

Investigation into the delays in issuing
**Title Deeds to Beneficiaries
of Housing Projects**
funded by the capital subsidy



Urban LandMark
making urban land markets work for the poor

Acknowledgements

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Chapter 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 sites¹. These have been delivered through a variety of subsidy mechanisms, with the most predominant being the Project Linked Subsidy (now revised to the Integrated Residential Development Programme) which resulted in 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').

¹ Victor Rajkumar, Department of Human Settlements, May 2011



A key component of the subsidy programme was that beneficiaries who received a house on an ownership basis would receive the title deed to the property. While the initial intention of the housing subsidy programme was to provide shelter for poor citizens, by early 2000 the concept that the house should be an asset was introduced. Accordingly the title deed was seen as critical to ensuring not only security of tenure, but also that poor households could use their house as an asset to build wealth. In addition, such properties would contribute to the operation of the property market.

The 'Comprehensive Plan for the Development of Sustainable Human Settlements', popularly known as 'Breaking New Ground' (2009) explicitly identifies the need to ensure residents of subsidised housing access to formal title, as a leading public policy priority. The Comprehensive Plan 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 without the provision of formal title, the report identifies the objective of ensuring that formal transfer occurs as quickly and as efficiently as possible.

"a central,
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ownership."

This report outlines the findings and recommendations of an investigation into the extent to which title has been transferred to subsidy beneficiaries and key challenges and opportunities to address this issue. The investigation was commissioned by **Urban LandMark** (ULM) and undertaken by **Shisaka Development Management Services** (Shisaka). The report is based on a desktop review and interviews with 32 stakeholders (for details on the methodology see **Annexure A** attached).

This report includes:

- ▶ Definition and value of title to a property
- ▶ The process of registering property in South Africa
- ▶ The process of delivering subsidy houses for ownership
- ▶ The extent to which title deeds have been registered in respect of subsidy housing
- ▶ Factors that are causing blockages
- ▶ The consequences of low levels of title deed registration of subsidy houses
- ▶ Overall findings and recommendations

Chapter 2

Definition and value of title to a property



A title deed is the legal document that reflects the ownership of a property. When a property is bought and/or sold and transfer takes place, the existing title deed is superseded by a new title deed which is executed in the Deeds Office through a signature by the conveyancer and the Registrar of Deeds. The title deed is therefore an extremely important document as it is the owner's proof of ownership. In practice, owners of property should either personally have a copy of their title deed, or if a financial institution holds a mortgage over the property, the title deed should rest with the financial institution².

² K Rust, Resource Report 7: Secondary markets, work undertaken by Matthew Nell and Associates and the Settlement Dynamics Project Shop for the Banking Association SA, 2005



The Registrar of Deeds is an independent unit within the National Department of Rural Development and Land Reform³ and has a staff contingent of approximately 115. In addition to the Office of the Chief Registrar of Deeds there are nine deeds registry offices located throughout South Africa. The function of the Registrar of Deeds is to keep a public register of land; preserve the records and provide information to the public. The Deeds Registrar Act, 47 of 1937 is the law which gives rise to the deed's office's mandate.

The value of a title deed is that it protects title to a property and facilitates market and financial transactions. Its key functions are that it:

- ▶ Protects rights
- ▶ Records changes
- ▶ Facilitates property transactions
- ▶ Facilitates financial transactions

In addition title deeds are important as they provide individuals with an address, recognise the owner and their family as being part of the municipality and enable ownership of the property to pass on to family members in the event of death. From a municipal perspective, ownership obliges the owner to pay property rates and service charges for services received, thereby contributing to its ongoing sustainability.

The title deed is therefore an extremely important document as it is the owner's proof of ownership.

³ Formerly the Department of Land Affairs.

Chapter 3

The process of registering land in South Africa



The process of registering land in South Africa can be divided into two components:

- ▶ Township establishment for ownership of individual erven/plots
- ▶ Process of purchasing and transferring land

Each of these is equally important in respect of the development of subsidised housing and is therefore outlined in more detail below.

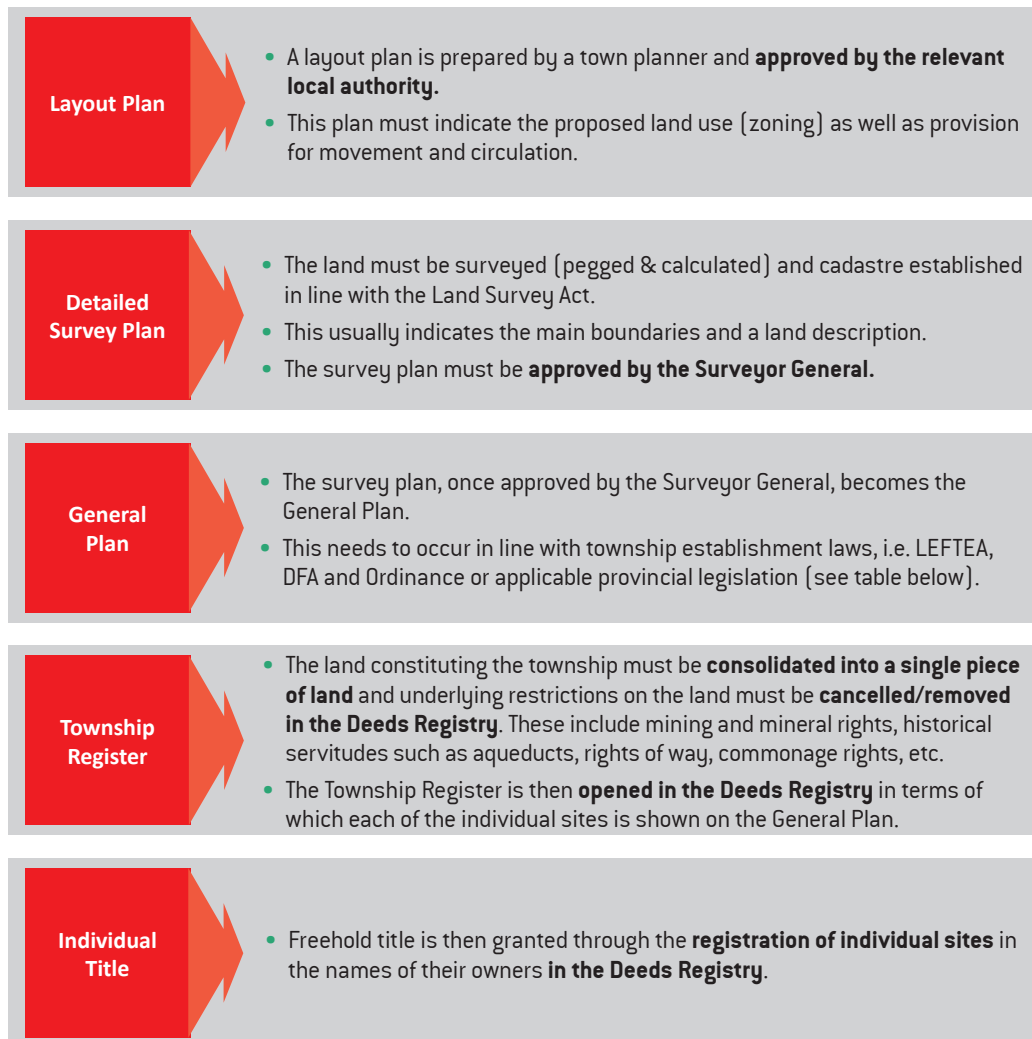
3.1 Township Establishment for ownership⁴

The Township Establishment process is a highly regulated process to bring vacant, serviced, identifiable, registerable sites onto the property market for transfer. Figure 1 below provides a summary of the typical township establishment process.

⁴ This section adapted from Workings of Township Property Markets, Cadastral Review, 2004



Figure 1: Typical Township Establishment Process



The Township Establishment Process is governed by a range of different laws that have evolved over time. At present, the mainstream options available to establish townships are the **Provincial Ordinances**, the **Less Formal Township Establishment Act** (LFTEA) and the **Development Facilitation Act** (DFA)⁵. Any of these can be used to establish a township and generally provinces, municipalities and developers will select the one that best suits their needs and processes. An overview of each of these processes and the advantages and disadvantages of each is shown in Annexure B attached.

What is critical to note is that before a township register can be opened, a General Plan must be prepared, based on an approved layout plan and a detailed survey plan of the township and it must be approved by the Surveyor General. This involves numerous steps and costs.

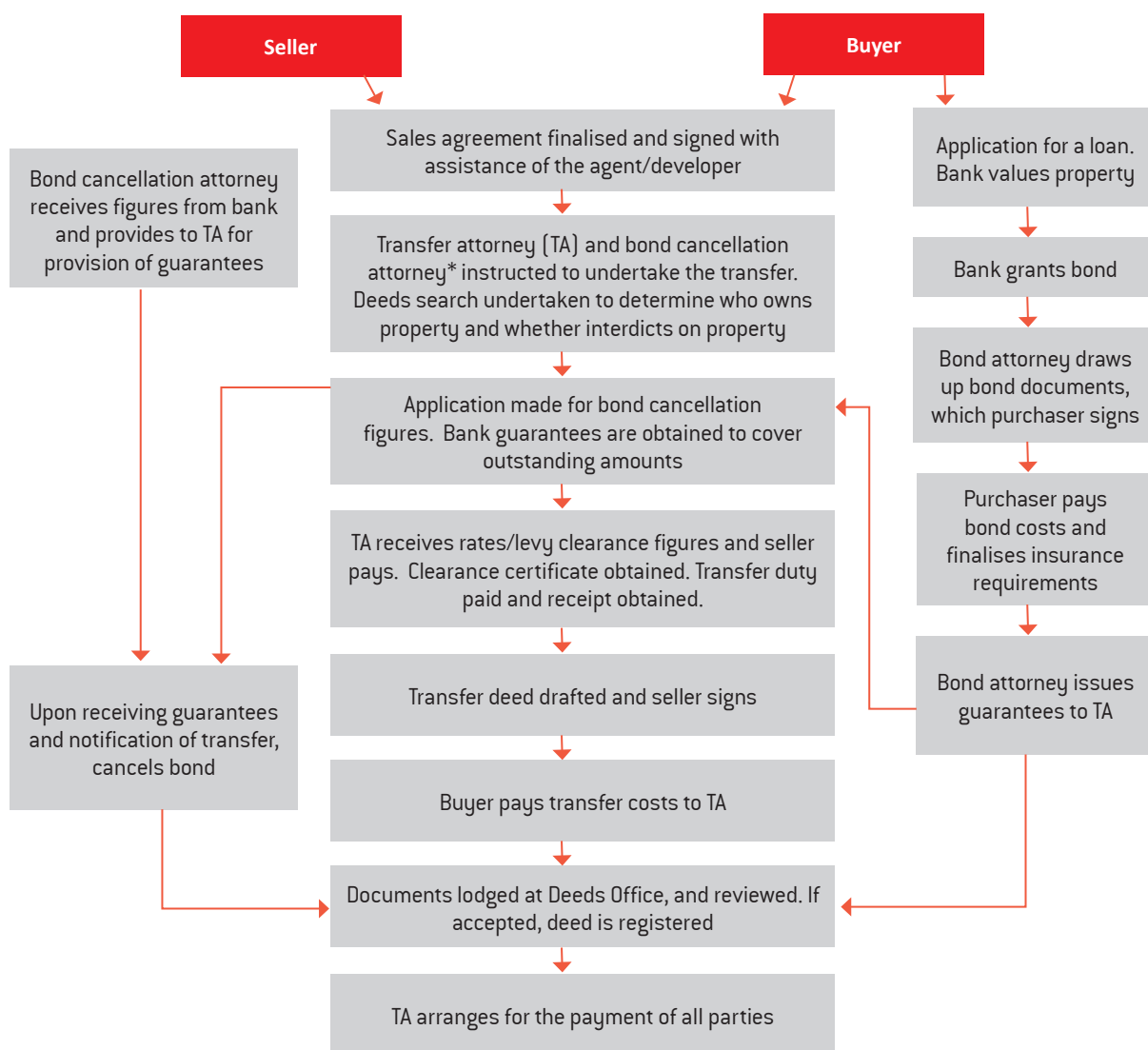
⁵ In June 2010 a judgment by the Constitutional Court invalidated sections of the DFA. In the judgment the court ruled that powers to establish townships and to rezone land are classified as “municipal planning” and are therefore the exclusive function of the local sphere of government as assigned under 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. Outside of the Cities of Johannesburg and eThekweni, the court suspended the invalidity of the said sections until 18 June, 2012.

It is a procedure required for all the township establishment laws specified above. It is **further critical to note that unless a Township Register is opened in the deeds Registry, individual title cannot be transferred.**

3.2 Purchasing/Selling and transferring land

Once a Township Register has been opened, the properties within that Register can be traded, i.e. bought and sold. Set out below is an overview of the typical process of purchasing/selling and transferring land in South Africa.⁶ As shown in the diagram it is a complex process undertaken by a seller and buyer with the assistance of a transferring attorney (conveyancer). The process can take six weeks to six months.

Figure 2: The process of selling and purchasing land in South Africa⁷



*The transfer attorney and bond cancellation attorney are both conveyancers

⁶ The analysis undertaken in this report assumes the purchasing and transfer of land between private individuals. The process may be different if the public sector is either the buyer or seller.

⁷ Workings of Township Residential Property Markets, Cadastral Review, 2004

Chapter 4

The process of delivering subsidy houses for ownership



Implementation of the housing subsidy programme commenced in March 1994⁸. Six subsidy mechanisms were available namely project-linked, individual, consolidation, institutional, relocation assistance and the peoples' housing process. Among these mechanisms the project-linked subsidy was the most popular. This subsidy comprised the approval of a housing project proposed by a developer and then the allocation of beneficiaries from a waiting list to that project. The developers identified the land and structured and implemented projects, drawing down the subsidy through a process managed by conveyancers. The process was strictly controlled and developers were required to meet specific milestones in order to draw down the subsidy amount. The

⁸ This section based on "A simplified guide to the housing code", 2007, Department of Housing and A Resource Guide to Housing in South Africa 1994-2010, Legislation, Policy, Programmes and Practice, Socio – Economic Rights Institute of South Africa, Kate Tissington, February 2011

last milestone was the registration of the title deed in the name of the beneficiary. The milestone breakdowns were reflected in the Housing Code published in 2000 and were as follows⁹:

- ▶ Draw 1: Approved engineering designs (about 5%)
- ▶ Draw 2: Approved General Plan (about 5% of total subsidy)
- ▶ Draw 3: Completed/installed services with services handover certificate by local authority (about 40%)
- ▶ Draw 4: End-user transfer with title deeds (about 10%)
- ▶ Draw 5: Completed top-structure with a letter from the beneficiary indicating that they are satisfied with the house that they have received called the 'happy letter' (about 40%)

However in early 2000, as a result of allegations of profiteering by developers and complaints by smaller developers and contractors that they did not have access to the subsidy delivery process, this method of delivery was revised. By 2001 the use of conveyancers to pay developers was terminated and the management of the delivery process had shifted, initially to provincial governments and then over time to municipalities, who were responsible for structuring projects and appointing private sector contractors (including small-scale builders) to construct the services and subsidy housing. This shift also impacted on the progress payment system and registration process, particularly in respect of the number of payment milestones, which were reduced.

More importantly in 2003, the progress payment system was revised to allow for payment of the completed top structure before the registration of transfer. This amendment responded to the reality that transfer processes were complex and took an extensive period to implement. Therefore, in order not to undermine a developer's access to payment, it was resolved that payment for the completion of a top structure could precede transfer, which often was long after occupation. In the Housing Code¹⁰ published in 2003, end-user transfer of the title deed is no longer reflected. The Code reflects the following payment milestones:

- ▶ Draw 1 : Land acquisition, opening of the township register, 50% of project management, land surveying and pegging, social facilitation and legal fees (up to R1100 per site)
- ▶ Draw 2: 50% of project management and services (up to R8300 per site)
- ▶ Draw 3: Construction of the house, overheads profit (remainder of the subsidy amount)

In 2007, as a result of requests from the provincial MECs it was decided to scrap the sequential milestone payment process. Provinces and municipalities were consequently able to build houses without any services in un-proclaimed towns and have the beneficiaries occupy the units.¹¹

⁹ National Housing code March 2000

¹⁰ Part 3a Housing Code 2003

¹¹ Louis van der Walt, Department of Human Settlements, 2011

The last milestone was the registration of the title deed in the name of the beneficiary.



In 2009 the Integrated Residential Development Programme (IRDP) replaced the Project Linked Subsidy Programme. In the IRDP a municipality assumes the role of the developer (where they lack financial, technical and managerial capacity, a provincial department can take on this role), undertaking all planning and project activities. As developers they appoint professionals (who design and establish the township, design and monitor the installation of services, and design the houses) and contractors (who construct the services and housing) to assist with the housing development process. Municipalities apply for funding from the MEC who approves project applications, reserves and distributes funds, as well as assesses and adjudicates various aspects of the project process. The project process comprises two phases:

- ▶ Phase 1 entails planning, land acquisition, township establishment and the provision of serviced residential and other land-use stands to ensure a sustainable, integrated community.
- ▶ Phase 2 comprises the house construction phase for qualifying housing subsidy beneficiaries and the sale of stands to non-qualifying beneficiaries and to commercial interests.

Title registrations have not been included as part of the payment process. Recently the Department of Human Settlements obtained approval for an additional R800 per beneficiary to finance the transfer cost or a portion thereof.

Chapter 5

The extent to which title deeds have been registered in respect of subsidy housing



The exact number of subsidy beneficiaries who do not have the title deeds to their properties is not known. However, **on the basis of current evidence it is estimated that just over one third or between 1,1 and 1,4 million subsidy beneficiaries currently do not have the title deeds to their properties.**

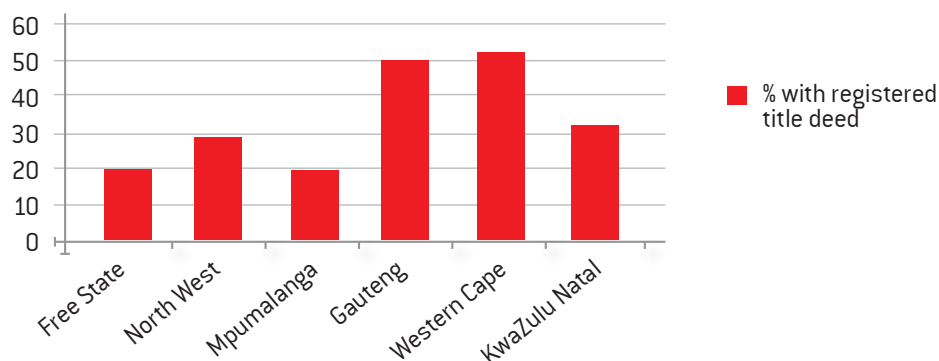
The Department of Human Settlements estimates that 3,25 million houses or sites have been delivered as at the end of the 2010/11 financial year¹². The Department's policy document 'The 'Comprehensive Plan for the Development of Sustainable Human Settlements' (2004) estimates that at least 35% of subsidised houses - some 900 000 units at the time of the report - had been delivered without the registration of formal title. This percentage of 35% is confirmed by a submission made to the Portfolio Committee on

¹² Victor Rajkumar, Department of Human Settlements, May 2011



Human Settlements in June 2011 on a Beneficiary Occupancy Audit done in the 2009/10 financial year on 262 686 households in six provinces. This audit found that the extent to which title deeds have been provided varied across the provinces from 22 to 54% (see diagram below). The average across the provinces is 36%.

Figure 3: Extent to which registered title deed provided by Province



If it is assumed that 35% of all subsidised houses have not received title then using current delivery figures (3,25 million) it amounts to 1,14 million properties.

This figure is in line with work currently underway by FinMark Trust which compares data captured as at 30 September 2010 of **all qualifying individuals in South Africa who have been approved for a subsidy with data on ownership records from the Deeds Registry**. This work has found that 3.2 million individuals were approved for a housing subsidy, both prior to and since 1994 when the national subsidy programme commenced. Of this list, 1,48 million individuals have never owned a property, indicating that such individuals were approved for a subsidy but either never received a property or received a property without a title deed.

None of the stakeholders interviewed were able to provide more details on these estimates. However, what emerged from the interviews was that the extent of registrations across South Africa is uneven, varying greatly between municipalities, provinces and areas of differing land tenure status. Furthermore part of the problem of not being able to determine how many subsidy houses have been delivered that have registered title, is that the department does not have statistics on each subsidy type and is therefore not able to dis-aggregate its data so as to distinguish between the different subsidy mechanisms. In particular no distinction can be made between houses delivered through the Project Linked Subsidy and the Discount Benefit Scheme. The latter programme involved providing title to housing stock built prior to 1994 for rental purposes, which was later provided to the occupants for ownership.

Chapter 6

Factors causing blockages to the registration of subsidy houses



The key factors causing delays in the transfer of title to subsidy beneficiaries as determined through the interviews with experts and the desktop review can be categorised as follows:

- ▶ Delays in the township establishment process and proclamation
- ▶ Revisions to the project payment process in the development of subsidy houses
- ▶ Failure to hand over title deeds
- ▶ Appropriateness of the deeds registration system

- 1. Delays in the township establishment process and proclamation:** The interviews with stakeholders indicated that this is the major, if not the greatest, root cause of the



delays in the registration of subsidy houses. The key causes of delays in the township establishment process and proclamation include:

- ▶ *Delays in proclamation.* These occur where the various requirements to get an approval of a general plan, such as surveying, have not been met.
- ▶ *Delays in opening a township register.* The primary delay in this respect is the resolution of the underlying land rights. This requires not only proclamation (i.e. approval of the general plan) to be in place, but also the resolution of all restrictions and servitudes and consolidation of the affected title deeds (including in some instances the subdivisions of some of the underlying properties). The process can be hampered by missing information, deceased rights holders, and general inaccuracies in recorded data.

The reasons for the delays in the township establishment process and proclamation as identified by the stakeholders were as follows:

- ▶ ***Problems in implementation of the process within provinces and municipalities:*** These problems include:

- Lack of capacity within municipalities and provinces
- Undertaking the township registration and proclamation process requires access to technical specialists such as land surveyors, lawyers etc. Municipalities and provinces do not have sufficient access to these specialists.
- The process is complex and is often not understood by officials.
- Misalignment between municipal departments such as Planning and Housing
- Lack of clarity as to roles and responsibilities particularly in respect of managing the process of opening the Township Register.
- Difficulties in rectifying mis-allocations of the subsidy to beneficiaries i.e. where the wrong house is allocated or where one house is allocated to two beneficiaries.

In addition to the above at least four of the interviewees (including municipal officials and external consultants) noted that there has been immense pressure on government officials in many areas 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.” Officials respond to the political pressures by focusing on housing delivery, rather than being guided by policy prescripts. In this context deed registration can come to be seen as “*secondary in operational terms*” by municipal managers and councillors.

In some cases municipalities are undertaking focused activities to address the issue. For example, Overstrand Municipality has now launched a concerted effort to address the problem. Activities undertaken include the Housing Department working closely with attorneys to attend to all outstanding transfers. This often means transferring the land from national to local government. Another factor is the cost of the transfer process. The municipality is making a financial contribution

“Many officials 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.”

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

towards fees in an effort to assist and speed up the transfer process. Delays were also caused by outstanding municipal debt, and special arrangements have been put in place in order for poor people to obtain the necessary clearance certificate¹³.

The Johannesburg Metropolitan Municipality has since 2006 committed itself to township development. Institutional arrangements were put in place so that the township establishment process is prioritised. The municipality ensures that potential legal and other problems are addressed before commencing the township development process. A comprehensive feasibility study is always undertaken before the decision (to develop or not) is made. Since 2006 the Metro has avoided building before the township is proclaimed.

- ▶ **Problems in the physical implementation of the process:** A key problem is where sites designated for subsidy housing development have been occupied informally. This makes the pegging of the site extremely difficult, if not impossible. The Surveyor General will not accept the general plan unless the pegging has been undertaken. This problem is significant in that a key focus of the housing subsidy programme is the upgrading of informal settlements.
- ▶ **Problems with the legislation:** The fact that there are three different legislative options namely the Provincial Ordinances, the Less Formal Township Establishment Act (LFTEA) and the Development Facilitation Act (DFA) makes an already complex task even more so. Each of the different legislations is complex and requires different processes and systems.

A further complicating factor is the June 2010 judgment by the Constitutional Court invalidating sections of the DFA. At least four interviewees believe that this will ultimately impact negatively on the issue of deeds transfer in respect of subsidy houses. In the 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 Tribunals¹⁴. Outside of the cities of Johannesburg and eThekweni, the court suspended the invalidity of the said sections until 18 June, 2012.

Some interviewees 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).

- ▶ **Problems within the Deeds Registry offices:** Among the interviewees there is a discrepancy in opinion as to problems relating to the Deeds Registry offices. Those officials from the Deeds Registry offices interviewed believe the problem to be that municipal and provincial officials and their service providers do not

“Parallel
legislation scares
and confuses
public officials.”

¹³ Overstrand Bulletin, May 2011

¹⁴ Cityscope Town Planners: <http://cityscope.co.za/> (accessed 14.4.2011)



prepare applications correctly. Officials in municipalities and provinces on the other hand argue that title deeds can go “backwards and forwards” between the deeds office, the attorneys and the municipality. 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. A municipal interviewee stated that he had seen deed applications for a subsidy house deed registration be rejected up to three times, adding that rejections are sometimes made for editorial 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 subsidy housing properties.

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.

- ▶ **Land held in trust by traditional leaders:** One interviewee indicated that large amounts of subsidy housing have been built on land held in trust by traditional leaders. The interviewee noted that full freehold title is not possible on this land. The interviewee 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. The stance of individual traditional leaders varies. 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.

2. **Revisions to the project payment process in the development of subsidy houses:** A number of interviewees identified the change in the project management and payment process of subsidy housing as a key factor causing the low levels of registration of title. At least three interviewees identified the low level of payment allocated in respect of the deed transfer of the developer’s fee (R800) as a key contributory factor. 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. At the time of the interview the Western Cape Department of Human Settlements 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.

Interviewees from the Western Cape Department of Human Settlements noted that improper project closure is also a major problem in that province. Emphasising that proper project closure must include the transfer of title deeds to beneficiaries, the Western Cape Department of Human Settlements conceded that throughout the



1990s and 2000s many subsidy house developers were paid out whether or not they had attended to this task (and other aspects of project finalisation).

At least four interviewees referred to the issue of the jumbling of the previously sequential series of payments as a direct cause of many subsidy houses remaining unregistered. Before 2007 it was not permissible to commence work on a top structure before the serviced residential stand had been transferred in ownership to the approved beneficiary. This was governed through the strict sequential progress payment system that 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 the 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 now being constructed while the township has not yet been proclaimed and the stands cannot be transferred to the beneficiaries.

- 3. Failure to hand over title deeds:** The interviews confirmed that, quite separate from issues with deed registration, problems with deed issuance also contribute to the low levels of title deed registration. 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.

This is substantiated by the Department of Human Settlements, which in its presentation to the Parliamentary Portfolio Committee on Human Settlements in May 2010 noted that many beneficiaries had still not collected their title deeds after they had been processed (and after having resided in the premises for several years). This could be as a result of a lack of understanding of the importance of a title deed.

The Department also noted that registered title deeds are sometimes held back by the conveyancer due to non-payment of fees by the project owner, which is usually the province or municipality (or a contractor appointed by such)¹⁵.

An example of a municipality addressing this issue is the Tshwane Metropolitan Municipality that in 2008 realised it had 76 39 tile deeds for subsidy properties that had been registered but not issued. An extensive campaign was undertaken in 2008 through 2009, encouraging beneficiaries to come to the municipality to 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 information on their deed), and a dedicated phone-line system. Unfortunately, few households responded and only 417 deeds were distributed as a result of this initiative. Early in 2011 the municipality developed a new campaign with a different approach - it went directly into the communities themselves. A series of community-based meetings

¹⁵ Department of Human Settlements: Briefing and presentation to the Portfolio Committee on Human Settlement on the issue of issuing title deeds: 26 May, 2010



were held in March and April 2011 in areas where there was a high level of people not having collected their deeds. 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. Other strategies have included, going from house to house, loud-hailing and word of mouth through civic and other organisations / networks.

Appropriateness of the deeds registration system: Some of the interviewees questioned the suitability of the current Deeds Registration system. A former Land Title Adjustment Commissioner argued that while the residential property conveyancing system in South Africa is thorough and legally sound, it is far too complex for small transactions. 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. He commented, *“We have a first-world deeds system in a developing-world spatial context. We need to question the very necessity of title deeds”*.

Consumer education is a critical part of this campaign.

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 subsidy 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”*.

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 and the person’s occupation is 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.

Chapter 7

The consequences of low levels of title deed registration of subsidy houses



The consequences of there being over 900,000 subsidy housing properties where the occupants do not have registered title deeds are significant and include the following:

- ▶ Informal sales and discrepancy between current occupants and owners
- ▶ Difficulties in rectification
- ▶ Difficulties in accessing title deeds
- ▶ Unresolved estates

Each of these is outlined in more detail below.

- 1. Informal sales and discrepancy between current occupants and owners:** As a result of not having a title deed, many beneficiaries who want to sell their properties have done so informally, whereby the transaction is not recorded in the Registry of Deeds. While there is no statistical evidence of this, anecdotal evidence indicates that this phenomenon is significant.



The phenomenon of informal sales does not only occur in respect of beneficiaries who do not have title deeds, but also in respect of those who received title deeds. One interviewee from Cape Town notes that, even if the owner has a title deed, 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 also for these reasons individuals bypass the formal sales process.

The result of this is that the current occupant of the subsidy house is very often not the original beneficiary. The fact that the vast majority of residents in RDP properties are not the official beneficiaries/ owners was noted by at least 14 interviewees. As indicated by one stakeholder, *“A high rate of RDP occupants who are not (the original) owners should not come as a surprise. Poor people need to be very mobile in terms of work requirements, attending to family matters etc”*.

One 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 as a 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 or too complicated or costly”*.

“the consequence of a legal system which becomes dysfunctional when applied in the context of the poor.”

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

Another interviewee noted that in 2007 the National Department of Human Settlements commissioned a mapping of 1,9 million subsidy beneficiaries in respect of the extent to which they had title deeds. The project was not completed, but 800,000 beneficiaries were mapped. The survey found that most people were not staying in the house that had been originally allocated to them and that there was a major disconnect between deeds records and the reality on the ground.

Both Lizette Killbourne in Resource Report 7: Secondary Markets (2005) and Leslie Downie (2011) look at the complexity and difficulties that arise once informal selling has occurred on a property. Issuing title or transferring title on a property where previous sales were informal is significantly more complex administratively and more costly than normal sales. Downie (2010:3) concludes that this is *“the consequence of a legal system which becomes dysfunctional when applied in the context of the poor.”*

The Department of Human Settlements¹⁶ also recognises this problem and identifies a number of difficulties that can occur as a consequence of the often lengthy delay between a beneficiary receiving an approved subsidy, being allocated a stand and the registration of transfer. These delays serve to further complicate the final phase of deed registration. It is not uncommon, for example, for an approved beneficiary to be uncontactable upon the attempted allocation of title. In other instances, after allocation when the registration of title is finally made the beneficiary may have sold

¹⁶ Department of Human Settlements: Briefing and presentation to the Portfolio Committee on Human Settlement on the issue of issuing title deeds: 26 May, 2010

or rented out his/her house or may have died. Clearly, title deeds cannot be given to a non-beneficiary.

2. **Difficulties in rectification:** Given that there is a high level of divergence between occupants and allocated beneficiaries or title deed owners, rectification of title deeds records is important. However, the interviews indicate that this is difficult to undertake. 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 the action to cancel a title deed costs 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.

In addition, clearance certificates are also a problem. 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 noted this as a problem towards registering deeds for RDP properties retrospectively. 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 circumstances 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.

3. **Difficulties in accessing title deeds:** One developer from the Western Cape has worked with subsidy residents attempting to obtain valid title in their own name, particularly where there has been a change in *de facto* title as a result of informal sales or inheritance, but where the title deed was not formally transferred. He claims that there are two possible remedies. One is a 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). In the case of 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).
4. **Unresolved estates:** Two interviewees (a municipal officer and a provincial officer) identified unresolved estates as a key issue. In the event of the death of a beneficiary of an unregistered property, deed issuance is not possible until such time that the legal heirs have been identified and the estate wound up. One interviewee noted that the heirs may be left with a bill of R5,000 to R6,000 for this purpose and few can afford it.

This issue is further complicated by the fact that, if the estate is worth more than R125,000, an executor must be appointed and the property valued. The Western Cape Department of Human Settlements receives queries on an ongoing basis, both from municipalities and heirs of beneficiaries, on estate issues.

Chapter 8

Overall findings and recommendations



The combination of the rigorous processes for the proclamation and establishing of townships, the pressure to deliver at scale on provinces and municipalities and the fact that there is no longer any financial incentive to register a subsidy housing asset, has resulted in a huge backlog of subsidy houses (estimated to be approximately 1,8 million) which do not have registered title and in many cases are not even located in an established township. In addition there are currently no mechanisms for addressing this backlog.

With respect to these subsidy houses where there is no title, the investigation found that:

- ▶ A high number are likely to be located in unproclaimed and/or unestablished townships;
- ▶ Where townships are established there has been no transfer of title to individual beneficiaries; and
- ▶ It is not certain if the original beneficiary is still in the property as they may have “absconded” or sold the property informally.

In addition, there are a large number of title deeds that have been registered in the name of beneficiaries but not physically handed over to these individuals and are being retained by the municipality or conveyancer.

The investigation further found that even in properties where registered title was provided, the owner registered in the deeds registry is, in a significant proportion of cases, unlikely to be the current occupant.

These high levels of discrepancy and informality in subsidised housing are undermining the property title deeds registration system in South Africa. There is a risk that this could become more widespread and result in the widespread reliance on the common law to protect property rights. Should this occur it will severely undermine the operation of property markets in South Africa.

The effectiveness and appropriateness of the current Deeds Registry and registered title system in South Africa is questionable, particularly in respect of the subsidised housing market. In established areas where the registration process is operating effectively it provides certainty. In those areas where it is not operating and informal transactions are being widely applied, it is a liability because it is reinforcing informality, as there are no other official options for documenting title. In addition, the cost of rehabilitating the Deeds Registry system within areas where it is not working, to bring it up to the level where it is working, is prohibitive. Finally, the general cost and complexity of the current formal title transfer process is in many cases disproportional to the overall value of the transaction on subsidised houses and is unlikely to be maintained in the normal course.

Overall, it can be concluded both in respect of new properties being developed and the backlog that exists in the subsidised housing market sector that the problem will continue and worsen and could reach a point where it is irredeemable, unless something radically different is undertaken. Moreover, given the significant proportion of the subsidised residential properties already registered in the deeds registry (25 to 30% of all residential properties), degradation of titling in respect of these properties could undermine the effectiveness and credibility of title across all residential property title.

Given the above, recommendations are made in terms of two areas of intervention:

- ▶ Improving the extent to which registration occurs in respect of new subsidy housing
- ▶ Resolving the issue of properties where registration has not occurred

8.1 Improving the extent to which registration occurs in respect of new subsidy housing projects

It is critical that the extent of registration of new subsidy housing that is delivered is significantly improved. To this end the following recommendations are made:

1. **Financial and administrative disciplines should be re-introduced** into the housing subsidy development process, even if it slows down development initially. In this regard the sequential phasing of development should be re-introduced so that it is not possible to commence the development of the housing until township proclamation and registration has occurred. In addition, the final payment should not occur until title deeds have been



provided to owners. Linked to this, the payments due for land servicing should not be payable unless the townships that have been serviced are also proclaimed. Further, the final payment should be substantial enough that developers will meet the milestone. It is estimated that these revisions will result in reduced delivery for one year.

2. **Metropolitan and large municipalities should establish dedicated teams that focus on the township proclamation and establishment process.** In the smaller municipalities this activity should be provided by province-wide dedicated teams. These teams should have sufficient budgets and adequate specialist input. This methodology has been applied very successfully by the City of Johannesburg and this case study should be written up and provided as an example.
3. **Training on and promotion of the importance of title deeds should be undertaken for relevant officials in provinces, and officials and councillors in municipalities.** This should include increasing understanding of the different forms of legislation that can be applied in undertaking township establishment and mechanisms for addressing the obstacles that can occur during the implementation process. In addition, councillors in municipalities should be briefed on the value of title deeds and the issues pertaining to them.
4. **The capacity and levels of skills within the Deeds Registry Offices should be improved.** Mechanisms to improve the time frame within which subsidy houses are reviewed and registered should be agreed between the Registrar of Deeds and the Minister of the Department of Human Settlements.
5. **Consideration should be given to establishing a parallel less formal, more immediate and more affordable title or land-holding system.** In considering this longer-term option, careful attention will need to be paid to the implications of such a system, both for the overall system of property rights registration as well as potential benefit for poor households. The key features of this system should be as follows:
 - ▶ It should retain administrative clarity on who owns a property.
 - ▶ Ownership should be registered on an alternative, more localised and accessible property register administered by municipalities or provinces.
 - ▶ The need for clearance letters and electricity compliance certificates should be streamlined or removed.
 - ▶ The title provided should be able to be upgraded to normal, full-registered title at the cost of the individual property owner at any time, should they wish to do so.
 - ▶ Sellers and buyers should themselves be able to process transactions and submit them for recording in the parallel register without reliance on conveyancers (see below).

It is estimated that these revisions will result in reduced delivery for one year.

This recognises the low likelihood of eradicating the title registration backlog and registering all new subsidy houses delivered in the short to medium term, while also acknowledging that township proclamation and registration backlogs should be eradicated as an absolute priority (see below).

8.2 Resolving the issue of properties where registration has not occurred

It is critical that the registration of subsidy housing that was provided without a title deed is resolved and that occupants of properties involving informal sales are able to access title deeds. To this end, the following recommendations are made:

1. **A registration backlog eradication plan should be introduced.** The focus of this plan should be to enable beneficiaries who occupy a property, but do not have the title deeds, to initiate a process to access such title. This will need to incorporate a dispute-resolution process to address contesting claims. **It is recommended that the model used in respect of the Discount Benefit Scheme (DBS) in Gauteng between 1993 and 2003 should be applied¹⁷.**

This programme enabled occupants of houses developed under the previous dispensation as rental stock to apply for ownership. Over a 10-year period, some 216,000 deeds were registered across Gauteng¹⁸. Key success factors of the scheme were:

- ▶ Municipal councillors played an important role in the campaign.
- ▶ Offices were located on-site, ensuring ease of access and administrative simplicity.
- ▶ A tribunal process was established to mediate cases where there was 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.
- ▶ 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 out of the 216,000 cases were adjudicated. 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. No decision taken by a magistrate was set aside by the High Court.

2. **There needs to be further investigation into a series of options to make it more cost effective to transfer individual title for lower-value properties (say below R250 000).** For example, options that need to be further investigated include:
 - ▶ **The need to use a conveyancer to register title should be removed for lower-value properties** (see above).
 - ▶ **Transfer occurs through a commissioner of oaths.** Municipalities would need to be accredited to do this. Either Department of Human Settlements or the Department of Rural Development & Land Reform investigates due diligence and accredits the municipality to provide interim formalisation and to oversee the secondary transaction process.

¹⁷ An alternative approach would be the application of the Land Titles Adjustment Act, at least in certain cases, and this warrants further investigation.

¹⁸ Personal communication with Van Gend Botha, attorney responsible for much of the conveyancing work in the project.

Chapter 9

Annexures



Annexure A: Methodology

The methodology for undertaking the work comprised:

1. **Desktop review:** This comprised a desktop review of existing research and documents.
2. **Interviews with experts:** A total of 32 interviews were undertaken in terms of the following categories of stakeholders. 28 of these were completed via telephone and three of them were completed face-to-face. The length of the interviews ranged in time from approximately 15 to 90 minutes.



- ▶ National deeds register (two interviews)
 - ▶ Provincial deeds registry offices (10 interviews – two each in five different provinces)¹⁹
 - ▶ 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)
3. **Developing recommendations:** A team workshop was held to review the findings and recommendations were developed.

¹⁹ 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.



Annexure B: Overview of township establishment legislation

1. Provincial Ordinances Model (mainstream model)²⁰

The Provincial Ordinances could be considered as the **mainstream 'model'** where a process is followed that allows for:

- ▶ submission of a written application;
- ▶ basic documentation is submitted with the application, mainly related to the specifics of the application, including layout plans and a motivation setting out the need and desirability of the development and consideration of the application in relation to surrounding uses, engineering services, geotechnical conditions, impact on transportation routes, environmental factors and how it fits in with development patterns of the area. Application fees are paid to the municipality (province where not an authorised municipality). Most provinces indicated that they require the Department of Environment to have made their Record of Decision prior to the planning application being submitted;
- ▶ advertising of the application on the site, in an English and Afrikaans newspaper and the Provincial Gazette for two consecutive weeks – cost to applicant;
- ▶ a comment period for interested parties to comment or object to the application. During this time the application is also circulated to all affected departments in the municipality, provincial departments and any service authorities, and neighbouring municipalities for their comments;
- ▶ full engineering or services report only needed later in the process when bulk contributions need to be determined;
- ▶ a decision is made and parties notified; where a party is aggrieved by a decision, an appeal may be lodged with the provincial authority (usually 28 days from notification of approval by the municipality). The final decision on the appeal is made by the MEC.
- ▶ if approved then the plans and diagrams are lodged with the Surveyor General;
- ▶ when all the conditions of establishment are complied with, applicant registers the township with the Registrar of Deeds (have one year to do this or it lapses) and the register is opened;
- ▶ the township is declared an approved township by proclamation in the Provincial Gazette;
- ▶ services are installed and clearances issued by local authority;
- ▶ Registrar of Deeds notified that individual erven can be registered.

In this 'model' the risk is moderate as minimum supporting documentation and reports are needed and more specialist reports are called for in the course of the process, if needed. The General Plan can be approved fairly early on in the process.

²⁰ This section adapted from National Treasury, Development Procedures: Township Establishment, Analysis of flow charts, 2 April 2008

Depending on the municipality (or provincial authority), and the ability of the applicant to supply all the necessary information timeously throughout the approval process, it can take between one and three years from submission to promulgation.

2. DFA (fast-track model)

To speed up decision-making, the DFA made important departures from the Ordinance procedures. The DFA requires the developer to carry much of the risk of the application upfront and the application is only submitted once all detailed information relating to the application has been compiled. This could be considered the **fast-track 'model'**.

The DFA requires specialist reports (geotechnical, services agreements, traffic impact, environmental scoping report, others as requested by the Tribunal) to be completed upfront, loading the cost and risk upstream of the decision. In particular, an environmental scoping report is required in terms of the DFA (in addition to the separate process under NEMA). Essentially, the DFA procedures are:

- ▶ All necessary documentation, reports, layout plans, motivation (on basis of DFA principles and SDF) submitted to DFA Registrar (no fees are prescribed);
- ▶ Application is advertised in similar manner as Ordinance applications – 21 days to lodge objections;
- ▶ Interested parties are also notified and these notices have the effect of a subpoena to attend the hearing;
- ▶ A hearing date is obtained 80 – 120 days from the registrar receiving the application;
- ▶ The hearing is preceded by a pre-hearing, one to two weeks before the hearing (all parties to attend). Here all administrative aspects of the application are clarified (the agenda is established by regulation) so that when the Tribunal meets, all facts can be placed before it and a speedy decision made;
- ▶ Hearing by the Tribunal – all parties to the application attend and state their case;
- ▶ A decision is made by the Tribunal within one week and parties notified; [Any aggrieved party may lodge an appeal against the decision of the Tribunal; the Development Appeal Tribunal hears the appeal and makes a decision.]
- ▶ Submission of plans to Surveyor General (within five months);
- ▶ Lodge with Registrar of Deeds for opening of the register (within two months of approved General Plan);
- ▶ Registration of individual title deeds.

Hence, this 'model' allows for the decision-making body to make a speedy decision in one hearing as it has all the facts of the application before it, can hear the views of all parties in one sitting and call for any additional information that it may need. Timeframes are established for outer time limits for setting up a hearing. The applicant is thus assured of when a decision will be made right from the date of submission. Developers often indicate that the upfront costs incurred by developers are usually offset by the faster decision-making process.



3. LEFTEA (shortened model)

It is possible that a third 'model' could be identified, although it is really a modification of the Ordinance general procedures, but with exclusions from certain requirements that are perceived to slow down the process or attempting to shorten existing mainstream procedures. It could be called **the shortened 'model'**. The LEFTEA uses this approach, mainly by cutting out the public participation steps and by granting the MEC (then Administrator) the unilateral powers to make decisions. It was introduced in the early 1990s as part of a final attempt by the then government to introduce land reforms, aimed particularly at low-income housing development. The key steps include:

- ▶ The application is submitted to the provincial authority;
- ▶ Province may or may not advertise the application;
- ▶ Province circulates to affected municipality and other provincial departments for comments;
- ▶ Province (MEC) approves the application, with conditions (meant to be within 60 days);
- ▶ Submit to Surveyor General to approve General Plan;
- ▶ Install services and can settle on the land;
- ▶ Township register opened at Registrar of Deeds;
- ▶ Registration of individual title deeds.

The LEFTEA also has some even faster procedures to allow early settlement on land (Chapter 1 provisions) where there is an 'urgent need' decided by the MEC. Through this process, land is designated by the MEC, laws affecting the development can be suspended, a General Plan (or provisional General Plan) is prepared and plots are pegged, people are settled on the land, a township register is opened and then transfers can take place.

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- ▶ Presentation of Land Affairs' performance (August, 2007)
- ▶ Medium Term Budget policy statement: Departments of Agriculture and Land Affairs: Briefings (November, 2007)
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