#8 A NEW LAND RECORDS SYSTEM
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Background and Introduction

Despite the South African Government providing 3.7 million housing opportunities between 1994 and 2014, the number of informal settlements in South Africa grew from 300 to 2 225, an increase of 650%.[1] Over the same period the housing backlog of the country grew from 1.5 million to 2.1 million houses. The "build-RDP-houses" approach to providing for the housing needs of the country is clearly not keeping up with the demand.

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[1] South Africa's Housing Conundrum, SAIRR, @liberty, No 4, 2015/6 October 2015/Issue 20

http://irr.org.za/reports-and-publications/atLiberty/files/liberty-2013-south-africas-housing-conundrum

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Rather than continuing to try and build RDP houses for everyone who qualifies, it is proposed that government should rather follow an incremental approach to addressing the housing and settlement needs of the country. This involves government adopting a two pronged approach that includes:

- upgrading the living conditions of people where they are in existing informal settlements - this is referred to as Upgrading of Informal Settlements; and
- letting people move onto (basic) serviced sites and upgrading these areas over time - this we refer to as Managed Land Settlement - MLS. [2]

It is fairly well understood how an incremental settlement approach works in the context of providing engineering services where government starts by providing basic services such as communal toilets and water and then in a step-by-step manner over time incrementally upgrades these services until everyone has water and toilets in their house. There is less understanding however for how an incremental settlement approach could work in the context of tenure security.

According to the United Nations Habitat programme, security of tenure is defined as 'the right of individuals and groups to effective protection by the state to unlawful evictions.'[3] Under international law, 'forced eviction' is defined as: 'the permanent or temporary removal against their will of individuals, families and/ or communities from the homes and/ or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.' [4]

Using the upgrading of informal settlements as an example, one option to achieve tenure security is for government to provide individual title deeds to all people living in informal settlements. However, if informal settlements are being developed in an incremental manner, it will take time and be expensive to follow all the necessary procedures to reach a stage where title deeds can be provided to everyone in that settlement. Over and above obtaining the necessary approvals for the upgrading of the settlement (e.g. environmental and town planning approvals), a land surveyor will need to arrange for a Survey Diagram to be approved by the Surveyor General and for the informal settlement to be pegged on site; and a conveyancer will also need to open a township register in the Deeds Office and transfer erven to final beneficiaries.

Another option for securing tenure of people living in informal settlements is to find a way to provide what many are calling 'off-register' forms of tenure security.[5] In South Africa, the concept of 'off-register' tenure emerged in both the rural context in an attempt to find appropriate ways to deal with communal, customary or 'social' forms of tenure[6], and in the urban context where development practitioners working in informal settlements have been exploring ways to provide basic and interim forms of tenure security for people living in informal settlements[7]. Internationally the United Nations - Habitat and the Global Land Tools Network are also exploring 'off-register' forms of tenure[8].

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[2] for more information on MLS see: http://afesis.org.za/managed-land-settlement/
[3] see http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf
[4] see http://www.ohchr.org/EN/Issues/ForcedEvictions/Pages/Index.aspx
[5] see "Annexure 4: perspectives on land rights and inheritance", found at http://afesis.org.za/rethinking-communal-land-administration/
[6] see Annexure 4: perspectives on land rights and inheritance" referenced above.
[7] see Urban LandMark tenure research at http://www.urbanlandmark.org.za/research/secure_tenure.php
[8] see, for example, the Social Tenure Domain Model at http://stdm.gltn.net/

The Land Governance Transformation Network (LGTN)[9], made up of urban and rural development practitioners and academics from both these rural and urban strands of enquiry, is emerging to promote these 'off-register' forms of tenure. This network is developing and motivating for new land records legislation that will provide an alternative form of tenure recognition for people living in communal land areas, in Communal Property Associations, on farms as farm dwellers, in informal settlements, in areas designated by government as managed land settlement areas, and in other 'off-register' situations.

A new land records system

What is being conceptualised and proposed by the LGTN is a single overarching land governance system that includes two parallel land governance sub-systems. The one, the land registration system, is the system that we are all familiar with, with the surveyor general and deeds office; and the other being a new, yet to be established, land records system. In such a proposed new land governance system, people would be able to choose which sub-system they want to be a part of and are able to move in both directions from one sub-system to the other.

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[9] The founding organisaitons of the LGTN includes Afesis-corplan, AFRA, Phuhlisani and the Socio-economic Rights Institute of South Africa.

The administration of the proposed new land records system involves:

- identifying a social unit such as a head of household, a family, a group, or an organisation;
- identifying a spatial unit or piece of land that is either defined to millimetre precision as a survey diagram; or demarcated to 'good enough' accuracy as shown on a scaled map such as a Google Earth map as a geo-referenced point, plot or erf;
- creating a link between the social unit and the spatial unit by noting the name of the social unit against the spatial unit within a locally administered but nationally coordinated land records electronic data base; and
- providing the social unit with some form of evidence, such as an Occupation and Use Right (OUR) certificate[10] that the social unit can use to confirm their right to use the identified portion of land.

New legislation (such as a new Land Records Act) will be needed to create and activate this new land records system. Such a Land Records Act will need to make provision for:

- collating and storing all existing land records such as Permission to Occupy Certificates and other land rights records found in various government departments and offices;
- conducting land rights enquiry processes to collect information from the ground (through enumeration and other community mapping techniques) as to who is making what claims to which piece of land;
- adjudicating and confirming that these claims to land are valid;
- providing for dispute resolution procedures like mediation and arbitration (in instances where there are disputes and conflicts over valid claims to land) to help the parties reach agreement or, as a last resort, using the courts to make a decision;
- the recording of which social units are linked to which spatial units so as to create an administrative record that confirms who has what rights to which piece of land;
- the issuing of some form of evidence certificate (such as an OUR certificate) by the authorising agency (government), that can be used by the occupant to confirm that they have legitimate rights to be on, using or accessing the land;
- procedures for maintaining and updating the social and spatial units as changes are made over time through, for example, inheritance or when a rights holder 'sells' their occupation and use rights; and
- mechanisms and procedures for ensuring the integrity and protection of the land records system, thereby minimising opportunities for the records to be tampered with and false claims to be made.

Table 1 (on the next page) compares the existing land registration system with the proposed new land records system against various aspects of land administration ranging from who is responsible for collecting the information on spatial and social units and dealing with any disputes relating to associated land rights[11].

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[10] Remember that the OUR certificate does not yet exist and would need to be created through legislation.
[11] This table is a slightly modified version of a similar table found in the main report at:
http://afesis.org.za/rethinking-communal-land-administration/

Table 1: Comparison of land registration and land records systems

Aspect	Land registration system	Land records system
Enabling legislation.	Land Survey Act (No. 8 of 1997). Deeds Registries Act (No. 47 of 1937).	New Land Records Act (yet to be developed, still being motivated for).
Responsibility for enabling legislation.	Department of Rural Development and Land Reform (DRDLR).	DRDLR.
Responsibility for administering the system.	National DRDLR through the national Deeds Registry and Surveyor General systems with offices in provinces.	Short term: DRDLR/ Dept. Cooperative Governance and Traditional Affairs (CoGTA). Long term: Municipalities.
Spatial location and/or boundaries.	Surveyed erven detailing boundaries.	Some geo-spatial referencing, such as a point or points, areas, outlines or natural boundaries.
Responsibility for establishing and maintaining spatial location and/or boundaries.	Registered land surveyors using technologically advanced measuring tools for centimetre accuracy; Town and regional planners; Engineers; and other specialists may be called upon for specific boundary problems.	Local officials and technicians using digital geospatial public tools, such as GPS and Google Earth.
Social units of people around which the system is based.	Individuals, nuclear families and corporate bodies.	Extended families, individuals, or organised or identifiable groups of individuals.
Adjudication of rights to authorise ownership and transfers.	Registered land surveyors and conveyancers	Local land records officers. This requires new guidelines, preferably legislation, for adjudication of "off-register" forms of tenure.
Custodianship of spatial records.	Erven kept by provincial Surveyor General's office.	Plots, points or areas kept at local municipal level, within a nationally coordinated spatial data base.
Custodianship of the identities of land rights-holders.	List of names recorded in deeds registries kept at the Deeds Office, as part of a national database.	List of names recorded in a land records system kept at the level of the local municipality, as part of a national database.
Evidence of registration or record.	Title deeds stored in the deeds office; copies to owners.	Occupation and Use Rights (OUR) certificate (or similar) stored in a local system; copies to rights-holders.
Procedures for dealing with disputes over social and spatial boundaries and associated rights.	Professional conveyancers, Courts.	Local structures as appropriate; then escalated to COGTA/DRDLR. Investigate establishing an Office of a Land Ombudsman. Approach courts as last resort.

Upgrading of informal settlements and the land records system

The establishment of a new land records system (though a new Land Records Act) will make it much easier for government to secure tenure within many different 'off-register' contexts including informal settlements.

In the upgrading of informal settlements, the starting point for the municipality is to arrange for a municipal land administration official/ technician to visit and record the names of all people living in shacks in their jurisdiction. Using a handheld GPS devise the location of the front door of the shack can be recorded on a Google Earth map. These social and spatial units can then be uploaded to a nationally administered spatial data base, such as or similar to the Land and Property Spatial Information System (LaPSIS) managed by the Housing Development Agency[12].

In this way the municipality is able to show that they recognise that the identified household is staying around the identified geo-referenced point. The municipality at this stage can only provide the occupants with a certificate indicating that they have been captured in the land and housing needs data base. The municipality is not able at this stage to confirm any rights to the household to stay on the land.

If it is decided by the municipality that the informal settlement occupants will be able to stay where they are (e.g. the municipality owns the land, the land is reflected as residential in the municipalities Spatial Development Framework, and the necessary environmental approvals have been obtained for development in the area, etc.), the municipality can then develop a more detailed spatial layout for the informal settlement showing on a map the boundary of the plot where the household will be able to stay. A plot in this instance is defined to be portion of land that is shown on a scaled map and its boundaries are then also broadly marked out on the ground[13]. Given that this demarcation is done by a municipal technician and not a professionally registered land surveyor, precision tolerances can be within centimetres and not millimetres. These records can be kept by the municipality in the nationally coordinated spatial data base. The municipality will now be in a position to provide the household (or appropriate social unit such as a family) staying on this plot with an OUR certificate, confirming that the household has the right to stay on the land and use it for residential (and possibly home based economic) purposes.

The Land Records Act (assuming it is legislated) will give the occupants of this land and the holders of the OUR certificate similar rights to individual ownership. Depending on the specific and locally agreed rules associated with the issuing of the OUR certificate, the occupant may be able to transfer their OUR certificate to someone else through inheritance or through some form of sale. In such situations the role-players involved will approach the municipalities land records office to record the transfer of the land rights (as outlined in the OUR certificate) from the outgoing person or social unit to the incoming person or social unit.

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[12] see https://www.lapsis.co.za/
[13] a plot at this stage does not have to be registered as an erf in the deeds registry

In future, if the land rights holder decides that they want to convert their OUR certificate to individual title deeds they will be able to do this by involving a land surveyor to survey and peg the site, and a conveyancer to arrange to register an erf in the deeds office and convert the OUR certificate to a title deed.

One of the advantages of such a land records system is that it is much cheaper for government to establish and manage, as one does not need to involve and pay qualified land surveyors and conveyancers in the record keeping process. The records will also be kept at the municipality so households do not have to work through the deeds registration system. This also makes it much easier and more affordable for the households to keep the records up to date.

A similar process as described above can be used within the context of Managed Land Settlement[14], where government arranges to develop demarcated plots (it can but does not have to be erven) in designated Managed Land Settlement areas, and provides allocated households with OUR certificates to these plots.

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[14] for more on Managed Land Settlement see: http://afesis.org.za/managed-land-settlement/

Conclusion

The scenario described in this learning brief (relating to the establishment and use of a land records system) could not be achieved within the current legislative framework as the land records system is not yet in place. We therefore call on government to develop and urgently promulgate new Land Records legislation to make it possible to provide for 'off-register' forms of tenure to people living in informal settlements and managed land settlement areas (and other 'off-register' contexts).

The land records system will make it possible for a range of 'off-register' or basic tenure, incremental tenure and social forms of tenure to be accommodated within a comprehensive land governance system. Such a land records system will go a long way to helping government and communities make inroads into the land and housing needs of this country: and as per section 25.6 of the Constitution, " tenure which is legally secure".