

## Urban LandMark Position Paper 4

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# Regulatory systems and making urban land markets work for the poor in South Africa

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## 1 BACKGROUND ISSUES

Urban land in South Africa is highly regulated; however the regulatory reach of South African law over urban land is disjointed and partial. The highest degree of formal regulation (although not necessarily of regulatory compliance) is found in the areas of high land values – predominantly the former white race zones – and it dissipates gradually as the land values drop, with effectively no formal regulation in the former African townships and informal settlements. It is beyond the scope of this paper to explain the causal relationships behind this scenario but we will try to set out the main issues relating to urban land regulation in South Africa, with a particular emphasis on identification of issues and themes that warrant further research and study. Since 1994 very little has been done to review, revise or reform the regulatory frameworks governing urban land in South Africa. To all intents and purposes the regulatory framework inherited from the apartheid regime remains in place. As government attention starts now to focus on the potential role of urban land in poverty alleviation and economic growth it is critical that the regulatory framework is not ignored. Laws of this sort – governing access to, the rights to develop and transact and the powers to tax urban land – are neither ideologically nor economically neutral. They shape the social, financial and political values of urban land and they influence directly the extent to which households, rich and poor, are able to realize the financial value held in their largest single investment, their homes.

Land has important influences on urban poverty. Currently, tenure insecurity is seen as one of the most important problems facing the urban poor, globally. The need to

remedy this has become a widely accepted requirement for alleviating the vulnerability of the urban poor. In addition, the international movement for the 'right to the city' adopts a rights-based approach towards the spaces occupied by the urban poor. However, a third, and less examined aspect is the possible role urban land markets can play in poverty alleviation. The problem, as largely seen, is that formal urban land markets do not sufficiently support the acquisition of well-located, affordable and adequately serviced land by and for the poor. The purpose of this research will be to examine the role of regulatory frameworks in the management of urban land in South Africa.

Since the focus of this paper will be on the influences of regulatory frameworks on access to land among the urban poor, it will be necessary to determine their influences on key issues such as cost of acquisition. Often, the interaction of various regulatory systems, including the length of the often-complex procedures they create, means that they have a significant influence on the initial acquisition cost of land. However, these influences extend beyond acquisition, to costs incidental to ownership of the land, for instance maintenance and the payment of municipal land-based taxes. Further, regulatory systems may create other hurdles that negatively affect the ability of the urban poor to acquire land. Often, laws become potent instruments in the hands of better off neighbouring communities, determined to resist the integration of their communities with the poor. Government systems meant to assist the poor to acquire well located urban land may not work properly; regulatory systems create fragmented and uncoordinated consent mechanisms, which pose serious challenges to under-resourced and under-capacitated municipalities, provincial departments and other institutions that drive these programs. Positive results are often obtained only after

determined pursuit over very long periods of time, often with the use of external consultants. In addition, institutions involved in the process of providing land at local, provincial and national government level administer disparate and uncoordinated aspects of the procedures. This makes going through the process a daunting task, which has a negative impact on the poor.

There is another dimension to the influences of urban regulatory systems. Regulatory systems control the rights exercised over the land, for instance, how it is used and transferred. The ideological underpinnings that shape these systems are based on certain preconceived notions of an ordered city. This order determines the allowable land uses and often, these may not be compatible with land uses commonly associated with the poor. In this regard, it is important to question whether the traditional benefits that accrue to those involved in the formal land markets do so similarly for the poor. Acquiring urban land is deemed investment in an asset, which can be realised by sale of the land, or its use as collateral. Regulatory systems are intended to protect and enhance this investment, for instance zonings and other regulations that prevent uses of land that negatively affect property values. However, this rationale for asset acquisition may not be the most significant reason for the urban poor to acquire land. Instead the land is more important as a place that provides access to employment, income generation through home based industries and rental income or for purposes of building social networks. These uses of urban land pose important questions on the reasons for entry and involvement in the urban land market among the poor, and consequently whether the underlying regulatory systems are relevant and appropriate.

Parallel and informal land markets often provide the most realistic avenue for entry into the urban land market for the poor. They are cheap, quick and familiar. Often, transfer of rights is done through agreements moderated by social ties, deemed as equally binding and legitimate as formal procedures. These informal systems also provide an important method for the poor to gradually, over time, upgrade their rights to the land, as well as develop the land and any asset on it. The fact that there exists a parallel and unrecognised system that works for a certain segment of the society points at the inherent disadvantages created by the formal and regulated procedures. The role of formal regulatory frameworks in driving this system ‘underground’ need to be better understood. Further, proposals for bringing this system within the fold of recognised procedures without it losing its inherent advantages need to be explored. In any consideration of this formal-informal divide it is important to remember that there are obviously elements of each in the other, within the informal there are aspects of formality and within the formal there are numerous examples of informal practices. It is also important to avoid romanticising either option but rather to focus on understanding them both and exploring ways in which a more efficient, more just and more inclusive system can be attained.

## **2 DEVELOPING POSITIONS**

This position paper will identify 5 thematic issues relating to different aspects of the regulatory framework for land management. These are:

1. the acquisition of urban land;
2. the secure tenure of urban land;
3. the use and development of urban land;
4. urban land transactions; and

## 5. the taxing of urban land.

Each of these themes will be described in relation to:

- the current legal and policy framework applicable;
- any proposed or imminent changes; and
- suggested areas and issues for LandMark engagement.

In each of these thematic areas, positions will be developed with regard to their influences on urban land markets and the poor. In addition, tentative positions needing further research and inquiry are highlighted. Whatever the case, LandMark may either wish to adopt or further engage with these posed positions.

## ***2.1 THE ACQUISITION OF URBAN LAND***

### ***2.1.1 Current legal and policy framework***

At present urban land can generally be legally acquired in one of a number of ways:

- It can be purchased on the open market from a willing seller, thereby giving the purchaser the full rights of ownership to that land. This can be by way of freehold ownership in which the purchaser owns both the underlying land and any improvements or structures fixed to that land. Or it can be by way of Sectional Title ownership, in which the owner owns only one part of either the land or a building on the land as well as an undivided share in the underlying property by way of membership of a Body Corporate.
- It can be rented from a person who owns land, whether they own it by way of freehold or Sectional Title.

- The land can be allocated to a beneficiary of the subsidy-driven public housing scheme in which case the beneficiary receives freehold ownership over that land, although there are signs that as the national housing programme pursues higher residential densities this may become possible in a Sectional Title context.
- In extremely limited circumstances land can be acquired by prescription, where the lawful owner is not aware that his or her land is being occupied in a public and open way by someone for more than thirty years, after which the ownership of the land vests in the occupant. This is however highly exceptional.

The law governing these modes of acquisition is a combination of

1. common law, ie Roman Dutch law passed on and adapted by judicial precedent over time, in the case of freehold ownership and rental; and
2. statute law, ie laws passed by the parliament of South Africa, in the case of Sectional Title and ownership via the subsidy-driven public housing process.

In the case of freehold ownership and rental of urban land there are also a range of statutes governing the legal relationships of the various parties involved. For instance the relationship between landlord and tenant is regulated by statute in certain provinces such as Gauteng and the process of registering and mapping ownership rights over all land in the country by the Registrar of Deeds and the Surveyor-General is also highly regulated by statute.



African Customary Law, which governs the acquisition of land in areas under the administration of traditional leadership, is generally not applicable in relation to urban land, although it does apply in certain exceptional cases, particularly on the outskirts of cities such as Durban, Pretoria and Nelspruit<sup>1</sup>. The extent to which variations of African Customary Law are adapted and applied in urban informal settlements is the subject of another position paper.

### ***2.1.2 Proposed or imminent changes***

There are no major changes to the legal and policy frameworks governing the acquisition of urban land, other than a proposal that the acquisition by foreigners be restricted. This arose from the recommendations of an Expert Panel appointed by the Minister of Land Affairs to investigate the issue of foreign land-ownership<sup>2</sup>. While the rationale for this investigation is likely to have arisen from concerns over the effect of foreign ownership of rural land and the implications this has for acquiring land for land reform it certainly did not exclude urban land from the investigation. Although the panel recommended a moratorium on the transfer of land to foreigners in a progress report dated February 2006, this recommendation was not taken up by the Minister of Land Affairs and the Minister requested the panel to do considerably more work on their report. The panel's final report is expected to be submitted to the Minister in April 2007.

Another aspect of land acquisition policy which is somewhat fluid is that of state-subsidised housing for the poor. Currently the acquisition of land (and usually a

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<sup>1</sup> These cities fall within the municipal boundaries eThekweni, Tshwane and Mbombela municipalities respectively.

<sup>2</sup> The panel was chaired by Professor Shadrack Ghutto of UNISA.

structure as well) in terms of the state housing programme is restricted in the sense that it cannot be sold within a stipulated time period. While the motivation behind this is clear – to curtail downward-raiding and to protect the beneficiaries of the programme from short-sighted decisions made because of immediate financial hardship – it is also inherently paternalistic and delays the emergence of a well-functioning urban land market in those areas. The prescribed period is now five years, having previously been eight, and it is unclear whether this time period will change or indeed whether the requirement will fall away.

### ***2.1.3 Areas for Urban LandMark engagement***

Currently there do not appear to be areas warranting Urban LandMark's engagement in relation to the regulatory framework governing the acquisition of land.

One area perhaps to consider for longer term engagement is that of the prescriptive acquisition of land in South Africa (where the ownership of land can be acquired through long-term occupation of that land in certain circumstances). In Brazil and other countries there have been significant changes to the rules governing prescription to make it easier for a person to acquire ownership in this way, especially in the context of informal settlement regularization programmes. Practically speaking, it is unlikely that such a change could be effected in South Africa during the existence of the Urban LandMark programme; however, the manner in which the programme profiles urban land as a resource for poverty alleviation could assist in building the argument towards such an outcome in the future.

## **2.2 THE SECURE TENURE OF URBAN LAND**

### **2.2.1 Current legal and policy framework**

On the whole, the security of tenure of urban landowners in South Africa is strong. Only where a landowner is in default to a creditor, and then only once stringent procedures have been followed, can a person be dispossessed of their property. Where tenure security becomes an issue in South African towns and cities is in relation to people who are either renting accommodation – and there is a wide range of possible rental-type arrangements – or are occupying land that is not theirs without the owner’s permission, as is the case in many informal settlements.

The security of tenure of urban landowners is guaranteed through formal systems of registration, governed by the Deeds Registries Act, 47 of 1937. If a piece of land is registered, in terms of the Act, in the name of Mrs X, she is the owner of that land under South African law, regardless of whether or not, for example, she paid the purchase price or even if she obtained the land fraudulently. Should a third party wish to challenge her ownership of the land this can be done, but until that challenge succeeds in the courts she remains the owner.

To address the repressive history of land ownership in South Africa, a number of laws were enacted to ensure the security of tenure of persons whose tenure was not formally registered and guaranteed. These include illegal occupiers, holders of traditional rights to land and labour tenants. These laws were enacted in two main

sets, the first being in the dying days of the apartheid regime, in 1991<sup>3</sup>, and the others during the first years of democracy from 1994 to 1998<sup>4</sup>. Many of these laws were drafted with rural land reform needs uppermost in the minds of their authors, but a number of them had, and continue to have, important implications for urban land. These are discussed more fully below.

#### *2.2.1.1 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)*

PIE provides rigorous controls and benchmarks for evictions, and aims at promoting greater security of tenure to occupiers of urban and rural land who may not be the lawful owners of that land. The procedural and substantive rigors of PIE require evictions to be carried out only through a court order and that must be 'just and equitable' and consider 'all relevant circumstances'. The Act especially focuses on the rights of the elderly, children, disabled persons and households headed by women. It is perhaps the most effective instrument to protect the occupiers of land from arbitrary eviction. It is however obviously not a blanket prohibition against such evictions; it merely requires that a number of steps have to be followed before an eviction can be lawful.

#### *2.2.1.2 The Interim Protection of Informal Land Rights Act (IPILRA)*

IPILRA, was enacted to provide for the temporary protection of people holding 'informal' land rights, broadly being those created by customary or indigenous law. These rights are available in an urban setting, where the land falls under the jurisdiction of customary law. In order for the protection of the act to apply the

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<sup>3</sup> These included the Upgrading of Land Tenure Rights Act, 112 of 1991 and the Less Formal Township Establishment Act, 113 of 1991.

<sup>4</sup> These included the Restitution of Land Rights Act, 22 of 1994; the Land Reform (Labour Tenants) Act, 3 of 1996; the Communal Property Association Act, 28 of 1996; the Interim Protection of Informal Land Rights Act, 31 of 1996; the Extension of Security of Tenure Act, 62 of 1997; and the Prevention of the Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.

occupation has to have gone on for a period of not less than five years prior to 31 December 1997. The Act was intended to be an interim one, subject to extension annually, which was last done for the period ending 31 December 2006.

#### *2.2.1.3 Rental laws*

Rental laws do extend some tenure security to persons who are in rental agreements. While the relationship is largely governed by contract, a number of unfair practices have been set out in each province's regulations to the Rental Housing Act, 50 of 1999. In Gauteng and Mpumalanga, for example, a court order is required by a landlord to evict a tenant.

#### *2.2.1.4 The Restitution of Land Rights Act, 22 of 1994*

Persons who have instituted restitution claims are entitled, in the interim, to protection from arbitrary eviction from that land during the proceedings leading up to the resolution of their claim. The Land Claims Court has the power to prohibit the eviction of any claimant resident on the land during the period of resolution of the land claim.

### **2.2.2 Proposed or imminent changes**

#### *2.2.2.1 Proposed changes to PIE*

The PIE amendment Bill is set to, among others, change the interpretation of PIE by the courts which has expanded the meaning of unlawful occupiers to include persons holding over expired leases as well as those subject to foreclosure of mortgages. Through its proposals, s 2 of the Act is to be amended to state specifically that the Act does not apply to people who occupied land by consent and continue to occupy once such consent has been withdrawn. These amendments may not be influential to the agenda of LandMark however.

### ***2.2.3 Areas for Urban LandMark engagement***

Tenure security has perhaps been one of the most successful areas of intervention under South African land reform, creating progressive regulations that mediate between the rights and interests of landowners and the needs of the poor. However, there is an area of tenure security that is increasingly coming under threat, that of inner city evictions.

Many municipalities have embarked on inner city regeneration projects to reverse trends of disinvestment and business flight from downtown areas. These projects have created a tension between the imperatives of attracting business and wealthier residents versus the needs of the urban inner city poor who have gradually moved into abandoned buildings now targeted for renovation, to be within easy reach of work opportunities. Municipalities have often resorted to evicting poor residents of decaying buildings using general health and safety regulations. These often sidestep the procedural rigours of laws like PIE and have been declared illegal in courts, for instance, inner city evictions in Johannesburg. While the concerns of the municipalities are often legitimate, in that many of the buildings are indeed health and safety hazards, the plight of the evictees has often been ignored and adequate and appropriate alternatives not provided (COHRE, 2005). The inner city is thus emerging as a potential area for the reversal of the gains in terms of secure tenure for the urban poor. The Urban LandMark can play an influential role in promoting dialogue between local government and inner city residents as well as civil society to identify acceptable solutions to the issue. Inner city residents, while occupying land illegally, are also a symptom of the broader spatial problems of urban South Africa: the vast distances between the places of work and residence.

## **2.3 THE DEVELOPMENT AND USE OF URBAN LAND**

This section examines the regulatory environment that frames, firstly, the development (or redevelopment) of urban land and, secondly, the use of the land by its owners or other occupants.

### **2.3.1 Current legal and policy framework**

#### *2.3.1.1 The development of urban land*

The development of urban land is largely controlled by ‘township establishment’ and ‘land development area’ procedures, and environmental regulations.

There are three regulatory routes for township establishment. Without an approval obtained through one of these legal routes a developer is unable to transfer plots, obtain municipal services or develop the land. The three routes are:

- The provincial Planning Ordinances<sup>5</sup> (Ordinances);
- The national Less Formal Township Establishment Act, 113 of 1991 (LEFTEA); and
- The national Development Facilitation Act, 67 of 1995 (DFA).

A prospective developer can, theoretically at least, choose which of these routes to follow. In practice his or her choice will be more constrained:

- in some provinces there is no DFA Development Tribunal so DFA applications cannot be made there;

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<sup>5</sup> The Land Use Planning Ordinance (C), 15 of 1985 (applicable in the Western, Northern and Eastern Cape provinces); the Townships Ordinance (O), 9 of 1969 (applicable in the Free State province); the Town Planning and Townships Ordinance (T), 15 of 1986 (applicable in Gauteng, Limpopo, Mpumalanga and North West provinces; and the Town Planning Ordinance (N), 27 of 1949.

- some municipalities refuse to cooperate with DFA applications so that route may not represent a useful way forward for a developer; and
- the LEFTEA applications are only really suitable for certain low-income housing projects. Nevertheless, this area of law is characterised by legislative overlap, outdated laws and considerable uncertainty among professionals, officials and the public as to which laws should be followed in a particular situation.

Land development projects face a number of challenges in the implementation of these laws:

- A lack of legislative clarity on the role of provincial government with regard to municipal planning emerged with the enactment of the DFA. This is because its use has often rested uncomfortably with the views of local government. Through the DFA, development applications have partly been taken away from local government, and vested in provincial planning tribunals. This has led to intergovernmental disputes<sup>6</sup> that have contributed towards substantial delays in approvals for development.
- The implementation of these laws has done little towards creating integrated settlements. One of the reasons for this is that they have failed to give the necessary legislative backing for the strategic visions of municipalities, expressed through the Integrated Development Plan. These laws are outdated, and none of them were enacted with the current developmental local government framework in mind.

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<sup>6</sup> In Gauteng for instance, it has led to court cases between the provincial authorities and Johannesburg Metropolitan Council



- All three laws are relatively old; the first two are a legacy of the pre-1994 establishment, and the DFA was enacted as a temporary measure in 1995. One consequence of this is that planning law has lagged behind legal developments in other sectors, for instance the environment. Currently, there are dual systems that run in parallel for granting planning and environmental approvals. This is onerous and costly, and often duplicates the issues to be dealt with. Again, this causes delays in development projects.

An important reason why these laws have continued to exist in the statute books is the absence of adequate consensus on the roles of national and provincial government with regard to planning (see section on imminent changes). There is thus uncertainty as to which sphere of government is responsible for legislating for the regulation of land use and land development. The resulting proliferation of duplicative laws undoubtedly is a hindrance to efficient governance in the urban planning sector, and creates a formidable regulatory maze for those embarking on urban development projects, whether driven by the state or by the private sector.

Certain land developments need to undergo environmental impact assessments (EIA's). Authorisations are generally given by provincial departments in charge of the environment, unless the proposed project is one designated for consideration by the national minister. The new regulations to the National Environmental Management Act provide a list of development projects that must undergo either:

- a. A basic assessment, which is short of a full environmental impact assessment. It does require however, among others, the appointment of an environmental assessment

practitioner, and a report which must contain detailed descriptions of the activity, property and the environment, identification of alternatives, cumulative impacts and mitigation measures, and include any necessary specialist studies. There is also a public participation process required. If the authorising authority deems it fit, the development, may be still required to undergo a scoping process, which will effectively entail a 'full-blown' EIA (see below).

b. A scoping study contains all the above ingredients of a basic assessment plus an environmental impact assessment. Should the scoping report be accepted, then the applicant has to conduct an environmental impact assessment, which is a rigorous process that requires the production of, among others, public participation and specialist reports and environmental management plans.

The practice of EIA's has been criticised by both the private and public sector. The process has been popularly viewed as unnecessarily long, bureaucratic and unduly restrictive. It has increasingly come under criticism from national government for failing to be sensitive to developmental needs, and is blamed for 'holding up development' (Mail and Guardian (b), 2006). Further, many Not In My Back Yard (NIMBY) communities see EIA's as opportunities to scuttle or substantially delay socially driven development. The current newly introduced regulations are aimed at solving the problem of unnecessary delays. They also require EIAs to be done for a shorter list of activities than the previous regulations did and provinces are given the power to 'fine tune' the activities requiring either basic assessments or 'scoping and EIA' according the province's specific needs. This will be tested as the new regulations start to be implemented.

### *2.3.1.2 Other regulations*

There are a number of other regulations that are applicable during the township establishment process. These include regulations with regard to:

- Applications for allocation of vacant land;
- Building standards, that regulate among others the safety of installations and the approval of building plans;
- Protection of heritage resources;
- Protection of agricultural land. These require either permission to subdivide agricultural land or prohibit, without permission, certain acts on agricultural land; and
- Deeds registration procedures, which require that the Registrar of Deeds approve and register townships.

The picture that emerges from the above is that there is a profusion of regulatory hurdles that have to be cleared when embarking on development projects. This leads to complex as well as time-consuming procedures. For instance, one study shows that delays in securing clearance certificates and title bond registration has gone up from 1 month to an average of 10 months, which has a substantial effect on developer profitability margins (Mathew Nell and Associates et al, 2005). This is exacerbated by the lack of coordination and alignment between the various authorities concerned with their implementation, and the relatively outdated nature of many of these regulations.

### *2.3.1.3 Land use management regulations*

Currently, once a township has been established, town-planning schemes determine the use rights that are available to the landowner. These town planning schemes, inherited from the pre-democratic era, and drawn up in terms of the provincial

Planning Ordinances of the old four provinces of the RSA, govern the historically white, India and coloured urban areas. Much more rudimentary schemes, drawn up under regulations in terms of the Blacks (Community Development) Act, 4 of 1984, and the Blacks (Administration) Act, 38 of 1927 govern the historically African urban areas. This has created multiple town planning schemes in urban areas. For instance, Cape Town municipality has to administer 27 different schemes within its urban area. Apart from the obvious administrative problems this causes, it has also had a number of other effects that directly influence the urban land market:

- Though IDPs are intended to provide a strategic vision for municipalities, these old schemes do not provide the mechanisms necessary to link these visions to day-to-day land use decisions. This influences the strategic planning for the supply of urban land directly: it is all very well using the IDP to identify land for a particular purpose but if the scheme does not permit that the legal and procedural hurdles to be cleared are considerable.
- The laws are highly procedural and technocratic. This means they hinder activities on the land itself, which limits the ability of landowners to maximise the use of their land. While this can have positive impacts on, for example, environmental amenity, it flies in the face of the commitment to facilitate urban land development and densification proposed in laws such as the DFA.
- They restrict the availability of well-located affordable land for socially driven land development. Many of these laws previously served as protectors of racial spatial privilege but have found a new lease of life in the current era protecting high property values in certain areas, with the effect of pricing out socially driven development.

There has been acknowledgement of the inadequacy of these regulations, and recognition of the need for reform. This has not materialised so far however, largely because of the confusion surrounding planning law reform as a whole and specifically the question of which sphere of government holds the legislative mandate to carry out this area of law reform.

#### *2.3.1.4 Title deed conditions*

Conditions of title impose limitations to the use of a particular piece of land. They are, as their name implies, attached to the title deed of the land. They include restrictive covenants, which are burdens that attach to land for the benefit of someone or some other piece of land; and conditions of title, which emerge out of the conditions of establishment for townships when they are proclaimed. These are imposed by the authorising body, for instance the provincial development tribunal or the municipality, depending on the legal route adopted by the developer, and then inserted onto the title deeds of each land parcel. The effect of these two types of conditions is similar. They both place restrictions on the use of land.

The use of restrictive conditions to create so-called ‘gated communities’ needs examination. Through restrictive conditions tied to land titles, a system of micro managed environments in suburban areas has emerged. In addition, a number of provinces have given this legislative backing<sup>7</sup>. Gated communities have many implications, including planning and environmental (issues of connectivity, transfer of infrastructure responsibilities to private communities, access to public sites and facilities, emergency access, visual impacts), property rights (the ability of the

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<sup>7</sup> For instance the Gauteng Rationalisation of Local Affairs Act enables a municipality to allow restriction of access of any public place to enhance safety and security.

landowner to freely deal with the land) and social (mainly the exclusionary effects of these environments)<sup>8</sup>.

#### *2.3.1.5 Restrictions on the use of land for various income generating purposes*

There are a number of controls and regulations that circumscribe the use of residential land for rental purposes. Firstly, zoning regulations control the density, height etc of buildings which will affect the carrying capacity of the land. These also regulate the commercial nature of the rental, for instance is it a commercial bed and breakfast for instance.

Secondly, there are regulations that apply generally to the proper and safe use of premises. These include building regulations, which regulate the quality of the accommodation. Thus for instance under the National Building Regulations and Building Standard Act, 103 of 1977, municipal councils are authorised to clear buildings that are considered unsafe. Health regulations are also another important set of laws. The Health Act for instance gives provincial and municipal authorities powers to deal with a broad range of health related issues, including those related to dwelling conditions in buildings.

Ultimately, the use zone specified for a land parcel in the applicable scheme determines whether it is useable for trading for instance selling liquor, establishing a spaza etc. This means that the land needs to be appropriately zoned, (for instance as a business) and the necessary consent obtained where applicable. In cases of sale of

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<sup>8</sup> The literature on gated communities is expansive and the issue is subject to intense debate (see for instance Landman, 2004; Robin, 2004; Harrison and Mabin, 2006); also see websites such as <http://www.gatedcomsa.co.za>). Dedicated query on their influences on access to urban land for the poor is the subject of another paper. However, it does seem that their influences extend beyond their self created microcosms, and affect governance of the wider urban region.

liquor, provincial licensing for trading in liquor is contingent upon a municipal authorisation to that effect. Conditions of title may also restrict certain business uses.

From the above sections dealing with the activities available to a land owner, it is notable that:

- There is a fine mesh of regulations that span zoning, health, safety and general licensing procedures. Control is the priority, and there is very little regulation that points at the importance of guidance and encouragement where appropriate.
- Many of the regulations are legally questionable in the current constitutional dispensation, for instance, the evictions allowed under building and standards regulations.
- The alignment of these regulations with broader policy needs to be clarified, for instance, the upgrading of backyard shacks.

### ***2.3.2 Proposed or imminent changes***

#### *2.3.2.1 Environmental Impact Assessment Regulations*

While the new national regulations create the framework for environmental authorisations, including the activities that require authorisations, as well as the procedures and outputs necessary, considerable latitude has been given to provincial authorities to identify *geographical areas* that are particularly environmentally sensitive, in which additional activities can be specified for environmental authorisation, or that are less sensitive, in which certain activities on the national list can be excluded from the requirement of an environmental authorisation. No provinces have yet completed this process but it is under way in Gauteng, Western Cape and KwaZulu-Natal. The judicious use of these geographical areas in a province

would have the effect of encouraging certain types of development in some areas and discouraging them in others. This allows for a more nuanced approach to environmental authorisation than currently prevails, in which there is one list of activities for which authorisations have to be obtained regardless of the location.

#### *2.3.2.2 Planning laws*

The new constitutional dispensation created three spheres of government national, provincial and local, which have each been allocated legislative powers over a number of issues. These legislative powers often have to be exercised concurrently by both national and provincial government, and these include the areas of ‘regional planning & development’, ‘urban & rural development’, and ‘municipal planning’.<sup>9</sup> This has created considerable uncertainty and affected legislative development. Currently, the space for legislating for a framework for provincial planning has been contested by national government (through the stalled Land Use Management Bill) and provincial governments (through their equally held up provincial planning and development acts drafted and enacted, but not yet implemented, in Gauteng, KwaZulu-Natal, Northern Cape and Western Cape).

##### *2.3.2.2.1 The Land Use Management Bill (LUMB)*

In 2001 the White Paper on Spatial Planning was authored to guide the development of a proposed new system of land use management and development. Following from it, was a draft bill, the Land Use Management Bill.<sup>10</sup> The intent of the bill is to “regulate land use management uniformly in the Republic”, and in this regard, it provides considerable detail on the mechanisms that need to be set up to guide planning at local government level. These include prescribing the structure and contents of spatial

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<sup>9</sup> Schedule 4 of the 1996 Constitution

<sup>10</sup> GG 2473 notice 1658 of 2001



development frameworks (SDFs) for inclusion in Municipal IDP's. The LUMB additionally requires the creation by municipalities of new, uniform, land use schemes to supersede the existing town planning schemes. The draft LUMB has been the subject of numerous amendments, but has never been finalised. Its future is uncertain.

#### *2.3.2.2 The enactment of provincial planning laws*

A number of provinces took the first step in legislating for provincial planning laws, although this initial enthusiasm waned because national government embarked on a similar process through the LUMB. These include KwaZulu-Natal, the Western Cape, Gauteng and the Northern Cape. These provinces each sit with new planning laws to replace their inherited provincial Planning Ordinances, but which they have not implemented. The Western Cape, KwaZulu-Natal and Gauteng have all recently revived their processes of law reform: impatient with the slow progress of the LUMB and facing growing administrative, legal and political difficulties in their provinces they have decided to proceed alone again.

### **2.3.3 Areas for Urban LandMark engagement**

#### *2.3.3.1 Planning law reform*

There is a window of opportunity for engaging with the process of developing, what will hopefully culminate in a new suite of planning laws applicable across the country. This must begin with the resolution of the Constitutional question on national and provincial government planning competencies. It is only through this that the necessary law reform process(es) can proceed with certainty. Obviously Urban LandMark cannot change the Constitution; however it would be very useful to being a process of engagement with the national government and selected provinces and metropolitan municipalities to expedite the process of clarifying legislative mandates

for urban land use and development management. This requires high-level engagement with, specifically, the National Treasury and the Presidency, both of which have taken a keen interest in the matter through their initiative on 'Modernizing the Planning Regulatory System'. This initiative, with the support of the Department of Provincial and Local Government, would benefit from the support of a programme like Urban LandMark, both in doing substantive research but also in promoting debate and dialogue on the issue. The focus of the National Treasury and the Presidency has been on the economic costs incurred from having such a confused and inefficient regulatory framework for urban land development, principally arising from delays in obtaining approvals and legal uncertainty around development 'rights', which in turn discourages potential investors. The Minister of Housing's concerns with the establishment of sustainable human settlements are directly compatible and mutually supportive of the Treasury and Presidency's concerns. Urban LandMark could thus also play a useful role in promoting and encouraging the building of shared positions on planning law reform, which will assist with breaking through the current impasse.

Once there is a clear constitutional basis for proceeding with the reform of planning law then the substantive issues can be addressed, such as:

- Ensuring strategic planning instruments such as the IDP have adequate links to day-to-day decision making mechanisms such town planning schemes;
- Allowing for the simplification of procedures for land use change;
- Ensuring the creation of laws that allow for the integration of poorer and traditionally marginalised communities into the mainstream urban land market.
- Ensuring laws that adequately balance the need for security and privacy with the imperatives of the overall urban form, and social integration.

- Ensuring the laws are geared towards guiding and encouraging desired types of land development rather than curtailing and controlling it;
- Ensuring the laws enacted reflect the spirit of the rights enshrined in the constitution, including property rights, environmental rights and the right to housing; and
- Ensuring the laws are properly aligned with new policy developments including informal settlement upgrading imperatives.

#### *2.3.3.2 Provincial supplementation and implementation of the new EIA regulations*

As provinces commence the supplementation and implementation of the new EIA regulations they will start to identify the less sensitive areas in which land development will be generally encouraged and the more sensitive areas in which specific types of development will be discouraged. This process, especially in the absence of coherent land use planning system for urban areas, will be central to the identification of land for new urban development, and especially new housing development.

## **2.4 URBAN LAND TRANSACTIONS**

The intense reform period that South African land law and policy has gone through is in many ways far reaching and radical. The legal basis upon which land is transacted - whether through sale, inheritance or pledge/mortgage - has remained unchanged in both the formal and informal/customary sectors. Urban land transactions in the formal sector, ie land that is registered in terms of the Deeds Registries Act, is strictly regulated by statute, while that in the informal and customary sectors is governed by practices and traditions of the particular community concerned..

Generally, property transactions involve a highly specialised field of law and other technical fields such as surveying. It is practised by relatively expensive specialists, and often circumscribed by technical and arcane rules and regulations. It is thus true to say that they create a substantial hurdle to acquisition of urban land, and potentially, the source of other less formal systems that develop. The rapid rate at which state-subsidised housing has been provided since 1994 has however overwhelmed the deeds registration system and many home-owners in 'RDP housing' estates remain effectively unregistered. The positive side of the system in South Africa is that there is a high degree of certainty as to the ownership or other rights in urban land, at least in the formal sector.

#### ***2.4.1 Current legal and policy framework***

##### *2.4.1.1 Sale of land*

A change in ownership of land is effected through the deeds registry system. The existing title deed is lodged at the deeds registry, a transfer signed, and the buyer of the land is registered as the new owner. There is however a large and complex body of rules and regulations – embodied in the process of *conveyancing* - that regulates the system. These among others necessitate the appointment of specialised attorneys to effect the sale of land. In addition, the seller has to produce a number of documents:

- The title deed to the land.
- Documents relating to rates taxes and duties: Transfers of duty are payable in most instances. The DFA exempts special deeds of transfer (dealing with land transfers in special development areas<sup>11</sup>).

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<sup>11</sup> These are generally areas with insecure tenure.

- Documents of proof. These are often used to prove that the seller has the authority to transfer the land, in case when he/she is not the original owner, eg when the owner is deceased.

Most descriptions of conveyancing and other registration procedures point to their complexity, and call for a simpler systems when dealing with access to urban land from the poor (Royston, 2002). Also, as a reaction to this complexity, formal tenure procedures are often bypassed, and instead a mixture of traditional or customary, informal and illegal systems of land acquisition proliferate.

#### *2.4.1.2 Inheritance of land*

Transfer of land to the heirs of a deceased person generally takes a similar form to that of other transfers such as sales. This means that the complex conveyancing procedures have to be adhered to. The transfer in this case, however, will additionally require a document of proof, such as a letter of administration, to prove the authority of the person effecting the transfer.

#### *2.4.1.3 Pledging of land*

Mortgages are a type of pledging of land. They are registered transactions over land used to secure an obligation of the landowner, for example, to repay a loan. Should the owner of land default on payment, the lender may foreclose, and sell the property. The most common type of mortgage bonds involve a bank or other financial institution lending money to a purchaser in order to finance the purchase price of land and the attached buildings. Registration of mortgage bonds often carries with it numerous other obligations imposed by the lender, for instance arranging the signature of suretyships, authorities for payment, the taking out of life insurance by the borrower, the signing of loan agreements and others. Bonds can be registered for long leases of

land (for periods over 10 years) as well as over a right of leasehold or a right of initial ownership referred to in the DFA.

#### ***2.4.2 Proposed or imminent changes***

The Communal Land Rights Act (CARA) has recently come into effect and has far-reaching impacts on the transacting of land in areas under communal ownership or under traditional or customary leadership. According to the Act, its purpose is to provide for legal security of tenure by transferring communal land to communities, or by awarding comparable redress. The Act among others provides for the securing of an 'old order right in land'. An old order right means a tenure or other right in or to communal land, but excludes tenant, labour tenant, and sharecropper rights as well as any right or interest based purely on temporary permission granted by the owner (s 1). Old order rights may be converted into ownership or into a comparable new order rights, or cancelled and comparable redress provided, by the Minister upon recommendations of a land rights enquiry. It is difficult to see the application of CARA in urban areas beyond the outskirts of Durban, Nelspruit, Pretoria and other cities close to former homeland areas.

#### ***2.4.3 Areas for Urban LandMark engagement***

The processes and procedures of transferring land, be they through sale, inheritance or pledge, are complex, expensive<sup>12</sup> and time consuming. The South African land reform program, though it has been premised on the restoration and delivery of land rights, has largely not departed from the existing European derived model and system

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<sup>12</sup> According to the World Bank, the cost of property registration is still high although the property transfer duty rate fell from 10% to 8% of the property value (Mail and Guardian, 2006). This presents a potential area of investigation especially on its influences access to urban land.

(Miller and Pope, 2000). Studies have been made with regard to the efficacy of these systems in Africa especially when considered in the light of their accommodation of traditional or less formal forms of tenure. The general opinion is that they are ill-suited for the realities of urban land regimes that intermingle common property and traditional regimes with other informal and pragmatic practices as a response to the needs of the urban poor. Rather than make use of these formal procedures, informal procedures consisting of a mix of “rural” or “customary” and individualised processes emerge especially in peri-urban areas (see for instance Durrand Lasserre, 2004).

One writer has noted:

‘In urban areas, customary land delivery in the strict sense of the term does not operate according to this (pure) model. It still survives at the periphery of most cities, but it has been progressively eroded during the colonial and post-colonial period. Recent empirical observations suggest that it is being replaced by what we can call “*neo-customary*” practices: a combination of *re-interpreted customary practices with the other informal land formal practices* (Durrand-Lasserre *et al* , 2004:3, emphasis as it appears).

Thus typically, in an urban setting, planned unlawful occupation of a vacant piece of land is ordered through community mediation that defines allocation and holding rules, including rules for choosing the local leadership, inclusion of newcomers, standards of behaviour, the ‘sale’ of land and so on.

Areas for engagement for the urban landmark with regard to these systems largely revolve around:

- a. These informal systems exist partly because of the failure of the formal land system to speedily provide adequate well-located land to the urban poor. Regulatory reform can be part of the solution (see also other sections of this paper on development and use of urban land). Thus for instance, less exacting alternatives to the current deeds registration process can ease speedy titling, which is currently complex and time consuming and already over-burdened by the demands being placed on it. Instances of poor record maintenance are emerging, and there is a 'lack of title deeds' for new developments (Mathew Nell and Associates et al, 2005).
- b. How these informal systems can be successfully embraced within some form of legal framework including recognition and formalisation, while retaining their relative advantages in terms of availability, speed, low cost and recognition. This is often necessary if they are in an area that has been recognised and slated for informal settlement upgrading.

This area of engagement is a challenging one. Regulatory reform that creates a radical shift from the current recognised system of land holding, especially in an urban setting, will be unpopular. Creating limited areas of application for these special forms for instance upgraded informal settlements is feasible. However, this may not be a popular proposal as it has strong hints of creating a separate system of law for a different people, antithetic to the notion of integration of the disparate regulatory systems previously applicable to different segments of the populations. It also has the potential to undermine the very reason for its establishment; while it may be useful to



integrate informal landholders into the more recognised fold through special concessions, it can also stigmatise their land, creating a less lively and beneficial land market that misses out on the growth of the more traditional one.

In the light of the above, all indicators are that this is a complex and intricate area for potential reform, and requires well-considered engagement. The first step in this regard should be a study to better understand the reasons behind the current backlog at the Deeds Registries around the country, especially in relation to the registration of state-subsidised houses: is it simply a question of inadequate administrative resources, or is it because of excessive legal red tape? If it is the former, the solution is relatively straightforward, in the form of capacity building and increased investment in equipment and software. If it is the latter a demanding programme of land reform will be required, and this will need the support of Urban LandMark.

## ***2.5 THE TAXING OF URBAN LAND***

The South African property rating system underwent major changes with the advent of 'wall-to-wall' municipalities. Previously, before the transformation of local government, property taxes were levied by municipalities in terms of four provincial Ordinances dealing generally with local government matters, and only within the boundaries of municipal urban areas. Rural land, outside of a municipal boundary was effectively exempted from municipal rates.

Before 1994, the political context had a bearing on the kind of taxation system as well as the culture that developed around the payment of taxes. Within white local authorities, tax collection was high and generally well received. Residential ratepayers

benefited from generous rebates, and much of the tax burden was shifted to commercial and industrial properties. Low property taxes were common in many areas, and the substantial profits generated from utility provision such as electricity and water were used to cross subsidise the general rates account (Franzsen, 1999). Black local authorities on the other hand suffered from a lack of legitimacy, and suffered from crippling rates boycotts. The development of a new local government dispensation meant that firstly, the entire tax base had to be amalgamated; secondly, there was a need to infuse a sense of citizenship in the former black areas, through campaigns such as the *Masakhane* campaign. Thirdly, the privatisation of utilities also meant that cross subsidisation was no longer feasible. Finally, the incorporation of rural areas into municipal government jurisdiction has raised the question of the type of taxation, if any, that should be levied on these lands and their relationship to taxes raised in urban areas.

### ***2.5.1 Current legal and policy framework***

#### *Local government rates and taxes*

Specific mechanisms for rating are still provided by the various rating ordinances that were inherited from the previous four provinces of South Africa. These ordinances generally provide for exemptions to certain classes of land users. In practice, these include religious and education institutions, welfare organisations and social type service organisations such as privately owned sporting clubs. This is achieved through full exemption, rebates or grants-in-aid.

The Local Government: Municipal Property Rates Act, 6 of 2004, creates one uniform system for rating land in South Africa and does away with different systems for

different provinces. It also has a much more extensive list of person exempted from rate payments. It provides for exemption of certain categories of property owners from paying municipal rates. These include:

- indigent owners;
- owners dependent on pensions or social grants for their livelihood;
- owners temporarily without income;
- owners of property situated within an area affected by a disaster or any other serious adverse social or economic conditions;
- owners of residential properties with a market value lower than an amount determined by the municipality; or
- owners of agricultural properties who are bona fide farmers.

The Act, while in force already, will only be fully implemented with the creation of new valuation rolls.

A key mechanism for municipalities is the power they get through the act to determine their own *rates policy*, in consultation with the public, which will determine how rates will be levied in the municipality, and from whom, in order to address developmental concerns.

#### *2.5.1.1 Other municipal charges*

Property attracts other rates and levies such as health, water, sewerage, sanitary and other special rates.

#### *2.5.1.2 Transfer duties and VAT*

In terms of the Deeds Registry Act, prior to a successful transfer of land, a receipt or certificate of a competent public revenue officer that the taxes have been paid is required. Transfer duty is payable on transactions involving immovable property in

terms of the Transfer Duty Act. A number of transactions are exempt from transfer duties, including acquisition by heirs. Recent amendments to the law go beyond taxes attached to the land and also target the broader tax history of the parties. Buyers and sellers to property must provide their income tax numbers, or alternatively, details such as all their sources of income, the date the property was originally acquired by the seller and the initial selling price. These details allow for a broader inquiry into the tax compliance of the parties, and can result in the transfer being stopped if any amounts are owed, or alternatively, amounts owed being debited against the sales proceeds. VAT is an alternative to transfer duties. In this case, acquisition of immovable property is taxed at the current rate by central government through the Value Added Tax Act . A rates clearance certificate is also required before a transfer can be registered at the deeds registry office.

#### *2.5.1.3 Capital gains tax*

Since 1 October 2001 capital gains obtained with respect to any transaction dealing with the sale of property is taxable unless exemption is allowed<sup>13</sup>.

#### *2.5.1.4 Taxes on land income*

Rental income is deemed part of a person's income and is taxable in terms of the Income Tax Act.

### ***2.5.2 Proposed or imminent changes***

Proposed regulations for the local government rating system in terms of the Rates Act deal with issues of the operation of valuation appeal boards, and related issues of

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<sup>13</sup> Second Revenue Laws Amendment Act no. 60 of 2001

valuation officers and the valuation roll. Under schedule 9 of the regulations, the procedure for objecting to the valuation in a valuation roll is provided.

### ***2.5.3 Areas for Urban LandMark engagement***

In the implementation of the new Rates Act municipalities have to devise rates policies. These policies will be the instrument for fine-tuning the rating system in a municipality to suit its particular needs.

For example, a municipality's rates policy will determine the relief, if any, on payment of rates for certain categories of land users, such as the poor. It is not clear how useful and effective property tax relief have been to the needy so far. The ordinances did not have explicit provision for relief for this category, although the relief was granted in certain instances. Often, property tax relief falls under a package of municipal services subsidies, which additionally encompass a fixed amount of free water and electricity, refuse removal and sanitation and as well as accumulated debt write offs<sup>14</sup>. These have been recently introduced and increasingly implemented in any municipalities. Determining what the effect of rates and other taxes, including accumulated debt, have and have had on poor households, and how effectively exemption mechanisms capture and benefit all deserving cases, is not straightforward. There have been some concerns expressed on the effectiveness of the targeting of tax relief in hardship cases, noting that often the value of the property can be misleading in gauging the ability of the owner to pay (Bowman, 2002); and that the rebate system has the potential to leak to undeserving people (Whelan, 2002). From an urban land

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<sup>14</sup> In Johannesburg for instance, the cities Special Cases Policy allows for basic municipal services of six kilolitres of water and 50kWh of electricity free a month and no charge for assessment rates for properties valued at less than R20 000.

perspective there is also obviously a concern that land-based tax liabilities may force poor people to dispose of their land in less than advantageous circumstances.

Another crucial element of a municipality's rates policy will be the use of rates to incentivise development, especially in the inner cities, but also in the urban areas previously ignored for commercial and industrial – ie job-creating – land development such as the former township areas. This is a complex aspect of land economics and very few municipalities are in a position to make informed and sustainable decisions in this regard.

It is therefore suggested that Urban LandMark prioritise support to local government with the development of effective rates policies, which could take the form of capacity building, manuals and so on. Given the general lack of skill and knowledge in this area of urban management, however, it would probably be sensible to start off with a study into the opportunities and constraints facing local government in their implementation of the new rating system in terms of its impact on urban land markets and the interests of the poor within that market.

As noted, South African inner cities have been subject to regeneration efforts. One of the mechanisms being used is rates tax breaks in *urban development zones* ('UDZs'). To supplement the work suggested above on the new rating system it is also important to determine what the effects of these efforts have on the inner city poor. This in the light of emerging evidence that inner city regeneration is often openly hostile to the interests of the inner city poor (see for instance COHRE, 2005). Such an investigation should include investigating the possibilities of incorporating the poor in the

regeneration efforts, with a scope for the subsidies to be tied to more and better land uses that are cognisant of them.

### **3 CONCLUSION**

The overarching concern that should guide Urban LandMark's engagement on the question of regulatory frameworks for urban land is that there are a range of regulatory tools that are available to the state to manage urban land better for the poor. These tools are either not being used adequately – in the case of municipal rating law – or have not been sufficiently well-developed to be useful – in the case of laws relating to land use and development. Urban LandMark will need to identify strategies that support government – at all spheres – in the integration of the available regulatory instruments into coherent programmes for managing urban land in the interest of the poor specifically, but of society as a whole as well.

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