



**Urban LandMark**

making urban land markets work for the poor

**INVESTIGATION INTO THE DELAYS IN ISSUING  
TITLE DEEDS TO BENEFICIARIES OF  
HOUSING PROJECTS FUNDED BY  
THE CAPITAL SUBSIDY**

**Report on the findings of  
interviews with experts**

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**This project was commissioned by Urban LandMark and undertaken by  
Shisaka Development Management Services.  
The project team comprised Ros Gordon, Matthew Nell and Adrian Di Lollo.  
This report was prepared by Adrian Di Lollo and Ros Gordon.**



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## 1. Introduction

South Africa's housing policy was launched in 1994 with a key component being the housing subsidy scheme, which promised to deliver one million houses in five years. Between that date and the end of the 2010/11 financial year, the Department of Human Settlements estimates that it has subsidised the development of approximately 3,25 million units of housing and serviced sites<sup>1</sup>. These have been delivered through a variety of subsidy mechanisms, with the most predominant being the provision of a small, low-cost house on a stand to a qualifying individual, free of or at a minimal charge, on an ownership basis (often called 'RDP houses').

The majority of these individuals should have received the title deeds to their houses. It is generally recognised that receiving title is an important component to the provision of a subsidy house and is critical to ensuring that poor households can use their house as an asset to build wealth. The Breaking New Ground review (2009) explicitly identifies the need to ensure residents of subsidised housing access formal title, as a leading public policy priority. The report emphasises that duly conferred legal title, as registered in the deeds registry, is critical to enable a functioning housing market, that it creates certainty in legal transactions and provides "a central, unchallengeable repository of ownership." Recognising that subsidised houses have extremely limited potential to function as an asset<sup>2</sup> without the provision of formal title, the report identifies the objective of ensuring that formal transfer occurs as quickly and efficiently as possible.

However, the extent to which title has been transferred to subsidy beneficiaries is not certain and there are currently a number of initiatives underway to determine the extent to which title has been provided.

**Urban LandMark** (ULM) appointed **Shisaka Development Management Services** (Shisaka) to carry out an investigation into what key stakeholders (government officials in all three spheres as well as housing institutions, developers, NGOs) and parties believe is the reason behind the delays and blockages in issuing title deeds to housing beneficiaries. The investigation was not intended to be primary research but rather an interrogation and analysis of informed expert opinion of key stakeholders. The investigation has been distilled into a report that includes recommendations on efforts to resolve the current problem and the historical backlog, as well as recommendations for how ULM could usefully take up this issue in the future.

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<sup>1</sup> Victor Rajkumar, Department of Human Settlements, May 2011

<sup>2</sup> A more fundamental concern is that lack of formal title undermines efforts to improve land governance, inhibits the functioning of the housing and undermines market rights (and obligations) of full urban citizenship. ,

The methodology for undertaking the work comprised:

1. **Desktop review** of existing research and documents.
2. **Interviews with experts:** Telephone interviews held with approximately 30 stakeholders to obtain their insights and opinions.
3. **Developing recommendations.**

**This report sets out the interviews with experts.** The desktop review had identified broad reasons for the delays in deed registration. Accordingly this component of the investigation probed these reasons (policy, budgetary, administrative and legal) to help gain a detailed and in-depth understanding of the problem and to suggest comprehensive solutions.

Interviewees were asked, *inter alia*, to expand on what they saw as reasons why so many RDP properties remain unregistered. More importantly, however, interviewees were also asked to suggest what interventions government could undertake to address the situation, even if such solutions are not currently possible within the current legislative, administrative or policy framework (governing land use, deeds etc.).

The findings are presented in section three of this report and are arranged in 23 sub-thematic categories. While the term *RDP housing* is perhaps an anachronistic description of the capital subsidy, it is still used broadly in the sector and was used by the vast majority of the interviewees. The term is therefore reflected in the report although, where appropriate, it is occasionally used interchangeably with the broader *Housing Subsidy Scheme* or HSS. The terms stakeholder and interviewee are also used interchangeably.

## 2. Methodology

A total of 35 interviewees were identified and agreed with Urban LandMark in terms of the following categories of stakeholders:

- National deeds register (two interviews)
- Provincial deeds registry offices (10 interviews – two each in five different provinces)<sup>3</sup>
- National Department of Human Settlements (two interviews)
- Provincial Departments of Human Settlements (10 interviews – two each in the same five provinces as for the deeds registry offices)
- Stakeholders in a municipality (five interviews in the same provinces as for the deeds registry offices)
- Developers of low-income housing (four interviews)
- Conveyancers involved in registration of properties on subsidy housing projects (two interviews)
- Other (comprising non-governmental organisations and consultants)

Interview guides were developed for each of the different categories of stakeholders. The guides are provided in a separate report and were agreed with Urban LandMark prior to the interviewing process commencing.

The methodology applied in undertaking the interviews was as follows:

- 1) The appropriate guide was sent to each interviewee ahead of time and was sometimes slightly modified in order to fine-tune the information required from that particular institution or stakeholder.
- 2) Because the knowledge range of the interviewees varied greatly, even within a single category, the researcher used the guides with discretion, drawing on them as needed and adding pieces to the discussion as relevant. In this sense the interviews were *semi-structured*.
- 3) In instances in which the interviewee's responses were comprehensive and/or complex (the majority of the interviews, in fact), the possibilities for misrepresentation or error were minimised by the researcher sending the interviewees a summary of the discussion with the main points emphasised. Interviewees were asked to review the summary and make any corrections, clarifications or additions. The researcher followed up with such summaries in 26 cases and 22 responded with written comments. In at least five cases the researcher also followed up with verbal a discussion to help further clarify particular points.

A total of 32 interviews were ultimately undertaken. 28 of these were completed via telephone and three of them were completed face-to-face. The length of the interviews

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<sup>3</sup> It was initially intended to undertake 10 interviews in relation to deeds offices overall. However, it became very evident early in the process that the value of such interviews were limited and that much more relevant information could be obtained through interviews with other stakeholders. *Inter alia*, the strong consensus was that the most fundamental problems did NOT lie with the deeds registry.

ranged in time between 15 to 90 minutes. Not all interviewees identified were willing to be interviewed. For those who refused or who did not respond, proxies were identified.

### **3. Findings**

#### **3.1 *Extent of the problem***

Stakeholders gave differing views of the extent of the problem of unregistered RDP properties. The picture that emerged was a very uneven one, varying greatly between municipalities, provinces and areas of differing land tenure status. Nelson Mandela Bay Metro is one of the “better” examples. In this municipality approximately 43,000 homes have been built since the inception of the RDP programme. Of these approximately 27,800 have deeds registered (while a further 2000 were sitting with the municipal attorneys in March, 2011). The Provincial Government of the Western Cape estimates (however roughly) that 30 to 40 per cent of the approximately 250 000 RDP units built in that province have no title deeds.

The national picture is not entirely clear. The National Department of Human Settlements (NDHS) claims that by March, 2011 approximately 2.1 million state-subsidised dwellings had title deeds but these included dwellings transferred to occupants through the Extended Discount Benefit Scheme (EDBS). The NDHS claim that this figure cannot be disaggregated for EDBS and RDP. In early 2011 approximately 2.4 million houses overall had been developed through the RDP (HSS) programme since its inception. But its share of the 2.1 million title deeds issued has not been revealed.

While not divulging the actual figure, another interviewee from the NDHS acknowledged that a recent beneficiary audit of the HSS showed the percentage of those with title deeds to be “relatively low” in most provinces.

Noting that the matter has been on the table since 2007, one interviewee (a former NDHS senior officer) recalled that the NDHS worked with a private company to map the deeds of 1.9 million beneficiaries. However, he noted that this project had not been completed and only mapped 800 000 units. It did determine, however, that:

- i) many people were not staying in the houses allocated to them
- ii) people did not understand the value of their home as an “asset”
- iii) there was a major disconnect between deeds records and reality on the ground.

These findings, *inter alia*, have been very much reflected in the course of the interviews for this project.

### **3.2 Delays in municipal processes in township establishment and proclamation**

Directly or indirectly most of the stakeholders expressed the sense that delays in municipal land development processes was a major, if not the greatest, root cause of the delays in RDP deed registration. One interviewee noted that:

*“The single biggest reason for the backlog is the inability of municipalities to process and finalise land development (township establishment, rezoning and subdivision) applications within a reasonable period of time.”*

One of the interviewees from a municipality revealed that, while there are certainly internal capacity limitations, difficulty in accessing external skills also contributes significantly to delays:

*“Township establishment is a highly technical process. It requires access to land surveyors and lawyers – skills that are hard to procure. So these matters are often shelved.”*

An interviewee from the Gauteng Provincial Department of Human Settlements stated that it takes two to three years to get a township established. Others gave examples of technical or legal requirements which result in delays. Difficulty in completing General Plans was also cited by several interviewees. As an example, one municipal officer cited a case in which a simple component-line record was required to finalise a General Plan. The record of the component line took several months to locate and in the process significantly delayed the township proclamation. Another municipal interviewee suggested that developing a General Plan can be a complex legal and administrative process (e.g. understanding the difference between class A, B and C General Plans) and that this process is sometimes simply avoided or never completed.

**“Government players have generally not been convinced of the value of securing title”**

Noting that conditions of township proclamation are difficult in many areas, one interviewee noted that a township may be approved, but this is not the same as proclamation. One interviewee (a planner) stated that:

*“It can be very difficult to determine the precise reasons for blockages in township proclamation in many instances. Sometimes the process just stops!”*

Stakeholders offered various insights as to the reasons for this. In some instances the consultant appointed to undertake the process does not see it through (which could indicate poor contract management on the part of the contracting agency). In other instances the municipal budget only covers the development process to a certain point. At least two interviewees argued that political interference can also be a factor. In the Phola Park/Greenfields development political infighting and rivalry was so great that the province

had to step in. Yet, some nine years later the process of township establishment has still not been completed.

Another interviewee, an attorney, argued that the cumbersome legal process involved in transferring land between spheres of government can, in some instances, serve to hinder the township development process. The Oukasi Township (near Brits) took eight years to establish. Because the land had been expropriated, a constitutional legal process kicked in by which the land had to be transferred to the province and ultimately to the municipality.

As noted by one interviewee, however, municipal policy itself, as well as a lack of alignment between municipal departments, can serve to delay or even prevent a township from being proclaimed. He noted that some municipalities (possibly based on a Council resolution) will not allow for a township to be proclaimed until the roads are tarred. In such situations township proclamation may be significantly delayed if the Housing and Roads Departments are not programmatically aligned.

The importance of alignment of municipal departments in addressing township development delays was emphasised by the interviewee from Tshwane Metro. The process greatly improved at that municipality following a move to escalate the responsibility for township proclamation to a higher office. The Service Delivery Coordinator located in the Office of the City Manager was given responsibility for establishing a task team of relevant line departments and key role players (e.g. City Planning Department, Legal Services Division, Housing, etc.) of the City. Such teams have generally been successful in meeting the challenges of township establishment.

Similarly, an interviewee from Johannesburg Metro stated that (at least since 2006), once the City has committed itself to township development, all institutional arrangements are put in place and the process is run in a parallel manner. However, the interviewee also underlined the importance of the municipality being aware of potential legal and other problems *before* commencing the township development process. A comprehensive feasibility study is always undertaken before the decision (to develop or not) is made. In some instances, the interviewee noted, there are good legal reasons not to proceed. Since 2006 the Metro has avoided building before the township is proclaimed.

Sheer lack of municipal capacity to undertake deed registration at scale, and/or the lack of will to build such capacity, was noted or inferred by several interviewees. One consultant noted that from the 1990s through to the 2000s most RDP housing was built by large construction companies. He argued that most of these companies had the capacity to undertake large-scale deed registration, many being accustomed to dealing with complex sectional title registration. When the companies exited the market, municipalities, and some provinces, had to take up this task, for which many of them were poorly capacitated. Some also inherited significant registration backlogs.

As an example, one senior officer stated quite directly that deeds are simply not secured for most of the RDP houses built in his municipality. The interviewee explained that

*“Many people are not versed in the process of registration of title deeds and all the issues involved. They tend to shy away from this and concentrate on what they know: basic housing delivery.”*

The interviewee team from this municipality spoke of the deed registration requirement almost in the sense of it being a luxury they cannot afford, given more fundamental demands on their resources:

*“Our major challenges (in RDP development) concern the acquisition, consolidation and subdivision of land. This is where the intellectual capital is used”.*

Gauteng Province has promoted the use of professional registered teams to ensure that all technical aspects of RDP housing development, including deed registration, are properly addressed. Teams include conveyancers, engineers, planners, quantity surveyors and others. Reflecting a broader problem in government however, the interviewee from Gauteng Province noted that such teams are not effectively monitored to ensure that the entire process / cycle is completed. He cited capacity limitations in provincial government in terms of monitoring & evaluation and contract management. However, the interviewee also referenced an initiative by province of creating a panel of 12 conveyancers which has the mandate of accelerating the deed registration process. This initiative seems to be working well and could be benchmarked by other provinces and municipalities.

Noting that in recent years most RDP housing development has taken place on municipal land, one stakeholder argued that this allowed for the “normal” sequence of development to be deviated from. As a result, construction and occupation of the houses can take place years before township approval and transfer. A private land owner, he argues, would not permit this.

One interviewee, a consultant and former municipal official, emphasised the importance of fully addressing legal obstacles well before the RDP developer commences work. He argued that the municipality (or province) should try to ensure that as much of the work as possible – in terms of layout, completion of General Plan etc, is completed prior to the developer being given the go-ahead. Citing a practice example at Cato Manor, the interviewee explained a land assembly legal expert would be engaged to ensure that all legal obstacles were cleared. He claims that this spawned the idea of authorities “assembling land ahead of time”, approaching the issue technocratically.

One municipality suggested that a lack of delegated authority to approve changes in respect of *conditions of establishment* adds considerably to blockages. The interviewees explained that as the approval process progresses, there are many changes that have to be made and these must be approved by various departments within the municipal and provincial spheres. In many instances approvals are delayed for long periods of time, as only the most senior officials are authorised to make such decisions.

The interviewees argued that appropriately delegated authority is needed to deal with conditions of establishment in cases where changes are not material or fundamental (i.e. the vast majority of cases).

### **3.3 *Land occupation and displacement***

One interviewee, a former Surveyor General, identified the fact that sites are sometimes informally occupied as a significant barrier to formal township creation. (A provincial interview team also raised this issue). Such land is usually classified as “green fields” but does not function as such. Land surveyors in some of these situations can be under great pressure and can’t do their work. In most cases the residents don’t want pegs drilled through their roofs or placed inside the dwelling yet the Surveyor General will not accept the necessary documents for township establishment when land has not been fully beacons. The interviewee’s experience is that in many cases occupants have not been involved or consulted. The residents often assume they have a right to the land and houses built on it. Municipalities are often reluctant to evict in such cases. The interviewee concludes that:

*“Not enough is done for the inclusion of the present occupants of the land in the future development. What happens if they are not beneficiaries of the development? The occupants must be participants and beneficiaries in the whole process”.*

In the context of discussing barriers to township development and proclamation, a developer interviewee noted that when the RDP development is part of an *in-situ* upgrade of an informal settlement, there will be many shack dwellers residing there who will not qualify for an RDP unit. (e.g., they may have used their subsidy elsewhere, they may not be South African citizens, etc.). This will lead to displacement of some and a host of social and legal problems. He also cited the common occurrence of two existing dwellings often being located on a single stand. In such cases the transfer cannot be initiated before one of the occupiers is relocated to a new site.

### **3.4 *Opposition to township establishment***

One interviewee, a land and environment attorney with the Constitutional Court, argued that an already cumbersome township establishment process is exacerbated where an application is formally opposed. Such an objection must, in terms of existing legislation, be considered by municipalities at “hearings”. In most metropolitan municipalities, hearings normally only take place between 18 and 24 months after the date of submission of a land development application. Hearings must also be held in respect of objections to rezoning and subdivision proposals, both of which are also relevant to RDP projects.

This interviewee recommended that the practice of such hearings at the municipal level be dispensed with and argued that there is no broader reason in law why applications and objections cannot be considered on the basis of the documents presented, without the necessity of having a hearing. In this attorney's opinion the persons making up the committee to consider the objections are often unqualified to assess the critical legal and planning aspects of the case.

Municipal councilors can make up the bulk of the panel/committee and (in the interviewee's experience) sometimes make decisions based on political considerations rather than on legal and planning principles. He noted that applications relevant to environmental authorisation in terms of the National Environmental Management Act, Subdivision of Agricultural Land Act in terms of Act 70 of 1970, applications for water use licences, etc., are all considered without hearings. Such cases are considered on the basis of the documents presented and this interviewee strongly felt the same should be made applicable to the consideration of planning applications by municipalities. He added that (in the proposed scenario) a hearing would be held only when an appeal is noted against a decision by a municipality.

### ***3.5 Municipal merging / rectification of mistakes***

**"Township establishment and registration of deeds do not have to be complex processes. But in South Africa many public officials administrate out of fear."**

At least three interviewees noted or inferred that technical problems had arisen from the merging of municipalities in 2001, which served to significantly slow down the process of township establishment (and, by extension, the process of deed registration). One municipal representative cited some specifics, noting that more than 30 per cent of the problems are related to changes in configuration in erven. As a hypothetical example, approval may be given for what

the municipality believes are 20 erven, but it turns out that the Surveyor General's cadastral records indicate that these amount to 120 erven. This interviewee also noted that erf numbers can change up to three times (presumably in the to-and-fro between that municipality and the Surveyor General) before they are finalised.

One municipal official argued that the provincial office often makes incorrect allocations (possibly based on the fact that cadastral records have not been fully standardised in some areas). He noted that, once a payment is made regarding the certification of a settlement plan, it is very difficult to reverse. In this example, letters concerning such rectification have been sitting with the relevant provincial office for up to five years. This has also created a problem with duplicate subsidies being approved via the HSS process and the interviewee felt that regulations needed to be amended to reverse these.

### **3.6 Impact of servitudes**

Noting that most RDP housing is now developed on government-owned land, a developer/planner interviewee pointed out that when dealing with public land there can be a number of conditions of establishment which must be addressed. He has found that these are often not taken into account (or not managed well) by municipalities when attempting to develop townships. There is a wide range of possible servitudes that could impact on the establishment of a township. There may be servitudes, for example, relating to Eskom, to water lines or to roads/transport infrastructure. This will prevent the opening of the township register and consequently the registration of stands in the name of the approved beneficiary. The cancellation of existing rights on particular parcels of land can be a complex process for many municipalities. One interviewee cited an example of riparian rights affecting land on which the municipality was planning to develop a township. In this instance, water flowed onto a farm which had, some years before, been subdivided into 150 plots. Legally speaking the 150 “new” owners had inherited the riparian rights. Ultimately, the municipality secured a High Court cancellation order, but this resulted in high costs for the municipality and the township development process was considerably delayed.

### **3.6 Opening of Township Registers**

Several stakeholders noted that once a township is proclaimed the opening of a registry does not automatically follow. One municipal official confirmed that numerous townships have been created which have never been proclaimed. Another suggested that people are not always clear as to who is responsible for opening registers. In such instances no single party (e.g. developer, municipality, province) is proactively taking responsibility, with the result that no registry is opened. This interviewee also noted that the range of technical and legal challenges faced by municipalities in the conversion of leasehold to freehold land also contributes to significant delays in the establishment of new registries.

One provincial official argued the establishment of a township register may sometimes be delayed even after the township is proclaimed, because the municipality does not wish to pay the required fees to the deeds office. In such circumstances the province may step in. An interviewee from a deeds office found this to be baffling, as the fee to open a new register is currently a mere R160. He suggested, however, that as this process must be undertaken by a qualified conveyance, the municipality may object to paying what could be a hefty attorney’s fee.

Two other interviewees noted that the municipalities or provinces often provide insufficient instructions – or no instructions at all - to the conveyancers undertaking the RDP deed registrations. Both considered that this was a significant delay factor. It can be inferred, in some areas at least, that there would be poor oversight and management of the conveyancing function.

One planner interviewee placed the problem of township registers (i.e. the fact that many are opened late or not at all) in the context of weaknesses in the bureaucratic process leading to a lack of continuity and responsibility. He stated that, while there are many skilled and dedicated people in provincial Departments of Human Settlements, the administrative process/structure sometimes does not enable a suitably empowered individual to see an issue through to the required outcome.

Responsibility for creating a township register is a prime example of this. The interviewee asserted that there can be a loss of continuity (and actual documents going astray) as an issue is passed to and fro between departments and agencies along with the responsibility for the next “stage.” Being at the end-stage of the township (and RDP) development process, register openings can be particularly affected by this phenomenon because by that stage the process has often derailed or fizzled out. The same interviewee recommended the implementation of an administrative arrangement by which a senior staff member be given full responsibility for ensuring that a township register is established. He noted that currently, provision for this (and other processes) is supposed to be “picked up in the document flow process” but often ends up with no-one taking responsibility.

A representative from the Pretoria Deeds Office confirmed that the cities of Johannesburg and Tshwane open township registries on a frequent basis. An interviewee from the City of

Johannesburg stated that the opening of township registers is no longer a problem for that municipality. Preparation for such is made well in advance, all necessary information is gathered and, in most cases, the register is opened as soon as the township is proclaimed.

**“A high rate of RDP occupants who are not owners should not come as a surprise. Poor people need to be very mobile in terms of work requirements, attending to family matters, etc.”**

The interviewee from the Chief Registrar of Deeds noted the importance of the Less Formal Township Establishment Act (LFTEA<sup>4</sup>) in the opening of township registries. He suggested that this law provides a straight-forward means to open registries at the end of the township development process. The Upgrade of

Land Tenure Rights Act of 1991 (ULTRA) also provides such a means, but this is apparently not as well documented. The officer from the Chief Registrar of Deeds also noted that, following the passage of ULTRA, the affected leasehold land was supposed to be converted to freehold within a two-year period. Funds were made available at that time to make township registers operational.

One stakeholder, an attorney, noted that while there is a statutory obligation to convert leasehold to freehold, this had been a “slow and difficult process” in many areas. As one example he cited a township located in Mogale City Local Municipality. Despite having been

<sup>4</sup> See section 3.9 of this report (possible consequential impact on LFTEA of court ruling on DFA)

proclaimed in 1987 (under the Black Communities Development Act) there is still no township register in 2011.

Two interviewees expressed doubt as to whether significant numbers of homes were converted to freehold using ULTRA. Yet it is through ULTRA that dwellings created under Proclamation 293 of 1962, which is still operable in some areas (e.g. former homelands), may be converted to freehold<sup>5</sup>. One interviewee noted the relative administrative ease of creating settlement under Proclamation 293, given the fact that the authority involved does not have to comply with the mainstream deeds and survey requirements or to develop township registers. She added that in the early 1990s the then Department of Land Affairs funded a programme to undertake land surveys in townships so that ULTRA could be applied. While it appears that some provinces undertook the surveying, registers have still not been opened for many of the affected townships. .

The negative consequences of not having a township registry were emphasised by a developer stakeholder. Again citing Phola Park/Greenfields as an example, he noted that some 6 000 units of housing remain unregistered and this means that the municipality cannot collect rates or other charges. This must also negatively affect the council's planning process, social budgeting and other functions as it would be very difficult to establish demographic profiles. The interviewee noted that this has been allowed to occur because the province (which took over the process) has no incentive to complete the difficult process of formalisation. He was one of several stakeholders who cited the need for incentives (two also mentioned penalties) for government agencies to see the deeds registration process through to completion.

At this juncture it may be apt to remember that many RDP properties are built in existing formal townships. These interviews have illustrated that problems in township establishment and proclamation (and in opening new registers) however primary, do not account for all of the problems concerning RDP deed registration.

### **3.7 Consequences of non-transfer and "title divergence"**

The socioeconomic effects, both on the household unit and on local market processes, of so many RDP beneficiaries not having title was explored by several interviewees. A common concern (one which was well documented in the desktop review) was the widespread practice of "informal" sales. However, it should also be noted that some informal sales seem to occur even when title has been issued to the beneficiary. One interviewee from Cape Town noted that, even if the owner has a title and is available, the process of formal transfer is complicated, can take between three and six months and the costs involved can be prohibitive for the "purchaser". He argues that it is for these reasons that communities have

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<sup>5</sup> Proclamation 293 creates the legal framework for a deed of grant or permission to occupy but not the right to freehold.

bypassed the process via informal transfer and that a unit with a market value of say R80,000 might be “sold” for R30,000.<sup>6</sup>

This interviewee, a developer and NGO director, assesses the problem in terms of what he calls “title divergence”, that is to say, when the title owner (or at least the owner who has the *right* to title) differs from the practical “owner”. He explains:

*“The issue is not only title deeds that have failed to ‘emerge’, though this has itself produced divergence between occupation and legal title. It is also regularisation of title divergence, the result of informal transfers that have occurred. In other words, quite rightly, communities have found mechanisms for the informal transfer of homes as the formal process is not possible (i.e. deed has not been registered or issued) or the process is too complicated or costly”.*

The interviewee cited a 2006 study of the De Noon township conducted by the province which indicated a “divergence” rate in RDP properties of 39 per cent. He argued, however, that the rate in older townships was likely to be significantly higher.

### **3.8 Problems at project close-out**

Reflecting an important issue identified in the desktop review, at least four interviewees noted or inferred that the improper RDP project closure contributes to the lack of deed registration in many areas. In particular, interviewees from the Western Cape Department of Human Settlements (WCDHS) noted that improper project closure had been a major problem in that province. Emphasising that proper project closure must include the transfer of deeds, the WCDHS conceded that throughout the 1990s and 2000s many RDP developers were paid out whether or not they had attended to this task (and other aspects of project finalisation). To redress the situation the Department has undertaken the following initiatives:

- Management has been restructured to ensure that there is a much greater focus on close-out. A Deputy Director has been appointed specifically for this purpose.
- Penalties for not properly closing-out have been mandated in contract clauses.
- An improved standard of ongoing project and contract monitoring has been implemented.
- Developers are now contractually required to produce a close-out report which (*inter alia*) must note if deeds have been transferred to beneficiaries.

The low level of the deed transfer component of the developer fee (R800) was also identified as contributing to close-out problems by at least three interviewees. In the Western Cape the experience has been that developers would often rather walk away than undertake the transfer and collect the R800 per property the programme makes available for this purpose.

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<sup>6</sup> In areas seen to be highly desirable, “selling” prices can be much higher than this. One interview noted that RDP homes in Cosmo City have been selling for as much as R175,000 in informal trade.

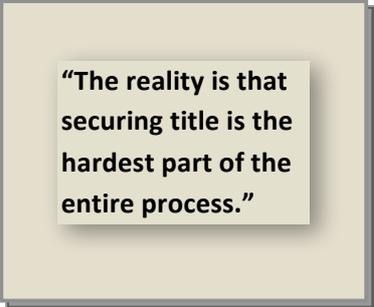
At the time of the interview the WCDHS was considering the possibility of motivating a change in structure to the final payment. In this scenario, the final construction payment would be combined with the deed transfer component to make it a total of R2 000. This would create a greater incentive for the developer to undertake the transfers.

One interviewee noted that some townships developed under LFTEA have had problems at the end-stage. She observed that, since LFTEA does not require the same level of service standards as municipalities, this led to problems at handover or unwillingness to take on the future maintenance of these areas.

### **3.9 Development Facilitation Act: Constitutional Court decision**

One stakeholder noted that due to, *inter alia*, the inability of municipalities to process applications, address the backlog and get the development off the ground, many land developers have turned to the procedure offered by the Development Facilitation Act (DFA). However, key parts of the DFA have been invalidated by the Constitutional Court

At least four interviewees referenced the June 2010 judgment by the Constitutional Court invalidating sections of the DFA as ultimately impacting on the issue of deed transfer in RDP projects. In that judgment, the court ruled that powers to establish townships and to rezone land are classified as “municipal planning” and are therefore the exclusive function of the local sphere of government as assigned under 156(1) of the Constitution. Chapters V and VI of the DFA were seen to undermine this exclusive function, assigning as they did powers to the provincial sphere of government represented in the “person” of the various Development Tribunals<sup>7</sup>. Outside of the cities of Johannesburg and eThekweni, the court suspended the invalidity of the said sections until 18 June, 2012.



**“The reality is that securing title is the hardest part of the entire process.”**

One interviewee who strongly disagreed with the ruling reflected arguments made before the court by a number of Senior Counsel that, should the court find that the operations of Provincial Development Tribunals (in terms of the DFA) are unconstitutional, it will have a profound ripple effect on the old-order legislation in terms of which most development is undertaken in many parts of the country. As examples the interviewee noted that in the Free State Province, planning decisions are taken on the provincial government level in terms of the Free State Planning Ordinance. In KZN, Western Cape, Gauteng, Mpumalanga, Limpopo, North West, etc., the old-order planning ordinances also provide for many instances where planning decisions are taken by provincial authorities. The Constitutional Court did not pronounce on the latter, and this has created substantial uncertainty as far as the legal/constitutional position is concerned.

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<sup>7</sup> Cityscope Town Planners: <http://cityscope.co.za/> (accessed 14.4.2011)

Similarly, some stakeholders have expressed the concern that the same constitutional principle of the exclusive functions of municipal government on which the court based its decision on invalidating key sections of the DFA, could logically also invalidate similar sections of the Less Formal Township Establishment Act (LFTEA).

However, another specialist attorney (not formally interviewed as part of this project) offered the opinion that both LFTEA and the old-order ordinances are operative until such time as they are specifically invalidated by the courts.

The City of Johannesburg was the prime (and successful) litigant in the case that invalidated key parts of the DFA. Interestingly, an interviewee from that municipality (a senior manager in the Planning and Urban Management Division) said that the City still intended to use LFTEA to develop new townships where RDP housing is planned. In fact, action was already underway to develop Orange Farm Extension 9 using this method. Cityscope<sup>8</sup> and other stakeholders have noted that many municipalities with limited capacity use LFTEA as one of the few means available to them to create townships. However, the Orange Farm example illustrates that it is not only marginalised or under-capacitated municipalities which benefit from LFTEA as a development and formalisation tool.

### **3.10 Progress payment sequence**

At least four interviewees referred to the issue of the jumbling of the previously sequential series of payments as a direct cause of many RDP properties remaining unregistered.

Before 2007 it was not permissible to commence work on a top structure before the serviced residential stand had been transferred into ownership of the approved beneficiary. This was governed through the strict sequential progress payment system which comprised five payment milestones. Progress payment number four represented the transfer fees. It was thus not possible to administer any payments under progress payment number five - the construction of the top structure - before progress payment number four had been administered.

However, in 2007 Housing MINMEC, the policy decision-making structure, approved that provinces and municipalities may administer progress payments out of sequence. One stakeholder noted that, since payments can now be made in any sequence, houses (in many instances) are being constructed while the township has not been proclaimed and the stands have not been transferred to the beneficiaries.

### **3.11 Land held in trust by traditional leaders**

One stakeholder, a former official of the National Department of Human Settlements, cited a 2007 study showing that approximately 600 000 RDP beneficiary households live on land held in trust by traditional leaders. These localities were not concentrated in Limpopo but distributed throughout Mpumalanga, Northwest Province, Eastern Cape and Northern Cape.

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<sup>8</sup> *ibid*

The interviewee noted that full freehold title is not possible on land held in trust by traditional leaders.

The stance of individual traditional leaders is significant. Some support the notion of individual title on land under their jurisdiction, while others don't. Some support formalisation but only on the basis of having communal title. One interviewee argued that, even when traditional leaders are supportive of the notion, little if anything is done to secure individual title. He added that, in any event, this process would take years.

Another interviewee (a planning consultant in Limpopo) argued that the whole issue of township development is clouded by legal uncertainty when the land is state-owned land in trust to traditional leaders. Vast portions of land in Limpopo meet this profile.

The abolition of the "homelands" (*inter alia*) represented a shift from the concept of "permission to occupy" and "deed of grant" statuses to full title. With RDP housing it became necessary to apply for freehold. But this raised the question for stakeholders of which legislative framework should be used to develop and proclaim a township. Should it, for example, be undertaken through the historical procedure or through LFTEA? Up until 1993 the traditional leader granted "permission to occupy." When an RDP project is introduced into this environment many officials remain confused as to which piece of legislation should guide the process. The planner interviewee noted that, in many parts of Limpopo, officials simply revert to old regulations in developing RDP projects.

### **3.12 Political pressure to build**

At least four of the interviewees (including municipal officials and external consultants) noted that government officials in many areas are under immense pressure to build RDP houses at scale. To do so, they will sometimes short-circuit the process of township proclamation to get houses on the ground with the sense that they will "look after the paperwork later."

In this regard, some officials appear to respond to political pressures to simply deliver housing rather than be guided by policy prescripts. In this environment, deed registration can come to be seen as "secondary in operational terms" by municipal managers and councillors. One interviewee referenced the behavioural psychologist B.F. Skinner who argued that people's behaviours (actions) are far more shaped by the immediate or short-term response from the environment than by the long-term consequences. This interviewee felt that this psychosocial dynamic very much plays itself out in terms of RDP housing development, resulting in an almost obsessive drive to build houses while ignoring the long-term consequences of doing so.

Indeed, a municipal officer volunteered that he and his staff were under great pressure concerning the "major urgency to deliver housing." Importantly, he noted that township establishment and, in particular, the deed registration process are lower-priority considerations. The official confirmed that "most houses the municipality is building do not have title deeds" and that many, if not most, of the townships do not have General Plans.

The townships are created through LFTEA but registers are rarely opened. Another (non-municipal) interviewee remarked that many communities established under LFTEA were not brought to finalisation.

### **3.13 Clearance Certificates**

Section 118 (1) of the Local Government: Municipal Systems Act 32 of 2000 provides that a Registrar of Deeds may only register the transfer of a property upon submission of a certificate issued by the municipality. This document must certify that all monies owed in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal charges for the period of two years before the date of application for the certificate, have been fully paid.

Eight of the interviewees – some 25 per cent – specifically noted the issue of clearance certificates as a stumbling block towards registering deeds for RDP properties. Most typically the problem relates to the significant time period between occupation of the property and the action taken to register the deed. In this often very lengthy period, household composition can change and the owner/beneficiary may no longer reside there, or has died, and a substantial backlog in service charges has accumulated. The City of Cape Town estimates that in approximately 90 per cent of cases of attempting to register the deed the owner does not reside in the premises and the occupant has not taken responsibility for charges.

**“Streamlined communication and coordination between the Metro and the Province are the keys to a better township establishment process. “**

While Section 118(1A) provides that the certificate is valid for 120 days from the date of issue, it appears that some municipalities apply a shorter period. Clearance certificates issued by Nelson Mandela Bay, for example, are only valid for a period of two months. Even slight complications at the deeds office (which in this case is located in distant Cape Town) may lead to time running out and the need to apply for a reissue of the certificates (which could take several weeks).

One stakeholder contended that many local authorities were often reluctant to give the required letter for a clearance certificate exemption. They are concerned that people on the sites owe the municipality money (development fees, connection fees, water, sewerage, etc.) and that providing the letter would be tantamount to a write-off. In this sense the withholding of the letter is a form of credit control. The problem is compounded due to the tendency to grant occupation prior to transfer.

Two of the municipalities interviewed claimed that, under the Public Finance Management Act (PFMA) and the Municipal Finance Management Act (MFMA), municipalities are prevented from writing off service and municipal debts in RDP housing for the purposes of

providing a clearance certificate. However, another interviewee (an attorney) strongly disputes this and points to an exemption contained in the Local Government Municipal Systems Act 32 of 2000. Section 118 (1) of that Act does indeed place restrictions on the transfer of properties against which service fees or municipal taxes/charges/fees levied in the previous two years remain unpaid. However, subsection 118(4)(a) of the Act specifically exempts from this restriction any transfer of a residential property financed with government funds (i.e. any RDP house). (This subsection also exempts properties vested through conversion of land tenure rights). The interviewee who pointed this out asked rhetorically how a municipality could possibly be in breach of the MFMA by confirming a statutory exemption.

### **3.14 Section 82 Certificates**

The Planning and Townships Ordinance 15 of 1986 (Gauteng) provides that the Registrar of Deeds may not register transfer of ownership of an erf in a township until the municipality concerned has certified that it will provide that erf with services, such as bulk infrastructure and engineering services, within a period of three months ("Section 82 Certificate"). At least two interviewees based in Gauteng commented that the inability of municipalities to guarantee services to some RDP sites means, by extension, that deeds cannot be registered for such sites.

One interviewee noted that a difficulty here is that the municipal departments responsible for providing the infrastructure and services may not have the same priorities as the housing department. He emphasised the importance of township and RDP housing development being undertaken in an integrated way across municipal departments. One interviewee noted that townships developed under LFTEA do not require Section 82 certificates. Another asserted, however, that whatever exemptions are made, there is no way of getting out of a set of requirements that are tantamount to a Section 82 certificate.

### **3.15 Change in household composition**

The fact that the vast majority of residents in RDP properties are not the official beneficiaries/ owners was noted by at least 14 interviewees. This makes rectification extremely difficult. Drawing from the earlier referenced beneficiary occupancy audit, an interviewee from the National Department of Human Settlements (NDHS) noted that many persons in occupancy are in fact approved beneficiaries, but are not the owner of record for that particular house. NDHS cites the high level of labour mobility as the chief reason for this phenomenon.

However, the departmental interviewee maintained that many, if not the majority of such instances don't relate to the head of household being absent (or dead) but to an administrative process which has not kept up with allocation. In such cases the beneficiary ultimately moved into a different house than the one the department's system indicated. In

such cases the provincial officials did not go back and update the record. This has also resulted in deeds being issued with an incorrect owner name.

Noting that the circumstances for many beneficiary households tend to change significantly in the intervening period between site allocation and the final phase of construction, Ekurhuleni Metro has stopped issuing title on stands before the top structure is built. Instead, an occupation agreement is issued to the beneficiary (in new allocations). The municipality reasons that this at least provides some level of regulation and a “fallback position.”

Several stakeholders commented on the considerable difficulty, time and expense of taking action to cancel an existing deed. An interviewee from a provincial Department of Human Settlements stated that many title deeds in RDP projects had (over the years) been issued in error. In instances where the occupant was uncooperative in the process, the action to cancel the deed will cost approximately R20 000, the bulk of which is used for attorney’s fees (in addition to court costs). An order of the High Court is required for this action.

**“Delivering title takes serious up-front commitment and planning. Both are often absent in many RDP projects.”**

At least two of the municipalities interviewed highlighted the extreme difficulty in reversing the title deed process once it has been transferred. However, both municipalities had taken the necessary court action (on occasion) in the past. One noted that the municipality had initiated discussions with Gauteng Province with a view to the latter taking up the matter but, as of April 2011, no agreement had been finalised.

One developer from the Western Cape (who is also the Director of a housing NGO) has worked with RDP residents attempting to obtain valid title in their own name. He claims that there are two possible remedies. One is High Court action, which can take at least two years and is extremely expensive, and the other is to use the Land Titles Adjustment Act (LTAA). On the latter, however, the interviewee stated that he had never seen a successful case. This interviewee argues that, at any rate, neither the Land Title Adjustment Commissioners nor the High Court could provide effective rectification of the problem (at least given the current legal framework).

### **3.16 Unresolved estates**

The fact that many beneficiaries have died by the time action is taken to register the deed was noted by several stakeholders. However, two stakeholders (a municipal officer and a provincial officer) also noted that this leads to another relevant issue: that of unresolved estates. This is highly significant because in the event of the death of a beneficiary of an unregistered property, deed issuance is not possible until such time that the legal heir/s has/have been identified and the estate wound up. One interviewee noted that the survivor/s may be left with a bill of R5,000 to R6,000 for this purpose and few can afford it.

The WCDHS has identified this as a serious issue which is significantly impeding the goal of regularisation. The department has (in the past) sought assistance from a law clinic based at the University of the Western Cape which responded by providing assistance to heirs of RDP beneficiaries on estate matters. However, the phenomenon is widespread and the clinic cannot assist all indigent heirs that the department refers. DHS is in the process of approaching the Law Society in the hope of securing more legal assistance.

This issue is further complicated by the fact that if the estate is worth more than R125,000 (and many RDP properties in the Western Cape are worth more than this) an executor must be appointed and the property valued. WCDHS receives queries on an ongoing basis both from municipalities and heirs of beneficiaries on estate issues.

### **3.17 Functioning of the Deeds Office**

Most interviewees who referenced issues at the deeds office itself expressed the sense that, while process or other problems at this institution sometimes impacted on timely registration of RDP deeds, these were not the primary components of the delays. Summing up the general consensus one interviewee noted that;

*“Difficulties lie not so much in the deeds office itself but in the work that needs to be done before approaching it.”*

Having noted this, however, the interviews revealed a distinct difference between the self-assessment of the deeds office and the experience of some key stakeholders. Furthermore, the research suggests that there are some processes and legal issues at the deeds office which if addressed could help facilitate greater ease of registration for RDP properties.

An interviewee from the office of the Chief Register of Deeds explained that while Deed Regulation 45.3 states that a deed must be registered within six working days, RDP property registration is governed by standards pertaining to “land reform transition”. In this latter category the turnaround time is three days. The officer felt that this standard was usually met and remarked that the “hold up” was with local government. The experiences of some other interviewees, however, suggest that this does not reflect the entire picture.

One municipal officer claimed that changes to title deeds can go “backwards and forwards” between the deeds office, the attorneys and the municipality. Numerous items can be changed, added or deleted. Another stated that clauses are often added and removed and this can be very time consuming. This interviewee also noted that, in his experience:

- Practices and “standards” vary significantly from examiner to examiner at the deeds office
- The conveyancing attorneys tend to work through correspondence and that this further slows down the process
- In some larger projects up to 100 deed applications can be rejected.

One interviewee, a developer and housing finance expert, stated that it can take up to a month to get a deed registered. He argued that while most deeds registry offices had reasonable numbers of staff, there are not enough employees with the necessary skills.

Another interviewee suggested that the deed registry offices were struggling and were not coping with the volume of applications they were having to process. He suggested that the Register of Deeds should examine ways in which the registry offices “*could become more facilitative rather than hard-core administrative.*” This interviewee identified the need to make the registration process easier without compromising the integrity and reliability of the deeds office.

A municipal interviewee stated that he had seen deed applications for an RDP deed registration be rejected up to three times, adding that rejections are sometimes made for technical rather than substantive reasons. A deeds office interviewee stated that there is “no reason why an application should be rejected more than once and that “it all comes down to the quality of the paper work.” He did concede, however, that “*not all staff are well trained*” and recommended that conveyancers always bring to the deeds office’s attention that a particular batch of applications are for RDP properties.

The interviewee from Lightstone also identified capacity limitations at some deeds offices as a contributing factor inhibiting timely registration of RDP deeds. More tellingly however, she also noted that in many cases for title deeds for HSS (RDP) properties, data had been captured incorrectly, was unclear or else the deed was missing. She based this assessment on a huge data-matching exercise which was being undertaken by Lightstone with the objective of matching beneficiaries with deeds.

At least two stakeholders questioned the value of the centralised nature of the deeds registration system in South Africa. One argued that centralisation of the system is problematic and also unnecessary. He estimates that 99 per cent of transactions are simply “A to B” and that functions could be devolved to municipalities.

### **3.18 *Appropriate role for conveyancers / question of suitability of deed system***

A general sense of several interviewees was typified by a former Land Title Adjustment Commissioner who argued that while the residential property conveyancing system in South Africa is thorough and legally sound, it is far too complex for small transactions. Consistent with the findings of the desktop review, interviewees with a background in conveyancing of RDP properties often found such transactions to be fraught with complications.

A developer interviewee pointed out that, in contrast to private housing sales, people in the RDP market don’t have a direct relationship with the conveyancing attorney. Information can be very difficult to obtain and beneficiaries often don’t have access to required documents. The interviewee referred to the “overwhelming logistics” of arranging all the necessary people to be present at the State Attorney’s office at the same time. He has found that

beneficiaries can be extremely difficult to contact and sometimes have to take a full day off work. The developer has sometimes had to make arrangements to meet the beneficiaries on Saturdays or in some cases arrange for the State Attorney's representative to go the beneficiary's house.

Several interviewees addressed or alluded to the fact that most municipal contact with the deeds office occurs via a conveyancing attorney. Some of them questioned the necessity to have an attorney undertake the conveyancing for RDP properties, a process that while mandated in law, brings considerable costs and complexity. One stakeholder (a development consultant) asked:

*“Could we possibly, for example, remove the need for an attorney to undertake the conveyancing? We could examine overseas models for this and on reducing complexity of the process and reducing transaction costs”.*

One interviewee, a legal adviser and municipal consultant, cautioned that dropping the role of the conveyancers entirely in RDP deed registration may be detrimental from a rights perspective. Noting that an important function of the conveyancer is to safeguard the tenure rights of the owner, she asserted that:

*“We can't create a system which, while attempting to simplify the process, undermines security of title for the poor.”*

However, this interviewee also argued that it should be possible to narrow the role of the conveyancer to one of checking that the rights of the beneficiaries/owners are fully safeguarded. She added that there is room to move several elements outside the current

legal purview of the conveyancing attorney. Specialised conveyancing clerks should be deployed in municipal housing offices.

**“The idea of integrating townships into the deeds registration system was good in theory, but in practice presents a myriad of obstacles”**

By the time the conveyancer is brought in, most of the work should have been done. She also emphasised that meticulous record keeping is vital in the conveyancing process and that this should not be compromised.

Beyond questioning the role of the conveyance, several of the interviewees questioned the very suitability of a deeds registration system for township communities. Indicative of this perspective, one interviewee argued:

*“The idea of integrating townships into the deeds registration system was good in theory but in practice presents a myriad of obstacles.”*

Another asserted:

*“We have a First World-deeds system in a developing-world spatial context. We need to question the very necessity of title deeds.”*

While not rejecting the notion of deeds, one stakeholder representing an NGO suggested an approach which would provide an intermediate measure. The proposal is to implement a form of “licensing” of the unit with the municipality, similar to a driving license. One would “register” occupancy with the local authority, the person’s occupation would be officially noted and a document issued. The occupant would pay a fee and the “license” would be transferable (for the same fee). After a period, (say seven years), the then “licensee” would be entitled to formally register ownership at the Deeds Office. The stakeholder’s organisation sees this as an incremental pathway to full normalisation.

### **3.19 State Attorney**

The State Attorney’s office plays a critical role in the deed registration process and various documents need to be prepared and populated with data held by this statutory body. One stakeholder noted that in undertaking its function in connection with the registration of RDP deeds, the State Attorney relies heavily on information from the municipalities (and also relies on the municipalities to undertake the necessary transactions). However, when such information is not forthcoming the State Attorney’s office does not have the capacity to follow up itself. Among other limitations, the State Attorney does not have the same access to land information on its databases as do the municipalities. The interviewee added that clearance certificates are often not forwarded to the State Attorney by the municipality. Such factors contribute significantly to RDP deed registration delays.

The experience of dealing with the State Attorney’s office around the registration of RDP deeds varied significantly among interviewees in different provinces. One noted that there is a significant problem of delays at the State Attorney’s office in KwaZulu-Natal, claiming that this particular office is very over-worked and under-capacitated.

While having a broad mandate to undertake litigation and perform other legal functions, the interviewee argued that the State Attorney (at least in KZN) is not well geared to undertake large volumes of conveyancing. Conversely, another stakeholder claimed that the State Attorney in Pretoria was not slow regarding deed registration matters and was even in a position to assist municipalities in opening new township registers. An interviewee in the Western Cape stated that while it was true that the State Attorney in that province was under-capacitated, this did not cause a significant “blockage” in RDP deed registration.

### **3.20 Dealing with National Departments**

Two interviewees noted that when land is in national government trust, it is necessary to obtain a Section 28 clearance which vests the land to the province, where it can then be

developed. This can only occur with the signature of the Minister for Rural Development and Land Reform and can take considerable time to obtain. Both identified this as a major stumbling block in the transfer of land to a municipality for the purposes of township development.

One of the interviewees suggested a partial solution which would see the Minister delegating this authority to provincial HoDs for Land Affairs. Legislation is not required as the Minister has competency to delegate such powers.

One interviewee argued that a major problem in developing townships in rural areas is the way the National Department of Agriculture (NDoA) administers the Subdivision of Agricultural Land Act (70 of 1970). The Act provides that farmland cannot be subdivided without the approval of the NDoA. Yet the process can take years. Furthermore, the department can apply this law in inconsistent ways, which sometimes show a lack of understanding of issues on the ground. This has led to substantial delays in Mpumalanga.

Providing an overall perspective on this issue, another stakeholder argued that a major factor leading to delays is poor coordination between various government departments, particularly when they are in different spheres. As an example he noted that the

**“Every new RDP project brings with it new challenges concerning deed registration.”**

Environmental Impact Assessment (EIA) process is run in conjunction with the town planning process and the process of obtaining development permission from the Department of Mineral Resources (DMR). The departments each work on their own time frames (none of which are governed by statute or regulation) and accordingly one is forced to wait until the proposal in question “reaches the top of the file.” A delay at one department, therefore, delays the whole process. As a result of the inter-department cooperation rules, the departments are reluctant to put pressure on each other to perform.

At least three interviewees referenced mineral rights issues as contributing to blockages. One of them noted that if a submission is made under the LFTEA, the Township and Town Planning Ordinance 15/1986 or the Land Use and Planning Ordinance, 1986, then the Mineral and Petroleum Resources Development Act (MPRDA), 2002 applies. The MPRDA provides that no development of land shall take place without the consent of the Minister for Mineral Resources. Such approval can take between 6 and 12 months.<sup>9</sup> This has been a particular problem in Gauteng (north of Johannesburg, East and West Rand) where much of

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<sup>9</sup> One stakeholder argued that the DMR is pro-mining and will not allow development if such may hinder present or future mining activities. Their reasoning is along the line that the minerals are in-situ and cannot be moved but for mining. DMR would argue that if the development takes place mining may not be possible and accordingly a finite natural resource is lost to the country.

the well-situated land (along transport routes, near work opportunities, etc.) are located near existing or past mining activities.

### **3.21 Deeds issuance**

The interviews confirmed that, quite separate from issues with deed registration, problems with deed issuance also contribute to the backlog. The process of registration may have taken place but this does not necessarily mean that the deeds have been distributed to the beneficiaries/owners. Noting that this is a particular problem in peri-rural areas, one stakeholder underlined the need for community education around this issue. An interesting illustrative case in point is the situation at Tshwane Metropolitan Municipality.

**“More legislation is not a suitable response to the problem. Parallel legislation scares and confuses public officials.”**

In 2008 the Metro realised it was sitting on 7 639 title deeds for RDP properties (i.e. registered but not issued). An extensive campaign was undertaken in 2008 through 2009, encouraging RDP residents to come to the municipality and pick up their deeds. The campaign used local radio stations, posters and flyers, an SMS facility (by which people would send a text message with personal details and then receive information on their deed), and a dedicated phone-line system. Unfortunately, few households responded and only 417 deeds were distributed as a result of the campaign.

The municipality attributed the poor response to several factors identified in this study. Prime among such factors were:

- i) a high level of illegal occupation
- ii) a high level of owners renting out their properties
- iii) unresolved estates following the death of the owner
- iv) general ignorance among owners/beneficiaries of the value of holding deeds.

Early in 2011 Tshwane Metro developed a new campaign with a different approach. Rather than asking people to respond proactively, the metro went directly to the communities themselves. A series of community-based meetings were held in March and April in areas where there was a high level of people not having collected their deeds. The municipality directly engaged communities. At one site 639 title deeds were handed over in one day and 303 at another.

Consumer education is a critical part of this campaign. The significance and importance of title deeds is discussed at the community meetings. (Many areas suffer from a high rate of “civic illiteracy”. Other strategies have included going from house to house, loud-hailing and word of mouth through civic and other organisations / networks.

A developer interviewee also noted that local social and political conditions could make deed issuance problematic. He cited an example at the Kingsway development in Benoni where

the ward councillor jostled with local “power brokers” and civic structures to get the kudos for handing out the deeds.

### **3.22 Lessons from the DBS experience**

Some of the experiences of the Discount Benefit Scheme (DBS) conversion work in the Gauteng between 1993 and 2003 are worth examining in respect of a large-scale deed registration effort for RDP projects<sup>10</sup>. An attorney who was heavily involved in the programme for several years was interviewed.

The original DBS was aimed at houses developed under the previous dispensation as rental stock. The scheme aimed at providing freehold title for the occupants. In a ten-year period, some 216,000 deeds were registered across Gauteng. Under the slogan “Come and claim your home” radio, TV and newspapers were used as part of a campaign to encourage residents to participate in the process and secure title to their homes. Municipal councillors played an important role in the campaign. However, the most critical success factor was that offices were located on-site, ensuring ease of access and administrative simplicity.

Also critical to the effectiveness of the DBS in Gauteng was the operation of a tribunal entrusted with the task of determining who the rightful owner of the house was in the event of a dispute. The “tribunal” generally amounted to a single magistrate making the ruling. Importantly, there was a pool of 100 to 120 magistrates available to make rulings and so, on the whole, decisions were made promptly and disputes over rightful ownership did not tend to clog up the programme.

Also significant was the fact that many rulings were made in the township where the disputed house was located. Other rulings were made in a special “court” set up in the provincial Department of Housing. Magistrates would speak to neighbours, family members and community leaders to help inform their rulings. Approximately 26,000 cases were adjudicated out of the 216,000 cases. Of these the rate of appeal to the courts by the losing party was between 2.5 and 5 per cent. About 20 ultimately ended up being considered by the High Court. The interviewee indicated that no decision taken by a magistrate had been set aside by the High Court.

This interviewee strongly endorsed the idea of a large-scale programme to offer title deeds to residents of RDP housing and agreed that key practices of the DBS could be incorporated into such an effort. He added that such a programme should be seen and promoted as a rectification in title deed status, rather than a transfer. The interviewee also emphasised that the current law prevents rectification.

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<sup>10</sup> See section 4.3

## **4. Possible interventions**

### **4.1 *Legislative rationalisation***

One stakeholder noted that there is a window of opportunity to deal with the deeds backlog issue with the promulgation of new provincial planning legislation, including land-use management. She noted that, as of April 2011, the National Government is also close to completing a new piece of legislation concerning national spatial planning and land use. This stakeholder added that it would be desirable if the new laws could include appropriate clauses to allow for upgrading of informal settlements and the regularisation of the tenure in these areas. This could be done through exempting the development of such settlements from more onerous, formal requirements, subject to provisos. All existing certificates created by different laws for registering tenure at the Deeds Office (e.g. DFA, LFTEA, BCDA) have/had different forms. This interviewee argued that these require rationalisation so that the Deeds Office issues deeds that are all the same. She strongly advocates that the new laws address this need for rationalisation.

Reflecting the sense of others that the legislative environment is too complex, the same interviewee strongly emphasised the need to consolidate laws rather than create new ones. She suggested that a panel of legal and other experts be convened to examine what is possible under current laws. Expert discussion focusing on solutions should also be facilitated around the issue of key parts of the DFA ceasing to be operable after June, 2012 and the possibility of LFTEA being similarly challenged.

### **4.2 *Intensive technical assistance and support***

At least four interviewees underlined the need to develop a comprehensive programme of technical support aimed at assisting relevant public authorities who are struggling with completing the process of township establishment and /or finalising deed registration for RDP developments. One municipal interviewee suggested that *“the starting point to help remedy the situation should be a capacitation programme.”* He added, *“National government should also provide a support programme – specialists to provide direct assistance in the deed registration process (consultants if necessary). This could possibly be combined with a capacitation programme”.*

At least three stakeholders suggested that that the task was so immense that the provision of technical assistance alone was not sufficient. What is also needed is a programme which provides additional skilled professionals to directly undertake the necessary work, targeted to the areas of highest need. One interviewee proposed that:

*“There needs to be a comprehensive programme with the necessary resources and skills. There must be incentives to participate in deed rectification so national government must put sufficient funds into this. A “crack squad” could be developed and should include*

*professionals such as planners and conveyancers. A panel could be set up to adjudicate as necessary.”*

### **4.3 On-site rectification for all occupants**

In the course of the interview with the City of Cape Town the municipality articulated the basis of a programme aimed at rectifying the backlog in RDP deed registration and issuance. In situations where deed transfer has not been undertaken, people who can establish that they are residents of the house should simply be offered title regardless of whether or not they qualify as beneficiaries. In cases where the resident is indeed the beneficiary of record or if they are indigent, the cost of the transfer should be absorbed. But if the occupant is not the registered beneficiary (or an immediate member of family) and has sufficient means, they should be charged an amount to help meet transfer costs. There could be significant savings in conveyancing fees, given the potential for a large volume of cases and a consequential economy-of-scale.

Situations will arise in which residents refuse the offer of a deed. In such instances (or when the resident is required, per the previous paragraph, to pay a transfer charge but refuses to do so) the property should become part of the municipal rental stock and be managed as such. Rent should be levied as per the usual procedure with rental property. There will also be the opposite situation – more than one person claiming to be the rightful “owner” of the property. These will need to be mediated and adjudicated and the experience of the DBS (as set out in section 3.22) may provide a useful model of how this judicial function could be implemented.

It must be noted that there are possible disincentives for some residents to claim a title deed. As noted by an interviewee from a development NGO, some “non-beneficiary” residents (particularly in the larger cities) may be on waiting lists in their area of origin and would not wish to claim a deed on what they may consider to be a temporary or “working” residence which would thereby invalidate their (and their household’s) claim at “home.”

This idea clearly needs much more consideration, including a comprehensive analysis of the legal framework required, before it is developed into a solid proposal. A legal opinion obtained from the then Gauteng Department of Housing in 2005 stated that in order to confirm or regularise the “illegal” occupants of RDPs and those who qualify for the housing subsidy, the department will have to follow a lengthy legal and costly exercise of deregistering missing beneficiaries. An interviewee from a municipality advocated that special legislative provisions be made to simplify the process of deed cancellation in dwellings constructed through the HSS. Significant legislative change may be necessary to make an on-site rectification effort feasible.

#### **4.4 Summary of other possible interventions**

Other possible interventions identified by interviewees include the following:

- Mandating that progress payments are made strictly in sequence, number four being for transfer fees, and that payment five only be made on successful completion of the deed transfer. And/or consider WCDHS example of combining final piece of construction-related payment with allocation set aside to cover registration.
- Increase subsidy portion relating to deed registration.
- Remove the need for a formal hearing when objections are lodged in regard to township establishment (and possibly rezoning and subdivision) and that such cases be reviewed on the basis of documents. The right of appeal would be preserved.
- Prescribe time limits by which municipalities must perform functions relevant to consideration of land use applications.
- Provide basic legal services for indigent heirs of deceased RDP beneficiaries, in situations in which no deed has been issued, in order to help wind up the estate.
- Convene a seminar of legal and other experts to determine what can be done under current law to address the problem and to consider possibilities of consolidation of laws. The same seminar could also consider the impact of the Constitutional Court ruling invalidating key sections of the DFA, and discuss appropriate legislative responses.
- The appropriate national government authority should clarify that the MFMA and PFMA do not create any condition to prevent the issue of a clearance certificate for a residential dwelling built with public funds.
- The authority to approve changes to satisfy conditions of establishment (of townships) should be delegated to appropriate municipal (or provincial) officers in a broad but prescribed set of instances (i.e. where such changes are not fundamental).
- Incentives and sanctions need to be considered for municipal and provincial governments to ensure that the deeds backlog is more comprehensively addressed.
- The Minister for Rural Development and Land Reform should consider delegating responsibility for considering and issuing Section 28 certificates to provincial departmental heads.
- Consider legislative and administrative changes that would narrow the role of conveyancers in undertaking RDP deed registrations (preserving the function of ensuring that rights of beneficiaries are protected).
- Municipalities should ensure that responsibility for township proclamation, the opening of township registers, and ensuring that RDP deeds are transferred in a timely manner be made the responsibility of the highest-ranking municipal officer possible.
- Government must address the need to define the role of traditional leadership in land administration and, more specifically, probe legal solutions to enable the development of freehold title on land held in trust.
- Municipalities could benchmark the City of Johannesburg's *Registered Professional Team* model and Gauteng Province's practice of appointing a panel of 12 conveyancers

to accelerate the deed registration process. The Western Cape DHS's standard contractual provisions and administrative arrangements concerning project closure could also be benchmarked, as could the most recent campaign at Tshwane Metro on deed issuance.