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socio-economic rights institute  
of south africa



## A Resource Guide to Housing in South Africa 1994–2010

Legislation, Policy, Programmes and Practice





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Kate Tissington  
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# Preface and Acknowledgements

The Socio-Economic Rights Institute of South Africa (SERI) is a non-profit organisation providing professional, dedicated and expert socio-economic rights assistance to individuals, communities and social movements in South Africa. SERI conducts research, engages with government, advocates for policy and legal reform, facilitates civil society coordination and mobilisation, and litigates in the public interest. Our thematic areas are housing and evictions, basic services (water, sanitation and electricity) and migrant rights & livelihoods.

SERI's work is funded by the Atlantic Philanthropies, Ford Foundation, Open Society Foundation and Misereor and their funding contribution to this research is gratefully acknowledged.

This resource guide provides an overview of housing legislation and jurisprudence, policy and implementation in South Africa since 1994. The housing terrain in the country is complex, in large part due to the deliberate policy and legislative framework of socio-economic and spatial exclusion and marginalisation created during apartheid, but also due to failures on the part of the post-apartheid state to adequately redress these problems since 1994. As with other socio-economic rights, the legislative and policy framework created by national government around housing is in fact quite progressive. However, implementation to date has been skewed and unable to address the land, housing and basic services needs of millions of poor South Africans who still lack adequate housing and access to water, sanitation and electricity. While the urban and rural spatial divide remains pronounced in respect of access to socio-economic goods and services, the phenomenon of the inadequately housed urban poor is increasing. The report explicitly focuses on access to housing in the urban context. Intrinsicly related to the provision of adequate housing is access to land, and its implications for urban and spatial planning. The unlocking of well-located urban land for residential purposes for the previously dispossessed in terms of inclusive, transformative urban and spatial planning has lagged behind other forms of transformation in the country. While touching on these issues indirectly, this report does not delve into issues of access to land, land use or urban planning in great detail. Rather, it provides a simplified yet comprehensive guide to policies, legislation, jurisprudence and practice in relation to urban housing in South Africa, which will hopefully be useful to a wide audience.

The guide has been adapted from a paper on housing policy and development since 1994, prepared for the Studies in Poverty and Inequality Institute (SPII) as part of a larger research project to compile a measurement matrix of progressive realisation of socio-economic rights in South Africa. Thanks go to Stephanie Brouckerhoff (senior researcher, SPII) and Isobel Frye (director, SPII) for allowing the paper to be adapted and for helpful comments on earlier drafts.

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The resource guide was written by Kate Tissington (research and advocacy officer, SERI) and edited by Jackie Dugard (executive director, SERI).

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# Abbreviations and Acronyms

ANC	African National Congress
BNG	Breaking New Ground
CBO	Community-Based Organisation
CCAP	Capacity and Compliance Assessment Panel
CDW	Community Development Worker
CRO	Community Resource Organisation
CRU	Community Residential Unit
DA	Democratic Alliance
DHS	Department of Human Settlements
EEDBS	Enhanced Extended Discount Benefit Scheme
EIA	Environmental Impact Assessment
ES	Equitable Share
ePHP	Enhanced People's Housing Process
FLISP	Finance-Linked Individual Subsidy Programme
HDA	Housing Development Agency
HSC	Housing Support Centre
HSS	Housing Subsidy System
IDP	Integrated Development Plan
IHP	Inclusionary Housing Policy
IHHSD	Integrated Housing and Human Settlement Development
IRDP	Integrated Residential Development Programme
ISHP	Interim Social Housing Programme
ISP	Institutional Subsidy Programme
MDG	Millennium Development Goal
MEC	provincial Member of the Executive Council
MIG	Municipal Infrastructure Grant
NDoH	National Department of Housing
NGO	Non-Governmental Organisation
NHBRC	National Home Builders Registration Council
NHF	National Housing Forum
NHDD	National Housing Demand Database
NHSS	National Housing Subsidy Scheme
NHSDB	National Housing Subsidy Database
O/M	Operations and Maintenance
OPS/CAP	Operational Capital Budget
PHP	People's Housing Process
RDP	Reconstruction and Development Programme
SAHRC	South African Human Rights Commission
SHF	Social Housing Foundation
SHI	Social Housing Institution
SHP	Social Housing Programme
SHRA	Social Housing Regulatory Authority
Stats SA	Statistics South Africa
TRA	Temporary Relocation Area
TRU	Temporary Relocation Unit
UISP	Upgrading of Informal Settlements Programme



# List of Key Housing Policy and Legislation

## Policy documents

- White Paper: A New Housing Policy and Strategy for South Africa (1994) (White Paper on Housing)
- People's Housing Process (1998) (PHP)
- Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (September 2004) (Breaking New Ground or BNG)
- Social Housing Policy for South Africa (June 2005) (Social Housing Policy)
- Framework for an Inclusionary Housing Policy (IHP) in South Africa (2007) (Inclusionary Housing Policy)
- National Housing Code (2000, revised in 2009)

## Primary legislation

- Constitution of the Republic of South Africa, 1996 (Constitution)
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act)
- Housing Act 107 of 1997 (Housing Act)
- Housing Consumers Protection Measures Act 95 of 1998
- Housing Amendment Act 28 of 1999
- Rental Housing Act 50 of 1999 (Rental Housing Act)
- Housing Second Amendment Act 60 of 1999
- Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act)
- Housing Amendment Act 4 of 2001
- Rental Housing Amendment Act 43 of 2007
- National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed through National Housing Programmes (2007) (National Norms And Standards)
- Social Housing Act 16 of 2008 (Social Housing Act)
- Housing Development Agency Act 23 of 2008

## Relevant secondary legislation

- Expropriation Act 63 of 1975
- National Building Regulations and Building Standards Act 103 of 1977 (NBRA)
- Sectional Titles Act 95 of 1986 (amended by Acts 24 and 29 of 2003)
- Environment Conservation Act 73 of 1989 (amended by Act 79 of 1992)
- Land Titles Adjustment Act 111 of 1993 (LTA)
- Development Facilitation Act 67 of 1995 (DFA)
- Land Reform (Labour Tenants) Act 3 of 1996
- Interim Protection of Informal Land Rights Act 31 of 1996
- Extension of Security of Tenure Act 62 of 1997 (ESTA)
- Water Services Act 108 of 1997
- National Environmental Management Act 107 of 1998 (NEMA)
- Public Finance Management Act 1 of 1999 (PFMA)
- Home Loan and Mortgage Disclosure Act 63 of 2000
- Division of Revenue Act 7 of 2003 (DORA)
- Municipal Finance Management Act 56 of 2003 (MFMA)
- Intergovernmental Relations Framework Act 13 of 2005 (IRFA)
- Co-operatives Act 14 of 2005

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# Structure of the Guide

## Chapter 1

### Introduction

Chapter 1 provides a framing overview of the housing landscape in South Africa, examining some of the systemic problems facing housing policy implementation and briefly discussing the nature of adequate housing.

## Chapter 2

### Housing legislative and policy framework in South Africa

Chapter 2 outlines the housing legislative and policy framework in South Africa, examining the Constitution, the Housing Act, the PIE Act, the Rental Housing Act, the National Norms and Standards, the Social Housing Act, the White Paper on Housing and Breaking New Ground in more detail. The National Housing Code, and the national housing programmes categorised therein, is outlined. Information pertaining to the National Housing Subsidy Scheme (NHSS) is provided, including the generic qualifying criteria for beneficiaries wishing to access state housing subsidies. The chapter further examines some of the legislated housing institutions in South Africa including the Housing Development Agency (HDA), the National Home Builders Registration Council (NHBRC), the Social Housing Foundation (SHF) and the Social Housing Regulatory Authority (SHRA).

## Chapter 3

### What is adequate housing?

Chapter 3 examines the concept of “adequate housing”, as enshrined in section 26(1) of the Constitution. The chapter briefly outlines what is contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and what the Constitutional Court has said regarding the “progressive realisation” and resource constraint clauses contained in section 26(2). This chapter should be read together with chapter 5 of this guide, which outlines constitutional jurisprudence on the right to housing in South Africa.

## Chapter 4

### Housing delivery and backlogs

Chapter 4 delves into the terrain of statistics - and data reliability – around housing delivery and backlogs in South Africa since 1994. It provides both qualitative and quantitative information on housing delivery, as well as on housing demand and backlogs particularly in relation to informal settlements, low-income rental accommodation and so-called affordable housing. Figures are provided for the number of houses completed or in the process of completion (by province); housing grant allocations and actual delivery since 2004; estimated housing delivery from 2008 to 2014 (by province); need for adequate shelter estimates (housing backlog) from 1994 to 2009; distribution of households by main dwelling (by province); and number and percentage of households living in informal dwellings (by major city).

## Chapter 5

### Constitutional jurisprudence on the right to housing

Chapter 5 provides an overview of the constitutional jurisprudence on the right to housing as developed by the Constitutional Court over the past decade. The chapter begins by describing the meaning of “respect, protect, promote and fulfil” - obligations on the state in respect of the rights enshrined in the Constitution. The *Grootboom*<sup>1</sup> case – the standard-bearing case on socio-economic rights which resulted in detailed directions to the state on requirements for an effective housing policy framework - is described in detail. The chapter further outlines some of the implementation challenges surrounding national housing policy as well as what the Court has said in relation to other housing-related cases including *Olivia Road*, *Joe Slovo*, *Abahlali* and *Nokotyana*. Finally, a summary of key findings from the Constitutional Court cases is provided.

## Chapter 6

### Housing policy development: 1994 – 2009

Chapter 6 provides an overview of developments in housing policy since 1994, including a summary of the deliberations at the National Housing Forum held between 1992 and 1994. The chapter examines the overarching policy framework contained in the 1994 White Paper on Housing, and the problems with RDP houses built after 1994. It also unpacks the 2004 Breaking New Ground policy amendment specifically in relation to its focus on the role of local government and the process of accreditation of municipalities, informal settlement upgrading, as well as urban renewal/inner city regeneration. Other specific policies which are examined include the People’s Housing Process (PHP) and the Inclusionary Housing Policy (IHP). The chapter concludes with an outline of the National Housing Code published in 2000 and recently updated in 2009.

## Chapter 7

### National housing programmes: policy vs. implementation

Chapter 7 summarises each of the national housing programmes and subsidies included in the revised National Housing Code (except for the rural programmes). Each subchapter outlines which groups are targeted by the specific programme, what funding is available and what institutional arrangements are in place or envisaged. A number of the programmes are examined in greater detail, referring to challenges in implementation and recent developments. These include the accreditation of municipalities, the rectification of post-1994 RDP houses, the Integrated Residential Development Programme (IRDP), the Upgrading of Informal Settlements Programme (UISP), the Emergency Housing Programme, the Social Housing Programme (SHP) and the Community Residential Units (CRU) Programme.

## Chapter 8

### Bibliography

Chapter 8 of this guide is a detailed reference section, providing full citations and online links (where available) to all books, journal articles, research reports, publications, media articles, government documents, housing policy/legislation and Constitutional Court judgments discussed in the guide.

<sup>1</sup> Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) (Grootboom)

# chapter 1 Introduction

“ Government’s housing development mandate emanates from the Constitution. It is therefore Government’s duty to work progressively towards ensuring all South Africans can access secure tenure, housing, basic services, materials, facilities and infrastructure. Government will have to apply measures of a legislative, administrative, financial, educational and social nature to fulfil its housing obligations.<sup>2</sup> ”

Section 26 of the Constitution of the Republic of South Africa, 1996, enshrines everyone’s right of access to adequate housing. Since 1994, the South African state has created a raft of legislation and policy to give effect to this right. Despite this, and notwithstanding the provision of 2.3 million housing units to nearly 11 million people,<sup>3</sup> South Africa still has a housing crisis after 16 years of democracy, with over 2.1 million households lacking adequate housing (and millions more lacking access to basic services).<sup>4</sup> The Minister of Human Settlements recently stated that despite the housing backlog, the government does “not want to create a beggars culture where people just expect to be given free houses from the State. This is just a safety net for the poorest of the poor, but cannot go on forever.”<sup>5</sup> It is generally recognised that the state cannot deliver housing on the scale required at a sustainable rate or within the means of low-income and poor households, and there is growing evidence that it will be impossible for South Africa’s current settlement policy and practice to fully address the United Nations (UN) Millennium Development Goals (MDGs) target of slum-free cities, and the South African government’s own target of “eradicating informal settlements by 2014.” The housing delivery processes aimed at the needs of the urban poor “suffer from severe capacity problems and cannot draw on the resources located in the traditional housing and property markets.”<sup>6</sup> Some of the critical issues not yet properly addressed have been the unlocking of well-located land in urban areas for residential development,<sup>7</sup> the connection of bulk infrastructure and services to new housing developments,<sup>8</sup> access to interim services and upgrading for millions of households living in informal settlements and the lack of decent, affordable rental housing for low-income and poor individuals and households in well-located urban areas.

Recently, the Minister of Human Settlements described efforts to address the informal settlement situation in South Africa as “dealing with a manmade disaster every day.”<sup>9</sup> Despite the existence of a progressive informal settlements upgrading programme since 2004, upgrading *in situ* has not occurred to any real extent and housing

<sup>2</sup> Department of Human Settlements (DHS) “National Housing Code” (2009) 7.

<sup>3</sup> While the DHS claims that over 2.3 million housing units have been made available since 1994, this does not necessarily mean the number of new houses constructed, completed and handed over with title deeds to beneficiaries. This figure is most likely to be far lower. See subchapter 4.1 of this guide for more on housing delivery statistics.

<sup>4</sup> “SA dealing with Haiti like situation every day: Sexwale” *The Herald* (29 January 2010).

<sup>5</sup> “Free housing cannot continue forever – Sexwale” *Engineering News* (30 November 2010).

<sup>6</sup> Urban LandMark & SHF “Small -Scale Private Rental: A Strategy for Increasing Supply in South Africa” (January 2010) 12.

<sup>7</sup> In his 2010 Budget Vote Speech, the Minister of Human Settlements referred to the acquisition of 6 250 hectares of well-located state land for human settlements development. DHS “Budget vote speech by the Human Settlements Minister, National Assembly” (21 April 2010). The new Housing Development Agency (HDA) is envisioned as playing a critical role in this. See subchapter 2.5 of this guide below for more on the HDA.

<sup>8</sup> The Minister of Human Settlements recently stated that the main risk to meeting delivery targets “is the challenge of providing bulk infrastructure to human settlements projects...there can be no viable, let alone sustainable, human settlements without the urgent rollout of large-scale electrification projects, the construction of new water treatment, and sewage processing plants, including pipelines to bring fresh and clean water to the people.” See “Sexwale concerned by rate of delivery” *IOL* (25 November 2010).

<sup>9</sup> Note 4 above.

officials admit that “informal settlement upgrading is a daunting task.”<sup>10</sup> Despite new social and rental housing programmes aimed to deliver quality housing to low-income and poor households, these groups continue to be excluded by the current models pursued. Indeed, the reality is that we have yet to see one successful and properly executed *in situ* upgrade of an informal settlement in Durban, Cape Town or Johannesburg, or low-income subsidised rental units at scale in inner city Johannesburg. Instead, we see much of the same type of housing development occurring - i.e. mass roll-out of freestanding Reconstruction and Development Programme (RDP) houses, Breaking New Ground (BNG) houses, and low-income bond houses (mortgage properties) on the periphery of cities - despite the efforts of community-based organisations (CBOs) and development-related non-governmental organisations (NGOs) to explore other housing and tenure options.

The continued lack of adequate housing - along with chronic problems related to basic services delivery (e.g. water, sanitation, electricity), growing unemployment and a largely unresponsive state, particularly at the local level - has resulted in an increasing number of so-called ‘service delivery protests’ in townships and informal settlements across South Africa. Rising dissatisfaction relates not only to the failure to deliver material benefits, such as houses and access to water, but also to the government’s non-consultative, often extremely heavy-handed, approach to urban governance. Thus, ‘service delivery protests’ are as much about the failures of local governance, and the lack of appropriate channels for communities to voice their needs, as they are about delivery of services.<sup>11</sup> When the government does initiate development projects, they are generally implemented with limited or non-existent engagement with, and participation by, affected communities; instead, external bodies undertake these projects and consultants often drive them. It is unclear whether state officials understand the obligation of, and rationale for, community engagement and participation and how to effectively engage in these processes. Where participation does occur, it is often purely procedural and not intended to incorporate ideas and demands put forward by participants, or to genuinely engage with substantive issues around the nature of development. Further, the preoccupation with ‘formalising’ those living in informal housing and “reducing the housing backlog” – a political imperative for the African National Congress (ANC) - has failed to consider the numerous benefits of aspects of informality for poor individuals and households and the various unintended consequences of ‘formality’ (often involving relocation to underdeveloped dormitory estates or transit areas) that make people *worse* off in real terms, particularly in relation to access to livelihoods and job opportunities. This is demonstrated by the high percentage of people who sell or relocate from their RDP houses back to informal settlements to be closer to employment.

At the same time as protests over local conditions and lack of community voice in development are escalating, public interest lawyers are inundated with cases relating to illegal evictions of residents from inner city buildings, shack demolitions in informal settlements, and repossessions of houses in township areas (and subsequent evictions of owners or tenants). This has rendered the right to housing the most adjudicated socio-economic right before the Constitutional Court.<sup>12</sup> Some might argue that this is because of the strong negative component of the right to housing that explicitly prohibits evictions without a court order. However, the reality is that the flip side of the government’s progressive and enabling housing policies – at the coalface where implementation takes place - is far less progressive than implied by the positive formulation of the right to housing in the Constitution.

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<sup>10</sup> DHS “Presentation to the Portfolio Committee: Recommendations by the Human Rights Commission regarding the National Housing Programmes” (10 November 2010).

<sup>11</sup> See, for example, S Friedman “People are demanding public service, not service delivery” *Business Day* (29 July 2009) and R Pithouse “The Service Delivery Myth” *SACS/S* (26 January 2011).

<sup>12</sup> Six of the twelve socio-economic rights cases to have come before the Constitutional Court relate to the right to housing in the Constitution.

Some of the systemic problems which have hindered and continue to plague housing policy implementation - and consequently the enjoyment of the right to housing for everyone – include *inter alia*:

- politicisation of housing delivery at all levels;
- dominance of the provinces in housing policy implementation, and their underspending of budgets<sup>13</sup> and underperformance<sup>14</sup>;
- poor inter- and intra-governmental relations particularly around bulk services connections to housing developments;
- poor coordination between different spheres of government in the housing delivery process, leading to delays in project initiation, approval, implementation and completion;
- problems in the allocation of the national budget to local government, particularly around subsidised services such as water, sanitation and electricity;
- elite capture<sup>15</sup> and political infighting at the local level;
- an often ineffective ward committee system;
- integrated development planning processes and similarly defunct bottom-up planning mechanisms;
- cost-recovery pressures at the local level which lead to compromised access to basic services for the poor;
- lack of availability of well-located land and release of public land for development;
- technical skills shortages and unwieldy approval procedures with regards to planning and proclamation of land for development;
- rampant evictions and shack demolitions by the state and private landlords/owners;
- reliance on, and influence of, the private sector in low-income housing development and lack of private sector regulation;
- corruption and/or irregular tender processes in the awarding of housing development contracts;
- escalation of construction-related costs.

Regarding some of these problems, as of April 2002 municipalities were allowed to become developers<sup>16</sup> of low-income housing, after changes to the procurement regime were made following the passing of the Housing Amendment Act 4 of 2001. Since 1998 there has been a deliberate shift towards a more local government-centred, state-driven approach.<sup>17</sup> Each municipality must now also produce a housing chapter in its Integrated Development Plan (IDP). More recently, through accreditation<sup>18</sup>, approved municipalities can carry out housing-related functions currently undertaken by provincial and national government, such as subsidy budget planning

<sup>13</sup> In January 2011 the DHS announced that it was moving R463 million in unspent housing grant funding from the underperforming Free State and KwaZulu-Natal provinces, to provinces that have met their delivery targets i.e. Northern Cape and Limpopo, as well as to the rectification of badly-built houses programme. The Minister announced that the Western Cape and Eastern Cape had also underperformed and would be closely monitored. The main reasons for underperformance were cited as lack of capacity in provinces, particularly project management experience; and lack of bulk infrastructure, such as large-scale electricity and water supply projects. "Free State and KZN lose housing grants" *Engineering News* (18 January 2011).

<sup>14</sup> According to a monitoring and evaluation report on the DHS and the nine provincial housing departments conducted by the Public Service Commission (PSC) in July 2010, the majority of departments were under performing when assessed on values and principles set out in section 195 of the Constitution i.e. professional ethics; efficiency, economy and effectiveness; development orientation; impartiality and fairness; public participation in policy-making; accountability; transparency; good human resource management and career development practices; and representivity. The DHS and Western Cape were the best performing departments, while the Eastern Cape and North West received the lowest scores. Despite having improved since the first assessment, six departments scored less than 50 percent. In terms of the relationship between total budget spent and total outputs achieved, on average departments spent 97 percent of their total budgets whilst achieving only 48 percent of their total planned outputs, albeit supplying explanations for the variances exceeding the two percent margin generally accepted by National Treasury. PSC "Consolidated Monitoring and Evaluation Report on the Departments of Housing (Human Settlements): Evaluation Cycle 2009/2010" (July 2010) 11-12; 20-22.

<sup>15</sup> "Elite capture" is a term relating to participatory democracy and governance and refers to the paradox that increasing opportunities for participation often increase political inequality i.e. that participation is often captured by the middle class, party elite or business groups as opposed to benefitting and empowering communities and residents.

<sup>16</sup> "Developers" in the context of housing delivery can be defined as those institutions (private sector, local authorities, communities etc) which legally contract with provincial government on housing projects, taking on risk in the process.

<sup>17</sup> S Charlton & C Kihato "Reaching the Poor: An analysis of the influences on the evolution of South Africa's housing programme" in U Pillay *et al* (eds.) *Democracy and Delivery: Urban Policy in South Africa* (2006) 263.

<sup>18</sup> See subchapters 6.4.2.1 and 7.4 of this guide below for more on the accreditation of local government to undertake housing functions.



and allocation, as well as the management and administration of priority programmes. The aim is to enable these accredited municipalities to eventually gain full control over these functions, as well as full financial administration of housing in their jurisdiction when they reach Level 3 (the highest level of accreditation). Thus, accredited municipalities will be responsible for all housing functions in their area, while the province assumes responsibility for monitoring and evaluation. There is undoubtedly a need to move away from the province-centric approach that has dominated housing delivery in the past, and to improve intergovernmental relations between the spheres of government in housing delivery. Indeed, part of the problems faced with achieving scaled up and sustainable human settlements delivery is that there are “limited powers are given to municipalities in housing delivery, despite the significant responsibilities they hold for the provision of infrastructure and the long term management of settlements.”<sup>19</sup> According to the National Treasury, “municipalities regularly complain of inadequate notice of housing projects, which often conflict with the priorities identified and financed in their own plans.”<sup>20</sup>

However, a note of caution should be raised regarding the role of local government in taking on the full housing delivery mandate, not least because of problems witnessed with the decentralised approach to basic services provision, where cost-recovery pressures have dominated delivery and had an often adverse effect on the poor. There is, furthermore, a crisis at local government level around both governance and technical capacity. The National Department of Housing (NDoH) – now called the Department of Human Settlements (DHS) - has acknowledged the “scant capacity and ability at local authority level in most towns to deliver, [which] continues to exacerbate the capability to meet our national targets.”<sup>21</sup>

The right to adequate housing is intrinsically bound up with a number of other cross-cutting rights – including the rights to public participation, equality, human dignity, just administrative action<sup>22</sup>, access to information<sup>23</sup> and access to justice – as well as a range of socio-economic goods and amenities. These include access to land, water, sanitation, electricity, livelihoods, transport, clinics and hospitals, schools, universities and cultural and recreational amenities such as libraries, public spaces, swimming pools, sports fields and religious centres. Taken together, access to these rights and socio-economic goods alleviates poverty, reduces inequality and improves the quality of people’s lives.<sup>24</sup> However, as yet, government has not taken the kind of holistic approach to such development issues that would fundamentally redress the lingering spatial and socio-economic divide across South African cities and towns, despite its promotion of “sustainable human settlements” in policy. To this end, revised national housing programmes included in the 2009 National Housing Code, along with recent undertakings by the DHS in relation to informal settlement upgrading and social/rental housing, are encouraging. However, there is a continued need for rigorous research, lobbying and engagement at all levels around policy, programmes and housing targets. This report contributes to this goal by providing a resource guide of easy-to-access information on South African housing policy, legislation and implementation since 1994.

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<sup>19</sup> National Treasury “Chapter 6: Human Settlements” in *Provincial Budgets and Expenditure Review 2005/06 – 2011/12* (September 2009) 96.

<sup>20</sup> Ibid.

<sup>21</sup> NDoH “Annual Report 2006-2007” 22.

<sup>22</sup> When assessed on how impartially, fairly and equitably and without bias services were provided by the various departments – and how they performed in relation to the Promotion of Administrative Justice Act 3 of 2000 (PAJA) - only three departments provided the necessary information, and compliance by departments in respect of communicating administrative decisions varied between 10 and 30 percent. It is clear from the assessment that the administrative action requirements of PAJA are not been followed by most housing departments. PSC (note 14 above) 31-32.

<sup>23</sup> In terms of the departments’ compliance to access to information requirements contained in the Promotion of Access to Information Act 2 of 2000 e.g. appointing a deputy information officer, preparing a manual on access to information and putting in place procedures to deal with requests for access to information, the PSC found that PAIA had across the board not been implemented. Four departments met none of the requirements of the Act, while the remaining six only partially complied. Ibid 48.

<sup>24</sup> “Service delivery agreements signed” *IOL* (29 September 2010).

chapter  
2

## Housing Legislative and Policy Framework in South Africa

Since 1994 there have been numerous policy and statutory developments relating to housing, which attests to the broad and complex nature of the housing terrain in the country. A non-exhaustive list of some of secondary legislation relating to various regulatory, financial, technical, environmental, institutional and developmental aspects of housing in South Africa are provided above in the introductory section to this guide.

This chapter highlights important information contained in the Constitution of the Republic of South Africa, 1996 (Constitution) and key housing-related policy and legislation, including the following:

- Housing Act 107 of 1997 (amended by Acts 28 and 60 of 1999; Act 4 of 2001) (Housing Act)
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act)
- Rental Housing Act 50 of 1999 (amended by Act 43 of 2007) (Rental Housing Act)
- National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed through National Housing Programmes (April 2007) (National Norms and Standards)
- Social Housing Act 16 of 2008 (Social Housing Act)
- White Paper: A New Housing Policy and Strategy for South Africa (1994) (White Paper on Housing)
- Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (September 2004) (Breaking New Ground or BNG)
- National Housing Code (2000, revised in 2009) (National Housing Code)

The chapter further highlights some of the housing institutions created by legislation in South Africa - the Housing Development Agency (HDA), the National Home Builders Registration Council (NHBRC), the Social Housing Foundation (SHF) and the Social Housing Regulatory Authority (SHRA).

## 2.1 Constitution (1996)

The Constitution contains justiciable socio-economic rights and enshrines everyone's right to have access to adequate housing. In the Bill of Rights in Chapter 2 of the Constitution, section 26 outlines:

- 26 (1) Everyone has the right to have access to adequate housing.*
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*

Chapter 3 of this guide provides a more detailed discussion of the meaning of sections 26(1) and 26(2) contained in the Constitution.

The Bill of Rights also includes a number of other rights which relate either directly or indirectly to the enjoyment of the right to housing. These include *inter alia*:

- Everyone has inherent dignity and the right to have their dignity respected and protected (section 10);
- No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property (section 25(1));

- Everyone has the right to sufficient water (section 27(b));<sup>25</sup>
- Every child has the right to basic shelter (section 28(c)).

## Cooperative governance

Chapter 3 of the Constitution deals with co-operative government and section 41(1) lists a number of principles that should apply to co-operative government and intergovernmental relations. Such principles include *inter alia* that all spheres of government and all organs of state within each sphere must: provide effective, transparent, accountable and coherent government for the Republic as a whole; respect the constitutional status, institutions, powers and functions of government in the other spheres; co-operate with one another in mutual trust and good faith; foster friendly relations; assist and support one another; inform one another of, and consult one another on, matters of common interest; coordinate their actions and legislation with one another; adhere to agreed procedures; and avoid legal proceedings against one another.

## Local government

Section 153(a) of Chapter 7 of the Constitution, which deals with local government, describes the developmental duties of municipalities and states that a municipality must: (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and (b) participate in national and provincial development programmes.<sup>26</sup> According to section 152, the objects of local government are to:

- (a) provide democratic and accountable government for local communities;
- (b) ensure the provision of services to communities in a sustainable manner;
- (c) promote social and economic development;
- (d) promote a safe and healthy environment; and
- (e) encourage the involvement of communities and community organisations in the matters of local government.

Part A of Schedule 4 in Chapter 14 of the Constitution lists housing, urban and rural development and regional planning and development, as functional areas of concurrent national and provincial legislative competence. Part B lists building regulations, electricity and gas reticulation, water and sanitation services, and municipal planning as local government matters. Section 156(4) states that national government and provincial governments must assign to a municipality the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if that matter would most effectively be administered locally and the municipality has the capacity to administer it (see subchapter 7.4 of this guide below for more on the accreditation of municipalities to take on the housing function).

## 2.2 Housing Legislation

There is a raft of primary and secondary legislation relevant to different aspects of housing in South Africa. A list of relevant secondary legislation is provided above in the introductory section to this guide. The following subchapters summarise key information contained in a number of the most important legislation – the Housing Act, the PIE Act, the Rental Housing Act and the Social Housing Act – as well as in the National Norms and Standards for the Construction of Stand Alone Residential Dwellings.

<sup>25</sup> The Water Services Act 108 of 1997 provides that “everyone has a right of access to basic water supply and basic sanitation.” For the policy and legislative framework around water services provision in South Africa, as well as systemic problems with local government delivery of water services, see CALS, COHRE & NCHR “Water Services Fault Lines: An Assessment of South Africa’s Water and Sanitation Provision across 15 Municipalities” (October 2008).

<sup>26</sup> The roles, responsibilities and duties of local government are outlined in the Local Government: Municipal Systems Act 32 of 2000. Sections 25 and 26 of this Act state that all municipalities are required to compile an Integrated Development Plan (IDP). See subchapter 7.6 of this guide below for more on the requirement to include housing chapters in IDPs.

## 2.2.1 The Housing Act (1997)

The Housing Act is the primary piece of housing legislation in South Africa. It legally entrenched policy principles outlined in the 1994 White Paper on Housing (see subchapter 6.2 of this guide below for more on this policy). The Act provides for a sustainable housing development process, laying down general principles for housing development in all spheres of government; it defines the functions of national, provincial and local governments in respect of housing development; and it lays the basis for financing national housing programmes.

In section 2(1) the Act states that all spheres of government must give priority to the needs of the poor in respect of housing development, and consult meaningfully with individuals and communities affected by housing development. They must ensure that housing development provides as wide a choice of housing and tenure options as is reasonably possible; is economically, fiscally, socially and financially affordable and sustainable; is based on integrated development planning; is administered in a transparent, accountable and equitable manner; and upholds the practice of good governance. Further, in section 2(1)(e) the Act states that all spheres of government must promote *inter alia* the following: a process of racial, social, economic and physical integration in urban and rural areas; measures to prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process; higher density in respect of housing development to ensure the economical utilisation of land and services; the meeting of special housing needs including the needs of the disabled; the provision of community and recreational facilities in residential areas; the housing needs of marginalised women and other groups disadvantaged by unfair discrimination.<sup>27</sup>

A number of amendments were made to the principal Act in 1999 and 2001 respectively. Section 4 of the Housing Act requires the Minister to publish a Code which includes the national housing policy and procedural guidelines for the implementation of the policy. The latter are discussed further in chapter 7 of this guide.

« Housing development is defined in the Housing Act as:

The establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to–

- a. *permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and*
- b. *potable water, adequate sanitary facilities and domestic energy supply.*

»

### Roles and responsibilities of the three tiers of government

The Housing Act, and later the National Housing Code (promulgated in 2000, pursuant to section 4 of the Housing Act), sets out the roles and responsibilities of the three tiers of government in respect to housing. These are as follows:

- National government: must establish and facilitate a sustainable national housing development process by formulating housing policy. It must also monitor implementation through the promulgation of the National Housing Code and the establishment and maintenance of a national housing data bank and information system.
- Provincial government: must act within the framework of national housing policy and create an enabling environment by doing everything in its power to promote and facilitate the provision of adequate housing in its province, including the allocation of housing subsidies to municipalities.

<sup>27</sup> According to Chenwi and McLean, despite legislation and policies in South Africa which attempt to incorporate gender concerns and ensure women's participation in housing delivery, there are a number of inadequacies and gaps in implementation and "the legal and social framework through which housing delivery takes place results in inequities in access to housing." See L Chenwi & K McLean "A Woman's Home is her Castle?" – Poor Women and Housing Inadequacy in South Africa" (2009) 25, 3 *South African Journal on Human Rights* 517.

- Local government i.e. municipalities: must take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the constitutional right to housing is realised. It should do this by actively pursuing the development of housing, by addressing issues of land, services and infrastructure provision, and by creating an enabling environment for housing development in its area of jurisdiction.

### Strengthening the role of local government

Section 9(1)(a)(i) of the Act states that, “every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis.”<sup>28</sup>

Section 10 of the Act allows for the administration of national housing programmes by local government through the accreditation of municipalities by the provincial Minister of the Executive Council (MEC).<sup>29</sup>

An announcement in 1998 by the National Department of Housing (NDoH)<sup>30</sup> signalled an intention to change the procurement<sup>31</sup> regime to allow local authorities with adequate capacity i.e. those accredited as per section 10(2) of the Housing Act - to be developers of low-income housing development from April 2002.<sup>32</sup> In 1999 the Act was amended twice in order to *inter alia* recognise the Social Housing Foundation (SHF) as a national institution, and make provision for the phasing out of certain housing subsidies. In 2001 the Housing Act was again amended in order to abolish the South African Housing Development Board and Provincial Housing Development Boards and to establish advisory panels at both the national and provincial levels, as well as to provide for the determination of procurement policy in respect of housing development. The Amendment also made provision for the publication of lists of national housing programmes and national institutions, and further made the National Housing Code binding on all spheres of government.

### State-subsidised houses

According to section 10A of the Housing Act, an owner of a state subsidised house or serviced site may not sell or “otherwise alienate” the dwelling/site within a period of eight years from the date that the property was acquired.<sup>33</sup> Further, if the property is vacated, the relevant provincial housing authority is deemed the owner and no purchase price or other remuneration is paid to the original beneficiary, however this beneficiary will be eligible for obtaining another state-subsidised house if they still meet the qualifying criteria (see subchapter 2.4.1 below for these criteria).

In 2004, the Breaking New Ground policy amendment explained that the above prohibition on selling government-subsidised houses was added to protect subsidy beneficiaries from downward raiding, but had “also had the unintended consequence of undermining beneficiary choice and housing mobility and has created a significant barrier to formal secondary transactions.”<sup>34</sup> Breaking New Ground stated that an amendment to section 10A of the Housing Act would be introduced to reduce the prohibition period following occupation to five years. In December 2006, the Housing Amendment Bill of 2006 was introduced for public comment. The Bill sought to amend *inter alia* sections 10A and 10B of the principal Act, however it has to date not been enacted.<sup>35</sup>

<sup>28</sup> See subchapter 7.6 below for more on the housing chapters in Integrated Development Plans (IDPs).

<sup>29</sup> For more on municipal accreditation see subchapter 7.4 of this guide below.

<sup>30</sup> The National Department of Housing (NDoH) changed its name to the Department of Human Settlements (DHS) in May 2009.

<sup>31</sup> According to the definition provided in the Housing Act, “procurement means the process by which organs of state procure goods, services and works from, dispose of movable property, hire or let anything, or grant rights to the private sector.”

<sup>32</sup> Charlton & Kihato (note 17 above) 263.

<sup>33</sup> This does not appear to mean that owners of state-subsidised RDP or BNG houses cannot rent their properties if they so choose.

<sup>34</sup> NDoH “Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements” (2004) 2.4. Whenever this guide cites from BNG, it will refer to the relevant section (as opposed to page number) of the document.

<sup>35</sup> “Housing Amendment Bill, 2006” Government Gazette Notice 1852 of 2006 (22 December 2006).

## 2.2.2 The PIE Act (1998)

The PIE Act is an important piece of national legislation enacted to give effect to section 26(3) of the Constitution. The PIE Act provides safeguards against the eviction of unlawful occupiers living on both privately- and publicly-owned land. It has been the subject of a number of high profile Constitutional Court cases around evictions – including *Grootboom*, *PE Municipality*, *Olivia Road*, *Joe Slovo* and *Abahlali* – and these will be discussed further in chapter 5 of this guide. The PIE Act covers all those not protected by other legislation which provides protection for specific individuals or communities facing eviction. These include the:

- Land Reform (Labour Tenants) Act 3 of 1996 - protects labour tenants;
- Interim Protection of Informal Land Rights Act 31 of 1996 - protects occupiers of communal, native trust or other indigenous land;
- Extension of Security of Tenure Act 62 of 1997 (ESTA) - protects occupiers of farm land.<sup>36</sup>

The PIE Act is applicable to everyone who occupies land or property without the express or tacit consent of the owner or the person in charge of the land or property. This includes those who occupied land lawfully at some point in the past but who no longer have the consent of the owner to occupy the land in question, as well as to those who took occupation of land unlawfully in the first place. In the 2002 case *Ndlovu v Ncgobo; Bekker and Another v Jika*<sup>37</sup> a consolidated decision was taken by the Supreme Court of Appeal (SCA) that the term “unlawful occupier”, as defined in section 1 of the PIE Act, refers to persons who unlawfully took possession of land *as well as* persons who once had lawful possession but whose possession subsequently became unlawful. This latter category includes persons who are essentially “holding-over.”<sup>38</sup> In these situations unlawful occupiers are protected by the PIE Act and an eviction order must be sought in terms of this legislation (as opposed to, for example, the Trespass Act 6 of 1959).<sup>39</sup>

Previously, the common law understanding of granting an eviction order was that an owner simply needed to establish ownership of the property and the occupier consequently had no right to remain in possession of the property. The PIE Act interpretation of granting an eviction - where the court needs to determine whether the eviction is “just and equitable” taking into account special circumstances – has changed this; however, common law principles still apply to affluent tenants. The only relevant circumstances in these latter cases would be that the landlord is the owner, that the lease has come to an end and that the lessee is holding over. While the procedural requirements of the PIE Act still apply to affluent tenants, an eviction would most probably be granted quite easily by a judge given these circumstances.<sup>40</sup>

### Procedural requirements for a lawful eviction

Sections 4 and 6 of the PIE Act stipulate a number of strict procedural requirements for evictions to be lawful i.e. steps that must be taken in order to get an eviction order, which pertain to both private bodies and the state respectively.<sup>41</sup> These requirements further allow courts to refuse to grant an eviction order where it would not

<sup>36</sup> The controversial Land Tenure Security Bill of 2010 (out for public comment in January 2011 and already receiving much criticism from land rights activists) seeks to address a number of challenges with ESTA and the Land Reform (Labour Tenants) Act. If enacted, the Bill will replace both these pieces of legislation.

<sup>37</sup> *Ndlovu v Ncgobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA)

<sup>38</sup> “Holding-over” refers to when tenants continue to occupy a property after the termination of a lease or when ex-owners remain in a property after it has been repossessed by the bank and sold.

<sup>39</sup> It is not unusual for owners and landlords to approach a Magistrate’s Court using the Trespass Act to get an occupier ejected from a property. However, the Trespass Act should not be used to evict unlawful occupiers from their homes and an application in terms of the PIE Act should be made so that all the relevant circumstances are considered by a magistrate or judge (required by section 26(3) of the Constitution). The fairness and constitutionality of using a criminal statute to pursue the civil remedy of ejection is questionable.

<sup>40</sup> CALS “Comment on General Notice 1851 of 2006: Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2006” (20 February 2007) 10-11.

<sup>41</sup> If an eviction application is brought in the High Court, a notice of motion as per Rule 6 of the Uniform Rules of Court should be served in addition to notice served in terms of section 4(2) of the PIE Act. A consolidated notice may be served when an eviction application is brought in the Magistrate’s Court. For a step-by-step guide to the eviction process see SHF & Urban LandMark “Eviction Process Mapping Guide: A Manual for Rental Housing Managers & Tenants” (June 2010).

be “just and equitable” to do so, attaching special consideration to the personal circumstances of occupiers. To be lawful, an eviction application launched in terms of the PIE Act must follow certain procedural requirements, summarised below:

- only the owner or person in charge of land/property may apply for an eviction order;
- the owner or person in charge must attempt to meaningfully engage with the occupier(s) before commencing an eviction proceeding;<sup>42</sup>
- in terms of section 4(2) of the PIE Act the owner must serve the occupier(s) with “written and effective notice”<sup>43</sup> of intention to commence an eviction proceeding at least 14 days before the day of the court hearing which must;
  - state that the proceedings are being instituted in terms of the PIE Act for eviction of an unlawful occupier;
  - include the date and time of the court proceedings;
  - set out the grounds for the proposed eviction (usually in the form of a founding affidavit); and
  - state that the unlawful occupier has the right to appear before court and have access to legal aid;
- the same notice must also be served on the municipality with jurisdiction over the land or property.

### Substantive defences to an eviction

The PIE Act also raises substantive defences - i.e. reasons that a person may give to prevent their eviction - that a court must consider when granting an eviction or not. To raise substantive defences under the PIE Act, an unlawful occupier must show that they have lived on the land/property for at least six months and are therefore relatively settled. If an unlawful occupier has been in occupation of the property for longer than six months, the Act says that a court must consider whether land is available to which they may be relocated, or whether land can reasonably be made available by the owner or the local municipality. Those who have lived on land/property for less than six months also have rights under the PIE Act, although they have fewer rights as regards to what the owner or municipality must do regarding the provision of alternative accommodation.

The main defence available to unlawful occupiers under the PIE Act is to demonstrate the personal or household circumstances of all unlawful occupiers of the property and the likelihood that homelessness will result if they occupiers are evicted. Sections 4(6) and 4(7) of the PIE Act state that a court must consider the rights and needs of certain vulnerable groups of unlawful occupiers before granting an eviction, which include the elderly, children, female-headed households and the disabled. A court will be reluctant to grant an eviction order if it is satisfied that homelessness will result and that there is no alternative accommodation available. Indeed, Constitutional Court jurisprudence on evictions has led to a situation where judges are hesitant to grant an eviction order in cases where homelessness may result, until and unless alternative accommodation is provided.<sup>44</sup>

### PIE Amendment Bill, 2006

In December 2006 the NDoH published the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2006 (PIE Amendment Bill) along with a memorandum stating that it was not the intention that the PIE Act “should apply to tenants and mortgagors who default in terms of their prior agreements with landlords and financial institutions, respectively. The Act should cover only those persons who unlawfully invade

<sup>42</sup> See the *Olivia Road, Joe Slovo* and *Abahlali* cases in chapter 5 of this guide. “Meaningful engagement” in the context of evictions is a process whereby the state or private owners/landlords engage with the individuals, households or communities whose constitutional rights will be affected by state or private action, in order to find out their personal circumstances and needs, and act accordingly. The state is under an obligation to act upon the inputs received from the affected households in the engagement process. For more on meaningful engagement: S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 418-423; K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 147-160; and L Chenwi & K Tissington “Engaging meaningfully with government on socio-economic rights: A focus on the right to housing” (2010).

<sup>43</sup> In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2000 (2) SA 67 (C) the court found that where practical, a section 4(2) notice should be in a language and through a medium of communication which is likely to be understood by those to whom it is addressed.

<sup>44</sup> This judicial requirement has been reinforced in *Olivia Road, Joe Slovo* and *Abahlali*. See chapter 5 of this guide for more on these cases.

land without the prior consent of the landowner or person in charge of the land.<sup>45</sup> While certain aspects of the Bill were welcomed by legal NGOs and other groups who made submissions on the proposed Bill, other aspects were heavily criticised. The Centre for Applied Legal Studies (CALS) welcomed the addition to the Bill of an inclusive definition of “constructive eviction” as well as the repeal of the distinction between occupiers living on land for less than six months, and those who have been living on land for more than six months. However, CALS criticised the Bill’s narrowing of the scope of protection of the PIE Act to exclude those who are essentially “holding-over”, stating that in this respect the PIE Amendment Bill would “create undesirable and constitutionally unjustifiable inequalities between groups of occupiers who are equally in need of the PIE Act’s protection. It would increase the likelihood and frequency of evictions which lead to homelessness.”<sup>46</sup>

The PIE Amendment Bill was amended and introduced again; however, in August 2008 the Parliamentary Portfolio Committee on Housing recommended that the second PIE Amendment Bill be rejected and sent back to the NDoH and the Department of Land Affairs for further review. Therefore the proposed amendments have not taken effect.

## 2.2.3 The Rental Housing Act (1999)

The Rental Housing Act is a piece of national legislation that regulates the relationship between landlords and tenants in all types of rental housing. Section 2(1)(a)(i) of the Act stipulates that it is the government’s responsibility to “promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures that improve conditions in the rental housing market.”

### Unfair practices and the Rental Housing Tribunals

Section 7 of the Rental Housing Act provides for the establishment of provincial Rental Housing Tribunals to resolve disputes between landlords and tenants concerning “unfair practices”. The latter are defined in section 1 of the Act as those acts or omissions by a landlord or tenant in contravention of the Act or practices prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord. According to section 15(1)(f), unfair practices can *inter alia* relate to: the changing of locks; deposits; damage to property; demolitions and conversions; forced entry and obstruction of entry; House Rules; intimidation; issuing of receipts; tenants committees; municipal services; nuisances; overcrowding and health matters; tenant activities; maintenance; reconstruction or refurbishment work etc.

Section 14(1) of the Act states that a local authority *may* establish a Rental Housing Information Office to advise, educate and provide information to tenants and landlords in regard to their rights and obligations, as well as to refer parties to the Tribunal and keep records of enquiries to submit to the Tribunal on a quarterly basis.

In 2001, Unfair Practices Regulations (amended in 2002) were prescribed by the Gauteng MEC for Housing, and other provincial departments have also passed their own regulations. In 2007, the principal Act was amended by the Rental Housing Amendment Act 43 of 2007, in which section 7 states that the Minister *must* make national Unfair Practices Regulations in consultation with each MEC. However, according to the Chairperson of the Gauteng Rental Housing Tribunal Trevor Bailey, he and his Tribunal “are still awaiting the Minister’s regulations,

<sup>45</sup> The PIE Amendment Bill made a number of proposed amendments to the PIE Act which included the criminalisation of the facilitation of hijacking of property rentals (i.e. acting as an illegal broker), the extension of the 14 day eviction notice period to 30 day period, the rectification of the SCA court judgment that included tenants in the protection of illegal occupiers by the Act, and the removal of the six months distinction relating to time period living on land so as to provide for a single set of criteria to be applicable in all cases of unlawful occupation. NDoH “Memorandum on the objects of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2006” Government Gazette Notice 1851 of 2006 (22 December 2006).

<sup>46</sup> CALS (see note 40 above) 4.



which will result in uniform regulations throughout the country. In the interim, the Tribunal continues to use the regulations promulgated in Gauteng by the MEC.<sup>47</sup>

Section 2(3) of the Rental Housing Act stipulates that national government *must* introduce a policy framework on rental housing which sets norms and standards intended to facilitate provincial and local government's efforts to promote rental housing. Further, section 3 of the Act empowers the Minister to introduce a rent subsidy programme to stimulate the supply of rental housing property for low income persons. It is unclear if the DHS regards its current social/rental subsidy programmes as having fulfilled these obligations. This is important to ascertain, as section 13(4)(c)(iii) of the Act empowers the Tribunal to discontinue "exploitative rentals" and section 13(5) empowers it to make rent determinations having regard to prevailing economic conditions of supply and demand; the need for a realistic return on investment for investors in rental housing; and incentives, mechanisms, norms and standards and other measures introduced by the Minister in terms of the rental housing policy framework referred to in section 2(3).

Neither the Rental Housing Act nor the Unfair Practices Regulations passed by provinces explicitly define exploitative rental as an unfair practice. The first two factors stated above clearly favour the landlord and in the absence of the third factor – prescribed ministerial norms and standards – at best the Tribunal in determining a reasonable, non-exploitative rental is restricted to considering whether a rental is so far in excess of an ordinary market-related rental as to be exploitative.

The Rental Housing Amendment Act in 2007 made a number of important changes to the Act, including criminalising "constructive evictions" i.e. illegal cut-offs/disconnection of services, and removing the power of the Tribunal to evict tenants. Also important is that tenants have the right not to have their possessions seized unless by a Tribunal ruling or an order of court. Landlords have *inter alia* the right to prompt and regular payment of rental, or any charges that may be payable as part of a lease, and can recover unpaid rental or other amounts due after obtaining a ruling by the Tribunal or an order of court. They have the right to terminate a lease on grounds that do not constitute an unfair practice and are specified in the lease. A landlord must give a tenant at least two months written notice of an intention to increase rental.<sup>48</sup>

### Rental Housing Amendment Bill, 2010

In 2010 the Rental Housing Amendment Bill was gazetted, following a monitoring and implementation process whereby the DHS discovered that not all provinces had established Rental Housing Tribunals. Some provincial departments had only recently established Tribunals, and only after intervention by the DHS (as it stands it appears Tribunals are fully operational in Gauteng, Western Cape, KwaZulu-Natal, North West, Limpopo, Mpumalanga and Northern Cape). Furthermore, it was found that there were several local authorities that have not established Rental Housing Information Offices, according to the DHS, "despite a dire need thereof." The Rental Housing Amendment Bill seeks to amend sections 7 and 14(1) of the Rental Housing Act in order to render the establishment of Tribunals in every province and the establishment of Rental Housing Information Offices in every local authority mandatory.

## 2.2.4 The National Norms and Standards (2007)

In 1999 the National Norms and Standards for the Construction of Stand Alone Residential Dwellings were introduced by the Minister of Housing in terms of section 3(2)(a) of the Housing Act. These provided minimum technical specifications including environmentally efficient design proposals. On 1 April 2007, these standards were revised in the National Norms and Standards in respect of Permanent Residential Structures (National

<sup>47</sup> T Bailey "Report of the Gauteng Rental Housing Tribunal for the Period 1 April 2007 to 31 March 2010" (2010) 8.

<sup>48</sup> Some of the persistent problems with rental housing in urban areas, particularly private rental provision in inner city Johannesburg, are discussed in subchapter 4.2.2 below.

Norms and Standards), which are contained in the 2009 National Housing Code. All standalone houses constructed through application of the National Housing Programmes must at least comply with these norms and standards. As stipulated, each house must have:

- minimum gross floor area of 40m<sup>2</sup>;
- two bedrooms;
- separate bathroom with a toilet, a shower and hand basin;
- combined living area and kitchen with wash basin; and
- ready board electrical installation, if electricity is available in the project area.<sup>49</sup>

While the subsidies provided under the national housing programmes are not meant to be used for bulk and connector services, internal reticulation services (e.g. water pipes inside a house) may be funded as a last resort through the provincial housing allocation. In general, all residential properties created through the national housing programme must at least comply with the following levels of services, as per the National Norms and Standards:

- *Water* - single standpipe per stand (metered);
- *Sanitation* - Ventilated Improved Pit (VIP) latrine or alternative system agreed to between the community, the municipality and the MEC;
- *Roads* - graded or gravel paved road access to each stand (this does not necessarily require a vehicle access to each property);
- *Stormwater* - lined open channels;
- *Street lighting* - high mast security lighting for residential purposes where this is feasible and practicable (on condition that such street lighting is not funded from the Municipal Infrastructure Grant (MIG) or from other resources).

In 2000, the Council for Scientific and Industrial Research (CSIR) published Guidelines for Human Settlement Planning and Design, more commonly known as “The Red Book”. This document provides practical and useful guidance, information and ideas to assist both private and public sector housing practitioners, architects, town planners, urban designers, engineers and developers to create “sustainable and vibrant human settlements”. The document consists of two volumes, with volume 1 focusing primarily on planning issues and volume 2 dealing with engineering services.

## 2.2.5 The Social Housing Act (2008)

The Social Housing Policy for South Africa was approved in June 2005 and the Implementation Guidelines published in November 2006. The revised policy has recently been included in the Social Housing Programme (SHP) in the new National Housing Code of 2009 which is dealt with in more detail in subchapter 7.14 below.<sup>50</sup>

In 2008 the Social Housing Act 16 of 2008 (Social Housing Act) was passed, providing the enabling legislation for the Social Housing Policy. The Act aims to establish and promote a sustainable social housing environment and defines the functions of national, provincial and local governments in respect of social housing, allows for the undertaking of approved projects by other delivery agents with the benefit of public money and gives statutory recognition to social housing institutions (SHIs). Further, it provides for the establishment of the Social Housing Regulatory Authority (SHRA) and defines its role as the regulator of all SHIs that have obtained, or are in the process of obtaining, public funds. The SHRA also will deal with the accreditation of SHIs in terms of this legislation and regulations pursuant to it. See subchapter 2.5 below for more on the SHRA.

<sup>49</sup> DHS “Technical and General Guidelines” Part A of Part 3 Vol 2 of the National Housing Code (2009) 21. A ready board is a pre-manufactured electricity distribution unit used in most township electrification projects. It is often installed together with a prepayment electricity meter (although these are not the same thing).

<sup>50</sup> DHS “Social Housing Policy” Part 3 Vol 6 of the National Housing Code (2009).

## 2.3 Housing Policy

In South Africa there are two relevant housing policy documents. The 1994 White Paper: A New Housing Policy and Strategy for South Africa (White Paper on Housing) is the principal, overarching national housing policy, while the 2004 Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (Breaking New Ground or BNG) is the first major policy amendment/refinement to the White Paper on Housing since 1994. Both these documents will be discussed further in chapter 6 below.

### 2.3.1 White Paper on Housing (1994)

The White Paper on Housing provided the framework for the country's ambitious housing development target of building one million state-funded houses in the first five years of office, as set out in the now abandoned ANC Reconstruction and Development Programme (RDP). A cornerstone of this early policy was the National Housing Subsidy Scheme (NHSS), which, among other subsidy systems, provided capital subsidies for housing to qualifying beneficiary households to take full ownership. Later referred to as "RDP housing", this was a developer-driven process, meaning projects were initiated, planned and built by private construction companies for the national and provincial government. The fundamental policy and development principles introduced by the White Paper on Housing continue to guide all developments in respect of housing policy and implementation. The White Paper on Housing will be discussed in more detail in subchapter 6.2 below.

### 2.3.2 Breaking New Ground (2004)

In September 2004 Breaking New Ground was adopted by the Cabinet as a revised framework for the development of sustainable human settlements. BNG is based on the principles contained in the White Paper on Housing and outlines the strategies to be taken to achieve the government's overall housing aim. While not clearly introducing any new policy direction, the document outlines a comprehensive plan for the development of sustainable human settlements in the next five years.<sup>51</sup> BNG will be discussed in more detail in subchapter 6.4 below.

## 2.4 National Housing Code (2000, revised in 2009)

The National Housing Code, first published in 2000 in accordance with the Housing Act, set out the underlying policy principles, guidelines and norms and standards which apply to the National Housing Programmes. Some of these programmes have been updated or removed, and new programmes included, after the adoption of Breaking New Ground in 2004. The Code is binding on provincial and local spheres of government. Chapter 6.6 of this guide outlines the National Housing Code in more detail.

In 2009 a revised National Housing Code was published and contains the BNG-compliant National Housing Programmes which are described as the "building blocks in the provision of sustainable human settlements."<sup>52</sup> These revised National Housing Programmes will be discussed in more detail in chapter 7 of this guide.

<sup>51</sup> Charlton & Kihato (note 17 above) 256.

<sup>52</sup> A useful summary of the national housing policy and subsidy programmes included in the revised Code is available at <[http://www.kznhousing.gov.za/Portals/0/docs/Policy&Legislation/National\\_Policy\\_&\\_Legislation/National%20Housing%20Policy%20and%20Subsidy%20Programmes.pdf](http://www.kznhousing.gov.za/Portals/0/docs/Policy&Legislation/National_Policy_&_Legislation/National%20Housing%20Policy%20and%20Subsidy%20Programmes.pdf)>

## 2.4.1 National Housing Programmes

The national housing programmes are categorised into different “Intervention Categories” as follows:

- Financial Programmes
  - Individual Housing Subsidies
  - Enhanced Extended Discount Benefit Scheme (EEDBS)
  - Social and Economic Facilities
  - Accreditation of Municipalities
  - Operational Capital Budget (OPS/CAP)
  - Housing Chapters of IDPs
  - Rectification of Pre-1994 Housing Stock
- Incremental Housing Programmes
  - Integrated Residential Development Programme (IRDP)
  - Enhanced People’s Housing Process (ePHP)
  - Informal Settlements Upgrading Programme (UISP)
  - Consolidation Subsidies
  - Emergency Housing Assistance
- Social and Rental Housing Programmes
  - Institutional Subsidies
  - Social Housing Programme (SHP)
  - Community Residential Units (CRU)
- Rural Housing Programmes
  - Rural Subsidy: Informal Land Rights
  - Farm Residents Housing Assistance Programme

The revised National Housing Code outlines a General Framework applicable to certain National Housing Programmes which form part of the NHSS i.e. Individual Subsidies, IRDP, Consolidation Subsidies, Institutional Subsidies and Rural Subsidies. These programmes are administered through an operational and administrative tool called the Housing Subsidy System (HSS) and all beneficiaries who have applied for or received housing subsidies are recorded on the National Housing Subsidy Database (NHSDB), which is managed by the DHS and used by provincial departments and accredited municipalities to administer housing projects and subsidy applications. These systems have been developed in line with section 6 of the Housing Act, which obliges the national department to “establish and maintain a national housing data bank and a national housing information system.”<sup>53</sup>

There is a set of generic qualifying criteria which must be fulfilled by those applying for state housing subsidies under the NHSS for the national housing programmes. However, there are also specific rules that apply to each subsidy programme and in some cases there are specific eligibility criteria that apply over and above the generic criteria.<sup>54</sup> The specific criteria are outlined in each of the programmes outlined below in chapter 7 of this guide.

### Qualifying criteria for housing subsidy programmes

The generic qualifying criteria as outlined in the revised National Housing Code are summarised as follows:

- *Citizenship*: applicant must be a citizen of the Republic of South Africa, or be in the possession of a Permanent Resident Permit.
- *Competent to contract*: applicant must be legally competent to contract (i.e. over 18 years of age, or married or divorced and of sound mind).

<sup>53</sup> For more on the NHSDB and HSS see DHS (note 49 above) 109-114.

<sup>54</sup> Ibid 11-16.

- *Not yet benefited from government funding:* the applicant or their spouse may not have received previous housing benefits from the government. In the event of a divorce involving a person who previously derived benefits, the terms of the divorce order will determine such person's eligibility for further benefits.
- *First time property owner:* the applicant or their spouse may not have owned and/or currently own a residential property. Except for the following cases:
  - disabled persons;
  - persons who:
    - own a vacant stand that was obtained through the Land Restitution Programme;
    - have acquired a residential property for the first time without government assistance and the house/dwelling on the property, if any, does not comply with the National Norms and Standards in respect of permanent residential structures.

In addition to the above requirements, any applicant must also satisfy the following general criteria:

- *Married or financial dependants:* the applicant must be married or constantly be living together with a spouse. A single person with proven financial dependants (such as parents or parents-in-law, grandparents or grandparents-in-law, children, grand children, adopted children, foster children) may also apply.
- *Monthly household income:* the applicant's gross monthly household income must not exceed R3 500. Adequate proof of income must be submitted.
- *Beneficiaries of the Land Restitution Programme:* beneficiaries of the Land Restitution Programme, should they satisfy the other qualification criteria, may apply for housing subsidies
- *Persons classified as military veterans as confirmed by the SANDF:* military veterans who are single without financial dependants may also apply for housing subsidies.
- *Persons classified as aged:* aged persons who are single without financial dependants may also apply for housing subsidies. Aged persons are classified as male and female persons who have attained the minimum age applicable to Government's old age social grant scheme.
- *Persons classified as disabled:* persons who are classified as disabled, whether single, married or co-habiting or single with financial dependants, may apply for housing subsidies. If a person who has already received state funding for housing and/or who already owns or owned a house, is or becomes disabled, or if his or her dependant(s) is/are or become disabled, such a person may receive an additional variation on the subsidy amount to finance special additions to provide independent living conditions.

## 2.5 Housing Institutions

There are a number of legislated housing institutions which undertake specific functions in the South African housing landscape. The National Housing Finance Corporation (NHFC),<sup>55</sup> the National Urban and Reconstruction Agency (Nurcha)<sup>56</sup> and the Rural Housing Loan Fund (RHLF)<sup>57</sup> are financial institutions involved in housing development. Some other important institutions include the following:

- The Housing Development Agency (HDA) is a national public entity created by the Housing Development Agency Act 23 of 2008 in 2009. It is tasked with the acquisition, management and release of state- and privately-owned land for human settlements development, and with providing project delivery support services to enhance the capacity of municipalities and provinces to deliver integrated sustainable human settlements.<sup>58</sup>

<sup>55</sup> The NHFC was established by the government to mobilise finance for housing, from sources outside the state in partnership with the broadest range of organisations.

<sup>56</sup> Nurcha's mandate is to facilitate the flow of finance from financial institutions into low-income housing development. To this end it issues guarantees for both bridging finance and end user finance loans, as well as administers the saving programme for housing.

<sup>57</sup> The RHLF focuses on its core business of providing loans, through intermediaries, to low-income households for incremental housing purposes i.e. as a people-driven process. Its mandate is to empower low-income families in rural areas to access credit that enables them to mobilise self help and savings schemes to build and improve their shelter incrementally.

<sup>58</sup> See <<http://www.thehda.co.za/>> for more on the HDA.

- The National Home Builders Registration Council (NHBC) is a national council established in terms of the Housing Consumer Protection Measures Act 95 of 1998 with the mandate to protect the interests of housing consumers, by providing warranty protection against defects in new houses, and to regulate the home building industry so that it delivers sustainable and quality houses. Through registrations, enrolments, inspections, training, warranties and dispute resolutions it further aims to promote innovative technology and compliance as well as capacitate home builders.<sup>59</sup>
- The Social Housing Foundation (SHF) is a nonprofit company set up in 1997 in terms of section 21 of the Companies Act 61 of 1973, in collaboration with the NDoH and in accordance with the Housing Amendment Act of 1999. The SHF was established as the national custodian of social housing in South Africa and offered a range of services to those in the social housing sector, assisting primarily in developing and building capacity for SHIs. The SHF delivered expertise, products and services grounded in knowledge of the challenges of the social housing environment.<sup>60</sup> In 2010 the SHF closed down and is transitioning to become the Social Housing Regulatory Authority (SHRA).
- The Social Housing Regulatory Authority (SHRA) is a new national regulatory authority created by the Social Housing Act and launched in August 2010. The principal function of the SHRA will be to increase the amount of rental accommodation available to people in low-income groups, particularly in urban areas. It will facilitate and channel increased funding for social housing projects, help to define new norms and standards in order to stimulate the development of new social housing projects in urban areas and oversee the accreditation of SHIs in terms of legislation and regulations. See subchapter 2.2.5 of this guide above and subchapter 7.14 below for more on the Social Housing Act and Social Housing Programme respectively.

In 2010 the Minister of Human Settlements introduced the Community Scheme Ombud Service Bill of 2009 to Parliament. The Bill seeks to establish a dispute resolution service for all community schemes, which include sectional title schemes, share block companies, homeowners associations and housing schemes for retired persons. These are property developments in which there is governance by the community involved, shared fiscal responsibility and land/facilities used in common. The Bill, if enacted, would establish the Community Scheme Ombud Service as a national public entity with exclusive authority vested in the Minister.<sup>61</sup>

<sup>59</sup> See <<http://www.nhbrc.org.za>> for more on the NHBC.

<sup>60</sup> See <<http://www.shf.org.za>> for more on the SHF.

<sup>61</sup> "Community Scheme Ombud Service Bill, 2009" Government Gazette Notice 1448 of 2009 (20 October 2009).

Section 26(1) of the Constitution states that everyone has the right to have access to adequate housing. However, “adequate housing” is not easy to define as it depends on the specific context and circumstances of households and individuals, together with their needs and priorities. Access to housing is also bound up with access to other socio-economic goods and amenities including access to land, water, sanitation, electricity, livelihoods, transport, clinics and hospitals, schools, universities and other cultural and recreational amenities such as parks, libraries, public spaces, swimming pools, sports fields etc. Further, achieving the right to housing is intrinsically bound up with a number of other cross-cutting rights, including rights to public participation, equality, human dignity, just administrative action, freedom of expression, access to information and access to justice etc. See subchapter 2.1 of this guide for more of the cross-cutting rights contained in the Constitution.

This interrelatedness and “interdependency of rights”<sup>62</sup> is affirmed by international human rights law. According to General Comment 4 on Article 11(1) of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) - which deals with the right to adequate housing –

“ the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. ”

General Comment 4 outlines aspects of the right to housing that must be taken into account in any particular context:

- legal security of tenure;
- availability of services, materials, facilities and infrastructure;
- affordability;
- habitability;
- accessibility;
- location; and
- cultural adequacy.<sup>63</sup>

Indeed, South Africa is characterised by lingering spatial inequalities and a pronounced rural-urban divide. Many different housing typologies exist, including high-density residential (e.g. inner city flats, rented spaces in inner city flats; erected shacks in abandoned inner city buildings; private rental housing; social housing), shacks in informal settlements on both publicly- and privately-owned land, RDP houses<sup>64</sup> in urban townships, backyard shacks adjacent to formal housing, rural housing dwellings etc. More important than the different housing typologies and geography, however, is the fact that South Africa has an extreme diversity of accommodation and housing *needs*. Individuals and households must have some choice between a wide variety of housing options which take into consideration adequacy of location, shelter, space, size of household, affordability,

<sup>62</sup> The principle of interdependency of rights means that socio-economic rights and civil and political rights are interrelated, and that the enjoyment of one right (or group of rights) requires enjoyment of others (which may or may not be in the same group).

<sup>63</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) “General Comment No. 4: Right to Adequate Housing” Article 11(1) of the International Covenant on Economic, Social and Cultural Rights 1991/12/13 (1991) 7-8. <<http://www.unhcr.ch/tbs/doc.nsf/0/469f4d91a9378221c12563ed0053547e?Opendocument>>

<sup>64</sup> See subchapter 6.2 of this guide for more on RDP housing.

physical security and tenure security. This epitomises adequacy and accessibility in the truest sense of the words.

Accordingly, while adequate housing concerns more than providing shelter from the elements (as highlighted in the *Grootboom* judgment and beyond), it is difficult or impossible to define the term exactly, despite the National Norms and Standards on the actual technical specifications of a standalone house (see subchapter 2.2.4 of this guide for these standards). Further, a homogenous definition does not apply, although some essential principles may be common across cases.<sup>65</sup> After researching land and housing typologies in the poorer parts of South African cities (which includes own shack in an informal settlement, rented shack in an informal settlement, rented room within a shack in an informal settlement, rental of space for own backyard shack in established township, rented room in established township, RDP house in upgrading project, RDP house in greenfields project<sup>66</sup> etc), Warren Smit, a housing researcher, has developed a matrix to assess their adequacy in terms of some key criteria, which mirror those outlined in General Comment 4. These include *inter alia*:

- adequacy of location;
- adequacy of shelter;
- affordability (in terms of upfront and ongoing costs);
- adequacy of services (water, sanitation, energy supply, etc);
- adequacy of space;
- physical security;
- security of tenure; and
- accessibility or availability.<sup>67</sup>

Smit concludes that:

« All the major land/housing options currently available to poor households have serious inadequacies. Although poor households are, for example, able to access relatively good locations and affordable accommodation in informal settlements or adequate shelter/services and secure tenure in RDP housing settlements, they are seldom able to adequately satisfy all their minimum requirements simultaneously.<sup>68</sup> »

In terms of section 26, the state should strive to ensure that *all* people living in South Africa are able to satisfy *all* the requirements with regard to adequacy of housing. This commitment would profoundly represent the transition to transformation, equality and socio-economic well-being for all citizens (and non-citizens). The reality, however, is that the state *prioritises* certain programmes and developments based on land and financial constraints, amongst other factors (which also include wanting to secure market return on investment). For those unable to access housing through the ‘normal’ residential market - where individuals or households can typically balance the various criteria to choose the most adequate for themselves - state prioritisation should be people-centred, so as to ensure their access to livelihoods.

In a country rife with unemployment, poverty and lingering socio-economic and geographical inequality, adequate housing may serve as a trajectory out of poverty, even if this is a gradual process or only facilitates exit

<sup>65</sup> The Constitutional Court has rejected the “minimum core” component of socio-economic rights. In the *Joe Slovo* case, however, it did prescribe in detail the form of the *temporary* alternative accommodation to be provided by the state to those evicted. While this is desirable in that the prescription includes some minimum requirements, including access to water, sanitation and electricity, the location of the temporary relocation area (TRA), the socio-economic disruption caused by such a mass relocation and the severely lacking ‘sustainable human settlements’ aspect of the N2 Gateway project is cause for concern. K Tissington “Joe Slovo residents let down by court” *Pambazuka News* (25 June 2009). The *Joe Slovo* case is analysed in greater detail in subchapter 5.4 of this guide below.

<sup>66</sup> A “greenfields” housing development is one where new construction occurs on a piece of previously undeveloped land.

<sup>67</sup> W Smit “Analysis of qualitative survey on accessing, holding and trading land: synthesis report” Report prepared for Urban LandMark (March 2008) 4-6.

<sup>68</sup> W Smit “Are urban land markets working well for the poor? Exploring a practical method of assessment” PowerPoint presentation (27 August 2008).



from the poverty trap for younger members of a household. Low-income, subsidised housing - that caters to household or individual needs in areas close to work, schools, universities, health care facilities, public libraries, internet access etc - can begin to overcome the class and race disparities that continue to divide South Africa. Recently, the President in his 2009 Budget Vote speech stressed that

“ housing is not just about building houses...it is also about transforming our residential areas and building communities with closer access to work and social amenities, including sports and recreation facilities. ”

The President's statements are in line with the Constitutional Court's statements in the *Grootboom* case that

“ housing entails more than bricks and mortar.”<sup>69</sup>

### 3.1 Progressive realisation

In terms of section 26(2) of the Constitution, “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” The exact meaning or interpretation of section 26(2) is contested, however, and “progressive realisation” is a difficult term to quantify. Some explanation is given to the term by both the UN Committee on Economic, Social and Cultural Rights (CESCR) and the Constitutional Court.

The ICESCR was a major source of reference for the drafting of the socio-economic provisions in the Constitution and contains a clause in Article 2(1) which states that all parties to the Covenant must take steps, “especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”<sup>70</sup> This wording is reflected in section 26(2). General Comment 3 of Article 2(1) of the ICESCR explains that the clause is a necessary flexibility device reflecting the “realities of the real world and the difficulties involved for any country in ensuring full realization of the economic, social and cultural rights.” However, it also imposes a substantive obligation on states to move as “expeditiously and effectively as possible” towards the goal of universal realisation of rights.<sup>71</sup>

Both the CESCR and the South African Constitutional Court have emphasised that “progressive realisation” implies a recognition that the full realisation of socio-economic rights will generally not be able to be achieved over a short period of time.<sup>72</sup> In the *Grootboom* case the Constitutional Court interpreted “progressive realisation” to mean the dismantling of a range of legal, administrative, operational and financial obstacles which impede access to rights, and the expansion over time of such access, to a larger and broader range of people.<sup>73</sup> The Court has adopted and developed a “reasonableness review” approach to socio-economic rights adjudication, and has not interpreted section 26 of the Constitution to place strong obligations on the state to ensure everyone has a basic level of housing immediately, although it found in *Grootboom* that the state has an obligation to take immediate steps to provide relief to those in urgent and desperate need and living in “intolerable conditions.”<sup>74</sup>

<sup>69</sup> *Grootboom* (note 1 above) 32.

<sup>70</sup> S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 107.

<sup>71</sup> CESCR “General Comment No. 3: The nature of States parties obligations” Article 2(1) of the International Covenant on Economic, Social and Cultural Rights E/1991/23 (1991) 9. <<http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument>>

<sup>72</sup> L Chenwi “Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court” Research paper written for SPII (2010) iii.

<sup>73</sup> *Grootboom* (note 1 above) 45.

<sup>74</sup> *Ibid* 52.

The Court has been unwilling to give any specific content or “minimum core” to the right to adequate housing. Some of the arguments put forward by the Court against the “minimum core” approach include the following: different groups in different contexts have different housing needs; there is a lack of an adequate informational base to determine the minimum core; there is no unqualified duty on the state to provide access to housing on demand given the textual formulation of section 26; minimum core obligations impose unrealistic demands on the state and it is impossible to give everyone a “core” service immediately; and finally, that the minimum core is incompatible with the institutional competencies and role of the courts, and they are not equipped to make the “wide-ranging factual and political enquiries necessary to determine what the minimum core standards should be.”<sup>75</sup> However, according to David Bilchitz, associate professor at the University of Johannesburg and director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), progressive realisation does not and should not mean some receiving housing now and others later, but rather “that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time.”<sup>76</sup>

While the South African state can be commended on the number of houses it has built over the years (expanded on in chapter 4 of this guide below), notwithstanding the many problems with their location and construction standards, it is unclear to what extent housing policy formulation is developed with an explicit reference to the constitutional obligations on the state to move progressively towards universal realisation of the right to adequate housing. While mention is made of the constitutional obligation to provide access to adequate housing and it is acknowledged officially (generally at the beginning of a policy in order to place it within a wider constitutional framework), housing tends to be framed entirely within other paradigms, usually political commitments to the electorate. These paradigms include, amongst others, “speeding up delivery” and “eradicating backlogs.” While these are not necessarily bad frameworks in and of themselves, where they are not informed and driven substantially by their positive impact on the poor and their linkages with livelihoods strategies, they can be disastrously misplaced and even detrimental to households and poverty alleviation efforts more broadly.

When one examines recent court cases related to evictions, reads newspapers or engages with informal settlement/township/inner city residents throughout the country, one hears of evictions, shack demolitions, unaffordable housing units, broken promises, undue private sector influence, rental exploitation, service cut-offs, local government incompetence and inability to engage with poor communities, housing allocation corruption and the loss of livelihoods. These are “retrogressive measures” that work in opposition to the obligation of progressive realisation. Every day across the country, the obligation to respect and protect the right to housing is violated, often as result of state-run projects aimed ostensibly at fulfilling this right but more concerned with delivery and scratching people off the backlog list. This was the case with the N2 Gateway housing project in Cape Town - the lead pilot project identified in the BNG policy document (described in more detail in subchapters 5.4 and 6.4 of this guide below) - and experience has shown that much of what has driven policy formulation and development in the past is political pressure to deliver amidst increasingly frequent community protests, the need to adhere to international development goals and the continued involvement of dedicated and professional teams of housing experts and consultants who provide technical and policy direction however with little real buy-in from provincial and local government when it comes to implementation.

As Sandra Liebenberg, professor of human rights law at Stellenbosch University, recognises, the major interpretative difficulty that arises in relation to the concepts of “progressive realisation” and “retrogressive measures” is whether they should be assessed in relation to particular individuals or groups, or in respect of the entire population. The former interpretation implies that the state must answer if benefits received by a particular individual or group are reduced, even if there is overall improvement in access to benefits for the entire population. The latter interpretation would mean that the state is not required to justify the reduction

<sup>75</sup> Liebenberg (note 70 above) 150.

<sup>76</sup> Ibid 187.

of benefits to any individual or group, provided there is no overall, statistical decrease in access to benefits.<sup>77</sup> Liebenberg argues that it would be best to expose all retrogressive measures to close scrutiny and while these would not be absolutely prohibited, and may be justifiable where they are necessary to achieve equity in the realisation of the right or a more sustainable basis for the adequate realisation of the right, weighty justifications should be required where they result in depriving marginalised and vulnerable groups of access to basic social services.<sup>78</sup>

## 3.2 Resource constraints

All the socio-economic rights in the Constitution, including the right to housing, have resource implications for the state, which has the obligation to ensure everyone has access to these rights on a progressive basis. The internal limitation clause, discussed above, of the socio-economic rights allows the state some leeway in delivering on its obligations, and the availability of resources is a factor when courts assess the reasonableness of a state policy. However, there remain questions as to the extent of the courts' ability or willingness to assess resource-based arguments and the adequacy of government budgets and redistribution efforts, and even, whether it is appropriate for courts to make these kind of judgments given the doctrine of the separation of powers. Despite all this, in the adjudication of socio-economic rights it is inevitable that courts will make orders with budgetary implications for the state. Liebenberg states that:

“ the transformative potential of socio-economic rights would be severely diluted if the courts adopt the view that the availability of resources for their realisation can only be assessed within the parameters of existing budgetary allocations to the relevant departments or spheres of government.<sup>79</sup> ”

Often, government departments fail to spend their budgetary allocations, due to bureaucratic or capacity constraints and this does not present significant separation of powers obstacles, as the executive and legislature have already allocated budgets for specific programmes and court intervention seeks to ensure successful implementation of the programme in question.<sup>80</sup> According to Liebenberg,

“ the jurisprudence suggests that orders with clear budgetary and resource implications will be made in circumstances where government does not place convincing evidence before the court demonstrating that it lacks resources or has other competing urgent claims on its resources.<sup>81</sup> ”

If existing budgetary allocations are inadequate for the realisation of a particular socio-economic right, the state should provide good reasons justifying this situation. Therefore, the burden of proof lies with the state.

The Constitutional Court has shown that one of its primary concerns with granting direct benefits to individuals or groups is its own institutional limitation in ensuring the equitable allocation of resources to all those similarly placed, and ensuring that others worse off will not suffer because more benefits have been conveyed on a specific individual or group. While there may be cases where this is a legitimate concern, there are situations where providing tangible benefits would not compromise other groups or be inequitable. According to Liebenberg, as with the resource constraints defence, the state should be required to produce evidence and arguments before the court concerning the alleged impact of granting an order favouring specific individuals or groups.<sup>82</sup>

<sup>77</sup> Ibid 189.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid 195.

<sup>80</sup> Ibid 194.

<sup>81</sup> Ibid 193.

<sup>82</sup> Ibid 206.

# chapter 4 | Housing Delivery and Backlogs

The DHS admits that the data it relies on to estimate the housing backlog in South Africa is most likely unreliable, and that a state-subsidised house that is delivered may “remain inadequate because of lack of access to basic services.”<sup>83</sup> Therefore in terms of “eliminating the backlog” and delivering adequate housing, the department is not actually clear where it stands. The DHS has further stated that in relation to statistics collection and verification, they are hoping that the 2011 Census will be able to give government a better sense of the accuracy of the data they currently use to measure backlogs and access delivery.<sup>84</sup> There are various reasons for unreliability of data, including poor provincial and municipal record-keeping in many parts of the country, as well as incomplete data on house construction. According to the National Treasury,

« detailed records of spending on subsidy instruments per municipality are not readily available on a national basis. These data weaknesses are a problem for the sector and reflect the ongoing coordination problems being experienced. It also severely undermines any detailed analysis, oversight and accountability.<sup>85</sup> »

This chapter provides statistics on housing delivery since 1994, as well as on the current and growing housing backlogs, with the caveat that the figures presented are most likely unreliable. In terms of housing backlogs, subchapter 4.2 looks at qualitative and quantitative issues relating to informal settlements, low-income rental housing and so-called affordable housing in more detail.

## 4.1 Housing delivery since 1994

According to the NDoH, from 1994 to 2004, R29.5 billion in state-assisted housing investment had generated 1.6 million housing opportunities and provided 500 000 families with the opportunity to secure titles of old public housing stock.<sup>86</sup> In South Africa’s 2007 Mid-Term Country Report on progress made towards achieving the UN MDGs, the government stated that it had made good progress in “eradicating backlogs” and providing adequate housing. It reported that over 3 million subsidies had been approved, benefiting over 10 million poor people. Cumulatively, the government stated it had spent R40 billion on housing development since the inception of the housing programme, contributing to 2.4 million houses being constructed or sites being prepared, as of 2007.<sup>87</sup> However, while approximately 3.3 million subsidies were approved as of 2009, actual delivery of subsidised housing units had been much slower.<sup>88</sup> Between 2001/02 and 2007/08 delivery declined in most provinces, while the allocation from the Integrated Housing and Human Settlement Development (IHSD) grant increased.<sup>89</sup>

<sup>83</sup> DHS presentation to the Parliamentary Portfolio Committee on Human Settlements (2 December 2009).

<sup>84</sup> Ibid.

<sup>85</sup> National Treasury (note 19 above) 100.

<sup>86</sup> NDoH (note 34 above) 3.

<sup>87</sup> NDoH “South Africa: Millennium Development Goals Mid-Term Country Report” (September 2007) 8.

<sup>88</sup> National Treasury (note 19 above) 102.

<sup>89</sup> Ibid. The IHSD grant is a conditional grant allocation that is transferred to provinces from the national department to finance the implementation of the national housing programmes.

According to the National Treasury, between 1995 and mid-2008 the IHSD grant disbursed approximately R49 billion which provided a total of 2.6 million housing opportunities at a gross average cost of R18 850 per unit, and an average annual delivery rate of 200 000 units a year. According to the department, “although accurate data is not readily available, the bulk of this spending occurs through project-linked subsidies, where developers implement housing projects at scale and a qualifying household obtains ownership of a complete residential unit.”<sup>90</sup>

In 2010, the Minister of Human Settlements stated that “since 1994 more than 2.3 million housing units have been made available for nearly 11 million people.”<sup>91</sup> Kecia Rust, a low-income housing finance expert, argues however that there are three major problems with reaching an aggregate figure for state-subsidised housing.<sup>92</sup> First, records in the deeds office do not indicate whether the house was constructed with or without a state subsidy, whilst data on the approval of housing subsidies is incomplete and difficult to match with actual house construction.<sup>93</sup> Second, it seems that a substantial proportion of state-subsidised RDP and BNG houses – perhaps as high as 50 percent – have not been registered with the deeds office.<sup>94</sup> Third, it seems that state subsidies have been used in some cases to finance transfers of ownership from the state to occupants i.e. leasehold being converted to freehold, which means a house was not actually constructed. Rust believes there are probably less than 1 million registered RDP and BNG housing units, and that the figure of 2.8 million can only be reached if there are as many unregistered RDP and BNG housing units and about the same number of properties where the ownership has been transferred from state to occupant. If this was the case there would still only be about 2 million new houses.<sup>95</sup>

Figure 1 below from the DHS shows housing delivery from 1994/1995 to 2007/2008 (houses completed and in the process of completion), both nationally and provincially. In the 2007/2008 financial year, 248 850 houses were completed or in the process of completion, and 2.6 million houses had been built or were in the process of being completed by March 2008. While Gauteng, Mpumalanga and Northern Cape recorded increases in delivery between 2001/02 and 2007/08, the delivery of subsidised housing units declined in most provinces, with the highest rate of decline evident in Eastern Cape, North West, and Limpopo (between 2006/07 and 2007/08). According to the National Treasury, “this trend is of considerable concern, as demand for publicly subsidised housing remains high and continues to grow.”<sup>96</sup>

Figure 1: Housing units completed and in the process of completion (DHS)<sup>97</sup>

Number	1994/95 –2002/03	2003/04	2004/05	2005/06	2006/07	2007/08	Total
Eastern Cape	187 237	27 119	37 524	19 825	16 526	12 684	300 915
Free State	87 859	16 746	16 447	20 536	19 662	12 482	173 732
Gauteng	340 331	49 034	66 738	59 310	77 044	90 886	683 343
Kwazulu-Natal	245 534	33 668	36 734	35 872	38 290	34 471	424 569
Limpopo	114 767	15 810	16 514	46 813	23 609	18 970	236 483
Mpumalanga	105 093	21 232	18 000	14 986	10 651	16 569	186 531

<sup>90</sup> Ibid 97-98.

<sup>91</sup> See note 7 above.

<sup>92</sup> K Rust cited in CSSR & PDG “The Social Consequences of Establishing ‘Mixed’ Neighbourhoods” (May 2010) 1.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> National Treasury (note 19 above) 102.

<sup>97</sup> Ibid.

Northern Cape	29 213	3 787	3 598	8 667	3 880	8 686	57 831
North West	125 353	10 484	10 037	35 515	46 972	19 945	248 306
Western Cape	185 510	15 735	11 756	11 310	34 585	34 157	293 053
Total	1 420 897	193 615	217 348	252 834	271 219	248 850	2 604 763

Figure 2 below shows the growth in the IHSD housing grant and actual housing delivery between 2004/05 and 2010/11. According to the National Treasury there are a number of reasons for “the slower than anticipated pace of spending” which include: under spending by provinces due to poor programme management arrangements; poor coordination between spheres and arms of government in the housing delivery process, leading to delays in project initiation, approval, implementation and completion; construction cost escalation that derails planned housing projects through reducing the value of the subsidy to below that required to complete a project; and inappropriate subsidy mechanisms that initially failed to adjust to changes in housing need and market conditions.<sup>98</sup>

Figure 2: IHSD grant allocations and actual delivery (DHS)<sup>99</sup>

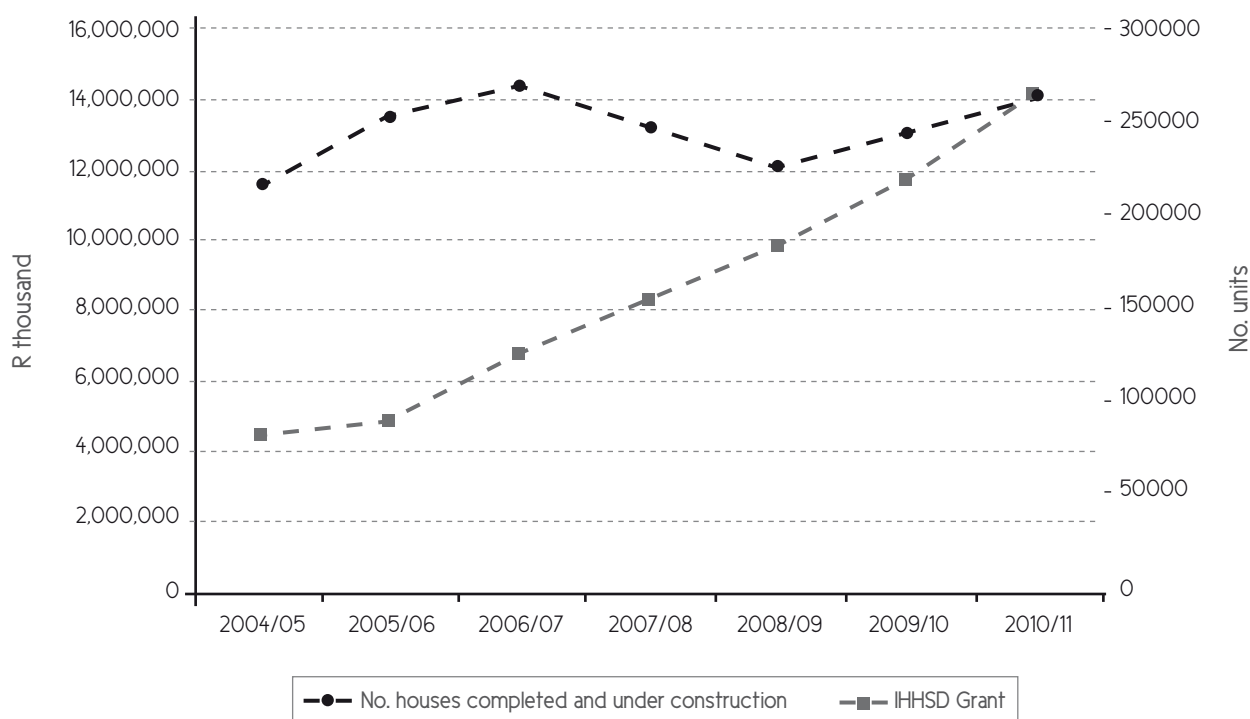


Figure 3 below shows the preliminary units delivered in 2009/10 and estimated delivery till 2014. If delivery occurred at this pace - on average 230 000 units per year (which is unlikely) - it would still only mean that by 2014 approximately 1.1 million housing units will be delivered. This is over 1 million units short of the current and growing backlog of 2.1 million households, which itself is thought to be a conservative figure.

<sup>98</sup> Ibid 103-104

<sup>99</sup> Ibid 102.

Figure 3: Estimated housing delivery from 2008 to 2014 (DHS)<sup>100</sup>

	Preliminary units delivered in 2009/10	Estimated Delivery			
		2010/11	2011/12	2012/13	2013/14
Eastern Cape	28 633	23 400	23 400	24 463	26 058
Free State	18 829	21 462	21 462	22 438	23 901
Gauteng	39 922	48 553	48 553	50 760	54 071
KwaZulu-Natal	27 376	26 626	26 626	27 837	29 652
Limpopo	23 079	22 613	22 613	23 641	25 182
Mpumalanga	8 291	8 181	8 181	8 553	9 111
Northern Cape	6 257	6 512	6 512	6 808	7 253
North West	35 141	30 954	30 954	32 361	34 472
Western Cape	32 371	31 698	31 698	33 139	35 300
Total	219 899	220 000	220 000	230 000	245 000

In 2009, South Africa's national budget for housing and community amenities was R73.2 billion (8.7 percent of the national budget) of which around R13 billion was distributed to provinces for housing subsidies. In 2010, more than R93 billion was allocated to housing and community amenities, a nominal increase of more than 14 percent on the previous year. Of that, more than R20 billion was earmarked for housing development. The Minister of Finance recently stated in his national budget speech that the human settlements grant is "one of the faster growing items on the budget."<sup>101</sup> However, as has been indicated above, whereas billions are being allocated to housing, and subsidies approved for poor and low-income households, delivery of housing units is not occurring at scale or at pace.

## 4.2 Housing backlogs

In 1994 the White Paper on Housing estimated the housing backlog to be 1.5 million units (urban informal households), with an estimated 720 000 urban sites in need of upgrading and approximately 450 000 people in hostel accommodation that needed upgrading. The 1996 Census showed that 1.5 million households lived in informal houses in urban areas and 1.6 million households lived in informal or traditional housing in rural areas. In 1999 the NDoH estimated a total backlog of 3 to 3.7 million households.<sup>102</sup> From 1994 to 2010 the housing backlog has grown from 1.5 million to an approximate figure of over 2.1 million, according to the DHS. This increase means that approximately 12 million South Africans (and probably many more than this) are still in need of adequate housing.

According to the 2009 General Household Survey prepared by Statistics South Africa (Stats SA), 12.8 percent of South African households lived in a RDP or state-subsidised dwelling and 13.5 percent of households have

<sup>100</sup> DHS "Presentation to the Portfolio Committee on Human Settlements" (5 March 2010).

<sup>101</sup> "Heaps of money for housing delivery" *Realestatweb* (17 February 2010). However, while this may be the case at national level, specific provincial departments do not necessarily fare as well. For example, the 2009/10 budget allocation for the Eastern Cape Department of Housing received a nominal increase of 2.44 percent yet in real terms i.e. once inflation is taken into account, the budget allocation experiences a decrease of -2.90 percent from the previous financial year. See Y Mukorombindo "Eastern Cape Department of Housing: Budget Analysis 2009/10" Public Service Accountability Monitor (September 2009) 1.

<sup>102</sup> NDoH "Strategies Identified to Address Policy Gaps" Presentation by NM Karsen, Deputy Director-General, at National Housing Conference on Housing Strategy for the New Millennium (1999).

at least one household member on a demand database or waiting list for state subsidised housing.<sup>103</sup> Figure 4 below provides estimates for adequate shelter needs i.e. housing backlog, from 1994 to 2009.

Figure 4: Need for adequate shelter estimates (housing backlog) from 1994 to 2009<sup>104</sup>

FIN YEAR	EC	FS	GP	KZN	LP	MP	NC	NW	WC	SA total
1994/95	Information for this period is not available due to unavailability of data from Statistics South Africa									
1995/96	Information for this period is not available due to unavailability of data from Statistics South Africa									
1996/97	309 791	181 963	472 564	345 200	141 548	126 875	28 421	174 512	165 461	1 946 336
1997/98	Information for this period is not available due to unavailability of data from Statistics South Africa;									
1998/99	Information for this period is not available due to unavailability of data from Statistics South Africa									
1999/2000	Information for this period is not available due to unavailability of data from Statistics South Africa									
2000/01	Information for this period is not available due to unavailability of data from Statistics South Africa									
2001/02	330 000	220 000	750 000	400 000	120 000	145 000	35 000	240 000	230 000	2 470 000
2002/03	339 200	133 900	461 000	379 700	104 500	123 400	12 000	124 500	172 000	1 850 200
2003/04	336 700	144 400	536 000	362 200	105 400	116 100	17 000	100 800	201 000	1 919 600
2004/05	388 500	201 300	556 300	395 800	124 600	126 400	17 000	95 900	213 000	2 118 800
2005/06	352 600	169 000	697 950	533 200	112 800	132 500	32 200	222 100	222 850	2 475 200
2006/07	265 700	208 000	628 000	400 000	153 000	153 000	48 500	220 000	403 500	2 479 700
2007/08	240 000	165 000	619 500	372 200	122 400	137 500	38 000	210 500	378 700	2 283 800
2008/09	235 000	160 000	615 000	365 000	110 000	128 000	34 000	202 000	305 000	2 154 000

In 2007 the Minister of Housing stated that in 3 years, R102 billion would be required to clear the housing backlog and that this amount would more than double to R253 billion in 2016 (this is nearly 20 times the entire current annual housing budget).<sup>105</sup> The housing backlog has grown exponentially since 1994, and continues to increase due in part to change in household structures, rapid urbanisation, migration to cities and large towns, lack of opportunities in rural areas, structural unemployment, more households falling into the subsidy income band and less access to housing finance. The DHS recently stated in a parliamentary portfolio committee workshop that it is moving away from the use of the term "backlog", as the term is time-specific and urbanisation/migration makes quantification of housing backlogs problematic. Instead, the DHS is referring to "housing needs" and the investment required to provide for these needs.<sup>106</sup>

According to the DHS, the "dual residence" of some households (who maintain a rural base while household members migrate temporarily to urban areas) is a deeply entrenched feature of many households whilst, at the same time, permanent urban migration is "irreversible and growing."<sup>107</sup> Indeed, changes in household composition have serious implications for housing backlogs and the nature of housing delivery. According to a recent Urban LandMark and SHF report, about a third of all households that constitute part of the housing

<sup>103</sup> Stats SA "General Household Survey 2009" (July 2009) 22. The General Household Survey is an annual household survey undertaken to determine the level of development in the country and the performance of programmes and projects on a regular basis. One of the broad areas covered is housing and household access to services and facilities, such as housing, water, electricity, refuse removal etc.

<sup>104</sup> DHS, table provided in reply to parliamentary question (2010) <<http://www.pmg.org.za/questions/table1866.pdf>>

<sup>105</sup> NDoH "Speech by L Sisulu Minister of Housing at the Occasion of the Budget Vote 2007/8 for the Department of Housing" National Assembly (8 June 2007).

<sup>106</sup> DHS, note 83 above.

<sup>107</sup> DHS "Presentation to the Select Committee on Public Service" (20 April 2010).



backlog consist of single-person households, one-third consist of two-member households, and the remaining third consist of households with three or more members.<sup>108</sup> The report finds that if one took the backlog to be only the 1.2 million households currently housed in informal settlements, “this implies that there is a demand for approximately 400 000 single-person accommodation options, 400 000 options appropriate for two people and 400 000 units suitable for households with three or more members.” According to the report, the current subsidised housing policy that delivers, with little variation, 40m<sup>2</sup>, mostly free-standing, freehold houses does not represent a comprehensive or responsive solution to existing demand patterns. Similarly, the MDG target to “eradicate all informal settlements by 2014”, by providing more of the same types of accommodation, cannot be successful under current conditions.<sup>109</sup>

According to Stats SA, in mid-2009, 13.4 percent of households in South Africa lived in informal dwellings.<sup>110</sup> The housing backlog is clearly linked to the country’s basic services backlog, which includes lack of access to water, sanitation, electricity and refuse removal.<sup>111</sup> Nationally, there was a slight, but not statistically significant, increase in the percentage of households that lived in informal dwellings. Figure 5 below shows the distribution of households by main dwelling, taken from Stats SA’s 2007 Community Survey.

Figure 5: Distribution of households by main dwelling per province (2007)<sup>112</sup>

Province (total number of households) in 2007	Percentage living in informal dwelling – shack in backyard (no. of households)	Percentage living in informal dwelling – shack NOT in backyard i.e. in an informal settlement (no. of households)	Percentage living in worker’s hostel (no. of households)	Percentage living in traditional dwelling/ hut/structure made of traditional materials (no. of households)
Gauteng (3 175 579)	8.4 (266 749)	14.3 (454 108)	3.1 (98 442)	0.4 (12 702)
KwaZulu-Natal (2 234 129)	2.3 (51 385)	6.3 (140 750)	3.2 (71 492)	27.4 (612 151)
Western Cape (1 369 180)	6.2 (84 889)	8 (109 534)	1 (13 691)	0.8 (10 963)
Eastern Cape (1 586 739)	1.6 (25 388)	6.4 (101 551)	0.2 (3 173)	36.7 (582 333)

<sup>108</sup> According to David Gardner, some of these small households may exist out of necessity as households may fragment simply due to the lack of adequate accommodation. He also notes that smaller households also result from normal demographic trends and may include single adults, such as unmarried people, students, widows and widowers and temporary migrants, and two-member household units including young couples, couples without children, same-sex partners and single parents. Urban LandMark & SHF (note 6 above) 14.

<sup>109</sup> Ibid 12-14. According to Steve Topham, accommodating these households in a full RDP-package (40m<sup>2</sup> top structure, a 250m<sup>2</sup> stand plus 30 percent of the subsidy amount for roads and amenities) would require 35 750 Ha of land plus the bulk and connector infrastructure to service it, which would cost an estimated R84 billion, or 70 percent of the projected national housing budget from 2009 to 2015.

<sup>110</sup> “Fewer people living in shacks - Stats SA” *IOL* (6 May 2010). This includes those living in backyard shacks and in informal settlements.

<sup>111</sup> According to the DHS, 3.95 million households still require access to water, 3.2 million households still require access to sanitation, 2.6 million households still require access to electricity and energy, and 4.56 million households still require access to refuse removal services. See note 83 above.

<sup>112</sup> Information compiled from Stats SA “Community Survey 2007: Key Municipal Data” (11 March 2008). The 2007 Community Survey is the largest survey conducted in the country and surveyed 274 348 dwelling units across all provinces. One of its sections covers “housing and housing services: type of dwelling, tenure status, access to water, type of toilet facilities, source of energy for (lighting, cooking and heating), household goods and refuse disposal.” In the definition of “informal dwelling” in the Community Survey, Stats SA differentiates between backyard shacks and shacks situated in informal settlements.

Limpopo (1 215 935)	19 (23 103)	3.6 (43 774)	2 (24 318)	9 (109 434)
Mpumalanga (940 403)	2.5 (23 510)	9.2 (86 517)	3.3 (31 033)	7 (65 828)
North West (911 120)	7.8 (71 067)	16 (145 779)	7 (63 778)	2.3 (20 955)
Free State (802 872)	4.9 (39 341)	13.6 (109 190)	5.7 (45 763)	4.6 (36 932)
Northern Cape (264 653)	16 (4 234)	8.9 (23 554)	4 (10 586)	4.5 (11 902)
South Africa (12 500 610)	4.7 (587 529)	9.7 (1 212 559)	2.9 (362 517)	11.7 (1 462 571)

Figure 6: Households (number and percentage of total population) living in informal dwellings in major cities (2007)<sup>113</sup>

City/Town (number of households)	Percentage of population in informal dwelling	Number of households in informal dwelling
Ekurhuleni (849 349)	26	220 830
Johannesburg (1 165 014)	18.4	214 362
Tshwane (686 640)	26.8	184 019
eThekweni (833 859)	17.1	142 589
Cape Town (902 278)	15.5	139 853
Rustenburg (146 542)	37.3	54 660
Buffalo City (208 389)	24.5	51 055
Nelson Mandela (276 881)	13.7	37 937
Mangaung (202 762)	18.2	36 902

The housing situation in major cities and towns in South Africa is also important to highlight. Figure 6 above shows the percentage and number of households living in informal dwellings in nine major urban hubs (this includes those living in informal settlements and backyard shacks), according to Stats SA's 2007 Community Survey. These numbers are outdated however, and the housing backlog or number of households that are inadequately housed in cities is considerably higher.

#### 4.2.1 Informal settlements

In 2010 the Minister of Human Settlements stated that the number of informal settlements has increased to more than 2 700, containing a total of approximately 1.2 million households in 2010.<sup>114</sup> According to the Stats SA's 2009 General Household Survey, the Western Cape has 134 000 households living in shacks in informal settlements, KwaZulu-Natal has 176 000 households living in shacks in informal settlements and Gauteng has

<sup>113</sup> Ibid.

<sup>114</sup> DHS "Address by the Minister of Human Settlements, Tokyo Sexwale MP, on the occasion of the Human Settlements Budget Vote, National Council of Provinces"(6 May 2010).

481 000 households living in shacks in informal settlements.<sup>115</sup> The 2009 survey further describes how the provinces with the highest percentage of households whose main dwelling was informal in 2009 were Gauteng (22.3 percent), Western Cape (17.1 percent), North West (16 percent) and Free State (14.8 percent). Of these provinces, the North West has shown a significant increase in the percentage of shackdwellers from 12.2 percent in 2002 to 21.5 percent in 2007.<sup>116</sup> A number of provinces have shown a decline in the percentage of households whose main dwelling is informal. These include: Mpumalanga (-5.6 percent), KwaZulu-Natal (-2.8 percent) and Eastern Cape (-2.2 percent). The Limpopo informal housing profile remained largely the same between 2002 and 2009 at 5.1 percent of households.

However, these statistics are likely to be unrepresentative of the actual number of households living in informal settlements across the country. According to Mark Misselhorn, CEO of Project Preparation Trust (PPT) in Durban, “the actual numbers of households residing in informal settlements is likely to be significantly higher than estimates by Stats SA.”<sup>117</sup> According to Misselhorn, evidence from actual research shows that shack counts done by housing officials (aerial surveys supplemented by ground surveys) are more reliable, and sometimes the discrepancy can be as high as 45 percent between Stats SA and municipal department figures. This is due to the fact that often the number of shacks is used as the basis for counting, and not the number of sub-households which might reside in a single shack. Further, official estimates do not factor in high levels of migration into South Africa from neighbouring countries. Misselhorn states that

“ it can therefore be argued that the actual number of households living in informal settlements in South Africa is probably substantially more than the official Stats SA estimate of approximately 1.2 million, and that, contrary to what official estimates suggest, there has probably not been a rapid decline in numbers of households living in informal settlements in recent years.”<sup>118</sup>

However, according to Huchzermeyer, inconclusiveness of available data and terminological confusion weakens any attempts to make any statement on the growth of informal settlements in South African cities. She refers, for example, to the interchangeable use of figures for households living in “informal settlements” and “informal structures”, the latter term referring to shacks which may be constructed on formally planned and authorised serviced sites, in planned and authorised temporary relocation areas (transit camps) or in unplanned informal settlements.<sup>119</sup> Further, she argues that the Census and community surveys give “no conclusive data on the number of informal settlement dwellers and on any increase or decrease in this number”, and warns that unsubstantiated claims of massive increases in so-called ‘illegal land invasions’ have contributed to repressive action taken against shackdwellers over the years.<sup>120</sup>

In 2010, the Minister of Social Development referred to a new target of upgrading 500 000 shacks in informal settlements by 2014 (125 000 informal settlement units annually over the next four years) through the provision of basic services and land tenure rights.<sup>121</sup> The Minister of Human Settlements has reiterated this delivery target in his 2010 Budget Vote Speech, and most recently signed a delivery agreement with the President for Outcome 8 of the government’s new measurable outcomes-based approach to service delivery between 2010

<sup>115</sup> Stats SA (note 103 above) 98.

<sup>116</sup> According to the survey, this may partially be attributed to changes in the housing policy of several mines. In recent years they introduced a housing subsidy for workers who lived in their own accommodation. Many workers opted to erect a shack and use the extra money for the erection of houses in their places of origin or for activities other than housing.

<sup>117</sup> M Misselhorn “Draft Position Paper on Informal Settlements Upgrading: Part of a Strategy for the Second Economy” Compiled for Urban LandMark (April 2008)15.

<sup>118</sup> Ibid.

<sup>119</sup> M Huchzermeyer “Pounding at the Tip of the Iceberg: The Dominant Politics of Informal Settlement Eradication in South Africa” (April 2010) 37, 1 *Politikon* 134.

<sup>120</sup> Ibid 134-135.

<sup>121</sup> “Plan to upgrade 500 000 shacks by 2014” *GCIS* (23 February 2010).

and 2014,<sup>122</sup> which focuses on sustainable human settlements and improved quality of household life. This delivery agreement includes Output 1 - accelerated delivery of housing opportunities – which has a Sub Output 1, the “upgrading of 400 000 households in well located informal settlements with access to basic services and secure tenure” by 2014.<sup>123</sup> On 19 November 2010 the Minister signed service delivery agreements with his nine MECs, and at present the identification of informal settlements for upgrading is being finalised.<sup>124</sup>

The housing programme identified to address the living conditions of those in informal settlements is the Upgrading of Informal Settlements Programme (UISP) which will be discussed in more detail in subchapter 6.4.2.2 and subchapter 7.10 of this guide below.

## 4.2.2 Low-income rental accommodation

As with the uncertainty of statistics on informal settlements and the shackdwellers that live in them, data on the demand for rental housing in South Africa is limited and says little about affordability levels and preferences relating to housing type and location. Further, there is very little data available on the supply of rental accommodation across all sectors including publicly-owned, social housing and privately-owned stock.<sup>125</sup> Approximately 2.8 million households rent their accommodation in South Africa, or 20 percent of the population. Approximately 2 million of black African households rent, which is 18.7 percent of the black African population and 14.5 percent of the total South African population. The Gauteng province has by far the largest number of renters at over 1 million households, or 38 percent of all households renting in South Africa.<sup>126</sup> According to Stats SA’s 2005/2006 Income and Expenditure Survey, while the social housing target market for whom some form of rental subsidy is provided comprises households earning between R1 500 and R7 500 a month - 51 percent of all renting households in South Africa - over 27 percent of households that rent earn less than R1 500 per month, with 14 percent earning less than R850 per month.<sup>127</sup> The majority of households that rent are poor or low-income – approximately 55 percent of renting households earn less than R 3 500 a month. According to the SHF,

“ data on dwelling conditions, which indicates that over 40 percent of renter households live in what could be characterised as slum conditions, points to a significant need for affordable, better quality accommodation.<sup>128</sup>

<sup>122</sup> These delivery agreements are based on the government’s 12 priority measurable outcomes which, in addition to “sustainable human settlements and improved quality of household life” include: improved quality of basic education; long and healthy life for all South Africans; safety and decent employment through inclusive growth; skilled and capable workforce to support an inclusive growth path; efficient, competitive and responsive economic infrastructure network; vibrant, equitable, sustainable rural communities with food security for all; responsive, accountable, effective and efficient local government system; environmental assets and natural resources that are well protected and continually enhanced; a better Africa and a better world as a result of South Africa’s contributions to global relations; and an efficient and development oriented public service and an empowered, fair and inclusive citizenship. Note 24 above.

<sup>123</sup> “Annexure A: For Outcome 8 Delivery Agreements: Sustainable Human Settlements and Improved Quality of Household Life” (19 September 2010) 14.

<sup>124</sup> These service delivery agreements focus on four key outputs: accelerated delivery of housing opportunities, improving access to basic services, mobilisation of well-located public land for low-income and affordable housing, and improved property market. Included in the delivery agreements are specific targets for housing delivery, slum upgrades, the provision of land for development and the provision of rental stock for low- and middle-income groups, as well as a number of interventions into the affordable housing market. DHS “Department of Human Settlements gears up for full delivery” (19 November 2010).

<sup>125</sup> Urban LandMark & SHF (note 6 above) 48.

<sup>126</sup> Stats SA (note 103 above) 101-102.

<sup>127</sup> Urban LandMark & SHF (note 6 above) 17-18.

<sup>128</sup> Ibid 2.

According to the revised Social Housing Policy, in 2001 approximately 1 million households were renting in metropolitan areas<sup>129</sup> in South Africa (out of a total of 1.8 million households who were renting nationally), and this figure is expected to rise to 1.5 million in 2006 and 2.2 million in 2011. Indications are that for the income group earning between R1 600 and R3 200 per month, the total formal renting requirement between 2006 and 2011 will increase by an average of approximately 7 percent per annum in metropolitan areas, with higher increases in some areas such as Johannesburg.<sup>130</sup> In 2007, 85.6 percent of South African households earned R3 200 or less per month.<sup>131</sup> There is undoubtedly significant unmet demand for affordable accommodation in key urban centres. According to the SHF,

« demand for rental accommodation is likely to grow strongly in the City of Johannesburg, City of Cape Town, Ekurhuleni and Tshwane...within these markets significant growth in demand for rental accommodation is strongest in lower income market segments. »

This is particularly so for households in the income band earning between R1 500 and R3 500 a month.<sup>132</sup> In Johannesburg alone it is estimated that by 2012, the demand for rental housing will be 317 000 units, with 81 000 units in this income band.<sup>133</sup>

As it stands,

« private landlords offering more affordable accommodation in inner city Johannesburg do not have to look for tenants. Demand in that market is characterized by property owners as 'insatiable', 'a bottomless pit' and rentals have increased significantly over the past few years.<sup>134</sup> »

The busiest of the provincial Rental Housing Tribunals is the Gauteng Rental Housing Tribunal, which was established in 2001. According to a recent report by the Tribunal, it was formed during a time when the rental housing sector in Gauteng was characterised by a high number of disputes between landlords and tenants; a lack of maintenance to rental property, particularly multi-tenanted buildings; the invasion of buildings by unscrupulous tenants committees, civic organisations, so-called estate agents and security firms; the failure of local authorities to enforce their own by-laws; estate agents contravening the Estate Agency Affairs Act and its code of conduct; and a general decay in living environments.<sup>135</sup> Since 2001, the Tribunal's case load has increased from 551 cases per year to 2 021 cases per year in 2009, with 84 percent of these cases occurring in Greater Johannesburg (mostly in the inner city). The majority of these cases have been related to unlawful evictions (35 percent), non-refund of deposits (13 percent), disputed utility charges (12 percent), disputed rental charges and rental determinations (10 percent), and lack of maintenance (10 percent).<sup>136</sup> As private landlords do not have to look for tenants, as the demand for accommodation is insatiable, they are de-incentivised from fully complying with legislation/regulations and treating tenants fairly and appropriately.

<sup>129</sup> The metropolitan municipalities are characterised by a region-wide urban footprint; an established formal core of industrial, commercial and suburban development; formal townships, hostels and backyards; informal settlements with significant subsidised housing on the periphery; high rates of (circular) migration; and the highest concentrations of urban poor. The six metros are City of Johannesburg, City of Cape Town, City of Tshwane, Ekurhuleni Metropolitan Municipality, eThekweni Metropolitan Municipality and Nelson Mandela Bay Municipality. Mangaung and Buffalo City municipalities are due to become metros as of the 2011 local government elections. Secondary cities are characterised by an established formal core of mining, commerce and suburban development; are often linked to old former homeland settlements in the vicinity; comprise formal townships with backyards, informal and traditional settlements; have significant subsidised housing on the periphery; show rapid urbanisation and extreme levels of poverty e.g. Nelspruit, Rustenburg, Polokwane and Witbank-Middelburg.

<sup>130</sup> DHS (note 50 above) 31.

<sup>131</sup> National Treasury (note 19 above) 91.

<sup>132</sup> Urban LandMark & SHF (note 6 above) 31-32.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid 2.

<sup>135</sup> Bailey (note 47 above), 4.

<sup>136</sup> Ibid 12.

In relation to the need for mass public housing in South Africa, the National Treasury has stated that there is a risk that government's public housing interventions "will not be bold enough" and

« housing stock may be of limited economic or social value to beneficiaries, and may also be located far from economic or social opportunities. Poorly located housing may result in the deepening of already high levels of inequality and inefficiency in South African towns and cities. This may impose long term costs on households and growing pressure on the public sector to fund access to basic infrastructure and transport services.<sup>137</sup> »

In 2010, the Minister of Social Development described how the government would increase the rate of affordable rental housing delivery to 300 000 units per year by 2014. The 2008 National Rental Housing Strategy for South Africa envisages the delivery of 100 000 rental units by 2011/2012. Of these units, 75 000 will be social housing for middle-income earners - those earning between R3 500 and R7 500 per month - and 25 000 will be Community Residential Units (CRUs) for low-income earners.<sup>138</sup> The housing programmes designed to address the demand for low-income and affordable rental accommodations are the Social Housing and CRU Programmes, together with the Institutional Subsidy. These programmes will be discussed in more detail in subchapters 7.13 to 7.15 of this guide.

### 4.2.3 Affordable housing

"Affordable housing" is a term often used quite loosely. However, it describes quite a specific segment of housing that comprises units valued at under R500 000, including housing in former African, coloured or Indian townships, government-subsidised housing and new housing developed by the private sector. According to a new initiative called the Affordable Land & Housing Data Centre (al+hdc), over 70 percent of South Africans are only able to afford houses of less than R500 000 and "while most of the population lives in such houses, very little is known about this market segment."<sup>139</sup> Moreover, households that earn between R3 500 and R8 000 per month "are falling through the cracks. They don't qualify for subsidised housing, but also don't earn enough to secure a bank loan." According to the al+hdc, "to cater for soaring demand, government and the private sector will need to build 600 000 new affordable housing units."<sup>140</sup> FinMark Trust estimated that there was a shortfall of nearly 694 000 units in the R2 500 to R7 500 range in 2006/07, which will rise to nearly 727 000 units by 2009/10.<sup>141</sup> This indicates that demand is growing considerably faster than the supply of housing units, at a ratio of about 4 to 1. Addressing this housing need by 2014 would mean erecting 170 000 new houses each year for five years.<sup>142</sup>

The DHS has recently stated that one of the major problems in the housing sector is that it is difficult to find a house that costs less than R300 000 (which would in any case require an income of R10 000 or more per month, and would require a deposit as banks no longer readily give 100 percent home loans). High household debt is preventing banks from extending credit to certain clients and repayment concerns are preventative of credit being granted to households. These households are also referred to as the "gap market." While the gap market is defined as the R3 500 to R7 000 per month income bracket in the National Housing Code, the DHS currently defines the gap market realistically as being as those earning between R3 500 and R12 500 per month, as set by the banks.<sup>143</sup> It is estimated that "some 17 percent of households considered to be living in inadequate housing earn between R3 500 and R12 800 per month and are excluded from the fully-subsidised as well as mortgage-

<sup>137</sup> National Treasury (note 19 above) 94.

<sup>138</sup> Note 121 above.

<sup>139</sup> R Munshi "Raising the roof" *Financial Mail* (11 November 2010).

<sup>140</sup> Ibid.

<sup>141</sup> National Treasury (note 19 above) 92.

<sup>142</sup> Ibid.

<sup>143</sup> DHS "Briefing on the establishment of the R1bn Guarantee Fund" Parliamentary Portfolio Committee on Human Settlements (24 August 2010).

financed housing market." The income group earning between R7 500 and R15 000 is currently unable to access bonds and "some in this band are currently renting until their financial situation improves, or lending criteria are adjusted."<sup>144</sup>

In 2010, the DHS and the National Treasury announced the creation of the Housing Guarantee Fund, a R1 billion fund to be set up in order to incentivise the private sector to supply housing units at lower prices and encourage low-income earners to build their own homes.<sup>145</sup> In his 2010 Budget Vote Speech, the Minister of Human Settlements referred to the creation of an enabling environment for the provision of 600 000 new loans in the affordable housing sector.<sup>146</sup> According to the DHS, the Housing Guarantee Fund still has to be finalised but would, in theory, implement mortgage insurance in order to facilitate an increased supply of affordable housing finance to the gap market. The Minister of Human Settlements and the Minister of Finance are promoting this initiative to attract the private sector to assist households with access to home loans and make the Finance-Linked Individual Subsidy Programme (FLISP) more responsive to affordability challenges faced by the target market, reducing the qualifying income bands and making long-term fixed interest rate capital available.<sup>147</sup> The aim is to allow low-income earners to access a fixed interest rate that would not fluctuate over time and "would give working families certainty about their commitments in terms of the home loan."<sup>148</sup>

In the poorer areas of South African cities, households are struggling to make repayments on so-called affordable houses, as well as on loans taken out to extend houses in township areas. A 2008 report by the South African Human Rights Commission (SAHRC), on evictions and repossessions from bond houses, highlighted that "the issue of evictions through bond defaulting appears to be systemic and thus requires a creative government intervention." The report outlined some recommendations, including that "it may be necessary to review government's policy of only assisting first-time homeowners", that "local government...should consider including the provision of alternative accommodation for those left destitute by evictions in their Integrated Development Plans (IDPs)" and that "government should consider whether the suggestion by banks that a 'loss of income cover' be developed as a part of the social security system would be a viable option to ensure that a significant asset like a home is not lost during unemployment or retrenchment."<sup>149</sup>

It remains to be seen if the Housing Guarantee Fund will assist those households that are currently falling through the cracks to access finance and houses. It has been argued in the wake of the announcement of the fund (and before) that the lack of finance is not the whole problem. Non-availability and high cost of housing units in the affordable housing market also contributes to the issue. The market is constrained by complex and high-risk processes which result in "time delays, increased costs, uncertainty and limited supply of housing units."<sup>150</sup> A 2005 report by Nell & Associates argued that significant constraints (which resulted in developers withdrawing from the low-income housing market) related to *inter alia*: extended time duration and delays experienced in land proclamation; lack of existing bulk services capacity in most well-located areas and reluctance on the part of the local and provincial authorities to increase bulk services capacity within committed time periods; delays in the registration of title and mortgages attributed to inadequate capacity at most Deeds Offices; and a lack of access to well-located and reasonably priced land and the lack of assembling of public land for low-income housing by local authorities.<sup>151</sup> According to the Banking Association of South Africa (BASA) in 2008, the high cost of labour and building materials are also contributing factors to lack of housing delivery in the affordable housing market.<sup>152</sup>

<sup>144</sup> DHS (note 123 above) 6 and 43.

<sup>145</sup> Note 121 above.

<sup>146</sup> Note 7 above.

<sup>147</sup> FLISP had a maximum subsidy of R55 000 and was for households earning between R3 500 and R7 000. The Programme is currently under review by DHS in collaboration with the Banking Association of South Africa (BASA).

<sup>148</sup> DHS (note 143 above).

<sup>149</sup> SAHRC "Report on the Public Hearings on Housing, Evictions and Repossessions" (2008) 44.

<sup>150</sup> J Sikhakhane "Gordhan's R1bn for housing is just a band-aid" *Business Day* (22 February 2010).

<sup>151</sup> Nell & Associates "Resource Report 5: Township Development and the Home Building Process" Prepared for Banking Association of South Africa (December 2005) 25-27.

<sup>152</sup> DHS (note 143 above).

chapter  
5Constitutional Jurisprudence  
on the Right to Housing

A relatively high number of housing rights cases have reached the Constitutional Court since its inception in 1995. While all of these cases have dealt essentially with negative infringements of the right to housing or with evictions (with the exception of *Nokotyana*), the jurisprudence on housing nevertheless further reveals government failures in policy interpretation and implementation.

This chapter begins with an overview of the state's human rights obligations in terms of housing, the justiciability of these rights, and an examination of how the Constitutional Court has applied these general principles to housing-related cases. It then examines specific cases – *Grootboom*, *Olivia Road*, *Joe Slovo*, *Abahlali* and *Nokotyana* – in more detail. The chapter also examines the extent to which the judgment in each case affected government policy and the implication for the progressive realisation of housing rights. Finally, a concluding subchapter is provided which summarises some of the key findings from the housing-related Constitutional Court cases.

## 5.1 The meaning of “respect”, “protect”, “promote” and “fulfil”

Section 7 of Chapter 2 of the Constitution obliges the state to “respect, protect, promote and fulfil” the rights contained in the Bill of Rights, obligations that are interconnected in theory and practice. The first two obligations place negative duties on the state, while the second two place positive duties on the state.<sup>153</sup> It is in this context that one must locate the state's responsibilities in relation to housing rights.

The obligation to “respect” is a duty that the Constitution places upon the state, other entities and persons not to prevent or impair a person's constitutional rights i.e. to refrain from interfering directly or indirectly with the enjoyment of the right. The state violates this obligation when, through legislative or administrative conduct, it deprives people of the access they enjoy to any socio-economic right, such as housing. For example, legislation that permits procedurally or substantively unfair evictions would constitute a failure to respect housing rights.<sup>154</sup> Similarly, the state fails to respect housing rights when it (or a private party) brings proceedings for the eviction of persons who will be left homeless if they are evicted, or when legislation permits the sale in execution of immovable property (i.e. a house) where less invasive means to satisfy the debt are available.

The obligation to “protect” the right to housing requires the state to take measures that prevent third parties i.e. individuals, groups or corporations, from interfering in any way with the enjoyment of this right. Two statutes that uphold this protection are ESTA and the PIE Act, which were specifically enacted to give effect to section 26(3) of the Constitution, the protective clause in the right to housing.

The obligation to “promote” constitutes another positive duty that requires state action to further or advance the right to housing. This obligation appears to require the state to create an enabling environment that will advance the realisation of the right to housing. In the words of the Constitutional Court in the *Grootboom* case:

<sup>153</sup> Liebenberg (note 70 above) 54-55.

<sup>154</sup> For example, in the cases of *Olivia Road* and *Abahlali*.



« ...[It] is not only the State who is responsible for the provision of houses, but ... other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all levels of our society.<sup>155</sup> »

Further, the *Kyalami Ridge* case (not directly a housing rights case) illuminates the fact that officials must take the right to housing into account, with due weight, in all administrative decisions that affect realisation of that right.<sup>156</sup> The obligation to promote tends to create a constitutional presumption in favour of that administrative decision which most favours the realisation of the right to housing.<sup>157</sup>

The final obligation to “fulfil” the right to housing has traditionally been regarded as the most contentious of the components of social and economic rights. It requires the state to “adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right.”<sup>158</sup> In *Grootboom*, the landmark case addressing this duty, the Court showed that the positive obligation to fulfil the right to housing is justiciable even in resource-constrained situations. A court judgment may not always result in an order for the provision of specific benefits to specific individuals but it can nevertheless have a far-reaching and fundamentally important influence on achieving the right to housing.<sup>159</sup>

## 5.2 Grootboom

*Grootboom* has become a landmark socio-economic rights case in South Africa, as well as internationally, and was the first significant case brought before the Constitutional Court in terms of section 26 of the Constitution.<sup>160</sup> The case began with the eviction of 900 people from a piece of privately-owned land, including the main applicant in the case, Irene Grootboom. After the eviction, the affected parties built makeshift shelters on the Wallacedene sports field, situated in the Oostenberg Municipality in the Western Cape. The group appointed an attorney to write to the municipality demanding temporary shelter during a period of bad weather. The attorney argued that section 26 of the Constitution obliged the municipality to comply with the request. When the municipality refused to provide temporary shelter, the community launched an urgent application in the Cape High Court to force the state to take action. The High Court, locating the state’s obligations in the child’s right to shelter in section 28 of the Constitution, ordered the state to provide temporary shelter to all the children in the affected community and at least one of each of their parents. The state then appealed to the Constitutional Court.

By the time the Constitutional Court handed down judgment in 2000, the parties had reached a settlement agreement, which alleviated the immediate plight of the community. This left the Constitutional Court to pronounce on the general obligations of the state in relation to the right of access to adequate housing. In substance, the Court found that the state had no direct obligation to provide a specific set of goods on demand to inadequately housed individuals. Rather, the state’s positive obligation under section 26 of the Constitution was to adopt and implement a “reasonable policy”, within its available resources, which would ensure access to

<sup>155</sup> *Grootboom* (note 1 above) 35. When citing from court judgments or from international treaties, the paragraph number (as opposed to the page number) will be provided.

<sup>156</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (3) SA 1151 (CC) (*Kyalami Ridge*)

<sup>157</sup> G Budlender “Justiciability of the Right to Housing - The South African Experience” in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 213.

<sup>158</sup> CESCR “General Comment No. 14: The Right to the Highest Attainable Standard of Health” Article 12 of the International Covenant on Economic, Social and Cultural Rights E/C.12/2000/4 (2000) 33 <<http://www.chr.up.ac.za/undp/global/docs/comment2.pdf>>

<sup>159</sup> Budlender (note 157 above) 218.

<sup>160</sup> Much of this case review was taken from S Wilson “Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality” (2009) 2 *South African Law Journal* 274-275.

adequate housing over time. The Court devoted much of its judgment to the requirement of reasonableness in devising medium- and long-term plans.

The Court concluded that, in failing to make reasonable provision for people with “no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations”,<sup>161</sup> the housing policy implemented in the Cape Metropolitan area did not adequately give effect to the positive obligations placed on the state by section 26 of the Constitution. The *Grootboom* judgment obliged the state, within its available resources, to provide temporary shelter for those who had been evicted or faced imminent eviction and who could not find alternative shelter with their own resources. Thus, the Court avoided the idea that section 26 could give rise to a right to housing on demand, stating that “neither section 26 nor 28 entitles the respondents to claim shelter or housing immediately on demand.”<sup>162</sup> However, its focus on the need for the state to alleviate the plight of those in desperate circumstances suggested that section 26 could ground a claim for shelter on demand (“shelter” being different from “housing”).

According to Stuart Wilson, housing rights lawyer and director of litigation at SERI, the state took this interpretation of the judgment when it adopted Chapter 12 of the National Housing Code in 2004, laying the basis for housing assistance in emergency circumstances. The Emergency Housing Programme, as it has become known, was adopted in terms of section 3(4)(g) of the Housing Act. Under it, municipalities can apply for funding from provincial governments to implement emergency housing programmes. The policy lists a broad range of emergency housing situations, explicitly including persons who are evicted or threatened with imminent eviction from land or from unsafe buildings. *Grootboom* thus gave rise to a right to emergency housing and a means for its enforcement, at least through the application of the Emergency Housing Programme. See subchapter 7.12 of this guide for more on the revised Emergency Housing Programme.

The *Grootboom* judgment revealed the Constitutional Court’s thinking on socio-economic rights enforcement and highlighted its developing stance on “progressive realisation” and minimum core obligations. According to Liebenberg, the Court interprets “progressive realisation” to mean the dismantling of a range of legal, administrative, operational and financial obstacles that impede access to socio-economic rights. It also entails the expansion of such access to a larger and broader range of people over time. This perspective on “progressive realisation” contrasts with the idea of a “minimum core obligation” as endorsed by the UN CESCR. Interpreting section 26 as a “minimum core obligation” would oblige the state to ensure that everyone had access to at least a basic level of housing. In this conception, the state would have to gradually improve the quality of goods and services to which people had access until it achieved full realisation of the rights. The Court rejected this “minimum core” argument in *Grootboom* and in terms of other socio-economic rights in the *Treatment Action Campaign*<sup>163</sup> case. The Court’s major principled objection has been that groups are differently situated and their socio-economic needs vary according to their different contexts.<sup>164</sup> The judgment in *Grootboom*, however, held that a reasonable government programme must provide for those in urgent need and living in “intolerable conditions” and that the provision of a basic level of services need not meet the qualitative standards implied by the full realisation of the relevant right.<sup>165</sup>

<sup>161</sup> *Grootboom* (note 1 above) 99.

<sup>162</sup> *Ibid* 95.

<sup>163</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC)

<sup>164</sup> Liebenberg (note 70 above) 151.

<sup>165</sup> *Grootboom* (note 1 above) 52.

## 5.3 Olivia Road

The Constitutional Court has pronounced on a number of other housing rights-related cases since *Grootboom*, including *PE Municipality*<sup>166</sup> and *Olivia Road*.<sup>167</sup> Both of these cases deal primarily with the state's obligation to "meaningfully engage" with those facing eviction to ascertain if they will be rendered homeless by an eviction. The state is also required to consider what alternative accommodation can be provided. While *PE Municipality* addresses the obligation of state institutions to engage meaningfully prior to taking a decision to institute eviction proceedings, *Olivia Road* expands on the nature and meaning of this obligation.<sup>168</sup>

In *Olivia Road*, the Court's decision concerned an eviction application by the City of Johannesburg to evict over 300 people occupying two so-called "bad buildings" in the inner city of Johannesburg. The application was brought to the Johannesburg High Court in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1997 (NBRA), the Health Act 63 of 1977, and the City's fire by-laws. The City sought an order to evict the occupiers on the grounds that: the buildings were unfit for human habitation, dangerous and unhygienic; evicting the occupiers would promote public health and safety; and the eviction would reverse inner city decay in line with the City's Inner City Regeneration Strategy (which aimed to attract property investors to the inner city).<sup>169</sup>

From 6 to 8 February 2006, the occupiers challenged the City's application in the High Court on two main grounds: that the respondent's right of access to adequate housing in section 26(1) of the Constitution would be infringed if the eviction order were to be granted; and that the City had failed to meet its positive obligations to achieve progressive realisation of the right of access to adequate housing.<sup>170</sup> They further opposed the application on the grounds that the provisions of the PIE Act ought to be applicable to the eviction, that the City had infringed the occupiers' rights to just administrative action in failing to afford them a hearing prior to taking a decision to evict them; and that section 12 of the NBRA was unconstitutional.

Judge Mohamed Jajbhay handed down judgment on 3 March 2006 and dismissed the City's application. He issued a declaratory order regarding the City's failure to comply with its constitutional obligations, obliging the municipality not to evict the respondents until it had "developed a pragmatic, constructive and coherent programme [to] deal with the predicament that the respondents [had] to endure."<sup>171</sup> The order declared that the City's housing programme failed to comply with its constitutional and statutory obligations and that it had failed to provide suitable relief for people in the inner city in a crisis situation or otherwise in desperate need of accommodation. The order further declared that the City had failed to give adequate priority and resources to people in the inner city in such circumstances. The court directed the City

“ to devise and implement within its available resources a comprehensive and co-ordinated programme to progressively realise the right to adequate housing to people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation.”<sup>172</sup>

<sup>166</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (*PE Municipality*)

<sup>167</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) (*Olivia Road*)

<sup>168</sup> K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 150.

<sup>169</sup> See COHRE "Any Room for the Poor: Forced Evictions in Johannesburg, South Africa" (8 March 2005) for more on this process.

<sup>170</sup> *Olivia Road* (note 167 above) 10-15.

<sup>171</sup> *City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 (1) SA 78 (W) 67.

<sup>172</sup> *Ibid* 2-3 (order).

The City appealed to the Supreme Court of Appeal (SCA) on 20 February 2007, which reversed the decision in a judgment handed down on 26 March 2007. The SCA found that the deprivation of unsafe housing did not amount to an infringement of the right of access to adequate housing.<sup>173</sup> Rather, it held that the eviction itself triggered an obligation on the City to provide emergency basic shelter to those who found themselves in a crisis situation. The SCA ordered the eviction, but further ordered the City to provide housing assistance in terms of the Emergency Housing Programme set out in Chapter 12 of the National Housing Code.<sup>174</sup>

The case was then appealed to the Constitutional Court, whose approach focused on the decision-making process of state institutions prior to taking a decision to evict. The case was heard on 28 August 2007, where judgment was reserved and an interim order handed down which ordered the parties to engage with one in an attempt to reach a settlement over the issues raised on appeal and on ways to improve the safety of the buildings in the interim. The City's failure to engage meaningfully with the occupiers formed the basis of both the Court's substantive finding and the remedy it awarded.<sup>175</sup> This negotiation process took place and the parties presented a settlement agreement to the Court for its endorsement in November 2007. The settlement committed the City to providing two buildings in the inner city for the occupiers as well as providing interim services to the buildings.<sup>176</sup> Judgment was handed down on 19 February 2008, and in September 2008 the occupiers were relocated to the two new buildings where they remain.

The obligation on state institutions to engage meaningfully prior to taking a decision to evict adds a significant requirement to the list set out in *Grootboom* for reasonable state action.<sup>177</sup> This obligation may have prefigured in the Court's decision in *PE Municipality*<sup>178</sup>, also in the context of engaging in consultation with affected persons threatened with eviction, but *Olivia Road* fleshes it out more fully. Thus, this Constitutional Court decision is important and far-reaching, and has proved helpful in subsequent eviction cases throughout the country.<sup>179</sup>

Further, *Olivia Road* gave rise to a number of other cases which have explored the state's obligations in relation to unlawful occupiers facing eviction from private land or property, specifically around the provision of alternative accommodation if homelessness will be a consequence. Evictions from privately-owned buildings in the inner city of Johannesburg are commonplace, as the City (in partnership with private property developers) embarks on a process of gentrifying the city centre in line with its Inner City Regeneration Strategy. A current appeal to a South Gauteng High Court judgment will be heard in the SCA in 2011. It is hoped that this case - *Blue Moonlight*<sup>180</sup> - will provide clarity on the role of the state in these circumstances. It is interesting, if not worrying, to note the recent reference to the latter case by the Minister of Human Settlements in his 2010 Budget Vote

<sup>173</sup> *City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 (6) SA 417 (SCA) 46.

<sup>174</sup> Ibid 78(c) 2.1. The Emergency Housing Programme was established in order to give effect to the obligation elucidated by the Constitutional Court in the *Grootboom* decision, which found that the state's policy was unconstitutional to the extent that it failed to cater for those in desperate need. See subchapter 7.12 below for more on the revised Emergency Housing Programme.

<sup>175</sup> McLean (note 168 above) 149.

<sup>176</sup> K Tissington "Challenging inner city evictions before the Constitutional Court of South Africa: The Occupiers of 51 *Olivia Road* case" (June 2008) 5, 2 *Housing and ESC Rights Law Quarterly* 1-6.

<sup>177</sup> Due to the potential horizontal application of the Constitution, evictions from private property are no longer viewed solely within a private law paradigm. A number of recent cases – including *Blue Moonlight Properties 39 (Pty) Limited v The Occupiers of Saratoga Avenue* 2009 (1) SA 470 and *Lingwood and Another v Unlawful Occupiers of R/E of ERF 9 Highlands* 2008 (3) BCLR 325 (W) – illustrate how courts are balancing the section 26 housing right and the section 25 right against the arbitrary deprivation of property, making the link between the obligations of organs of state in terms of the *Grootboom* judgment and the courts' need to make just and equitable orders in eviction cases in terms of PIE. Also important to note is the courts' acknowledgement of the interrelatedness of all three subsections of section 26 and the developing jurisprudence on the state's obligations to provide alternative accommodation if an eviction from private land will lead to homelessness (identified after an individualised assessment of the specific circumstances of occupiers through meaningful engagement). Liebenberg (note 70 above) 286-289.

<sup>178</sup> *PE Municipality* (note 166 above) 39-43.

<sup>179</sup> The danger however, is that meaningful engagement becomes a purely procedural 'box to tick' by government and that the quality and purpose of engagement is not maintained and does not fulfil the aim of levelling the playing field between the state or private owners and poor communities, rather serving to entrench existing power and resource imbalances.

<sup>180</sup> For more on the *Blue Moonlight* case see the SERI website < <http://www.seri-sa.org/> >

Speech, where he refers to the “worrying trend” of the “legalization of illegality” and the “negative impact of unintended consequences emanating from certain landmark judicial rulings on the human settlements mandate.” He goes on to state that:

“ in some cases, the rulings have forced the amendment of human settlements policy, with severe and unplanned budgetary consequences. The most recent far-reaching ruling is the one against the Johannesburg Metropolitan Municipality where the city has been ordered to pay rent to a private property owner on behalf of illegal occupiers until alternative accommodation has been found. While being dutifully circumspect about the constitutional independence of the Judiciary, the Ministry of Human Settlements is concerned about rulings that could virtually collapse government budgets and plans where unlawful behaviour – in this case illegal land and buildings’ occupation – is legitimised by a series of court rulings.<sup>181</sup> ”

In *Olivia Road*, the Constitutional Court refused to substantively engage with the occupiers’ attack on the constitutionality of the City’s housing policy. Rather, the Court sought to resolve the dispute through encouraging the parties to settle despite their contention that they could not resolve a number of issues. The matters in dispute included the City’s failure to formulate and implement a housing plan for persons similarly situated to the occupiers; the City’s policy for dealing with so-called ‘bad buildings’; the constitutionality of section 12(4) (b) of the NBRA; the review of the City’s notices to the occupiers; the applicability of the PIE Act; and the reach and applicability of sections 26(1), 26(2) and 26(3) of the Constitution. Despite identifying all of these remaining disputes, the Court declined to decide all but one of them: the narrow issue of the criminal sanction in the NBRA. According to the Court:

“ It is not necessary for this court to consider the question of “permanent housing solutions” for the occupiers. The city has agreed that these solutions will be developed in consultation with them. The complaint by the occupiers that negotiations have been marred by unclear and inconcrete housing plans is not in my view a sufficient reason for this court to consider this question at this stage... It is the duty of both parties to continue with the process of negotiation and for the occupiers or the city to approach the High Court if this course becomes necessary.<sup>182</sup> ”

Thus the *Olivia Road* decision demonstrated the Court’s reluctance to pronounce directly on the constitutionality of state housing policy, ushering in a new trend in Constitutional Court jurisprudence on housing (and other socio-economic) rights decisions that emphasise “meaningful engagement.” A subsequent housing case, *Joe Slovo*, would test this pattern.

<sup>181</sup> DHS (note 114 above). A number of legal NGOs have subsequently responded to the Minister’s worrying statements in this regard. See SERI, SECTION27, LHR, LRC, CALS and CLC “Legal NGOs respond to recent statements by the Minister of Human Settlements” (2 December 2010).

<sup>182</sup> *Olivia Road* (note 167 above) 34.

## 5.4 Joe Slovo

Shortly after the *Olivia Road* judgment, the *Joe Slovo*<sup>183</sup> case came before the Constitutional Court. This case involved an application by Thubelisha Homes, a now defunct national housing parastatal,<sup>184</sup> for the eviction of approximately 4 000 households from the Joe Slovo informal settlement in Cape Town, to Delft (on the outskirts of the city) in order to make way for the N2 Gateway housing project.<sup>185</sup> In March 2008 the Cape High Court had ordered the eviction of the occupiers according to a timetable provided by the Court, and required the state to report back every two months on the implementation of the order and the provision of permanent housing to those evicted. Once evicted, the Joe Slovo residents were interdicted from returning to the land for the purpose of erecting or taking up residence in informal dwellings. The High Court did not regard the case as an issue of mass eviction. Rather, it considered the eviction a strategic move to relocate the affected people, which would not result in homelessness because of the state's obligation to provide alternative accommodation.<sup>186</sup>

On 21 August 2008, the Joe Slovo residents brought a direct appeal to the Constitutional Court against the decision of the High Court, naming as respondents Thubelisha Homes, the national Minister of Housing and the Western Cape provincial Minister of Local Government and Housing. The Community Law Centre of the University of the Western Cape and the Centre on Housing Rights and Evictions (COHRE) were admitted as *amici curiae* (friends of the court). The *amici curiae* submission provided the Court with information showing that the N2 Gateway Project was contrary to South African and international housing law and policy, focusing on why the TRUs in Delft - located in what are known as temporary relocation areas (TRAs) or so-called transit camps - did not constitute adequate alternative accommodation for Joe Slovo residents. Their submission urged the Court to consider their lived reality and the profound socio-economic implications such a move would have on their fragile livelihoods and important social and community networks.<sup>187</sup>

The Court was asked to consider whether the respondents had made a case for the eviction of the applicants in terms of the PIE Act, which required a determination as to whether, at the time the eviction proceedings were launched, the applicants were unlawful occupiers in terms of the Act. The Court thoroughly investigated the related question of whether the residents had tacit or express consent to occupy the land. The second issue for the Court's consideration concerned whether the respondents had acted reasonably within the meaning of section 26 of the Constitution in seeking to evict the applicants.<sup>188</sup>

On 20 June 2009 the Court responded with five concurring judgments in the case, all in support of the same order but with different reasoning. A separate judgment which included the order was written by the Court as a whole. The order granted the eviction but included mitigating measures to render the eviction more humane - including the order of meaningful engagement, setting standards for the alternative accommodation at Delft and stipulating that the N2 Gateway development house 70 percent of current and former Joe Slovo residents. The judges also agreed on various grounds that, at the time of the eviction, the applicants were unlawful occupiers in terms of the PIE Act.<sup>189</sup>

With regard to "progressive realisation", Justice Yacoob stated in his judgment (which largely dealt with the history of the matter and the relevant facts) that the occupiers were being evicted and relocated in order to facilitate housing development, and, as such, "their eviction constitutes a measure to ensure the progressive

<sup>183</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16 (*Joe Slovo*)

<sup>184</sup> Thubelisha closed in July 2009 after being involved in the disastrous N2 Gateway project, and becoming technically insolvent in 2007.

<sup>185</sup> The N2 Gateway housing development was the lead pilot project of Breaking New Ground, which will be discussed further in subchapter 6.4 of this guide below.

<sup>186</sup> L Chenwi & K Tissington "'Sacrificial lambs' in the quest to eradicate informal settlements: The plight of Joe Slovo residents" (September 2009) 10, 3 *ESR Review* 18.

<sup>187</sup> See the heads of argument of the *amici* at <<http://www.communitylawcentre.org.za/court-interventions/archive-of-court-interventions/Thubelisha%20Homes%20-%20Amici%20Heads.pdf>>

<sup>188</sup> *Joe Slovo* (note 183 above) 3 and 15.

<sup>189</sup> *Ibid* 4 and 5.

realisation of the right to housing within the meaning of section 26(2) of the Constitution” as is reasonable in terms of the Court’s findings in the *Grootboom* judgment. Yacoob J further found that eviction is a reasonable measure to facilitate the housing development programme.<sup>190</sup>

Deputy Chief Justice Moseneke found in his judgment that the High Court had misunderstood the submissions made on behalf of the residents. According to Moseneke DCJ:

“ It’s very finding that informal settlements would be upgraded, moved, or redeveloped on a progressive basis, implies that they would remain where they were until those steps were taken in due course. In other words, the occupiers were implicitly allowed on a temporary basis to continue to occupy the land until housing would be provided on a progressive basis. To hold otherwise, as the High Court did, in effect, means that although our constitutional scheme accepts that the right to have access to adequate housing will be achieved progressively and within available resources, those who live on state land waiting to be provided housing do so as perpetual outlaws and are thus open to eviction as unlawful occupiers. In my view, the correct position to take is that ordinarily temporary occupation of this kind occurs with the consent of the state entity that owns the land subject to its right to give proper and lawful notice intended to terminate the right to occupy.<sup>191</sup> ”

In his concurring judgment, Chief Justice Ngcobo found that “the Housing Act, the Housing Code, the BNG policy and the N2 Gateway Project, constitute ‘reasonable legislative and other measures within [the government’s] available resources, to achieve the progressive realisation of [the right of access to adequate housing]’ as contemplated in section 26(2) of the Constitution.”<sup>192</sup> Ngcobo CJ describes how the government initiated the BNG policy “whose primary objective is to eradicate informal settlements over time, through in-situ upgrading of informal settlements and the relocation of households where development is not possible or desirable.”<sup>193</sup> Therefore, Ngcobo CJ found that it was in the public interest that the residents be relocated to allow for the implementation of the project aimed at benefitting them. He held that this relocation would be consistent with the obligation of the government to facilitate progressive realisation of the right of access to adequate housing.<sup>194</sup> Ngcobo CJ further stated:

“ What must be emphasised is that the government has a wider range of needs to meet. As we held in *Grootboom*, ‘housing must be made more accessible not only to a larger number of people but to a wider range of people.’ There are those who can afford to buy houses and there are those who cannot. Income determines what form of housing people can afford. In developing a policy to provide access to adequate housing, the government must endeavour to address all these needs. And the primary obligation to achieve the progressive realisation of the right of access to adequate housing rests on government. It must determine how and when this should be done. This, however, is subject to the requirement of the progressive realisation of the right – it must progressively facilitate accessibility. How and when the obligation must be fulfilled depends on the availability of resources, in particular, the availability of land.<sup>195</sup> ”

<sup>190</sup> Ibid 115.

<sup>191</sup> Ibid 154.

<sup>192</sup> Ibid 229.

<sup>193</sup> Ibid 228.

<sup>194</sup> Ibid 235.

<sup>195</sup> Ibid 250.

Justice O'Regan in her judgment justified the decision to order the eviction on the grounds that the N2 Gateway project is "one of the first attempts at a housing development in terms of the new housing policy... given the huge numbers of people living in inadequate or makeshift housing in Cape Town (and indeed many of our municipalities), and given the fact that this is a pilot project, it is not surprising that it has not been implemented without controversy"; that there was some consultation with residents, however lacking; and that other inadequately housed people stood to benefit from the project and had already co-operated with the respondents in the hope that their co-operation would expedite their receiving permanent housing.<sup>196</sup>

Generally, the Court's judgment underscored the obligation of the state to provide alternative adequate accommodation should it evict a settled community and to engage meaningfully with the affected individuals. The various judges in their judgments dealt extensively with two issues: whether the occupiers had consent to occupy the land, and whether it would be just and equitable to evict the applicants in terms of section 6 of the PIE Act, which regulates evictions instituted by an organ of state. Moseneke DCJ observed that on the facts of the case it was difficult to conclude that it was just and equitable to forcibly evict the applicants and "relocate them far away from their homes and modest comfort zones in order to give way to the construction of new subsidised homes." However, considering that the applicants would benefit directly from the development, he found that this aspect rendered the eviction just and equitable.<sup>197</sup> In terms of *in situ* upgrading, according to Ngcobo CJ in his judgment, "it is not for the courts to tell the government how to upgrade the area. This is a matter for the government to decide."<sup>198</sup> O'Regan J in her judgment stated that "the applicants are dismayed by the fact that the plan does not provide for *in situ* upgrading, but although *in situ* upgrading may often be desirable, it cannot be said that in not providing for it the plan is unreasonable."<sup>199</sup>

Despite its misgivings on the quality of the engagement between the state and the residents around the project, the Court went ahead to sanction the eviction. It took this position despite its own precedent that courts should be reluctant to grant an eviction order where meaningful engagement had not taken place i.e. *PE Municipality and Olivia Road*. The Court endorsed the decision to relocate the Joe Slovo community to temporary residential units (TRUs) in Delft or other appropriate locations, annexing a relocation timetable to its judgment that detailed the dates by which households would be moved.<sup>200</sup> An interesting aspect of the Court's order is the detail in which it specified the quality and nature of the temporary housing to be provided, including the provision of services and facilities. The Court ordered that existing TRUs had to comply with certain specifications and new ones had to be of equivalent or superior quality. The units had to:

- be at least 24m<sup>2</sup> in size;
- be accessible using tarred roads;
- be individually numbered for identification purposes;
- have walls constructed with Nutec;
- have galvanised iron roofs;
- be supplied with electricity through a prepaid electricity meter;
- be situated within reasonable proximity of a communal ablution facility;
- make reasonable provision for toilet facilities, which may be communal, with waterborne sewerage; and
- make reasonable provision for fresh water, which may be communal.<sup>201</sup>

The Court required the respondents to engage meaningfully on the time frame of the relocation as stated above. It also directed them to consult with the affected residents around each individual relocation, specifying the issues that needed to be included in this engagement. The parties had to ascertain among other things the names, details and relevant personal circumstances of those affected by each relocation; the exact time, manner and conditions under which the relocation would be conducted; the precise TRUs to be allocated to

<sup>196</sup> Ibid 302-303.

<sup>197</sup> Ibid 138 -139 and 175.

<sup>198</sup> Ibid 253

<sup>199</sup> Ibid 295.

<sup>200</sup> Ibid 5.

<sup>201</sup> Ibid 7(10). See the Emergency Housing Programme guidelines on temporary settlements in subchapter 7.12 below.



those relocated; the provision of transport for those to be relocated and for their possessions; the provision of transport facilities to those affected from the temporary accommodation to amenities such as schools, health facilities and places of work; and the prospect of the subsequent allocation of permanent housing to those relocated to temporary accommodation, including information on their current position on the housing waiting list and assistance in completing housing subsidy application forms.<sup>202</sup> For discussion of the problems associated with temporary relocation areas (TRAs) see subchapter 7.12.1.1 of this guide.

While the Court acknowledged the difficulty of balancing competing interests, it failed to properly assess the reasonableness of the government's policy choices, displaying a particularly deferential attitude to the government. It allowed the government to evict a relatively large community to make way for a project that did not include proper consultation or the provision of affordable housing for the intended beneficiaries. Furthermore, the project failed to identify clearly the roles and responsibilities of the different spheres of government as required in *Grootboom*, an observation highlighted by the Auditor-General's special audit report on the N2 Gateway development.<sup>203</sup> The project has been plagued by such problems as mismanagement, overspending and under-financing. The project was inconsistent with international best practices and the South African housing policy as it focused primarily on relocation. Further, it appeared to run counter to housing policy stating that informal settlements should be eradicated through *in situ* upgrading where possible, leaving relocation to serve as a last resort.

The socio-economic impact of the relocation from Joe Slovo informal settlement to Delft was an immense proposition. Joe Slovo is close to economic hubs where jobs and food can be accessed relatively easily. Children in the settlement can walk to school, young adults can take night classes thanks to their proximity, and churches have developed congregations made up of members that have been in the area for years. The settlement is close to the city centre and a cheap train network improves people's ability to commute to work. In contrast, there is no train network in Delft, transport is expensive and TRA is 15km further from the city than Joe Slovo. A study by the Cape Town-based NGO the Development Action Group (DAG) on the impact of households moving to Delft TRA found that relocation has an enormous impact on household incomes and expenditure, social networks and security. According to DAG, relocation should be a last resort not only because it negatively impacts those affected but also because it places a burden on the government to provide a larger social safety net and to mitigate the social problems caused by the relocation. The challenges of relocation are evident in the Constitutional Court's order requiring the government to engage with the affected communities on transport to schools, health facilities and places of work.<sup>204</sup>

On 24 August 2009, the Constitutional Court quietly issued an order suspending the evictions until further notice. Their action came after the Western Cape MEC for Housing submitted a report to the Court stating that he had "grave concerns" that the "massive relocation" might end up costing more than it would to upgrade Joe Slovo informal settlement. The MEC had been newly elected after the national election and represented the Democratic Alliance (DA), as opposed to the ANC, which had formerly been in power in the province. He also raised concerns about the absence of a plan regarding those who would not be accommodated in the new settlement, arguing that the inadequate number of houses would mean people left behind in TRAs. At present, the government is exploring upgrading the settlement *in situ* and the community and NGOs have conducted preliminary planning for this.

On the face of it, the *Joe Slovo* judgment is problematic. It showed extreme deference to government housing policy even when it was implemented contrary to the spirit and letter, and without proper consultation and engagement with the community. However, despite the Constitutional Court's order for an eviction, it indirectly

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<sup>202</sup> Ibid 7(11).

<sup>203</sup> Auditor-General "Report of the Auditor-General on the special audit of the N2 Gateway Project at the National Department of Housing" (2008).

<sup>204</sup> *Joe Slovo* (note 183 above) 7. See DAG "Living on the Edge: A Study of the Delft Temporary Relocation Area" (March 2007) 25.

gave weight to a number of important factors related to the right to adequate housing, including the provision of electricity, water and sanitation as well as transport to schools, clinics and places of work in relation to the temporary housing. It is interesting to note that the Court was willing to discuss, and even order the content of the right to housing in relation to negative obligations and infringement. Subsequent developments have vindicated the issues raised in the case by the residents and the *amici curiae* to an extent. Further, the economic, social and financial desirability of *in situ* upgrading versus relocation has been explored at great length as a result of the case.

## 5.5 Abahlali

Another direct appeal to the Constitutional Court in 2009 came in the form of the *Abahlali* case,<sup>205</sup> which was a judicial challenge to the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 (KZN Slums Act) by the Durban-based shackdweller movement Abahlali baseMjondolo (AbM). The long title of the Act reflects its three purposes concerned with slums: the progressive elimination of slums, measures for the prevention of the re-emergence of slums and the upgrading and control of existing slums. The KZN Slums Act aimed to “eliminate slums” in KwaZulu-Natal by *de facto* enabling and encouraging evictions to occur without meaningful engagement. AbM, along with other organisations, had attempted early on to impede the passing of the Slums Bill; however, were unsuccessful. Their experiences of illegal evictions and demolitions in Durban made them extremely wary of the impact of the Bill if passed, and they decided to mount a constitutional challenge.<sup>206</sup> They challenged the constitutionality of the Act in the Durban High Court in November 2008, however they were unsuccessful and the application was dismissed.

On 14 May 2009 the Constitutional Court heard arguments relating to various aspects of the KZN Slums Act, most specifically around the problematic section 16 of the Act which states that a municipality *must* start proceedings for the eviction of unlawful occupiers if the owner or person in charge of the land fails to do so within the time period prescribed by the MEC. The applicants argued that section 16 violated section 26(2) of the Constitution in three ways: it precluded meaningful engagement between municipalities and unlawful occupiers; it violated the principle that evictions should be a measure of last resort; and it undermined the precarious tenure of unlawful occupiers by allowing the eviction proceedings to begin without reference to the procedural safeguards contained in the PIE Act. The Court ruled that section 16 of the Act was unconstitutional and invalid, as it gave too much power to the MEC and seriously undermined the protections in section 26(2) of the Constitution read with other housing legislation.

In the main judgment written by Moseneke DCJ (with all the judges except Yacoob J concurring<sup>207</sup>) and handed down on 14 October 2009, the Court found that, “the proper view is that section 16 cannot be reconciled with the national Housing Act and the National Housing Code, both of which have been passed to give effect to section 26(2) of the Constitution.”<sup>208</sup> He also held that the MEC’s power to issue a notice as envisioned in section 16 is “irrational and overbroad.”<sup>209</sup> Moseneke DCJ further found that section 16 could not be interpreted in a way that promoted the ostensible objectives of eliminating and preventing slums and providing adequate

<sup>205</sup> *Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others* [2009] ZACC 31 (*Abahlali*)

<sup>206</sup> For more on the practice of evictions and demolitions in Durban, see COHRE “Business as Usual? Housing Rights and ‘Slum Eradication’ in Durban, South Africa” (September 2008).

<sup>207</sup> The judgment of Yacoob J found that the contested provision could be read subject to all the safeguards provided by the Constitution and the PIE Act and that on a proper construction of the KZN Slums Act an owner or municipality had to comply with the PIE Act and all other relevant legislation before an eviction could be ordered. His findings on the legislative competence argument were accepted by the entire Court and these essentially dismissed the applicants’ contention that the KZN Slums Act was more concerned with land rather than housing, which is a national competence and not within the scope of the province to pass. *Abahlali* (note 205 above) 43 and 40.

<sup>208</sup> *Ibid* 115.

<sup>209</sup> *Ibid* 118.

housing. He referred to the fact that the challenged Act was a pilot piece of legislation and other provinces were “awaiting guidance from the Court before deciding on similar legislation.”<sup>210</sup>

According to CALS (the legal organisation that represented AbM in the case):

“ The Slums Act equates the elimination of slums with the eviction of people living in them and was intended to make that a much more frequent and easily facilitated occurrence. The core focus of the Act is on facilitating eradication, not in providing adequate housing. While it ostensibly allows government to fast track housing delivery, the Act has the real and pernicious effect of actively encouraging the eviction of unlawful occupiers living in informal settlements and buildings without taking into account their circumstances or the provision of alternative accommodation. There is a lack of acknowledgment that informal settlements and slum conditions are a symptom of a bigger problem in South African cities around well-located land and access to livelihoods.<sup>211</sup> ”

Key findings from the *Abahlali* judgment include the decision that if engagement takes place after there has been a decision to institute eviction proceedings, it cannot be genuine or meaningful.<sup>212</sup> Another important finding was that proper engagement includes taking into consideration the needs of those who will be affected, the possibility of upgrading the area *in situ* and the provision of alternative accommodation where necessary. The Constitutional Court stated that,

“ no evictions [in terms of the PIE Act] should occur until the results of the proper engagement process are known. Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation.<sup>213</sup> ”

This affirms that eviction or relocation should only ever occur as a last resort, and only after *in situ* upgrading has been considered. The revised national informal settlements upgrading programme – the UISP – reiterates this principle (see subchapter 7.10 of this guide for more on the UISP).

## 5.6 Nokotyana

Shortly before the *Abahlali* judgment was handed down - which saw the Constitutional Court render the KZN Slums Act unconstitutional and recognise the importance of meaningful engagement and *in situ* upgrading of informal settlements - another case relating to informal settlement upgrading came before the Court. Although not explicitly a housing rights case, *Nokotyana*<sup>214</sup> highlights a number of fault lines around the way the different spheres of government approach (or do not approach) informal settlement upgrading and the crisis of lack of access to basic services in these settlements.

Regarding the facts, since 2004 a community living in Harry Gwala informal settlement, located in Ekurhuleni Metropolitan Municipality in Gauteng, had attempted to engage with the municipality to have the settlement upgraded *in situ* as opposed to being relocated (the municipality had taken the decision to remove the occupiers, without consultation, to a relocation site 13km from the settlement).

<sup>210</sup> Ibid 126.

<sup>211</sup> CALS “Abahlali baseMjondolo celebrates as Constitutional Court declares KZN Slums Act unconstitutional” (14 October 2009).

<sup>212</sup> *Abahlali* (note 205 above) 69 and 120.

<sup>213</sup> Ibid 114.

<sup>214</sup> *Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33 (*Nokotyana*)

According to Marie Huchzermeyer, professor at the School of Architecture and Planning at the University of the Witwatersrand who has researched and written on informal settlement policy and practice in South Africa, a number of groundless excuses were advanced by the municipality as to why the settlement needed to be relocated, and why it could not be upgraded as per the Chapter 13 Informal Settlement Upgrading Programme in the National Housing Code.<sup>215</sup> In response to the Harry Gwala committee's requested clarity on the provision of interim services in respect of water, refuse removal and electricity pending the upgrading *in situ* of the Harry Gwala informal settlement, the Gauteng provincial government commissioned a feasibility study in 2006. Applying conventional housing layout standards, the study found that the land yielded only some 300 units. After engagement with the community, the municipality requested a revised feasibility study from the province, for an *in situ* upgrade rather than a conventional housing development.<sup>216</sup> With no clarity regarding the decision about, or timeframe for, the *in situ* upgrading of Harry Gwala by 2008, the committee launched application for interim services – including seven additional taps, high mast lighting, refuse collection and sanitation – in the South Gauteng High Court.<sup>217</sup>

The municipality argued that households had lived at Harry Gwala informal settlement for many years and therefore could not qualify for emergency assistance, and that feasibility for a Chapter 13 *in situ* upgrade needed to be established before interim services could be provided. It offered to provide seven additional taps and to resume refuse collection however argued that sanitation and lighting would not be provided (unless the occupiers accepted to relocate). On 24 March 2009, Acting Judge Epstein handed down a judgment where he dismissed the applicability of Chapter 12 and accepted the municipality's argument that interim services could only be provided under Chapter 13 of the Housing Code "where it has been decided to develop an informal settlement in situ" and that the municipality had no obligation to provide interim services until it had been decided that the land could be developed for residential purposes. Epstein AJ further found that "in the present case, there is no suggestion, (nor could there be substance to such a suggestion), that the Municipality is not carrying out its obligations to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that services are provided in a manner which is economically efficient."<sup>218</sup>

The Harry Gwala community decided to appeal the decision to the Constitutional Court, specifically around the High Court decision not to provide sanitation or high mast lighting. Arguably as a result of the pressure of litigation, the municipality revisited its budgets and conceded to provide one portable chemical toilet for every ten informal settlement households across its jurisdiction. According to Huchzermeyer, "due to the unreasonable delay in the decision whether to upgrade Harry Gwala, National and Provincial governments offered additional funding to allow one chemical toilet for every four households in Harry Gwala only, shortly before the Court hearing on 15 September 2009."<sup>219</sup> At the hearing, the Court welcomed an apology from a provincial government representative to the Harry Gwala community and the Court for the three year delay in securing a feasibility study that would determine whether the settlement could be upgraded *in situ*. On 19 November 2009, Justice van der Westhuizen handed down a unanimous judgment in *Nokotyana* which dismissed the appeal. The judgment however found that the delay was unconstitutional on the grounds of non-compliance with section 237 of the Constitution, or with the requirement of reasonableness imposed on the government by section 26(2) of the Constitution with regard to access to adequate housing. The Court ordered the MEC for Local Government and Housing to take a final decision on the municipality's application in terms of

<sup>215</sup> M Huchzermeyer "Chapter Ten: A challenge to the state's avoidance to upgrade of the Harry Gwala informal settlement" in *Cities with slums: from informal settlement eradication to a right to the city* (provisional title), draft manuscript (forthcoming, UCT Press). Chapter 13 is now "Part 3 Vol 4: Upgrading of Informal Settlements Programme" contained in the 2009 National Housing Code. See subchapter 7.10 of this guide for more on the programme.

<sup>216</sup> Ibid.

<sup>217</sup> According to the Water Services Act 108 of 1997, every household must be within a 200m radius of a communal tap.

<sup>218</sup> *Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality* Case No. 08/17815 para 39.

<sup>219</sup> Huchzermeyer (note 215 above).

Chapter 13 of the Housing Code, to upgrade the settlement, within 14 months of the order. This was the time deemed necessary to commission a new feasibility study.<sup>220</sup>

Bilchitz has written that in *Nokotyana* the Constitutional Court took an extremely formalistic approach to the issues before it, and

« avoided making any decision as to whether the normative content of s 26 includes basic sanitation. The inescapable conclusion seems to be that for some reason the court was attempting to use all the tools it had to avoid giving definitive content to socio-economic rights.<sup>221</sup> »

According to Huchzermeyer, three months before this court deadline, no investigation into the feasibility of *in situ* upgrading, and no evidence that, according to the principles of Chapter 13 of the Housing Code, relocation is being treated as a last resort.<sup>222</sup> In October 2010 a Draft Environmental Impact Assessment (EIA) Report was presented to the community for comment. The Draft EIA is not for *in situ* upgrading but for “high density subsidy linked housing, which will consist of three storey mixed walk up centres” containing a total of 500 units, with the explicit intention of marketing the majority of these units to people across Gauteng and not to allocate them to the current Harry Gwala residents.<sup>223</sup> According to Moray Hathorn, attorney for the Harry Gwala community, as of January 2011 the 14 month period for a decision as to whether there will be *in situ* upgrading comes to an end. Thereafter, further legal action will be considered if appropriate decisions have not been taken regarding upgrading.

## 5.7 Summary of key findings from Constitutional Court cases

The Constitutional Court has pronounced on a number of housing-related cases during its tenure, with a number of important findings on the negative and positive obligations around the right to adequate housing. These findings include *inter alia* the following:

- A reasonable government programme must provide for those in urgent need and living in “intolerable conditions” (*Grootboom*);
- The state is under an obligation to “meaningfully engage” with those facing eviction to ascertain if they will be rendered homeless by an eviction and to determine what alternative accommodation can be provided. State institutions are obliged to engage meaningfully prior to taking a decision to institute eviction proceedings (*Olivia Road; Joe Slovo; Abahlali*);
- If engagement takes place after there has been a decision to institute eviction proceedings, it cannot be genuine or meaningful and proper engagement. Engagement is meaningful when it takes into consideration the needs of those who will be affected, the possibility of upgrading the area *in situ* and the provision of alternative accommodation where necessary (*Abahlali*);
- No evictions in terms of the PIE Act should occur until the results of the proper engagement process are known (*Olivia Road, Joe Slovo, Abahlali*);
- Courts will be reluctant to order an eviction if homelessness will result (*Joe Slovo, Olivia Road*);
- The Constitutional Court is loath to pronounce directly on the constitutionality of government housing policy particularly in relation to permanent housing, however in *Olivia Road* ordered that the occupiers

<sup>220</sup> *Nokotyana* (note 214 above) 62(4).

<sup>221</sup> D Bilchitz “Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*” (2010) 127, 3 *The South African Law Journal* 597.

<sup>222</sup> Huchzermeyer (note 215 above).

<sup>223</sup> *Ibid.*

and the state engage in consultation over an appropriate solution to the eviction, which more specifically relates to the consequences of the eviction which would be homelessness for the occupiers;

- The Constitutional Court may order that temporary housing units comply with certain specifications when it is dealing with a negative infringement of the right to housing (*Joe Slovo*);
- In respect of informal settlements, relocation is a last resort and only after *in situ* upgrading has been considered (*Abahlali*);
- When faced with a case involving the non-application of the informal settlement upgrading programme, the Constitutional Court may be reluctant to second-guess the motives of the government in relation to steps it was taking to apply the policy, however the Court may accept that considerable delay in taking a decision is inconsistent with the “requirements of reasonableness” and should be rectified (*Nokotyana*);
- In respect of the provision of interim services to informal settlements, the Constitutional Court is reluctant to pronounce on standards prescribed by the municipality, and applies its “reasonableness” test to sanitation standards in informal settlements (*Nokotyana*).

Over the past 16 years there have been numerous shifts in South African housing policy, which attests both to the socio-economic importance and political imperative of housing provision in the country. According to Sarah Charlton, senior lecturer at the School of Architecture and Planning at the University of the Witwatersrand with specific research interest in low-income housing, and Caroline Kihato, theme coordinator for the regional programme at Urban LandMark, the housing policy shifts that occurred since 1994 were most often reactions to weaknesses in policy implementation, or were driven by other agendas such as political pressure or internal departmental politics. According to the authors, housing policy shifts “are not, however, explicitly rooted in a rigorous interrogation of the needs of the poor, such as the impact of housing programmes on livelihoods and economic activity of the poor beneficiaries.”<sup>224</sup> There does not appear to have been a clear process of housing policy evolution underpinned by a rigorous conceptual framework.

They argue that much of this had to do with the movement of personalities and senior housing officials out of the policy and research division of the housing department, and a lack of continuity and institutional memory to carry the policy development forward strongly and decisively.<sup>225</sup> Key players in the National Housing Forum (NHF), described in more detail in the following subchapter, moved into government housing administration so that the NHF did not just produce a policy but an entire *machinery* of housing (i.e. in the operational aspects). Further, politicians in political spaces like MinMECs<sup>226</sup> became a significant force behind housing policy adjustment.<sup>227</sup> Another problem was that while housing policy may have been relatively progressive, urban policy, IDP processes and land availability – crucial elements for successful housing provision – have lagged behind. Indeed, the contentious issue of well-located land for housing was never adequately addressed and some have asserted that this has to do with the reluctance of the urban elite to grapple with an issue in which they themselves may hold a significant stake.<sup>228</sup>

This chapter provides an overview of housing policy development since 1994. As background, it briefly examines the National Housing Forum (NHF) process which preceded the development of a national housing policy, and moves to an analysis of the guiding national housing policy, the White Paper on Housing, the policy refinement document *Breaking New Ground*, as well as the People’s Housing Process (PHP) and the Inclusionary Housing Policy (IHP). The final subchapter will discuss the National Housing Code.

<sup>224</sup> Charlton & Kihato (note 17 above) 267. Added here should be the concern that most recently the Constitutional Court has not shown this sensitivity either in relation to the impact of housing policy implementation on the poor in the *Joe Slovo* case. Rather, they accepted the existence and implementation of a “reasonable policy” as justification for a mass eviction.

<sup>225</sup> Ibid.

<sup>226</sup> MinMECs are informal political forums where national and provincial departments with common sectoral responsibilities - i.e. housing - discuss policy issues and coordinate their activities. They consist of the national Minister and the nine provincial MECs, supported by key departmental officials.

<sup>227</sup> Charlton & Kihato (note 17 above) 268.

<sup>228</sup> Ibid.

## 6.1 National Housing Forum (1992–1994)

It is instructive to briefly recount the debates that dominated the National Housing Forum (NHF), a multi-party non-governmental negotiating forum comprising business, political, development, and civic organisations which met between 1992 and 1994 to discuss the post-apartheid housing situation. The aim of the NHF was to formulate a consensus around a new non-racial housing policy and two fierce debates characterised the process: first, whether housing should be provided by the state or the market; and, second, whether the standard should be a completed four-room house or a “progressive” (incremental) house.<sup>229</sup> The NHF set the tone for the first democratic national housing policy in 1994.

While a number of stakeholders participated in the NHF, including civic and labour organisations, criticisms emerged about the dominance of the private sector and big business at the negotiations, and the implications of this on the housing policy that emerged. Further, the influence of international experience affected the outcome as well as the “need for pragmatism around operational implementation and the heightened sense of urgency of the need to demonstrate delivery.”<sup>230</sup>

The NHF was characterised by debate over *who* would provide the housing and *how*. According to Mary Tomlinson, a housing policy expert who was active in the NHF, the constituencies on the ‘Left’ and the private construction sector argued, for different reasons, that the government should provide mass rental housing. The ‘Left’, also referred to as the Mass Democratic Movement (consisting of the ANC, COSATU and the civic movement) argued that this would immediately entail a high standard of provision. The private sector held a similar standard with the caveat that the private sector should be employed as contractors and not developers so as to limit their financial risk.<sup>231</sup> Opposition to this view was based on a concern that the proven financial and administrative burdens of this approach would be too onerous for a fledgling government. Moreover, critics argued that local authorities were already eager to rid themselves of the responsibility of managing rental housing because of difficulties in collecting rent, maintaining stock and applying qualifying criteria to tenants.<sup>232</sup> Those in favour of a mass state rental programme were challenged to explain how the state would finance and manage it, however were unable to convincingly do so and a more pragmatic approach was pursued.

On 27 October 1994, the newly-elected government hosted the National Housing Summit in Botshabelo, where it was able to secure formal support from a broad range of key stakeholders for the new housing policy and strategy in what is known as the Botshabelo Housing Accord. In terms of the debate around the role of the state versus the market in driving housing delivery, it was decided that the government would provide the framework for housing provision and facilitate delivery, while the private sector would apply for subsidies on behalf of communities, identify and service land, and construct structures where possible. This approach was heavily criticised by many who believed that it would not address endemic flaws in the South African housing market and would simply perpetuate them. However, according to Huchzermeyer, the approach was a consensual one and related to the “pacted” nature of the South African transition, in which the private sector had a powerful leverage over both the National Party and incoming ANC governments.<sup>233</sup>

The debate about what housing would be delivered concerned the cost of addressing the housing backlog and different estimates of budgets, time-frames and standards. It was finally agreed that a once-off capital subsidy scheme would be adopted to benefit households with an income of less than R3 500 per month and the government launched the NHSS. The “housing option” available to a household – which could be a house, a flat or a serviced site (with or without a top structure) – would depend on the government subsidy it

<sup>229</sup> M Tomlinson “South Africa’s housing policy: Lessons learnt from four years of the new Housing Subsidy Scheme” (1999) 2, 3 *Third World Planning Review* 283.

<sup>230</sup> Charlton & Kihato (note 17 above) 275.

<sup>231</sup> Tomlinson (note 229 above) 286.

<sup>232</sup> *Ibid.*

<sup>233</sup> Charlton & Kihato (note 17 above) 274.



received and access to private funds.<sup>234</sup> The subsidy was linked to individual ownership (as opposed to rental), and households effectively “bought” a housing option with their subsidy. The aim of the new dispensation was to deliver housing opportunities and options to as many previously dispossessed South Africans as quickly as possible. The dilemma highlighted at the NHF had been between “targeting as many as possible with some form of basic housing provision versus targeting a lucky few with a complete housing package.” This trade-off was known as the “breadth versus depth” debate.<sup>235</sup>

A new housing policy - the White Paper on Housing - emerged from the NHF process and Housing Accord and was influenced by the broad principles and targets of the ANC’s RDP in 1994.<sup>236</sup> This latter strategy focused on meeting basic needs and was heavily concerned with delivery.<sup>237</sup> The White Paper on Housing, however, was criticised for having failed to reflect the fully subsidised, comprehensive and large-scale plan for housing envisioned in the RDP, despite its ambitious aim that 1 million low-cost houses should be constructed over five years.<sup>238</sup>

## 6.2 White Paper on Housing (1994)

The incoming ANC government adopted the White Paper on Housing after the historic 1994 democratic elections, with the aim to “create viable, integrated settlements where households could access opportunities, infrastructure and services, within which all South Africa’s people will have access on a progressive basis to:<sup>239</sup>

- *A permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements; and*
- *Potable water, adequate sanitary facilities including waste disposal and domestic electricity supply.”<sup>240</sup>*

The White Paper on Housing states that:

“ despite the constraints in the environment and the limitations on the fiscus, every effort will be made in order to realise this vision for all South Africans whilst recognising the need for general economic growth and employment as well as the efforts and contributions of individuals themselves and the providers of housing credit, as prerequisites for the realisation thereof.<sup>241</sup> ”

The goal of the policy was to increase the national budget allocation to housing to five percent and to increase housing delivery on a sustainable basis to a peak level of 338 000 units each year to reach the government’s target of one million houses in five years.<sup>242</sup> The White Paper on Housing describes how the government’s overall approach to the housing challenge is aimed at mobilising and harnessing the combined resources, efforts and initiative of communities, the private and commercial sector and the state.

<sup>234</sup> Tomlinson (note 229 above) 285.

<sup>235</sup> Charlton & Kihato (note 17 above) 271.

<sup>236</sup> In 1996, the ANC discontinued the RDP’s cabinet status, effectively eliminating it, and replaced it with the Growth, Employment and Redistribution: A Macro-Economic Policy Framework (GEAR) which favoured a market-oriented approach and relied heavily on the private sector for housing delivery.

<sup>237</sup> Charlton & Kihato (note 17 above) 253.

<sup>238</sup> NDoH “White Paper: A New Housing Policy and Strategy for South Africa” (1994) 4.3. This report will refer to the relevant section of the White Paper on Housing (as opposed to page number) when it cites from the policy.

<sup>239</sup> Ibid 4.2.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid 4.3.

The policy outlines seven key strategies it would pursue in order to achieve this:

1. stabilising the housing environment in order to ensure maximal benefit of state housing expenditure and mobilising private sector investment;
2. facilitating the establishment or directly establishing a range of institutional, technical and logistical housing support mechanisms to enable communities to, on a continuous basis, improve their housing circumstances (i.e. supporting the PHP);
3. mobilising private savings (whether by individuals or collectively) and housing credit at scale, on a sustainable basis and simultaneously ensuring adequate protection for consumers;
4. providing subsidy assistance to disadvantaged individuals to assist them to gain access to housing (i.e. through the NHSS and National Housing Programmes);
5. rationalising institutional capacities in the housing sector within a sustainable long-term institutional framework;
6. facilitating the speedy release and servicing of land (i.e. utilising the Development Facilitation Act and the HDA);
7. coordinating and integrating public sector investment and intervention on a multifunctional basis.<sup>243</sup>

The state wanted rapid delivery to ensure broad access to housing and it relied predominantly on the individual, income-linked state subsidies to achieve this goal (one of the strategies outlined above). The subsidies were accessed by private sector developers (as well as other types of developers including CBOs, NGOs, local authorities etc) for them to develop serviced houses on freehold tenure site, basically a "site-and-services" model with a house added on top (as negotiated at the NHF). According to Charlton and Kihato, "the subsidy is a once-off 'contribution' by the state aimed at meeting the ANC objective of 'housing for all'."<sup>244</sup> The NHSS – government's flagship subsidy programme - made once-off capital subsidies available to low-income households, working on a sliding scale depending on household income levels. Subsidy levels increased several times from 1994 onwards, however has not kept up with inflation. In 1994 the subsidy amount was R12 500 and the first increase came in 1998, when it was adjusted to R15 000. In 1999, it increased to R16 000 and in 2002 it was again adjusted to R20 300.

In April 2002, the state introduced a compulsory beneficiary contribution (savings or credit) to make up the difference between the subsidy and the cost of a minimum standard house. The minimum savings contribution was R2 497, but households earning above R1 500 a month were expected to contribute savings in proportion to their income in order to afford at least the minimum standard house. This minimum contribution remains the same at present. The beneficiary contribution did not apply to beneficiaries earning less than R800 per month or elderly or disabled persons, who received the full subsidy worth R25 580 (as of April 2003).<sup>245</sup> As of April 2004, households earning between R2 500 and R3 500 per month were entitled to a subsidy of R8 600; those earning between R1 500 and R2 500, a subsidy of R15 700; those earning less than R1 500, a subsidy of R25 800.<sup>246</sup> In September 2004, it was announced that the subsidy scheme would be expanded to include those earning up to R7 000 a month, and that the three subsidy bands would be collapsed to enable households earning below R3 500 to access the full subsidy amount.<sup>247</sup>

Apart from income requirements, beneficiaries had to be married, co-habiting, or have at least one proven financial dependant; be citizens of South Africa; and be 21 years or older. See subchapter 2.4.1 of this guide above for more on the current generic qualifying criteria for state housing subsidies.

<sup>243</sup> Ibid 4.6.

<sup>244</sup> Charlton & Kihato (note 17 above) 254.

<sup>245</sup> D Gardner "Getting South Africans under shelter: An overview of the South African housing sector" Housing Finance Resource Programme (August 2003) 44.

<sup>246</sup> NDoH "Adjustment of the Quantum of the Housing Subsidy for the new Financial Year" (8 April 2004).

<sup>247</sup> NDoH "Press statement by LN Sisulu, Minister of Housing on the public unveiling of the new housing plan" GCIS (2 September 2004).

On adoption of the policy in 1994, according to Charlton and Kihato:

“ The intention was to deliver a ‘starter house’ (sometimes consisting of building materials, where the subsidy only covered land and servicing costs), which beneficiaries would add to and consolidate over time. This incremental way of achieving the right to housing was related to a key assumption in the policy that beneficiaries would be able to access loan finance, which would be spent on improving the house.<sup>248</sup> ”

Charlton and Kihato state that by the late 1990s, the nature of the house to be delivered shifted from the open-ended concept of a “starter house” to a minimum 30 m<sup>2</sup> unit of defined specification.<sup>249</sup> As outlined in subchapter 2.2.4 of this guide, in 1999 new National Norms and Standards placed increasing focus on the size and quality of the top structure or house and stipulated minimum standards.

An undesired effect of this new policy, according to Charlton and Kihato, was that service standards relating to sanitation, water and roads were often dropped in order to deliver houses in greater numbers and of greater size. Thus, VIP latrines, communal standpipes and gravel roads were accepted as adequate, reinforcing the trend towards development on peripheral land as housing projects were built in areas where lower service levels were more acceptable.<sup>250</sup> According to Charlton and Kihato:

“ This policy adjustment, driven by a political need to deliver acceptable houses, was not rooted in a deeper understanding of the consequences of the service levels/location/top-structure trade-off on beneficiaries. Rather, it was a reactive move related to the historic rejection of the notion of incrementalism – the gradual consolidation of a starter house over time by the end-user – and may again, in fact, have further contributed to the spatial marginalisation of the poor.<sup>251</sup> ”

The NHSS was used to finance the construction of over 1.5 million housing units across South Africa between 1994 and 2003.<sup>252</sup> In March 2007, the NDoH announced that a total of 3 043 900 subsidies had been approved and 2 355 913 houses built since 1994.<sup>253</sup> While this achievement has been lauded, the government often notes that the backlog is increasing due to rapid urbanisation, amongst other factors. It currently estimates the backlog at around 2 million units.<sup>254</sup> See chapter 4 of this guide on housing delivery since 1994 and current housing backlogs.

## 6.2.1 Problems with RDP houses

Despite the efforts of the NHSS to deliver housing to all, there have been problems with both the quantity and quality of housing delivered since 1994. More broadly, as noted by the NDoH more recently, housing delivery has had a limited impact on poverty alleviation and houses have not become the financial, social and economic assets as envisioned in the early 1990s. The NHSS has generally been provided through project-linked subsidies for large-scale housing developments, often located on the periphery of existing townships on land first acquired or zoned for township development under apartheid.<sup>255</sup> This perpetuates the marginalisation of the poor and does not contribute to the “compaction, integration and restructuring of the apartheid city.”<sup>256</sup>

<sup>248</sup> Charlton & Kihato (note 17 above) 254.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid 267.

<sup>251</sup> Ibid.

<sup>252</sup> Gardner (note 245 above) 21.

<sup>253</sup> See the DHS website at <<http://www.housing.gov.za/>> for more housing statistics.

<sup>254</sup> “SA housing backlog at two million” *SABC News* (8 October 2007).

<sup>255</sup> Charlton & Kihato (note 17 above) 268.

<sup>256</sup> Ibid 255.

According to a COHRE report, this trend served to reinforce the “spatial segregation of cities, the isolation of the poor from livelihood opportunities and social services, as well as the tendency towards urban sprawl.” The organisation further found that, “this problem has often been exacerbated by the fact that there has also been little co-ordination between government departments to ensure that public transport, schools, clinics, libraries and police stations are provided for the new community.”<sup>257</sup> Other factors, such as the cost of home ownership because of rates and service charges and heightened unemployment, have also limited the effect of housing provision on poverty alleviation.

Important to note in relation to location are recent findings by the SHF which indicate that:

“ the location and density of affordable housing makes a significant difference to the overall costs and benefits of housing to South African society over time and that housing that is well-located in urban centres, even though it financially costs much more to build, (due to higher land prices) actually has more benefits for society and costs less over time than does much cheaper housing on the periphery.”<sup>258</sup>

What has been witnessed over the years is that RDP houses and settlements have become residential dormitories, and many beneficiaries choose to trade their houses and move back to informal settlements or other informal housing to be closer to work. According to research conducted by Urban LandMark in 2010, since 2005 approximately 11 percent of all RDP houses were unofficially traded by owners who were barred from selling their houses due to the mandatory lock-in period of 8 years. Over half of these were transactions for between R5 750 and R17 000.<sup>259</sup> According to the Minister of Human Settlements, based on a random sample consisting of 10 percent of housing units completed between 1994 and 2008, of the approved beneficiaries since 1994, 34 percent are still occupying houses allocated to them in terms of the NHSS.<sup>260</sup> According to Urban LandMark, it is difficult for households to use RDP houses as financial assets and get lending against them and that the location of houses often fails to match beneficiaries’ needs. Therefore, people accept RDP houses but rent them out to those who can use the house as an asset, themselves choosing to live in an informal settlement or backyard shack in a township to be closer to jobs and livelihood opportunities.<sup>261</sup> Further, delays in the transfer of title deeds and the protracted length of township establishment have meant many beneficiaries do not have their title deeds or proof of ownership.<sup>262</sup>

The White Paper on Housing aimed to “ensure the participation of emerging, largely black contractors” by providing financial assistance to enable the scheme to accredit such contractors despite a lack of resources and adequate track record, and to develop special mechanisms to enable such participation without compromising the right of the consumer to a proper standard product.<sup>263</sup> However, there have been numerous problems with this model including corruption in the allocation of subsidised housing units as well as in construction tenders, the latter resulting in construction short cuts being taken and poor quality houses being built.<sup>264</sup> Recently, the Minister of Human Settlements announced that the government would be using R1.3 billion, or 10 percent of the department’s budget, to rectify badly constructed RDP houses.<sup>265</sup> See subchapter 7.7.1 of this guide below for more on this programme.

<sup>257</sup> COHRE (note 206 above) 87.

<sup>258</sup> SHF “Think Piece 1: Location and Density” Cost Benefit Analysis: Social Rental Housing (September 2009) 7.

<sup>259</sup> L Wessels “Black market highlights RDP cracks” *Fin24* (31 March 2010).

<sup>260</sup> Parliamentary Question No 2692 and reply from the Minister of Human Settlements (2010).

<sup>261</sup> See K Tissington, K Rust, R McGaffin, M Napier & S Charlton “Let’s see the real value in RDP houses” *Business Day* (31 August 2010).

<sup>262</sup> Note 259 above.

<sup>263</sup> NDoH (note 238 above) 4.6.3.1.

<sup>264</sup> For example, a former councillor in the East Rand in Ekurhuleni was recently arrested for allegedly selling RDP houses in the Tsakane housing development and charged with fraud and corruption. He is alleged to have recruited people to buy RDP houses, receiving deposits ranging from R6 000 to R20 000. “Former Tsakane councillor in court” *The New Age* (23 November 2010).

<sup>265</sup> L Prinsloo “NHBC to crack down on unregistered home builders” *Engineering News* (12 May 2010).

## 6.3 People's Housing Process (2008)

As the state strengthened its role in low-cost housing delivery, a parallel process was underway to increase beneficiary participation in the process by getting them involved in savings and construction. The People's Housing Process (PHP) was adopted by the Minister of Housing in 1998 to assist communities to supervise and drive the housing delivery process by building their homes themselves. The idea of community participation had been part of the White Paper on Housing, reflected in the requirement for a social compact between developers and communities. Despite this provision, the *meaning* of community participation had not been clearly defined and its interpretation varied widely across projects.<sup>266</sup>

The PHP was developed partly in response to lobbying by grassroots organisations, such as the South African Homeless People's Federation (SAHPF), for greater beneficiary participation and pressure from international organisations, such as the UN, which had experience showing that beneficiary participation resulted in more responsive and effective low-cost housing delivery.<sup>267</sup> The PHP aimed to work with NGOs in the housing sector to assist communities in planning and implementing the construction of their own housing settlements through "sweat equity" (i.e. using beneficiaries' labour to build houses) offset against the NHSS savings requirement. This meant that poor households could overcome the affordability barrier and gain access to a house without the long wait to access housing finance. The process was supported by a number of South African development NGOs (who later formed part of a PHP Reference Group to lobby for changes to the PHP) on the basis that it would achieve more response and effective delivery. Some critics have argued, however, that the PHP shifts part of the cost of housing onto the poor and that there is a fundamental dissonance between the collective nature of community-based processes and the individualised – and often random, and therefore individualising – nature of plot allocations by the state.<sup>268</sup>

The argument made by critics is that participation in the PHP is limited to housing construction, with little influence by beneficiaries over key issues like location of housing projects and layout around the existing patterns of land occupation.<sup>269</sup> According to Huchzermeyer, organised communities have not been able to identify and manage infrastructure projects.<sup>270</sup> Another criticism is that through the PHP the state is abrogating its responsibility and shifting the burden of delivery to the poor. There have been instances of effective joint partnership in housing delivery, COHRE acknowledges, such as the NDoH's extensive financial support for partnerships between various levels of government and the Federation of the Urban Poor (FEDUP), which is administered by international NGO Slum/Shack Dwellers International (SDI). Still, COHRE maintains that the PHP process has often failed at the local level. While eThekweni Metropolitan Municipality (City of Durban) saw some early success, resulting in over a thousand houses being built from 2002 to 2004, no houses at all were built through this process in 2005 or 2006 and numbers were negligible in 2007.<sup>271</sup>

In July 2008 the Enhanced People's Housing Process (ePHP) was adopted to replace the old PHP programme. The new ePHP was rolled out in April 2009 and is included in the revised National Housing Code. See subchapter 7.9 below for more on the ePHP.

<sup>266</sup> Charlton & Kihato (note 17 above) 265.

<sup>267</sup> Ibid.

<sup>268</sup> Ibid.

<sup>269</sup> M Huchzermeyer *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (2004) 48.

<sup>270</sup> Ibid.

<sup>271</sup> COHRE (note 206 above) 89-90.

## 6.4 Breaking New Ground (2004)

### 6.4.1 Development of BNG

From 2002 to 2003, the NDoH undertook a comprehensive review of its housing programme after recognising a number of “unintended consequences” of the existing programme. These unanticipated problems included peripheral residential development; poor quality products and settlements; the lack of community participation; the limited secondary low income housing market; corruption and maladministration; a slowdown in delivery; underspent budgets; limited or decreasing public sector participation; the increasing housing backlog; and the continued growth of informal settlements.<sup>272</sup> The review process aimed at providing a new policy direction and establishing a research agenda to inform and support policy decision-making within the housing programme, particularly to counter the dispersal of knowledge and intellectual capacity that had occurred over the previous decade. The review aimed to use the NDoH as a hub to focus and address complex questions of space and economy.

In 2002 there was a marked move towards a more local government-centred and state-driven approach to housing delivery, away from a private developer driven approach.<sup>273</sup> According to Charlton and Kihato, the reasons for this include a combination of the following: a move towards the creation of a strong local state more generally after 1999; the political imperative of local government councillors to gain greater influence over a visible aspect of state delivery; the need for spatial and programmatic alignment with integrated development planning (particularly with respect to the delivery of bulk services); reaction to the negative perceptions of the white construction industry; a concern for getting the best deal for beneficiaries through maximising the value of the subsidy and perceptions of poor construction and abuse by private developers; the withdrawal of private sector actors from low-income housing delivery due to tightening environmental regulations; delays in township registration and transfer of title deeds; and increasing financial risk.<sup>274</sup> Some saw this shift to state control of housing delivery as a positive move that would reduce the interest of the private sector in housing and enable a strong, development-orientated local state.<sup>275</sup> Others, however, argued that the shift was due to the fact that private developers had struggled to make profits from low-cost housing projects and wanted to be free of such obligations.<sup>276</sup> The ability of the already overburdened and under-capacitated local government sphere to take on this role was questioned. Some commentators cautioned that the motivation for the shift included a desire for local councillors to gain control over housing developments, expressing concern that this could lead to clientelism and patronage, undermining the development and allocation of housing on the basis of need.<sup>277</sup>

In 2003 a new research chief directorate was established at the NDoH as part of an effort to develop an in-house research culture to feed into policy-making and review. It undertook an intensive process of consultation with housing stakeholders at national, provincial and local levels, as well as a survey of beneficiaries about the impact of the NHSS. Six research papers were commissioned on the appropriateness of current policy, the role of the private sector in delivery and international shifts in shelter and settlement policy. Research focused on concepts such as housing as an asset, integrated development and sustainable human settlements. The empirical evidence gathered reinforced the recognition that major gaps existed in the policy.<sup>278</sup>

<sup>272</sup> NDoH “Presentation on BNG to the Programme in Housing Policy Development and Management” P&DM (January 2008).

<sup>273</sup> See amendments made to the Housing Act in subchapter 2.2.1 of this guide above.

<sup>274</sup> Charlton & Kihato (note 17 above) 263-264.

<sup>275</sup> Ibid.

<sup>276</sup> Ibid.

<sup>277</sup> COHRE (note 206 above) 88.

<sup>278</sup> Charlton & Kihato (note 17 above) 260.

The review process was meant to lay the foundation for a new housing policy and research agenda and to contribute to a “second generation” housing policy for the next 10 years. According to Charlton and Kihato, however, these outcomes did not occur as envisioned. A Housing Summit in November 2003, where it was expected that the Minister of Housing would unveil a new strategy, was downgraded to a “listening process.” They speculate that this may have been because a national election was around the corner and it was politically difficult to introduce new policy at the time. In early 2004, the NDoH, in consultation with the Presidency and the National Treasury, produced a “turn-around strategy”, which contained elements of a new policy direction based on the research process. However this strategy was never implemented and did not significantly shift the NDoH’s thinking.<sup>279</sup> At best, the research introduced pro-poor language into government discourse, which some argued was “far ahead of practice.”<sup>280</sup>

There is some debate as to precisely how new and innovative Breaking New Ground actually is. Charlton and Kihato assert that BNG did not clearly introduce any new policy direction and should be understood within the context of the President’s proposals on housing policy at the time. In his 2004 State of the Nation address, President Thabo Mbeki promised that the NDoH would present to the Cabinet a policy document that addressed human settlements and social infrastructure within three months. There was thus clear *political* pressure for the department to “generate a new document that engaged with socio-economic issues around human settlements.”<sup>281</sup>

It has been argued that BNG lacks clear strategic direction and that the policy is “confusing and disappointing” given the extensive research and consultation process that occurred prior to its development.<sup>282</sup> As mentioned above, the final document reflected surprisingly little of the review process and lacked the involvement of key officials who drove the process in 2002 and 2003.<sup>283</sup> Instead, 19 different business plans from various sectoral programmes within the department were amalgamated and given to a “consultant with links to the World Bank” to consolidate. According to Charlton and Kihato, “despite this refinement the document does not clearly demonstrate a unifying conceptual foundation which offers policy direction into the future.”<sup>284</sup>

The influence of international organisations and their discourse is evident in South Africa’s housing policy development, particularly in relation to informal settlement policy. The determination to “eradicate informal settlements”, referred to by former Minister of Housing Lindiwe Sisulu as the “war against shacks”, corresponds with the Cities Alliance’s Cities without Slums initiative and there has been a lingering misinterpretation of this target by the NDoH.<sup>285</sup> While former Minister of Housing Lindiwe Sisulu became the champion of BNG after 2004, it was the high level policy team appointed under her predecessor Bridget Mabandla, which contributed to some of the more progressive aspects in the new policy, particularly around *in situ* informal settlement upgrading. According to Huchzermeyer, “there is little evidence that Minister Sisulu ever aligned herself to its [BNG’s] innovations.”<sup>286</sup> As various academics and housing practitioners have pointed out, this “eradication” discourse is somewhat confused with the political discourse that focuses on the “inferiority of informality” and the need to eliminate the blight of shacks and their concomitant association with poverty. Such a discourse is opposed to the notion of upgrading settlements through the provision of services and tenure in order to integrate settlements into “the broader urban fabric to overcome spatial, social and economic exclusion.”<sup>287</sup>

<sup>279</sup> Ibid 261.

<sup>280</sup> Ibid.

<sup>281</sup> Ibid 256.

<sup>282</sup> Ibid 259.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

<sup>285</sup> Ibid 258.

<sup>286</sup> M Huchzermeyer “Chapter Six: South Africa’s drive to eradicate informal settlements by 2014” in *Cities with slums: from informal settlement eradication to a right to the city* (provisional title), draft manuscript (forthcoming, UCT Press).

<sup>287</sup> NDoH (note 34 above) 3.1.

## 6.4.2 BNG – a new and coherent policy direction?

Moving onto the content of the policy amendment/refinement document, BNG intended to shift away from a focus on *quantity* of houses delivered to *quality* (size and workmanship of housing product, settlement design, alternative technology, etc) and *choice* (tenure type, location, etc). It aimed to increase the rate of delivery of well-located housing of acceptable quality through a variety of innovative and demand-driven housing programmes and projects. BNG was to build on the principles of the White Paper on Housing but also supplement existing mechanisms and instruments to ensure more responsive, flexible and effective delivery. It also sought to place increased emphasis on the *process* of housing delivery, i.e. the planning, engagement and the long-term *sustainability* of the housing environment.<sup>288</sup> Its key objective is to “eradicate all informal settlements by 2014.”<sup>289</sup> According to Huchzermeyer, where the political leadership of the post-apartheid state chose first to focus simplistically on the delivery of one million houses in its first term, by the end of its fourth term the target was the eradication of slums or informal settlements.<sup>290</sup>

BNG acknowledged the change in the nature of the housing demand, the increasing average annual population growth, the drop in average household size, significant regional differences, increasing urbanisation, skewed growth of the residential property market, growth in unemployment and a growing housing backlog despite substantial delivery over the previous decade. It recognised that the lack of affordable, well-located land for low-cost housing had led to development on the periphery of existing urban areas, achieving limited integration. According to BNG:

“ the dominant production of single houses on single plots in distant locations with initially weak socio-economic infrastructure is inflexible to local dynamics and changes in demand... the new human settlements plan moves away from the current commoditised focus of housing delivery towards more responsive mechanisms which addresses the multi-dimensional needs of sustainable human settlements.”<sup>291</sup>

Further, BNG acknowledged that subsidised houses had not in fact become the valuable assets envisioned in earlier policy.<sup>292</sup> Moreover, beneficiaries’ inability to pay for municipal services and taxes meant that municipalities viewed such housing projects as liabilities, and were not particularly responsive to the national department’s more progressive intentions around housing. The BNG document frames housing delivery more explicitly as a catalyst for achieving a set of broad socio-economic goals. Thus, BNG aimed to move from a supply-centred model to a model driven by the needs of those on the ground i.e. demand driven approach.<sup>293</sup>

In BNG, the income band of those benefitting from the programmes was expanded to include those earning up to R7 000 a month. In section 2.3.1 of BNG, it states that in order to promote the participation and contribution of the private sector in housing construction, the existing three subsidy bands are to be collapsed to enable households earning below R3 500 to access a uniform subsidy amount. This mechanism, according to the policy, “will address housing bottlenecks in respect of households earning above R1 500 and will also substantially increase the number of households who qualify for a full housing subsidy.”<sup>294</sup>

Despite these aims, BNG has been criticised for not fully addressing the key weaknesses with the previous policy direction, as identified in the NDoH’s research process, or offering clear direction on the difficult political issues of land ownership, the land market and rights around property values. Charlton and Kihato argue that, “although the programme strives for broader outcomes, key indicators of performance appear to remain

<sup>288</sup> NDoH (note 34 above) 4.

<sup>289</sup> National Treasury (note 19 above) 95.

<sup>290</sup> Huchzermeyer (note 119 above) 144.

<sup>291</sup> NDoH (note 34 above) 2.2.

<sup>292</sup> COHRE (note 206 above) 95.

<sup>293</sup> NDoH (note 34 above) 3.

<sup>294</sup> Ibid 5.2.



largely quantitative, focused around numbers of houses produced and budgets spent.<sup>295</sup> Further, some of the weaknesses of housing policy to date exist *outside* the ambit of the government organs responsible for housing, and there is a worrying lack of alignment between the current focus in government on the contribution of housing to poverty alleviation and the ability of housing policy to achieve these aims.

Further, despite the progressive nature of BNG in offering a choice of housing options and a demand-driven approach, its stated intent to offer a greater choice of tenure, location or affordability has not been realised significantly to date.<sup>296</sup> The DHS and provincial government departments still prioritise fully subsidised, low-density, detached, freehold family accommodation over other delivery modes, tenure systems and accommodation choices. According to a recent report by Urban LandMark and the SHF, this is not a justifiable response to South Africa's diverse and changing demographic composition.<sup>297</sup> Current housing policy has made little impact on stimulating the supply of rental accommodation affordable to lower-income households (earning less than R3 500 per month). Although the Social Housing Act requires a proportion of all stock to be affordable to households in the two lower subsidy bands (earning R1 500 to R2 500 per month and R2 500 to R3 500 per month), the scale of delivery in these bands is limited (see subchapter 7.14 of this guide on the revised Social Housing Programme). According to Gardner, there are increasingly better understood and more clearly expressed requirements for alternative tenure arrangements, such as rental, and intermediate accommodation options, such as smaller-scale, better located units. For example, new private and social housing inner-city accommodation providers indicate very large demand for more affordable smaller units.<sup>298</sup>

According to Rust, it is evident that the:

« Majority of households in the worst housing conditions (squatting, backyard shack and backyard room rental) are very poor households. It is also clear that pushing them into fully-subsidised, minimum-standard owned accommodation may not suit them from a number of perspectives: their choice of tenure (rental versus ownership), their ability to afford owned accommodation (both capital and running costs), the ability to access the (albeit significant but still insufficient) newly developed subsidised stock and the suitability of this accommodation given their household size.<sup>299</sup> »

The following three subchapters present some of the key areas of focus in BNG, highlighting where it departs from the White Paper on Housing in its approach. The three areas this report considers in greater detail are: the role of local government in a demand-driven approach; the approach to informal settlement upgrading; and urban renewal and inner city regeneration.

### 6.4.2.1 Role of local government in a demand-driven approach

A greater role for local government in the housing delivery process is envisioned in BNG, because municipalities are seen to be "closer to the people" and better able to respond to housing demand more effectively. According to BNG, the previous housing programme granted private developers a leading role in the delivery of housing within a supply-driven framework. In contrast, the new housing plan shifts towards a more demand-driven process. The plan accordingly increases its emphasis on the role of the state in determining the *location* and *nature of housing* to link the demand for and supply of housing. Municipalities will assume overall responsibility for housing programmes in their areas of jurisdiction through a greater devolution of responsibility and resources to them. The document assumes that municipalities will proactively take up their housing responsibilities given clear guidelines and resourcing from the national sphere.

<sup>295</sup> Charlton & Kihato (note 17 above) 259.

<sup>296</sup> Urban LandMark & SHF (note 6 above) 12.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid 13.

<sup>299</sup> K Rust "Analysis of South Africa's Housing Sector Performance" FinMark Trust (December 2006) 15.

## Accreditation

One of the interventions under BNG is the *accreditation* of municipalities, particularly the metropolitan municipalities and secondary cities.<sup>300</sup> This involves municipalities proving their capacity to plan, implement and maintain projects and programmes that are aligned with their IDPs, amongst other requirements. It was envisioned that the accreditation of municipalities will assist them to plan better by allocating funding for three years and concluding payment schedules with the provinces. Accreditation is also meant to improve the transparency of municipal allocations.

The document states that in order to be accredited, municipalities must establish housing departments or units with enough staff to execute projects according to existing requirements; establish cross-sectoral Sustainable Human Settlements Planning Committees; submit complete inventories of land owned by municipalities, including land suitable for low-cost housing; and submit a council resolution indicating the willingness of the municipality to meet the national department's anti-corruption, monitoring and reporting requirements. Municipalities must develop enhanced housing chapters for the IDPs, which include providing a housing needs assessment; the identification, surveying and prioritisation of informal settlements; the identification of well-located land for housing; the identification of areas for densification; the linkages between housing and urban renewal; and the integration of housing, planning and transportation frameworks. Community participation is a key component of this process. Successfully accredited municipalities are empowered to manage the full range of housing instruments within their areas of jurisdiction and take control of the demand-driven housing process envisioned in BNG.<sup>301</sup>

See subchapter 7.4 below for more on the accreditation of municipalities in the revised National Housing Code.

### 6.4.2.2 'New' approach to informal settlements – in situ upgrading vs. eradication

According to Charlton, informal settlement upgrading, although not widespread throughout the country, had been practiced since the 1990s and some successful *in situ* upgrading projects occurred post-1994 and before Breaking New Ground. Given that during the early part of the housing programme upgrading was practiced and was recognised by the NDoH and politicians, she argues that an important question to ask is what has led to the idea that upgrading is a new phenomenon and why upgrading is equated with relocation.<sup>302</sup> The latter idea remains despite the fact that Breaking New Ground refers to "progressive informal settlement eradication" and explicitly states that a phased *in situ* upgrading approach in desirable locations is favoured. Further, BNG recommends that informal settlement eradication occurs through upgrading in line with international best practice, and relocation is only to occur when development is not possible or desirable. BNG recognises that the existing housing programme will not secure the upgrading of informal settlements.<sup>303</sup> It therefore articulates the need to shift the official policy response to informal settlements from one of "conflict or neglect", to one of "integration and co-operation, leading to the stabilization and integration of these areas into the broader urban fabric."<sup>304</sup>

<sup>300</sup> See note 129 above.

<sup>301</sup> NDoH (note 34 above) 5.2.

<sup>302</sup> Personal correspondence with S Charlton (31 January 2011).

<sup>303</sup> NDoH (note 34 above) 4.1.

<sup>304</sup> Ibid.

BNG refers to nine informal settlement upgrading pilot projects, with the N2 Gateway project in Cape Town being the lead project.<sup>305</sup> The policy amendment introduces a new informal settlement upgrading funding mechanism, which would support upgrading on an area-wide basis, maintain fragile community networks, minimise disruption and enhance community participation through a phased process.<sup>306</sup> Chapter 13 of the National Housing Code, the Upgrading of Informal Settlements Programme was developed in line with these principles in 2004.<sup>307</sup> BNG also recognises the need to redefine the nature, focus and content of the PHP in line with some of the contradictions inherent in the process and to adopt an area-wide or community approach.<sup>308</sup>

According to Huchzermeyer, despite there being a legitimately entrenched legal policy on doing away with informal settlements which focuses exclusively on indirect measures - i.e. Chapter 13, which seeks to address the structural causes of informal settlement formation, particularly in relation to access to land access and services and the provision of housing – the dominant politics of housing has remained focused on pushing for direct efforts at eradicating informal settlements.<sup>309</sup> The rationale of the former approach is that, “if followed through and accompanied by other important aspects of socio-economic transformation set out in the Constitution, it will reduce and eventually dissolve the need for unplanned, unauthorized and sub-standard housing solutions” and ensure minimal disruption to the lives of those who have had to resort to living in informal settlements.<sup>310</sup> However, as Huchzermeyer argues, the South African government has pursued the latter approach and has consistently misinterpreted the MDG Goal 7 Target 11 - “[b]y 2020 to have achieved a significant improvement in the lives of at least 100 million slum dwellers” (and its slogan “Cities Without Slums”) - to legitimise a direct and often repressive approach to informal settlement eradication dominated by the use of force.<sup>311</sup>

See subchapter 7.10 of this guide below for more on the revised informal settlements upgrading programme (UISP) contained in the National Housing Code, and problems with the implementation of this BNG priority area to date.

### 6.4.2.3 Urban renewal and inner city regeneration

With regard to urban renewal, BNG states that the policy encourages the promotion of affordable inner city housing by municipalities to ensure the inclusion of poor inhabitants in urban renewal initiatives. According to the policy document:

“ Inner city areas are traditionally integrated into the benefits of the urban economy, which are close to transport hubs and commercial enterprise and work localities. They also have higher order social amenities including hospitals, libraries and galleries. They accordingly provide a key focus for urban restructuring.”<sup>312</sup>

The policy envisions that the use of the social housing interventions, as well as the new incentive to facilitate loan finance for individuals earning above R3 500 per month (referred to as the “middle income group”), will create demand for well-located housing and create an incentive for the redevelopment of inner city properties.

<sup>305</sup> This pilot project was the subject of a Constitutional Court challenge in the *Joe Slovo* case, when the implementing agent attempted to evict the 4 000 families from the informal settlement in order to relocate them to Delft in what was *not* an *in situ* upgrade. See subchapter 5.4 above for more on the case.

<sup>306</sup> NDoH (note 34 above) 4.1.

<sup>307</sup> Chapter 13 is available online at <<http://web.wits.ac.za/NR/rdonlyres/74FBBB09-90B0-40CE-A04D-A60BCA2E18C4/0/Ch13finalversion19Oct2004InfSettleUpgrProgr.pdf>>

<sup>308</sup> NDoH (note 34 above) 4.1. See subchapter 7.9 of this guide for more on the revised PHP.

<sup>309</sup> Huchzermeyer (note 119 above) 130.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid* 131. This has also occurred through the introduction of repressive provincial legislation. See subchapter 2.2 of this guide above for more on the KZN Slums Act.

<sup>312</sup> NDoH (note 34 above) 3.5 (footnote).

It places great emphasis on rental housing, through the Social Housing Programme, in order to enhance the mobility of people and promote a non-racial and integrated society. It also introduces a new funding mechanism to enhance delivery and accommodate a mix of different social housing forms including medium-density housing, communal housing, transitional housing and hostel redevelopment.<sup>313</sup> BNG states that, “social housing interventions may also be used to facilitate the acquisition, rehabilitation and conversion of vacant office blocks and other vacant/dilapidated buildings as part of a broader urban renewal strategy. Social housing developments should be dovetailed with other initiatives such municipal redevelopment projects and the urban development zone tax incentive offered by SARS.”<sup>314</sup> The stated aim is to increase demand for low-income rental housing. It appears, however, that the real focus is on access to loan finance for the middle income group. This aim is premised on BNG’s assumption that the “re-introduction of demand-driven individual subsidies will have the effect of increasing effective demand for existing, well-located property” and that “this is expected to provide an incentive for the redevelopment of properties within inner city areas.”<sup>315</sup>

There is a major flaw in the BNG’s conceptualisation of the social housing instrument as a panacea for urban regeneration and low-income inner city housing. The shortcoming exists because social housing projects (where they have been built) often fail to match the income affordability levels of the majority of individuals and households in inner city areas. The percentage of social housing units built to accommodate lower-income households is negligible given the scale of demand in a city like Johannesburg, for example. Indeed, the revised Social Housing Programme fully acknowledges its shortcomings in this respect (see subchapter 7.14 of this guide below).

Inner city evictions from private rental accommodation, as well as from so-called ‘bad buildings’, together with exploitation in private rental accommodation are commonplace in Johannesburg’s inner city.<sup>316</sup> In part, this situation is due to the huge demand for low-income rental housing, the extremely limited supply of state-subsidised accommodation in the inner city and the lack of public housing stock or rent control in buildings.<sup>317</sup> As a result, there is a crisis in inner city buildings, where access to services are denied and upgrading has been sidelined in favour of market-driven ‘regeneration’ initiatives by the city in partnership with the private sector.<sup>318</sup> See subchapter 5.3 above for more on this in relation to the *Olivia Road* case.

The BNG policy document also acknowledged the need for more research on backyard rental accommodation or small-scale rental, looking into its scale, conditions, rental charges and facilities.<sup>319</sup> Much of this research has been conducted by the SHF, often in collaboration with Urban LandMark, over the past few years. This work has generated reports on small-scale private rental, supply and demand of rental accommodation and shack rentals in South Africa as well as reports and reviews of the rental market in various provinces and social housing projects around the country.<sup>320</sup>

<sup>313</sup> Ibid 4.2.

<sup>314</sup> Ibid 3.5.

<sup>315</sup> Ibid.

<sup>316</sup> According to the Gauteng Rental Housing Tribunal in a 2009/2009 systems report, since its inception there were 1 851 disputes in Region 8 (the inner city of Johannesburg) out of a total 5 788 disputes in the whole of the Gauteng province. i.e. 32 percent. 730 of these were eviction disputes. Gauteng Rental Housing Tribunal “Systems Report” (21 October 2008).

<sup>317</sup> According to South Africa’s 2007 MDG Mid-Term Country Report, because inner city dwellings with insecure tenure are difficult to isolate, the inner city was excluded from South Africa’s discussion of slums. NDoH (note 87 above) 8.

<sup>318</sup> See SHF & Urban LandMark “An Investigation into an Apparent Increase in Evictions from Private Rental Housing: Report and Position Paper” (June 2010).

<sup>319</sup> NDoH (note 34 above) section 4.2.

<sup>320</sup> See the SHF website at <www.shf.org.za> for all of these publications online. In 2010 the SHF closed down and is transitioning to become the new SHRA, as per the Social Housing Act. Given the importance of research in policy-making and the need to maintain skilled personnel for continuity in housing policy development and implementation, it is cause for concern that institutional change is occurring now in such a critical and rapidly developing area of housing policy. It remains to be seen how research conducted during this process will be taken forward in the future.

## 6.5 Inclusionary Housing Policy (2007)

In September 2005, at a Housing Indaba in Cape Town, the government and the private sector - including banks and property developers - agreed to accelerate housing delivery in order to address the housing backlog. This newly formed collaboration between the public and private sectors has resulted in developers agreeing, in principle, to set aside a percentage of the total value of the commercially driven housing developments, in a certain price range, for investment in the low-cost housing sector. More specifically, the Minister of Housing and key role-players in the housing industry signed a Social Contract for Rapid Housing Delivery which stated that “every commercial development including housing developments that are not directed at those earning R1 500 or less, spend a minimum of 20 percent on the construction of homes within human settlements for those who qualify for government subsidies.”<sup>321</sup> This initial decision was later amended and extended to the R3 500 to R7 000 per month income bracket, due to affordability issues.<sup>322</sup>

The 2007 Framework for an Inclusionary Housing Policy (IHP) in South Africa emanates from this process and aims to achieve a “more balanced outcome of built environment creation in the direction of more racially integrated and income inclusive residential environments.”<sup>323</sup> Inclusionary housing in South Africa means:

“ the harnessing of private initiative in its pursuit of housing delivery to middle/higher income households to also provide (include) affordable housing opportunities in order to achieve a better socio-economic balance in residential developments and also contribute to the supply of affordable housing.”<sup>324</sup>

Its goal is to incentivise or compel the private sector to provide accommodation opportunities for low-income and lower-middle income households (often black households) in areas from which they might otherwise be excluded because of the dynamics of the land market.<sup>325</sup> It also seeks to boost the supply of affordable rental<sup>326</sup> and ownership<sup>327</sup> housing.

The IHP proposes two distinct but complementary strategies: a Voluntary Pro-Active Deal-Driven (VPADD) component and a component referred to as the Town Planning Compliant (TPC) approach. In the former voluntary approach, municipalities identify inclusionary housing projects that they want to actively pursue with private sector partners, possibly using local government-owned land and other incentives. In the compulsory but incentive-linked regulation-based approach, rezoning or subdivision approval for the private sector would be contingent on meeting specified inclusionary requirements in return for certain development rights. There would be added incentives that include: public investment in bulk and connector infrastructure, density bonuses and the allowance of multi-story units and some commercial rights. However, 30 percent of units developed in the project would have to be affordable i.e. the VPADD approach is based on individual projects, while the TPC is based on town planning and development control processes. The latter is a more controversial approach and the IHP states that it would be phased in. The intention is that these two components would allow for a win-win

<sup>321</sup> D Smit & J Purchase “Review of the International Experience with Inclusionary Housing Programmes: Implications for South Africa” Prepared for the NDoH (2 February 2006) 1.

<sup>322</sup> Centre for Urban and Built Environment Studies (CUBES) “Monthly Policy Update – Prepared for the South African Property Owners Association” (2007) 5.

<sup>323</sup> DHS “Presentation to the Portfolio Committee: An overview of the current Inclusionary Housing Policy and its development progress” (3 December 2009).

<sup>324</sup> NDoH “Framework for an Inclusionary Housing Policy (IHP) in South Africa” (June 2007) 9.

<sup>325</sup> The requirements for beneficiaries are that they are older than 18 years of age, are lawfully resident in South Africa and have not benefited previously from access to an inclusionary housing unit. Ibid 10.

<sup>326</sup> Affordable housing for rent is the range between the rent someone earning between R1 500 and R7 500 per month can pay, which implies a range of R600 to R3 000 a month. Ibid 9.

<sup>327</sup> Affordable housing for ownership refers to the range between the current cost of a fully subsidised RDP house and the top of the “affordable housing range” (which in 2007 was between R50 000 and R350 000). Ibid.

situation in which the private sector with state support could ensure the provision of low-income rental and ownership options in well-located areas.

While the idea of inclusionary housing has been widely applauded, it has been slow to get off the ground and has been confined to urban and metropolitan areas in its limited implementation. According to Smit and Purchase, there have been misgivings about continued spatial skewing because the development of such projects has only been in urban areas and very few municipalities have the capacity required to administer the complex programme.<sup>328</sup> Gauteng and the Western Cape have implemented inclusionary housing projects and Johannesburg and eThekweni have lead the way in requiring developers to include affordable housing in their projects. In Johannesburg these much lauded projects have generally involved large-scale greenfields developments with additional private funding e.g. Cosmo City<sup>329</sup> in the north of Johannesburg and Brickfields<sup>330</sup> in Newtown, Johannesburg, as well as the N2 Gateway project in Cape Town. Huchzermeyer argues that the impact of these projects on urban integration and inclusion has remained negligible.<sup>331</sup>

Further, tensions have arisen from different income bands and cross-subsidisation within housing developments and buildings. Other concerns are that the capacity and level of sophistication required to model viable projects and implement them successfully may outweigh their limited impact, and that the impact of the policy on the private sector development market may be negative. Another critical factor is that the size of the middle- and upper-income base is small in South Africa (so the driver of the process is small). Therefore, while inclusionary housing is an important concept “not too much should be expected regarding the scale of impact.”<sup>332</sup> Indeed, inclusionary housing will contribute very little to alleviating the crisis of affordability across the entire housing spectrum in South Africa given the affordability levels of the rental and ownership housing it targets.

There is as yet no legislation to give effect to the IHP and it has been stated that the policy may remain policy for a while, until further consultation and review takes place particularly on the constitutionality of any compulsory approach that is pursued.

## 6.6 National Housing Code (2000, revised in 2009)

The National Housing Code was first published on 21 October 2000 in line with section 4 of the Housing Act. It set out the national housing policy of South Africa, together with procedural guidelines for its effective implementation through the inclusion of the National Housing Programmes. The Code’s vision for housing in South Africa echoes the definition of “housing development” as outlined in the Housing Act. According to the 2000 Code, government’s housing goal is “subject to fiscal affordability, to increase housing delivery on a sustainable basis to a peak level of 350 000 units per annum until the housing backlog is overcome.”<sup>333</sup>

In 2004, BNG made provision for a new National Housing Code to be published, with the intention to align and cohere with the policy so that its goals and aims can be implemented. The Code is also meant to accommodate changes since 2000 and to convert the National Housing Programmes into flexible provisions and guidelines. Accordingly, the revised National Housing Code was adopted and published in February 2009 and it sets the underlying policy principles, guidelines and norms and standards which apply to government’s various housing assistance programmes, some which have been newly introduced and others updated. A few old

<sup>328</sup> Smit & Purchase (note 321 above) 27.

<sup>329</sup> Cosmo City is a mixed housing development which consists of approximately 12 500 housing units including 5 000 fully subsidised RDP units, 3 000 partially subsidised units, 1 000 rental apartments and 3 300 fully bonded houses. It was initiated by the City of Johannesburg in partnership with the Gauteng provincial government and Phase 1 of the project began construction in 2005.

<sup>330</sup> Brickfields is a R97.8-million social housing project in Newtown built by Johannesburg Housing Company (JHC) and launched in 2005. It provides 742 rental flats of various sizes to qualifying tenants.

<sup>331</sup> Huchzermeyer (note 119 above) 132.

<sup>332</sup> Smit & Purchase (note 321 above) 27.

<sup>333</sup> NDoH “The User Friendly Guide to the National Housing Code” (2000) 5.

programmes were removed from the new Code including the Project Linked Subsidy Programme, Relocation Assistance Programme, Blocked Projects Programme and Rectification of RDP Stock 1994-2002 Programme (see subchapter 7.7.1 below for recent developments around this programme); however, these still remain valid and the rules of the 2000 Code apply.

The National Housing Code is intended to be revised on an annual basis in order to ensure that it keeps abreast of legislative or policy changes. It is wide-ranging and addresses a variety of housing programmes mentioned in BNG, as well as removing old programmes and including some new ones. It is aimed at simplifying the implementation of housing projects by being less prescriptive while providing clear guidelines. However at over 30 volumes it is extremely dense and difficult to navigate for those wishing for an informed snapshot of housing policy and programmes in South Africa which outlines policy aims, targeted groups and some of the current challenges with implementation. The following chapter provides this kind of summary of the national housing programmes.

# chapter 7 | National Housing Programmes: Policy vs Implementation

Chapter 2.4 of this guide briefly outlined the National Housing Code. This chapter provides a summary of the National Housing Programmes and subsidy mechanisms included in the new Code.<sup>334</sup> The DHS identifies three programmes as core programmes for future housing delivery - the IRDP, UISP and Social/Rental Housing Programme. Where certain key programmes – those which match to the greatest housing need in South Africa and target the most marginalised - have not been taken up in lieu of other ‘easy target’ programmes in the past, or where there are important fault lines around certain programmes and their implementation, these will be analysed in greater detail. Relevant recent developments around specific programmes are also discussed and unless otherwise stated, information has been summarised from the housing programmes outlined in the Code.

## 7.1 Individual Housing Subsidy Programme

This Individual Housing Subsidy Programme<sup>335</sup> provides access to state assistance where qualifying households wish to acquire an existing house or a vacant serviced residential stand, linked to a small-medium construction contract through an approved home loan i.e. properties that are available in the normal secondary housing market or those that have been developed as part of projects not financed through one of the National Housing Programmes. There is also an option that does not include mortgage finance. The Programme is only available to those acquiring residential properties in registered individual ownership. The Programme encourages the growth of the secondary residential property market, an objective of BNG.

Beneficiaries are those who qualify in terms of the NHSS (those who have acquired a stand before *without* state assistance and require a subsidy for a top-structure are also eligible), however beneficiaries of Credit Linked Subsidies will be subject to additional criteria as stipulated by the financial institution. The Individual Consolidation Subsidy Programme (see chapter 7.11 of this guide below for more on this programme) can be accessed by beneficiaries who have previously received state-financed serviced stands i.e. through the Land Restitution Programme.

The Programme provides access to funding for two categories:

- **Credit Linked Subsidies:** In cases where the applicant can afford mortgage loan finance, the applicant may apply for a subsidy that is linked to credit from financial institutions which are approved by the MEC. Applicants apply to the financial institutions directly, the latter acting as agents of the MEC.
- **Non-Credit Linked Subsidies:** In cases where the applicant cannot afford mortgage loan finance or does not want to access such finance, they may apply for a subsidy to acquire an existing house entirely out of the subsidy and may supplement this with other funds that may be available. Qualifying persons who bought vacant serviced stands from their own resources and need assistance to construct a house may also apply these subsidies.

Credit Linked Subsidies are administered on behalf of the MEC by banks, financial institutions and other approved providers of credit who have concluded agreements with the MEC and who act as agents of the MEC. Subsidy

<sup>334</sup> Due to the urban focus of this report the rural interventions – Communal Land Rights Programme and Farm Residents Subsidy Programme – have not been included in this analysis.

<sup>335</sup> DHS “Individual Subsidy Programme” Part 3 Vol 3 of the National Housing Code (2009).



applications are submitted directly to financial institutions (lenders) who process the applications, consider the loan application against its credit criteria and submit the applications for approval to the MEC. The MEC pays the subsidy to the lender upfront once it has been approved, or alternatively in terms of an agreed guarantee scheme (see subchapter 4.2.3 of this guide for more on the proposed Housing Guarantee Scheme).

Non-Credit Linked Subsidy applications are submitted to the provincial department together with a conditional deed of sale for the relevant property for evaluation, and require the MEC's approval. If successful, the payment of the approved subsidy funding is administered in terms of a guarantee issued by the MEC that the approved subsidy will be paid to the seller of the stand when registration of the property in the name of the subsidy beneficiary has taken place. In the case of the Developer Driven Individual Subsidy - where small-scale contractors apply for the purchase of vacant serviced stands and the construction of a limited number of houses on such stands for qualifying beneficiaries - the approved subsidy amount is paid as per agreement between the MEC and the small-scale contractor. Generally, 50 percent of the subsidy is paid on registration of transfer of the serviced stand in the name of the beneficiary and the balance is paid after the completion of the house to the satisfaction of the provincial department. Proof of completion of the house takes the form of a "happy letter" signed by the beneficiary as well as an inspection certificate.

The allocation of subsidies is dependent on financial resources available. The current subsidy quantum is R55 706. The MEC can withdraw both Credit and Non-Credit Linked Subsidies if properties are not transferred within three months from the date when the provincial department pays the subsidy amount to the conveyancer or financial institution.

## 7.2 Enhanced Extended Discount Benefit Scheme (EEDBS)

The Enhanced Extended Discount Benefit Scheme (EEDBS)<sup>336</sup> replaces the old Discount Benefit Scheme (DBS), which was found to have problems with implementation. The EEDBS is intended to stimulate and facilitate the transfer of pre-1994 housing stock to qualifying beneficiaries/occupants. It assists persons to acquire state-financed rental housing and allows existing sales debtors to settle the balance on purchase prices of properties acquired from the public sector or to settle publicly financed credit that had been used for housing purposes. The Programme applies to state-financed properties first occupied before 1 July 1993, and stands or units contracted for by 30 June 1993, and allocated to individuals before 15 March 1994 (when the NHSS was implemented). The EEDBS is intended to allow households that had been provided with state-funded and managed housing stock in the pre-1994 period the opportunity to take ownership of the units in which they had lived.

The Programme is accessible to a number of people, as outlined in the policy framework, including those who (in terms of the framework) have a direct housing arrangement with the state or have an outstanding debt with the municipality or the provincial department. The Programme is also available to *de facto* tenants, where the registered tenant cannot be found and the individual and/or household occupying the housing unit is not the registered beneficiary/tenant but can prove that they have either a contract with the legal owner/tenant, or can prove that they have consistently taken on the responsibilities of a tenant and acted accordingly. It applies to housing stock which includes free standing, semi-detached, terraced (row) and duplex houses as well as high rise/low rise flats and communal housing. The subsidy quantum differs between income categories of households and the Individual Subsidy mechanism is utilised. Procedures are put in place for those who do not qualify for the EEDBS, and for dispute resolution between occupiers during the regularisation process.

<sup>336</sup> DHS "Enhanced Extended Discount Benefit Scheme" Part 3 Vol 3 of the National Housing Code (2009).

## 7.3 Provision of Social and Economic Facilities

The Provision of Social and Economic Facilities Programme<sup>337</sup> aims to address the historic problem of non-provision of primary social and economic facilities in housing developments, which occurs due in part to the prioritisation of backlogs in existing settlements by the relevant authorities. Social and economic facilities are publicly-owned collective facilities which include medical clinics, community halls, community parks/playgrounds, taxi ranks, sport facilities, informal trading facilities, and basic ablution facilities for the aforementioned infrastructure. The Programme provides assistance to municipalities which do not have the ability to fund such facilities themselves, and is applicable to both existing and new housing developments as well as within informal settlement upgrading projects. The Programme is aligned with the Expanded Public Works Programme (EPWP). Municipalities take on the role of developer, conduct a needs assessment and apply to the provincial department for funding, where the MEC considers the application and makes a decision on whether to reserve funding for the project.

## 7.4 Accreditation of Municipalities

Consistent with section 156(4) of the Constitution, the accreditation of municipalities to administer National Housing Programmes has been emphasised as a key government priority with a view to “locate the decision-making authority and funding capacity for local development at the most local sphere of government.”<sup>338</sup> While the possibility of accreditation has been in existence since the Housing Act, it has taken 13 years for it to be prioritised. The process entails delegation<sup>339</sup>, and ultimate assignment<sup>340</sup>, of housing functions to municipalities so they are responsible for decision-making with regards to the implementation of National Housing Programmes.<sup>341</sup> In order to be accredited, municipalities must demonstrate sufficient capacity to plan, implement and maintain projects and programmes that are integrated within municipal IDPs. The aim is for accreditation to result in improved efficiencies in the housing delivery process.

There are three levels of accreditation, and municipalities can choose which level they wish to achieve dependent on their own development priorities, housing needs and capacity. For each level there is certain municipal capacity and function required, and accreditation units are to be established at both national and provincial levels to build required capacity as well as to assess municipalities for accreditation along strict criteria. The three levels are:

- **Level One:** beneficiary management, subsidy budget planning and allocation, and priority programme management and administration (delegated functions);
- **Level Two:** all Level One functions as well as full programme management and administration of all national and provincial housing programmes which includes project evaluation and approval, subsidy registration (via the HSS into the NHSDB), programme management (including cash flow projection and management) and technical (construction) quality assurance (delegated functions);
- **Level Three:** all Level One and Level Two functions are formerly assigned and there is the additional responsibility of financial administration including subsidy payment disbursements and financial reporting/reconciliation (all functions are assigned).

<sup>337</sup> DHS “Provision of Social and Economic Facilities” Part 3 Vol 3 of the National Housing Code (2009).

<sup>338</sup> DHS “Accreditation of Municipalities” Part 3 Vol 3 of the National Housing Code (2009) 9.

<sup>339</sup> “Delegation” is not a permanent transfer of functions and does not include the transfer of the authority role nor does it entitle the municipality to legislate on the issue or direct funding from the fiscus. It entails the exercise of a function on behalf of the delegating authority as an “agent” where the ultimate authority still vests in the delegating authority i.e. provincial or national government.

<sup>340</sup> “Assignment” is a permanent transfer of a function which includes the transfer of the authority role. It includes the right to directly receive the funds and assets necessary to perform the function.

<sup>341</sup> Certain functions will be retained at provincial level. These are the approval of extraordinary applications i.e. special approval of non-qualifiers and the administration of the Individual Subsidy Programme (both Credit Linked and Non-Credit Linked Subsidies). DHS (note 338 above) 22-23.

Level One accredited municipalities will identify and plan for local housing programmes and projects and allocate housing subsidy funds from their annual housing subsidy funding allocation. In this regard, Level One accreditation delegates the authority and responsibility to respond to national housing policy directly. They will determine their housing plans which identify the specific programmes and projects to be undertaken within the fiscal year in their municipal area, and will develop specific individual housing project plans for submission to the provincial department for approval. Following this approval, they proceed with implementation on the basis of funding disbursements from the provincial government on a cash flow basis.

Level Two accredited municipalities will have the added delegated responsibility for evaluating and approving specific housing projects against pre-determined project criteria and undertaking the housing subsidy registration function for all national and provincial housing programmes. This requires that municipalities put in place municipal housing subsidy systems that will be the extension of the NHSDB. They will also need to establish their own governance arrangements to allow for the necessary checks and approvals.

Level Three accredited municipalities will have the authority for all Level One and Two functions, and the authority and responsibility for the financial administration of housing development in their jurisdiction. The municipal fund allocation will be disbursed on a cash flow basis to the accredited municipality directly from the DHS. The municipality will report directly to the DHS in respect of housing draw-downs and financial reconciliation, and will provide a regular financial reconciliation report to the provincial department on their progress in respect of delivery.

#### 7.4.1 Problems with the accreditation process to date

Accreditation of municipalities was expected to occur over ten years according to BNG, beginning in December 2004 with nine municipalities and followed by 20 more in year two until all 284 municipalities had been accredited.<sup>342</sup> In September 2005, the Housing MinMEC approved the Policy Framework and Guidelines for the accreditation of municipalities. Following this, the Housing MinMEC had several deliberations on the implementation of the municipal accreditation programme and on 16 January 2008 a joint meeting of the Housing and Local Government MinMEC was held which recommended a “differentiated approach to accreditation of municipalities with a view to fast-tracking the accreditation of metropolitan municipalities to level two not later than June 2010.” This required that the necessary expertise be assembled to assist provinces to undertake the capacity and compliance audit of the accreditation of priority municipalities before functions are delegated.<sup>343</sup>

According to the 2008/2009 NDoH Annual Report, 18 municipalities applied for Level One accreditation as per the approved Municipal Accreditation Framework.<sup>344</sup> In June 2009, the DHS established the municipal accreditation Capacity and Compliance Assessment Panel (CCAP) to assess the existing capacity of priority municipalities to perform the housing function in terms of the municipal accreditation framework. The CCAP concluded assessments in all six metropolitan municipalities as well as three local municipalities. Out of 18 prioritised municipalities<sup>345</sup>, eight were still to be assessed in the financial year 2010/2011. According to the Annual Report 2008/2009, as of April 2010 only five municipalities – Polokwane, Emalahleni, Buffalo City, Nelson Mandela Bay and eThekweni – had been granted Level One accreditation, and the provincial housing departments were facilitating the transfer of accredited functions to these municipalities. The DHS hopes that the CCAP will assist in fast-tracking the Level Two accreditation of all the metropolitan municipalities. In his 2010

<sup>342</sup> NDoH (note 34 above) 5.2.

<sup>343</sup> DHS “Terms of Reference - Establishment of Municipal Accreditation: Capacity and Compliance Assessment Panel” (19 November 2010).

<sup>344</sup> NDoH “Annual Report 2008/2009” 66.

<sup>345</sup> According to the DHS, in December 2009 priority municipalities included the six metropolitan municipalities (see note 129 above for a list of the metros); seven local municipalities: Buffalo City Municipality, Emalahleni Local Municipality, Rustenburg Local Municipality, Mangaung Local Municipality, Polokwane Municipality, Sol Plaatje Municipality and Emthanjeni Municipality; as well as five municipalities in the Northern Cape: i!Khara Hais Local Municipality, Pixley ka Seme District Municipality, Frances Baard District Municipality, John Taolo Gaetsiwe District Municipality and Namaqua District Municipality. Note 123 above, 25.

Budget Vote Speech, Human Settlements Minister Tokyo Sexwale announced that all six metros and four local municipalities had been assessed to determine their readiness for accreditation, and further assessments were being undertaken to bring the total of prioritised municipalities to 27 in line with Outcome 8 of the presidential outcomes.<sup>346</sup>

Municipalities appear eager to be accredited to get around some of the problems of inter-governmental relations and the dominant role of the provinces in housing delivery. These inter-governmental problems, from the municipal perspective, particularly concern: the allocation of housing subsidies on an *ad hoc* basis and local governments' resulting inability to plan long-term; the lack of a mechanism to negotiate the number of subsidies allocated, and confusion over what to do to improve allocations; little control over the appointment of developers; difficulties in multi-year planning in housing development; and the lack of sufficiently long-term allocations to ensure that developments do not simply take place in peripheral areas where serviced sites are available.<sup>347</sup> Despite these problems, provincial government has been unwilling to relinquish control over the housing development and delivery function and has resisted the accreditation of municipalities in the past.<sup>348</sup> Only the provincial MEC can approve accreditation, in line with the provisions of section 10(2) (a) of the Housing Act. There is explicit antagonism between provincial government and municipalities over accreditation, particularly obvious in the case of Western Cape and Gauteng provinces. In 2009 the City of Cape Town declared an intergovernmental dispute with the Western Cape when it was told it first had to be assessed by the Auditor-General to ensure it had adequate capacity.<sup>349</sup>

## 7.5 Operational Capital Budget (OPS/CAP) Programme

The OPS/CAP Programme provides provincial governments with a mechanism for the reservation of a certain percentage of the annual housing funding allocated by the DHS, for the purposes of appointing external expertise/capacity required by provincial departments and accredited municipalities to assist in the implementation of the national housing programmes. Priority programmes include the UISP, Social and Economic Amenities Programme, projects that promote integration and the creation of a non-racial society and the unblocking of stalled projects. Where a National Housing Programme provides funding for project management purposes, such allowances may not be augmented through the application of the OPS/CAP Programme i.e. project management in the UISP (see subchapter 7.10 of this guide below).

## 7.6 Housing Chapters of an Integrated Development Plan (IDP)

IDPs have not historically contained housing chapters, which has meant a disjuncture and lack of alignment between planning and housing at the local and provincial levels.<sup>350</sup> In line with BNG - which recognises that the supply of state-assisted housing must respond to the housing demand and that this relationship is best packaged at a local level - the new National Housing Code provides for the introduction of housing chapters in IDPs and also makes provision for municipalities who lack in-house capacity to draw up their own housing chapters, to

<sup>346</sup> DHS (note 7 above).

<sup>347</sup> M Mokoena and L Marais "The Missing Link in Cooperative Governance and Housing Delivery: Lessons from Mangaung Local Municipality" (2007) 18 *Urban Forum* 318-319.

<sup>348</sup> Huchzermeyer (note 286 above).

<sup>349</sup> A Makinana "D-Day set for Cape's housing ambitions" *Cape Argus* (27 August 2009).

<sup>350</sup> An IDP is a single, inclusive strategic plan for the development of a municipality. It links, integrates and coordinates plans and take into account proposals for the development of the municipality. It aligns resources and capacity of the municipality with the implementation of the plan, complies with the requirements of the Municipal Systems Act and is compatible with national and provincial development plans and planning requirements binding on the municipality in terms of legislation.

access external capacity/expertise. The Programme provides guidance on the formulation of Housing Chapters and establishes the provision of grants to municipalities - who do not have sufficient financial and/or human resources to enable them to compile a Housing Chapter as part of their IDP process - to do so.

The Programme sets out the different steps to implement the Housing Chapter in the IDP, which begins with the identification of a person or team of people who will champion the housing issues in the IDP and who understand trends in housing demand e.g. in-migration, out-migration, temporary migration and backlog etc. This person or team is termed the "Housing Voice." The Programme provides guidelines on how to define and specify housing demand, through technical and participatory-based analysis. It identifies three potential champions for the housing sector and its programme: first are technical officials within the municipality whose roles include housing-related functions; second are community, civil society, other NGO and parastatal stakeholders sitting on participatory structures (i.e. part of the IDP Representative Forum or consulted directly as part of participatory activities); and third are provincial and DHS officials participating in key IDP activities, such as the strategies formulation work sessions and the IDP Project Task Teams, or part of the IDP Representative Forum.

Once a municipality has identified housing demand, formulated its Housing Chapter and priority issues, and priority housing projects have been identified in the IDP, the Mayor needs to enter into an agreement with the MEC to secure funding for the projects from the various applicable housing programmes. Each individual project agreement between provincial department and municipality should incorporate the approved business plan as an annexure. Provincial government may only rely on IDPs when allocating funding, and projects that are not indicated in the municipal IDPs will in future not be funded from the National Housing Programmes.

## 7.7 Rectification of certain residential units that were created under the pre-1994 dispensation

The Programme for the rectification of certain residential units that were created under the pre-1994 dispensation<sup>351</sup> intends to improve the quality and condition of houses that were built under apartheid and are still state-owned, or have been transferred to individual beneficiaries. The main aim of the rectification programme is the improvement of municipal engineering services, where inappropriate levels of services were delivered and/or the renovation, upgrading or complete reconstruction of dwellings that are structurally compromised and are regarded as inappropriate for transfer into ownership of the beneficiary or unfit for human habitation. Certain minimum norms and standards for the top-structure and for municipal engineering services are included in the Programme. Funds from the Programme can only be allocated for the latter where funding from the MIG is unavailable, or cannot be made available.

The objectives of this Programme are aligned with the objectives of the EEDBS i.e. the sale and transfer of quality housing units to the relevant beneficiaries. The Programme excludes municipal and provincial-owned rental stock that will never be sold, houses that have already been transferred to beneficiaries who have already rectified the defects utilising their own resources, defects that are attributed to poor maintenance or defects in extensions to the original dwelling. Funding is in the form of grant to municipalities and/or provincial departments, who are urged to apply the Programme in only the most deserving or emergency cases, as identified by the municipality.

<sup>351</sup> DHS "Rectification of Pre-1994 Residential Properties" Part 3 Vol 3 of the National Housing Code (2009).

## 7.7.1 Rectification of RDP stock 1994–2002

The 2000 National Housing Code includes a Programme for the Rectification of RDP Stock 1994–2002, which remains valid however has not been included in the new Code. Since coming to office in 2009, the Minister of Human Settlements has focused heavily on the issue of the quality of RDP houses previously built, as well as corruption in housing projects through his national audit task team.<sup>352</sup> According to the 2009 General Household Survey, across the country, 16.1 percent of households living in RDP or state-subsidised dwellings felt that the walls of their dwellings were weak/very weak, whilst 14.9 percent felt that their roof was weak/very weak.<sup>353</sup> There was considerable variation between provinces in perceptions about housing quality. In the Western Cape and Eastern Cape, nearly a third of all households had a problem with their walls and roofs. In the Northern Cape, 17 percent of households had problems with their walls and 18 percent had problems with their roofs. In KwaZulu-Natal, 14.9 percent of households had problems with their walls.

The Minister announced that the government would be using R1.3 billion, representing 10 percent of the department's annual budget, to demolish and rectify badly constructed RDP houses. This commitment implied that 40 000 houses would have to be rebuilt.<sup>354</sup> The Eastern Cape would need approximately R359 million to demolish the province's approximately 20 000 shoddy RDP houses. Towards the end of 2009, he stated that he had identified nearly 3 000 RDP houses in the Eastern Cape and KwaZulu-Natal that had to be demolished because of inferior workmanship. They had been built in the 18 months prior to his identification of them as intolerably poor structures.<sup>355</sup> Unscrupulous and corrupt housing contractors, public servants, lawyers and estate agents have been targeted. The Minister expressed a desire to sue contractors who have built substandard housing with government tenders and force others to finish housing projects that they had abandoned. A national audit of housing projects was launched in November 2009, which would supplement an ongoing probe by the Special Investigating Unit and legal cases already underway.

According to Jane Duncan, professor in the Chair of Media and Information Society at Rhodes University:

“ In delivering RDP housing, the government has ignored a key principle of the RDP, namely to promote integrated development. RDP housing rectification is an ineffective form of redress if it continues to be implemented in a policy context where services are treated primarily as commodities rather than entitlements, and where the private sector is relied on, in the main, to provide jobs.<sup>356</sup> ”

The desire to improve the workmanship, unit size and value for money in housing provision, either in rectification or new construction, is undoubtedly a welcome intervention. This policy direction reflects a progressive attempt to improve housing quality in addition to quantity. There is a danger, however, in adopting a narrow focus on the literalities of “adequate” and “quality” housing. The location and broader socio-economic impact of housing provision is as important as formalistic notions of adequacy and access i.e. quality of structure. See subchapter 6.2.1 of this guide for more on this.

<sup>352</sup> E Naidu and M Isaacson “How to build quality houses for R55 000 ” *IOL* (6 December 2009).

<sup>353</sup> Stats SA (note 103 above) 23.

<sup>354</sup> The NHBRC is looking to government to conduct a legislative review of the Housing Consumers Protection Enforcement Act, and to include certain changes and amendments aimed to ensure the effective protection of housing consumers, adequate and equitable warranty cover, effective processing of complaints, maximum compliance by home builders, effective enforcement of the Act, promotion of administrative action and effective compliance by banks. L Prinsloo “NHBRC to crack down on unregistered home builders” *Engineering News* (12 May 2010).

<sup>355</sup> X Mbanjwa “Sexwale declares war on housing crooks” *IOL* (3 November 2009).

<sup>356</sup> J Duncan “Houses to Die For?” *SACSIS* (1 April 2010).

## 7.8 Integrated Residential Development Programme (IRDP)

The IRDP, which replaces the Project Linked Subsidy Programme, was introduced in order to facilitate a new vision of housing in which housing development occurs in well-located areas that provide convenient access to urban amenities, including places of employment. According to the IRDP:

“ existing housing policy programmes focus primarily on the development of subsidised housing and do not provide much scope for area wide settlement planning and the integration of a range of housing types and price categories, together with commercial and social amenities in a project. The IRDP provides a tool to plan and develop integrated settlements that include all the necessary land uses and housing types and price categories to become a truly integrated community.<sup>357</sup> ”

The IRDP provides for phased area-wide planning and development of integrated housing projects in situations where a) a project is undertaken in an area where unoccupied vacant land is developed; or b) a project is undertaken in an existing township where an undeveloped parcel of land is utilised for development purposes. It does away with the requirement found in other policy programmes to identify subsidised housing beneficiaries up front and provides for both subsidised, as well as finance-linked<sup>358</sup>, housing i.e. catering for households earning between R3 500 and R7 000 a month. It also provides for social and rental housing, commercial, institutional and other land uses to be developed.

In the IRDP a municipality assumes the role of the developer (where they lack financial, technical and managerial capacity, a provincial department can take on this role), undertaking all planning and project activities. As developers they appoint professionals (who design and establish the township, design and monitor the installation of services, and design the houses) and contractors (who construct the services and housing) to assist with the housing development process. Municipalities apply for funding from the MEC who approves project applications, reserves and distributes funds, as well as assesses and adjudicates various aspects of the project process. Plans for projects undertaken within the scope of the IRDP must be based on approved housing chapters of IDPSs. Beneficiaries are those who qualify in terms of the NHSS (for residential stands) as well as those who are able to obtain non-residential stands in the development.

Phase 1 entails planning, land acquisition, township establishment and the provision of serviced residential and other land use stands to ensure a sustainable integrated community. Phase 2 comprises the house construction phase for qualifying housing subsidy beneficiaries and the sale of stands to non-qualifying beneficiaries and to commercial interests.<sup>359</sup> During Phase 1 non-residential stands can be allocated i.e. institutional stands (police stations, clinics, public sector use etc); business and commercial stands; serviced stands for use by not-for-profit community service providers (churches, crèche/pre-school/nursery schools, old age schemes etc); and public uses (parks, recreation areas, informal trading areas, taxi etc). There are rules as to how these stands can be sold (see subchapter 7.8.2 of this guide below for more on this allocation process).

The subsidy quantum for the IRDP is R55 706 for the construction of the top structure (those earning between R1 501 to R3 500 per month must contribute R2 479 out of their own savings towards this). The cost for the provision of internal municipal engineering services must be financed from alternative sources and the use of the housing subsidy allocation for the financing of such internal services may only be approved as an option of last resort. If the latter is the case, a subsidy amount of R22 162 is available for the preparation of a serviced stand.

<sup>357</sup> DHS “Integrated Residential Development Programme” Part 3 Vol 4 of the National Housing Code (2009) 9.

<sup>358</sup> The FLISP was introduced to address the affordability and product gaps in the income range R3 500 – R7 000. The DHS is currently revisiting the sliding scale and reviewing the top income group. See note 147 above.

<sup>359</sup> DHS (note 357 above) 10.

In the past, most provinces and municipalities have elected the Turn Key Contracting Strategy, which shifts all the development responsibilities to a private sector contractor, including the administration of beneficiaries.<sup>360</sup> The developer must ensure that identified beneficiaries complete and sign the application form for the grant of an IRDP Individual Subsidy (see subchapter 7.1 of this guide above), which is submitted to the principal department. The identification of beneficiaries to receive housing construction subsidies must be undertaken before the design and housing construction planning phase commences. However, the allocation of the stands and the submission of application forms for housing subsidies and applications to buy the stands should be undertaken and finalised before the approval of the housing construction project phase. Once the provincial department has received and approved a subsidy application within three months, it records the name and identity number of the applicant (and their spouse plus dependants if applicable) on the NHSDB.

## 7.8.1 National Housing Needs Register and Demand Database

In the past, households have registered on municipal housing waiting or other lists to stand in line for government subsidies and houses, however these lists have generally not been verified and municipalities do not have the capacity to do so. Different provinces, as well the City of Johannesburg and City of Cape Town, have developed their own databases to capture the details of those waiting for houses. However these lists have been plagued with difficulties and since 2008 there has been a process of centralisation of housing lists, with Gauteng province developing a Housing Demand Database and publishing a Housing Demand Database and Allocation Policy in April 2009.<sup>361</sup>

An initiative by the DHS to develop a centralised demand database - the National Housing Demand Database (NHDD) - is also currently underway. The process is envisioned as follows: people are captured onto the National Housing Needs Register from municipal lists and other waiting lists (those who record their housing needs do not automatically qualify for housing subsidies), their information is then verified and they are uploaded onto the NHDD, this information is then used by an allocation committee to identify beneficiaries and for subsidy application processes in line with the Housing Allocation Strategy (only information off the NHDD can be used by the Allocation Committee – see the following subchapter). The NHDD is the only source of registered housing needs and is aligned with the HSS and other databases for verification purposes. The National Housing Allocation Strategy is outlined in more detail in the following subchapter.

## 7.8.2 National Housing Allocation Strategy

The selection of beneficiaries and allocation of state-subsidised houses in South Africa has been a perpetual site of contestation and mistrust over the years, with the process lacking transparency and openness. As mentioned previously, during the past sixteen years most housing delivery has been developer-driven, with over 76 percent of projects initiated and led by developers, often from the private sector. According to a recent monitoring and evaluation report on the DHS and the nine provincial departments conducted by the Public Service Commission (PSC), this model limits participation and “of concern also is the de-linking of beneficiaries from the development and construction phase in order to speed up delivery. This severely limits the say beneficiaries have in projects.”<sup>362</sup>

A Strategy for the Allocation of Housing Opportunities Created through the National Housing Programmes (Housing Allocation Strategy) was approved by the Minister of Housing in 2008 in an attempt to depoliticise the

<sup>360</sup> There have been a number of problems and gaps in policy and process with this model of beneficiary registration and allocation.

<sup>361</sup> In 2008, Gauteng began the process of developing a housing demand database, named Project Ziveze, to “clean-up” the system and remove those who have acquired houses from the housing list, assist the provincial department in allocating houses to rightful owners, improve efficiency and fast-track housing delivery, The province is in the process of importing its data to the national database in collaboration with the DHS, along with other provinces and municipalities. N Dlamini “Database will ‘cut housing backlog’” *Joburg* (21 February 2008).

<sup>362</sup> PSC (note 14 above) ix.



housing allocation process and tackle some of the problems around mal-administration and fraud occurring in the subsidy-based housing programmes. The Housing Allocation Strategy establishes Allocation Committees (AC) which comprise at minimum two members from the Office of the City/Municipal Manager and two members from the provincial department of housing. No political office-bearers are allowed to sit on the Allocation Committee.<sup>363</sup> The Housing Allocation Strategy is undertaken in conjunction with the National Housing Needs Register, which was developed at the same time to provide a list of credible beneficiaries, and the Strategy only applies to housing projects undertaken in terms of the IRDP and UISP.<sup>364</sup>

The Housing Allocation Strategy introduces priority selection criteria for allocation, which differ across the two programmes. Where there is an existing housing demand database or waiting list, the following selection criteria apply:

- Primary level: “first come first served” basis will apply i.e. earliest date on which the application for housing assistance was made.
- Second level: vulnerable group i.e. families with children and especially women-headed households with children.
- Third level: indigent beneficiaries including disabled persons or beneficiaries with disabled family members residing with them as well as the aged (for females this refers to a person of 60 years or older, and for males refers to a person of 65 years or older).<sup>365</sup>

According to the Strategy, where there is no existing housing needs database or waiting list for a specific area or region, it may be required to facilitate a transition process, leading up to the completion of registration of all entries on the National Housing Needs Register of those areas. Where IRDP projects are “implemented based on socio-economic surveys that determine the overall housing needs, the municipality must pursue a public open invitation process, inviting households who satisfy the qualification criteria to tender applications for housing subsidies linked to the housing products to be delivered.” Where the number of qualifying applications exceed housing opportunities available, the municipality must deploy an “open and transparent process of allocation of the housing opportunities” which may entail a process of “first come first served”, or an “open lottery system” where this is not feasible.<sup>366</sup>

The Housing Allocation Strategy outlines the allocation policy applicable to greenfields housing developments undertaken in terms of the IRDP. In these developments some housing opportunities are created for persons that do not satisfy the NHSS qualification criteria. Households whose income is between R3 500 and R7 000 a month can apply for a subsidy under the FLISP for the construction of a house or apply for rental accommodation. These households will most probably not be on a housing database so the Strategy recommends that “the MEC will have to invite applications through public advertisements and consider the applications on a first come first served basis, and may apply the priority criteria where such a need exists and is regarded as feasible.”<sup>367</sup> Households whose income exceed R7 000 per month can apply for rental accommodation managed by SHIs or buy a vacant serviced stand at the current market value of the properties, which the provincial department must determine. Single persons with no financial dependants or persons who have benefited from state financed housing schemes in the past (but who are not the owners of residential properties at the date of selection) are eligible to buy vacant serviced stands at input cost. Single persons with no financial dependants may also apply for rental accommodation. In all these cases the selection criteria is on a “first come first served” basis.

<sup>363</sup> At a Parliamentary Portfolio Committee on Human Settlements workshop held on 2 December 2009, the DHS presented on the Housing Allocation Strategy. The Committee highlighted that the composition of the AC and the processes for allocating housing to communities represented the foremost challenge for both the DHS and the Committee going forward. Some members raised problems around the non-inclusion of councillors in the AC and expressed the view that the AC should be broadly representative and inclusive of existing grassroots community structures and civil society. The politicisation of certain municipal offices and the problems this causes for fair allocation was also highlighted. See note 83 above.

<sup>364</sup> In 2009 the City of Cape Town developed its own Housing Allocation Policy and in February 2010 it’s Draft Implementation Guidelines to deal with the City’s needs regarding the allocation of beneficiaries in low-income housing developments. See CSSR & PDG (note 92 above) 10.

<sup>365</sup> DHS “Strategy for the Allocation of Housing Opportunities Created through the National Housing Programmes” (2008) 10-11.

<sup>366</sup> Ibid.

<sup>367</sup> Ibid.

According to the PSC report, allocation on a “first come, first served” basis is problematic and a fairer system should be considered, possibly one which is based on *need* rather than time spent on the waiting list. Special categories for those considered the most vulnerable (i.e. aged, people with disabilities and women-headed households) are helpful in this regard, however the poverty measure, in and of itself, does not consider dependency ratio (size of household), length of time on the waiting list etc. This leads to dissatisfaction with the perceived unfair allocation process.<sup>368</sup>

## 7.9 Enhanced People’s Housing Process (ePHP)

The Enhanced People’s Housing Process (ePHP) was adopted in July 2008 and rolled out in April 2009, to replace the previous PHP programme. This new policy was the result of lengthy and difficult negotiations with the NDoH, dating back to 2004, on the part of a handful of NGOs including Planact, DAG, the Built Environment Support Group (BESG), Afesis-corplan, Urban Services Group, Utshani Fund and Federation of the Urban Poor (FEDUP).<sup>369</sup> These NGOs had for some time objected to the narrow definition of the PHP as “self-build” housing involving contributions of “sweat equity” as opposed to the use of contractors. They believed it should fundamentally concern a collective, “community-based process of decision-making that would seek to address housing in the context of other social needs and community priorities.”<sup>370</sup> See subchapter 6.3 of this guide above for more on the original PHP.

The new policy adopts a broader definition of PHP, allowing for greater flexibility and choice while maintaining the central principles of people-centred development. The DHS recognised that a number of different approaches to community development needed to be accommodated with “community involvement in the decision-making processes, community empowerment and the leveraging of additional resources being the determining factors for making it a project.”<sup>371</sup> The broadening of the scope of the PHP, with a focus on the outcomes of the housing process as a whole rather than just how the housing product is delivered, informed the development of the ePHP.

According to the DHS, the ePHP provides for a process in which beneficiaries actively participate in decision-making over the housing process and housing product so as to: empower beneficiaries, create partnerships, mobilise and retain “social capital”, build “housing citizenship”, encourage beneficiaries who are aware of their rights and responsibilities, promote local economic development, foster stable communities, build houses that are better suited to the needs of individual households, involve women and youth more directly, and finally, create sustainable and inclusive human settlements which are more responsive to the needs of the community.<sup>372</sup>

The ePHP is fundamentally a community-driven process that takes place over a period of time i.e. it is not orientated towards delivery at scale over limited timeframes. It involves the participation of organised community groupings in the housing process, through amongst *inter alia* the provision of “sweat equity”, which replaces their requirement for a financial contribution. “Community” is defined either by location and/or by common interest and community groupings can take the form of a voluntary association, community trust, co-operative or section 21 company. An approved Community Resource Organisation (CRO) e.g. NGO, faith-based organisation etc, is appointed by the provincial government to provide technical and administrative assistance to the community organisation. Both of these groups have specific roles and responsibilities, as set out in the ePHP.

<sup>368</sup> PSC (note 14 above) 34.

<sup>369</sup> For more on the development of the PHP see Planact & Rooftops Canada “Success at a Price: How NGO advocacy led to changes in South Africa’s People’s Housing Process” (2009).

<sup>370</sup> R Himlin “People’s Housing Process: Enhanced!” *NGO Pulse* (November 2008).

<sup>371</sup> DHS “Enhanced People’s Housing Process” Part 3 Vol 4 of the National Housing Code (2009) 9.

<sup>372</sup> *Ibid* 9-10.

The ePHP is applicable in two different scenarios: an organised community that wants to participate in the housing process approaches the municipality i.e. demand-led approach, or a municipality prioritises and allocates land to the ePHP programme in its IDP and mobilises communities to participate in the housing process i.e. supply-led approach. The ePHP provides assistance to all those who qualify under the NHSS and can be applied to greenfields developments i.e. IRDP, informal settlements upgrading projects (UISP), hostel upgrades (CRU) and rural housing developments. There are four different funding streams for the ePHP which include capital funding, capacity-building funding, community contribution/equity funding and bridging finance.

In terms of capital funding, the standard housing subsidy amount for the top structure applies (unless the municipality cannot cover land and infrastructure costs, then the full capital subsidy can be applied). There is a dedicated subsidy for the ePHP programme. The subsidy amount available for the ePHP programme is R55 706, which covers the top structure but excludes the cost of internal municipal engineering services which must be financed from alternative sources.

Funding for infrastructure should be provided through the applicable grants if available or as a last resort, accessed from the province. The municipality is responsible for all land packaging and town planning/township establishment funding (including the undertaking of EIAs and rezoning) and could provide land purchase funding or donate land to communities. The municipality is also responsible for funding additional facilities and amenities. Bridging finance may be necessary to “ensure programme momentum and to reduce the risks for CROs”, and this would be on a project-specific basis and would be mobilised and organised by the CRO and the community with assistance from the DHS i.e. to attract donor funding, encourage the banking sector to provide affordable funding etc. Capacity-building funding relates to six aspects of the housing process: pre-project consumer education funding; project specific capacity-building and facilitation funding; funding for building the physical structure to be used as the Housing Support Centre (HSC); funding for facilitation and capacity-building for the sector; and funding for unblocking blocked projects.

The ePHP outlines a number of community contributions/equity that should also be incorporated into an ePHP project, both pre- and during the project (at least four need to be incorporated into the project). A compulsory contribution is time, leadership, participation and ownership of the project by the community, by participating in community meetings and setting up a project steering committee. Another compulsory contribution is screening a CRO to work on the project with the community. Other contributions include: land, savings contributions, top-up funding through various partnerships forged by the community with other stakeholders, demonstrated knowledge/skills/expertise, labour, materials contribution (e.g. through setting up of brick-making yards, recycled material or through a donation from a supplier), special community initiatives related to and connected to the housing (e.g. food gardens, community care etc) and bringing in community volunteers or employers (e.g. student internships, employer volunteers etc).

## 7.10 Upgrading of Informal Settlements Programme (UISP)

As discussed earlier in this paper,<sup>373</sup> there have been numerous problems with the (lack of) implementation of Chapter 13 of the National Housing Code since it was introduced in 2004. As outlined above in the discussion on the *Nokotyana* case, municipalities appear unwilling to implement this programme. Nevertheless, the National Housing Code states that the UISP<sup>374</sup> is “one of the most important programmes of government which seeks to upgrade the living conditions of millions of poor people by providing secure tenure and access to basic services

<sup>373</sup> See subchapter 4.2.1 above for more on informal settlement backlogs, subchapters 5.4 and 5.6 on the *Joe Slovo* and *Nokotyana* cases, and subchapter 6.4.2.2 on the ‘new’ approach to informal settlement upgrading outlined in BNG.

<sup>374</sup> DHS “Upgrading of Informal Settlements Programme” Part 3 Vol 4 of the National Housing Code (2009).

and housing.<sup>375</sup> The revised UISP and the upgrading of informal settlements<sup>376</sup> is thus a priority development initiative for the DHS and national government in general.

### Who qualifies for the UISP?

The UISP applies to those who qualify under the NHSS criteria, however is also applicable to excluded groups including: households that exceed the income threshold, persons without dependants, child-headed households, aged persons who are single without financial dependants and persons who are not first-time homeowners. Persons may be considered on a "case-by-case" basis who have previously received state housing assistance and who have owned or currently own residential property,<sup>377</sup> as well as "illegal immigrants."<sup>378</sup> Depending on the nature of the beneficiary, different housing and tenure options will be available during the final phase of the project, also known as Phase 4 or the Housing Consolidation Phase. This will be discussed further below.

According to the DHS's Housing Allocation Strategy, in the UISP the housing needs of occupiers are "recorded at project initiation stages and the project is designed for the specific needs of the individuals in these areas." As soon as the housing needs survey has been completed, the municipality must record the particulars of all persons on the National Housing Needs Register and NHDD so that they can be approached to complete application forms for serviced stands when these are ready for allocation, and housing subsidy application forms "when the house construction phase commences."<sup>379</sup> The Strategy states that where UISP projects also cater for additional stands for persons who have registered their needs on the NHDD (and who do not reside in the settlement, presumably), the same allocation process applicable to IRDP projects, as outlined in subchapter 7.8.2 of this guide, should be followed.

### What funding is available?

The UISP only finances the creation of serviced stands, and beneficiaries must apply for housing construction/ownership assistance through other housing programmes in Phase 4 of the Programme e.g. Individual Subsidy Programme, Consolidation Subsidy, ePHP, Social Housing Programme, CRU. Funding under the UISP is linked to the number of persons who qualify for assistance i.e. it is *individual*-based as opposed to *area*-based. The subsidy quantum for the UISP in 2009/2010 is broken down into funding for the three phases, and is provided from provincial government's annual allocation from the IHSD grant administered by the DHS.

Once an informal settlement upgrading project has been approved, a grant is made available to a municipality by a province to undertake Phases 1 to 3 (as well as a relocation grant if necessary). Phase 1 funding is provided for survey, registration, participation, facilitation, dispute resolution as well as geotechnical investigation, land acquisition pre-planning and interim engineering services. Funding for Phases 2 and 3 is for detailed town planning, land surveying and pegging, contour survey, land survey examination fee, civil engineering fees, site supervision fees, permanent engineering services provision and project management. Relocation grants cover transportation and loading costs for people and household effects, social service support and relocation food support to households. In terms of the construction of social and economic amenities e.g. sport fields, community centres, municipalities can apply through the Social and Economic Amenities Programme for funding,

<sup>375</sup> DHS "Simplified Guide to the Housing Code" Part 1 Vol 1 of the National Housing Code (2009) 16.

<sup>376</sup> According to the UISP, informal settlements typically manifest the following characteristics: illegality and informality; location on unsuitable land and environmental factors; restricted public sector investment; poverty and vulnerability; and social stress.

<sup>377</sup> Persons falling in this category will not automatically qualify for assistance under the programme and the MEC has "discretion to award conditional access to the programme benefits to such persons." DHS (note 374 above) 40.

<sup>378</sup> According to the UISP, in cases where "illegal immigrants" are identified in a settlement, the municipality/provincial department must report to the Department of Home Affairs who will investigate the matter and make recommendations to the developer on "how to proceed and whether informal occupation rights could be awarded to such persons as an interim measure." Ibid 39-40.

<sup>379</sup> DHS (note 365 above) 14. See subchapters 7.8.1 and 7.8.2 above for more on the Housing Allocation Strategy.

however the UISP states that “where funding is available from line functions departments this should be the first option.”<sup>380</sup>

Municipalities are required to make a 10 percent minimum capital contribution towards the upgrading project and are encouraged to contribute more “capital counter-funding” if it is within their means. They are entitled to use MIG funding to finance their counter-funding requirements under the UISP. Municipalities must also assume responsibility for the operations and maintenance (O/M) of all engineering infrastructure under the UISP as well as all O/M of social, community and economic facilities. These O/M costs are over and above the capital contribution and should come from non-housing sources in the municipality.

### What is provided under the UISP?

The Programme provides funding for the installation of both interim and permanent municipal engineering services i.e. the creation of serviced stands. However, interim services must always be undertaken on the basis that they constitute “the first phase of the provision of permanent services.” The nature and level of permanent engineering infrastructure must be the subject of engagement between the local authority and residents, and balance community needs, preferences, affordability indicators and sound engineering practice. Importantly, the UISP stresses the importance of upgrading people where they are i.e. *in situ*, and categorically states that only “as a last resort, in exceptional circumstances, [may] the possible relocation and resettlement of people on a voluntary and co-operative basis as a result of the implementation of upgrading projects” be considered.<sup>381</sup> It advances one possible reason for relocation as being the need for de-densification and states that the provisions of the UISP will apply to both the upgraded settlement and the relocation site.

Security of tenure is central to the UISP and may be achieved through a “variety of tenure arrangements and these are to be defined through a process of engagement between local authorities and residents”, however the nature of tenure rights to be awarded during a project (before township establishment and the Housing Consolidation Phase begin) is at the discretion of the MEC.<sup>382</sup> The UISP states that tenure rights awarded during Phases 1 to 3 could include rental agreements and/or gratuitous loan of a site for occupation by the relevant household, known as a *Commodatum*. The National Norms and Standards in respect of the creation of serviced stands do not apply under the UISP, but can serve as a guideline. The UISP states that “the layout of informal settlements generally precludes the determination of uniform stand sizes. Accessible stand sizes should emerge through a process of dialogue between local authorities and residents.”<sup>383</sup>

### Roles and responsibilities of community and state

Community participation is acknowledged as being critically important to the UISP and funding is made available to support social processes. According to the UISP, this participation “should be undertaken through Ward Committees with ongoing effort in promoting and ensuring the inclusion of key stakeholders and vulnerable groups in the process.”<sup>384</sup> The UISP notes that in certain circumstances the assistance of Community Development Workers (CDWs) can be used in collaboration with the ward structures. The municipality can apply for funding for external capacity to assist in the participation processes leading up to the conclusion of the participation agreement with communities which would include undertaking the following tasks: socio-economic surveying of households; facilitating community participation; project information-sharing and progress reporting; conflict resolution (where applicable); and housing support services i.e. training and education on housing rights and obligations, capacity-building of housing beneficiaries, assistance with the selection of housing options, management of building materials, and relocation assistance.

<sup>380</sup> DHS (note 374 above) 15.

<sup>381</sup> Ibid 9.

<sup>382</sup> Ibid 15 and 38.

<sup>383</sup> Ibid 14.

<sup>384</sup> Ibid 15.

Municipalities take on the developer role under the UISP, provided they are accredited and capacitated to do so. Where municipalities are not accredited or lack capacity, the provincial department assists and supervises accordingly. Municipalities - in collaboration with the provincial department - initiate, plan and formulate applications for projects under the UISP, which are sent to the MEC for comment and approval. The MEC has the final decision-making authority and once approved, the provincial department must reserve, reprioritise and allocate funds from its annual budget allocation and manage, disburse and control funds allocated for an approved project, in accordance with their required Memorandum of Understanding (MoU) with municipalities. Further they must assist with the use/implementation of accelerated planning procedures and monitor the implementation of the project. The DHS also has a support role in the UISP and is tasked with maintaining the policy and programme, assisting with interpretation, providing implementation assistance and monitoring this implementation. See subchapter 7.10.2 below for more on the role of national government in the informal settlement upgrading programme.

### Relocation as a last resort and in 'emergency situations'

The UISP notes that relocation should only be considered as a last resort and where it is unavoidable it should be based on the principle of "minimal disruption to the affected persons and to relocate the persons to a site as close as possible to the existing settlement."<sup>385</sup> A relocation strategy must be developed in collaboration with the community. The Programme further refers to situations where the urgent relocation of households is required, and where the MEC may approve the application of the Emergency Housing Programme (see subchapter 7.12 below for more on this programme) in addition to the UISP. The funding available under these two programmes must be aligned and "may not be used in a manner that will enhance the funding limits available under the programmes."<sup>386</sup>

### Movement of households within settlements

The UISP highlights the management of the movement of households within project phases, including the demolition of informal structures when households relocate to formal housing and the influx of new households to the area, as a "critical success factor" for project implementation.<sup>387</sup> The Programme states that the developer must ensure that for each formal housing opportunity created and accessed, the informal structure vacated by the beneficiary household must be demolished. Further, land vacated by the household must be secured and protected against reinvansion/occupation "in accordance with the provisions of the relevant legislation."<sup>388</sup>

### Housing consolidation in Phase 4

Phase 4 of the UISP is the Housing Consolidation Phase and according to the Programme, benefits available under this final phase are determined by the status of the relevant person regarding competency to contract, previous ownership of residential property, previous access to a state housing subsidy and citizenship status. The UISP provides guidelines which may be considered in determining the benefits to be awarded. A summary of these guidelines is provided below:

- **Illegal immigrants:** a municipality identifies "illegal immigrants" during the feasibility stage and contacts Department of Home Affairs who makes a recommendation as to eligibility; benefits to them could comprise rental accommodation; individual ownership is not allowed while persons are regarded as illegal.
- **Previous/existing owners of residential property or those who have previously received a state housing subsidy:** can apply for benefits, however eligibility for Phases 1 to 3 assistance is decided on a case by case basis; they can acquire registered ownership of stands or choose rental accommodation if these are provided; ownership eligibility is at the discretion of the municipality and the community "on condition

<sup>385</sup> Ibid 32.

<sup>386</sup> Ibid.

<sup>387</sup> Ibid 69.

<sup>388</sup> Ibid.

that no evictions will be allowed outside the prescripts of the relevant legislation”;<sup>389</sup> those who are eligible for ownership could be required to pay a purchase price (equal to the cost of the development of the stand).

- Child-headed households and minors: Department of Social Development must give directive; they do not qualify for registered ownership of stands and cannot receive any Consolidation Subsidies for the construction of houses; they can be accommodated in rental accommodation or special facilities; where legal guardianship exists, ownership may be transferred as provided by the guardianship arrangement or in trust.
- Single persons without financial dependants: may apply for individual ownership of stands or rental accommodation; they are not allowed to apply for Consolidation Subsidies for house construction; they must comply with remaining qualification criteria of the relevant National Housing Programme chosen.
- Persons earning in excess of R3 500 per month: must comply with all other NHSS qualification criteria; they may apply to acquire individual ownership (will be required to pay a purchase price equal to the cost of the development of the stand) or choose rental accommodation, if available; they may apply for Financed-Linked Individual Subsidies; do not qualify for Consolidation Subsidies for house construction.

### 7.10.1 Fault lines around the implementation of the UISP

Despite the introduction of the BNG policy amendment in 2004 and its identification of informal settlement upgrading pilot projects, “at all levels of government and in all parts of the country, there has been a systemic failure to implement the substantive content of BNG that recommends and makes financial provision for participatory and collective *in-situ* upgrades.” Richard Pithouse, lecturer at the Department of Political and International Studies at Rhodes University, describes how there has been a shift to a “security driven approach to the urban poor” (i.e. viewing them as a threat). As a result, the progressive legal and policy framework has been overshadowed by the forceful anti-poor discourse around “eradicating slums”, and attempts to formalise this tendency through repressive provincial slum legislation (see subchapter 5.5 of this guide on the KZN Slums Act case).<sup>390</sup> Millions of shackdwellers in South African cities continue to live in life-threatening conditions, where two of their biggest threats come from fire<sup>391</sup> and diarrhoea.<sup>392</sup> Both of these threats can be easily ameliorated within current budgetary limits by providing basic support to shack settlements, most importantly adequate sanitation and water provision but also electricity. According to Pithouse:

“ It seems that a major reason for the general failure to provide this support is that the housing subsidy system has created a widespread view that shack settlements are temporary phenomena that will soon be replaced by formal housing. Indeed many government officials have stated this directly. However despite the large numbers of houses built via the subsidy system in the first five years after apartheid there was not a decline in the number of people living in shacks. There is, therefore, no rational basis for the assumption that, under current policies and practices, shacks will soon be eradicated. For this reason the failure to provide basic life saving services to shack settlements – such as electricity, toilets, sufficient water, fire hydrants and so on – must be deemed a major failure on the part of the state.<sup>393</sup> ”

Since 2004, most housing interventions around informal settlements have not followed the BNG principles or vision at all. Generally what has occurred is that a greenfields housing project is built with some subsidised units and low-income bond houses, and a specific number of units are allocated to people residing in certain

<sup>389</sup> Ibid 67.

<sup>390</sup> R Pithouse “A Progressive Policy without Progressive Politics: Lessons from the failure to implement ‘Breaking New Ground’” (2009) 54 *Town Planning Journal* 1-2.

<sup>391</sup> On average in South Africa over the last five years (2002-2008), there were ten shack fires a day, with someone dying in a shack fire every other day. M Birkinshaw “A Big Devil in the Jondolos: The Politics of Shack Fires” (August 2008).

<sup>392</sup> In South Africa, diarrhoea is the third highest cause of death and the disease is linked directly to poor sanitation. See CSIR “Diarrhoea third biggest killer in South Africa” (2009).

<sup>393</sup> Pithouse (note 390 above) 8.

identified informal settlements. Shackdwellers from identified settlements are then accessed to see whether they qualify for a housing subsidy or not and are checked off on the NHSDB to ascertain whether they have previously received a subsidy.

Other manifestations have been along the lines of the N2 Gateway project, where a housing development is envisioned on a piece of land where an informal settlement is located and the shackdwellers are 'relocated' to TRAs or transit camps in far flung areas while housing that is unaffordable to them is built. They are often left in these temporary areas indefinitely and are made worse off than before. Often these 'relocations' are done by force using private security companies (the most notorious being Wozani Security, whose eviction crew is commonly known as the "Red Ants") and police officials. In many cities, most notably those in Gauteng, land invasion management and eradication of informal settlements is outsourced to private security companies. However, according to Pithouse, "across the country it has not been unusual for people to simply abandon relocation houses and move back to better located shacks or to refuse to leave shacks for relocation houses, as often happened under apartheid and has often happened with forced removals to peripheral relocation sites the world over."<sup>394</sup>

According to Huchzermeyer, by 2008 none of South Africa's large cities had implemented the upgrade of informal settlements under Chapter 13 of the Housing Code and only the City of Cape Town, in response to an initiative by NGO DAG at the Hangberg informal settlement in Hout Bay, had applied for funding as per this programme (and in accordance with principles defined in the programme).<sup>395</sup> In mid-2008 Phase 1 of the Hangberg informal settlement upgrade was approved, however the project has subsequently met with bureaucratic delays, failure by the City to implement an acceptable solution to the housing needs of the community and most recently the controversial demolition of shacks by the City which led to violence in the settlement.<sup>396</sup>

When "formalisation" or "regularisation" of informal settlements has been explored by provincial departments or municipalities, what is often raised (after feasibility studies and EIAs are conducted) is the fact that the land is unsuitable due to high densities, steep slopes, geotechnical or drainage problems, undermining etc. One of the perpetual problems faced by informal settlement communities in Ekurhuleni and Johannesburg, for example, is the phenomenon of dolomite, which requires mitigating measures to be taken in order to rehabilitate the land for residential development. These measures generally cost more money than the available subsidies provide, and sometimes require larger plots or medium density projects to be undertaken on the land. It appears that while this money can be made available for developing the land for bond houses and social housing projects, government is unwilling to spend these extra funds on poor communities in informal settlement upgrading projects (see subchapter 5.6 of this guide above on the *Nokotyana* case).

Huchzermeyer has raised a number of problems with the reformulated informal settlement upgrading programme included in the revised 2009 Code, particularly where some of progressive aspects of the Chapter 13 programme have been rolled back and where the UISP does not provide enough guidance for municipalities on important issues and fault lines around implementation. She suggests that refinement is needed around the following eight aspects of the UISP:<sup>397</sup>

<sup>394</sup> Ibid. This grassroots resistance has been witnessed across the country and has been documented by movements like AbM, Western Cape Anti-Eviction Campaign (AEC), Anti-Privatisation Forum (APF), Landless Peoples Movement (LPM) etc. In July 2008, AbM launched a Cape Town branch and soon after AbM joined with the AEC, LPM and the Rural Network to form the Poor People's Alliance. The Alliance adopted the slogan "No Land! No House! No Vote!" to show its rejection of electoral politics in "a context where no political party proposes a programme in the interests of the urban poor and no political party actively supports the struggles of the urban poor this enables the movements to sustain a clear focus on their key issues and, in those areas where the movements are hegemonic, to develop a degree of dual power." Ibid 11-12.

<sup>395</sup> Huchzermeyer (note 119 above) 141.

<sup>396</sup> A Soeker & K Bhana "Hangberg - a Question of Land Denied" *Pambazuka News* (8 October 2010).

<sup>397</sup> M Huchzermeyer "Suggestions for the refinement of the National Housing Code Vol 4 Part 3 Upgrading of Informal Settlements Programme" Submission to the National Upgrading Support Programme (6 August 2010). The following eight sections of this subchapter are taken from her submission.



## Standardised approach to housing development still entrenched

Chapter 13 was a shift away from the individual subsidy qualification and calculation of funding according to qualifying households, towards an *area-based* or *community-based* subsidy which was calculated on the actual technical cost of upgrading so as to encourage a more flexible response to diverse and changing circumstances. It was based on the recognition that standardisation of funding for informal settlement upgrading placed severe limitations in terms of what was possible for the improvement of people's lives. The revised UISP focuses on funding being linked to *qualifying beneficiaries* and does not give clear guidance to municipalities implementing the programme for the first time about how *in situ* upgrading differs from the entrenched approach of registering subsidy qualifiers and delivering housing (or serviced sites with the top structure to follow).

## Lack of clarity over relocation and use of the Emergency Housing Programme

"Urgent relocation" is not defined in the UISP and, given the tendency of municipalities to seek urgent evictions on unjustified grounds or to resort to the Emergency Housing Programme to 'temporarily' relocate households indefinitely, there are problems with encouraging this option explicitly in the UISP. Grounds for "urgent relocation" should be clearly defined and approval should not merely be at the discretion of the MEC. The interaction between the UISP and the Emergency Housing Programme should be examined more carefully.

## Selection of housing type required too early in the process

The UISP assumes a conventional housing delivery approach where it refers to "housing option elected" early in the township design and layout phase, presupposing that the final housing option is a standardised one which is clear from the start of the project. In reality, some households will not qualify for a subsidy and will invest their own resources over a period of time into improving their shack into a formal structure. Because top-structure assistance for those qualifying may only materialise later on, in the interim period people will respond to their tenure security by investing in brick and mortar structures themselves. It is therefore unrealistic to determine early on in the project the "housing options elected" by households. It is unclear in the UISP at what point households will receive the right to build permanent structures, which ideally should be as early on as possible and not contingent on them applying for ownership of the stand.

## Lack of clarity over tenure issues

In Chapter 13, a wide range of tenure options was provided and the "Permission to Occupy" or Commodatum was listed as the preferred option. The UISP lacks support information to municipalities to dissuade them from simply continuing with freehold ownership as the preferred tenure type, and ownership options like "communal ownership schemes" need to be created at the tenure regularisation, not just in Phase 4. The top-structure subsidy in Phase 4 of the UISP is only awarded to households who own their stand, and this should extend to those with a Commodatum as well.

## Lack of non-subsidy linked top-structure support

Both Chapter 13 and the UISP fail to provide for non-subsidy linked top-structure support to non-qualifying households i.e. assistance with savings-linked credit, technical advice, disbursement of building materials etc. Given the new emphasis on securing tenure, which has the effect that households are encouraged to make permanent house improvements, such assistance would be very important.

## Identification of illegal immigrants is misplaced

The identification of "illegal immigrants", presumably through door-to-door surveys, early on in the project appears at odds with the feasibility phase e.g. where household numbers are merely estimated. An estimate of "numbers of illegal immigrants" would suffice, if relevant at all.

### Internal settlement relocation management and strategy is problematic

The UISP's requirement of a framework for a strategy to manage the movement of households within project phases and the demolition of informal structures as and when households relocate to their formal housing sends the signal to municipalities that the UISP is a regular housing development in which households will be relocated to their formal houses once they have been built. This is at odds with the upgrading approach. Further, the Programme's focus on the "re-invasion of land" belongs to a roll-over approach to upgrading, which is not applicable in an *in situ* upgrade where households remain on the land they occupy, infrastructure is provided and they are encouraged to improve their shack into a permanent structure. What is missing in the strategy is an allocation approach to new households wishing to enter upgraded informal settlements where a simple approach to the transfer of occupational rights needs to be developed early on in conjunction with the securing of tenure (this is discussed briefly in subchapter 7.8.2 above on the National Housing Allocation Strategy).

### Lack of clarity over national government support and role of NUSP

The role of the new National Upgrading Support Programme (NUSP) within the DHS is not included in the UISP and there should be a focus on national governments role in the dissemination of information about the UISP, active promotion through initiatives to change mindsets of municipalities in relation to informal settlements, facilitation of training and knowledge-sharing for implementation and capacity-building at provincial government level for support to municipalities.

## 7.10.2 Recent developments relating to the UISP

In 2010 the President undertook to upgrade 400 000 households on well-located land over the next four years, and a delivery agreement was signed with the Minister of Human Settlements which included this output. According to the delivery agreement,

“ Output 1 is a shift away from the current paradigm of exclusively state-provided housing for the poor. It explicitly includes improving livelihoods through the provision of different forms of tenure, and provides for alternative methods of housing delivery. It is the first large-scale programmatic response to incremental upgrading of informal settlements in the country.<sup>398</sup> ”

The National Upgrading Support Programme (NUSP) has been launched in order to facilitate and support the fast-tracking of informal settlement upgrading in South African municipalities.<sup>399</sup> According to the NDoH Annual Report 2008-2009, the NUSP was established in collaboration with the international Cities Alliance, and 16 priority projects were studied with a view to identifying best practices in informal settlement upgrading. According to the report, it is envisaged that the learning achieved under the NUSP will lend further substance to policy refinement and the development of a new and improved implementation strategy at project level. The initiative also aims to provide critical support to housing projects in their early stages. A team of national and international experts support the programme by providing it with advice and guidance, and the aim is to develop a "community of practice." According to the NUSP, it will develop a "detailed roll-out strategy and programme for informal settlement upgrading for the country as a whole" which, given the decentralised nature of systems of governance in South Africa, will be as much a "mobilisation exercise as a technical one." Provinces, local authorities, the private sector, civil society support organisations and communities will "all have to be

<sup>398</sup> Note 123 above, 14. In relation to the weak communication of and lack of familiarity with the UISP, the delivery agreement states that "the DHS and its provincial counterparts have been inconsistent in promoting and refining the use of the programme and its associated instruments. Simplistic interpretations of the ambition to 'eradicate' all informal settlements by 2014 have consequently come to dominate official thinking." Note 123 above, 8.

<sup>399</sup> See the NUSP website for more <<http://upgradingsupport.org/>>. The NUSP is initially targeting some 49 municipalities, hoping to focus on as many informal settlements as possible – possibly up to 60 to 65 percent of all informal settlements. Note 123 above, 17.

mobilised into action, via a coherent plan” and the NUSP will then provide the necessary capacitation in order to ensure that this mobilisation is effective.<sup>400</sup>

Evidence of growing frustration with the non-implementation (or misguided implementation) of informal settlement upgrading can be seen in recent interventions around land access pursued by civil society organisations (CSOs) and shackdwellers. The first intervention involves an initiative called LANDfirst<sup>401</sup>, which is advocated by Afesis-corplan, Urban LandMark, Planact and a number of other organisations. LANDfirst seeks to develop an incremental tenure system (between a shack and an RDP house) that is affordable to establish and allows the poor to access land and tenure security. Under the this managed land settlement initiative, the outer boundary of an existing informal settlement earmarked for future upgrading, or a new piece of land identified for phased and incremental settlement, could be identified and communities are afforded the right to settle on a plot and granted permission to build certain types of structures on it. The proponents of this incremental approach are lobbying for government support for a pilot and demonstration projects to explore these different tenure arrangements.<sup>402</sup> Recently, LANDfirst and SERI hosted a workshop aimed at coordinating civil society efforts around informal settlement upgrading, in response to the creation of NUSP and the articulation of upgrading delivery targets by the DHS.<sup>403</sup> One of the critical areas of concern that emerged out of this workshop revolved around the issue of lists, and what happens to those informal settlements that are not prioritised for upgrading, as well as how transparent and open the process of selection is.<sup>404</sup>

Another intervention involves frustrated informal settlement and backyard shackdwellers proactively occupying land and erecting shacks, after many unfulfilled promises of housing for over a decade and in defiance of the so-called ‘land invasion units’ that have been created by various metropolitan municipalities. These actions make the statement that the poor do (and should) have a place in the city and that state housing policy and implementation are failing those in desperate need.<sup>405</sup>

## 7.11 Consolidation Subsidy Programme

The Consolidation Subsidy Programme is available to beneficiaries who have already received state assistance to acquire a serviced residential site under pre-1994 state housing schemes. The subsidy is applicable to serviced sites that were obtained on the basis of ownership, leasehold or deed of grant, and may be utilised to complete, construct or upgrade a top-structure on the relevant property to the level required by the National Norms and Standards. In respect of serviced sites, the stand to which the subsidy will be applied must previously have been serviced utilising public funds and must comply with a minimum level of engineering services i.e. a piped water supply with at least 1 stand pipe per 25 households, a properly functioning sanitation system for each household, suitable access to each property and a storm water drainage system. Where the stands do not comply with the above-mentioned standards, funding for the upgrading of the service levels must be obtained from resources other than the housing allocation. Where no alternative funding is available, the MEC may, as an option of last resort, allocate funding to rectify services.

The subsidy quantum is R54 650 and the Programme provides for Individual Subsidies as well as project-based schemes. In the case of the Project Linked Consolidation subsidies, beneficiaries must establish a CBO

<sup>400</sup> NDoH “Annual Report 2008-2009” 47.

<sup>401</sup> See the LANDfirst website <[www.landfirst.org.za](http://www.landfirst.org.za)> for more on this initiative.

<sup>402</sup> R Eglin “Between a Shack and an RDP House: Alternative Forms of Tenure Security” (October/November 2009) 15, 5 *Transformer* 3-5.

<sup>403</sup> The LANDfirst/SERI workshop report is available at < [http://www.seri-sa.org/images/stories/report\\_from\\_landfirst\\_seri\\_workshop\\_on\\_informal\\_settlement\\_upgrading\\_sep10.pdf](http://www.seri-sa.org/images/stories/report_from_landfirst_seri_workshop_on_informal_settlement_upgrading_sep10.pdf)>

<sup>404</sup> K Tissington and L Royston “Urban Reform: Making up lost ground in SA’s informal settlements” *Business Day* (15 November 2010).

<sup>405</sup> See, for example, T Molefe “We will build shacks on vacant land” *City Press* (14 April 2010); R Pithouse “Land Occupation and the Limits of Party Politics” *SACSI* (25 May 2009); and M Legassick “Too few houses, too many people to house” *Cape Times* (26 May 2009).

as a representative organisation, and apply for the project subsidy in collaboration with the developer i.e. the municipality. In the case of individuals applying for an Individual Consolidation Subsidy, the rules and processes applicable to the Individual Subsidy Programme will apply (see subchapter 7.1 of this guide above for more on this).

The developer must reach an agreement with beneficiaries on which contracting strategies to opt for i.e. Turn Key Contracting Strategy (contractor built), traditional Pre-Planned Contracting Strategy (small contractors), Development Contracting Strategy or ePHP.

## 7.12 Emergency Housing Programme

In the previous Code, the Chapter 12 National Housing Programme: Housing Assistance in Emergency Housing Circumstances was developed to provide for temporary relief to people in urban and rural areas who found themselves in emergencies (see subchapter 5.2 of this guide on the *Grootboom* case for more on how this programme came to be adopted). According to the revised Emergency Housing Programme, also known as the National Housing Programme for Housing Assistance in Emergency Housing Circumstances, “the objective is to provide for temporary relief to people in urban and rural areas who find themselves in emergencies” as defined and described in the Programme.<sup>406</sup>

Assistance through the Programme is provided through grants to municipalities, administered through the provincial housing department, to enable them to respond rapidly to emergencies through the provision of land, municipal engineering services, relocation assistance and shelter to households on a temporary basis. With the approval of the MEC, the cost of consumption of the following basic municipal services for a maximum of three years (in cases where the municipality presents proof of its inability to provide the services from its own resources, and the services are actually provided by the municipality) can now also be funded by the Programme:

- Water consumption;
- Sanitation services provision;
- Refuse removal; and
- Street lighting where applicable.<sup>407</sup>

Funding is also provided for the possible relocation and resettlement of people on a voluntary and cooperative basis “in appropriate cases.”<sup>408</sup>

The Programme applies to situations where people have become homeless as a result of a declared state of disaster or a situation which is not declared as a disaster but extraordinary occurrences, such as floods, strong winds, severe rainstorms, hail, snow, devastating fires, earthquakes, sinkholes or large disastrous industrial incidents cause destitution. It also applies to people who live in dangerous conditions such as on land prone to dangerous flooding and who require emergency assistance, as well as to those who live in the way of engineering services or proposed engineering services, such as those for water, sewerage, power, roads or railways and who require emergency assistance. It further applies to those who are evicted, or threatened with imminent eviction, from land, unsafe buildings or situations where pro-active steps ought to be taken to forestall such consequences; those whose houses are demolished or threatened with imminent demolition; those who are displaced or threatened with imminent displacement as a result of a state of civil conflict or unrest; those who

<sup>406</sup> DHS “Emergency Housing Programme” Part 3 Vol 4 of the National Housing Code (2009) 9.

<sup>407</sup> Ibid 18.

<sup>408</sup> The Code explicitly states upfront in a summary of the Emergency Housing Programme, that “during the process of upgrading informal settlements, it may be necessary to temporarily re-house households while services are being installed or formal houses are being built on sites previously occupied by informal structures.” DHS (note 333 above) 21. See subchapter 7.10 above for more on the UISP and the implications of thinking in relation to the objects of the Programme i.e. *in situ* upgrading vs. relocation.

live in conditions that pose immediate threats to their life, health and safety and require emergency assistance; and those who are in a situation of exceptional housing need, which constitutes an emergency that can be addressed only by resettlement or other appropriate assistance, in terms of the Programme.<sup>409</sup>

In terms of qualifying beneficiaries, normal qualification criteria do not apply and assistance can be provided for people and households earning more than R 3 500 per month, those who are non-lawful residents, those who have previously received housing assistance or have previously owned and/or currently own a residential property, those do not have dependants as well as minor-headed households.

It is at the discretion of the municipality to decide whether assistance is required under the Programme and they determine the approach to project implementation depending on the circumstances of the emergency housing need. The Programme provides for a number of options for various emergencies, including “temporary assistance with resettlement to a permanent temporary settlement area”, in cases where a municipality chooses to establish a “permanent temporary settlement area” for affects persons until permanent housing at another location becomes available.<sup>410</sup> The Emergency Housing Programme provides R22 416 for the repair of existing services and up to the Individual Subsidy quantum amount for the reconstruction of existing houses. In terms of temporary assistance, the Programme provides R4 230 for municipal engineering services and R47 659 for the construction of temporary shelters.<sup>411</sup>

The National Norms and Standards do not apply to the implementation of the Emergency Programme (unless engineering services require reconstruction/provision at another site or repair/replacement of formal superstructures is required), however there are guidelines on the maximum level of basic engineering services to be provided in temporary settlements as well as requirements for temporary shelter:

- *Water*: access to a water point or tap for every 25 families;
- *Sanitation*: temporary sanitation facilities which may vary from area to area however where possible Ventilated Improved Pit (VIP) latrines must be provided as a first option on the basis of one VIP per five families;
- *Electricity*: the provision of high-mast lighting in special circumstances.

The Programme states that temporary shelters should be “basic, simple in form and easy to construct.” Their structural design should provide the strength, stability, and durability for the anticipated life-span of the shelter, providing basic shelter against the elements. The floor area should be at least 24m<sup>2</sup> and may vary up to 30m<sup>2</sup> depending on the need and possibilities within the funding limits.<sup>412</sup>

Annexure C of the Programme contains guidelines on accelerated land planning and township establishment procedures for the purposes of housing development in circumstances of emergency housing, outlining relevant legislation applicable for purposes of total or partial exemption from legislation and procedures in the case of emergency or temporary housing; less formal procedures; or accelerated procedures.

## 7.12.1 Problems with the Emergency Housing Programme

To date, interventions by municipalities to deal with emergencies under the Emergency Housing Programme have for the most part been minimal and administered on an *ad hoc* basis.<sup>413</sup> Research conducted in 2009 on the use of the Emergency Housing Programme by municipalities showed that only six out of the nine provinces had claimed funds from DHS for emergencies in municipalities in their areas: Eastern Cape, KwaZulu-Natal, Mpumalanga, Northern Cape, North West, and the Western Cape. Most grants were disbursed for disasters and

<sup>409</sup> DHS (note 406 above) 15-16.

<sup>410</sup> Ibid 34.

<sup>411</sup> DHS “Subsidy Quantum – Incremental Interventions” Part 3 Vol 4 of the National Housing Code (2009) 4.

<sup>412</sup> DHS (note 406 above) 38-39. See subchapter 5.4 above on the technical specifications outlined by the Constitutional Court in the *Joe Slovo* case.

<sup>413</sup> SHF & Urban LandMark (note 318 above) 18-20.

floods to rural areas, and urban areas have not really been claiming for assistance under the Programme.<sup>414</sup> It appears that Emergency Housing Programme funds are difficult to access and there are no clear guidelines on what constitutes an emergency and the nature of emergency, as well as what constitutes emergency, temporary and, finally, permanent accommodation for affected persons. According to a City of Johannesburg official, it is difficult for the City to get money out of the Gauteng province for emergency or temporary accommodation, and the provincial government needs to have a broader view of what constitutes an emergency and the suitable remedies that it will fund, which can alleviate hardship and vulnerability of those affected.<sup>415</sup> A recent housing report, attached by the City to court proceedings in an eviction application brought by a private owner in the inner city of Johannesburg, stated that over the past years it has made three requests for funding from the province, none of which were approved.

### 7.12.1.1 Temporary relocation areas (TRAs)

What *has* occurred is the proliferation of temporary relocation areas (TRAs) or ‘transit camps’ in various cities including Johannesburg, Cape Town and Durban,<sup>416</sup> to ostensibly deal with the housing backlog i.e. the overflow of people waiting for houses. Households are moved from shacks they have occupied, often for many years, to these areas where they are often left indefinitely with no timeline of when they will receive permanent accommodation. They are, in effect, off the “backlog radar” as they are neither informal nor occupants of formal RDP or bond houses. Because of their so-called temporary nature, City officials are unwilling to invest much in infrastructure in these areas and in fact, the Emergency Housing Programme explicitly discourages this. However, at the same time, substantial money is spent and costly infrastructure is invested and questions must be raised as to why the money used on “temporary shelters” could not be better spent on building proper houses elsewhere.

Transit camps have been widely criticised along with the temporary structures that comprise them (which are referred to derogatorily as “government shacks”).<sup>417</sup> In Delft in Cape Town, the City has come under fire for living conditions in its notorious ‘Blikkiesdorp’ TRA,<sup>418</sup> where residents have complained about the poor quality of structures, erosion of social networks, lack of job opportunities in the area, no place for children in schools, high transport costs to the city, lack of activities or recreation places for young people, high levels of crime and violence etc. These complaints are echoed across the country at other TRAs.

In a case study on the economic implications on households moving from King’s Rest informal settlement in Durban to a large transit camp near Orient Hills in Isipingo (ostensibly to make way for a fuel pipeline on the land), Hunter shows that even a relatively short move to a surrounding area resulted in devastating economic consequences for the households, destroying many livelihoods. He further found the transit camp did not provide the expected benefits of “formality”, as “the risk of floods, poor water supply, and dirty toilets were worse than the situation in the existing informal settlement.” Residents had not been given information on when and to where, they might be relocated to permanent accommodation. Hunter notes that temporary settlement areas ascribe formality to a population however, in doing so, ironically make them more invisible.<sup>419</sup>

<sup>414</sup> Ibid 55.

<sup>415</sup> Ibid.

<sup>416</sup> For example, in 2005 approximately 2 400 families from Langa in Cape Town were relocated to a transit camp called Tsunami. In Johannesburg, 6 400 families in Protea South in Soweto fought a plan to move them to a decant camp in 2007. In Durban, 52 families in Siyanda, KwaMashu, were evicted in December 2008 and moved to a transit camp to make way for a new freeway. See K Chance, M Huchzermeyer & M Hunter “Listen to the shack-dwellers” *Mail and Guardian* (24 June 2009).

<sup>417</sup> See, for example, CALS “Forced removal of Siyanda residents to transit camps” (23 January 2009).

<sup>418</sup> Blikkiesdorp was established in direct response to the occupation of N2 Gateway houses in Delft by neighbouring backyarders, who were evicted and ‘temporarily relocated’ to the area. The transit camp is occupied by approximately 1 250 households and provides shelter for other people in various emergency situations, including the occupants of unsafe or condemned buildings, homeless people and the victims of xenophobic attacks. “Give me a home, but not in a Temporary Relocation Area” *IRIN* (30 April 2010). See also J Hromnik “No temporary solution” *Weekender* (14 March 2009).

<sup>419</sup> M Hunter “Case Study: The Difference that Place Makes: Some Brief Notes on the Economic Implications of moving from an Informal Settlement to a Transit Camp” Department of Geography, University of Toronto (August 2010).

## 7.13 Institutional Subsidy Programme (ISP)

The Institutional Subsidy Programme (ISP) intended to provide “affordable rental housing” to the lower end of the market, which is recognised as being highly under-served.<sup>420</sup> While the Social Housing Programme is only applicable within specific urban restructuring zones, there are other areas that require rental accommodation, such as parts of informal settlements, rural areas and possibly even wealthy suburbs, where the ISP can be used. The ISP was introduced in order to provide capital grants to registered housing institutions to construct and manage affordable rental units outside of restructuring zones in respect of qualifying beneficiaries.

Qualifying criteria for beneficiaries are as per the NHSS, however, single persons without financial dependants, those who have previously owned fixed residential property and those who have previously benefitted from the NHSS are eligible to rent (however may not buy their units through an Individual Subsidy and must purchase the unit themselves). Where qualifying beneficiaries vacate their units they must be replaced by other qualifying beneficiaries. The ISP incorporates the option to sell the rental units to tenants after four years from the initial occupation of the units and tenants may also apply for Individual Subsidies to establish ownership of their units. The ISP complements the CRU, which is a *state*-owned rental housing scheme. See subchapter 7.15 of this guide below for more on CRU.

Housing institutions that meet the designated criteria may apply to the MEC in respect of a lease agreement, instalment sale, cooperative tenure arrangement or share-block agreement scheme. Qualifying beneficiaries then apply to the housing institution to occupy the rental stock. The regulatory and accreditation mechanism administered under the Social Housing Programme also apply to the Institutional Housing Subsidy Programme (see subchapter 7.14 of this guide below). Projects are only considered where housing institutions make capital contributions over and above the institutional subsidies to be allocated in respect of qualifying beneficiaries, with the minimum financial contribution per unit being equal to the financial contribution required from Individual Housing Subsidy beneficiaries i.e. R2 479. At present the subsidy quantum for the ISP is R52 171.

Once a beneficiary has occupied a rental unit, specific registration rules for the NHSDDB apply which differ from other programmes:

- Beneficiary occupies rental unit: if an institution concludes a lease agreement in respect of its residential property with a beneficiary or if it grants other rights of tenure in respect of the property to beneficiaries, the name of the beneficiary (and his or her spouse, if any) must be recorded on the NHSDDB and the endorsement “institutional” appears next to the entry. The beneficiary and spouse may not receive an Individual Subsidy while they occupy the property;
- Beneficiary vacates unit: if the beneficiary vacates the property occupied for any reason whatsoever, their name must be removed from the NHSDDB and they will once again qualify for a housing subsidy;
- Beneficiary ‘buys’ unit prior to four-year clause: if the beneficiary wishes to take transfer of the property before the expiry of the period of four years, they may apply for an Individual Subsidy in accordance with their income to discharge a portion of the purchase price. If the Individual Subsidy is approved, the endorsement “institutional” against the name of the beneficiary is replaced with an indication that an Individual Subsidy has been granted. In this case the housing institution would be required to, against transfer of the property to the beneficiary, pay to the MEC the amount calculated in accordance with a set out in the ISP set out below;
- Beneficiary ‘buys’ unit after four-year clause: if the property is sold and transferred to the beneficiary at any time after the expiry of a period of four years after the occupation date, the endorsement “institutional” must be removed to signal that the beneficiary has received an Individual Subsidy. The original subsidy quantum paid by the MEC to the institution is considered to be an Individual Subsidy and therefore does not need to be refunded.

If the housing institution provides the option to buy the unit after four years, the purchase price at which the beneficiary may purchase the property *must* be stipulated in the lease agreement entered into between the

<sup>420</sup> DHS “Institutional Subsidies” Part 3 Vol 6 of the National Housing Code (2009) 13.

beneficiary and the institution upon the occupation date. The institution may, if the beneficiary fails to exercise any option given to them, cancel the lease agreement on 6 months written notice to the beneficiary. If no option to purchase is given to the beneficiary, the institution may nevertheless require the beneficiary to purchase the property concerned on six months written notice given at any time *after* the passing of four years following the occupation date. If the beneficiary fails to purchase the property within the six months period, the institution may cancel the lease agreement on 90 days written notice to the beneficiary.<sup>421</sup>

If an institution has concluded a lease agreement (or other rights of tenure) in respect of property, the institution may at any time sell the property to any person other than the beneficiary with whom it has concluded the agreement *only* if the purchaser agrees to be bound by the agreement between the housing institution and the beneficiary. In this case, the housing institution must pay to the MEC the actual amount of the Institutional Subsidy it received for the property or the amount calculated in accordance with a formula outlined in the UISP.

## 7.14 Social Housing Programme (SHP)

The Social Housing Policy for South Africa was approved in June 2005 and the Implementation Guidelines published in November 2006. The policy has recently been included in the new National Housing Code of 2009 as the Social Housing Programme (SHP).<sup>422</sup> The Social Housing Act provides the legal framework for the implementation of the Social Housing Policy. According to the SHP, social housing is defined as follows:

“ a rental or co-operative housing option for low income persons<sup>423</sup> at a level of scale and built form which requires institutionalised management and which is provided by accredited social housing institutions<sup>424</sup> or in accredited social housing projects<sup>425</sup> in designated restructuring zones.<sup>426</sup> ”

BNG’s aim to create sustainable human settlements includes the promotion of more efficient cities, towns and regions. In support of spatial restructuring, BNG highlights the need to “integrate previously excluded groups into the city and the benefits it offers.” It flags the need to promote densification, including “housing products which provide adequate shelter to households whilst simultaneously enhancing flexibility and mobility.” Rental housing is acknowledged as being especially important to the poor, offering choice, mobility and an opportunity to those households who do not qualify for an ownership subsidy. The Social Housing Policy is envisioned as a key component to achieving these objectives to promote social housing, which the Policy believes “is able to significantly contribute to urban regeneration and to urban efficiency. It can meet objectives of good location, integration, and viability. The sector can facilitate local economic development through supporting local economies. It makes a financial contribution to local authorities by way of regular payments for rates and services.”<sup>427</sup>

<sup>421</sup> Ibid 28.

<sup>422</sup> DHS (note 50 above).

<sup>423</sup> Low-income persons are broadly defined as those whose household income is below R7 500 per month. According to the SHP, income mix prescriptions for individual social housing projects will specify desired percentages of participants for different income categories within this band to ensure a good spread across the range R1 500 to R7 500 a month.

<sup>424</sup> An accredited housing institution is as a legal entity established with the primary objective of developing and/or managing housing stock funded through the SHP, and which has been accredited by the SHRA.

<sup>425</sup> An accredited project is a state-subsidised social housing project provided by the private sector to make affordable rental units available to those who are eligible, and has received accreditation through the SHRA.

<sup>426</sup> Designated restructuring zones are geographic areas identified by local authorities and supported by provincial government for targeted and focused investment. Restructuring zones were approved (as of 2006) in the following areas: Ekurhuleni Metropolitan Municipality, City of Cape Town, City of Johannesburg, eThekweni Metropolitan Municipality (Durban), Nelson Mandela Bay Municipality (Port Elizabeth), City of Tshwane (Pretoria), Buffalo City Municipality (East London), Mangaung Local Municipality (Bloemfontein), Msunduzi Local Municipality (Pietermaritzburg), Polokwane, Potchefstroom, Kimberley and Nelspruit. See SHF “Minutes of Local Government Social Housing Forum” (22 November 2006).

<sup>427</sup> DHS (note 50 above) 6.



## 7.14.1 Background to the SHP

Since 1997, SHIs and social housing projects have been developed in South Africa following the introduction of the Institutional Subsidy (see subchapter 7.13 of this guide above). The delivery models employed by SHIs have been diverse and vary from pure rental, to co-operative housing, instalment sale options, and hybrids of these delivery models. While the notion of rental housing provided by institutions was included in the White Paper on Housing as one of the subsidy programmes, this form of housing has taken some time to get off the ground.<sup>428</sup> At the Presidential Jobs Summit Pilot Project on Housing held in 1998, the government aimed to deliver 50 000 rental units by the end of 2000. According to the Social Housing Policy, approximately 60 SHIs have been formed, delivering approximately 30 332 units throughout the country as of 2005. The SHIs have developed social housing stock using the Institutional Subsidy together with loan funding from the NHFC, and have relied on donor funding and local authority grant funding to cover set-up and operational costs. The Social Housing Policy aimed for the delivery of 22 500 units in the first three years and a total of 50 000 units within five years (as of 2005). The recent national Rental Housing Strategy proposes to deliver 100 000 units from 2007 to 2012, 75 000 of which would be social housing units.

## 7.14.2 Past challenges and constraints

According to the SHP, in the past SHIs developed social housing stock using the Institutional Subsidy together with loan funding from the NHFC and have relied on donor funding and local authority grant funding to cover institutional set-up and operational costs. This has “resulted in an unsustainable situation where the majority of the SHIs have developed and currently depend on donor funding.”<sup>429</sup> Other problems identified with the previous system include: difficulties with achieving scale given that the capacity and experience base is limited and needs to be consolidated and properly reinforced; overall funding framework and the Institutional Subsidy is not tailored to the production of viable medium to higher density housing products and projects, and has no proper provisions for the O/M costs of the housing stock; immense financial pressures and the parameters of the current subsidy approach are too tight to allow the provision of social housing too far “down-market”; limited emphasis on project packaging, project implementation, and project operations skills needed to run viable SHIs; lack of suitable governance and management capacity evident within some of the SHIs; lack of regulatory authority; and social housing sector moving out of the low- income market into the middle-income markets (i.e. upper R3 500 per month band) due to the financial pressures and subsidy constraints, therefore competing with private sector players. The Social Housing Policy and new SHP roll-out strategy aims to fill the policy vacuum and to address the myriad challenges of the sector through the intervention of the new regulatory body, the SHRA.

### Reaching the ‘deep-down market’

A fundamental constraint to the ability of social housing to assist poor individuals and households access affordable and well-located rental housing is that SHIs have tended to look “up-market” (above the eligibility cut-off point) in order to survive and very little has been done to increase the range of options available to those in the lower bands of the subsidy range, also known as the “deep-down market.” The Social Housing Policy acknowledges that there is a perception that “social housing is for a small relatively privileged elite and does little to contribute the housing challenge in South Africa” (see subchapters 4.2.2 and 6.4.2.3 of this guide for more on this critique).<sup>430</sup> While the SHP aims to tackle these challenges, it admits that the primary policy objective of the SHP is *restructuring*, not mass delivery.<sup>431</sup> While the SHP aims to maximise “deep-down reach” and target those earning R1 500 a month (and less if possible) it aims for mixed-income projects (vs. uniformly

<sup>428</sup> Charlton & Kihato (note 17 above) 266.

<sup>429</sup> DHS (note 50 above) 6

<sup>430</sup> Ibid 29.

<sup>431</sup> Ibid 32.

housing very low-income households in one project) and requires participants to demonstrate a regular income which is able to sustain the monthly rental, and the payment of a deposit equal to rental of three months.<sup>432</sup>

An ever-present challenge with rental accommodation in the social housing and private sector is escalation of rentals (see subchapters 2.2.3 and 4.2.2 above for more on this in relation to private landlords). The SHP states that the raising of rentals must occur through well-defined processes, taking into consideration that rentals will need to be raised on an annual basis (at CPIX) to ensure the financial viability of projects and SHIs as well as to ensure that there is a “harmonious rent level for units of comparable quality across the social housing sector.”<sup>433</sup> The SHP recommends an approach of charging higher rentals (than required in terms of the financial modelling estimates) at the outset of a project and to escalate rentals at a more gradual rate. The implications for initial entry are noted, however are not elaborated on in the SHP.<sup>434</sup>

The SHP notes that an upper limit for eligibility for social housing subsidies is important *inter alia* to “ensure only that the worst excesses of downward raiding are avoided” (if some units within a social housing project are unsubsidised and market rental applies to them, as is intended to help achieve an income mix, then the upper income limit does not apply).<sup>435</sup> Previously the upper income limit for eligibility for social housing subsidies was R3 500 per month; however the SHP notes that this has become increasingly problematic because it has not been inflation-adjusted over the years. Therefore, while the eligibility limit has remained static, buying power has reduced dramatically, with the result that households with incomes below about R3 000 are unable to access state-supported rental housing via the Institutional Subsidy, and are serviced by the private and informal market. In addition, “households whose income has increased find themselves over the specified eligibility income limit, even if in real terms they are actually poorer than they were ten years ago.”<sup>436</sup> The SHP has thus increased the upper income level to R7 500 a month for subsidised social housing units (worked out in terms of annual CPIX escalations from the time the upper income limit was introduced). The SHP advocates that the upper income limit should be escalated each year at CPIX, however with the caveat that the social housing subsidy mechanisms have been structured accordingly so that there are incentives for reaching down-market and achieving a spread across the income range between R1 500 and R7 500 in all qualifying projects.

### Defining eligibility – from income audits to rental audits

Another identified problem has been the use of income-based means testing to determine eligibility for social housing units, regarded as being very difficult to determine and audit. An alternative approach advanced by the SHP shifts the emphasis from auditing incomes to auditing rents that SHIs or projects charge. The assumption is that if rental units of different quantity/quality levels are injected into the marketplace at rents affordable to the income mix targeted, self-targeting will occur insofar as higher income earners will not want to stay in the poorer quality units. The SHP proposes that periodic social surveys be undertaken to establish the actual correlation between incomes and types of units occupied. If out of line, remedial action would have to be taken. The SHP argues that one of the main advantages of this approach is the circumvention of the so-called “edge of the world” effect that occurs at the outer limits of income bands e.g. if the upper limit of the band is R3 500 and a person’s income is R3 499 per month the person is eligible for a big capital grant, but if the person’s income is R3 501 they are eligible for nothing.<sup>437</sup> Another advantage identified by the SHP is the easing of administrative burden on both government and SHIs. The SHP notes that this approach is open to abuse and vulnerable to “downward raiding” by higher income households of units meant for lower income people. The SHP maintains that the success of self-targeting depends on the way projects are implemented, and that clear guidelines

<sup>432</sup> Ibid 31.

<sup>433</sup> Ibid 34.

<sup>434</sup> Ibid.

<sup>435</sup> Ibid 35. “Downward raiding” refers to a situation where housing units meant for a certain income bracket are taken over by those in a higher income bracket.

<sup>436</sup> Ibid.

<sup>437</sup> Ibid 32-33.

are required to promote effective self-targeting. Other interventions that limit downward raiding should be explored. The following subchapter 7.14.3 describes the SHP approach in more detail.

### Shift from an individual-based to project-based approach

The SHP moves away from the previous individual subsidy-based approach to a project-based approach. It is envisaged that appropriate targeting will be addressed in the project approval process and that it will be a pre-condition for the award of a project grant or subsidy. Each project will specify a range of housing products targeted at income groups appropriate to the area and context, based on tested demand and in line with the broader restructuring aims of the Social Housing Policy. The difference between rental revenues and the cost of providing the units will be subsidised via a grant from government. This grant will be calculated with reference to the project as a whole rather than with reference to particular unit types. However to the extent that deep down-market reach is intended,

« those units meant for the very poor will attract proportionately more subsidy than units meant for those low-income people with more substantial incomes.<sup>438</sup> »

### 7.14.3 Mechanics and funding of the SHP

The SHP envisages a dedicated capital fund at national level which the DHS (or the SHRA) disburses to accredited local authorities and provinces (who apply for social housing development in restructuring zones). There are two components of this grant. The first is a standard/fixed component of the social housing grant – the capital restructuring component - provided by national government. In order to qualify for the capital grant on every unit, a social housing project must have at least 30 percent of units contributing to deep down-market reach and maximum rentals no higher than R2 500 (implying an income of R7 500 per month i.e. the top of the income band).<sup>439</sup> The social housing financial arrangements provide incentives for achieving even higher proportions of deep down-market rentals and the capital grant will increase linearly as the proportion of units with deep down-market rentals increases from a minimum of 30 percent of all units to a maximum of 70 percent. A project is not eligible for this subsidy unless it achieves a minimum of 30 percent down-market reach. The standard component is calculated as a proportion (60 percent) of the subsidy required to ensure a viable project in a generic mixed rental project, and is expressed as an average subsidy per unit for the project. The typical mixed rent project used to calculate subsidy requirements assumes that 30 percent of the units achieve deep down-market reach whilst the rest have rentals below R2 250 per month. In such a scenario the average subsidy per unit required is approximately R55 000.<sup>440</sup> Thus the standard grant component from national will be 60 percent of this, which is R33 000. If 70 percent deep down-market reach is achieved the maximum standard subsidy is R 44 000 (assuming an overall average subsidy of R74 000). Projects can exceed the limit of 70 percent but they will not attract any extra standard component subsidy

The second component of the social housing capital fund is the top-up/variable component which is administered by provincial departments or accredited municipalities and sourced from the Equitable Share (ES) budget, which is allocated to provinces every financial year i.e. provinces top-up the standard subsidy. The idea is for a portion of this budget to be allocated towards social housing – in the form of Institutional Subsidies to be applied outside restructuring zones, and to top-up/augment the standard component of the social housing capital grant (so as to enhance the affordability of social housing and thereby promote deeper down-market

<sup>438</sup> Ibid 34.

<sup>439</sup> The SHP defines deep down-market reach where rents fall between the lowest possible rental, which is operating cost per unit (assumed to be R500 per month and implying an income of R1 500 per month) and R1 166.66 (implying an income of R3 500 per month). Moreover the average rental of units in this band must be no more than R825.

<sup>440</sup> The SHP notes that the *actual* subsidies for the deep down-market units are on average R90 000 per unit when 30 percent of the units are deep down-market, and R108 000 when per unit when 70 percent fall into the deep down-market category.

reach). The top-up component will however be subject to a cap (equivalent to the Institutional Subsidy amount). Municipalities and provinces are encouraged to “top-up further” by making land, buildings, municipal rental stock available to municipal infrastructure and services for approved social housing projects, as well as to seek donor funding where available.<sup>441</sup>

In addition to the above, the SHRA is mandated with further managing capacity-building grants to assist SHIs and other social housing delivery agents.<sup>442</sup> Delivery agents can include accredited SHIs as well as private sector developers undertaking accredited social housing projects and the desire is for this to be undertaken in collaboration with municipalities. The SHP recommends that metropolitan municipalities consider establishing a dedicated unit for their support functions to social housing development, however that local governments should not manage SHIs directly e.g. the Johannesburg Social Housing Company (JOSHCO) was established by the City of Johannesburg in March 2004 and is solely owned by the City and governed by a Board of Directors appointed by the City.<sup>443</sup> Another role-player in the social housing landscape is the National Association of Social Housing Organisations (NASHO), the representative lobbying and coordinating body for SHIs established in 2002.<sup>444</sup>

#### 7.14.4 Recent developments around the SHP

After the approval of the Social Housing Policy in 2005, the government launched the Interim Social Housing Programme (ISHP) in 2006 to test the provisions of the policy in a pilot programme. ISHP 1 (2006/2007) received R102.6 million from DHS and 1 698 units were built in four projects in Msunduzi, eThekweni and Cape Town. ISHP 2 (2007/2008) approved projects to the value of R235.2 million and a total of 1 893 units in four projects where funded in Buffalo City, Cape Town and Johannesburg. In 2010 the ISHP was transferred to the SHRA and two approved projects were approved for ISHP 3 to the value of R240.2 million to fund 1 818 units in Nelson Mandela Bay, Buffalo City, Tshwane, eThekweni and Cape Town.

Despite the social housing policy and enabling legislation, there are a number of concerns with the slow pace of low-income rental housing delivery and the ability of the policy to address the needs of very low-income beneficiaries. Indeed, social housing in South Africa is still largely envisaged as *private* and is not the mass public housing vision that some at the NHF had advocated. Most social housing projects cater predominantly for those households earning between R3 500 and R7 500 a month, with a small percentage catering for the bottom end of the market (mostly because the subsidy mechanism makes this mandatory). According to the SHF in a study of ISHP 3, out of 13 SHIs examined, eight were charging an average rent of higher than the cut-off point of R875 per month which indicates that they “are not catering for their low-income target market.” Out of the 13, only three SHIs were charging average rents of less than R500 per month. Only 38 percent of units (with a rental of R875 per month or less) are accessible to the low-income target group meaning that 62 percent of rentals are beyond the reach of this market. When the figures are examined excluding JOSHCO, the situation becomes even worse and only 22 percent of social housing stock has rentals of less than R875.<sup>445</sup>

A major deterrent in the provision of social housing for the very poor is the ongoing management and O/M costs associated. The reluctance of private SHIs to take on the risks associated with very low-income rental housing provision is cause for concern and necessitates a policy rethink by the DHS with regard to this.

<sup>441</sup> DHS (note 50 above) 50.

<sup>442</sup> Capacity-building includes training, technical assistance, financial and on-the-job management support, as well as sharing of information and experience. Capacity-building grants can be accessed by the SHIs, other delivery agents, provincial and local government and support organisations.

<sup>443</sup> See the JOSCHO website for more <<http://www.joshco.co.za/>>

<sup>444</sup> See the NASHO website for more <<http://www.nasho.org.za/>>

<sup>445</sup> SHF “A snapshot of the Interim Social Housing Programme (ISHP) 3: 2009/10” SA Rental Housing Manager (March 2010).

## 7.15 Community Residential Units (CRU) Programme

In November 2006 the Community Residential Unit Policy Framework and Programme Guidelines were developed which have been incorporated into the revised National Housing Code. The Community Residential Units (CRU) Programme,<sup>446</sup> which replaces the national Hostel Redevelopment Programme and the proposed Affordable Rental Housing Programme, intends to provide rental accommodation to very low income households who are currently underserved and accessing informal rental housing opportunities. In line with the National Rental Housing Strategy, the aim is to deliver 100 000 rental units by 2010, 25 000 of which will be CRU stock. Since neither the Social Housing nor the Institutional Subsidy Programmes are able to extend fully into the bottom-end of the market, the CRU aims to provide a framework for the provision of secure tenure, stable conditions and good quality rental accommodation to the lowest income sector. The programme targets persons and households earning between R 800 and R3 500 per month who are not able to enter the formal private rental and social housing market.

According to the DHS and outlined in the CRU programme, there are approximately 2 000 public hostels that need to be addressed as well as 200 000 residential units owned by the provinces and municipalities, which through the EEDBS could be transferred into individual ownership but may be more viable, cost effective and strategic to be retained as public assets to provide low-income rental.<sup>447</sup> The Programme particularly acknowledges that in the case of multi-storey buildings, it is "extremely complex, difficult and costly to transfer ownership to individuals and therefore the stock would be better suited to be retained as rental accommodation."<sup>448</sup>

The Programme intends to redevelop or develop:

- public hostels owned by provincial departments and municipalities;
- 'grey' hostels that have both a public and private ownership component due to historical reasons;
- public housing stock that forms part of the EEDBS, but which cannot be transferred to individual ownership;
- publicly-owned rental stock developed after 1994;
- existing dysfunctional, abandoned or distressed buildings in inner cities or township areas that have been taken over by a municipality; and
- new public rental housing assets.

Hotels and accommodation that are being used to accommodate public sector employees do *not* form part of the CRU programme. Under the CRU, housing stock must be owned by either a provincial housing department or municipality and must remain in public ownership and not be sold or transferred to individual residents i.e. there is no pre-emptive right to purchase as per the Institutional Subsidy. There are a number of approaches that municipalities and provincial departments can take to different properties, which are outlined in great detail in Part D of the CRU Programme along with estimated costs etc. These approaches include stabilisation, simple demolition, medium complex demolition, complex demolition, basic refurbishment (no upgrade), upgrade refurbishment, hostel redevelopment, simple and complex conversion of existing inner city buildings, new build infill on existing sites and new build on greenfields sites.<sup>449</sup>

The target market for the CRU programme is existing residents of public housing stock (both subsidy and non-subsidy qualifiers), displaced persons from informal settlement upgrading or evictions, new applicants who are on the provincial or municipal waiting list, and qualifying indigent groups who are able to pay some form of rental and service/utilities. The CRU capital grant is disbursed by the provincial department and funding

<sup>446</sup> DHS "Community Residential Units" Part 3 Vol 6 of the National Housing Code (2009). For more information on the CRU programme see <<http://www.dhs.gov.za/Content/CRU/Home.htm>>

<sup>447</sup> Ibid 9.

<sup>448</sup> Ibid.

<sup>449</sup> Ibid 39-116.

provision must be made in the provincial budgets and business plans for the CRU programme on an annual basis.

The CRU programme is administered by municipalities or provincial housing departments who can choose to manage the housing stock in-house or outsource the management to an accredited SHI, private company or municipal entity (as long as all costs related to the units forming part of a specific scheme can be financed within the operating budget for the specific housing stock). Funding is provided for the development or refurbishment of the properties in question through the capital costs of project development and the long-term capital maintenance costs. Operating costs (which can include rates, taxes and services; administration costs; emergency and general maintenance; general upkeep and cleaning; insurance of buildings; education and training for residents; security; furniture and utility costs of common areas) has to come from the rental income collected by the municipality or provincial department i.e. the owner. Further, the responsibility for efficient management of the housing stock rests with the owner.<sup>450</sup>

The Programme acknowledges that relief assistance may be required by residents which would be provided by the property owner to the tenants. According to the CRU,

« rent setting needs to be done in such a manner to ensure that operating costs are covered but also ensuring affordability for the target market. Therefore cost-recovery rentals will apply.<sup>451</sup> »

The cost-recovery rental is calculated using the standard m<sup>2</sup> rate, which is determined by taking the total operating budget for the housing stock and dividing it by the total m<sup>2</sup> of housing stock that the municipality or provincial department owns. All tenants will be charged the same m<sup>2</sup> rate and the rental and m<sup>2</sup> rate must be clearly communicated to tenants. Annual rent increases will relate to the operating cost increases.<sup>452</sup> The CRU states that electricity on individual units should be provided through the installation of pre-paid meters and water to individual units is to be controlled through flow-meters installed on each unit. The cost of electricity and water usage in common areas should be included in the operating budget and therefore recovered from the rentals.<sup>453</sup>

### 7.15.1 Implementation of CRU to date

In 2008, implementation of the CRU programme was conducted in the Free State province in collaboration with the SHF. A technical advisor assisted the Free State housing department to develop and implement a CRU provincial strategy and CRU database and complete a five year project pipeline. The finalisation of the Western Cape CRU programme, processes and procedures also occurred. The SHF delivered technical support to assist municipalities/provinces in the maintenance and management of their own stock and assisted the DHS with CRU “roadshows” throughout the country to publicise the roll-out of the Programme to local and provincial housing departments in Free State, Gauteng, Western Cape and KwaZulu-Natal. In 2010 the SHF published the CRU Implementation Toolkit which was designed to assist in the various phases of implementation of CRUs.<sup>454</sup>

The City of Cape Town has undertaken to refurbish and upgrade approximately 7 700 CRU rental properties in over ten poor areas across Cape Town in Phase 1 of its CRU project. As of August 2010, upgrades to 200 City-owned rental units had been completed. According to the City, residents are relocated to “temporary accommodation villages” for the duration of the upgrade. The City claims that no irregular rental increases are

<sup>450</sup> Ibid 20.

<sup>451</sup> Ibid 19.

<sup>452</sup> Ibid 19–20.

<sup>453</sup> Ibid 20.

<sup>454</sup> SHF “Annual Report 2008/2009” and “Annual Report 2009/2010” 22–28.

planned after upgrades take place. However, “the City will also strictly apply its credit control policies...tenants who cannot pay are urged to apply for a rebate under Council’s housing indigent policy.”<sup>455</sup>

According to a 2008 case study on the impact of the redevelopment of six hostels, several key challenges were identified which have implications for the CRU programme going forward. These include: the importance of comprehensive capital investment to ensure the viability of a development; the need for municipalities to act as facilitator for the physical redevelopment as well as the prime agent of building human capital; success is intrinsically linked to local economic, social, transport and internal services development; the lack of any form of ongoing national rental subsidy programmes for indigent tenants does not bode well for the future operational self-sufficiency of developments etc. It is hoped the CRU programme will address some of these shortcomings in the future.<sup>456</sup>

According to the recent delivery agreement on human settlements, the CRU programme “needs to be legislated and must include tightening of the guidelines to include changing the mandate for grant management and regulation to the SHRA and the introduction of a subject subsidy to realize the deep down reach.”<sup>457</sup> The agreement further highlights three reasons why the CRU programme is one of the most challenging to roll out. The first is around the tenant regularisation process, which is “difficult and cumbersome given the poor track record of management by provinces and municipalities and the resultant culture that it has entrenched together with the lack of political will to support a turnaround of tenant behaviour initiatives.”<sup>458</sup> The second major challenge is that the “current policy as it stands is not robust enough to ensure that the funding element is not abused and used for refurbishment only in isolation of considering the turnaround of the project to sustainability.”<sup>459</sup> Finally, the third challenge is that the policy assigns the grant management and regulation mandate to provinces, which “do not have the capacity or skills to undertake such management, and the development role to municipalities who also have the same problems, and interests that are not necessarily aligned to the policy prescripts.” Finally, the pipeline of projects is not as stable as the social housing pipeline, in that it was “not driven and tracked over the past two years and therefore much work has to be undertaken to package it for delivery.”<sup>460</sup>

<sup>455</sup> City of Cape Town “City’s rental stock tenants pleased with major upgrades” (31 August 2010).

<sup>456</sup> SHF “Transformed Communities or Unmet Challenges? Consolidation report of lessons learned from six hostel redevelopment case studies” (April 2008) 25.

<sup>457</sup> Note 123 above, 32.

<sup>458</sup> Ibid 54.

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This housing resource guide provides an overview of housing legislation, jurisprudence, policy, programmes and practice in South Africa since 1994. The housing terrain in the country is complex, in large part due to the deliberate policy and legislative framework of socio-economic and spatial exclusion and marginalisation created during apartheid, but also due to failures on the part of the post-apartheid state to adequately redress these problems since 1994. As with other socio-economic rights, the legislative and policy framework created by national government around housing is in fact quite progressive. However, implementation to date has been skewed and unable to address the land, housing and basic services needs of millions of poor South Africans who still lack adequate housing and access to water, sanitation and electricity. While the urban and rural spatial divide remains pronounced in respect of access to socio-economic goods and services, the phenomenon of the inadequately housed urban poor is increasing. The report explicitly focuses on access to housing in the urban context. Intrinsicly related to the provision of adequate housing is access to land, and its implications for urban and spatial planning. The unlocking of well-located urban land for residential purposes for the previously dispossessed in terms of inclusive, transformative urban and spatial planning has lagged behind other forms of transformation in the country. While touching on these issues indirectly, this report does not delve into issues of access to land, land use or urban planning in great detail. Rather, it provides a simplified yet comprehensive guide to policies, legislation, jurisprudence and practice in relation to urban housing in South Africa, which will hopefully be useful to a wide audience that includes social movements, community-based organisations (CBOs), non-governmental organisations (NGOs), lawyers, development practitioners, planners, government officials, academics, scholars etc.

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