



Lesotho Urban Land Market Scoping Study

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ACRONYMS

ALA	Administration of Lands Act
BOS	Bureau of Statistics
CoL	Commissioner of Lands
DfID	Department for International Development
DG	Director General
GoL	Government of Lesotho
IDM	Institute of Development Management
LA	Land Act
LAA 1969	Local Administration Act of 1969
LAA	Land Administration Authority
LARP	Land Administration Reform Project
LEHCO-OP	Lower Income Housing Company
LGP	Local Government Proclamation
LHC	Lesotho Housing Corporation
LHLDC	Lesotho Housing and Land Development Corporation
LSPP	Directorate of Lands, Surveys and Physical Planning
MCA-L	Millennium Challenge Account-Lesotho
MCC	Millennium Challenge Corporation
MMC	Maseru Municipal Council
MOWPT	Ministry of Works and Public Transport
MUP & T	Maseru Urban Planning and Transport Study
NGO	Non-Governmental Organisation
PEMS	Paris Evangelical Missionary Society
PSD	Private Sector Development

RCM	Roma (Roman Catholic Church)
SDA	Selected Development Area
TY	Teyateyaneng
UGA	Urban Government Act
UN-HABITAT	United Nations Centre for Human Settlements
USA	United States of America

1.0 INTRODUCTION

This is a scoping report on urban land markets in Lesotho that provides current background on urban land market governance in Lesotho. The report, commissioned by Urban LandMark, also reviews the efforts of the Lesotho government, assisted by its international development partners, to reform its land management and administration systems. The report focuses particularly on current reforms supported by the Millennium Challenge Corporation of the government of the United States of America, specifically the potential impact of the reforms on access to land by the urban poor. This report also identifies issues around Lesotho's modernisation of its governance systems for land administration where organisations working in this area could provide support in the medium term, and identifies opportunities to make urban land markets work better for the poor in Lesotho.

The report is divided into nine sections, including this introduction. Sections 2 and 3 provide brief background information on urbanisation and the evolution of modern urban land law in Lesotho, respectively. Section 4 identifies and discusses the areas of the MCC's assisted land administration reforms that have a potential to influence urban land market activity in Lesotho and provides some tentative notes on the likely impact of the interventions on access to land by the urban poor in Lesotho. Section 5 discusses governance of urban land, while section 6 highlights the pattern of urban land ownership and rights. Section 7 provides some information on urban land market actors, while the nature of urban land markets is presented in section 8. Section 9 summarises the issues that could inform a future work programme in Lesotho.

2.0 URBANISATION IN LESOTHO

2.1 *Emergence of towns: A brief history*

Lesotho has no history of indigenous settlements that were large enough to qualify as towns. It was only with the arrival of missionaries that population concentrations began to appear in the vicinity of mission stations, especially Morija (Paris Evangelical Missionary Society – PEMS) and later Roma (Roman Catholic Church – RCM). Other relatively concentrated settlements were typically confined to areas around the residences and courts of the most important chiefs.

With few exceptions, contemporary urban centres in Lesotho are British colonial creations that were meant for the exclusive occupation of colonial magistracies and police. These settlements were spatially set apart from the rest of the countryside as colonial 'government reserves' that were directly controlled by British District Commissioners. Land within the reserves could be privately owned, while outside the reserves only occupancy or use rights under customary tenure prevailed. However, alienated colonial reserve land was a source of continuous conflict between the British colonial authorities and customary chiefs, who considered the government reserves as '*paballo*'¹ land that would ultimately return to their custody as soon as colonial settlement ended (Duncan, 1960; Machobane, 1990).

¹ '*Paballo*' comes from the verb '*ho baballa*' (to keep or look after something, usually on someone's behalf). In terms of land, it was taken to mean that a chief had ceded the use of land under his jurisdiction for use by subjects of a neighbouring chief, but without the ceding chief losing control over the ceded territory. Hence colonial reserves were accordingly regarded as land under the '*paballo*' of the colonial administration and that such land would revert to its customary administrator (the chief having jurisdiction) once the colonial master had either left or no longer required the land (see Duncan, 1960)

Most colonial towns, especially those that were founded prior to and during the period of Lesotho's (then Basutoland) annexation to the Cape Colony (1871-1883), are located in the lowlands and close to the border with the Republic of South Africa. Several factors could explain this peripheral location:

1. The security concerns of British colonial officers who were stationed in Lesotho, as peripheral location would have ensured quick exit in times of unrest, as was the case during the gun war (Machobane, 1990);
2. Facilitation of communication with the Cape Colony, then the headquarters of British colonial administration in Lesotho;
3. Facilitation of import and export of goods and services, as traders also chose to locate in the reserves;
4. The imperative to keep expenditure on infrastructure in Lesotho to the barest minimum, which would have been in keeping with British colonial policy that there should be no significant expenditure beyond what Basutoland could finance from its own resources; or
5. The convenience of recruitment and transfer of migrant labourers to the South African mines.

Therefore, a parallel would seem to exist with towns that developed as ports elsewhere in Africa, in that border location could similarly be taken to reflect a space economy with strong external orientation².

2.2 *Contemporary urbanisation in Lesotho*

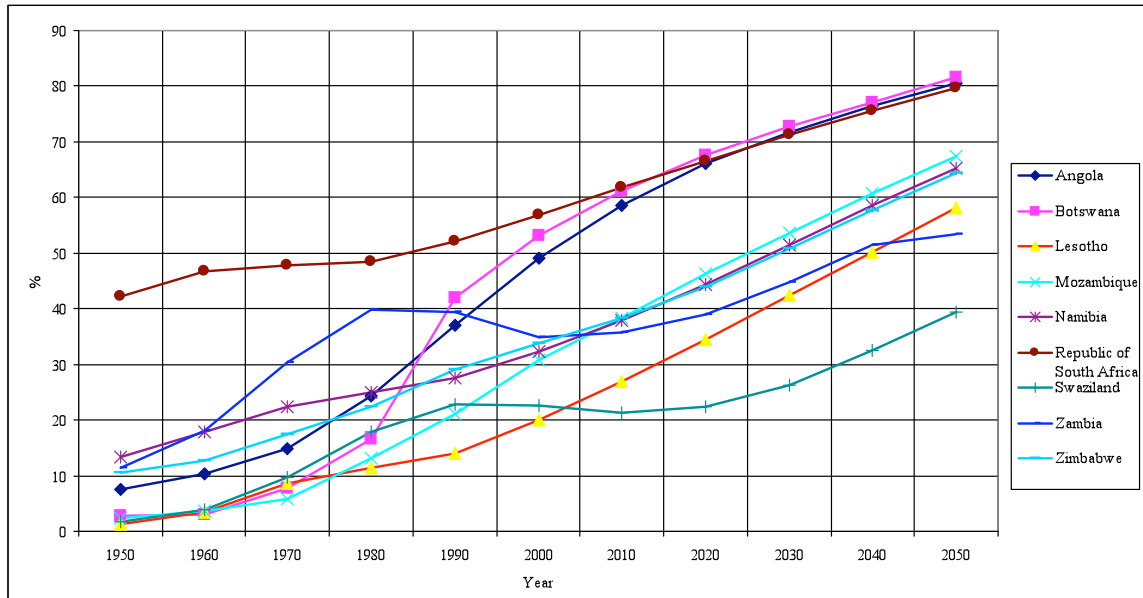
Urbanisation is understood to refer to a process by which an increasing proportion of a country's population ends up living in towns or cities. However, substantial differences exist in the way in which different countries divide their populations into urban and rural. Different criteria have been used in various countries, including population size, dominant economic activities/functions and legal declaration. In Lesotho, legal declaration has been used to define urban areas, with the inherent drawback that often such definition is neither based on functional nor statistical criteria. It is, therefore, arbitrary and *ad hoc*, with urban areas often proclaimed as such one day, only to be legally reclassified as rural the next day. For instance, Lesotho had 11 proclaimed urban centres up to June 1980, after which an additional five rural settlements with a combined population of over 30 000 people were proclaimed as urban, thereby bringing the total number of urban centres in Lesotho to 16. However, following the military coup in 1986, the five urban centres that had been added in 1980 were again re-designated as rural villages, bringing the number of urban centres down to 11.

These shifts make it extremely difficult to compute the level of Lesotho's urbanisation with any degree of certainty. Even in Lesotho itself, government departments have tended to define urban areas differently. For instance, the Department of Lands, Surveys and Physical Planning (LSPP), which is responsible for town and regional planning, strictly utilises legal proclamation, while the Bureau of Statistics population censuses define urban areas as all administrative district headquarters and other settlements of rapid growth and predominantly engaged in non-agricultural activities. The Water Resources Management survey of 1996 defined urban centres in terms of concentrated settlements of at least 2 500 people with a density of at least 1 000 persons per square kilometre.

At independence in 1966, the level of urbanisation was 7%. By 1976 it had grown to 11% and to 14% in 1986, 19% in 1996 and to 23% in 2006. The UN-HABITAT (2010) estimates the level of urbanisation at nearly 27% in 2010. This figure is expected to reach 34% by 2020 and nearly 60% by 2050 (Figure 1).

² A similar observation has recently been made by consultants of the Ministry of Public Works and Transport in 2010.

Figure 1: Southern African Nations' Urbanisation 1950-2050 (%)



Source: UN-HABITAT (2010) *State of African Cities Report*. Nairobi: UN-HABITAT

In a sub-regional context, the level of urbanisation in Lesotho is relatively low, although the rate of urbanisation is acknowledged to be one of the region's highest (UN-HABITAT, 2010).

Urbanisation drivers in Lesotho mainly consist of rural-urban migration, natural growth and variations in settlement classification. However, the greatest composition of growth is rural-urban migration. Most internal migration surveys emphasise the importance of rural poverty as a push factor leading to migration to Maseru and secondary towns. Several studies note that factors such as the decline in agriculture, superior services, family problems, rampant livestock theft (especially in the mountains which often leaves many households without the means to cultivate their fields), have all combined to push people out of the rural to urban or peri-urban locations in the lowlands (Sechaba Consultants (Gay, 1998;. Turner, 2001).

Table 1 below shows the population growth trends of Lesotho's most important urban areas. The capital city of Maseru is clearly the most populated urban area, followed by Teyateyaneng (TY) and Maputsoe. Maseru and Maputsoe provide significant employment opportunities in garment manufacturing and consequently attract the majority of rural job-seekers (BOS, 1996).

Table 1: Urban Population in Lesotho (1976, 1986, 1996, and 2006)

Urban Area	1976	%	1986	%	1996	%	2006	%
Butha-Buthe	7 740	6.4	8 340	4.6	12 610	4.0	14 070	3.3
Hlotse	6 300	5.4	8 080	4.4	23 120	7.4	55 180	13.1
Maputsoe ¹	15 820	13.6	11 200	6.1	27 950	9.0	--	--
Teyateyaneng	8 590	7.4	12 930	7.1	48 870	15.6	61 270	14.5
Maseru	55 030	47.2	109 200	59.6	137 840	44.1	195 300	46.3
Mafeteng	8 200	7.1	12 180	6.6	20 800	6.7	31 760	7.5
Mohale's Hoek	5 200	4.5	7 900	4.3	17 870	5.7	27 690	6.6
Quthing (Moyeni)	3 500	3.0	4 310	2.3	9 860	3.2	13 490	3.2
Qacha's Nek	4 840	4.1	4 600	2.5	4 800	1.5	8 100	1.9
Mokhotlong	1 480	1.3	2 390	1.3	4 270	1.4	8 490	2.0
Thaba-Tseka	-----	----	2 150	1.2	4 450	1.4	6 750	1.6
TOTAL	116 620	100	183 200	100	312 440	100	422 100	100.0

Source: Compiled from LSPP (1989) Maseru Development Plan Working Paper No. 6, *Population*,; (for the years 1976, 1986 and 1996); BOS 2006 Population Census Report (for 2006).

Notes:¹ *Population of Maputsoe in the 2006 census has been added to the population count of Hlotse.*

²*Thaba-Tseka district and town were gazetted in 1980.*

Most rural-urban migrants and newly formed households settle in peri-urban neighbourhoods where, until 1980, the control of land was by local chiefs using customary land tenure rules. In peri-urban areas, housing land can easily be bought informally or extra-legally from sub-divided fields (*masimo*) and due to scarcity of land supplied through formally planned plots (see Sections 7 and 8), between 70 and 80 percent of urban development in Lesotho could now be occurring this way. However, perceived scarcity of cultivable land (estimated at a decreasing 9% of Lesotho) and the location of towns on prime agricultural land have over time compelled government authorities and their donor partners to 'do something' about informal peri-urban growth and ribbon development along major roads. Coupled with the need to protect arable land has often been concern about issues such as the absence of formal land markets, tenure security and the disorderly and inarticulate residential layouts resulting from land sub-divisions sanctioned by the customary chiefs. Observers from outside Lesotho have equally remarked that peri-urban development was characterised by slum-like dwellings on the outskirts of urban centres (see for example Witzsch, 1992). Policy responses by government have largely taken the form of legislation, perhaps hoping that an appropriate and effectively implemented legislative framework was all that was required to solve urban problems and restore order to urban development.

3.0 EVOLUTION OF MODERN URBAN LAND LAW

3.1 *The formative years*

The basic principle of land tenure in Lesotho is that land belongs to the Basotho nation and is held in trust by its King. Under customary law, this trusteeship carries with it the responsibility to allocate and revoke land allocations, and is delegated to principal and ward chiefs and from them to junior chiefs and village headmen. According to Sheddick (1954), recipients of chiefly allocations held “usufruct” rights entitling him or her to use the land according to terms and conditions set out during the allocation. When this type of title lapsed, as through death or removal, rights in land reverted to the chief for reallocation to other members of the village; however, the actual practice has been for family land to pass from father to son(s) as if inherited, without going through the process of reallocation by the chief.

There is a fairly long history of dissatisfaction with the customary land-tenure system that dates back to the colonial period, with disquiet largely related to lack of security of tenure in general, while in the urban sector, customary tenure was considered to have hindered the development of an efficient urban land market and had encouraged low-density urban sprawl and irregular peri-urban settlements (Mateka, 1988; Witzch, 1992; Romaya and Brown, 1998; Theko, 1998). However, efforts to reform customary rules were first initiated in 1967, when the government enacted the Land (Procedure) and the Deeds Registry Acts of 1967. The former outlined procedures for land allocation by customary chiefs, who were to work with elected Land Advisory Boards. The Land (Procedure) Act 1967 also formalised the customary land allocation system by introducing documentation as proof of allocation. The Deeds Registry Act aimed to facilitate the registration of titles to non-agricultural and principally urban land (Leduka 2000; Mdee 1991).

These two laws did not, therefore, propose any substantial change to the land-allocation process. They still upheld the customary principle of usufruct and non-transferability of land. The basic right remained an ‘allocation’, which conferred usufruct in perpetuity. Significant reforms were attempted only in 1973, with the enactment of the Land Act of 1973 (LA 1973) and the Administration of Lands Act of 1973 (ALA 1973). LA 1973 covered rural land and remained in force until 1980, when it was repealed by the Land Act of 1979 (LA 1979). Although LA 1973 still upheld the provisions of the Land (Procedure) Act of 1967, it provided that consultation with advisory boards was a statutory requirement that was legally binding on the chiefs (Leduka 2000; Mdee 1991).

The Administration of Lands Act of 1973 (ALA 1973) was meant for urban land and was the first legal instrument to attempt to nationalise urban land by conferring on central government exclusive power of land administration in all designated urban areas. It was also the first piece of legislation to introduce the notion of a leasehold tenure, as well as land revenue by way of assessed ground rent. However, it was never brought into operation, because it was alleged that it proposed land-tenure changes that threatened the authority of traditional chiefs over land. Accordingly they obstructed its implementation (Mdee 1991; Mosaase 1982).

Further land reform efforts were introduced again in 1979, involving the consolidation of the two 1973 Acts into the Land Act of 1979 (LA 1979), which is briefly described below. In contrast to the 1973 Acts, which had to accommodate the government’s intention to allow chiefs to continue to allocate land, LA 1979 was premised on a cautious approach involving an evolutionary transformation of the customary land allocation process. This evolutionary change was to begin with the establishment of land allocation committees chaired by chiefs in an ex-officio capacity, but with provision for direct elections to all committees at some time in the future. To achieve this, LA 1979 nationalised all land in Lesotho, with

rights to be leased from the state. Thus, similar to many other parts of post-colonial Africa, the state became the trustee, and all titles to land in urban areas (except land used principally for agricultural purposes) were converted to leaseholds. For purposes of allocation, LA 1979 established a system of urban land allocation committees, the members of which were all nominated by the Minister responsible for Lands.

3.2 *The Land Act of 1979*

The LA 1979 established three forms of land tenure: the leasehold, allocation and licence. It also made provision for setting aside certain areas of land for selected development, to respond to the critique of lack of commercial agriculture, as well as challenges brought about by uncontrolled peri-urban sprawl. Each of these is briefly outlined below.

3.2.1 *State leasehold*

The leasehold (or 'lease' in local usage) was the most important title to land under the 1979 Act. It gave lessees exclusive possession and enjoyment of land so leased, subject to statutory conditions that could be attached. Rights in land could be sold, sub-let or mortgaged, albeit with the consent of the Minister of Local Government (hereafter Minister), who was also responsible for lands (see Section 4 for extended discussion of consents). The coming into force of the Act in June 1980 meant that the following categories of titles to land were deemed as having been converted into leaseholds:

- all titles to land in urban areas, other than land that was at the time principally used for agricultural purposes;
- all land in rural areas not used for agricultural purposes, including land that was the subject of 'registrable titles'.

Leaseholds varied in terms of duration, with the longest being 90 years for residential, professional, educational, charitable and religious purposes. Industrial, commercial or hotel-purpose leaseholds subsisted for a maximum period of 60 years. The shortest leasehold period was 30 years for land used for the sale of petroleum products.

A registered leasehold title could only be terminated by the Minister for Lands following a statutory notice of one calendar month. Such termination could be made if the lessee was in breach of a condition(s) of the leasehold and had failed to comply with a notice to remedy such a breach within a specified period of time. Compensation was payable in the event of termination or cancellation of leasehold interests for lawful improvements on the land.

3.2.2 *Allocation*

An allocation carried a similar meaning to that understood under customary allocation and applied exclusively to rural land. Rights under an allocation remained, in the main, non-transferable and non-negotiable for a monetary consideration. What was new under the Act was that an allocation was explicitly defined as a 'use right' that was legally inheritable, in contrast to 'customary' law under which allocations were not inheritable.

While allocations were normally for unspecified periods, an allocating authority had power to revoke an allocation on thirty days written notice, spelling out the reasons for such revocation. Grounds for revocation may, for instance, included misuse of land through failure to combat soil erosion, or failure to cultivate the land for three successive seasons or when the land was required for public purposes. Where an allocation was revoked, compensation was payable for lawful improvements on the land.

Grounds for revocation other than for public purposes could be appealed against to a senior land allocating authority and from there to a land tribunal.

3.2.3 *Licence*

Strictly speaking, the 'licence' was an urban phenomenon introduced by the Act specifically to apply to urban land that was still predominantly under agricultural use. The licence entitled the licensee to use and occupy land only for that purpose (i.e. agricultural) and under conditions specified in the licence. The licensee could not dispose of or create lesser interests in the land. Any alterations and improvements on the land, except for purposes of agriculture, were to be undertaken only with the express permission of the Minister.

Licence rights were premised on the notion that agricultural land, that is allocation rights, were granted freely under customary law and, therefore, allottees were expected to also surrender such rights freely to the state, in the public interest. As argued extensively elsewhere, the licence was a controversial and politically charged issue from its conception in 1973, and opinion from most urban stakeholders has been that it was the sole cause of illegal subdivision and sale of peri-urban fields. The licence was also the first clause in the Act that was repealed by the military regime in 1986, although reasons for it doing so have never been clear (Leduka, 2004).

3.2.4 *Provisions for special purpose development*

In urban areas, Part V Sections 44 and 49 of the Act made provision for land to be set aside for special development as Selected Development Areas (SDAs). SDAs were defined as an area of land set aside for:

- the development or reconstruction of existing built-up areas;
- the construction or development of new residential, commercial or industrial areas;
- the readjustment of urban boundaries for the purposes of town planning (LA 1979, Interpretation Section).

When an area of land had been declared as a 'selected development area', all existing titles and privileges to land were nullified pending the grant of substitute rights by the Minister. SDA provisions were subsequently found to be useful tools for rectifying defective titles that had arisen from 'valid' allocations by chiefs under repealed laws, but that had not been registered as required by the Deeds Registry Act of 1967. SDAs were also used to make new land grants by the Minister, as long as a declaration was made in the 'public interest', also defined at the discretion of the Minister (Leduka 2000).

The apparent misuse of the SDA clause was heavily criticised by the Land Act Review Commission set up in 1987 to look into the implementation problems that were besetting the implementation of the Act. The Commission noted that although the SDA was conceived for laudable public policy objectives, Ministers had unfortunately misused it. The Commission strongly recommended that the clause be maintained, but that the Minister's powers be withdrawn and substituted by those of local authorities. The Commission noted further that the Act made no provision for the consultation of affected parties prior to SDA declaration and recommended that consultation be made a statutory requirement (GoL, 1987). Regrettably these recommendations were not implemented.

LA 1979 further provided for the extension of urban boundaries to cover substantial peri-urban areas where agricultural land was being rapidly converted into urban uses. The government had hoped that the Act would halt the conversion of arable land to urban development and promote orderly urban

growth. However, with the exception of a few areas where the state successfully appropriate land, the extension of urban boundaries to cover hitherto peri-urban villages and their farmland did not, in practice, result in any substantial change to the allocation of peri-urban land by customary chiefs. The latter have continued both to allocate land and to authenticate allocations derived from private subdivision, contrary to the provisions of the law. As a result, bureaucratic allocations by government agencies tend to be predominant within the old town boundaries, in which formally laid-out neighbourhoods are located. Outside the old town boundaries, where land is under customary land holding, informal systems predominate.

4.0 THE MILLENNIUM CHALLENGE CORPORATION'S ASSISTED LAND REFORMS

4.1 Introduction

The Millennium Challenge Corporation (MCC) was established by the government of the United States of America (USA) in 2004 for the purpose of managing the USA's foreign aid in a new way. Its main focus is to eradicate poverty through sustainable economic growth. Eligible countries establish their own implementing agencies, and in Lesotho this is the Millennium Challenge Account-Lesotho (MCA-L). The funding agreement between the MCC and the Lesotho government, called 'the Compact', was endorsed on the 17th September 2008 and is scheduled to end in September 2013. The priority sectors of the Lesotho compact are health, water and private sector development (PSD). The Land Administration Reform Project (LARP) is part of the PSD and aims to achieve the following:

- Improve land laws and policies;
- Improve people's awareness of land rights, especially women;
- Enhance the efficiency of issuing lease titles to people in urban areas of Lesotho, beginning with Maseru; and
- Support the establishment of a Land Administration Authority (LAA) for the purpose of providing improved land administration services.

It is anticipated that improved land administration services will help reduce land-related transaction costs and inefficiencies and thereby unlock markets in leasehold rights. To this end, significant legislative and institutional reforms have been undertaken to date, culminating in a series of new Acts (and draft bills) and the establishment of a new land administration authority. Some of these are:

- Land Administration Authority 2010
- Land Act 2010
- Land Regulations 2011
- Land Court Regulations 2011
- Sectional Titles Bill 2011 (Draft)

4.2 Land Administration Authority Act 2010

The Land Administration Authority Act 2010 has merged government departments that deal with cadastre, national mapping and deeds registration into a new parastatal agency called the Lesotho Land Administration Authority (LAA). The LAA adopts an organisational structure that is similar to the Lesotho Revenue Authority, with a Director General (DG) who reports to a Board of Directors, that in turn reports to the Minister of Local Government and Chieftainship. The LAA is currently being established, with all departmental managers expected to be in office by the end of August 2011 and all operational staff by end of November 2011. The responsibilities of the LAA are to:

- Administer the land registration system;
- Administer surveying and mapping functions;
- Perform functions created under the Deeds Registry Act 1967 in so far as they relate to land administration;
- Solve registration and cadastre complaints and disputes;
- Collect ground rent, fees and issue notices from time to time prescribing the fees be paid for the Authority's services;
- Advise the Minister and the Government of Lesotho on suitable changes and additions to land administration laws and policies;
- Cooperate with the Ministry and other governmental and private bodies with regard to all matters relating to land administration (Section 5(2), Land Act 2010).

It is anticipated that once fully established, the authority will improve land administration and information service delivery and recover all associated costs from the services that it provides. Cost recovery should in turn enable the LAA to become self-financing.

4.3 *Land Act 2010*

The history of the Land Act 2010 begins with the Ramodibedi Commission's Report (2000) which, similar to earlier commissions, had unearthed serious implementation constraints and endemic corruption with the implementation of the 1979 Land Act. The initial reform that followed the Ramodibedi commission was funded by the British Department for International Development (DfID), with the final output being a draft land bill of 2004. However, the bill remained dormant until it was revived in 2009 under the MCA's LARP and finally gazetted as the Land Act 2010 in June of the same year. Preparations for the enactment and the actual implementation of the Land Act 2010 have also been rather drawn out, resulting in most stakeholders not being certain if land matters are currently being dealt with under the 2010 or 1979 Act. What is widely known now is that, similar to the Land Act of 1979, which was enacted only following threats by the World Bank to withdraw a loan of nearly M6 million for the Khubetsoana Low-Income Housing Project and Thamae Upgrading Projects (Leduca 2000), government's ambivalence towards the enactment of the Land Bill in 2009 ended when the MCC also threatened to withdraw its land sector reform funding from Lesotho (Emery, no. date).

However, even as the Land Act 2010 is being implemented, the key professional staff involved in the LARP express serious reservations on the true commitment of government to the reform process. Of the many reservations that have been expressed to date the following seem to be key:

- The Minister of Local Government is not keen on the implementation of the 2010 Land Act and is quoted as having openly dismissed the proposed Land Administration Authority as a 'white elephant'. Key officers in the Ministry are also said to be openly opposed to the on-going land reform project.
- Strong reservations have also been voiced concerning both the Land Act 2010 and the LAA Act 2010, which, in the words of one observer, 'do not talk to each other'. This could be disastrous to the land reform process if it is not addressed urgently.

That notwithstanding, the main objective of the 2010 Land Act is to modernise land administration, regularise peri-urban land and settlements, facilitate investment, including foreign investment and create land markets, and abolish customary land tenure in rural areas. The preamble states the purpose of the Act as to

...repeal and replace the law relating to land, provide for the grant of titles to land, the conversion of titles to land, the better securing of titles to land, the administration of land, the expropriation of land for public purposes, the grant of servitudes, the creation of land courts and the settlement of disputes relating to land; systematic regularisation and adjudication; and for connected purposes (GoL, Land Act 2010: 387).

The remaining parts of this section briefly outline those main provisions of the 2010 Act that are likely to have a bearing on land market activity. These are: ministerial consents, title regularisation, foreign land ownership, land ceilings and sectional titles.

4.5 *Minister's consents*

The conditionality of leaseholds is crucial to security of tenure, and in order to achieve greater degrees of tenure security, leases must be as free from limiting conditions as possible. Until the 2010 Act, transactions involving leases in Lesotho were circumscribed by requirements for prior consent, which could only be granted by the Minister responsible for Lands. However, people have had to wait for months or years for consents by ministers, which caused unnecessary delays in transactions and became a major drag on the leasehold market and mortgage lending. Therefore, consent requirements tended to limit the ability of landholders to respond to land market demands (Bruce, 2007).

However, a little caveat on the consent powers in the Land Act 1979 seems appropriate here. The requirement for consent was included in the act for altruistic purposes that were meant to protect unsuspecting land owners from unscrupulous land deals/transactions. However, the process of granting consents slowed down transactions as there was no time limitation within which the Minister for Lands ought to grant such consents. Therefore, consents became a serious obstacle on land market transactions and mortgage lending.

The Land Act 2010 abolishes consents to most transactions in leased land rights, and those concerning transfers (Part VI) have been delegated to the CoL LAA (Director of Lease Services), also for altruistic motives that are fairly similar to those under the Land Act 1979. Even in these cases, the 2010 Act compels the CoL (read Director of Leases) to grant consent within 30 days of application, with provisions for appeal to the Minister for Lands where the CoL fails to do so. This is a significant improvement, even though there is no time limitation within which the Minister should make determinations of appeals. It is expected the abolition of consents will shorten the time for transactions and make them more transparent and secure. This is a significant reform in terms of land administration in Lesotho. Several studies and reviews leading to the MCA LARP, as well as some estate agents who were consulted during the preparation of this scoping report, have welcomed the abolition of consents, especially on mortgage transactions.

Bankers who are represented on the LAA Board are also reported to be happy with the LAA as consents for mortgages are no longer required, and better records will be kept, which means that the bank's interests will equally be protected. Nevertheless, the land administration aspects of the 2010 Act are yet to be fully implemented and outcomes are likely to take some time before being significantly felt. For instance, the Act stipulates that the preparation of a lease should take a maximum of three months from the date of allocation, but the LAA aims at a turn-around period of one month from the date of application for a lease, assuming that matters relating to allocation are in order.

4.6 *Systematic regularisation*

A third significant innovation ushered in by the 2010 Land Act, which is likely to change the nature of the urban land market in Lesotho, is regularisation. This is provided for in Part XI of the 2010 Land Act

and detailed further in the Systematic Regularisation Regulations 2010. It is generally considered as a significant innovation because it facilitates retrospective legalisation of historic, as well as contemporary informal land allocations. Regularisation is defined in the Act to mean one or both of the following:

- i) the process of surveying, planning, adjudicating and registering the boundaries and rights associated with a parcel of land informally occupied or;
- ii) readjustment of boundaries for the purpose of town planning (Land Act 2010: Part I)³.

Regularisation schemes are prepared by the Commissioner of Lands (CoL)⁴ following consultations with local councils having jurisdiction for approval by the Minister for Lands. Once such a scheme has been prepared, the law requires that it should be published in a government gazette.

A regularisation (in effect mass titling) scheme of 50 000 land parcels in Maseru is about to commence, with possible extension to other urban areas that are yet to be selected. The mass titling scheme follows a pilot regularisation scheme of 5 000 informally allocated peri-urban land parcels that has been underway in Maseru for over a year now. The pilot scheme is generally considered a success, with nearly 4 500 leases out of 5 000 targeted households being distributed. Fraudulent Form Cs, old title deeds and uncontested physical occupation were all accepted as evidence of legitimate claims to land. During the pilot and roll-out phases, regularisation (titling) was and will continue to be free, except for a minimal stamp duty fee. Disputes in the pilot phase are noted to have been relatively few and were mainly between family members rather than unrelated individuals (intra-household disputes rather than inter-households disputes). Most disputes were also successfully dealt with through mediation.

Some plots (possibly 10% or less) in the pilot regularisation areas are reported to be without claimants, some of which are held under formal leasehold titles. Explanations were sought from project staff as to the possible reasons leading to unclaimed plots. The following are some of the important explanations given:

- i) Leased plots for which the original lessees had either transferred their leases informally without following procedures laid down by law;
- ii) Disputes over plot ownership;
- iii) Individuals who seemingly did not wish to pay ground rent, especially plots on which rental units stand alone, hoping that if the project did not identify them now then they would be left alone.

The pilot regularisation project has, therefore, seemingly revealed aspects of the land market that have until recently only been speculated on, namely, land hoarding and speculation. Frantic efforts are currently underway to identify the claimants, failing which the unclaimed land parcels will revert to the state. The pilot project has also revealed informal transactions that involve the transfer and exchange of formal property titles and rights without following the processes established by law.

³ A narrower definition of regularisation in the context of Lesotho is offered by Sean and Matela (undated) as: 'a process that adjudicates existing land rights and landholdings and converts informal or irregular landholdings into leases'.

⁴ Although the Land Act 2010 and its various regulations make reference to the Commissioner of Lands for purposes of implementation, the actual implementing agency is the Land Administration Authority which has a Director of Leases for purposes of executing all activities and undertaking all duties that the law currently assigns to the Commissioner of Lands. The position of the Commissioner of Lands remains a statutory position within the Ministry of Local Government and Chieftainship with no direct role in land administration anymore. It is widely anticipated that the Land Act 2010 is likely to be amended to reflect this state of affairs.

4.7 *Land holding by foreign entities*

The initial draft bill provided for unqualified landholding (land ownership) to foreign enterprises/corporate entities in Lesotho. However, this provoked heated debates in both the National Assembly and civil society groups. This led to postponement of assembly debates on the bill for further public consultations. A final compromise position was that foreign ownership became (as was the case in the Land Act of 1979) qualified in terms of shareholding requirements by Basotho in foreign enterprises.

Section 6 (1) (c) of the Land Act 2010 provides that foreign enterprise may hold land in Lesotho “provided Basotho, whose land may be valued so that it may form part of the shareholding in such a partnership, form at least 20% of the membership or shareholding of the enterprise”. In addition, in allocating land to foreign enterprises, several factors are to be taken into account, as provided for in Section 6(4)(a-f). These are:

- a) The magnitude and origin of the tangible and intangible assets;
- b) Employment generation;
- c) Strategic nature of the enterprise;
- d) Whether the business in relation to the application provides for the transfer of business expertise;
- e) Advancement of business undertakings owned by citizens; and
- f) Environment (sic) protection.

In the final analysis, the substance of foreign land ownership under the repealed 1979 Land Act still remains significantly intact, the only change being the reduction in the quantum of shares that must be held by Basotho, from 51% under the Land Act of 1979 to 20% under the 2010 Act if a foreign company desires to hold land in Lesotho. Another new addition is that the value of land owned by Basotho will form part of the shareholding agreement.

Some key stakeholders consulted during the preparation of this report argued that the reduced shareholding quantum was sufficient as an incentive to encourage foreign investors into Lesotho. Others stakeholders were not so hopeful, arguing that even unqualified foreign ownership was unlikely to attract any meaningful foreign investors into Lesotho. To some observers, qualified foreign ownership was a serious flaw in the law and made little sense, given that Lesotho is situated in the middle of South Africa where ownership is available to foreign investors. There is still no provision for land ownership by natural persons who are not citizens of Lesotho, which also limits small investment, such as in the residential property market (see also Section 6.8).

4.8 *Land holding ceilings*

Land ceilings are provided for in Part VII of the 2010 Act and detailed in Regulation 31 of the Land Regulations 2011. Provisions for ceilings stipulate that no lease will be issued on a residential plot of land that exceeds 1 000m² and that no one individual will cumulatively hold residential land in Lesotho in excess of 5 000m². Maximum limits for commercial and industrial landholdings are 2 000m² and 4 000m², respectively. There are exceptions to these general limitations, such as for land held by parastatals or where, even in the case of individuals, the Minister for Land grants consent for the ceiling to be exceeded. These ceilings are similar to those provided in the repealed Land Regulations 1980, with the exception of industrial land holdings where the maximum limit has been increased from 3 000m².

Land ceilings are essentially problematic, especially where the law gives politicians significant discretionary powers to vary the ceilings at will. As Bruce (2007: 32) notes, land ceilings are notoriously difficult to implement consistently and fairly, and 'if implemented at all, it will likely be found that, as has happened elsewhere, they will be applied selectively and possibly for political reasons'. As a matter of fact, evidence exists in Lesotho to show that enforcement of ceilings has not worked in the past. For example, the Ramodibedi Commission (2000) reports an instance where an individual businessman was found to have held a total of 32 business plots in a single town. Assuming a minimum size of 200m² for a commercial plot, this would have meant that the businessman had amassed well over 6 000m² of commercial land, over three times the legal limit. Bruce (2007) had recommended that provisions for ceilings be removed from the draft bill, but this has obviously not happened.

4.9 *Sectional titles*

The purpose of sectional titles legislation is to enable separate ownership of a section or sections of a building in a building complex without necessarily owning the land on which the building stands. It is hoped that once enacted, this new law will open up new property market opportunities that have never existed in Lesotho before now. This is another significant innovation under the MCA-L's LARP. Although initially provided for under Section 9(1) of the 2010 Act, sectional titles are now the subject of a separate and more detailed Sectional Titles Bill 2011 (draft), which is said to have been modelled along the South African sectional titles legislation, and for good reasons: first, because banks and insurance houses that operate in the Southern African region are much accustomed to the South African sectional titles practice; and second, because South African court judgements are routinely followed by the Lesotho courts as established precedents.

From the foregoing analysis, and reading from its mandate, the LAA has no role in land allocation and management, which remain the responsibility of the Ministry of Local Government and the various community and local councils. Sean and Matela (undated) unequivocally maintain that the mandate of the LAA is to "implement only the land administration parts of the Land Act 2010", while allocation and management remain with central and local government. Incidentally, while reforms are clearly visible and significant with respect to land administration, matters relating to land management remain largely similar to those under the Land Act of 1979. Expectations are that a lot more land in the short run would come from spontaneous subdivisions and sale of existing but newly titled urban and peri-urban properties. Increased security of tenure and aggressive public outreach is also expected to unlock the market for second-hand (subdivisions) land. However, evidence from Latin America, where mass titling has a long history, shows that titling puts the land out of reach of most poor urban households.

5.0 **GOVERNANCE OF URBAN LAND**

5.1 *Historical background*

The colonial and post-colonial arrangements and changes in political and administrative arrangements for local governance follow closely on the (mis)fortunes that characterise the evolution of modern state structures and party politics in Lesotho. This section, therefore, discusses the changing fortunes and structures of local government in colonial and post-colonial times, with special focus on how national party politics have shaped, and continue to shape, the nature of local government structures in Lesotho.

The Lesotho pre-independence constitution (1959) made provision for the establishment of limited local government in the form of district councils. These were established in 1960, as corporate bodies with powers defined by Local Government Proclamation No 52 of 1959 (LGP 1959). District council elections were based on adult male suffrage. Council membership was made up of elected and ex-officio members, the latter being all principal chiefs. Each district council also had a president in the

person of a principal chief appointed by the paramount chief (King), after consultation with the Resident Commissioner.

In terms of the LGP 1959 the District Commissioner retained authority over a number of local matters that were considered to be beyond the administrative and technical competence of district councils, such as matters concerning the administration of township (reserve) land, public health and traffic control. Therefore, District Councils had authority over fairly unsophisticated matters, such as the construction and maintenance of selected roads and bridle paths, control of soil erosion, selected aspects of public health, fisheries, livestock grazing and movement, public order, regulation of trade, commerce and industry.

District councils were abolished in 1968, two years after independence, followed a year later by the enactment of a Local Administration Act of 1969 (LAA 1969) for the purpose of enabling central government to reorganise local administration. It was under the provision of the LAA 1969 that development committees (district and village) were established to fill the vacuum left by district councils. A military coup in 1986 ushered in military government, which changed development committees to village, ward and district councils, chaired by village and principal chiefs. The councils were (theoretically) responsible for fund-raising for local developments, as well as stimulating local participation in development. It was under military rule that some progress towards the establishment of urban local government was made with the establishment of the Maseru City Council in April 1989.

5.2 *Limited urban local government under military rule*

To facilitate the establishment of a council for Maseru, the 1980 Urban Government Bill was enacted into an Urban Government Act in 1983. In 1989 a council for Maseru was finally created. The establishment of the Maseru City Council was a World Bank project, for which it had earmarked M28 million. The Bank had to exert pressure on an otherwise unwilling and undemocratic government to establish a council by threatening to suspend assistance to the urban site-and-services and upgrading projects in Lesotho (Qobo, 1993).

Although theoretically responsible for the management of the entire city of Maseru, the Council has struggled to extend its activities over the entire urban area. With the exception of isolated project areas in the former peri-urban areas, the activities of the council have been restricted to the old colonial urban reserve. However, the management of council affairs were a nightmare from the first day of its inception, with matters coming to a head in 1990 when the entire Council was temporarily suspended and a two-man commission of inquiry appointed to look into problems that were confronting the Council.

Briefly, the report of the Commission identified two principal sources of council problems. First, that there were tensions between the council and central government. The former, having been elected to office through a local popular vote, believed that an un-elected military government had no mandate over its affairs. Second, that relations between the Mayor (indirectly elected and with only symbolic authority) and most of his councillors, and the Chief Executive (Town Clerk) and his cadre were extremely poor, ostensibly because the Mayor and his team belonged to the then ruling party, while the Town Clerk and his executives were perceived to be members of a rival political party. This division within the council hampered effective operation of the council, as both parties allegedly used the council to push their political agendas in an environment where the military had outlawed party politics (Leduka, 1995).

The Maseru City Council was dissolved in 2000 and revived as a Municipality in 2005. However, it has inherited numerous problems and weaknesses of its predecessor (see Box 1), all deriving from the inability or unwillingness of central government to devolve real power and resources.

Box 1 Summary of problems of the Maseru City Council

- The Urban Government Act [1983] is weak and ambiguous, and does not clearly define structures of MCC management control and responsibilities;
- The Council's functions and responsibilities are not matched with the requisite levels of financial and human resources, leading to inadequate facilities and inability to perform essential functions;
- There is an apparent or perceived lack of political commitment on the part of the Central Government and unwillingness to intervene timely and effectively in resolving management problems of Maseru City Council;
- The Council's top management is weak and ineffective;
- There is a virtual absence of management systems in key departments, namely finance, personnel, purchasing and personnel (sic). Consequently, the key functions of management and financial control and accountability are not being effectively performed;
- Operations of the Maseru City Council in the provision of services and enforcement of regulations are hampered by the inadequate transfer of authority and legal powers from the Central Government to the Council;
- Due to inadequate resources and personnel, overall performance of the City Council and the level of services provided are very poor and inadequate;
- Compensation packages are unattractive and therefore unable to attract professionals of the right calibre;
- There is poor staff morale and the public has little confidence in the Maseru City Council as a local government institution.

Source: IDM (Institute of Development Management) Consultants (1996) *Management Audit of the Maseru City Council* (Draft Final Report), p. 5.

5.3 Recent developments in local governance

Local government is established under the Local Government Act of 1997, which repealed the Urban Government Act of 1983 and came into operation on December 10th 2001. The Act puts into place three types of local government structures consisting of Community, District and Municipal councils. In April 2005, 128 community councils, ten District Councils made up of two nominees from each community council and a Municipal Council for Maseru (the only municipality that was created) were elected. Customary chiefs are elected into councils like any other council member, and not as *ex-officio* chairpersons, as had been the case in the past.

However, in reviewing progress since 1993, several commentators have noted serious fault lines within the decentralisation project in Lesotho. For instance Kapa (2005) notes that it took the government nine years to bring local government into being, and concludes that the regime had no political will to decentralise government. A year after the local government elections, Likoti and Shava (2006) also remarked that the Ministry of Local Government had provided neither logistical nor financial support to local authorities. Poor communication between central government on the one hand, and customary chiefs on the other, was also noted as endemic. Senior government civil servants at central and district levels seem to consider their offices and functions as superior to those of local authority councillors, while the chiefs and councillors also seem to disagree on responsibilities. Lack of communication has been squarely blamed on government's failure to demarcate areas of responsibility between the district and council servants, as well as between councillors and customary chiefs, especially with respect to land allocation. As Kapa (2005), Shale (2005), Leduka (2006) and Quinlan and Wallis (2003) all note, in the absence of local government, chiefs have remained useful and respected symbols of grassroots authority and attempts to remove them from local policy matters in the past have rarely paid dividends.

6.0 PATTERN OF URBAN LAND OWNERSHIP AND RIGHTS

The 2006 population census shows that most people access housing land through allocation by customary chiefs (67%), followed by inheritance (20%), purchase from someone else (7%), government agency (4%) and unspecified other (2%). Although the disaggregation of the census data at urban levels does not yet exist, analysis of urban-level data in the Maseru Urban Planning and Transport Study (MUP&T) (MOWPT) (2010) shows more or less similar access pattern in Maseru, although inheritance was not as significant. Most households in Maseru had acquired land from customary chiefs (53%), followed by those who had purchased land from others (19%), government agency (13%), inheritance (9%) and other unspecified sources (6%). In brief, the delivery of land by government and its agencies has been minimal compared to other actors. However, more localised neighbourhood studies have shown that the proportion of households who had acquired their land from or with the assistance of customary chiefs, especially in peri-urban neighbourhoods, could be in the range of 70-80 percent (Leduka 2000; 2004). The MUP&T study also shows that more than 50% of urban housing stock was rented compared to 45% which was owner-occupied, with the rest occupied free or through other means. Most rental housing consisted of *Malaene* (rows of single and double rooms with shared latrines and water).

At national level, land tenure (sic) according to the census shows that 63.1% of households had the Form C, 4.2% had leaseholds, 2.9% had deeds of title and 29.0% had no title to their land. For Maseru as a whole, the MUP&T study shows that 68% of households had the Form Cs; 16% had leaseholds; 3% had deeds of title and 13% had no title at all. Clearly, therefore, in terms of access to land and ownership, the chief and Form Cs are the most predominant in both rural and urban areas.

In a typical new peri-urban neighbourhood, Hall (2004) shows that 80% of households had the Form C as evidence of land ownership; 15% had a simple letter from the Chief and only 5% had formal leaseholds. Similar patterns were recorded by Leduka (2000; 2004) in both older and newer peri-urban neighbourhoods, where the Form Cs were held by 83% and 73% of households, respectively, with those having the formal leasehold being 10.3% in older and 5.1% in newer peri-urban neighbourhoods. Overall, Leduka (2000) shows that 83% of households who had acquired land through formal administrative procedures had leaseholds, while 68% of those who had acquired land through informal procedures had the Form C, with 14% having converted their Form Cs to formal leaseholds. As argued extensively elsewhere (Leduka 2000), it is the loophole in the law that arguably continues to sustain the viability of the informal land acquisition process (see for example Box 2).

Box 2 Extract from conversation with Commissioner of Lands, Maseru, 9 April 1999

Researcher: Can allocations by the chiefs [through the Form C] be converted into registered titles, the leasehold?
Commissioner: Well, it is possible to convert any title to land, any formal title to land or an illegal title to land into a legal title. The 1992 amendments to the Act [Land Act 1979] put in place mechanisms to legalise these titles. It is called revalidation by way of the urban land committee verifying the original allocation and then making a new grant.
Researcher: Is the illegality of the Form C ever challenged during application for registration or conversion into legal title?
Commissioner: No, it is not ordinarily challenged, except where there could be some kind of dispute and one party happens to know that the other party is applying for a lease. Then there is provision for adverse claims.
Researcher: So are you saying that challenges to applications for registration come from parties who may claim similar interests on the land the subject of registration and not from your office [LSPP]?
Commissioner: Yes, most challenges come by way of adverse claims and not from the office.
Researcher: So it is possible to begin with an illegal condition in the form of an illegal Form C, but to end up with a perfectly legal condition, in the form of registered leasehold?
Commissioner: Yes. In fact, the majority of registration of titles is by people who acquired land illegally or informally and are legalising their titles. This is because the rate of land delivery in the informal sector is higher than that in the formal sector. Unlike the informal sector, the state has to first acquire land before delivery, while the informal sector owns the land and delivers it directly. So we cannot outcompete (sic) them.
Source: Leduka 2000

Although Form Cs are generally considered to be illegal, a direct query on the issue often provokes elusive responses from all sorts of people. However, from Box 2, a number of conclusions are possible. The first is that it is difficult to prove the illegality of the Form C because the chiefs are regarded as the primary witnesses to the legality or otherwise of Form Cs. Second, where the chief is unable to attest to the legality or illegality of a Form C, or where the Form C was lost, the Land Act of 1979 provides that a sworn affidavit by any three persons with at least 30 years of continuous residence in the area in question is considered acceptable and lawful evidence. The irony, however, is that the majority of people with that length of residence in any given area are either field-owners or chiefs, who tend to collude with each other in this exercise (Leduka 2000). More recent indications are that since 2005, the verification of the legality of the Form C has now been passed to community councils, but it is doubtful that the outcomes are significantly different. Below we discuss the main urban land market actors.

7.0 URBAN LAND MARKET ACTORS

This section focuses on the most significant urban land market actors and their impact on how markets operate. Rules, procedures and processes that guide decision-making on land access are also outlined, especially with respect to the urban poor.

7.1 Directorate of Lands, Surveys and Physical Planning (LSPP)

The LSPP, which is headed by the Commissioner of Lands, was established in 1974 with a specific set of functions. These are: to prepare and issue titles to land; to maintain records of land transactions; to provide cadastral surveys and mapping; to undertake physical planning and development control services; to collect land revenue by way of assessed ground rent with respect to all land held under leasehold, as well as development charges. Under the Land Act of 1979, the Commissioner of Lands is the land and planning authority for Lesotho as a whole, including the Maseru city. The office, therefore, retains the most important land management and planning functions.

The Land Act of 1979 essentially established two central agents for allocating urban land. The first is a system of land committees (whose function has now been assumed by local councils) and direct land grants by the Minister responsible for lands. For the committees (councils) the procedure is that land is first subdivided according to an approved subdivision scheme or layout, cadastrally surveyed and provided with services (which rarely happens due to resource constraints). Thereafter the plots are advertised in a government gazette and local newspapers, specifying all costs associated with each plot (this also rarely happens). At the end of the statutory period allowed for the advertisement of plots for new grants, the committee then decides on the applications and makes grants to successful applicants.

The Minister for Lands also derives authority to make direct grants from special 'public interest' provisions of the 1979 Land Act, which have ostensibly been carried over into the new Land Act 2010. In the 1979 Act, these powers appear under what are called Selected Area Development (SDA) Declarations. The effect of a SDA declaration is to nullify existing titles and rights on land, with original rights-holders entitled to first preference when the Minister grants substitute rights following the declaration, or equivalent compensation outside the area declared for selected development. Swedesurvey (2006) notes with some concern that, although the main actors in land administration and management are the Commissioner of Lands (LSPP) and councils, the Minister personally plays a very active role in day-to-day administration of land.

Analysis of allocations by both committees/councils and the Minister has revealed several weaknesses in administrative procedures. Besides the slow process in terms of releasing land to the market, administrative procedures have favoured the urban elite, as there are no guidelines for deciding on

applications for either committee grants or beneficiaries of the Minister's SDA grants. The formal processes of land allocation by both committees (councils) and the Minister have also tended to discriminate between beneficiaries on the basis of their socio-economic status (see Box 3).

7.2 *Maseru Municipal Council (MMC)*

The Maseru Municipal Council (MMC) was first established as Maseru City Council in 1989, a corporative body created by the Urban Government Act (UGA) of 1983. The MMC's various responsibilities under the UGA included the delivery of municipal services, such as the collection of waste, provision and maintenance of streets and access roads, as well as the management of the entire city of Maseru. However, the UGA 1983 prohibited the MCC from automatically becoming a land authority until declared as such by the Ministry of the Interior (then responsible for local government). It was only in 1992 that the MMC was declared a land authority for Maseru, with responsibility for acquisition, servicing and disposal of land through sale. However, in practice, much of the formal land acquisition process remains the responsibility of central government through the Department of Lands, Surveys and Physical Planning (LSPP).

The MMC's main involvement in land delivery has been to facilitate the acquisition of land for servicing and development by other agencies, such as the Lesotho Housing and Land Development Corporation (LHLDC). Direct involvement of the council in land subdivision, servicing and allocation has generally been minimal and controversial. For instance, in contrast to the general land allocation committee system, which has no established criteria for land allocation, sources from within the MMC assert that the urban land allocation committee of the council has an established set of criteria that it uses to prioritise applications for land grants. The first is that an applicant must be a citizen of Maseru. Only when such applicants have been dealt with would consideration be given to any other applicant, with priority given to those who do not already have a plot of land elsewhere. The second criterion is that an aspiring applicant has to have cash, especially for those plots allocated through a tendering process. However, even where tendering is not done, cash is still considered an important requirement. Evidence shows that between 1992 and 2003 the MMC had released a total of about 256 minimally serviced (water and gravel roads) plots into the market, with first priority reportedly being given to the council's employees ahead of other applicants. Overall, between 1992 and 2003, the MMC contributed an average of 23 plots per year into the formal urban land supply system (Leduka, 2004). The absence of vacant land for acquisition by the MMC within council boundaries and lack of financial resources with which to pay compensation for acquiring masimo (fields) land are constraints that hamper the MMC from delivering any significant amount of land into the market.

7.3 *Minister of Local Government and Chieftainship*

Land acquisition and expropriation for public purposes is provided for under Part IX of the 2010 Land Act. Some of the key stakeholders consulted argue that provisions under this part are a continuity of the SDA clause of the Land Act 1979 and were being similarly misused to grant land plots to individuals favoured by ministers responsible for lands, particularly Section 51(1) (see Appendix 1). Section 51(1), similar to the 1979 Act SDA clause, arguably gives unlimited leeway to the Minister responsible for lands to make land grants to virtually anybody as long as a 'public interest' declaration has been made. Land set aside for purposes of 'public interest' grants are also not advertised and its availability for development is, therefore, not widely known unless the media somehow comes to know about it⁵.

⁵ See Lesotho Times of September 1-7 and 8-14, 2011, especially the Editorial Comment on the latter issue, which calls on the Minister of Local Government to explain the land (stands/plots) that she had recently granted to nine government ministers, judges and senior civil servants (but to no ordinary Basotho) in prime areas in Maseru city.

Current media reports seem to suggest that the SDA-like misuse of Section 51(1) is continuing unabated, notwithstanding recommendations by the various land commissions to restrict the powers of Ministers of Lands in terms of how this clause might be used. As indicated earlier in this report, the MCA's land reform focuses almost exclusively on titling at the exclusion of the supply of new land into the market. Therefore, the flawed systems of land supply that existed under the repealed Land Act of 1979 have been left unreformed.

7.4 Lesotho Housing and Land Development Corporation (LHLDC)

The Lesotho Housing and Land Development Corporation (LHLDC) was set up in response to a recommendation in the National Housing Policy that was prepared with World Bank assistance by the Canadian Housing Foundation in 1987. Although the housing policy was never formally adopted by government, certain aspects of it were followed, the major one being a merger of the then Lower Income Housing Company (LEHCO-OP) and the Lesotho Housing Corporation (LHC) into the present LHLDC. The mandates of the LHLDC include:

- Land development through the provision of serviced sites for all income groups;
- Provision of rental accommodation for all income groups;
- Provision of home ownership for all income groups.

Therefore, the LHLDC is a state-owned land developer which benefits from formal land allocation by the LSPD and deploys its own internal rules and beneficiary selection criteria, all necessitated by the imperative to be financially self-sufficient. Access to the LHLDC plots is based exclusively on affordability. As of 2010/11, the LHLDC had delivered 9 519 serviced sites in various urban areas (Appendix 2).

Unsurprisingly, the majority of the LHLDC's projects are in Maseru, where nearly 52% of serviced plots and 76% of housing units delivered to date are located. Following a rather slow start after the merger of the LHC and the LIHC in 1987, due in part to operational constraints such as finance and land acquisition and registration, the LHLDC has in recent years significantly improved on its delivery mandate, although a lot more still has to be done. However, addressing especially the rental needs of low-income groups remains a significant challenge, and the majority of this group will probably have to content with rental housing in privately provided *malaene* (rows of single or interconnecting double rooms popularly constructed for letting, see Plate 7) or equivalent.

In general, the government's contribution to urban land supply has been minimal and provides no significant avenues for the development of rental housing, as it is principally targeted at owner-occupied housing. Hall (2004) shows that the combined land delivery by government agencies, including the MMC, could barely meet 10% of the demand for urban land in Maseru alone. Based on the average number of people being added to the urban population per year, Leduka (2004) estimates that all the formal land-supply systems combined could only meet about 30% of potential demand for urban land for housing purposes. Leduka (2004) further provides evidence that, beyond 'patronage and elite networks', access to most land provided by government agencies is limited to relatively wealthy households or those who can provide evidence of income from regular employment (Box 3), which is a very small proportion of the urban population. Although the LHLDC has slightly improved the supply of serviced land, it is doubtful that the impact on the market has changed much, given corresponding increase in the pace of urbanisation in recent years.

Box 3 Formal Land Allocation Discriminates on the Basis of Socio-economic Status in Maseru

To illustrate the exclusionary nature of formal rules, this case study draws from the results of a survey of 90 households in the up-market neighbourhoods of Hillside and Maseru East in Maseru, the capital city of Lesotho, where access to housing land has been through formal state rules. Three indicators were used as proxies for socio-economic status of household heads, namely, educational qualifications, employment status and household possessions. These indicators have been used as useful proxies for household wealth or deprivation in Lesotho.

The survey revealed a positive correlation between educational attributes and access to land. Household heads with university education were the majority of beneficiaries at 44 per cent, followed by 43 per cent of heads with senior secondary or vocational training. Over four-fifths of households had obtained plots as free state grants in accordance with existing state law. Very few had purchased land from those who had benefited from the free state grants, in clear contravention of the law, which stipulates that land in Lesotho can neither be bought nor sold. As it turned out, the sale of state-granted plots was by those who had obtained more than one housing plot, who thus took advantage of their knowledge of the formal system of rules to extract cash from people who had no other means of accessing urban land.

Socio-economic status was also reinforced by corruption, patronage and elite networks, which were clearly useful in negotiating formal state rules when looking for a housing plot. Useful pointers to these networks became obvious when probing for information about availability of plots. Formal rules as embodied in the Lesotho Land Act 1979 provide for advertisement of plots in local newspapers and government gazettes. By law, individual requests for land grants are to be declared by way of application to urban land committees, which should decide on grants only after applicants have been interviewed. However, evidence from the survey revealed no formal criteria by which the choice between applicants was made when considering such applications. What became obvious was that, as the formal process of housing plot allocation drew closer to the actual act of making a land grant, it degenerated into personalised relations of reciprocity and nothing more.

The socio-economic status of households in informal settlements was also analysed, again with a view to establishing the types of people who benefited from such rules and procedures. In terms of education, nearly half (48%) of 300 household heads that were interviewed had either not attended school at all or had only primary education; 36% had secondary (mostly junior) or vocational training and less than one-fifth (16%) had university education. Again, evidence exists to show that the poorest households in Lesotho are those headed by individuals with primary education or no schooling. Similar correlations were observed with respect to employment and household possessions. The study concluded, therefore, that access to housing land in informal settlements was open to a wide range of households, including the poorest. However, most post-1980 plot acquisitions in informal settlements were almost entirely commercialised, which made plots less accessible to the very poorest households.

The purpose of this case study is to demonstrate that access to land through the state bureaucracy favours wealthier urban residents, with the poor either relegated to low-income housing project areas (very few), but mostly left to fend for themselves the best way they can in informal settlements. Over 80 per cent of the demand for urban land in Maseru is met from informal sources outside the state (Leduka, 2004).

Leduka, R. C. 2004. Informal Land Delivery Processes and Access to Land for the Poor in Maseru, Lesotho. *Informal Land Delivery Processes in African Cities: Working paper 5*. Birmingham: University of Birmingham.

7.5 *Masimo (crop fields) owners and customary chiefs*

Although invisible before the law, and often considered irrelevant to land-use planning decisions, customary chiefs, *masimo*-owners and their clients are arguably the most significant actors in the growth, planning and management of the city. As already alluded to earlier, until June 1980, land outside the former colonial 'urban' reserves was managed by customary chiefs and headmen and its disposal thereby rested with them and individual *masimo*-owners. When the towns expanded beyond the colonial reserve boundaries in the late 1970s, customary chiefs became vital in determining the pattern and rate of growth of the sub-urban areas. However, whereas chiefs were traditionally

accustomed to providing land to their immediate subjects and to a limited number of newcomers (removers from other villages), the growing attractiveness of towns, especially Maseru, meant that the chiefs had to deal with demands for land from strangers. This new role led to the development of a phenomenon that is new to Lesotho - the exchange of land for money (Leduka 2000).

Soon after the enactment of the Land Act of 1979, the idea that local chiefs encouraged their subjects to subdivide their *masimo* or face state appropriation without compensation became popular. Even after 1985, when compensation for urban agricultural land became payable, it was widely intimated that it was too low to discourage the owners of *masimo* from sub-dividing their land and selling plots. In return, chiefs issue certificates of land allocation to those who purchase plots, the Form Cs, backdated to periods prior to June 1980, the date on which the Land Act of 1979 came into force. However, this service was not rendered free, as should have customarily been the case, because *masimo* owners had to pay a fee, the nature of which seems to have changed over time (for details, see Leduka 2000). With virtually every local chief in the former peri-urban areas authorising informal land subdivisions and sales, the traditional villages have merged into each other to produce extensive areas of haphazardly arranged and poorly serviced mixed-income residential settlements that have become the trademark of all Lesotho's towns.

The backdating of certificates of allocation by traditional authorities has been made possible by the fact the law has so far allowed the conversion of such certificates into formally registered leaseholds, as long as the allocation date could be shown to predate June 1980 when the Land Act of 1979 came into force (Box 3). This process has elsewhere been explained in terms of 'indeterminacies and inconsistencies' in formal state law (Leduka 2000). In recent times, the courts have upheld the legitimacy of Form Cs that had been issued as recently as 2000 (Leduka and Sets'abi, 2008).

7.6 *District and community councils*

The Local Government Act 1997 specifies functions of councils. One of the most significant functions of district and community councils is the allocation of land in both rural and urban areas. Since there is only one urban area (the municipal council of Maseru), land allocation in smaller towns is essentially the responsibility of community councils, which are now sufficiently capacitated with planning staff who are competent in basic land parcelling and residential layout designs. However, market activity in the smaller towns is the least known, although it is not expected to differ significantly from what is known about the capital city.

7.7 *Emerging private developers*

As a result of urban crime, especially property crime, a phenomenon that has elsewhere been described as urban spatial fragmentation is emerging in the old Maseru reserve. The most significant form of fragmentation in Maseru is homestead-gating or fortified dwellings, where middle and high-income households enclose their houses with high security walls and/or fences (sometimes electrified), with or without 24-hour security guards, including all sorts of surveillance gadgets, all in response to real or perceived crime. Although scattered throughout the entire city, most fortified dwellings are concentrated in middle and high-income areas in the old parts of Maseru city (Liboti, 2004; Leboela 2007).

The second type of spatial fragmentation takes the form of ostensibly 'market-driven world-city inspired and aspirant cultures' (UN-HABITAT, 2010: 209) of *built micro-environments* and emergent urban architectural forms that closely resemble developments in so-called *urban glamour zones* (UN-HABITAT 2010). These are high-security 'shopping malls' and 'enclosed high-density residential

estates', although not yet of the conventional self-contained gated community-type development that are seen in most South African metropolitan areas). These new developments have significantly been considered to represent a 'property boom' (Lesotho Times, Nov 12th 2010), although currently restricted to inner parts of the Maseru, and meant exclusively for high-income earners, and to a limited extent the middle-income sector. Naturally, recent developments are often lavishly serviced in contrast to the poorly serviced mixed development of peri-urban informal neighborhoods.

These developments pose new challenges to urban planning, management and governance. For example, in terms of physical planning, the Development Control Code specifies the height of walls and other forms of enclosures that are permissible around homes, to which emergent architectural forms do not seem to conform. The factors behind this so-called 'property boom' are not yet fully understood. However, evidence would seem to suggest that developers equally encounter numerous challenges in terms of land acquisition and registration, often pointing to long delays in the issuing of titles. In addition, the rules that guide access to land by the emerging property developers require further follow-up. Limited evidence would seem to suggest that access to land by the developers is facilitated directly by the office of the Minister for Lands. As indicated above, the new developments are meant exclusively for high-income and to some extent middle-income earners. However, it is doubtful that the demand for high-income housing that possibly exists in Maseru (and Lesotho) justifies the volume of investment that is currently underway, especially given that foreigners are legally prohibited from owning property in Lesotho.

7.8 Lesotho National Development Corporation (LNDC)

The LNDC was established in 1967 with a mandate to spearhead industrial and commercial investment in Lesotho. It has also developed some housing for occupation by its senior staff. As of 2009, LNDC's property consisted of eight residential units, three shopping centres, nine commercial outlets, six office blocks and seven industrial estates, with 138 factory shells on these estates and a new enclosed residential complex opposite the Maseru Golf Club. Most industrial estates are located in Maseru (LNDC, 2009 www.lndc.org.ls/about_LNDC.htm).

7.9 Financial institutions

Given the nascent nature of the real estate sector in Lesotho, the market role of financial institutions, such as banks, has equally been subdued, and there is virtually no readily available data on bank lending in the property sector.

8.0 THE NATURE OF THE URBAN LAND MARKET

8.1 Characteristics of urban land markets

The foregoing sections of the report demonstrate that, similar to land markets elsewhere in Africa, markets in Lesotho are characterised by the co-existence of different modes of land supply. Customary land tenure remains important in all towns, especially in peri-urban areas. However, customary systems have been so convoluted that some commentators have come to consider them as no longer customary, but as neo-customary or falling somewhere between true customary and statutory. The distinction has further been seen as leading to a continuum of market types, ranging from formal land markets on the one extreme and informal land markets on the other, with different land delivery modes and transactions in between the two extremes.

Formal markets generally trade in real rights, that is, those appearing on deeds registries. A common attribute of the formal market is that the poor are unable to enter and transact, largely because they

have neither access to the finance nor the income that would enable them to participate. However, evidence seem to indicate that even formal titles are now being transacted informally, without following procedures specified down by law. Informal markets on the other hand, deal in rights (entitlements) that derive not from Deeds Registration, but from a myriad of socially sanctioned and legitimated processes. Informality largely derives from the failure of the formal market to provide for low-income households and those who are self-employed. It is now widely believed that in urban Lesotho, over 70% of the population obtain land through informal means, and that it not only the urban poor who do so, but recent evidence from on-going regularisation scheme in Maseru points to active participation of relatively wealthy people, who have possibly acquired land for investment in rental housing (*malaene* see Plate 7).

Malaene have indeed become a feature of privately provided low-income housing, which has eased the pressure on the public sector to provide housing for the urban poor. In some parts of Maseru, especially around the areas where the garment factories are located, tenancy rates can be as high as 72% (Hall, 2004). Hall (2004: 25) argues that the 'high proportion of tenants [indicates] that land-owners were responding effectively to [an] investment opportunity' and notes further that "if all those investing in *malaene* were to follow the formal administrative procedure and set standards, the whole process would be slowed down to a snail's pace, with homelessness being the inevitable result'. However, although something is known about the profiles of tenants of *malaene*, those of their landlords, their investment rationale and market impacts of their activities in Maseru and elsewhere remain unknown.

8.2 Data on market activity

There is no data on urban land market activity in Lesotho, including Maseru. Some rudimentary data has been put together by the MOWPT (2010) consultants, but even they seem to have been at pains to present a reasonable picture of market activity in Maseru. They show that beyond the colonial reserve, the property market exists in isolated areas and land values in the city in general are marginal, with those on the urban fringe being merely symbolic. This they attribute to the absence of viable commercial agriculture, which could have acted to create valuable land use against which urban land uses would have to compete.

Aliber, *et al* (2003) conclude, as most observers have also recently done (see for example MOWPT 2010) that the formal property market in Lesotho is significantly inactive. To illustrate this, Aliber *et al* compared property transfers in Lesotho and Botswana in 1993. They show that in Lesotho, less than 170 properties were transferred per year between 1993 and the first quarter of 2003, compared to over 3 300 property transactions that were recorded with the Deeds Registry office in Botswana in 2001 alone. Their analysis of property transfer data and values for 2001 and the first quarter of 2003 shows that the total value of property transfer was approximately M6 million in Lesotho, which was 80 times less than the value of property transferred in Botswana in the same year.

Aliber *et al* (2003) further attest to an inactive property market by alluding to the near absence of estate agents in Maseru, except small companies that provide a variety of property-related services, with estate agency constituting a small component of their services. However, in recent years anecdotal evidence seems to suggest that informal estate agents are on the ascendancy, although the majority are unlikely to have been trained as such.

Market activity is further constrained by the slow title-registration process. Work by Swedesurvey (2006) shows that the volume of registered leases was very low, as approximately 10 000 leases had been registered over the 25-year period since 1980 when the Land Act 1979 came into force. Over the same period, 27 000 lease applications had been lodged and over 40 000 plots had been surveyed, for which leases were yet to be prepared. It takes a long time to register a lease, with an average estimate of one

year for land grants from planned and surveyed layouts and up to eight years for land obtained through informal means. Add to this, the requirement for consent to transactions by the Minister for Lands, which may take some time to be given.

In summarising the land administration problem in Lesotho, Swedesurvey (2006) shows that:

“Formal land tenure systems and its administration do not provide what the Lesotho society needs. The consequences of this are for instance that formal land rights are not provided to the majority of Basotho, investments are hampered, government revenue is not collected and land markets are dysfunctional.”

They go further to indicate that there were four underlying ‘root problems’ to land administration:

- The formal system is expensive;
- It is slow and inefficient;
- It is not transparent, and
- It is perceived as restrictive (Swedesurvey 2006: 5)⁶

Swedesurvey (2006) estimates that about 10% of leases could have been transferred since 1980. Although considered high, transfer costs are about 8% of property value (see Box 4), which is certainly not the most expensive in sub-Saharan Africa (Swedesurvey 2006).

Box 4 Cost of transfer and mortgage

The following formula is used to calculate the cost [to transfer property], the majority paid to the Deeds Registry:

- Transfer duty is 3% of the value up to M10 000 and 4% on excess;
- Stamp duty is M70 up to a value of M7 000 and thereafter 3%;
- Additional fees are altogether M13.50;
- The cost of valuation if done by the LSPP valuer is M150.00
- Cost for the conveyancer is M2000.00 – M4 000.00;
- The stamp duty for mortgage is 3%.

Transfer of a property valued to (sic) M1 000 000 would cost about M73 000, while to register a mortgage of the same amount would cost M30 000.

Source: Swedesurvey (2006) *Status of Land Information Systems and Land Registration Systems in Lesotho: Baseline Study Report*. Maseru: Ministry of Finance & Development Planning.

There is also virtually no information on the sale prices of different land parcels, which makes it difficult for the market to establish reasonable prices. But barring the land parcel, house prices in new private housing developments mentioned in Section 7 have possibly been influenced by those obtaining in South Africa’s metropolitan areas and neighbouring towns.

⁶ See Swedesurvey (2006) for detailed assessment of procedures of land registration in Lesotho.

8.3 Market distortions

Efficient and equitable land markets are necessary for well-functioning cities. However, the market has limits and these emerge when it fails to allocate goods, such as land, efficiently, thereby prompting state intervention. Arguments exist that, left on their own, formal markets will not allocate land to poorer urban residents, which often leaves this section of the population to be catered for by the state or fend for themselves the best way they know how in informal settlements. However, in the process of intervention, the government often also produces market distortions that tend to further exclude the urban poor.

It has been shown in previous sections of this report that formal land markets suffers from distortions caused by poor land information systems, and cumbersome and slow land registration processes, as well as unregulated private land development, leading to unplanned or ribbon/corridor development of land in the urban periphery. Lack of uncommitted land within the inner city areas has also tended to push both the poor and relatively wealthy developers further out into informal peri-urban areas, invariably leading to increased commuting distances from peripherally located settlements. Attempts by the government to acquire customary landholdings through eminent domain have hastened informal and clandestine subdivision and sale of such land by customary holders. This has resulted in extensive unplanned and un-serviced mixed-income residential areas.

9.0 SUMMARY

The report has reviewed the efforts of the Lesotho government, alone and assisted by its international development partners, to reform its land management and administration systems in the past and in recent years. The report significantly focused on current reforms funded by the Millennium Challenge Corporation, specifically the potential impact of the reforms on access to land by the urban poor. In the main the review shows that the MCA's land reform focuses exclusively on titling at the exclusion of the supply of new land to the market. The MCA's regularisation project is in effect a mass titling project and international evidence would seem to suggest that the poor, especially the landless, rarely benefit from such programmes. In addition, while reforms are clearly visible and significant with respect to land administration, matters relating to land management remain largely similar to those under the Land Act of 1979. Therefore, the flawed systems of land supply and management that existed under the repealed Land Act of 1979 have been left unreformed. This means that the urban poor will continue to rely on informal systems of access to urban land.

It is now widely believed that in urban Lesotho, over 70% of the population obtain land through informal systems, and that it is not only the urban poor who do so. Recent evidence from an on-going regularisation scheme in Maseru points to active participation of relatively wealthy people, who have possibly acquired land for investment in rental housing (*malaene*). *Malaene* are a significant feature of privately provided urban low-income rental housing in Lesotho, which has not only eased the pressure on the public sector to provide housing for the urban poor, but has ensured that slums are nearly non-existent. However, although something is known about the profiles of tenants of *malaene*, those of their landlords, their investment rationale and urban land market impacts of their activities remain unknown.

Last but not least, due to various constraints that derive from inefficient land management and administrative systems, the formal property market in Lesotho has remained undeveloped and is largely inactive. Evidence for this is the near absence of estate agents in Maseru, except small companies that provide a variety of property-related services, with estate agency constituting a small component of their services. It is acknowledged however, that in recent years the number of informal estate agents has been in the ascendancy, although the majority of them are unlikely to have been trained as such.

There appears to be three significant areas where organisations working in this field could play a potentially useful role, given its mandate of ensuring that land markets work better for the poor. These are:

- A detailed review of land supply to the urban poor with appropriate recommendations
- Assessment of the *Malaene* rental housing or a comprehensive housing market analysis would be probably be a more useful exercise.
- Assessment of the impact of MCA's mass titling programme on the poor.

Additional areas that have been suggested by some of the stakeholders consulted during the preparation for this report include:

- The need for a community-based NGO that could educate people on the virtues of formal titles and the need to stay within the system.
- The need for an NGO that would mobilise communities around service provision, which is a missing link in the MCA's funded regularisation programme.

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