

Phase One: General Research

Annexure D: Land Markets

For Discussion

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1. Introduction

The purpose of this report is to explore the international and South African lessons on land markets and how they affect secondary housing markets in former black townships. It is intended as a desktop review of literature and forms one element of a broader review which includes economic, social and legal aspects of secondary markets. The latter three aspects are covered in separate source reports.

Before turning to the international literature, the first section contextualises the role of land in housing markets. Chapter 2 presents the international literature and draws out lessons for South Africa, in relation to land acquisition, land development and Land registration and tenure. Similar aspects are explored in Chapter 3 from the South African perspective, but includes some anecdotal inputs in Chapter 4. As informal settlements in South Africa provide lessons on land demand the organic development of informal land markets, some local case studies are included and lessons for formal secondary markets drawn. The paper concludes with the overall lessons for secondary township markets in Chapter 6.

1.1 *Brief introduction to land markets*

In relation to land, land markets are shaped by the forces of supply and demand. However, the land market is different from other types of markets because land is unique in terms of its location. It is fixed and the supply of land in one location cannot be increased. The key actors responsible for creating this demand and supply are:

- ✍ Consumers - get the best and most for lowest price
- ✍ Producers - to maximise profits
- ✍ Financiers - also want to maximise profits
- ✍ Governments - have many objectives (housing, income redistribution, environmental, etc) subject to their revenues and the regulatory powers they have.

Basically, demand is shaped by the **use** of that land. In terms of residential land it is driven by the demand for housing.

The **demand for housing** (or land) is determined by demographic, economic and cultural/social factors:

- ✍ Demographic: household formation, composition
- ✍ Economic:
 - household income,
 - capacity to mobilise savings,
 - access to credit,
 - number of people willing to invest (depends on the incentives government creates such as secure tenure and registration systems).

On the **land supply side**, the quantity and price of land is affected by:

- ✍ Infrastructure investment spatially
- ✍ The topography
- ✍ Willingness of land owners to make land available on the market
- ✍ Government restrictions on the use of the land (zoning, land use controls, registration)

What must be remembered about land markets is that the ease of entry and exit are controlled by governments (public sector activity). The policies that government have in place can directly affect the supply of land. The main aspects to consider here are:

- ✍ Property rights
- ✍ Land titling and registration
- ✍ Land use regulations
- ✍ Direct public intervention in the acquisition of land
- ✍ Fiscal practices

We need to explore how these factors lead to the land market not operating efficiently or effectively (is the price of land too high? Is land in short supply? Are government policies restricting the market?).

Internationally, Mayo (1987) indicates that the hallmarks of a land market that works well include:

- ✍ ease of entry
- ✍ ease of performing transactions.

These both need adequate land information, secure tenure arrangements and appropriate registration mechanisms.

Conversely, what are the hallmarks of land markets that do not function?

- ✍ overcentralisation of management and administration
- ✍ inappropriate, detailed, inflexible regulatory and legal frameworks
- ✍ the lack of resources (skilled persons, finance) and political will to tackle problems
- ✍ administrative systems that are inefficient, inequitable, not accountable;
- ✍ a failure to encourage participation of the urban poor.

While all of the above is especially relevant to primary housing markets, with respect to secondary housing markets, the land is included as part of the property package. This means that primary activities relating to land identification and acquisition play less of a role, but regulation and the transfer of property rights remain as significant in affecting the dynamics of the market.

The broader aspects of land markets for low-income housing will be addressed in this report by looking at international examples and then the South African situation.

The literature review will show how land for formal low-income housing is supply driven, with South Africa being an extreme example. The townships were established in specific locations through government policies and can hardly be said to be a result of the demand low-income households express for land. The converse is true in informal land settlements.

2. International Literature Review

2.1 Context for Review

In understanding low-income land markets, land for low income housing often tackled from the perspective of land supply. The most important determinant of land supply for low-income housing is the government policies relating to land acquisition and development. The ease of entry and exit of households into the land market is controlled by governments - it is a public sector activity. It is therefore useful to understand the public sector activities in this regard.

The main activities that government influences in relation to land are:

- ✍ Land identification and acquisition
- ✍ Land development and release
- ✍ Land use regulations
- ✍ Land titling and registration

This section will briefly outline these aspects as they are handled in the international literature.

However, land markets are also influenced by the demand for land. It is argued that that this demand is usually expressed by the establishment of informal or extra-legal developments, particularly in South Africa where government policies have severely restricted land supply in formal township areas.

2.2 International Case Studies

2.2.1 Land Identification and Assembly

Land supply and Government Regulation

While the article below by Dowall (1991), does address issues beyond land acquisition, it provides an interesting introduction to the problems with land supply broadly.

In an article by David Dowall¹ he notes the shift in policies to recognising that informal housing is a valuable capital asset. He stresses the direct relationship between government regulation of housing and land development and the informal housing production sector. The informal sector exists because of the constraints of government regulations. He asks the question 'At what minimum level of regulation can housing affordability and access by the poor be balanced with broader interests?' The paper is intended to offer insights into the costs of high land regulations.

Firstly, the policies adopted are often borrowed from developed countries and the question of the cost of applying is seldom asked. Government regulation of land use and development affects land and housing markets in three broad ways:

- ✍ Constraining land supply
- ✍ Adopting excessive plot size standards and subdivision design
- ✍ Procedural delays

Each is outlined briefly.

Land Supply Constraints: zoning regulations can restrict land supply and increase land costs. For example, in South Korea, the land prices in Seoul have increased dramatically due to restrictions on conversions of agricultural land, greenbelt policies and land readjustment. In Karachi, the lack of infrastructure has reduced land supply and prices have increased faster than household incomes. Informal developments increased at the same time. Another problem is unrealistic planning and under-allocation of land for low income housing, such as happened in Serpong, Indonesia

Subdivision standards: In so many countries the high subdivision standards result in the cost of plots being beyond the means of the poor. In Malaysia for example, the area provided for roads is four times greater than in comparable North American or Western European projects. The cost of plots can be dramatically reduced by lowering standards

Procedural delays: Complicated procedures for obtaining development permission make it difficult for developers to respond quickly to changing demand. In Malaysia it can take five to eight years to obtain the necessary permits from 15 to 20 government agencies for subdivision approval. In Thailand it takes about five months to get subdivision approval from five government agencies.

He continues the paper by addressing government policies on liberalising land and housing markets. He believes that most government officials do not actually know what goes on in local land markets. If planning offices are visited it is often revealed that little is known about, inter alia,

¹ Less is More: The Benefits of Minimal Land Development Regulation, in Regularising the Informal Land Development Process, Vol 2: Discussion Papers, USAID, Office of Housing and Urban Programs, 1991.

- ✍ Patterns of urban land development
- ✍ The number of housing units built (formal and informal) in the past year
- ✍ Land and housing prices
- ✍ Rents for buildings
- ✍ Infrastructure deployment patterns
- ✍ Land subdivision patterns.

Governments need to undertake land market assessments and determine future urban land requirements in a strategic way. While the three factors discussed in the beginning of the paper as those that constrain land supply, he notes that the role of public and private land developers needs a rethink. In study after study he notes that public sector land development is a critical constraining factor that limits the responsiveness of land and housing markets to demand. He proposes that governments should privatise public land development agencies and promote vigorous competition in land and housing markets and governments should facilitate urban development.

Land Markets and the Poor

The problem of depending entirely on the market to supply land for the poor is that the only land the poor can afford will be where prices are lowest. In most cities, this is on the edges of town. As a result, governments usually intervene in the market to acquire land for low income housing.

Michael Kitay (1985) devoted an entire book to land acquisition in Developing countries. He notes that few countries have comprehensive laws and procedures for land acquisition and even fewer have institutions and trained personnel to administer the laws. A range of mechanisms available to governments to acquire land, but the most common for low-income housing includes:

Voluntary bargain and sale: preferred by more free-market countries, but often difficult to find willing sellers. Thailand used this method through its National Housing Authority (NHA) and found that it tended to increase the price of land as few responded to the call for land. In some respects the land calls in Gauteng are based on similar principles of voluntary bargain and sale.

Barter and exchange: used quite widely as governments often own land for public uses (e.g. schools, hospitals) for which it is unsuitable and can swop these parcels for low income housing. Used in Egypt, Mexico, Peru, Romania, Chile, India, Hong Kong. There needs to be a system for determining land values in place for this to work.

Land Readjustment: this requires specific legislation to pool a number of small land parcels and re-design, develop and transfer them. While developed for rural circumstances it is widely used in South Korea since the 1960's. It has also been used in India, Taiwan and Japan as well as a number of western countries such as Australia, Canada and Germany. It is a form of public-private partnership and not used in South Africa.

Compulsory Acquisition or Eminent Domain (Expropriation): In order for a government to expropriate land it needs to have powers of eminent domain. This concept has derived from England and spread through colonisation and the laws generally need serious revision to eliminate the cumbersome procedures (Farvacque and McAuslan 1992). In South Africa it is enacted and the process involves first trying to negotiate a fair market value for compensation, before the state acquires the land.

Land Banking: this is the advance acquisition of land by governments. It has had low success in delivering land to the poor, and has been tried in Turkey, Chile and India (Rivkin cited in Oelofse, 1988). Lack of finance is a major constraint as are land invasions and the rising price often means that the land does not go to the very poor as often originally intended.

Many countries have created institutions or agencies to acquire land for low-income housing. Examples include the Malawi Housing Corporation, the Delhi Development Authority, the Tunisian Agence Fonciere de l'Habitat, the Urban Development Corporation of Jamaica, Urban Improvement Corporation of Chile (Kitay 1985).

To Sum Up:

The poor are at a disadvantage at acquiring land in a market where land goes to the 'highest bidder'. In such a market, the cheapest land is furthest from the city centre, where transport costs are high. The poor can therefore only exercise demand for land in these formal markets in these poor locations, but this is often reduced by other economic and social factors. This is exacerbated by the presence of informal land markets, where the poor may access better-located land, closer to amenities. Governments therefore try to intervene and supply land for low-income households through a variety of means. Again, because of the operation of formal markets, the ability to secure well-located land by government is restricted unless subsidies are involved or governments intervene to keep land prices low (distorting the market). Partnerships and land swaps appear to be the most cost-effective methods for governments operating in formal markets.

2.2.2 Land Delivery/Development

Even if the obstacles to acquiring land for low-income housing are overcome, there are still constraints in the development of land that makes it difficult for the poor to acquire formally-developed land parcels. The constraints generally relate to the high capital costs of obtaining development approval and servicing, the time taken to obtain such approvals, the laws governing procedures being cumbersome and often archaic and the lack of institutional capacity in government. Political factors also play a role as development can be blocked by elites or neighbours due to the NIMBY syndrome.

The constraints of formal legal land delivery systems

The example of Lima, Peru is a good illustration of the constraints the poor face in accessing formal land and housing in developing countries. The example is taken mostly from de Soto (1989 and 2000).

The decision to go the informal route in Lima is largely a rational evaluation of the costs of formality versus informality. The formal system needs a brief explanation.

Land Acquisition: the poor may request adjudication of state land if they cannot afford an urbanised plot. This takes 43 months and involves 6 different departments, 207 bureaucratic steps involving 48 different government offices. From a cost point of view, this would be the equivalent of 56 months (4 years and 8 months) worth of wages at minimum living level wage (p 139).

Land Development: Having acquired land, a plan needs to be approved by the relevant authorities. It must comply with zoning regulations, minimum standards of quality and density requirements. This takes an average of 28 months to be approved.

Building Permit: This is required prior to construction and the building must be certified after construction. This takes about 12 months.

The total process takes 83 months (almost 7 years).

To sum up, the formal system has the following problems for the poor:

- ✍ It takes too long to meet the immediate housing needs of the poor;
- ✍ It is highly bureaucratized and inaccessible;
- ✍ The costs are beyond the means of the poor;
- ✍ It is too complex and requires technical knowledge and information that the poor do not have access to (or can afford);
- ✍ The system is rigid in terms of standards and regulations.

As a consequence, the poor resort to alternative, extra-legal mechanisms. These are summarised by way of comparison with the formal system.

Land Acquisition: Usually by land invasion, based on an 'invasion contract' which can be an unwritten agreement relating to allocation of plots, functions and responsibilities. Over time extra-legal norms develop, borrowed from customary laws and rules mixed with official legal systems where these are socially relevant.

Land Development: these are the reverse of the formal system. Land is acquired first, it is then built on and then serviced. Ownership is acquired last.

Land Tenure: while the invasion establishes a right to land and provides some security to build a house, it does not necessarily provide the incentive to invest large sums of money in that house, according to de Soto. The right is an Expectative Property Right (EPR) and is not full ownership which renders selling problematic. It is temporary until government confers definite ownership.

While there are problems with the formal system, de Soto notes that there are also costs associated with informality. These are:

- ✍ The lack of full property rights reduces the informal dweller's aggregate investment;
- ✍ The property cannot be transferred easily;
- ✍ The property cannot be used as collateral;
- ✍ Threats of removal reduces the incentive to invest;
- ✍ No one is obliged to provide services.

Peru did introduce measures to regularise these settlements, firstly through an Act in 1961 which made it possible to formalise existing settlements. This Act imposed conditions for legal recognition, rather than address the underlying issue of access to housing. One of the provisions was the restriction on selling, renting or subdividing for five years after receiving title. As they often had to wait 20 years to obtain title, this meant and they were landowners with reduced rights for an impossible 25 years. Further reforms were introduced in the 1980's to make the acquisition of titles easier.

In de Soto's more recent book (2000), he notes that Lima is not unlike many other developing countries when it comes to engaging in the formal system. In the Philippines, if a person obtained land legally from the state or private sector, s/he would have to form an association with his neighbours to qualify for a state housing finance programme. This would involve 168 steps involving 53 public and private agencies and take 13 to 25 years. If the land is still considered to be 'agricultural', an additional 45 bureaucratic procedures are necessary adding another two years to the process.

Similarly, in Egypt, to acquire state-owned land legally and register it, at least 77 bureaucratic steps must be followed involving 31 public and private agencies. This can take from five to 14 years to complete. He notes that 4,7 million Egyptians have consequently chosen to build their dwellings illegally, despite the risk of having it demolished or ending up in prison if he tries to formalise the rights.

An interesting observation made by de Soto (2000, p 21) is that it is nearly as difficult to stay legal as it is to become legal. He observes **that it is not so much that they break the law, the law breaks them**. This is an important lesson for South Africa and its programmes to transfer freehold title to occupants of state housing as well the transfer of freehold through the housing subsidy scheme.

As the poor are unable to exercise demand in the formal system very effectively in many developing countries, they exercise it in the informal markets or in the case below, have developed extra-legal (quasi-formal) systems within the informal market.

How extra-legal land delivery systems can survive alongside and support legal systems

This paper by Gilbert (1981) looks at two cities and compares the attitude of authorities to land invasions. The example of Bogota is extracted as it provides an example of extra-legal land delivery which also upholds formal concepts of property.

Bogota

Invasions are rare but pirate subdivisions are an important way of providing access to land for the poor.

Pirate subdivisions are unauthorised subdivisions on the periphery of serviced urban areas. They are illegal in that the services provided, the width of roads and so forth do not conform to planning regulations. A pirate sub-divider sells the plots and purchasers receive a contract but this does not have full legal standing. Most purchasers believe they will not be removed.

The system is also organised so that the poor can gain credit (not from formal institutions) and it allows the poor to improve their houses and offer rental rooms to increase their income.

Gilbert explains the reasons why these pirate subdivisions persist, the most important being:

- ✍ The poor gain access to land and are generally satisfied by this process, in the absence of other alternatives
- ✍ Landowners benefit as it reduces the risk of land invasions on their land. Landowners have a choice of developing their own land (long process) or sell to a

pirate sub-divider who still upholds the sanctity of private property, thus protecting their interests.

- ✍ Local politicians can gain patronage from these areas.
- ✍ Housing for the poor is relatively cheap through this method, so government is relieved of a responsibility to provide housing for the poor or subsidise such housing.

However, it is not without its difficulties, an important one being that the poor may pay as much for these unserviced plots as they might for serviced plots. Land without planning permission is often used and is more expensive to service. The system is also prone to corruption, as bribes are necessary to obtain planning permission.

The State tried to introduce policies to control pirate subdivisions, including reducing service levels (minimum norms policy) to encourage the formal development route and legalisation of informal settlements. Legalisation involved three stages:

- ✍ Upgrade by providing basic services
- ✍ Legalise and issue legal titles
- ✍ Provide full range of services and community services

The programme was not successful mostly because the cost of land and shortage of it. Gilbert notes that the constraints on the supply of land for low-income housing is due to inappropriate zoning regulations, bureaucratic delays and the concentration of land in the hands of large companies/land owners. Land is therefore still cheaper through pirate subdivisions than through the minimum norms policy. This policy also had the unintended consequences of rationalising the pirate market and forcing more intensive use of land to compete with the minimum norms policy and increased the profits of the pirate sub-dividers.

What this illustration shows is that the demand for land by the poor finds expression in extra-legal systems when governments do not supply sufficient well-located land. The actual price of the land may not be less, but the relative advantages of good location outweigh pure land price.

2.2.3 Land Registration and Tenure

The process of bringing land into the formal market through identifying the parcel, attaching a legal form of holding and recording this publicly through a known process that is justiciable, is what is involved in land registration. In formal land systems, it is seen as the backbone of the land market as it confers a status on the land which allows it, as de Soto states, 'to live a parallel life' in that it forms a representational systems that allows it to generate capital.

This aspect of land is also very important to the secondary housing market. It is through this formal system that property is given greater value and is securely traded, thus supporting a secondary housing market. One key to this is the ability to raise credit through mortgages on the property which can also unleash capital for other economic activities.

There has been a general hegemony from development policy quarters such as the World Bank and USAID that secure tenure is essential for developing countries as it improves the lives of the poor. As part of the Habitat Agenda (Istanbul, June 1996) relating to 'Adequate Shelter for All', a global campaign for secure tenure was embarked upon². The emphasis of this campaign is on security of tenure, and not necessarily on promoting freehold tenure over other forms.

Internationally, there are ongoing debates about whether formal, legal security of tenure serves the interests of the poor and achieves things like access to credit, promoting a secondary housing market and creates an asset. Detractors point out that perceptions of security may be as important. The debates are illustrated below by examples of some international authors in this regard.

Security of title or perceptions of security?

In an article tackling the provision of water and sanitation to the urban poor, Tim Campbell (1987)³, raised an important issue regarding household investment decisions of the poor. He notes that before the poor commit resources to improvements, households must be sure that their investments will not be lost. He quotes the example of Cartagena, in Columbia (taken from Strassman, 1982), where government installed water connections to illegal plots, unleashing a huge investment in the area by the poor. The government had sanctioned the settlement by providing water thereby reducing uncertainty. Improvements included roofs, rooms, paint and kitchens and replacing latrines with toilets or septic tanks. It led to a doubling of housing value. In other examples he notes that the provision of services, for example in Manila, resulted in 60 to 85% increases in property value.

He goes on to indicate that authorities must take the difficult steps of acknowledging the legitimacy of the settlements and helping organise participation by residents. Authorities can help mobilise private resources and investments in a number of ways including partial investment in services or symbolic recognition of the legitimacy of settlements. This can be through meetings, letters of acknowledgement or deciding not to move settlements.

² This campaign was launched just prior to the Global Campaign on Urban Governance but the two were seen as part of the larger Habitat programme and not separate initiatives.

³ Applying Lessons from Housing to Meet the Challenge of Water and Sanitation for the Urban Poor in the Journal of the American Planning Association, Spring 1987, Vol 53 No.2 pp186 - 192.

What this article raises is the question of whether secure title is a precondition for the poor to invest in their properties or whether it is simply the perception of security.

Questioning the role of formal title and the poor

In a thought provoking article by Niels Haldrup (1994)⁴, three assumptions that commonly underlie land tenure policy and are used to justify conventional methods of land registration, are questioned. They are:

- ✍ That the definition of the land parcel is necessary for land registration
- ✍ That formal title improves security of land tenure
- ✍ That formal title improves or even ensures security of credit.

Each of these is looked at briefly by Haldrup.

That the definition of the land parcel is necessary for land registration:

Regarding the definition of the land parcel, he notes that in developing countries the sheer size of demand for urban land is enormous and most of the need for land and housing is satisfied outside of the formal procedures. He quotes Payne (1988) who comments that only 10 to 20% of demand is met by the formal system in developing countries and Baross and van der Linden (1990) who show that the cheapest legal new housing was beyond the means of 50 - 70% of low income families in Korea, Egypt, Columbia, Sudan and the Philippines.

The conventional process of urban development, commonly described as Planning, Servicing, Building, Occupation (PSBO) sequence in developing countries is practically reversed (OBSP) by informal processes because the formal procedures are unable to meet the demand for land.

In such a scenario, the role of the public sector is not only to supply planned and surveyed land but to respond to this reversed sequence of development. He suggests this can be achieved through an iterative process. He notes the pre-occupation with identifying the land parcel in formal systems and indicates that this could happen later in the process after formalising the 'what' and the 'who' questions relating to tenure.

That formal title improves security of land tenure: He questions the conventional belief that a household with a formal title holds its land and house on more secure terms than the household that has no officially recognised proof of its land rights. He provides three observations from the formalisation of land rights in existing informal urban settlements.

⁴ Land Registration under Uncertainty. An Essay on the Need for official protection of Land Rights on the basis of incomplete information, January 1994.

- ✍ Legalisation exposes households to property taxes and makes it necessary for them to conform to planning and building regulations;
- ✍ Providing full legal title to informal settlements soon after they are developed would increase their attraction to higher income households and increase the prices to a level almost the same as that of a formal private sector plot, forcing the poor out of the market.
- ✍ Granting legal title will enable households to borrow against the equity for investment in small businesses. However, the increased value and the temptation it provides to raise capital may encourage the poor to sell their plot.

On this basis, he notes that in the context of low-income households in developing countries, formal land title is not necessarily attractive and the formalisation of land rights may initiate a process whereby the poor lose the only land rights they already have.

That formal title improves or even ensures security of credit: Formal title gives access to credit because it can be used as collateral for a mortgage. The lender therefore has a remedy to enforce the payment of monies due. The land registration and cadastral systems unambiguously identify land parcels which can act as security for a loan. Because of this, there is an underlying assumption that this will ensure repayment. He notes that for low-income households in developing countries, formal title does not necessarily establish such behaviour (similarly for payment of land taxes). He used the example from Botswana to indicate that defaults on service levies and building material loans were substantial, despite a contractual obligation to pay in return for secure title. Considerable government capacity was used to recover these payments.

He concludes by summing up some of the arguments on whether making land available as collateral (by formalising land rights) promotes investment and income. He quotes Dale who observes that the case for or against cannot be proved as some individuals lose out while others may improve income. On the other hand, de Soto argues strongly that property rights are a prerequisite for economic progress.

He then goes on to point out the implications for land administration and notes that security of credit for low income groups cannot be assumed to materialise from the orthodox legal remedies in mortgage relationships. Credit can be based on other aspects such as savings behaviour. If land is not required for collateral, then the procedures for formalisation could be relaxed. Equity is an issue. He indicates that this can be pursued through vehicles such as a Community Land Trust which holds land for a community and can step in to assist when there are defaults. This is a method which allows a larger parcel to be registered and the internal arrangements administered by the community, reducing the burden of information requirements for formalisation.

He concludes by stating that no automatic mechanism should be assumed between formal title and the usual objectives of security of tenure and credit, financing local government through land taxation and so on.

2.2.4 Role of Formal Titles

The basic tenet of de Soto's (2000) work is that the poor in developing countries, despite holding considerable assets, do not have a representational system, especially for property rights, that can turn these assets into capital.

Important in understanding how to unlock the capital in these assets is to understand the nature of property. In the West the formal property system describes and organises the most economically and socially useful aspect about assets by preserving this information in a recording system (register) and then embodying them in a title. Precise legal rules govern this process. Property is therefore a concept rather than a physical thing (not the house but the legal representation through the title), best examined by its effects. He describes 6 effects:

Fixing the economic potential of assets: Formal property representation is separate from the asset it represents. It can be used as collateral, an address to collect taxes, receiving services, etc. So while a house may provide shelter, the property representation system allows it to lead an 'parallel life' by carrying out a range of other functions, most important of which is producing value over and above its physical assets.

Integrating dispersed information into one system: This was a slow process even in the West, but most assets are integrated into one formal representational system. The formal property system lets people know what assets are available and what opportunities exist to create surplus value without needing to see the asset itself.

Making people accountable: Property creates individuals from masses. Formal property not only protected ownership but the security of transactions encourages citizens to obey the law.

Making assets fungible: The representational system makes property more 'fungible' or able to be fashioned to suit other transactions. It does this through property descriptions and standardising these. It allows assets to be split up and re-combined.

Networking people: Because assets are fungible, owners and assets identified and linked and ownership linked to enforcement, owners are in effect converted into a network of identifiable and accountable business agents. It has improved the flow of communication about assets.

Protecting transactions: Property records are continually tracked and protected over time and there is security in the transactions.

He therefore contends that the property system is fundamental to creating capital - it is the link between capital and modern money. Property records and transactions provide financial institutions with evidence they need to issue additional legal tenure.

An important point he makes is that this did not happen spontaneously in the West, rather it took centuries and was a result of struggles of those outside the diverse 'formal' systems that existed even then. The move to a unitary system is recent and evolved out of systems that early settlers fashioned for themselves, combined with aspects of conventional legal systems. He notes that a similar groundswell is present in the developing nations as the bulk of these urban populations live outside of the formal legal systems and are fashioning a range of extra-legal systems. He urges that we cannot afford to ignore this.

He believes that the poor in developing countries have no alternative but to live outside this property system as this system is complex, expensive, time consuming and does not take into account their social realities.

While governments have tried to address the issue of burgeoning informality, they have largely failed because they tend to operate under five basic misconceptions, according to de Soto. These are:

- ✍ People participate in extra-legal activities to avoid paying taxes;
- ✍ Real estate assets are not held legally because they have not been properly surveyed, mapped and recorded;
- ✍ Enacting mandatory law on property is sufficient;
- ✍ Existing social contracts in extra-legal arrangements can be ignored
- ✍ You can change the system without high level political leadership.

He dispels these misconceptions by noting that illegality also has costs such as bribes that often equate to the amount paid in taxes. Secondly, because property is not a physical thing, largely technicist approaches that concentrate on survey and mapping solutions have failed. Survey plans and maps only tell us of the physical state of the asset and nothing about who really owns the asset or how people have organised the rights that govern them (the social contract). So extra-legal systems persist and while they do, the occupiers will see not reason to notify authorities of any changes in the disposition of their assets. The once-established formal system can then lapse back into informality. Thirdly, the formal legal system needs to interact with the extra-legal arrangements that are rooted in people's beliefs and are more likely to be followed.

He has found that in most countries of the developing world, people have generated their own varieties of property rules and institutions, especially in the past 40 years. One of the most striking features is the desire to be incorporated into the formal sector. Governments need to find out what these extra-legal arrangements are and find ways to incorporate them into the legal system.

To sum up, a few extracts from the book relating to land and housing markets, are noted:

- ✍ The obstacles to legality are formidable for the poor:
 - to get legal authorisation to build a house on state-owned land in Peru took six years and 11 months, 207 administrative steps in 52 government offices.
 - To get legal title took 728 steps
- ✍ To become legal is difficult and to stay legal is just a difficult
- ✍ People acquire land in innovative ways, e.g. through co-operatives and subdivide illegally into smaller plots.
- ✍ Former legal properties, e.g. flats, retreat back to the informal systems
- ✍ Backlogs in registries, e.g. in Port-au-Prince, result in properties changing hand without anyone bothering to notify the registry office
- ✍ Formal systems are too costly and too complicated to engage with.

While he does not specifically address the secondary housing market, it is assumed that with legal tenure, property transfers will be easier and such a market will be promoted.

Alternative Views: A Critique of de Soto

Alan Gilbert⁵ (2002) questions de Soto's book by showing that legalisation does not provide the benefits for the poor as de Soto claims. Formal finance is not necessarily forthcoming after formalisation and more sales occur under informal title than when it is legalised.

In his rebuttal of de Soto, Gilbert asks some important questions. These are summarised below.

⁵Gilbert, Alan., On the mystery of capital and the myths of Hernando de Soto in IDPR, 24 (1) 2002

Is illegality a real problem in Latin America?

Land invasions are common and the key to understanding them is the attitude of government. Most governments only remove settlements that threaten the elite or are close to the city centre. Some governments even encourage illegal settlements. For the poor illegality is not really a problem as when they purchase a plot illegally they know they are owners as soon as they pay their deposit and continue to build their houses. For governments it is not a problem either as these settlements provide electoral support and it is cheaper to service to these settlements than to destroy them or develop alternative areas. Also, self-help housing such as this reinforces conservative values among the poor and does not undermine the idea of private ownership.

Is there a need for land titles?

Gilbert agrees with de Soto that the absence of legal title can inconvenience the poor. Certain categories of people feel insecure including those in newly formed settlements, and female-headed household, immigrants communities and minority groups in long-established neighbourhoods.

He also notes that the absence of legal title may complicate the buying and selling process and getting credit. His main point is that security of tenure does not require the issue of full legal title. Vulnerability can be due to other factors too. The main reason why large-scale titling programmes are popular is because they are cheap - cheaper than servicing. Organisations can also make money from these programmes, especially if the beneficiaries pay the full costs. He notes that there are other costs to beneficiaries which are often not made clear to the poor. These include property taxes and this can also affect renters as rents are increased to pay taxes. He notes other authors argue that the raised property values make the settlements vulnerable to downward-raiding. His main concern is not so much whether the poor suffer from the granting of title deeds but rather whether they actually benefit.

Is legal title necessary for housing improvements?

Gilbert questions whether legal title accelerates the process of housing improvements and quotes a number of authors who indicate that the perception of security is more important than actual legal title. He concludes that for a settlement not threatened by removal, illegality seems to have little effect on the willingness of the poor to build. In the pirate subdivisions in Bogota, settlers assume security and build immediately they have a receipt for their land. Once services are installed, self-help construction shows no barriers. He concedes that certain groups may require the assurance of legal title but notes that the causal relationship may in fact be the reverse of what we think it is. Housing investment may be what brings about the granting of legal titles. He also notes that even in settlements with legal tenure, other measures are often required to unleash investment in housing, such as services provision.

Does legal titling improve the functioning of the housing market?

Gilbert disagrees strongly with de Soto on this aspect. He observes that illegality rarely stops a market developing - it merely affects the prices in that market. For land, illegality simply reduces the price. While in the Western countries, properties are often considered an investment, Gilbert notes that this is not always the case and like any investment, may not give a return. He explains that you cannot realise the asset if you cannot sell it. This means that there has to be a market.

In a survey in Santiago, he found a very limited market and noted that this is not uncommon in poor settlements. It's the limits on the market that are important in self-help settlements. One of these is the availability of finance.

Does legal title improve access to formal finance?

Properties are bought and sold in poor settlements but this is mostly confined to shacks, land or modest homes. No one could afford to buy the two or three-storey homes.

Gilbert strongly argues that there is sufficient evidence to suggest that the possession of legal title makes little or no difference to the availability of formal finance. It is often the low income of the lenders that deters financial institutions from lending or it is the nature of their income as self-employed people or simply that they lack confidence that the loans will be repaid. Added to this is the low profitability of lending to the poor.

Despite the land titling programme in Lima, most (57%) who obtained formal title still relied on own resources to improve their homes and 18% got loans. The loans came from public institutions rather than private banks. He quotes Calderon who concludes that in Lima, there is no connection between the official registration of property and access to loans from private banks.

He explained that as most self-help settlers in Bogota have legal titles now, the impediment to obtaining a loan must be the nature of the property they are using as collateral. Like many banks, the savings and loans corporations in Bogota have strict rules about the buildings and the areas where they loan. So, despite the fact that the poor may be reliable at repaying loans, this does not matter if the lender doesn't lend. Micro-finance programmes have also had little impact on housing finance in poor areas.

Gilbert then asks whether the poor in fact want to borrow money with their house as collateral. He concludes that there is some reluctance as it could endanger a whole household's financial viability. Many fear the consequences of failing to repay the loan. They choose instead to improve their homes using individual or group savings,

sweat equity, small loans from neighbourhood moneylenders, all of which are uneven. He undertook a survey in illegal subdivisions and found that most purchased the land by paying deposit and paying the plot off in instalments, in effect securing a loan from the vendor. Family and friends provided the other most popular source of a loan.

Lastly Gilbert tackles the issue of legal titles and rental markets. While he provides evidence that the absence of legal title does hamper the rental market as landlords fear the tenant could make a claim on the property, he concludes that renting is still widespread in such settlements across most developing countries. Generally landlords do not issue contracts or are familiar with rental legislation and are unlikely to change their behaviour if they had legal titles. Even if they had formal title, it would be unlikely that they would get formal credit to expand their rental housing stock.

Gilbert concludes that most poor families are glad to receive titles and governments are happy to provide them. Having title deeds does not hold many dangers for the poor but he questions the advantages of legalisation that de Soto espouses. In Bogota's self-help settlements formal property titles have not resulted in healthy housing markets or the regular supply of formal credit. Given the poor location of many of these settlements, it is unlikely that the poor will make money from their properties.

Key Lesson from de Soto and Gilbert

Legal title to property is a desirable but not a necessary condition to improving the lives of the poor.

2.3 Lessons from International literature

- ✍ Procedures - too long, too many authorities, high cost, requirements onerous
- ✍ Poor areas are not attractive to formal financial institutions whether the owners have formal title or not
- ✍ Perceptions of security may be just as important as actual security of tenure
- ✍ The sense of security is derived as much from removing the threat of relocation and providing services as from granting legal title
- ✍ The legal process of gaining title in developing countries is cumbersome and inaccessible
- ✍ The poor still engage in housing markets, albeit informal transactions, despite not having registered titles
- ✍ The poor develop their own systems to exchange properties, often mirroring legal systems but including their own social conventions
- ✍ Formal tenure systems can return to informality
- ✍ Formal systems provide security for the most vulnerable groups such as women.

2.4 Lessons for secondary housing markets

- ✍ The demand for formal housing in formal property markets by the poor is restrained by their affordability, their lack of choices and shortages in supply of affordable land.
- ✍ Governments intervene in securing land for the poor through a range of mechanisms, but their attempts at supplying land are bedevilled by lack of a broad range of acquisition methods, high cost of land, high development costs, slow procedures for development and vested interests. Even if they acquire the land and form partnerships for development with the private sector, the regulatory systems raise costs and developers do not see this as a profitable market to service.
- ✍ The poor resort to exercising their demand through a range of informal markets, which has with it risks. These risks are minimised if authorities do not remove them or supply services.
- ✍ The informal markets, while their presence is widespread, are restricted to low-value properties.
- ✍ Formal title does not necessarily improve access to formal credit for the poor.
- ✍ High costs and procedural requirements for land registration are barriers to the poor even when they have received formal tenure and informal transfers present an attractive alternative. Hence, formal title in second generation transfers is not guaranteed by first generation formal title. Lapsing back into informality is common.

3. South African Review

A similar structure to that used for international land markets is applied here by providing a brief explanation of the components of land that affect markets in South Africa.

In summary, the land aspects of township markets led to the creation of townships as a 'sub-market' distinguished by race and ethnic group, location and inability to sell (up until the 1980' largely). These isolated and distorted township 'sub-markets' (along with other racial group areas) sat within a broader system of white-owned land which approximated more closely conventional western constructs of formal property markets (willing buyer, willing seller, universal freehold title, parameters). With the removal of group areas and the conferring of leasehold and freehold titles in townships, these markets have not taken on the characteristics of the white sub-markets.

The question is why. This section attempts to unpack some of the salient factors relating to land in South Africa and draw on some implications for the secondary housing markets in the townships.

3.1 *Land identification for Low-income housing*

The availability of land for housing affects land markets in that efficient land markets are characterised by a good supply of land. In South Africa, land for urban black townships has always been in short supply for a number of reason, mostly related to apartheid policies which only acknowledged the permanence of urban Africans in the mid - 1980's. Historically, planning instruments such as Guide Plans failed miserably in identifying sufficient land. Land that was identified was on the peripheries of the city, close to existing townships.

With the introduction of the housing subsidy scheme, the supply of land for low-income housing became inextricably linked to projects that obtained housing subsidies. Most of the land already identified in terms of the Black Communities Development Act (Section 33 land) and not developed became subsidy scheme projects. These were generally in locations adjacent to existing black townships. Other new land identified was also poorly bcated as the price of the land was included in the housing subsidy. Faced with ongoing criticism of badly located subsidy projects and responding to claims that the housing subsidy scheme did not comply with national procurement policy, the Department of Housing introduced a procurement policy for land⁶.

⁶ At the housing MINMEC of 29 May 2000, the NDoH was mandated to develop a new procurement procedure to include a formal tendering process.

This new policy was introduced in April 2002 and is aimed at increasing the role of municipalities in facilitating a more competitive way to identify land for new subsidy scheme projects.

In Gauteng, a 'Land Call' was made in 2001, encouraging private owners and municipalities to 'offer' their land for development. This did not achieve significant results but has formed the basis for more detailed land identification procedures by the Department. The Gauteng Department of Housing has developed an elaborate procedure for identifying land and has developed a GIS system to provide vital land availability information.⁷ Where land is government land, Land Availability Agreements are entered into with developers. The detailed GIS is accessible only for government departments and there is little, if any, in the way of formal land acquisition by private developers for low income housing subsidy schemes. Private developers identify land and enter into the full township establishment process for housing for higher income groups who can access formal bond finance in township areas. No details on the extent of the land acquisition or housing delivery quantum could be accessed without primary research into this.

With the introduction of Integrated Development Planning, municipalities are now required to approach the planning and development of their area in a more holistic way. As part of the IDP process, Spatial Development Frameworks (SDFs) are meant to be prepared. The IDP Manual⁸ does provide some guidelines for the spatial strategies that the Strategies Phase of the IDP (Phase 2), but much of this is overtaken by the Guidelines for SDFs. Ideally Spatial Guidelines in Phase 2 of the IDP should address:

- ✍ the provision for development of urban and rural land and existing and new settlements;
- ✍ the equitable access to land;
- ✍ tenure security (Pg. 51, Guide III).

The Regulations under the Municipal Systems Act (GN R796, August 2001), relating to SDFs, still only provide very broad guidelines. It requires a municipality to set out objectives that reflect the desired spatial form and develop strategies and policies to achieve these. These strategies and policies must:

- ✍ Indicate desired patterns of land use;
- ✍ Address the spatial reconstruction of the municipality;

⁷ Discussions with Andre van der Walt at the Gauteng Department of Housing. As part of the Municipal Housing Development Plans process, the land identified in the 2001 land call has been analysed and identified up to 2006. A Land Use Task Team was set up. Regional Professional Teams undertake feasibility studies on the land and then earmarked if suitable. Through this process land for housing is identified for future housing subsidy projects. The Dept has indicated that it has sufficient land identified.

⁸ IDP Guide Pack - Department of Provincial Planning and Local Government in association with GTZ.

- ✍ Provide strategic guidance in respect of the location and nature of development within the municipality [Clause 4(c)(i)-(iii)]

It also requires that plans be prepared that indicate where public and private land development and infrastructure investment should take place [Clause 4 (i)(i)].

It is therefore through this IDP process that municipalities should identify land for low-income housing. Municipalities should identify Priority Areas for new housing development.

However, few IDPs or SDFs have in fact done this and land identification and release for the poor continues to be driven by the government housing subsidy scheme in most cases. Many of these projects are still on the periphery of urban areas or within former township areas.

What this adds up to is that government, despite elaborate planning mechanisms to identify land for the poor, has always struggled to acquire land for low-income housing. Even since the introduction of IDPs, it is still individual housing subsidy scheme projects that drive the acquisition of land. This is driven by cost and inevitably delivers land at the periphery. If 'location, location, location', are the three main factors in determining property values in a formal land market, the emergence of secondary markets on the land that has been acquired for the poor through government efforts, will already be at a disadvantage.

3.2 Release and development of Land - Township Establishment Procedures

While the identification of land affects the land market, the release or conversion of that land into saleable plots is also key in determining land supply. Sufficient land may be identified but if the procedures that govern its release are cumbersome and time consuming, demand can outstrip supply, causing the poor to use their own informal methods to develop land.

The overall purpose of formal land development procedures is to undertake a stepped process to bring vacant, serviced, identifiable, registerable sites onto the property market for sale.

In order to do this, the formal development of land is a highly regulated process, mostly by municipalities and Provincial authorities, depending on the legislation used.

As mentioned, South Africa has a history of differentiated laws and procedures governing this activity. At the broadest level, government policy historically resulted in different laws applicable in black townships and in former white areas. While the reforms introduced after 1994 have resulted in a new unitary procedure being available through the DFA, it is not widely used for land development for low-income areas⁹.

Prior to 1991, the mainstream procedures for land development in the townships included:

- ✍ Regulation 1036 (Blacks (Urban Areas) Consolidation Act 25 of 1945): in most black urban townships;
- ✍ Black Communities Development Act (BCDA) of 1984: especially in areas designated as Development Areas, i.e. Section 33 areas;
- ✍ Proclamation R293 (Regulation for the Administration and Control of Townships in Bantu Areas): versions of which also still applicable in some former homeland areas;
- ✍ Section 6a of the Prevention of Illegal Squatters Act: for 'emergency camps'.

While these have all been repealed as procedures to develop land in African areas, the heritage of them in terms of the land tenure they delivered is still with us today.

With the 1991 Land Reforms, the Less Formal Township Establishment Act (LFTEA) was introduced and it has become the mainstream procedure even today, through which land for low income housing is brought onto the market. This is because it is used for housing subsidy scheme projects development. The procedures for this will be detailed in Annexure A.

With ongoing local government transformation following the introduction of the New Constitution, local government areas now include the former black townships and the Provincial Ordinances have application in the townships. However, there are few instances of township establishment procedures under the Ordinances being used for low-income housing development¹⁰. Even if they were used, many municipalities have long backlogs in processing these applications and LFTEA is therefore a more attractive option¹¹.

Hence the policy framework for land development for low income housing remains fragmented and governed by different legislation. The only new unitary procedure, nationally, through the post-apartheid DFA (which ironically was expressly promulgated to speed up the delivery of low income housing), is not being used for

⁹ This is true for Gauteng and additional research will need to be carried out to confirm this for the other Provinces.

¹⁰ This is true for Gauteng and additional research will need to be carried out to confirm this for the other Provinces.

¹¹ The main attraction, however, is the relatively closed process that is used and the streamlined 'in-house' decision-making that characterises this legislation.

this purpose. While LFTEA, an apartheid creation, has become the most commonly used procedure as it has easy application to the housing subsidy projects.

New Provincial planning legislation is on the cards for many Provinces and it will attempt to provide a unitary procedure for land development, applicable in all parts of a municipality. None have been promulgated yet, although the Gauteng Bill has been to the Legislature.

In sum, all these township development procedures require detailed applications to be made, incorporating many requirements that push up the costs (environmental assessments, traffic impact, geological reports, etc) and require additional professional inputs. Decision-making in municipalities (Ordinance applications) can take up to two years whereas the DFA and LFTEA is much shorter and cheaper (can take three months). Associated requirements include General Plans being prepared and approved as well as township registers being opened at the Deeds Office. This can take additional time.

Within the numerous housing subsidy scheme projects developed using LFTEA, the most important delay in finalising the development process and handing over secure title to beneficiaries has been the opening of township registers. In such circumstances, beneficiaries cannot obtain title deeds to their properties. Technically, this would be an impediment to the secondary market as beneficiaries would not be able to sell their properties until the property is registered in their name. However, other more significant legal obstacles, such as the condition of sale preventing an owner from selling a subsidy house for eight years after obtaining it, tend to push these transactions into the informal realm.

As mentioned at the beginning of this section, it was noted that the overall purpose of land development procedures is to undertake a stepped process to bring vacant, serviced, identifiable and registerable sites onto the property market for sale. Making the land registerable, comes right at the beginning of the process, usually before services and houses are provided. As indicated in the international literature, the development process is reversed in informal markets. It is therefore concluded by observers of this phenomenon that the constraints to formal, legal land development are what drives people to occupy the land first, build a shelter, then service it and lastly obtain title.

3.3 Land Use Regulation

Land use regulation affects land markets in that it imbues land with use rights, affecting the value of that land. Regulations also impact on the secondary market in that they set out rules for changing the use of the land and can be used to improve market value and promote active secondary markets.

In South Africa, land use zoning is commonly used and applied in White areas through Town Planning Schemes¹². In black townships, the regulatory framework is far more permissive and implementation is poor. There is also little recognition of the land use regulatory frameworks in black townships and most homeowners tend to carry out any range of activities without the required permission from local authorities.

Development Frameworks, Spatial Development Plans, Forward Plans, Precinct Plans, are all types of plans that municipalities use to direct the use of land. While these do not confer actual rights in the way that a town planning scheme does, they do influence where development may or may not occur and the nature of that development. They may then serve to either promote land markets or subdue them. Since the amalgamation of municipalities and the introduction of Integrated Development Planning, few municipalities have been able to prepare plans at a level of detail or instil commitment (desire to enforce) to these plans that is having much impact on land markets¹³.

Land Use Regulation Systems

Local government policy in this regard is in disarray¹⁴. Under apartheid, land development legislation applicable in the black townships also regulated land use. By way of generalisation, the characteristics of these land use regulations can be summed up:

- ✍ Highly control oriented
- ✍ Widely permissive allowing some economic activity on residential erven (restricted to 49%)
- ✍ Simplistic - not many definitions of land use categories
- ✍ Often regulated through title deed restrictions, increasing the cost to remove
- ✍ Limited procedures for changing land use
- ✍ Poorly administered and enforced
- ✍ Poor creation of awareness of the need for land use regulation

By comparison, in the former white suburbs, the Provincial Ordinances applied (and still apply) and land use rights are conferred through land use zoning governed via town planning schemes. Any change of land use not permitted in terms of a particular zone, requires an application to the municipality for a rezoning or consent use. Property owners generally uphold these 'rules' as a way of protecting the value of their properties. However, the land market (vacant land and secondary markets) is

¹² Town Planning Schemes are governed by Provincial Planning Ordinances and vary from municipality to municipality.

¹³ A good example of a municipality that is committed to planning frameworks is the City of Johannesburg which has an overarching IDP and Regional Spatial Development Frameworks (RSDFs) for each of its regions and now also has 4 approved Precinct Plans. No development that does not conform to the Precinct Plan may be undertaken, however, individuals and developers may still apply for rezonings and they will be judged on their merits and the Precinct Plans and RSDFs.

¹⁴ Referring to the ability of municipalities to apply a unitary system of land use regulation and enforcement across the municipal area.

constantly subject to changes in land use as developers see opportunities to change existing designated land use due to changing economic trends, speculation or individual need. Properties frequently change hands in association with rezonings as new developers see opportunities to enhance land values through rezoning. However, this type of land market is not widespread in the former black townships, especially not in the housing subsidy scheme areas¹⁵.

The consequences of this dualistic approach is that the former townships have widespread informal or extra-legal land uses throughout the residential areas, making the land use rights tenuous at most. The absence of enforcement of the limited regulations in these areas means that many activities such as panel-beating, taverns, spaza shops, service industries and retail, which would be outlawed in the suburban residential areas, have proliferated.

Municipalities are now beginning to tackle these issues but are having difficulty as the transition has impacted on capacity and rather than improving enforcement in the township areas, we are seeing a breakdown of enforcement in the suburban areas. As there has not been a strong history of implementation of land use regulations in the former township areas, the task is more difficult as a tradition has not been established¹⁶.

Enforcing land use regulations as well as regularising informal housing areas are intended to bring township areas into the ambit of formal legal systems. It has implications for future land use changes as the cost of rezonings can be considerable, not to mention the numerous associated requirements, often resulting in the need to employ professionals to present the rezoning application to the municipality. If the cost is too high for township areas, residents will simply ignore the regulations and take the risk of being caught. No studies have been carried out in townships on the effect of minimal land use regulation and its effect on property markets that I know of, making it difficult to determine what effect this has (or could have) on property values and hence township housing markets.

3.4 Land title and registration

As with land development, the laws and procedures governing the acquisition of title to land had been dualistic in South Africa.

The mainstream process in the former white suburbs is the granting of freehold through the land being registered in a township register and the individual title being

¹⁵ This is a generalisation and an assertion, not backed up by empirical data but based on observation.

¹⁶ Additionally, 'cracking down' on informal attempts to generate jobs and income by marginalised groups is seen as unsympathetic to state goals of poverty alleviation and promoting small businesses.

conferred through a deeds registration procedure in the Deeds Registry Office, after a General Plan has been approved. Sectional title options are also available for medium and high-density housing.

Before township registers can be opened, a General Plan must be prepared, based on a detailed survey plan of the township and be approved by the Surveyor General. This involves numerous steps and costs. It is a procedure required for all mainstream township establishment laws (LEFTEA, DFA, and Ordinance).

In the former townships a range of tenure options, all falling short of freehold were available prior to 1986 and still in evidence today. While black urbanisation was not recognised up to that time, the main forms of tenure available in the townships were:

- ✍ 99-year Leasehold;
- ✍ Deed of Grant
- ✍ Permission to Occupy in peri-urban areas

These forms of tenure only partially met the requirements of the Land Survey Act and Deeds Registry Act and were therefore considered 'inferior' forms of title.

What this means for land markets is firstly, that forms such as PTOs were never allowed to be sold, stifling the creation of any land markets. Permission had to be obtained from the authorities before the property could be sold under deed of grant. Leasehold (the 99 year version) most closely approximated freehold, but often township registers were not opened in these areas.

With introduction of full freehold tenure, the provisions of the Land Survey Act and Deeds Registry Act became applicable, placing tenure rights of whites and blacks on an equal footing. However, many townships did not have township registers and these needed to be completed. In many instances this required compliance with the Land Survey Act and many townships were surveyed, registers opened and the stage set for transferring freehold tenure. These programmes were all funded by government in an attempt to provide secure tenure in the former townships.

Land registration is an important aspect as it is the recordal of information on land to facilitate the transfer of property rights between parties (i.e. the conveyancing system). It also provides information, e.g. a cadastre or mapping system (Farvacque and McAuslan (1992 p55).

While registers of some form or another were kept for administrative purposes for these lesser forms of title, many of the records were lost or destroyed in the 1980's. Additionally, many of the records are outdated as authorities did not keep up with registering deaths and subsequent inheritance of the land parcels, not to mention the

extensive informal transfers which took place. Hence, even if 'owners' did want to engage in formal procedures to sell their properties, the system could not support them.

Title Deeds

South Africa provides for a system of registration of title to land rather than a deed. These requirements are quite stringent. A short summary of the requirements is provided below¹⁷.

Documentation requirements:

- ✍ personal documents such as identification document, marriage certificate, birth certificate;
- ✍ power of attorney from the purchaser;
- ✍ Leasehold Annexure C is also required if going leasehold route.

There are frequently problems in getting these documents quickly in township areas. The need for both spouses to sign can cause delays here, too.

Bond Registration requirements:

- ✍ Can be different for different banks;
- ✍ Bond approval can be delayed, holding up the process;

Title Deed Registration:

This is the process whereby the conveyancing attorney prepares and lodges the necessary documents at the Deeds Office for approval and registration. A typical property transfer involves 11 parties and up to 51 steps¹⁸. There are many delays in this process, including:

- ✍ Strict requirements of the Deeds Office for accuracy and format - can result in documents being sent back to be re-done.
- ✍ Where bonds are to be registered, banking institutions want to check deeds and this can add time;
- ✍ Getting spouses to sign: difficult to get both at same time. Also, usually need to physically go to the conveyancer's office.
- ✍ General co-ordination of information and parties is also difficult and can cause delays.

¹⁷ Much of this is summarised from an investigation carried out by the Urban Foundation in the early 1990's but the requirements still hold true.

¹⁸ This was noted in Transforming the Industry for the 21st Century, business Futures Group, 1994 and in a more dated paper by Treismann (1991) but the process has not fundamentally changed since then (improved through electronic technologies for example).

Many of these constraints are especially difficult for township owners, especially first time owners. Particularly important is the cost of conveyancers. Conveyancers often do not enter this market because of the high educational requirements (takes time to explain the first-time owners) and the low returns.

3.5 Extending Ownership in the Townships - Transfer of Houses Programme

This case study is mentioned as it is extending freehold ownership to tenants of former black townships housing stock and should therefore create conditions for a secondary market in these properties.

The properties involved are the old 'matchbox' 51/9 houses, row and semi-detached houses that were being rented or had rights under the Conversion Act. The Discount Benefit Scheme is used, allowing a discount of R7 500 off the purchase price. Other properties (tricameral) were later included in the scheme, including those developed under LFTEA which did not have township registers and so freehold title was not possible.

In their Overview of Achievements 1994 - 2003, the National Department of Housing provided the following information on the number of properties transferred under the Discount Benefit Scheme:

PROVINCE	NUMBER OF PROPERTIES TRANSFERRED
Eastern Cape	118 512
Free State	34 258
Gauteng	140 931*
KwaZulu Natal	2 956
Mpumalanga	24 030
Northern Cape	9 776
Limpopo	1 594
North West	12 251
Western Cape	57 831
TOTAL	402 139

*As LFTEA townships are being tackled now this figure is already significantly higher at around 250 000 (July 2003) and the total number of properties under this scheme in the Province is around 333 000.

To implement the Programme, two important initiatives were necessary - setting up Housing Bureaux in the townships and developing a streamlined procedure to determine and transfer the rights.

Streamlined Procedures

Interesting for the secondary housing market in the townships, is the streamlined procedures developed. Through this process, tenants were invited to submit claims (widely advertised in the townships) which were then checked against council records (often out of date) and then the claims were advertised. Where necessary, adjudication ensued to determine the rightful owner. Following this, the registration process began. Consulting firms were used for this as it is a mass - based programme. All the necessary documentation required to lodge title deeds in the Deeds Office were prepared and managed by the consultants. Draft deeds are advertised for checking and corrected, if necessary. In other words all the documentation requirements are managed and undertaken without conveyancers, until lodging at the Deeds Office. Deeds are pre-printed and signed. Once lodged and finalised, they are returned to the municipality to hand over to the new owners. By using the LFTEA development procedures, a conveyancer is not required to sign (authorised officer such as a municipal manager can sign) the title deed.

This procedure is much faster than the conventional process and it also removes the beneficiary from all the obstacles of conveyancing. The state pays all the costs of registration.

The question is whether such a system can be adapted for second generation transfers. Owners under this scheme have to engage in the formal procedures for second generation sales and face the costs and obstacles associated with transfer.

3.6 To sum up land tenure and registration in the townships:

Essentially, the implications for land markets is that technically properties with inferior forms of title could not be bought and sold freely in the formal system as the forms of title (government policy) relegated them to the extra-legal system for transfers. This coupled with a history of forced removals, insecure property rights, shortages of land and lack of housing options has meant that 'owners' retain the property they have been 'given'. Alternatively, those in the formal market, often return to informal, extra-legal mechanisms when it comes to selling or improving their properties as the cost, procedures and informational requirements of remaining legal are too inaccessible.

4. Formal Secondary Markets in the Townships – Anecdotal Stories

Most of the information outlined so far provides technical information on land markets. A few anecdotal stories of secondary markets in the townships are included below to provide a more human side to the market.

In a study by Gear (1999), a resident in a conventional township suburb on the outskirts of Soweto referred to her neighbour's plight. She told of how her neighbour had left her house, despite trying to sell it for two years. This indicates that the secondary market is virtually non-existent. A housing contractor who also operates as an estate agent in the area confirmed that there are few who can afford to buy into the development. He mentioned that many are selling to try to get out of the financial trap of repaying a bond (PG 40, 41).

In a useful study by the HFRP (2003) beneficiaries were interviewed to obtain views on the housing subsidy schemes. While questions on secondary markets were not an explicit part of the survey, there were some interesting findings and comments from respondents. Firstly, the research did not find widespread evidence of houses being sold (pg. 21), however, nearly half of the focus groups mentioned that they were aware of some people in the area having sold their homes. Some comments from respondents included:

"People sell for between R5 000.00 and R10 000.00"

"People buy the houses for R15 000.00, pay rent of R2 000.00 and pay R100.00 rent per month for a single room."

An interesting aspect of the survey was to get responses to whether people should be allowed to sell their houses. The reactions were mixed.

Some condemned the idea vehemently as the house was a gift from the government. Some felt that if you wanted to leave you should hand the house back so it can go to someone who needs it. Others felt that you should not make a profit with government money.

Opposing views included that people have a right to sell as it is now their property, with title deeds. They should be able to do what any other owner is allowed to do.

The former views are instructive to secondary markets, especially when coupled with comments from respondents about their sense of permanence. Views included:

"I will definitely die here. This house is for my grandchildren to inherit"

"It is my place and I will live here all my life"

Even when not entirely satisfied with the development, comments included:

"I will not go away. I have wanted a house for so long. My children will have to traditionally honour this. They know it's got attachment of pride and belonging".

"Most of the housing projects have the same problems, so it will not help to move. We must tackle the problems and ask government to subsidise us to improve these houses and the area...."

These anecdotal inserts raise the issue of social (attitudinal) factors affecting demand in secondary housing markets in the townships. A range of land supply conditions may be addressed through government policies, but will there be 'willing buyers and willing sellers' to fuel the secondary markets?

5. Informal Land Markets in South Africa

Informal developments can take on a number of forms, but the over-riding characteristic is that they are outside of the legal system. In some instances a whole settlement may have been illegally established and so all land development and housing aspects are outside the law, in others the settlement may have begun legally but planning regulations, building construction and transfers occur informally. There are variations in between as governments introduce programmes to upgrade or regularise informal settlements.

The reason for looking at informal land markets that they:

- ✍ Are indicative of the demand for land and housing by low-income earners;
- ✍ Are instructive in learning about tenure arrangements and perceptions
- ✍ Often develop their own land transfer mechanisms

The case study below is from KwaZulu Natal and it illustrates most of the points above.

5.1 Folweni - eThekweni Municipality

Land Tenure in Folweni

In his survey of 360 households in Folweni, Magni (2001) found that residents held great store in having a 'piece of paper' indicating a right to the land. In this particular area, PTOs¹⁹ were the only form of tenure possible and is a lesser form of title than freehold. The survey showed that two thirds had their PTOs, others had a receipt, a sales agreement, a letter from the Councillor, valuation certificates or certificate of occupation. All these are not formally recognised in law except for the PTO which can be upgraded to full tenure (using the Upgrading of Land Tenure Rights Act - ULTRA).

Most wanted to have freehold tenure if given a choice. However, they were not entirely sure of what freehold tenure means compared to other forms or how it actually works. The respondents displayed instead, some application of more customary concepts of tenure rather than the western concept of freehold which brings an obligation to register the land, especially if it changes hands. In other words, there is little concept of tenure as an ongoing process (in Zulu custom you are allocated the land and have the freedom to do with it what you like within the confines of traditional law)

¹⁹ Permission to Occupy permits.

These points are important in terms of a secondary market as it influences how land is exchanged as well as responses to formalising tenure in the form of conventional freehold tenure.

Is there a land market in Folweni?

Some respondents in the survey indicated that they had purchased their property. While the incidence is low, it is an indication that a land market is evident. Residents acquired their property in a number of ways. Some obtained it from the Nkhosi, but this method is in decline as the influence of traditional leaders diminishes and the role of Councillors increases. Many indicated they had bought land through a Councillor and a local 'estate agent' who also happened to be a Councillor. Information on the market is largely through 'word of mouth', often by telling the Councillor they wanted to sell. Purchase prices varied across the township, but also because the time period spans 20 years. People expected to get quite high prices for their properties when asked what price they would sell their house for. By comparing the actual purchase prices with expected selling prices, it was clear that their expectations outstripped what they would likely get as a selling price. Magni notes that similar findings were evident in another study by Clarke in 1996 where respondents overestimated housing/land prices in informal markets.

This quote from Magni, sums up the land market in Folweni

"Rather, the informal housing and land markets in Folweni are a complex and heterogeneous web of transactions dependent upon both traditional and common law interpretations on land holding, a deep-seated fear of removals, family and friendship networks and injections of formal housing, which have collectively influenced the exchange of land and housing on the ground." (pg. 106)

Lessons from informal markets in Folweni

There are many lessons to be learnt that have an impact on fostering secondary housing markets. These include:

- ✍ That security of tenure is important to people.
- ✍ This security may take a number of forms, not necessarily freehold title.
- ✍ Knowledge of the formal freehold deeds registration process is limited.
- ✍ Concepts of tenure include concepts of traditional systems.
- ✍ That so-called informal tenure systems do have secondary markets operating.
- ✍ Original forms of tenure given can restrict the secondary market (PTOs do not allow for sales of property), but people find ways other informal ways around this.
- ✍ Informal markets also display other forms of illegality such as disregard for town planning regulations, building regulations, etc, further entrenching informality.
- ✍ Exchanges of property occur through community networks and is therefore quite restrictive.

- ✍ The provision of services is very important to residents in informal areas (often a higher priority than freehold tenure itself) and many believe they could get banks to value their properties if only formal services were available.

Informal processes tend to mirror formal systems in their objectives, but through locally developed processes and institutions.

- ✍ Information exchange and improving education is important in promoting a secondary market.
- ✍ The secondary market activity has increased since incorporation of the area into the metropolitan municipal area (reduction in influence of customary leaders).
- ✍ Affordability is an issue for secondary markets as poverty prevents many from being able to offer market-related prices of land and housing, effectively shrinking the market.
- ✍ There is an understanding that with freehold title they can use the property as collateral, but knowing this does not lead to mortgages.
- ✍ Informal areas, even when formalising, are generally not attractive to formal financial institutions.

The study therefore does support many of the assertions of de Soto, especially in developing systems to formalise tenure based on local knowledge and practice. However, Magni (2001) notes that not all de Soto's ideas are suitable for South Africa. One important matter to address is that of finance and the poor. Formal freehold title is not the only precondition banks have for lending to the poor in township areas. This fact is re-iterated by other sceptics of de Soto (see Gilbert, 2002).

5.2 Other Examples of Informal Land Markets - KwaZulu Natal

In a report by Cross (1993) which is now 10 years old, some interesting points about informal land markets still have application.

Firstly, it notes that land and housing sales do occur in informal settlements (at that time at prices ranging from R300 - R1 000 or more). Usually this is done without formal documents, but witnesses such as neighbours or community committees do attest to the sale. When people leave an area they are also most likely to sell, subject to the approval of the buyer by the area's leadership. Movement is quite common and the informal settlements in KZN had few locally born adult residents. People came from outside the settlement and either built or bought a structure, most building the house themselves.

In more established settlements, the process of entrance into the area is interesting. Outsiders wishing to enter are interviewed by committees. Couples with children are preferred over singles, and women, especially single mothers find themselves disadvantaged, as they are treated as an 'incomplete' household. Singles are regarded as unstable and hard to control.

Regarding the links to formal tenure systems, the informal markets often reflect the African land ethic in urban practice. Informal tenure types that have evolved in these settlements are systems of relative social rights rather than systems of property rights.

This quote from Cross sums it up

..."urban informal tenures tend to float on the land surface, with little or no legal or institutional connection to the ground. They have adapted to mobility and to a considerable extent, represent portable land rights. At the same time, the seeds of permanence are still contained in existing urban tenures, and informal residents clearly want greater objective security together with at least their present scope to transact their own properties with minimal formalities. Both users and planners share the goal of well-ordered stable communities on the ground."

With respect to formalisation and the granting of conventional freehold title, Cross makes the following observations:

"South African informal residents clearly want documented security and are willing to accept property ownership documents if they are offered. However, the chances that property ownership, once introduced at great expense, will be followed by observance of the necessary transfer procedures appear very doubtful. The usual outcome is a greater degree of self-perceived owner sovereignty, but also the re-establishment of informal undocumented transfer. Without an effective, regularly updated property register, freehold ownership falls apart and becomes a dead letter." (pg. 22)

This latter aspect is important and one of the reasons why the Folweni area research was extended and methods of introducing local registries explored.

5.3 Need for land registers

The ability to foster or sustain secondary markets in townships or formalised informal settlements will ride quite heavily on the ability to engage in a formal property transfer process. Based on Cross (1993) and other experiences such as the Transfer of Houses Programmes across the country, there is scepticism whether this can be

achieved. For this reason it is useful to look at more recent initiatives in Folweni to establish local land registers.

In a workshop paper prepared by Rutsch and von Riesen, et al (2003), the main points regarding land registration are as follows:

- ✍ There is an informal land market in Folweni and it is governed by a set of rules or social norms which residents in the community are familiar with;
- ✍ Sales are advertised by word of mouth, the local Councillor, mention at social gatherings or advertising in the newspaper.
- ✍ A witness validates the sale. This person can be the Councillor, the Izinduna, the police, an attorney, community leader or person agreed to by parties. An attorney can confirm the value of the property and witness the transaction, suggesting an interface with formal systems.
- ✍ The 'title deed' is only given once the financial transactions are complete.

In relation to registers, the community was unanimous in support of a local office, but that it should be 'independent'. Residents also indicated the kind of information that should be included on a form at the registry office. No reference to a map was included, but there was reference to the size of the property, its location in the town and its attributes (e.g. flat or steep).

The report suggests that the current extra-legal land market is not hostile to the formal land market and tenure regimes and is functional. However, it operates on the 'default paradigm'. That is, residents' own tried and tested methods of transfer. It notes that as emerging land owners enter the land market they are testing the waters, so to speak. Where the water does not respond to their needs, they revert to the default paradigm. This indicates that the formal system is complicated and not clearly understood, is unaffordable and is remote. They revert to the 'comfort zone' of their familiar practices to provide security and give credibility and certainty to the transactions and the rights (pg. 20).

5.4 Anecdotal reports of informal sales in townships

The Rutsch and von Riesen report also included some anecdotal accounts, a significant one being that even in new low-income townships where land is held under Deed of Grant or even freehold title, sites are 'sold' and 'resold' without registration of transfer in the deeds registry. Land is also subdivided and reallocated or 'sold' without survey. (pg. 11).

6. Lessons for South African Secondary Markets in Townships

The townships property markets in South Africa have been distorted by the land regimes applicable in these areas since colonial days and exacerbated by apartheid legislation. Distortions include:

- ✍ Land only being available for certain race groups in specific locations;
- ✍ Gross land shortages for urban Africans;
- ✍ Poor location of townships on land where property values are lowest, generally
- ✍ Housing provided through state-driven initiatives;
- ✍ Design of housing areas that were driven by the imperative of control (security and poor road integration and access) and cost-savings resulting in monotonous housing environments and similar houses;
- ✍ Inferior and un-enforced land regulations where negative development externalities are often borne by neighbours
- ✍ Inferior forms of tenure which, initially, did not include freehold, effectively preventing buying and selling of land
- ✍ Lack of formal finance through mortgage bonds being widely available - due to the area as well as the perceptions of the borrower being high risks
- ✍ No widespread government programmes to educate township owners on freehold title, despite policies and political statements about promoting housing assets and ownership.
- ✍ Reliance on practices and laws applicable in the suburban white property markets (costly, high professional input, foreign to township residents) for property transfers in townships.
- ✍ Social attitudes to land ownership, compounded by a very recent memory of forced removals and land dispossession may not encourage 'willing buyer, willing seller' dynamics.

In the face of all these distortions, secondary markets are emerging, and have always operated in informal areas. These settlements represent a closer approximation of 'true' demand for land and display creative ways of trading in land and housing. As de Soto reminds us, we need to learn from these methods and look for ways to create the 'bridge' between these informal and formal systems so the poor can gain a foothold into the formal property market.

Lessons relating to informal land transfers are being learnt all around us but no changes to the formal systems appear forthcoming for application in informal or township areas that may give impetus to the secondary markets. This may be the difference between a sustainable secondary market or a retreat back to informal systems in the already formalised township areas.

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