirmative action; (2) Affirmative action: (3) Affirmative action."
- "Political representatives as well as officials in all 3 spheres of government should be made more directly accountable for decisions/ actions taken or NOT taken."
- "Cross cutting inter government grouping with full mandate to dovetail/ integrate legislation impacting on development field would be a good step forward. The fact that the three spheres of government impacts on a local government field and the uncertainty with respect to field of responsibility is a recipe for disaster. Unless the spheres effectively talk to each other and work towards a common cause and learn to trust each other we are not going to get anywhere. It should be a national vision to support any development and anything impacting on this vision should be removed/ streamlined."

- "The only method to improve accountability would probably be to require that all decisions be made in public and must be made public. This would imply that in instances where politicians and officials disagree, this should be published in a register or the press."
- "It is important that legislation be made more clear in order that everyone will know who is responsible for what. This may require constitutional amendments. Concepts such as 'municipal planning', 'urban and rural planning' and 'provincial planning' should be clearly defined."

4.5.6 Experience of respondents

The results obtained from the questionnaires indicate that the **administrators**, **practitioners** and **developers** have the following experience in terms of the number of years that they have been involved in their respective fields:

Less than 5 years	5 - 10 years	10 - 15 years	15 - 20 years	more than 20 years
*	***	*	*	**

4.6 FINDINGS AND DISCUSSION¹³⁰

The main objective of this thesis was to establish what exactly is meant by the constitutional requirements that local government and the public administration should be accountable; more particularly, to illuminate the concept of accountability, to explore, describe and explain the available mechanisms for achieving government accountability and to assess the effectiveness and adequacy of those mechanisms within the land use planning and development context in the Western Cape. The available mechanisms for achieving government accountability were identified in the course of the literature and law reviews and the study then proceeded to establish the effectiveness and adequacy of those mechanisms with reference to practical examples encountered in the field of study.

The processes of conceptualisation and operationalisation of the study were described in Chapters 1 and 4 above and need not be repeated here. Suffice it to say that the researcher compiled a list of questions that are assumed to be elements or factors of the phenomenon

¹³⁰ The averages referred to in this sub-paragraph were calculated and have been rounded off to the nearest full percentage, e.g. 66% instead of 66.499%.

called accountability and presented those questions to a sample of individuals in the form of a questionnaire. The aim was to obtain responses from a representative target group in order that the researcher might gain an overall impression from the target group's perspective of the current state of government accountability within the specified context.

All the practitioners regarded the existing land use planning as basis for decision-making in the national sphere as inadequate, whilst 5 out of 7 developers thought the same. Surprisingly 2 developers regarded land use planning in the national sphere as adequate for decision-making. Not surprisingly 3 out of the 4 administrators regarded national planning as basis for decision-making as adequate. The researcher realised, in retrospect, that he should have asked the respondents to name the existing national plans, because with the exception of "Guide Plans"¹³¹ no other national plans existed that he knew of. He did not regard policy statements and documents such as the NSDP as planning in the ordinary grammatical meaning of the word (see glossary). Be that as it may, a slight majority of respondents (66%) regarded the national plans as inadequate for purposes of informing decision-making within land use planning and development context.

In the provincial sphere the adequacy of existing land use planning as basis for decision-making received a better rating than national planning - 3 practitioners and 4 developers regarded it as inadequate, whilst 1 practitioner and 3 developers regarded it as adequate. All 4 administrators regarded it as moderately adequate. The fact of the matter was that provincial planning which could have served as guideline for land use planning decisions was basically non-existent. Provincial policies and guidelines abounded,¹³² but not provincial planning. The researcher realised, in retrospect, that he should have asked the respondents to name the existing provincial plans, because their answers would have shown the extent to which "planning", "policy" and "guidelines" were in practice all regarded to mean the same thing, to wit "planning".

A slight majority of the respondents (54%) regarded the provincial plans as adequate for purposes of informing decision-making within the land use planning and development context, but the majority of practitioners and developers (63%) regarded it as inadequate. Likewise the

¹³¹ Made in terms of the Physical Planning Act and now known as regional or urban structure plans.
¹³² E.g. the PSDF and "Guidelines for Resort Developments in the Western Cape" (DEADP, 2005).

majority of respondents regarded the existing municipal planning as an adequate basis for decision-making (i.e. 53%), whilst the majority of practitioners and developers (i.e. 63%) regarded it as inadequate.

The practitioners were unanimous that the authorities were generally not responsive to external stakeholders. The developers were divided on the issue, with 4 indicating that the authorities were not responsive and 3 indicating that they were responsive. Surprisingly 3 out of the 4 administrators regarded the authorities as being unresponsive to external stakeholders.

Only 27% of the respondents did not believe that the authorities provided sufficient opportunity for citizen participation in deliberative processes of government. The researcher fears that of the 73% of the respondents that believed that the authorities did provide sufficient opportunity for citizen participation, many if not most of them may not have fully comprehended what was meant by "participation in the *deliberative processes*". In the industry, the mere opportunity or invitation to lodge an objection was seen as public participation. As was pointed out above, public participation implies at least two ways or mutual communication and more. It is something more than an instrumental process to get a plan approved, and should involve the empowerment of people to have control over which and how things are done. In the researcher's experience this was not the case in practice and as a result he was unconvinced by the result.

As one of the developers have not responded to the statement that citizens usually were afforded an effective opportunity to confront adverse evidence before a decision was taken, the result was a draw in the "practitioners and developers" category (5 agreed and 5 disagreed). The administrators were unanimous in their opinion that citizens usually were afforded an effective opportunity to confront adverse evidence before decision-making. The result obtained in the "practitioners and developers" category (i.e. 50: 50) was in line with the researchers own experience.

The majority of respondents (60%) felt that the authorities generally provided sufficient opportunity for professional consultants' participation in deliberative processes of government.

Notably the practitioners were unanimous in their disagreement with this statement and 1 developer shared their point of view. In the researcher's experience, developers rarely attended meetings of the authorities where land use planning and development applications were considered and the opinion expressed by the developers therefore had to be approached with caution. The researcher's earlier comment that it was not always fully comprehended what was meant by "participation in the *deliberative processes*" equally applied in this instance. Although the administrators tended to regard participation in deliberative processes as a mere opportunity or invitation to lodge an objection or comment, this could not be equated to participation in the deliberative processes. In the circumstances the researcher verily believed that the response of the practitioners was the best available indication of the factual position in this respect.

The researcher has specifically attempted to emphasise the word *debate* in the statement that decisions by municipal councillors were usually taken "after *debate* of agenda items". It seems that the point has been missed by respondents. There is a difference between "discussion" and "debate". In the researcher's experience of many years, councillors pass comments on agenda items, but real debate is an extremely rare occurrence. A slight majority of respondents (53%) have indicated that council decisions are usually taken without debate. The researcher argues that only in exceptional cases does debate precede decisions within the municipal sphere and that this causes difficulty for officials who are required to provide reasons for decisions when formulating some form of response that would hopefully withstand a court challenge.

The vast majority of respondents (80%) indicated that the authorities usually provided reasons for decisions when informing applicants and objectors of their decisions. This was to be expected as the authorities were by law required to provide reasons when requested. It was disconcerting that the authorities, when required to provide explanations in respect of the reasons given by them, were not cooperative. The Vumazonke court case, for example, concerns applications for social grants that have not been granted by government. The court applicants found the failure or refusal of government to deliver adequate reasons within a reasonable time to explain why their applications have not been granted, unacceptable. The slackness of the authorities to explain themselves, of which the Vumazonke case is a sad

example, confirms the experience of the respondents in my research that alleged that government has failed or refused to deliver reasons within a reasonable time.

With the exception of 1 administrator and 1 developer the respondents (86%) were of the opinion that based on the councillor debates and reasons given for decisions, the decision-makers were not fully conversant with all the relevant facts. If so, how could one expect proper decisions to be made?

Nine of the fifteen respondents indicated that when the authorities were requested to provide reasons for decisions, such requests were not promptly complied with. National legislation stipulates time periods within which *inter alia* requests for reasons have to be complied with (e.g. PAIA). Yet 60% of the respondents state that such requests are not promptly complied with. In a similar question relating to the promptness with which the authorities complied with requests for access to information, eleven out of the fifteen (73%) respondents indicated a moderate to strong view that such requests were not promptly complied with.

Only two respondents in the "practitioners and developer" category agreed mildly with the statement that the reasons given for decisions by the authorities included adequate substantiation in support of the decisions; 81% of the respondents in that category were of the opinion that adequate substantiation was generally not included. The four administrators have, as expected, indicated that they thought that adequate substantiation was usually included in the reasons given for decisions. The difficulty was that a mere statement of something as fact (e.g. that a proposed building may be unsightly) was in itself insufficient substantiation, without an explanation as to why the decision-maker held such an opinion.

The researcher observed that of the five respondents that expressed the opinion that the reasons for decisions given by the authorities usually set out the reasoning that has led to the conclusions reached, three were administrators (notably two from the provincial government). Provincial officials were only rarely exposed to municipal land use decisions (i.e. when LUPO appeals were lodged with the provincial authority). For this reason and based on the researcher's own experience, he does not regard the response of the two provincial officials as a true reflection of the practical reality. Even the mild agreement of the 3rd administrator with the statement should be regarded with some measure of doubt, on the

basis of the doctrine of reactivity. Even if their responses could be regarded as truthful, 66% of the respondents would still disagree with the statement that the reasoning that has led to conclusions reached were usually provided.

The practitioners were unanimous that the reasons given for decisions were not rationally related to the decisions taken and five out of the seven developers supported this view. It was surprising to find that one of the administrators also agreed with this view. The researcher did not attach much value to the point of view of the three administrators that mildly agreed with the statement that reasons given for decisions are rationally related to the decisions taken. This was mainly due to the fact that in his experience it was usually those very same officials that were required to formulate some form of response that would hopefully withstand a court challenge once a decision has been taken, that were now required to say whether they believed that they generally were doing a fine job at writing reasons for decisions taken by others.

Only two developers were of the opinion that statutory codes of conduct provided effective means to enforce accountability of officials and councillors. The researcher believes that their responses have been based on speculative theory rather than fact and submit that the majority view (86%) that those codes do not provide effective means to enforce accountability represents the factual situation. A case in point was the recent shock-decision of Minister Pierre Uys (as he then was) relating to a local councillor of Stellenbosch.¹³³ It was alleged that a contractor required a certain amount of money for undertaking certain work on behalf of the municipality, that according to the documents on the municipal files the figure owing to the contractor exceeded the actual contract sum by more than R20 000,00, that the higher figure was paid out to the contractor, that a councillor subsequently recovered the difference between the actual contract sum and the amount paid to the contractor from the contractor, but retained that sum of money. The minister refused to take action and the councillor is currently facing criminal charges.

The researcher was surprised to find that 3 of the administrators regarded the current methods and existing tools available to monitor the conduct of the authorities as inadequate,

¹³³ Reported in "Die Burger" of 29 November 2008 on p 6 : "Meer as R20 000 van die stadsraad se geld het glo in sy sak beland".

a view with which the practitioners strongly agreed and which was shared by all but 1 developer. Overall 86% of the respondents regarded those methods and tools as inadequate.

Only the four administrators and two of the developers regarded the institutions created by law to oversee the exercise of statutory powers as adequate. The bulk of the practitioners and developers (81%) regarded those institutions as inadequate.

One of the administrators mildly agreed that the current methods and existing tools available for achieving effective oversight were adequate, whilst one developer was of the opposite view. All the practitioners and the remaining six developers regarded those methods and tools as inadequate - a view held by 73% of the respondents and if the responses from the administrators should be disregarded, a view held by 90%.

Only one of the respondents (an administrator) was of the moderate opinion that our system of political accountability was effective. The other fourteen respondents disagreed, ten out of the fourteen expressing strong disagreement. Their response confirmed the opinion of the writers (e.g. Cheibub & Przerworski, 1999: 230) that the assertion that democracy induces accountability was at least far too broad. A similar pattern of response to the questionnaire was observed in respect of the statement that the introduction of party politics in the municipal sphere has resulted in the general improvement of accountability.

One developer expressed moderate agreement that our system of legal accountability is effective, whilst all the other respondents disagreed. A draw occurred between mild and strong disagreement on this score.

The one practitioner that expressed the opinion that our system of professional accountability was effective had less than 5 years experience as a town planner. (The researcher was under the impression that he had more years experience when he was included into the target group). It is not known on what the developer that expressed moderate agreement that the system of professional accountability was effective, based his opinion. It is noteworthy that all the administrators regarded this system of accountability as ineffective and that three of the

practitioners and three of the developers held strong views that the system of professional accountability was ineffective.

It was again surprising to find that three of the four administrators regarded the current methods available to restrain the authorities from abusing their powers as ineffective. The practitioners strongly agreed with this view and six out of the seven developers also regarded those methods as ineffective. Overall 86% regarded those methods as ineffective.

Three out of the four administrators were of the view that the corrective mechanisms of the system to obtain correction or redress when government performance was deemed unacceptable were inadequate. All the practitioners concurred and so did six out of the seven developers. Overall 86% regarded those mechanisms as ineffective.

Only one administrator regarded the existing statutory provisions as adequate for citizens to impose sanctions on the authorities in cases of manifest conduct. All the other respondents (93%) disagreed, the practitioners which once again recorded strong disagreement.

Only one out of the four administrators was of the mild opinion that national and provincial governments ensure the effective performance by municipalities of their planning functions. All the other respondents (93%) disagreed moderately to strong.

The majority view in response to the questions relating to the contribution of the listed factors to the erosion of government accountability was that all of the listed factors made a high contribution in this regard. It is noteworthy that the practitioners regarded the restraint practices by our courts in examining the substance of decisions as of medium importance only. Five out of the seven developers regarded the contribution of the fragmented character of service delivery as of only medium importance, whilst all the practitioners marked this factor as of high importance. The difference in approach may be ascribed to the fact that it is the practitioners that in practice normally have to face the problems of fragmentation and only to a lesser degree the developers. The same argument may apply in respect of the contribution which the factor "no demonstrated competence for position to which appointed"

makes to the erosion of government accountability. Three of the practitioners gave this factor a high rating, whilst three of the developers gave it a medium rating.

From the comments made in response to the open-ended questions the researcher gained the impression that the respondents adopted a balanced and truthful approach (e.g. the comment by a practitioner that "[I]f the public had clarity regarding process and practice, challenging would be easier").

Twelve of the respondents (80%) indicated that the processing of rezoning applications by the authorities took 12 months or longer to finalise. It is submitted that if local government should promote socio-economic development,¹³⁴ a drastic reduction in the time period required to decide rezoning applications are essential. This is not a new thought. As far back as 1983 the Venter Parliamentary Commission of Inquiry into township establishment and related matters¹³⁵ made similar comment, clearly with little or no lasting effect.

Eight of the respondents indicated that it took on average between 6 and 12 months to obtain decisions relating to subdivision, whilst seven respondents indicated that it took more than 12 months. Only one respondent (notably an administrator) indicated that it took less than 6 months to finally decide an application for departure, whilst eight indicated that it took between 6 and 12 months and six respondents indicated that it took longer than 12 months. A drastic reduction of the time period required for processing and taking decisions by the authorities in respect of applications for subdivisions and departures is needed.

Although the Building Act requires every municipality to approve or refuse building plan applications within thirty or sixty days (depending on the architectural area) eight of the respondents (53%) confirmed that it took on average six months or longer to obtain building plan approval. The response of the three developers that indicated that it took between 6 and 12 months to process and finalise an application for removal of restrictive title conditions have not been regarded as factually correct. All the practitioners have indicated that it took longer

¹³⁴ A local government objective in terms of the Constitution. See supra.

¹³⁵ "The extremely long time taken by the township establishment process at present is one of the most critical factors that hamstringing the rapid and effective production of residential sites. A drastic reduction in the period required to complete establishment is necessary if the industry is to function on a sound basis at all." See par 2.2.10 of the Venter Report (1984: 11).

than 12 months and the three administrators that responded confirmed this point of view. Be that as it may, even requiring more than 6 months to process applications of this nature and to come to a decision is much too long if the authorities are to be development-orientated as required by law. Based on the researcher's own experience he submits that the 10 respondents (66%) that indicated that on average it takes longer than 12 months to process and obtain authorisation in terms of the environmental legislation reflects the factual situation correctly.

In terms of section 62 of the MSA municipal managers are required to "promptly" submit appeals in terms of that Act to the internal appeal authority and the latter is required to "commence with an appeal within six weeks and decide the appeal within a reasonable period".¹³⁶ Eight of the respondents have indicated that it took between 6 and 12 months to process and decide such an appeal and 3 respondents have indicated that it took more than 12 months to obtain a decision on appeal.

Applicants are expected to first exhaust their internal remedies before they may approach the court with an application for judicial review.¹³⁷ The lengthy time periods associated with High Court litigation have been discussed above. In the Strydom-matter¹³⁸ the court reserved judgment and only gave judgment more than a year after the hearing, refusing the application on the basis that the nuisance complained about was a *private* (as opposed to a *public*) nuisance. The important fact is that even once the court hearing has eventually taken place it may take a considerable further period of time before the judgment is handed down.

Only two of the respondents indicated a time period of between 6 and 12 months to process and decide appeals in terms of LUPO, whilst the other thirteen respondents indicated that on average it took longer than 12 months to process and decide such appeals.

¹³⁶ See sub-section 62(2) and (5) of the MSA.

¹³⁷ See discussion under sub-paragraph 3.9 above.

¹³⁸ Johan Hendrik Strydom v The City of Cape Town: Supreme Court (CPD) Case Number 7015/2001 (unreported). The court was requested to grant an "order to compel" (a so-called "mandamus") against the City of Cape Town who failed or refused to enforce the provincial noise-control regulations, but declined the application even though the municipality's own noise-control officer gave evidence that the permissible noise levels were exceeded.

It should be clear against the above background why the company in the Helderberg judgment (discussed in par 1.3.3) was not prepared to lodge an appeal against an invalid condition requiring the cession of land free of charge to the municipality. Such an appeal would have suspended the development approval (which meant that the company would have been unable to convert the opportunity into income). Although the company would not be able to derive immediate income from the investment, it would have had continuing expenditure (i.e. serving the interest payments on the development bond) pending an appeal decision. The appeal decision could have been negative, requiring a subsequent court challenge.

Eight of the fifteen respondents rated the national government accountability at between 0 - 20%, whilst one rated it between 21 - 30%. It is noteworthy that three of the four administrators rated the national government accountability to be between 11 - 20%.

The provincial government fared better in the ratings, although the majority of respondents (53%) rated provincial government accountability to be below 50%. Again notably was that three of the four administrators rated provincial government accountability to be between 51 - 60% and the fourth rated it between 41 - 50%.

The administrators awarded the best rating to municipal government (i.e. 1 between 51 - 60%, 2 between 71 - 80% and 1 between 81 - 90%). The practitioners, however, were far from agreement and two rated municipal government between 0 - 10%, one between 21 - 30% and one between 71 - 80%.

On the basis of the response to the statements made in section 1 of Part II of the questionnaire (the list of characteristics or dimensions denoted by the concept "accountability") the findings of this study indicated that the majority view of respondents was that the proverbial house of the authorities was not in order. If adequate planning is not in place to serve as a basis for decision-making, for example, how is arbitrary or capricious decision-making to be avoided? Whilst some of the statutory plans are enforceable, policy which is a guideline only is not.¹³⁹ Would the constitutional requirement¹⁴⁰ that public participation in policy-making should be encouraged serve a useful purpose if policy failed to

¹³⁹ E.g. so-called "Guide Plans".
¹⁴⁰ Section 195(1)(e)

crystallise into planning? In the absence of planning how is local government to promote socio-economic development? If planning is not to take place, those people that have largely been excluded from land use planning and development processes in the past will continue to be so excluded.

If the authorities fail to provide adequate substantiation in support of decisions, should it be required of applicants to beat the air in an attempt to discover the reasoning supportive of conclusions reached and would their rights of appeal in those circumstances be anything more than merely symbolic? The comment by one respondent that "[f]inal planning decisions are more influenced by political considerations rather than applying good planning practice" seemed to hit the nail on the head.

The majority view of respondents was that our system of political, legal and professional accountability was not effective and that the current methods available to restrain the authorities from abusing their powers were ineffective. The same goes for the corrective mechanisms available to citizens to obtain redirection or redress when state performance was deemed unacceptable. It is not necessary to again run through the whole list. Suffice it to say that the lengthy delays in deciding applications and appeals are irreconcilable with the requirement to promote socio-economic development or the concept of "good government".

The findings of this study on the basis of the ratings of the listed factors in section 2 of Part II of the questionnaire have been equally illuminating. In terms of the majority view all those factors with the exception of 4 (i.e. court restraint, the fragmented character of service delivery, lack of demonstrated capacity and public official immunity) were rated as making a high contribution to the erosion of government accountability. If the possible explanations which the researcher suggested for the perceived inaccurate ratings by the developers in respect of the "fragmented character of service delivery" and "lack of demonstrated capacity" would be accepted, it would only leave "public official immunity" and "court restraint" as the odd ones out. Notably, if the opinion of the administrators would be ignored, the "public immunity" factor would also be rated as making a high contribution to the erosion of government accountability.

Without sounding overtly negative it was something of a miracle that Mrs Grootboom and the other applicants (see par 1.4) managed to obtain a positive judgment against the odds as explained above and that some of the successful applicants even managed to receive houses within eight years after that judgment.

This thesis raise as a particular concern two factors that the respondents indicated as contributing to the erosion of accountability in government, to wit "officials are racist" and "racial discrimination". Unfortunately the respondents did not provide further motivation. It is not open to speculate about what they might have had in mind. What is clear, however, is that "our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities".¹⁴¹ The success of BBBEE has been questioned and its criticism is growing (see par 2.7). Suffice it to say that the BBBEE legislation that the new government has adopted discriminates against people of this country on the basis of colour and fails to convert the Freedom Charter vision for the future to a constitutional reality. Skjelten's claim (2006: 164) that the "constitution guarantees ... racial equality" is not compatible with reality. As discriminatory laws of the previous regime have damaged and undermined the reputation of the judiciary and destroyed respect for the law, discriminatory laws of the current regime can reasonably be expected to have the same result.

4.7 SUMMARY

This chapter showed in more detail how the researcher approached the supplementary study that was undertaken to obtain the views of persons active in the field of study on government unaccountability within land use and planning context. It described the actual process of fact-finding involving a target group, analysed the data obtained and described and discussed the research findings. It was shown that in the majority view of the respondents the available systems of government accountability and the mechanisms for achieving same were regarded as ineffective and that the majority of respondents gave the national, provincial and municipal spheres of government a low rating on accountability.

¹⁴¹ The Freedom Charter of the Congress of the People, June 26, 1955. See Dugard, J (1992:162).

CHAPTER 5: CONCLUSIONS, RECOMMENDATIONS & FUTURE RESEARCH

5.1 INTRODUCTION

The objective of this research was to assess the measure of government accountability within the land use planning and development context in the Western Cape and more particularly, to assess the effectiveness of the available mechanisms for achieving a reasonable measure of government accountability. To this end it aimed (a) to provide an understanding of the accountability requirements as encountered in theory and in legislation; (b) to provide an understanding of the available mechanisms for achieving government accountability; and (c) to contribute to the existing body of scientific knowledge regarding government accountability.

The purposes of this chapter are to describe the contemporary position regarding government accountability on the basis of insights from practical examples, to explore contextual challenges (e.g. understanding the complexities of accountability) and to reflect on the problems of diversity and clashes of interests in the context of the problems experienced and the difficulties that arise with government accountability in the Western Province.

Consideration is given to the changes required to achieve and maintain effective government accountability. Some key challenges facing those who wish to achieve a continuous improvement in effective accountability to the local population are described.

5.2 THE CONTEMPORARY POSITION

The purpose of this section is to provide a crude overview of the current state of government accountability and the effectiveness of some of the mechanisms aimed at achieving such accountability within land use planning and development context in the Western Cape. There seems to be general agreement that the state has a key role to play in growing and developing the economy and fighting poverty. Various factors impact negatively on the ability of the state to effectively initiate, formulate and implement policies with good judgement.

5.2.1 Elections

Politicians are not legally compelled to abide by their platforms in any democratic system and there are no institutional devices to force elected administrators to be faithful to their

platforms. Clearly elections are not a sufficient mechanism to insure that governments will perform adequately to maximise citizens' welfare. In this research only one of the respondents (an administrator) was of the moderate opinion that our system of political accountability is effective. The other fourteen respondents disagreed, ten out of the fourteen expressing strong disagreement. Within the land use planning and development context elections are not an effective mechanism for enforcing accountability.

5.2.2 Legislation

The introduction of legislation to provide a legal framework within which accountability is to be achieved, to provide for fundamental rights and to set requirements, with which the authorities are required to comply, is a necessary pre-condition for government accountability. There is no shortage of legislation for this purpose, but currently the legislation falls short in many important respects, of which a few are highlighted below.

1. *Permissive legislation*

Legislation is often drafted in permissible rather than peremptory fashion. So for example the provincial executive *may* intervene when a municipality cannot or does not fulfil an executive obligation in terms of legislation,¹⁴² but it need not interfere. A further example of empowerment lacking a clear obligation to act is the provision that national and provincial government have the legislative and executive authority to see to the effective performance by municipalities of their functions by regulating the exercise of municipal executive authority.¹⁴³ However, they need not exercise their legislative powers in this regard. The authorities may either fail to act in terms of such permissive powers or are slow to do so, yet they can not be held accountable for failure to act or slowness, as the legislature did not create clear responsibility.

From personal observations over many years it is clear that although land use planning is popular in rhetoric, government has to date practically achieved very little land use planning in South Africa. Only recently the belief in spatial planning gained more importance, starting with the NSDP and the creation of various spatial planning posts in the Department of Land Reform and Rural Development. Yet in this country land use planning exists for the most part

¹⁴² Section 139(1) of the Constitution.

¹⁴³ Section 155(7) of the Constitution.

in theory only. Amongst the possible explanations for this phenomenon is the arguments put forward against planning, e.g. that government regulation and planning are unnecessary and often harmful "... because they stifle entrepreneurial initiative, impede innovation, and impose unnecessary financial and administrative burdens on the economy" (Klosterman, 1985: 150 *et seq*).¹⁴⁴ Other plausible explanations for this phenomenon may relate to the lack of ability of planners to perform their craft; staff shortages, and day-today pressures of work as opposed to long-term pressures. In addition this may be the result of the institutional, legislative and political frameworks within which government officials must operate, the extent to which educators have not succeeded in equipping planners for their work, lack of personal attributes and funding, lack of adequate staff made available, lack of support for planning from higher spheres of government, and complexity.

2. *Inadequate legal requirements*

Legislative requirements may in themselves be inadequate, e.g. requirements relating to the undertaking of land use planning. It is currently only required of the municipal sphere of government to undertake spatial planning, which includes land use planning,¹⁴⁵ but no such requirement applies to the other two spheres of government.¹⁴⁶

In terms of the findings of this research, all the practitioners consulted regarded the existing spatial and land use planning as basis for decision-making in the national sphere as inadequate, whilst five out of seven developers thought the same. In the provincial sphere the adequacy of existing spatial and land use planning as basis for decision-making received a better rating than national planning, with three practitioners and four developers regarding it as inadequate, whilst one practitioner and three developers regarded it as adequate. However, as pointed out in paragraph 1.1 national and provincial policies and guidelines abound, whilst national and provincial spatial and land use planning is basically non-existent.

¹⁴⁴ A counter argument would be that actual planning may make a major contribution to cut out extensive delays and to promote socio and economic development.

¹⁴⁵ Section 25 of the MSA. See the provisions of LUPO relating to structure plans and the definition of "planning" in the glossary..

¹⁴⁶ Requirements such as those found in section 11 of NEMA, to wit that specified national departments exercising functions which may affect the environment and every province must prepare an "environmental implementation plan", are not regarded as requiring land use planning *per se*.

Just re-writing the laws is not sufficient to secure real changes (Parnell & Pieterse, 1998: 19). Even if legislation did require all three spheres of government to undertake spatial and land use planning, the legislation would not guarantee that it would be done properly. Local government functions have for example been expanded to include the eradication of poverty and LED. The IDP is the institutionalised mechanism for local authorities to achieve these responsibilities and provides them with an enabling tool to negotiate with the population. However, the general trends with the preparation of IDPs seem to be that it is more of a technical emphasis on producing the IDP document than on ensuring that an effective strategic planning process is engaged in. One of the respondents in the research remarked that Spatial Development Frameworks (a component of an IDP in terms of the MSA) are nothing more than a "wish list" where there is no connection between the environment, planning, infrastructure, finances and so forth.

The inspiring theories that conceptualised planning as a process of developing a shared vision, a "more collaborative and inclusive approach" to the decision making in a representative democracy and so forth, are clearly meaningless if actual land use planning is not undertaken. In the Western Cape, there is generally no noteworthy "intervention with an intention to alter the existing course of events" in terms of planning undertaken, only policy and guidelines without 'teeth'. As a result the marginalised and oppressed groups and minorities that have over time been systematically excluded from land use planning have not yet been embraced. Due to the lack of planning, the way in which local governments operate within the land use planning and development context have thus not changed much and the potential contribution which planning otherwise could have made to remaking urban and rural communities remain *potential* only. Sustainable development will not take place without appropriate planning and the theories regarding sustainable planning and sustainable development serve no practical purpose (other than perhaps serving as window-dressing in political speeches and policy statements) if actual land use planning is not undertaken.

The legislature generally shies away from setting time periods within which the authorities

must finalise the processing of applications and inform applicants of decisions.¹⁴⁷ In the research 80% of the respondents indicated for example that the processing of rezoning applications by the authorities took 12 months or longer to finalise. If the municipal decision was taken under delegated authority and the applicant was dissatisfied with the decision, she should first have to exhaust her right of appeal in terms of the MSA before moving on to other legal remedies. In the research 8 of the respondents have indicated that it takes between 6 and 12 months to process and decide such an appeal and 3 respondents have indicated that it takes more than 12 months to obtain a decision. Once the MSA appeal has been decided and if the applicant or an objector was dissatisfied with the appeal decision, any one or more of them could lodge a LUPO appeal with the provincial authority. In the research only 2 of the respondents indicated a time period of between 6 and 12 months to process and decide appeals in terms of LUPO, whilst the other 13 respondents indicated that on average it took longer than 12 months to process and decide such appeals.

3. *Government culture*

Legislation does not necessarily change the mind-sets and attitudes of administrators. The extensive legislation that was introduced by the new government in South Africa in recent years did not automatically change the mind-sets and attitudes of all administrators. The many government initiatives are therefore constrained by governance culture which provides the way governance processes operate in any context.

Coupled with this phenomenon is the tendency of officials to focus on their own dimension of interest or competency. Although the silo nature of approach has rightfully been criticised (see par 2.5), it may also be said that without that approach the authorities might have been even less successful in providing basic services. At the moment, sustainability is everybody's responsibility, but no one's responsibility in particular, which is a major weakness in the struggle for a more sustainable way of life. The value systems and underlying processes of urban governance and planning need to be reformed to reflect a sustainability agenda and legislation is required that will ensure that land use applications are evaluated holistically.

4. *Ineffective mechanisms*

¹⁴⁷ The requirement in the Building Act relating to building plan approvals is a rare example in land use planning context.

The mere setting of legal requirements is in itself inadequate to guarantee accountability. Effective mechanisms must be in place to compel almost immediate compliance with those requirements. Without such mechanisms the authorities are likely to continue ignoring those legal requirements. The requirements relating to the approval of building plans may serve as an example. It was shown that although authorities are legally required to either approve or refuse building plans within 30 or 60 days, depending on the architectural area of a proposed building, 8 of the respondents (53%) have indicated that on average it takes 6 months or longer to obtain building plan approval.

Section 9 of the Building Act provides for a right of appeal to an aggrieved applicant in certain circumstances. In the researcher's experience it may take six months or more to finalise such an appeal. If the applicant is then still not satisfied with the result, she may approach the court. The facts in example number 1 described in paragraph 3.7.1 show how ineffective the current mechanisms are if one is dissatisfied with decisions taken relating to building plans. The Hayes-judgment serves as a further practical example of how judicial restraint may impact on potential development (see par 3.7.3).

Against the above background it is understandable that even three of the four administrators in this research regarded the current methods available to restrain the authorities from abusing their powers as ineffective, a point of view with which the practitioners strongly agreed and with which six out of the seven developers agreed. It was also established that three out of the four administrators were of the view that the corrective mechanisms of the system to obtain correction or redress when government performance is deemed unacceptable, are inadequate. All the practitioners concurred and so did six out of the seven developers.

5.2.3 Courts

Judicial restraint results primarily from the impact of the doctrine of separation of powers. It materially restricts the role of our courts in the quest for accountability. It was shown that the courts consider themselves bound to give due weight to findings of fact and policy decisions made by those in the executive with special expertise and experience in the field and not to attribute to itself superior wisdom in matters entrusted to other branches of government.

Judge O'Regan who wrote the majority judgment in the *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA (CC) (discussed in par 3.4.1) pointed out that judicial restraint "... does not mean that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision".¹⁴⁸

The reference to "facts" creates the hope that the courts may in future enquire into the merits of a case, yet the point of departure remains that the courts will afford due deference "to the other arms of government, especially when the matter relates to complex procedures beyond the expertise of this Court".

Dunn (1999b: 338) argues that the abuse of public power can be shown to be accountable only if it is put on trial in an effective and well-secured judicial system, but that "the most formidable challenge is to get it to court in the first place". The argument equally applies in South African context (see par 3.7.1). Dunn suggests that one cannot prosecute for "lethargy or stupidity, or even for gross cowardice as such, let alone for hardness of heart, but only for well-formed acts, consciously recognised by their perpetrators as breaching public law".

In this research 80% of the respondents regarded the formality of proceedings in our courts, their remoteness and inaccessibility (high costs of litigation and so forth) to make a major contribution to the deterioration of government accountability. The long delays before cases are decided in court were rated as making a major contribution to the deterioration of government accountability by 80% of the respondents.

Barnard (1999: 171) argues that in theory the potential of legal rights of persons adversely affected by environmental impacts was never realised in South Africa. This was *inter alia* due to the courts that failed the people as "their doors were effectively closed to litigants". If one wishes to challenge a municipal decision in the High Court, the attorney representing the court applicant will normally require an initial deposit of between R30 000,00 and R50 000,00, depending on the facts of the matter. The deposit requirement in itself puts litigation beyond the means of the vast majority of South Africans. A number of legislative changes are making

¹⁴⁸ Paragraph 48 of the judgment, also quoted with approval by Madala J in the Nyathi-judgment at par 88 *et seq.*

it possible that the court doors are slowly opening. For one the legislature has provided in some instances for legal standing to overcome problems that otherwise would have made the courts inaccessible to potential litigants.¹⁴⁹ Section 32(2) of NEMA empowers a court to decide *not* to award costs against a person who fails to secure the relief sought in respect of any threatened breach of environmental management legislation. This it may do if the court is of the opinion that the person acted reasonably out of concern for the public interest or in the interest of protecting the environment and has made due efforts to use other means reasonably available for obtaining the relief sought.

A similar provision is not to be found in legislation regarding the enforcement of other fundamental rights, with the result that prohibitive costs are likely to exclude potential litigants in most instances from attempts to enforce their other fundamental rights. De Waal (2001: 173) argues that the object of a court awarding a remedy should include vindication of the Constitution and deterrence of future infringements. It is clear from the case law that although development in this direction is possible, it may take many years before anything meaningful may be accomplished in this regard due to the practice of judicial restraint.

If one manages to raise the necessary funds for litigation, is able to overcome the many hurdles in the way of litigants (e.g. requirements relating to standing, remoteness and mootness) and eventually obtains a court date (which may be 12 or 18 months down the line) it is possible that after the court hearing, judgment may sometimes be reserved for a year or more. Even if judgment was obtained much earlier, the court will normally remit the matter to the executive authority for reconsideration. In other words, after all the risks involved with litigation, the effort, time taken and considerable expense (all of which will not be recovered even in the event of a successful court challenge) one could end up back where you started say two years or longer previously.

Not surprisingly 93% of the respondents in this research did not regard our system of legal accountability (which relies mainly on the courts and audits in holding the authorities accountable) as effective. The majority of respondents held moderate to strong views in this regard.

¹⁴⁹ E.g. section 32(1) of NEMA that provides for legal standing to enforce environmental laws.

It was shown that as a constitutional principle for governance, the state must respect, protect, promote and fulfil the rights contained in the Bill of Rights (see par 3.2). Furthermore that the Bill of Rights applies to all law and binds the judiciary. One would therefore expect the judiciary, when required to interpret the constitutional requirement that the public administration should be accountable, to find in favour of an interpretation that would require a more direct form of accountability than mediated democratic accountability.

5.3 KEY CHALLENGES AND PRINCIPLES

It is unlikely that an acceptable degree of judicial liberalism (see par 3.4) sufficient to overcome all the current shortcomings in the judicial system will emerge. It is equally unlikely that the various legislatures will coordinate their legislative activities perfectly or that they will start making perfect laws that will overcome all the current shortcomings in legislation.

Many arguments put forward in the literature regarding elections referred to above assume a civic-minded and capable public, but what would it take to get that? Is it required that we first have to establish all priorities and build consensus before anything may be done? It is unlikely that diverse attitudes, values and often conflicting preferences in society will totally disappear and that NGOs and social groups will obtain perfect cooperation amongst members of the collective.

Government policies and guidelines will remain open to different interpretations by different administrators. Within the current structure, political accountability will never be direct and reliable, but will remain very elaborately mediated. Elections will not by some miracle suddenly become a sufficient mechanism to insure that governments will perform adequately to maximise citizens' welfare. It is unlikely that all politicians will become entirely virtuous and that institutions will evolve endogenously in such a manner as to encourage accountability.

We do not have the luxury of time to really turn the problems of inadequate legal and institutional reform into opportunities. The key challenges for accountability revolve mainly around mobilisation of the people and institutional design. Accountability is first and foremost an individual responsibility and a key challenge is to mobilise and maintain sufficient public

support across party-political lines for proposals aimed at curing the problems within the current system and mechanisms. Furthermore, there is a need to mobilise and maintain active public engagement of a sufficiently large number of members of the public with politicians, focussed on exerting enough political pressure to influence the lawmaker's willingness to tackle the issues and to bring about the desired changes.

The current problem of inculcating citizenship (i.e. civic minded, able and capable members of the public) should be reduced to civic-minded and willing members of the public only. In other words, lack of personal ability and capability should not stand in the way of anyone to require and obtain government accountability. The idea of an epistemic community, promoted by Pieterse (2006 and discussed in par 2.4) comes into play in this regard. It concerns the idea of empowering the people to challenge fundamentally the conventional mainstream about what is possible and impossible in terms of transformative urban development agendas. The case for the establishment of deliberative forums to imagine and plot alternative approaches to urban development, connects usefully with Pieterse's own argument for a vibrant radical democratic politics in the city. The deliberative forums should serve to give back "a voice" to the people, to act as communicative links between the private and public spheres, to build a strong relationship between the state and civil society by providing debate and diversity and should be aimed at establishing shared reality. It should ensure that authority is vested in the people themselves, *the real actors of positive change*. The underlying guiding principle of the deliberative forums process should be as expressed by the slogan "*nothing about us without us*" coined by Cyril Ramaphosa during the constitution-making process (Skjelten, 2006: 28). It will be a formidable challenge to mobilise the population back to the public arena to make claims for accountability in the management of local affairs, yet a possible task. The current system of ward committees however does not create an adequate deliberative platform for matters concerning the national and provincial spheres of government (see par 3.3), although it could with appropriate statutory amendments serve as deliberative forums.

The second key challenge relates to institutional design (see Manin et al, 1999: 50 and other sources referred to in par 2.4). This thesis is not an argument against democracy. It is an argument for institutional reform and for institutional innovation in addition to, and supporting democracy. The scale of the obstacles to any endeavour to cure the weaknesses of the

current system within the existing structures only, is all too obvious. A system of accountability that relies for its success on elections, cooperation between members of society, the building of sufficient capacity amongst administrators, and so forth, should not be expected to eventually become sufficiently effective. As the electoral and other mechanisms do serve a purpose they may be retained but should be supplemented, e.g. by a new institutional structure aimed at the progressive realisation of the rights of everyone to accountable government. Such an institutional structure should not be hampered by the shortcomings evident in the current system and would require appropriate principles and rules. What is necessary, as Montesquieu long ago exclaimed, is "that one power should be in a position to stop another: to bring it to a halt".¹⁵⁰

Constituency offices and accountability agencies as suggested by Manin et al and Gilbert respectively (referred to in par 2.4) and the establishment of administrative courts (discussed in par 2.6) are examples of institutional reform that may potentially contribute to improved government accountability. This thesis argues that at least the following important principles and rules should apply in respect of the proposed new institutional structure.

1. A tribunal should be created within the proposed new institutional structure for hearing all complaints against the authorities within the land use and development context. Members of the tribunal should be sufficiently representative to ensure that environmental, social and economic considerations will receive due consideration and that a holistic approach is adopted to the evaluation of applications or complaints. Amongst those members should be persons with a sound legal background and practical experience in the various authorities.
2. The method of nomination and appointment of members of the new entity should ensure detachment from undue party political influence to improve credibility of decisions and to insulate the new entity from undue political influence. It should be independent of other branches of government (similar to administrative courts abroad) and may be subject to some form of direct popular control (e.g. non-party political elections).

¹⁵⁰ Quoted by Dunn (1999b: 336).

3. A challenge of public authority should not have to rely on the cooperation of different members of the public or on the ability and capability of individual members of the public for its success. An illiterate individual should be able to enforce accountability, even in the face of opposition from a majority in the local community.
4. The new entity and its officials should be empowered to investigate, on own initiative or on receipt of a complaint, specified matters (i.e. comparable with but going beyond the powers of public protectors described in chapter 3). Such matters may *inter alia* include any alleged maladministration in connection with government affairs, abuse or unjustifiable exercise of power or unfair, capricious or other improper conduct, undue delay by a person performing a public function or any act or omission by a person employed in government, which results in unlawful or improper prejudice to any other person. Such power should include the right to consider the merits of decisions and to enquire into the reasons supportive of decisions reached.
5. The procedure relating to challenges to government action or inaction should be informal and the new entity and its officials must be empowered to ascertain any relevant fact in such manner as they deem fit. The aim should be to avoid a process that is so specialised and so academic that it becomes just another intellectual puzzle.
6. The new entity must be empowered to make rules aimed at facilitating proof of allegations (e.g. that every authority shall, upon receipt of a land use application, issue an acknowledgement of receipt confirming the date of receipt and the reference number under which it will be dealt with by the authority; that the tribunal may require that the relevant case file of the authority be handed to it immediately for inspection¹⁵¹ or requiring that administrators develop a record of proceedings that can be examined by outsiders, which must bear some systematic relationship to subsequent decisions).

¹⁵¹

The current provincial practice is that when an application is received for access to information, the case file is first referred to the internal legal advisors for scrutiny before such access is made available. The researcher regards this approach as sinister.

7. The tribunal should serve as the appeal authority for all appeals available in terms of the relevant legislation, but excluding the MSA appeal which should remain in place (see “self-rectification” in 2.6). The intention should be to replace the current successive rights of appeal on the same set of facts to several different appeal authorities. In the event of an appeal against the decision of an authority to the new entity, the former should lose its decision-making powers and should become a commenting authority only (comparable with the section 38(8) procedure discussed above). Even though rules should be drafted *as if* they were universally valid and timeless, the tribunal should re-evaluate those rules each time they are applied, requiring an ethical choice (in line with the thinking of Cilliers, 1998:122).
8. The grounds for judicial review for the findings of the new entity and its officials should be restricted to interest in the cause, bias, malice, gross irregularity with the proceedings and failure of the administrator to apply his/ her/ its mind.
9. Anyone should be entitled to bring a charge of say "misconduct in office" before a special official of the new entity, who could render a formal provisional condemnation if she considers it well founded.¹⁵² The special official should proceed inquisitorially to ascertain the relevant facts.¹⁵³ The complainant must submit acceptable proof that the administrator or authority concerned received written notice of the complaint but failed to remove the cause of the complaint within say thirty days from date of notification.
10. If a provisional condemnation was granted, the authority against which it was granted should be afforded the opportunity to correct its action within a specified but limited time period (see the principle of “self-rectification” referred to in 2.6). If the authority concerned failed to respond within the stipulated time period, the condemnation will automatically become final.

¹⁵² A similar procedure was available in the Athenian model (Elster, 1999: 268). It could serve as a preparatory examination or what is known as a "rule *nis*" (a provisional order with a return date). In other words, it will not be a final condemnation, but the result of which has to be confirmed by the return date or which could be passed on to the entity's tribunal for consideration.

¹⁵³ I.e. a similar approach to that prescribed in section 26(3) of the Small Claims Court Act, No. 61 of 1984.

11. If the special official is not prepared to grant a provisional condemnation, the aggrieved person must be able to challenge the officials refusal by way of internal appeal and subject to payment of an appeal fee, which will be refundable if successful on appeal.
12. If the special official is not prepared to grant a provisional condemnation as the evidence produced is regarded as inconclusive *or* if the authority challenges the provisional condemnation, the special official should allow the aggrieved party and the authority concerned the opportunity to file supplementary papers and to have the matter considered by the tribunal.
13. It should be cheap to enforce accountability. The high costs associated with litigation coupled with the ineffectiveness of the judicial remedies and the practice of judicial restraint have to date ensured that many an abuse of public power has gone unchallenged. If the situation was to be turned around and more effective and efficient instruments were put in place to challenge decisions of the authorities, the government machinery might grind to a halt if the system was not properly constructed and managed. The operation of the tribunal should gradually be phased in with appropriate slowness to prevent overload. An initial deposit requirement of say R2 000,00 might assist in order to achieve the progressive implementation of the new order. Persons requiring the tribunal to enquire into government action or inaction would be required to pay such deposit, which sum should be refundable in the event of a successful challenge. The amount of the deposit should over time be reduced substantially to bring the new remedy within reach of everyone.
14. All reasonable expenses incurred by the aggrieved party (including the costs of professional consultants that assisted with the matter) must in all instances be recoverable from the authority whose decision is overturned on review or from the administrator personally in circumstances as described below. The legislation aimed at restricting state liability should not apply to costs orders made by the tribunal and legal provision should be made to obtain prompt execution.¹⁵⁴

¹⁵⁴

Japta J said at 452G-H in the Mjeni-judgment that "[t]he constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made".

15. In addition to recovery of reasonable expenditure the payment of a *solatium* should be prescribed by law (not leaving it to the discretion of the courts) to serve as vindication of the Constitution and to deter future infringements. This should also apply in the case of a successful application to the courts for judicial review or a *mandamus*. See in this regard De Waal's argument (2001: 188) in par 3.4 for the development of damages as a remedy for certain violations of fundamental rights.
16. Whilst it is important that costs related to the adjudication of disputes should not serve to withhold complainants from challenging unacceptable decisions, appropriate arrangements should be put in place to discourage frivolous challenges to applications or decisions of the authorities (see the concept of *graphe* in par 2.4). The same penalty should be imposed if a party that challenged an application or a decision taken in the exercise of public power abandoned the challenge after starting it, as a blackmailer might do if he succeeded in getting a bribe from his victim.
17. If an administrator (or if she or he can not be identified, the administrative head of the relevant government department) fails to comply with an order contained in a final condemnation or with an order of the tribunal within the time period stipulated, the tribunal should be empowered to make a costs order against the individual personally (in other words the individual and not the authority concerned will be held liable for payment of costs occasioned by or in respect of the hearing). This should be done if the tribunal is of the opinion that the person failed to take reasonable action or failed to make due efforts to use other means reasonably available for taking the necessary action. The intention is to create more direct accountability by officials to members of the public, to discourage officials that abuse public power from continuing to do so or to act inappropriately and to engender office bearers to a culture of accountability in their official duties. The researcher argues that such an approach will contribute to the reform of the value systems and underlying processes of government to reflect an accountability agenda.

18. In the event of repeated final condemnations or orders of the tribunal granted against the same administrator or authority for similar conduct and if the tribunal believes that reasonable steps have not been taken to ensure that a repetition does not occur, it must inform the provincial executive accordingly. In such event the provincial executive must be required by law to forthwith intervene effectively in the municipal sphere.

19. Strict time periods should apply within which the authorities and the new entity (including the tribunal and special officials) must provide comment, process applications, appeals and complaints and inform the parties concerned of the decisions reached. The lengthy delays in deciding applications and appeals are irreconcilable with the requirement to promote socio-economic development or the concept of "good government".

20. All spheres of government should be required to undertake land use planning and the provincial and national spheres of government should be required to align their planning with municipal IDPs.

21. Legislative reform by all three spheres of government and co-ordination of their legislative activities should support the new initiative.

5.4 CONCLUSIONS

Accountability is a legitimate passion. Yet according to James Madison¹⁵⁵ the great difficulty with it lies in this: "you must first enable government to control the governed; and in the next place oblige it to control itself". In a 2008 Constitutional Court judgement, the judge also had the following to say: "If the foundational values of the constitution are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude".¹⁵⁶

In terms of the majority view of respondents in this research our systems of political, legal and professional accountability are not effective, the current methods available to restrain the

¹⁵⁵ *Federalist* no.51 as quoted by Manin (1999: 1).

¹⁵⁶ Per Madala J in Nyathi- judgment at par 80.

authorities from abusing their powers are regarded as ineffective and the same goes for the corrective mechanisms that citizens could potentially use to obtain redirection or redress when government performance is deemed unacceptable.

These research results have confirmed the researcher's existential hypothesis (par 4.1) that government was mostly not accountable within the land use planning and development context within the Western Cape and that the available mechanisms for achieving government accountability are ineffective. The researchers overall finding was that the accountability requirement has largely been rendered vain and ineffectual as a result of the lack of effective mechanisms and measures to obtain accountability. The mere existence of responsibility and accountability mechanisms was not in itself sufficient to ensure effective accountability. The situation calls for an urgent intervention to improve accountability of all three spheres of government within the specified context.

A pre-condition for sustainable development is sustainable planning. Sustainable planning will not happen by itself. It requires at least a legal and enforceable legal obligation resting on all spheres of government to undertake spatial and land use planning and to create effective opportunity for everyone to actively engage in government processes. It also remains a formidable methodological challenge to institutionalise a comprehensive process of "bottom-up accountability" which goes beyond representative community action and sporadic participation. Suffice it to say that a combination of various types of intervention (e.g. law and institutional reforms, co-ordination of legislative activities amongst the three spheres of government, formulation of improved policy directives, undertaking land use planning and so forth) are required to if government accountability is to be improved.

5.5 RECOMMENDATIONS

This thesis recommends that at least the following law reforms be undertaken to improve local-level government accountability within the land use planning and development context within the Western Cape.

5.5.1 National or provincial legislation should be adopted to create deliberative forums to imagine and plot alternative approaches to urban development and perform the other

functions described in par 5.3. The manner in which the current legislation and existing guidelines relating to municipal ward committees have been drafted, are considered inadequate (as discussed in par 3.3.8). Deliberative forums need to be fiercely independent, which will *inter alia* require that inclusion of topics of discussion in forum agendas may not be refused or controlled in any manner whatsoever by elected politicians or appointed government officials.

- 5.5.2 Elected representatives should by law be required to attend regular monthly meetings of such forums upon invitation to hear complaints, to answer queries and to report back to those in attendance on government matters.
- 5.5.3 Legislation should provide for a new structure as contemplated in par 5.3 to be established to serve *inter alia* for the monitoring and support of local government and the promotion of the development of local government capacity to perform their functions and manage their own affairs.
- 5.5.4 The new structure proposed in par 5.3 above should by law also serve as an independent accountability agency. The main difficulty in judging what government has done is that the public just do not know enough. Public information must therefore not depend on what the government wants the public to know and the public should be able to rely on the expertise and independence of the entity for credible assistance.
- 5.5.5 In the event that elected office-bearers and their officials disagree on the outcome of applications and the elected office-bearers approve such applications against the recommendations of their officials, this should be recorded in a register open to public scrutiny and include motivated reasons for rejecting the advice of the officials.
- 5.5.6 The current land use legislation should be amended in accordance with the approach adopted in section 38(8) of the Heritage Act. In terms of that section, the heritage authority is converted from a decision-making authority into a commenting authority in the event that environmental authorisation is required, whilst the provincial environmental authority is the decision-making authority. The latter is, however,

required to take into account comment made by the former when taking a decision. The proposed amendment should achieve greater coordination and speedier decision-making.

5.5.7 Legislation that discriminates against people on the basis of the colour of their skins should be repealed. State structures should be transformed and de-racialised as proposed by Davids and Maphunye (2005: 62). In general there should be a thorough review of all pre 1994 legislation by all 3 spheres of government to see what can be scrapped.

5.6 FUTURE RESEARCH

The researcher pointed out that it could be expected that the BBBEE laws of the current regime may damage and undermine the reputation of the judiciary and destroy respect for the law as did the discriminatory laws of the previous regime. In the research, fourteen of the fifteen respondents disagreed that the introduction of party politics in the municipal sphere has resulted in a general improvement of accountability, ten of which strongly disagreed indicating that it rather contributed to the reduction of accountability.

A shortcoming of the study is that it has not sufficiently explored the influence of the introduction of party politics on accountability in the municipal sphere, nor the continued impact of old and new discriminatory laws on government accountability. Loss of professional capacity (resignations) was identified by fourteen of the fifteen respondents as making a major contribution to the erosion of government accountability, but it is not clear whether those resignations relate to party-political influences in government, new discriminatory laws (which may in the longer term result in a more equal system) or came about for other reasons. Future research on government accountability within South African context should explore these subjects. It should also explore the role and functioning of accountability agencies, deliberative forums and the use of constituency offices to promote effective public participation aimed at promoting improved government accountability. The role of corruption on accountability and the role of party politics in land use planning context needs to be explored in more detail as well as the role of administrative courts in promoting government accountability.

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ANNEXURE 1

QUESTIONNAIRE

I am undertaking a study as part of a Master's Programme in Sustainable Development Planning and Management. The title of my thesis is *Improving local-level government accountability - a study of the government's accountability within land use planning and development context in the Western Cape*. My aim is to assess the adequacy of available mechanisms to achieve effective government accountability.

I am interested in learning *your opinion* about the accountability of government within Western Cape planning and development context. In particular, I'm interested in how you, as a person active in the planning and development field, personally and professionally experience/ perceive aspects of government's accountability.

For purposes of this study accountability means "to be answerable" or providing an explanation, reason or justification for government acts or omissions. It also implies that, in the event of unsatisfactory account-giving, "something can be done" by an aggrieved party that would lead to avoidance of a repetition, redress or corrective action.

This questionnaire will take only about 15 to 20 minutes of your time. Be assured that you will not be identified by name when this survey is completed. Please take a few minutes to respond to this survey - your input is greatly appreciated.

Johan Du Plessis

PART I: PERSONAL INFORMATION

(Please indicate by underlining your choice).

Sex: Male / Female

Sector: Public / private sector: If public sector, national/ provincial / local government sphere.

Profession: Town Planner / Property Developer/ Environmental Practitioner/ Engineer/ Attorney/ Heritage Consultant / Architect / Other (please specify)

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Professional experience: Less than 5 years/ 5 - 10 years/ 10- 15 years/ 15 - 20 years/ more than 20 years

Today's date: 2008

PART II: SURVEY QUESTIONS

There are no right and wrong answers! Your perceptions are what are important. Do not ponder over the questions; answer with your first instincts.

- 1. Read each of the following statements and then circle the number that best represents your opinion. (1 - strongly disagree; 2 = moderately disagree; 3 = mildly disagree; 4 = mildly agrees; 5 = moderately agrees; 6 = strongly agrees).**

Adequate land use planning exists that may serve as a basis for decision-making in the following spheres of government:

National:	1 2 3 4 5 6
Provincial:	1 2 3 4 5 6
Municipal:	1 2 3 4 5 6
The authorities are generally <i>responsive</i> to external stakeholders	1 2 3 4 5 6
The authorities generally provide sufficient opportunity for <i>citizen participation</i> in the deliberative process of government	1 2 3 4 5 6
Usually citizens are afforded an effective opportunity to confront adverse evidence before a decision is taken	1 2 3 4 5 6
The authorities generally provide sufficient opportunity for <i>professional consultants' participation</i> in the deliberative process of government.	1 2 3 4 5 6
Decisions by municipal councillors are usually taken without any <i>discussion</i> of agenda items	1 2 3 4 5 6
Decisions by municipal councillors are usually only taken after <i>debate</i> of agenda items	1 2 3 4 5 6
The authorities usually <i>provide reasons</i> for decisions when informing applicants and objectors of those decisions	1 2 3 4 5 6
It is evident from councillor debates and the reasons given for decisions that the decision-makers are usually fully conversant with all the relevant facts	1 2 3 4 5 6
When the authorities are requested to provide reasons for decisions, such requests are <i>promptly</i> complied with.	1 2 3 4 5 6
The reasons for decisions given by the authorities include <i>adequate substantiation</i> in support of the decisions.	1 2 3 4 5 6
The reasons for decisions given by the authorities set out the <i>reasoning</i> that has led to all conclusions reached	1 2 3 4 5 6
The reasons given for decisions are <i>rationally related</i> to the decisions taken	1 2 3 4 5 6
Statutory <i>codes of conduct</i> provide for effective means to enforce accountability of officials and councillors	1 2 3 4 5 6

The current methods and existing tools available to <i>monitor</i> the conduct of the authorities are adequate	1 2 3 4 5 6
When the authorities are requested to provide <i>access to information</i> , such requests are promptly complied with	1 2 3 4 5 6
The <i>institutions</i> created by law to oversee the exercise of statutory powers (e.g. the public protector) are adequate	1 2 3 4 5 6
The current methods and existing tools available for achieving <i>effective oversight</i> are adequate	1 2 3 4 5 6
Our system of <i>political</i> accountability (which relies on the theoretical possibility of poor performers not being re-elected) is effective	1 2 3 4 5 6
The introduction of <i>party politics</i> in the municipal sphere has resulted in a general improvement of accountability	1 2 3 4 5 6
Our system of <i>legal</i> accountability (which mainly relies on the Courts and audits in holding the authorities accountable) is effective	1 2 3 4 5 6
Our system of <i>professional</i> accountability (which relies on professional bodies in holding officials accountable) is effective	1 2 3 4 5 6
The current methods available to <i>restrain</i> the authorities from abusing their powers are effective	1 2 3 4 5 6
The current system has adequate corrective mechanisms for citizens to obtain <i>redirection/ correction</i> when government performance is deemed unacceptable	1 2 3 4 5 6
Adequate statutory provision exists generally for citizens to impose <i>sanctions</i> on the authorities in cases of manifest misconduct in office	1 2 3 4 5 6
<i>National and provincial</i> governments ensure the effective performance by municipalities of their municipal planning functions through adequate regulation, monitoring & support	1 2 3 4 5 6

2. **Please rate the following factors to indicate what contribution they make (if any) to the erosion of accountability in government. Use possible ratings of low (1), moderate (2), or (3) high in a comparative sense, and then circle the number that best represents your opinion. A high rating (3) would indicate a major contribution whilst a low rating (1) would indicate little or no contribution.**

The <i>formality</i> of proceedings in our Courts, their <i>remoteness</i> and <i>inaccessibility</i> (high costs of litigation, etc)	1	2	3
The <i>restraint</i> practiced by our Courts in examining the substance of decisions	1	2	3
The long delays before <i>applications</i> are decided	1	2	3
The long delays before <i>appeals</i> are decided	1	2	3
The long delays before <i>cases</i> are decided in Court	1	2	3
Duplicative and wasteful <i>procedures</i> in public administration	1	2	3
<i>Fragmented</i> character of service delivery	1	2	3
Absence of a <i>performance regime & culture</i>	1	2	3
The <i>regulatory burden</i>	1	2	3
The <i>complexity</i> of the statutory framework	1	2	3
Loss of <i>professional capacity</i> (resignations)	1	2	3
Understaffing	1	2	3
Lack of visible <i>qualifications</i>	1	2	3
Lack of <i>experience, skill and knowledge</i>	1	2	3
No <i>demonstrated competence</i> for position to which appointed	1	2	3
<i>Lack of will</i> to enforce requirements	1	2	3
Public official <i>immunity</i> from civil suits for official action/ inaction	1	2	3
Inadequate time, information & resources on part of citizens	1	2	3

Are there other factors that in your opinion contribute to the erosion of accountability in government?

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3. Please indicate the average time taken by the authorities to finalise processing the following, using the possible ratings indicated and then circle the number that best represents your opinion (1 = less than 6 months; 2 = between 6 and 12 months; 3 = more than 12 months).

Rezoning applications	..	..	..	..	..	1	2	3
Subdivision applications	..	..	..	..	..	1	2	3
Departure applications	..	..	..	..	..	1	2	3
Applications for building plan approval	..	..	..	..	..	1	2	3
Applications for removal of restrictive title conditions	..	..	..	..	..	1	2	3
Applications for environmental authorisation	..	..	..	..	..	1	2	3
Appeals in terms of the Municipal Systems Act	..	..	..	..	..	1	2	3
Appeals in terms of the Land Use Planning Ordinance	..	..	..	..	..	1	2	3

4. How do you rate the current measure of accountability of the three spheres of government in the planning and development field in the Western Cape (expressed as a percentage)? Please circle the category that best represents your opinion

National government:

0 -10%	11-20%	21-30%	31 - 40%	41 - 50%
51 - 60%	61 - 70%	71 - 80%	81 - 90%	91 - 100%

Provincial government:

0 -10%	11-20%	21-30%	31 - 40%	41 - 50%
51 - 60%	61 - 70%	71 - 80%	81 - 90%	91 - 100%

Municipal government:

0 -10%	11-20%	21-30%	31 - 40%	41 - 50%
51 - 60%	61 - 70%	71 - 80%	81 - 90%	91 - 100%

5. Please briefly motivate your choices in 4.

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6. Do you have any suggestions as to what is required to improve the accountability of the three spheres of government in the planning and development field generally?

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I want to thank you for your time and help with this survey.

Please return to J P Du Plessis at jp@jdpprop.co.za or by facsimile to 021-851 4852 by not later than **14 December 2008**.