



FREE MARKET FOUNDATION

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Free Market Foundation submission on LAND REFORM – OVERVIEW

SEE ALSO: Free Market Foundation submission on LAND REFORM – MORE DETAIL (ATTACHMENT)

To: Committee 2 (Land Reform)
High Level Panel on the Assessment of Key Legislation
By: Free Market Foundation

1. The Free Market Foundation

The Free Market Foundation (FMF) is an independent non-profit public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships.

2. Introduction

Secure property rights represent one of the most important requirements for the protection of both economic freedom and civil liberties. South Africa's "land acts" are often regarded as the cornerstone of apartheid, the aspect of South Africa's "crime against humanity" that made the biggest single contribution to psychological, political and material dispossession of black South Africans. The "land question" remains one of the most problematic and conflict-provoking aspects of post-apartheid South Africa. The "land debate" consists primarily of a discourse about land redistribution from whites to blacks, which is so overpowering that scant attention is paid to other aspects that have greater potential for black economic empowerment. Black South Africans constitute 80% of the population and live primarily on urban "plots" which they hold under a range of limited forms of tenure. The balance live on plots or farms in rural "tribal" areas (formerly "homelands"), also under a range of forms of tribal tenure. Around 3.4 million black families have been housed in RDP houses where pre-emptive clauses distinguish their ownership from that of whites. A small but growing number of blacks live in historically "white" areas. Twenty-two years after transition to predominantly black rule, most black South Africans still live under the legislative progeny of the Land Acts.

3. The FMF proposes that:

1. All black occupied council-owned urban plots / rental stock be converted to full ownership ("freehold").

The *Khaya Lam (My Home) Land Reform Project*, one of the FMF's flagship initiatives, is dedicated to transformation through ownership. Between five and seven million urban plots – mostly residential – throughout South Africa are owned by local government, and not the people who live on them. Converting these plots from council-owned to privately-owned with full freehold title deeds will bring a sense of pride and dignity to the occupants, who, as 'new owners', will be able to invest in and perhaps generate an income from their property. In many cases, ownership is all that is needed for millions of South Africans to enter the market as legitimate small business owners, or landlords to others who do not yet have the means to own property.

See attachment: Speech: Khaya Lam (My Home) Land Reform Project

2. Superfluous government land be redistributed to the victims of apartheid as a substantial once-off compensation for the crime of apartheid.

The Department of Land Affairs and Works, according to the Deeds Registry, owns a substantial amount of unutilised land throughout the country – both urban and rural. Throughout South Africa, especially in "proclaimed" areas (towns and cities), there is a substantial amount of land marked as 'reserved' for specific government purposes. Many or most departments, provincial governments and councils have billions of rands worth of land without knowing it. However, due to the sheer complexity of apartheid land law which the

government inherited, the departments which are to use these plots, in many cases, do not even know that they exist. Government therefore has it well within its means to convert millions of plots across the country to full ownership title and to distribute, at virtually no cost, unused government land to landless black individuals. The massive amount of land which the State owns has not been given the attention it deserves in the national conversation about land reform. No accurate "land audit" exists. Nothing purporting to be an audit captures the extent of land at the disposal of government in all its forms. "Reserved land", for instance, appears in deeds registries as private land.

See attachment: Article: Transfer land from the state to the people now

3. *Pre-emptive clauses be removed from existing and future RDP titles.*

Where the government has done substantial good – RDP houses – it has not gone far enough. RDP title deeds include 'pre-emptive clauses' that prohibit owners from selling their home for a specified time period. These clauses nullify a central feature of property ownership, which is the choice and the ability to sell or let. According to studies referenced by the FMF, this phenomenon has led to 80% occupancy of RDP homes by people who 'bought' them illegally from the previous owners. There is no justice in forcing poor home owners to choose between losing their most valuable asset and getting a job in another city, or remaining where they are and jobless, just because they are not permitted to sell their house and move to another area. FMF argues that government should treat black South Africans the way whites are treated. Whites are allowed to let and sell their property; so too should blacks be allowed to utilise their most valuable asset.

See attachment: Article: Convert all RDP housing to full and unrestricted freehold title

4. *Freehold title on "redistributed land"*

All or most land that has been redistributed from white to black South Africans on the "willing buyer willing seller" basis, has in fact not been redistributed at all. Typically it has not been transferred to black property owners. Black occupiers are, as under apartheid, tenants at the behest of government. What the country needs is a fundamentally new paradigm, namely that "black" land is fully and unambiguously owned on precisely the same basis as "white" land. Only when that principle is adopted and purposefully implemented can it be said that the racist land legacy of apartheid no longer prevails.

5. *In traditional areas, communities be allowed to grant private title over homesteads while maintaining communal rights over arable land – if that is what they choose.*

Traditional property titling options should take into account the sentiments of traditional communities while at the same time ensuring the security of tenure that comes with conventional legal titling. The principle should be that traditional communities be empowered to decide democratically what to do with their land. It is clear from experience in the East Cape and Mpumalanga that some, probably most, will opt for freehold title subject to condition of title appropriate to the community. Those that decide democratically to opt for "traditional" tenure, should be respected and allowed to do so. They should be free to adopt whatever future variations are democratically proved.

See attachment: Article: Traditional communities at risk

6. *The Subdivision of Agricultural Land Act, 70 of 1970 should be repealed to make it easier to finance smaller, more affordable plots of land; to allow farmers to give freehold title to farm workers resident on their farms.*

The Subdivision of Agricultural Land (an apartheid land law) prohibits owners of 'agricultural' land from subdividing it without jumping through bureaucratic hoops. Poor individuals cannot buy a small plot of land from a farmer for their own purposes, unless they get consent from the Minister of Rural Affairs and Land Reform. To add insult to injury, the Minister may dictate "as he deems fit" the purposes for which the new subdivided land may be used. As with RDP homes, this is an instance of the government severely limiting ownership rights to the detriment of the poor. This Act should be substantially amended to reflect our post-apartheid dispensation, or repealed entirely.

Other attachments

1. Frequently asked questions
2. Article: Myths about land reform
3. [Free Market Foundation submission on LAND REFORM – MORE DETAIL](#)

Attachment to FMF submission on LAND REFORM – OVERVIEW

Khaya Lam (My Home) Land Reform Project

“A man is not a man until he has a house of his own” Mandela: Long walk to Freedom

The Free Market Foundation's Khaya Lam Land Reform project should be studied against the historical background of a series of laws. Laws that were designed to economically disempower blacks, and, thereby, provide a black labour pool for the agricultural sector, and, later, for a burgeoning mining industry.

The main thrust of these laws restricted, nullified and prevented ownership of fixed property by blacks. The Glen-Grey Act of 1894 was such a piece of legislation. But, the most effective and devastating of these pernicious policies was the notorious Natives Land Act of 1913.

The Act was passed on 19 June 1913. The day after, Sol Plaatje lamented: “Awaking on Friday morning, 20 June 1913, the South African native found himself not actually a slave, but a pariah in the land of his birth”. So vehemently opposed to this Act was the South African Native National Congress (a precursor to the African National Congress), that it saw fit to dispatch the leadership which included Plaatje, to engage the British colonial government in Britain and voice the objections of the native population. This was to no avail.

In another statement on behalf of the Heidelberg District of the South Africa Native National Congress, TM Dambuzu said: “The Natives’ Land Act breaks our people and puts them back in the rearing of their stock and ruins what they term their bank. It causes our people to be derelicts and helpless. We beg the Commission to approach the government and make our grievance clear and find a haven of refuge for our oppressed. There is winter in the Natives’ Land Act. In winter the trees are stripped and leafless...” (Illustrated history of South Africa published by the Reader’s Digest)

These voices from the past resound to this day. They foresaw the socioeconomic consequences that the policy would leave in its wake. That is why there has been sustained and vociferous opposition, particularly to this Act.

While some progress has been realised in terms of the socioeconomic upliftment of blacks primarily through their own endeavours, an opportunity exists today that goes beyond ameliorating the consequences of past segregationist policies. It is an opportunity that will address the challenges and catalyse a process of economic self-empowerment that, in turn, will result in people effectively participating in the wealth creation process and progressively becoming wealthier.

Such a process starts with a deep understanding of private property, its logic and the socioeconomic implications that inevitably emanate from it.

Occupied property means only that and nothing more in terms of economic significance. Such property cannot be used as collateral in order to secure capital for purposes of starting or expanding an existing business or for securing a loan for various needs of the household, such as payment for the education of the children. When a property is not their own, the occupants tend

to be reluctant to make any improvements to it, even when they are allowed to do so. This point, inter alia, is underscored in Hernando de Soto's seminal work, the book *The Mystery of Capital*, in which he describes such property as dead capital.

When people have freehold legal title to property, that property can be used as collateral. The capital is no longer dead. And the legal status of being a property owner unleashes a spirit of enterprise and individual initiative more than any other policy measure. The Glen Grey Act, the Natives Land Act, and all other such policies resulted in the economic emasculation of blacks. To confer full freehold legal status on occupied land is the single most important measure to reverse such damage and to set blacks on the steep upward trajectory of socioeconomic progress.

The FMF's Khaya Lam (My House) Land Reform Project is the measure that will transform the prevailing status quo. To this day, twenty years into democracy, the majority of blacks still continue to be merely tenants on the property they occupy. Government, at national, provincial and local municipal level is still the landlord. The implementation of Khaya Lam is achieving what socialists could only dream of but inherently are unable to achieve: transforming have-nots into haves. In the case of the Khaya Lam template, this occurs at the stroke of a pen. And most significantly, at no stage does the process entail that the government needs to commandeer any portion of taxpayers' incomes to fund the project.

Freehold title was secured by some blacks just prior to the kicking in of the democratic dispensation and especially during the early years of the Mandela administration. Just as reported to have happened then, the result of the Khaya Lam pilot project being carried out in the townships that fall within the Ngwathe municipal (Free State province) area, such as Thumahole and others, affords abundant evidence of what benefits unfold for the home owners.

The long-time occupiers, now 'new' owners of their properties, hire all sorts of artisans to improve their houses. These artisans, of course, include brick layers, plasterers, carpenters, plumbers, welders and painters, and many others. They build additional rooms. In some cases, entire existing structures are demolished and new houses slowly rise up. The now proud owners save a substantial amount of their income for such home improvement initiatives, some work overtime at their places of employment to finance envisaged improvements. The more entrepreneurial individuals establish informal retail shops on their premises, or even low scale manufacturing businesses such as welders manufacturing gate and burglar bars for doors and windows.

These formerly state-owned rental properties now catalyse a cauldron of diverse economic activity in the townships and rural areas on a scale inconceivable only a short while ago.

Another important dimension to the Khaya Lam project is that in many cases the owners bequeath the property to their children. This encourages youngsters who take pride in their family home to seek employment and contribute towards making further improvements to the house. With the added care shown and every improvement, the value of the asset appreciates. So from one generation to another, layer by layer, their level of wealth will increase.

What starts out as a straightforward initiative to convert dead capital into a real economic asset unleashes a stream of progressive wealth-creation that has no end. The demonstration effect of

the Khaya Lam project is that it has to be implemented throughout the country as speedily as possible.

Another very important consideration is that, with economic freedom, which means free markets, protection of private property is an essential cornerstone. The logical extension of this is that the policy environment of the country has to be conducive to and support the process for people to acquire private property.

In a free market, there has to be voluntary exchange, personal choice and personal responsibility. Only when government accepts these principles as sacrosanct, can South Africa realise a peaceful, socioeconomic revolution that will result in the socioeconomic upliftment of the greatest number of people in the shortest possible time.

Mandela knew this when he said: "As I moved around the world and heard the opinions of leading people and economists about how to grow an economy, I was persuaded and convinced about the free market. The question is how we match those demands of the free market with the burning social needs of the world."

South Africa's policy makers, and those of any country for that matter, must shift from the policy paradigm of throwing money at problems as is characteristic of welfare systems. Such state welfare-oriented policies undermine self-pride and result in low self esteem on the part of able bodied individuals who are, in reality, subsidised by the economically productive individuals. Policy makers must focus instead on policies that will involve the greatest number of people in the wealth creating process. This essentially means adopting policies that are based on the sovereignty and thus the economic freedom of the individual.

Mandela asserts this point quite poignantly: "Money won't create success, the freedom to make it will".

The Khaya lam (Ngwathe Land Reform) project speaks volumes in this regard.

Temba A Nolutshungu
FMF

This is the text of a speech delivered in Cape Town on Friday, 5 September 2014, at the SYPALA 2014 conference hosted by Entrepreneurs in Public Policy and the Independent Entrepreneurship Group.

Attachment to FMF submission on LAND REFORM – OVERVIEW

Transfer land from the state to the people now

Black South Africans in historically black areas (HBAs) hold but, with rare exceptions, do not own about 10 million parcels of land. White South Africans in historically white areas (HWAs) own about five million parcels. Denial of the right to own land was one of the cornerstones of apartheid oppression, and it's still with us. Holding without owning land has negative consequences; land ownership allows people to buy, sell, let, mortgage, develop, subdivide and consolidate it, all of which ensures that the country's most valuable asset is allocated and utilised efficiently. Without these rights, people in historically black areas remain at an unconscionable disadvantage.

Black South Africans may be allotted urban or rural land if they are lucky. Often they must pay bribes or be adult males in tribal villages. Then they're stuck with it even if they live elsewhere and their land remains idle or under-utilised. They can transfer their land only by way of complex processes, usually subject to severe restrictions, and without proper compensation for land or improvement value.

The problem is that land in HBAs, where most black South Africans live and are likely to live for many years, is still owned by the state and held under a complex array of restrictive forms of 'apartheid' title which deny them the right to deal with their land as whites do. In this important sense, whites are still freer than blacks.

Verwoerd's 'native affairs' laws still govern land tenure in most HBAs and reduce it to what Hernando de Soto in his celebrated book *The Mystery of Capital* calls 'dead capital'.

One of the first acts of transition was the Upgrade of Land Tenure Rights Act No 112 of 1991, which promised conversion of apartheid land tenure to ownership. The limited extent to which there has been 'tenure upgrade' is undocumented and has been prohibitively costly.

There are many reasons for the failure of tenure upgrade policy, ranging from bureaucratic inertia to perverse vested interests created by land laws that confer substantial arbitrary power and status on some officials, and require prohibitively costly and complex intervention by land surveyors, conveyancers, town planners and developers. Given 16 years of failure, the only feasible solution is for government to override vested interests and upgrade black land tenure by simple statutory decree at best, or by substantially streamlined procedures at worst.

Apart from land held under apartheid tenure in HBAs, superfluous state land is a second huge source of 'dead capital', which at virtually no cost, can be redistributed to landless black South Africans. Most landless black South Africans are women who were denied access to land by virtue of not having 'section 10 rights' under apartheid, and discriminated against under tribal law. If the government uses less than 10% of its superfluous land, it can provide all landless households with a free plot under a 'one family one plot' programme. Most of this land by area is reflected in the Deeds Registry as belonging to the Departments of Land Affairs and Works. Most of it by value is probably owned – though there is presently no way of knowing – by a multiplicity of government departments, agencies and parastatals at all four levels of government,

A plot of land investigated by me twenty years ago in Hyde Park, one of SA's highest value suburbs, is a typical example of thousands of mysterious 'reserved' properties throughout the country. The Education Department, for whom it had been reserved in terms of 'conditions of establishment' many years ago, knew nothing about it. The government structure for which such land has been reserved as a pre-condition for development is often unaware of it. Land not regarded as appropriate for redistribution could be sold and enormous revenues generated that could be used to acquire land for black South Africans elsewhere.

No one knows what proportion of state land by value, area or locality is superfluous or under-utilised. It is clear that statements, some purporting to be backed by sophisticated research, massively understate the amount.

Instead of the current national obsession with how much 'white' land can or should be redistributed to blacks, and whether or not it should be confiscated or purchased, much more can be achieved, more expeditiously, and at virtually no cost, by the simple process of upgrading apartheid tenure and redistributing superfluous land already owned by government. South Africans should learn from Zimbabwe, where to this day the majority of people living in HBAs ('townships', 'locations' and 'tribal trusts') still do not own their own land, and their government, like ours, owns a massive proportion of all land, much of which is superfluous. There, as here, virtually no attention has been given to the fantastic potential for black economic empowerment and for national prosperity of pro-market land reform.

Tenure upgrade and superfluous state land redistribution would be an act of empowerment and a boost to the economy far in excess of any other proposal currently under consideration. It would be racially harmonising, morally imperative and economically progressive.

Leon Louw
FMF Executive Director

Attachment to FMF submission on LAND REFORM – OVERVIEW

Convert all RDP housing to full and unrestricted freehold title

Wouldn't it be wonderful if black South Africans had equal rights, if they enjoyed the same home ownership rights as whites, if they were emancipated, empowered and trusted, if they were presumed to be the equals of whites and no longer patronised? Wouldn't we rejoice if racism were ended, not just racism by whites against blacks, and blacks against whites, but racism by blacks against blacks? Imagine a world in which blacks stop treating blacks as if they are inferior and think they should no longer live under patronising laws which deny them the right to own and deal freely with their land.

Much fuss is made when blacks who get RDP houses that cost R50,000 or more sell them for R10,000. But, no spontaneous outrage erupts when politicians and officials announce with pride and glee the repossession of houses or farms from blacks who were not using them to their satisfaction, or who were not in personal occupation. It would make headline news if whites were treated like this.

This is not recycled news from the 1960's apartheid years; this is now, in the new 2011 aspirantly non-racial, post-apartheid South Africa.

Why is no outrage expressed? Because racism is so ubiquitous that one of its most extreme manifestations is going unobserved and unquestioned. Bureaucratic inertia may explain, but does not excuse why racially inferior land tenure inherited from apartheid is not being converted into full freehold title. Failure to do so is continuing and prolonging the Verwoerdian legacy of giving toxic RDP and redistribution title to blacks in the new South Africa and is perpetuating and exacerbating the problem.

Since 1994 about three million "RDP" houses have been allocated to black South Africans. Most or all are subject to racially discriminatory, restrictive and pre-emptive conditions. The two most common are (a) an eight-year prohibition on selling or letting, and (b) a condition that there may be only one dwelling per property. Both seem reasonable at first, but, as everyone who has anything to do with 'black townships', 'locations' and 'informal settlements' knows, the real world bears virtually no relationship to the fantasy world of planners and legislators. Experts and land audits suggest, but no one actually knows, that one half to three quarters of all RDP and other township houses are not occupied by official beneficiaries; most, in some areas virtually all, have illegal tenant shacks in the yard; and properties have been unlawfully sold, let or developed.

All major political parties have been reported as having taken back such housing. Not one major political party has been reported as calling for blacks in "black" areas to enjoy the same ownership rights as blacks who own property in "white" areas. This is especially curious since presumably no one wants the status quo in which most blacks live under virtual house arrest.

Most blacks are faced with the following intolerable choice: if they can get a job somewhere other than where they happen to live, which is the norm, they have to remain unemployed or abandon their most valuable asset, their house. If they choose to abandon an RDP house, it is reallocated to the next person on the waiting list (or, some believe, the next person to pay a suitable bribe), and

they never get another, regardless of how compelling their reason might be for leaving. In short, they have to choose between being housed or employed. If they choose to remain unemployed, they will probably lose their house anyway because they won't be able to afford to maintain it or pay property taxes.

Most blacks ignore their lawful options and sell or let their RDP or other township house "informally". Since the law prevents them from having secure or tradable title, they are forced to sell or let at massively discounted "black market" prices. New occupiers live in a state of permanent fear that they might be caught and, with their belongings, summarily evicted onto the sidewalk.

Because of the discretionary and clandestine allocation of RDP houses, there is real or suspected corruption. In some areas people at the bottom of the list believe they will never rise to the top unless they bribe housing officials.

A common objection to black titling is that recipients of RDP housing will dispose of their houses, pocket the cash, and become homeless once more. The most conspicuous thing about this objection is that it is never raised against white rights. Why is it assumed that blacks are incapable of behaving responsibly? Why is it not assumed that people of all races who sell or let their most valuable asset do so after careful consideration? They might need the money more than the house for a host of legitimate reasons: relocating to somewhere with better employment prospects, starting a small business, educating children, or health care.

Perhaps the most bizarre aspect of this objection is the assumption that RDP houses disposed of by initial beneficiaries remain unoccupied. In truth, other blacks move in. For various reasons, the new occupants are likely to be more suitable: they have the resources to maintain or improve the house; they have upgraded from living in a slum; or they have moved to be near their place of employment.

The propensity for freely tradable assets to gravitate rapidly into optimal hands when markets are free is the 'Coase Theorem', according to which there is no need to anguish about the initial holder of assets. Provided there is no restriction on assets being exchanged, they will soon end up in optimal hands.

By far the most important first step that needs to be taken if the problem – or is it a national crisis? – is to be solved, is for the highest levels of government to decide to uproot apartheid tenure once and for all. The decision, fully backed and appreciated by the Cabinet, and purposefully championed by the President should be to immediately discontinue restrictive and pre-emptive RDP housing conditions. The effect would be that all new RDP beneficiaries would get full non-racial (white equivalent) title and property rights would no longer be racially denied.

Leon Louw
FMF Executive Director

Attachment to FMF submission on LAND REFORM – OVERVIEW

Traditional communities at risk

South Africa's traditional communities – their customs, cultures and perhaps even their languages are at risk. The threat comes from what at first glance seems an unexpected source: the government many of them voted into office. Yet closer examination reveals, significantly, that members of the South African Communist Party are at the forefront of the attempts to divide the communities and reduce their influence. Communists from the earliest days of the USSR have distrusted – and tried to stamp out – cultural autonomy because of their fear of contending loyalties. Of course, they have not revealed their real intentions; their excuse is that there is no place for traditional forms of decision-making in a modern democracy, and that the Constitution does not provide for people to be deprived of their voting rights. However, there is no form of government that is more democratic than the African tradition of consensus decision-making – and, indeed many senior members of the ANC have frequently made this point in the past.

Democracy means "government by the people" and is not necessarily confined to Western-style 50 per cent plus one majority rule. African tradition requires the people of a village, region or nation to gather together to discuss important issues until a consensus emerges. No leaders – whether chiefs or Kings – are allowed to be autocratic – they are bound by the will of their people. It is therefore not surprising that traditional African communities are generally peaceful. Western democratic systems of governance are not superior to this process, and tribal peoples have every right to be proud of their heritage.

In the debate that has been taking place recently over the demarcation of local authority boundaries, nothing whatsoever has been said about traditional communities themselves – the focus has been solely on the rights and powers of their leaders. It is almost as if these communities are invisible. No one in government has suggested that they should be allowed to gather together in their traditional manner, to listen to arguments about modernisation and Western-style democracy versus traditional African systems, and then in their own time, village by village, and region by region, to choose for themselves the kind of local government they prefer. Instead, they are to be dictated to, just as they were by the colonial powers and by the country's successive undemocratic governments

Planning for the detribalisation of South Africa was incorporated in the Constitution. Whereas all the other institutions of government were carefully described, Chapter 12 on traditional leaders did not set out the powers, functions or duties of the traditional community institutions. A seemingly innocuous "poison" section was then incorporated in Chapter 7 that said that local government would consist of municipalities, "which must be established for the whole of the territory of the Republic". How were traditional communities to know that this section would be used to impose elected municipal councils on them?

The ANC could make itself a lot of friends in the traditional communities by adopting the following proposals, which will restore to traditional communities some measure of the autonomy they were deprived of in the colonial past:

- Recognise and entrench the rights of the traditional communities in the Constitution.
- Adopt legislation that gives recognition to the traditional decision-making mechanisms of tribal communities.
- Convert all trust land and government-owned tribal land to tribal "owned land" by registering that land in the names of the respective communities in the Deeds Office.
- Establish functioning mechanisms for the Provincial Houses of Traditional Leaders and the National House of Traditional Leaders to deal with all legislative, administrative and budgetary matters relating to areas under the jurisdiction of traditional authorities.
- Establish fiscal measures based on population numbers, under the control of the traditional authorities, for the provision and maintenance of infrastructure and services, and for the general development of the tribal areas.
- Transfer to the traditional authorities the responsibility for the proper functioning of local authorities, policing, schooling, and health and welfare services in the tribal areas.
- Establish lines of authority that require traditional authorities to report ultimately to Parliament on the administration of their budgets and not to any lower level of administrative or political authority.
- Establish mechanisms that will allow traditional communities to maintain land registers and grant freehold land ownership rights in their areas, with the power to confine such rights exclusively to members of their own tribes.
- Recognise traditional justice and traditional courts in the tribal areas with safeguards to ensure compliance with the Constitution.
- Vest decisions relating to the accession of their traditional leaders with the respective communities, including the question of the possible accession of women to leadership roles where this issue has not yet been dealt with.
- Vest power with the respective communities to determine their own structures of leadership with no requirement for uniformity across communities.
- Remove the colonial and apartheid legacy of government leaders being responsible for the appointment of leaders of traditional communities.

These reforms will not deprive traditional communities of the vote, as some politicians contend, as they will vote in all elections except local government elections. They will also have a far greater say in local affairs than they would have under an elected local authority.

The traditional communities are the custodians of their distinctive tribal cultures, languages, histories and traditions, and they will be able to do this more effectively if they are in control of local government. As matters now stand, traditional leaders are accused of doing nothing for their people, yet they have been given neither power nor resources with which to provide infrastructure or services of any kind.

If the African renaissance is to have any real meaning at all, it must surely be rooted in venerable African traditions and promote their resurrection.

Eustace Davie
Director, FMF

Attachment to FMF submission on LAND REFORM – OVERVIEW

Frequently asked questions

Before interrogating individual questions, the general point should be made that most concerns about and objections to blacks having indistinguishable property rights from whites, amounts to a perpetuation of the apartheid notion that blacks should be treated differently, specifically patronisingly and as if they are innately inferior. The assumption underlying most objections to conversion to full freehold is that black South Africans cannot be trusted with rights and powers taken for granted by white South Africans.

Is it right to give people free land? If they have to buy it, even at a nominal price, will they not value it more and be more likely to retain and improve it? Will free land on a vast scale not aggravate the “culture of entitlement”, and encourage black South Africans to expect the government to “deliver” all their needs?

These are good questions to which there is no simple answer. The case for conversion to full freehold at no cost to beneficiaries is that black South Africans were denied land rights under apartheid and that *one-household-one-plot* can be regarded as a form of compensation for the crime of apartheid utilising black-occupied land nationalised by the apartheid regime. In other words, it should not be seen as a matter of welfare or charity, but as just compensation for harm inflicted.

Secondly, most black households have paid “rent” and “rates” which can be regarded as instalments for the purchase of their land.

It is true that many have refrained from paying since the rent boycotts as part of the anti-apartheid struggle and that massive amounts of notional debt have accumulated in government books. The fact is that it is practically impossible to unravel the mess. There seems to be no practical solution to the problem, which is compounded by massive administrative problems in the books of government departments at all three levels. The extent to which such notional debts have in any event prescribed is unclear. In most cases the land concerned has acquired its present value by virtue of investment in improvements.

Finally, by virtue of the “land ethic” amongst most South African blacks, there is a singular relationship with and attachment to the land, which includes the belief that land permanently occupied rightfully belongs to the occupant. What full freehold will do is to modernise this relationship as beneficiaries become accustomed to the idea that land is tradable and residence does not have to be perpetually fixed regardless of economic realities such as whether people want to be peasant farmers or relocate to places with superior opportunities.

If blacks are free to sell, mortgage or let their land, will they not simply dispose of it – “cash in their chips” – and become landless, indigent dependents of the state?

The fact is that a vast proportion of South Africans are presently landless in that they live on land “informally” (i.e. unlawfully). They live in informal, semi-formal, and “squatter” settlements, and in shacks in the yards of people occupying land lawfully. They live in informal and unproclaimed settlements on farms and on allotments often made without regard to legal requirements in urban, rural and traditional areas.

If someone who is a newly empowered land owner, sells or lets their land, there is presently concern about whether they should be allowed to do so given that land was allocated to them by the

state. There are an increasing number of instances of land being repossessed because it is not being used to the satisfaction of the state, being let to tenants or sold informally (i.e. unlawfully).

In the discourse on the matter, there is seldom if any mention of the person who has acquired the land. There are two parties to such transactions, those who attach higher value to the land and can make better use of it and are therefore willing and able to pay more than the value the land has for the preceding occupier. That means not only that the land has been transferred to someone who attaches more value to it, but that the land value has been enhanced not only for the land concerned but of all land in the community, the majority of which has not been alienated. In other words, such transactions benefit the vast majority of land holders.

Furthermore, those who alienate land benefit in many ways. They now have resources with which to pursue objectives that are for them of higher value, such as relocating to another town where they might get a job or start a small business. They may need the money for health or educational purposes. It makes no sense to force people to stay on land which is not of adequate value to them and which is in a place where it is inappropriate for them to reside.

There is a related concern that people who alienate land would not do so to use the proceeds sensibly. Instead of using it to relocate to somewhere where they can get a job or start a business, or to educate their children, or acquire essential health care, or whatever, they may waste the money on reckless living.

This is an obviously patronising, insulting and demeaning conception of South African citizens. It is also manifestly in conflict with reality. There will always be a few people who do not conduct their lives responsibly and forcing them to remain on an unsatisfactory plot is no solution. Fortunately the reality is very different from the fear that vast numbers of beneficiaries will sell or let their properties recklessly and destructively. On the contrary, the black land ethic is such that black South Africans are extremely, perhaps excessively, reluctant to alienate land even when it is manifestly in their interests to do so. The experience in the few places where blacks hold land under freely tradable title is that there is a minimal land market. There are virtually no "for sale" or "to let" signs and very few if any estate agents.

Instead of discouraging blacks from alienating land, what is needed is a public education campaign accompanying conversion to full freehold to encourage blacks to regard land as tradable, lettable and mortgageable.

Regarding mortgages, the fear is that people will recklessly mortgage their lands to banks and others and then default on their payments and lose their land and the instalments they have paid. There are two reasons why this fear is unjustified. Firstly, mortgage grantors are reluctant to grant mortgages in low-income communities. The risks and administrative costs are far too high. This is why the government has gone to great lengths to encourage financial institutions through the financial sector charter and other means to grant mortgages in predominantly black areas. The greater interest of banks when low income communities have full freehold is that they are "bankable". The mere fact that people have a substantial tradable asset means that, without a mortgage, they qualify for a rich range of financial products and services. Secondly, there is not much demand for mortgages, which is why banks promote and encourage awareness of the mortgage option.

If it is so simple, why has it not been done?

This is perhaps the best question of all. The answer seems to be a combination of attitudes mentioned in the introduction above to the effect that blacks cannot be trusted with as much freedom and emancipation as whites, on one hand, and complex technical challenges, and perverse vested interests on the other.

The technical challenges vary depending on the nature of existing land occupation. The proposal for conversion to full freehold is that all land permanently occupied by black households should be regarded, as it technically is, as land belonging to government in one of its forms. The underlying commonality between all contexts is disposal of state land. Increasingly "title deeds" have been given or sold to blacks in urban "townships". The problem here is that in many or most there are restrictive conditions according to which land may not be freely sold, let, developed or mortgaged.

Another substantial technical problem is that for land to be owned, present law requires complex and costly preconditions and formalities including cadastral land survey, township proclamation, town planning schemes, deeds registration and conveyancing. There is no experience in South Africa of processing such substantial quantities of land. Serious consideration should be given to reforming the relevant laws so as to enable fast-tracking of at least initial titling.

Another significant technical challenge is that most local governments have as one of the biggest assets on their books outstanding rates and rents from the "townships". This can be dealt with by a combination of writing off debt from indigent households (for the simple reason that, as everyone knows, it will never be paid), writing off debt that has prescribed by effluxion of time, and converting remaining debt to civil debt so that it is delinked from the land and local governments can issue rates clearance certificates.

The principle vested interest is that of low-level officials who administer land in predominantly black areas. These officials are one of the many problematic legacies of apartheid. They can be expected to resist or sabotage land reform for the very simple reason that if blacks own their land unambiguously there will be no need for such officials in black areas for the same reason that there are none in white areas. Needless to say, land management, control and allocation in predominantly black areas is accompanied by a significant degree of real or suspected abuse and corruption. This is of great value to the officials concerned and government will have to decide what to do with them: severance packages, redeployment, etc.

Won't blacks have to start paying rates, property taxes and municipal service charges?

Conversion to full freehold does not change the law in this regard at all. Residents in predominantly black areas are presently required by law to pay whatever charges are levied on such properties. The reality is that there is a random mixture of individuals and communities that do or do not pay according to law. Many do not start paying simply because arrears (rates plus compound interest) that have accumulated since the rent boycotts amount in some cases to over R100,000. They see no point in starting to pay now because it will make very little difference to the total debt they owe and therefore the risk of foreclosure. In particular, there is no point in them paying arrears which frequently amount to more than the value of the land, so even where they are entitled to take transfer into freehold title, they do not do so.

More fundamentally, what rates and charges government decides to impose are a matter of policy regardless of the nature of occupancy or title. The most obvious policy for government is to delink the two completely, that is to determine its rates and services policies independently of occupancy and title.

The point should be made, however, that if people have full freehold title, they will be more inclined to pay rates, etc for the simple reason that they will be wealthier. If they want to sell their land, they will then have to pay whatever is due in order to get a clearance certificate. When people have freehold title they have a valuable asset, which local governments can attach, although this is not recommended.

What this all amounts to is that freehold title does not in and of itself entail any negative implication for beneficiaries as far as government charges are concerned, on one hand, but does substantially enhance the likelihood of increased government revenue, settlement of outstanding debts, and people being inclined to make payments according to law in future.

Doesn't conversion to freehold discriminate unfairly against many people?

There are many senses in which conversion to freehold could be regarded as unfair discrimination.

Firstly, and most obviously, it is a discrimination in favour of people living in predominantly black areas who will be given a substantial asset by the state, in most cases the most valuable asset they will ever own. People of all races outside these areas will not get a comparable "donation". In a perfect world with limitless resources it would be possible to investigate the circumstances of every individual and household with a view to making appropriate and just decisions. The best that can be achieved in the real world is to deal with 50 million South Africans in accordance with general rules that will have overwhelmingly appropriate consequences notwithstanding individual distortions. The legacy of apartheid is that people living in predominantly black areas are generally poorer and to a greater or lesser extent victims of apartheid, specifically land deprivation. They are therefore overwhelmingly the appropriate beneficiaries of conversion to freehold. At a practical level, people in these areas do not have title like their counterparts in predominantly white areas, yet have invested in improving the land and thus its value although they cannot freely trade it.

A more complex ethical challenge is that people who already have permanent occupation of land (whether formal or informal) are privileged compared with people who are landless or live in shacks on other peoples land. Titling for black South Africans could therefore be seen as privileging the privileged. This is a truly serious consideration which has a particular gender dimension. Under the notorious Section 10 of the Group Areas Act, urban land was made available exclusively or predominantly to men. Land in traditional areas was and often still is allocated only to men. This means that most beneficiaries to freehold will be men and that it could be seen as unfair discrimination against women. Women were disproportionately discriminated against under apartheid as far as land is concerned. That this problem exists is no basis for denying the morality, justice, and socio-economic benefits of conversion to freehold. Whilst this is a massive part of the solution to the apartheid land legacy, it does not pretend to be an omnibus solution to all evil.

Mercifully there is a relatively simple and cost free solution to the problem of households that do not receive land on conversion to freehold. Namely to have a *one-household-one-plot* policy whereby superfluous state-owned land in urban areas is utilised for such people. The point is that the state already owns in virtually all urban areas substantial quantities of land, much of which it does not even know it owns. This is not the place to elaborate the point, but a substantial part of such land is called "reserved" land, which is land set aside in all proclaimed predominantly white townships for a full range of government purposes by property developers. Such land remains in perpetuity in the name of the developer in deeds registries and is only identifiable as state land if conditions of title are examined.

Much of this land is suitable for low-income housing. That which is not, can be used for BEE property development purposes or transferred to community owned trusts that will benefit from commercial development thereof.

The next form of apparently unfair discrimination is that all property holders will get full freehold title at no cost regardless of whether they have paid rates, rents, tax and service charges. People who have paid can be regarded as unfairly discriminated against when people who have not paid are treated equally. In a perfect world with limitless resources it would also be possible to address each case on its

merits. The reality is that this is simply impossible. Even if it were possible it would delay normalisation of land ownership for decades as technocrats try to unravel the mess.

The time has come for South Africa to put an end to the apartheid land legacy by a practical and symbolic act that will probably be welcomed by all concerned even if they feel somewhat aggrieved that delinquent neighbours are enjoying the same generous treatment.

Attachment to FMF submission on LAND REFORM – OVERVIEW

Myths about land reform

Land reform is bedevilled by tenacious myths starting with the widely held view, especially amongst blacks, that it has failed.

Myth 1: Land reform revolves around restitution or redistribution of “rural” land

One of the most basic manifestations of progress is urbanisation, to the point, in advanced societies, where less than 5% of the population is in agriculture. Urbanisation is not only inevitable, but also highly desirable, resulting as it does in a reduced cost of housing and an increase in social and physical infrastructure, transport, and access to resources. Settlements in rural areas transform rapidly into towns and should no longer be considered “rural”. South Africa’s rural areas already have fully-fledged municipalities with all the trappings of urban life. Land reform should be concerned with access to land and housing in urban areas and the mindset that it is about rural land should be abandoned.

Myth 2: Access to land is an important component of black advancement and liberation

Most people in advanced countries do not own land, but live as tenants on someone else’s land. Many of the wealthiest people in the world live in apartment blocks as tenants or sectional title owners. If South Africa is serious about wanting economic development, it should aspire to having land used efficiently rather than remaining obsessed with who owns parcels of land in “townships”.

Myth 3: Land reform entails redistributing land from whites to blacks

Restitution is not always clearly understood, especially by whites who assume that it amounts to a Mugabe-like threat to their property rights. On the contrary, restitution is about respecting and upholding property rights. Blacks have a heavy burden of proof that they owned land and that it was misappropriated under apartheid. They are subject to an arbitrary and, in my view, unjust cut-off date of 1913. In addition, once they discharge the burden of proof, they seldom get restitution and more commonly, get offered alternative land or compensation.

Redistribution has acquired the erroneous meaning of rural land being purchased from whites and redistributed to blacks when their restitution claim is rejected. This concept of restitution and redistribution is prohibitively costly, time-consuming and conflict provoking. By far the bigger and best prospect for land redistribution is from government. Government is the primary owner of land in historically black areas (“homelands”, “townships”, “squatter settlements”): land that can be immediately redistributed to existing occupiers at virtually no cost. Estimates of the number of parcels of land vary widely but it appears to be somewhere between 5- and 15-million. In other words, redistribution from government, at virtually zero cost, could result in millions of black land owners with billions of rands of capital released into the hands of existing occupiers and unleashed into the economy where it can be traded, mortgaged, let and developed.

The second form of land that can be redistributed, is superfluous land owned by the government in one of its many forms. No one has any idea how much superfluous government land there is or even what proportion of land belongs to the government. Existing estimates are profoundly flawed in two senses. Firstly, there is an obsession with area rather than value. What matters is not how much blacks own as a proportion of South Africa’s land area, but what they own as a proportion of land value (the high-value land obviously being urban). Secondly, a fundamental flaw in existing estimates is that organs of state owning land have been too narrowly defined; for example, municipal land is defined as private.

Thirdly, there is the mysterious and unquantified “reserved” government land. For more than a century developers have been required to reserve parcels of land for government purposes: parks, telephone exchanges, police stations, schools, post offices, transformers and so on. An investigation by the Department of Works some time ago revealed that it was in possession of vast quantities of land, some in rural areas, defined as “depots”, which were originally for road maintenance crews no longer in existence. The Department of Agriculture has similar land called “outspans”; originally where farmers could rest and graze livestock being driven to distant markets. Such depots and outspans are misleadingly reflected in the deeds registry as belonging to private owners.

Myth 4: The success or failure of low-income housing policy is measured by the number of RDP houses provided by the government

When the government publishes statistics on progress, it mentions only RDP housing supplied by government and does not include what is probably much more significant, ie, housing and land acquired by black people themselves. The truth is that the post-apartheid, deregulated market has supplied a substantial proportion of low-income housing. Paradoxically, the policy of allowing easier private property development and house construction was introduced by the late-Secretary of the Communist Party, then-Minister of Housing, Joe Slovo. His policy of privatisation and deregulation has been an extraordinary and largely unappreciated success.

Myth 5: “Delivery” is what the government gives blacks

My housekeeper, Gladys, complains that the government is not “delivering”. I pointed out that she is the proud owner of a house in Ivory Park. She said: “Yes, but I bought and built it myself.” In her mind, government does not deliver by creating an environment in which black South Africans become land and home owners and enjoy other benefits by their own efforts through a liberated market, but only when it literally gives blacks benefits largely at the expense of whites. Perversely, the government seems to share this view (see Myth 4).

Myth 6: Blacks don’t have land; under apartheid blacks had only 13% of the land

When I was an anti-apartheid activist, I regarded the cliché that blacks had “only 13% of the land” as an objective truth and assumed, like everyone else, that it was based on some incontestable fact with a dependable source. This myth lives on and I now realise that it is and always was nonsense. Firstly, the so-called 13% was the land held by homeland governments. This land did not in any meaningful sense belong to black South Africans, but to the apartheid regime. That 13% is for practical purposes still not owned by blacks, but by the apartheid regime’s successor. Secondly, the land concerned was 13% by area and a great deal less by value. By far the most valuable historically black land was and remains urban. There has never, to my knowledge, been a reliable estimate of either the area or value of such land. Thirdly, homeland land included “consolidation” land, which comprised large tracts of land bought and expropriated from white farmers by the apartheid regime and never transferred to homeland governments.

Myth 7: Freehold title is a Euro-centric, cultural idea not shared by Africans

Needless to say this view is racist in the extreme. Traditional southern African land tenure systems had private ownership as an integral part of tribal law. So-called “communal” land existed only in the “commonage” used primarily for grazing. Even there, access was highly privatised, protected and valued, usually by way of grazing right quotas allocated by the chief-in-council or headman-in-council. All other land – residential, kraals, bomas, arable allotments, trading sites, light industry – was privately allotted in perpetuity. Subject to significant variations from one tribe or village to another, land could be traded and inherited. In some tribal systems, extra voting rights were granted to land owners. The removal and corruption of traditional land ownership systems is a legacy of colonialism. Under

apartheid, control over land was centralised in the hands of chiefs as a means of subjugating blacks. In all pre-industrial, primitive societies, there were forms of land tenure and allocation that were communal in some contexts and private in others. All modern, prosperous societies, regardless of history, culture or race, convert traditional tenure into modern tradable ownership. Any suggestion that black South Africans should not enjoy such progress is not just racist, but counter-revolutionary and retrograde.

Myth 8: The proportion of land held by whites, blacks, government, etc, is inappropriately measured by area

To the limited and inaccurate extent that estimates have been made of the proportion of land held by black South Africans, it refers to land by area rather than by purpose or value – both of which are more important. It is also presumed that land owned by private business is “white”. A more honest and realistic assessment would start by regarding land held by government as held indirectly by or on behalf of black South Africans in that they constitute the majority of voters in a democracy. Land held by companies should either be regarded as non-racial or, for those who are obsessed with race, according to the proportion of beneficial owners of different races. Beneficial owners of most listed companies, by value, are increasingly black through “institutional” investment on behalf of trade unions, medical schemes, unemployment funds, policy holders, depositors in banks and the like. In some of these areas the rapid growth of black participation has passed 50%.

Myth 9: That land reform and land restitution has restored land or redistributed land to black South Africans

The myth was exposed when the Minister of Land Affairs recently announced the intention to repossess land not being used to the government’s satisfaction. What this exposes is the fact that black South Africans in post-apartheid South Africa are still being treated as inferior and being given inferior title. One of the reasons they are not using the land to the satisfaction of government and critics is that they are not free to dispose of it. If black South Africans had the title they should have in a truly non-racial post-apartheid South Africa, they would be free to sell the land to people who would pay good prices for it because they attach or can extract higher value. The legacy of apartheid lives on in that even the post-apartheid regime has not fully embraced treating black South Africans the way people are treated in historically white areas.

Having exposed and disposed of these myths, the proverbial bottom line is that all land lawfully or permanently held by black South Africans in predominantly “black” areas, should firstly, be summarily converted to full, unambiguous, freely tradable ownership at zero cost to beneficiaries. Secondly, the law should be amended to allow private owners with informal settlements on their land, to convert that land through private contracts with occupiers, with nominal red tape and cost, to full, unambiguous, freely tradable ownership. Thirdly, a small proportion of superfluous government land will be sufficient to provide all landless and homeless South Africans with a free residential plot of urban land or a viable portion of agricultural land and full, unambiguous, freely tradable ownership. This should be done immediately and excuses and obfuscation should be dismissed. Finally, community, traditional and tribal land should be unambiguously and democratically owned and controlled by the people concerned, who should be empowered, as envisaged in the Communal Land Rights Act, to convert the land of each lawful occupant, if they wish, to full, unambiguous, freely tradable ownership.

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Free Market Foundation submission on LAND REFORM – MORE DETAIL

To: Committee 2 (Land Reform)
High Level Panel on the Assessment of Key Legislation

By: Free Market Foundation

1. The Free Market Foundation

The Free Market Foundation (FMF) is an independent non-profit public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships.

2. Land and housing reform – problems and proposals

Problems

Many black South Africans have suffered dispossession of their land, denial of adequate access to land, inadequate tribal or apartheid forms of title to accessible land, and restrictions on their use of accessible land. These historical disadvantages have severely handicapped small business development, small-scale agriculture and the provision of housing. Various other factors, including unrealistically high building, surveying and registration standards, are impeding rapid land reform and economic growth.

Experience with land reform to date suggests that far-reaching reforms to existing laws, procedures and institutions are necessary to achieve an acceptable degree of land reform at affordable prices within a reasonable time-frame.

The gradualist approaches thus far adopted to address the huge need for land and housing have hardly made a dent in the problem. The longing for property and shelter cries out for a swifter and more purposeful approach. Many of the measures recommended in this report involve the simple suspension or abolition of obstructive laws and regulations. They can be implemented at the stroke of a pen and will have a dramatic and virtually immediate effect.

This paper draws heavily and verbatim on:

Harris, J and Louw, L (1997) Laws Affecting Small Business – LAND, Friedrich-Naumann-Stiftung, Johannesburg.

RECOMMENDATIONS (summary)

1 Property and rights in land

- Amend the Constitution to prevent future legislation from placing obstacles in the way of obtaining secure, tradeable title.
- Grant all South African land holders security of tenure.
- Give people the right to deal with or dispose of their land without undue restriction.
- Ensure free transferability of traditional land rights subject only to the right of the tribe to confine transfer to its members if desired.
- Respect tenant/owner agreements relating to land.

2 Superfluous state land

- Transfer superfluous state land to the homeless.

3 Democratised administration and disposal of tribal land

- Empower tribal communities to dispose of land into secure and tradeable forms of title.

4 The challenge of secure title

- Allocate new land by a simple low-cost form of registration.
- Exempt unsurveyed land from the Land Survey Act for conversions to freehold for existing occupiers.
- Make the Deeds Office registration requirement optional.
- Scrap the requirement to use a conveyancer for routine property transactions.
- Upgrade existing magisterial registries to provide accurate and legally adequate records of land rights.
- Convert all “apartheid” forms of title to full ownership.

5 The challenge of financing

- Repeal usury law ceilings.

6 Removal of restrictions on land use

- Scrap prescriptive land-use controls.
- Simplify requirements for the establishment of formal and less-formal settlements.
- Create Special Housing Zones exempt from building codes, interest-rate ceilings and costly formalities for mortgage or non-mortgage finance.
- Reduce minimum housing standards to realistic levels or, preferably, scrap them in favour of common law relating to safety and neighbourhood effects.
- Amend town planning schemes and municipal by-laws, replacing zoning laws with nuisance and neighbourhood law.

7 The National Home Builders Registration Council Act

- Scrap the National Home Builders Registration Council Act.

8 Removal of stamp duties and transfer duties

- Abolish imposts on land transfer and mortgage (transfer duties and stamp duties) – especially for low-income communities.

Clearly, land reform on an adequate scale in an acceptable time-frame at an affordable price cannot occur without far-reaching reforms. This paper recommends reforms which could enable the country to achieve otherwise unattainable objectives of "land reform".

1 PROPERTY AND RIGHTS IN LAND

Recommendation 1.1

Grant all South Africans security of tenure, including the right to hold, use and enjoy, sell, let, and mortgage land and rights in land.

It should hardly be necessary, in the light of the world's experience, to present the case for security of rights, and particularly land rights. Ordinary people need the right to hold, use and enjoy, sell, let and mortgage land and rights in land. Secure land rights promote optimal land use, provide access to finance, and encourage investment. People who feel secure and can trade their land rights freely, are more likely to look after what they hold, to optimise its short-term use, to enhance its long-term value, and to seek the ideal balance between long-term and short-term trade-offs. They will be less inclined, for instance, to cause long-term damage such as soil erosion for short-term gain if this will be detrimental to their ultimate interests, or those of their heirs.

At present, rural "black" tenure under a so-called "permission to occupy", or other rights of occupation granted under indigenous custom, is subject to legal insecurity and, more seriously, the curtailment of tradeability. This situation should be rectified as soon as possible, with due regard to the interests of any tribe or community occupying the land, so that all land rights which black South Africans hold now or will acquire in future are secured unambiguously.

Considerations (regarding Recommendations 1.1)

Greater security and tradeability of tenure will meet resistance from some traditional leaders, politicians and officials who do not want to relinquish the power they exercise over disadvantaged people in historically black areas.

Recommendation 1.2

Give people the right to deal with or dispose of their land without undue restriction.

Whites in general have been, and remain, relatively free to dispose of or use their land as they wish, whether by sale freely contracted between "a willing buyer and a willing seller", inheritance, donation, lease or mortgage. Under apartheid, with rare exceptions, blacks had no such freedom, either in "black" area "homelands" or in "townships", "locations" and "black spots" in "white" areas.

Occupants of tribal land under "permission to occupy" (PTO) are, to this day, subject to severe restrictions on their capacity to transfer their rights to any other person. These are in the form of legislation, conditions of title, or traditional law. In all situations where the rights are held under forms of title – there are about ten – and not under traditional law, there is no good reason not to repeal all restrictions on tradeability. They are an unacceptable legacy of apartheid not yet excised from the new South Africa.

The right to sell is often curtailed where land is acquired with state assistance. The reason is the fear that people will sell the land and squander the cash. The evidence to date does not support this fear. A glance at any predominantly "black" newspaper or a visit to any "black" area makes it clear that we are far from a world in which black South Africans trade in land rights. Quite the opposite of restrictions on alienation by choice is needed. If anything, black South Africans with newly-acquired land rights should be encouraged to regard land rights as a legitimately-traded part of the economy.

In any case, it is racist and patronising to restrict black people's right to dispose of their own land. It also reveals an unwarranted lack of confidence in the common sense of ordinary people. Government policy in an emancipated society should assume that individuals are capable of looking after themselves – that they are "rational profit-maximisers" as economists would put it.

Recommendation 1.3

Promote free transferability of tribal land rights, confined to the members of the tribe if that is the tribe's preference.

Tribal land rights often appear to be more complex, covering for instance, familial rights and the "land ethic". But whatever the rights are, including familial rights, there seems to be no good reason why they should not be freely tradeable, though confined to members of the tribe if that is the tribe's preference.

Considerations (regarding Recommendations 1.2 to 1.3)

The same resistance from a few reactionary chiefs mentioned in respect of security of tenure might arise. The solution may be to require, by regulation or condition of title, that the property cannot be transferred to a person who is not a member of the same tribe without the approval of the tribe. It should be noted in our new democracy that where tribal meetings have been held, or surveys done, the overwhelming majority of people in tribal communities have voted for conversion to ownership.

Recommendation 1.4

Base arrangements such as labour tenancy solely on agreements between owner and tenant.

An effective way for low-income earners, most of whom are black, to gain access to land is through lease agreements such as labour tenancy.

People who cannot afford to buy, or who prefer not to do so, should have the option to rent for cash or kind. If they have no money, the law should permit them to gain access to land by offering their services in exchange. The Land Reform (Labour Tenants) Act, 1996 entitles labour tenants to land owned by farmers, and this discourages farmers from taking on or keeping labour tenants. Instead, the law should uphold whatever agreement a farmer and tenant choose to make.

Holders of rights should be able to use them as they see fit, not confined to personal use or outright sale. More fundamentally, the law should be amended to allow farmers to sell to labour tenants. This would be a more efficient and more moral solution.

Considerations (regarding Recommendation 1.4)

The Land Reform (Labour Tenants) Act, 1996, was intended to grant benefits to labour tenants by providing them with greater security of tenure and the opportunity to purchase land, and ensuring that they could not be summarily evicted. Although existing labour tenants may have secured benefits under the Act, the concern is that no landowners will enter into new agreements with labour tenants whilst the Act remains in place. Because of the failure to adopt a dynamic labour tenancy policy, many disadvantaged people will remain or become landless.

2 SUPERFLUOUS GOVERNMENT LAND

Government owns vast tracts of South Africa's land through the Defence Force, the Departments of Land Affairs, Water Affairs and Forestry, Transport, and Works, former homeland governments, wilderness areas, and provincial and local governments. Much of this land is defined by the Department of Land Affairs as "superfluous", and is readily disposable.

Recommendation 2.1

Transfer superfluous state land to the homeless free of charge.

Some of this superfluous state land could be used dramatically and immediately to empower every homeless and landless household with a free plot of land. A "one-household-one-plot" approach could proceed without financing or housing construction, and without costly and time-consuming surveys and deeds registration. Land could be transferred into full and immediate ownership under secure and unambiguous title that can be freely sold, mortgaged or let.

Currently, land is made available only after infrastructure or basic housing can be provided. So most landless people are destined to stay that way indefinitely. A national site-without-service approach (such as the Mayibuye programme in Gauteng) would establish people with undeveloped, securely-held land which they can develop. Site-without-service is a proven approach, as it has always been the basis of traditional land allocation.

A short-term benefit of this approach would be an end to land invasions and sprawling, uncontrolled squatter settlements. Large numbers of plots could be provided at very low cost. The approach can dovetail easily with existing housing subsidies, and there would be no need to wait for housing subsidies to be processed.

There is at least 32 million hectares of state land, the real figure probably being closer to 40 million hectares. Of eight million households with an average family size of five, up to one-third or perhaps three million families are homeless or landless and need land or housing urgently.

This estimate may be too high, as many of the nominally homeless are tenants or tribal residents or live in accommodation supplied by employers. But even on this estimate the state could supply land easily to all landless South Africans using less than six per cent of its land. One-third of these households might prefer rural land. They could receive one rural hectare each, while the remaining two million households might receive urban plots of 200 square metres each. This would require less than two million hectares. So the government could provide all homeless households with unencumbered title to land and still retain at least 30 million hectares.

Alternatively, rural families could be given up to five hectares each, with one million hectares going to urban households. This would still leave the state with well over 25 million hectares – nearly a quarter of all South African land.

All South Africans would then at least have a place of their own, and be able to build a house, even if the initial structures are rudimentary. This is better than nothing and would launch a dynamic and dramatic process of empowerment and housing improvement.

What is envisaged is not a repeat of homeland “dumping grounds” far from employment opportunities or of poor farming potential. State land is of great variety, and common sense should be used to allocate appropriate land to meet the needs of each target homeless population. Stutterheim City Council, for example, owned an abandoned brickworks in which formerly unemployed black youths are now running a brickmaking operation.

Considerations (regarding Recommendation 2.1)

Even though most government land is idle, and the economy is presently denied any benefit from it, there is a reluctance on the part of governments to part with government land.

On purely economic grounds and without regard to historical realities and the need for redress, it might be considered more “efficient” to sell superfluous government land to the highest bidder. There is, however, good economic evidence that if the land is distributed as suggested, the distribution will result in efficient outcomes, provided that initial recipients are not prevented from dealing freely with the land. In addition, it could be argued that the symbolic benefit of a massive land redistribution from the state to the historically disadvantaged would be so enormous as to far outweigh any concerns about economic optimality.

3 DEMOCRATISED ADMINISTRATION AND DISPOSAL OF TRIBAL LAND

Tribal land issues include whether there should be compliance with existing “white” land survey and registration formalities, what the attitude of the Chiefs might be, and whether financial institutions will lend against privately owned tribal land.

Recommendation 3.1

Enable chiefs to allocate or dispose of land as they or their people choose, with the proceeds going into the tribal authority trust account.

As observed above, there is a widespread belief that most Chiefs are reactionary and will resist the introduction of land ownership and mortgage. This view is probably mistaken. Most Chiefs, it seems, wish to promote development in their areas. Tribes also want the income they can derive from selling or leasing land. However, there is no need to settle that debate in advance. Chiefs should simply be given the right to allocate or dispose of land by whatever form of title they or their people choose. The proceeds could go into the tribal authority trust account.

Land reform in tribal areas is hampered by misconceptions, created by mainly white commentators over many years, about traditional tenure. Historically, much more land was held under secure title,

and traded, than is commonly believed, though this varied from tribe to tribe. Upgraded title can exist within a tribal system without undermining it in any way. Far from undermining the Chiefs' powers, these rights would be enhanced in the shorter term by enabling them to upgrade existing plots and allotments and sell and let land into full ownership or long registered lease.

Democratic methods such as community meetings or referenda should be encouraged to establish whether all non-residential land in tribal areas should remain "communally held" or whether and how some or all of it should be converted to ownership. Tribal authorities might be empowered to sell or let farms, or to convert pasturage grazing rights into cooperative farms.

Given the choice, the Mathanjana community mentioned above, decided to convert commonage to owned commercial farms.

Considerations (regarding Recommendation 3.1)

There is a danger that some reactionary traditional leaders who believe that they will lose power by granting security of tenure will resist reform. Fortunately, traditional land is held under a considerable degree of security and land removals are almost unknown. The assumption that traditional leaders and tribal authorities can remove land from their subjects with impunity tends to be more of a legal fiction than a practical reality.

4 THE CHALLENGE OF SECURE TITLE

The challenge is to transfer government land into private hands with secure title, and to convert inadequate private or tribal title to secure title, without costly and unnecessary survey and deeds registration.

The legal requirements of land survey and deeds registration impede rapid large-scale provision of cheap land and housing. Systems of registration and survey historically used for "white" land are far too costly and slow, for too little gain, to use in the short term, if our aim is to facilitate the swift creation of secure title.

Recommendation 4.1

Allocate new land under a simple low-cost form of registration, defining land boundaries by description.

Frequently, survey and transfer costs exceed the value of the land in rural areas. If there were a market (and some informal markets do exist), an undeveloped plot in a rural area might be worth around R500. A cadastral survey of this plot would cost anything from R200 to R5 000, depending on the number and size of plots surveyed. Conveyancer's costs to register such a newly subdivided plot in the Deeds Office would be approximately R600.

Thus, existing "apartheid" titles should be upgraded to full ownership under existing forms of registration and demarcation. New land should be defined and allocated under a simpler form of registration, like vehicle ownership registration, with land boundaries defined inexpensively by description.

People who oppose the suspension of cadastral survey and Deeds Office registration requirements argue that banks need title to be secured by survey and registration before granting mortgages. In fact, the banks need to comply with the law. The law currently requires that they lend only against title secured in this way, but the law can and should be changed. Banks and other lenders will then decide for themselves.

Recommendation 4.2

Suspend the Land Survey Act wherever it applies to conversion to freehold and transfer to existing occupiers.

“White” boundaries in South Africa are “defined” by costly land survey. In the 1960s South Africa adopted an even more accurate, and therefore even more costly and inappropriate, system of cadastral land surveying, potentially the most accurate in the world.

The Deeds Registries Act requires a Surveyor-General (SG) diagram to be attached to a deed of transfer. The Land Survey Act requires an SG diagram to comply with cadastral standards for a detailed survey showing. (An SG diagram’s unique positional (X,Y) coordinates relate to the country’s network of trig beacons and hence to planetary latitude and longitude.)

But there can be secure title with boundaries perhaps less accurately defined by means other than surveys. Title in more mature democracies such as the USA and the UK commonly exists without survey. Deeds of transfer existed in Holland since the 12th century containing descriptions but no diagrams. In the past, our courts have also said that a survey diagram is not absolutely necessary to own land. In the Transvaal, title deeds of farms were issued to burghers with a written description of the boundaries, without a survey. Our judges have said that the boundaries of a piece of land can be fixed monuments or natural objects. There is no magic in a diagram. Clear boundary descriptions in title deeds take precedence over a diagram.

The Land Survey Act states that if a surveyor surveys land for which a title deed has been issued without a diagram, he must ensure that neighbouring landowners agree to the boundaries that he is adopting in the survey. In other words, the factual position accepted by the neighbours is more important than the survey.

The Act also says that an arbitrator deciding a boundary dispute where a diagram exists must be guided by the principle that the original boundary markers (beacons) of a piece of land define the true boundaries even if they do not correspond to the diagram.

It would therefore not violate legal principles and tradition in this country to once again permit ownership to be acquired before a survey.

Nevertheless, as stated above, the law presently requires a survey, done to the highest standards, before transfer of ownership. This imposes huge costs and delays. It has been estimated that all existing South African land surveyors (if they were available) would need ten to fifteen years to survey only existing unsurveyed properties. Black South Africans cannot wait this long to acquire secure title to their properties, especially when the cause of the delay, the survey of existing boundaries, is of negligible legal value. Furthermore, a cadastral standard survey (R200 - R5 000) of each such property could cost a few billion Rand and such money is clearly not available. For

converting existing black plots and allotments to freehold and transferring them to lawful occupiers, therefore, the Act should be suspended. Survey would then be optional for owners and mortgagees, and conversion and transfer could proceed immediately.

Most ownership disputes cannot be blamed on a lack of surveyed, registered title deeds. The disputes have arisen because a number of farmers sold land unlawfully to blacks more than once in the same land's history without transferring, and later acknowledging, real ownership. The proposals in this document will not result in such disputes.

To mass-produce new properties, where survey is appropriate, the government might choose to adopt less accurate forms of survey than cadastral land survey.

Whether or not banks will give mortgages is no reason to withhold security of title from the victims of apartheid. If blacks get unencumbered land, without diagrams, there is no fear that they would be unable to use it as security for borrowing. Where the property is of high value, it would be within the interest and means of the owner or potential purchaser to have it surveyed by choice. If, say, an expensive casino or shopping centre is to be built in a rural area, it would be up to the developer concerned to have the property accurately surveyed and registered.

Considerations (regarding Recommendations 4.1 and 4.2)

There is a danger, though it has been somewhat exaggerated, of an increased number of boundary disputes if the procedures relating to land survey are changed. It must be borne in mind, however, that this recommendation does not suggest that existing boundary definitions should be degraded. It merely suggests that high-standard and costly land surveys should not be a precondition for the granting of more secure ownership rights to the millions of people whose rights are presently insecure.

The interests of the people who presently suffer as a consequence of insecure title should take precedence over vested-interest arguments against the introduction of a more rapid and less costly means of identifying properties and their boundaries.

Deeds registration is not necessary

Conveyancing is the branch of law dealing with the transfer of ownership of property, after the document (conveyance) which transfers legal title. It is in the interests of conveyancers and deeds registrars that upgraded apartheid titles should have to be registered in the existing deeds registry system or some slightly amended form of it. Although this faith in deeds registry is without practical substance, three years into post-apartheid South Africa it still denies black South Africans the enjoyment of immediate, secure land title.

Recommendation 4.3

Make the Deeds Office registration requirement optional.

Formal registration under the existing deeds registry system should not be allowed to delay upgrading titles and normalising the position for millions of South African blacks. It is not possible without huge delay and cost to bring all upgradeable titles into the deeds registry system.

Deeds registration does not guarantee title in law. It is evidence at first glance in favour of ownership, but registered title is subject to fraud and error or to servitudes that arise from long-term usage.

Recommendation 4.4

Suspend the requirement to use a conveyancer for routine property transactions involving simple transfer of ownership or the registration or cancellation of a mortgage bond.

There is no reason why title of land should not be established in the same way that other forms of title are. There is also no reason why there should be only one form of registration of title in a country. For land that is already surveyed and registered, the existing “white” system can be maintained, and co-exist with a parallel system or systems. Transfers and mortgages should take place in much the same way as vehicles and shares are transferred or pledged, or as land registers already operate in most areas of the world.

All forms of “black” land title have worked well for centuries without being registered in a deeds office. Tribal law provides mechanisms to allot and later transfer land. Title disputes are extremely rare and when they arise they are usually readily resolved by courts or tribal authorities. Land title in black areas is recorded in various ways, from formal sealed contracts to a handshake or even tacit non-verbal agreement like a mere nod to secure a binding legal contract of sale. A voetstoots sale was secured, for instance, by the action, before witnesses, of placing the object being sold on the ground and pushing it by foot across to the buyer. Such visual memories in the minds of witnesses and community elders are a proven centuries-old method of recording title. Title might be secured similarly by ceremonially breaking off a branch to hand it to the new holder, imprinting this visual record indelibly on people’s minds. By the time they die, title is so adequately secured as to need no further evidence of this kind.

The great historical episodes of prosperity in the first world occurred when there was no land registration. In some of the world’s richest countries, land registration is not compulsory to this day, and some of the most valuable properties in Europe’s greatest cities are unregistered.

In the USA, title may be secured, if the owner chooses, by insurance rather than registration. Insurance costs are lower and delays briefer than those incurred by our existing registry system.

Recommendation 4.5

Upgrade existing magisterial registries to provide accurate records of land rights.

All existing unregistered titles could become the lawful property of the existing lawful holder “at the stroke of a (statutory) pen”. Where registration already exists, it can be used and upgraded. Permission to occupy (pto) is usually registered in the local magistrate’s office. To provide secure tenure in the short term, it is much more realistic to upgrade existing magisterial registries than to transfer all properties to the deeds office. In the old Transvaal republic, before the deeds registry was established in 1867, it was legal and customary for land transactions to be executed at the office of a notary and then registered by the local landdrost (magistrate).

Land reform must not be held up by requiring conveyancers to process all acquired land at huge cost. Almost everything that conveyancers do has become an anachronism. No routine property

transactions involving simple transfer of ownership or registration or cancellation of a mortgage bond should require a conveyancer; costly property (for example, jewellery, boats, cars, planes, oil rigs and machinery) is transferred daily throughout the country without them. Conveyancers should be used only for unusual transactions, for example, where a servitude, usufruct, subdivision, or consolidation is concerned.

Registration in a Deeds Office is costly and cumbersome. It is not needed to establish adequate legal ownership of land, just as it is not needed to establish vehicle or machinery ownership (where the value often far exceeds that of plots of land). Local and international history shows that land titles and land boundaries will be secure under most methods of tribal land allocation and demarcation. The costs and delays of Deeds Office registration should not be allowed to impede the immediate upgrading of title, in tribal areas and elsewhere.

Considerations (regarding Recommendations 4.3 to 4.5)

The conveyancing and deeds registry communities are likely to resist these proposals, which argue that increased security should be extended to historically disadvantaged people without having to wait for the "Rolls Royce model" of property registration. Government will have to choose whose interests should have precedence.

It is simply impossible to survey or register all the land presently held by black South Africans, and land which will be acquired by them, for many years. We really have no choice. Either we permit ownership under systems other than those that exist at present, or the deprived majority of South Africans will continue to be deprived for many decades.

If these proposals are implemented, there would continue to be two systems of land ownership and land registration. This recommendation proposes that the second and less costly system be used to record ownership as well as historical forms of tenure.

Recommendation 4.6

Convert all forms of apartheid title such as permissions to occupy and all forms of lease to freehold title and ownership by the existing lawful occupant, after suitable local advertising of property-holder lists where these exist.

It should prove simple to convert all existing tenancies (formerly residential permits) in established townships such as Soweto to secure title automatically by operation of law. Initial local advertising of lists of tenants will reveal if there are competing claimants. The tenancies should thereafter be summarily converted to ownership without depending on prior deeds registration.

It should also prove simple to convert all informal titles to rural parcels of land held under some form of individual or non-"communal" arrangement, whether residential or non-residential, into secure title automatically by operation of law, bypassing the costly and cumbersome "perfect system" of both cadastral survey and deeds office registration.

All this summarily converted urban land and non-"communal" rural land held under some form of individual title should automatically become the property of the existing lawful holder. Legal provisions for rectification of title can handle any boundary problems which may emerge later.

Considerations (regarding Recommendation 4.6)

Existing records in many parts of the country are notoriously inaccurate or derelict. Predictably there will be disputes regarding the rightful beneficiaries. In traditional areas, the rights of relatives will be problematic. Additional complaints may come from people who purchased neighbouring properties at great personal cost and who may feel that they have been unfairly treated.

Problems of this kind explain the current inertia. Government has the unenviable choice of being accused of non-delivery, on the one hand, or of dealing with myriad problems relating to rapid property-rights recognition on the other. Clearly the potential benefits far outweigh the risks.

5 THE CHALLENGE OF FINANCING

Recommendation 5.1

Repeal usury law ceilings on effective interest rate to enable banks to lend against low-value property to those perceived as high-risk borrowers.

Banks would be more willing to lend, against the security of low-value property such as small plots of land, to those perceived as high-risk borrowers if there were no usury law to limit interest rates and related charges. Moreover, they would not necessarily need to raise interest rates if they were allowed to adjust their administration fees to compensate for risk and transaction size.

Housing finance comes mainly from government subsidies and private financial institutions. Usury laws and other laws relating to financing prevent poor people, who are perceived as high-risk borrowers without either security or a credit record, from borrowing lawfully for housing. Even when they have title which can be mortgaged, formal-sector lenders usually will not provide finance because the permissible return is too low and the perceived risk too high.

A possible solution to this problem would be to establish Special Housing Zones which would be exempted from interest-rate ceilings and costly formalities for mortgage or non-mortgage finance. Low-income people in these areas would then be able to obtain housing finance formally and lawfully. Though the bonds would be at higher interest rates than those available to lower-risk borrowers, they would nevertheless be at more favourable rates, and have less onerous repayment terms, than those offered by "loan sharks" and other informal and underground lenders to whom the poor must currently go.

A further issue needs to be addressed, and that is the likelihood of payment. Even if banks are satisfied that Deeds Office registration is not needed for security, and they are allowed to charge higher interest rates to high-risk borrowers, they will still reject applications for bonds unless they are reasonably certain that they will be repaid. Lenders need the likelihood of payment even more than security, and it is admittedly not clear whether rural borrowers will pay dependably. As soon as legal barriers are removed, banks can move into historically closed areas and this market issue can be addressed. As with the Chiefs, this may not pose a serious problem for progressive and innovative banking. One possible solution may be for a loan applicant's stokvel to pledge collective security for repayment.

As far as government financing of land and housing is concerned, it is important not to repeat the error of soft loans to farmers through the Land Bank or some equivalent. Anyone who doubts the unsuitability and counter-productivity of soft loans should read Symond Fiske's excellent book *Damage by Debt* (FMF Books, 1995) in which he explains why debt subsidies waste capital and hurt the people who use them.

If the government has a million Rand to help aspirant land holders, it can maximise the benefit of the money, not by lending it to a few borrowers at unjustifiably low rates, but by using it to underwrite numerous loans at market rates of interest. For example, it could enter into a contract with commercial bankers to underwrite, say, a fifth of their loans to historically disadvantaged people.

Considerations (regarding Recommendation 5.1)

Unsophisticated people may possibly over-extend themselves but this problem has to be seen in the context of overall policies during the transition. Government has tough choices: it can strive for a perfect risk-free world for its citizens, or it can have a dynamic prosperous economy. Unfortunately it can not have both.

6 REMOVAL OF RESTRICTIONS ON LAND USE

Until the 1960s, as in many other countries, it took about four months from start to finish to develop new land into "townships". The conditions of establishment were seldom onerous; often the only requirement was for graded roads. Residents provided their own boreholes, septic tanks and other infrastructure.

Thereafter, township development procedures became ever more cumbersome and costly, and today only wealthy developers can afford them. Under township development laws the government, through township development boards, requires costly infrastructure including long-life tarred roads, storm-water drains, water-borne sewerage, water and electricity. Formal approval from countless government departments and organisations can take a few years.

If laws for establishing "formal" settlements reverted to the 1960s versions, this would lead, as it did then, to empowerment of lower-income developers and an explosion of property development and rapid delivery of affordable land and housing to large numbers of people.

Recommendation 6.1

Scrap prescriptive land-use controls.

The right to hold and the right to use tend to be confused. It is possible to render the right to hold property meaningless by curtailing the right to use or enjoy it. If an inner-city office block were rezoned as a wilderness area, for example, the owners' or tenants' rights would be rendered valueless. In extreme cases the courts in some countries have considered the curtailment of the right to use and enjoy to be tantamount to confiscation or expropriation. Normally, however, the curtailment of use rights is less obviously confiscatory and holders suffer losses without compensation or the right to due process. As a matter of principle, therefore, land policy should

regard any new restriction on usage as a usurpation of property rights for which there should be just compensation.

In practical terms, land rights should include the reasonable right of use and enjoyment. Many existing restrictions, especially conditions of title and zoning, are excessively restrictive and should be reviewed critically.

Considerations (regarding Recommendation 6.1)

This recommendation is controversial because of South Africa's tenacious planning mentality, which is a legacy of our authoritarian past. It is very difficult for most South Africans to imagine a voluntary spontaneous order. Their immediate assumption is that the absence of coercive central planning will lead to chaos or anarchy. Experience around the world proves that this is not so, but often perceptions are more important than realities. There will accordingly be considerable resistance from vested planning interests in the private and government sectors to increased land use freedom.

These fears are not entirely unfounded. It is true that a controlled society is often more orderly. But it is also more stifling, and inhibits the cultivation of a national enterprise culture. If this recommendation is implemented, there will be undesirable neighbourhood effects, but again, the question is whether benefits outweigh advantages, and whether alternative methods of nuisance control would be more effective.

Recommendation 6.2

Drop most approval requirements for the establishment of formal settlements and make costly infrastructure (roads, drains, electricity, etc.) optional.

Formalities and compliance costs when developing property for residential purposes are huge obstacles to housing delivery, as is the need for approval of building plans for housing. Township development laws and building codes were recently relaxed, but the urgent plight of the homeless cries out for a more radical interim solution.

Recommendation 6.3

Establish new Special Housing Zones in low-income areas, in which township-development laws and slum laws are suspended. Exempt these zones from building codes (reduce minimum housing standards to realistic levels or, preferably, scrap them in favour of common law relating to safety and neighbourhood effects), interest-rate ceilings and costly formalities for mortgage or non-mortgage finance.

A low-income housing option would be to suspend or relax housing, township development and slum laws within new Special Housing Zones (SHZs). There homeless people would settle on land in which they have security and mortgageable wealth and where they can build immediately, confident that their buildings will not be condemned. This would rapidly improve the present plight of squatter settlements and obviate the need for land invasions. SHZs should be located with regard to neighbourhood effects and other externalities. In due course social and physical infrastructure and housing subsidies would lead to further improvements.

Housing of a low standard is preferable to no housing, and lawful housing is better than unlawful housing. To address the urgent needs of the homeless, with or without Special Housing Zones, low-cost housing needs a blanket exemption from expensive legal requirements.

Recommendation 6.4

Reduce minimum housing standards to realistic levels.

South Africa's housing backlog cannot be alleviated for decades at current rates of delivery or within the existing policy framework. Housing delivery is far below RDP targets. Adjusted housing policy might accelerate housing provision. Housing standards should be drastically reduced, then raised by increments later if necessary. Only after most people are housed does it make sense to impose high minimum standards.

For example, fuses and innovative earthing systems could be permitted in place of circuit breakers and earth leakage protection. The latter provide a desirable safety net to cover other electrical shortcomings, accidents and abuse, but are hardly used elsewhere in Africa.

Recommendation 6.5

Amend town planning schemes and municipal by-laws, replace zoning laws with nuisance and neighbourhood law (common law). Enable the courts, especially small claims courts, to enforce these and to issue interdicts.

Zoning laws should be relaxed or replaced with "neighbourhood laws". Instead of trying to dictate to people how they should use their property, the state should let the market decide, while protecting the rights of neighbours against land uses that cause a nuisance. Nuisance and neighbourhood law is common law that has evolved over the centuries as a perfectly adequate method of protecting people against socially harmful land use.

What is lacking is not law, but access to redress. The courts, especially the small claims courts, should be able to enforce neighbourhood and nuisance law, and to issue interdicts. This would require an amendment to town planning schemes and zoning laws as well as extension of the powers of the small claims courts.

Around the world the poor typically live on the most valuable inner-city land and drive the rich out to the periphery of cities. They out-compete the rich by living either in apartment blocks or in high-density housing developments. In South Africa, however, Group Areas Act zoning has created an anomalous situation in which the poor live in peripheral "townships" while the rich live in suburbs close to city centres, such as Houghton in Johannesburg.

Zoning laws place a density restriction on land use; their effect is to make valuable land available at artificially low prices to high-income people. The laws and practices should be liberalised to allow market-driven land use and development. This will densify land use close to the CBD, making more land available for industrial and commercial purposes and (in optimal localities) for lower-income people and emerging entrepreneurs. These suggested reforms should apply to all existing zoning laws, and not just to the Development Facilitation Act and other zoning laws made after 1994.

As with all reforms, there will predictably be enormous resistance from those who benefit from the status quo. They will raise all the stale arguments about “regressive” reforms “lowering standards”. But the economic consequence of pandering to the elite is an inefficient use of land and other resources. Inefficiencies are by now absolutely pervasive, and the economic, environmental and human impact is hard to quantify. The fact that most people are forced to live far from places of employment and from commercial and entertainment centres not only increases travelling costs, but also unduly burdens infrastructure. An enormous amount of potentially productive time is wasted and millions of Rands have been invested in transport and other facilities which otherwise would not be necessary.

In many lower, and to a lesser extent, middle income areas there are either no zoning provisions or the law is ignored. Areas in which strict zoning cannot be enforced in practice should be formally exempted so that the law coincides with reality and common sense.

Land use should be neighbourhood-focused and government’s concern should shift from grand town-planning schemes to what communities want for themselves. In particular, zoning laws that are hostile to business should be amended to promote an enterprise culture and international competitiveness. Presently the law restricts the use of urban land for business purposes, rather than preventing the disturbance of neighbours by the manner in which the land is used.

If someone makes furniture for themselves in their garage, it is lawful under zoning laws. However, if the same person makes the same furniture, but for sale, it would be unlawful. There is clearly no logic in this position.

Considerations (regarding Recommendations 6.2 to 6.5)

Relaxed zoning laws are not problem-free. Yet methods can be found of allowing people to make optimum use of their land without being a nuisance to their neighbours.

7 THE NATIONAL HOME BUILDERS REGISTRATION COUNCIL ACT

Recommendation 7.1

Scrap the National Home Builders Registration Council Act or exempt all small-scale builders.

Current laws impose entry barriers into the building industry and minimum standards for building materials and labour, thus raising costs and curtailing the supply of low-cost housing. The draft National Home Builders Registration Council Act imposes further costs and entry barriers. It creates an unnecessary, undesirable and potentially harmful bureaucracy.

The National Home Builders Registration Council (NHBRC) is a Section 21 non-profit company which seeks to provide warranties on the building of new homes. Funds for the operation of the Council are obtained from home builders who pay a registration fee, an annual subscription, and a levy on all homes built.

Notwithstanding their opposition to the NHBRC scheme, home builders find themselves in a trap. The members of the Association of Mortgage Lenders refuse to provide mortgage finance to purchasers of newly built homes which sell at between R25 000 and R250 000 unless the homes

have been built by home builders who are registered with the NHBRC and the individual homes have been “enrolled” with the NHBRC. In effect, this means that mortgage finance is not available at all for homes in that price range built by builders not registered with the NHBRC, as all the large providers of mortgage finance on homes are members of the Association of Mortgage Lenders.

Some of the criticisms of the scheme from members of the building industry are:

- The warranty which forms the basis of the scheme, and without which it would have no function, is an unenforceable contract. The home buyer is required to sign an undertaking that he/she will have no legal claim against the NHBRC: the NHBRC says only that it will “endeavour” to support the consumer in the event that the developer fails to comply with NHBRC requirements.
- Land value and sectional title infrastructure are included in the amount upon which the levy is calculated, although the scheme’s purported warranty applies only to the building.
- The buyers of homes in the lower income bracket, who have the greatest need for help in assuring quality, are excluded from the scheme, whilst home buyers who are capable of protecting themselves against poor workmanship are included.
- The levy adds R3 250 to the cost of a R250 000 home.
- Much better and more flexible warranty schemes would probably be offered by the country’s highly competitive insurance companies.
- Homes are already subject to inspection by local authorities and mortgage lenders. A third inspection agency is unlikely to detect additional examples of defective workmanship that escaped the notice of the existing agencies.

Despite all the controversy surrounding the NHBRC, the National Home Builders Registration Council Act gives statutory authority to this NGO. The Council not only has the coercive support of the Association of Mortgage Lenders but is also in a position to apply for interdicts against home builders and levy fines for non-compliance.

The NHBRC Act does not improve building quality. There will always be building failures, because of inherent, irreducible risk and where these occur the Act tries to apportion liability for failure among owner, developer, builder and NHBRC, but with little clarity or certainty. The NHBRC itself has discretionary liability, and if it rejects liability in a particular case, the homeowner has no right of claim against it, even if the home was enrolled and built by a registered builder, and even if there was a clear breach of the standard warranty, and even if the builder is no longer in business or is unable to meet his obligations. Builders and developers have to cover this risk by insurance or other means, and are then subjected to the additional cost of NHBRC levies and fees.

The Act states that all contracts for building homes must be in writing, with plans, specifications, price and payment terms. This section is presumably intended to protect home-buyers, but will have the consequence of disempowering illiterate and monolingual builders. It also empowers the NHBRC to prescribe a so-called “standard” warranty, which the NHBRC may nevertheless amend at any time. The Act states that the NHBRC may, as part of this warranty, impose any obligation on a home builder. This NHBRC warranty can require a home builder to rectify, at his cost, any major structural defect in the home during any period, however long, that the NHBRC might fix. These ambitious attempts to obtain perfection in home-building will, in practice, be passed on by builders to purchasers in the form of higher prices.

Together with “registration” and “warranty”, there is a third line of bureaucratic control, namely “enrolment” of buildings. Mortgage lenders “shall” not lend to owners unless builders are registered, and conveyancers “shall” ensure that builders are registered. This is a deliberate attempt to reduce the possibility of competition from new entrants into the home loan market who may, in the absence of the proposed NHBRC bureaucracy, cut the cost of lending, establish their own method of ensuring the soundness of their security, and out-compete the other lenders.

Inspectors cover the whole country including the loneliest rural areas. A small builder in a village, who is unaware of the existence of the NHBRC, and builds a house which falls within its ambit, is guilty of an offence and liable to a fine or imprisonment. If the government wishes to promote small business, it should scrap laws that have these implications. Honest, hard-working people should not have to worry constantly that they may be committing an offence that carries a harsh penalty.

Withholding information is an offence, and courts are given interdict powers to stop a construction project. Penalties of R25 000 and/or one year of imprisonment are set for not registering or “enrolling”, for lending money for a non-registered or “non-enrolled” project, or for withholding information, as if house-building were like some heinous crime, to be prevented at all costs!

The NHBRC Act should be withdrawn in toto. There is no justification for the registration of builders, let alone the “enrolment” of houses. This Act ensures that we get less housing, rather than better housing.

8 REMOVAL OF STAMP DUTIES AND TRANSFER DUTIES

Recommendation 8.1

Abolish imposts on land transfer (stamp duties and transfer duties).

In a country where land redistribution is a priority, it is anomalous that the state intervenes to make it difficult and costly. Land transactions should not be a source of general revenue, so stamp duties and transfer duties attached to land transactions should be scrapped for all first home-buyers.

Transfer duties originate in the medieval notion that the land belongs to the Lord of the Manor. In the modern world there should be no transfer cost, and imposts on land transfer should be abolished forthwith. The state should stop prohibiting and inhibiting land redistribution, and facilitate it instead.

Considerations (regarding Recommendation 8.1)

The obvious consequence of this recommendation would be a loss of revenue. This will be offset by the economic benefits of removing a restriction on market-driven land redistribution, as well as the benefit of removing an obstacle in the path of landless people.