URBAN LAND BULLETIN I

Urban Land and Housing Dialogue Series:

Access to Housing and Release of Well-Located Land in the Context of COVID-19

Development Action Group

1 Why Access to Land and Housing Matters in the Context of COVID-19

The question is why now; why is it so urgent to discuss the release of well-located land for housing in the context of COVID-19?

"COVID-19 has changed everything – the deep impact of the pandemic, the socio-economic rights, the lack of shelter and a response to over-crowded conditions has come under the microscope dramatically. President Ramaphosa himself said: "there can be now greater injustice than a society where some live in comfort and plenty while others struggle at the margins to survive with little or nothing at all".

(Adi Kumar, DAG Urban Forum/Dialogue I)

The right of all citizens to adequate housing is a basic human right enshrined in the South African Constitution. Section 26 provides that the state must take reasonable legislative and other measures to progressively realise the right to housing, within its available resources.

Section 27, Chapter 2: Bill of Rights

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.

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Access to housing became absolutely paramount when the country was hit by the global Coronavirus pandemic (COVID-19), early in 2020. As a means to avoid the rapid spread of the Coronavirus pandemic, the government declared a national state of disaster, decreeing that as of March 2020, the country would go into lockdown, thereby confining all citizens to their homes to protect themselves and others from contracting the virus.[1]

Noting the important role that a house played in shielding oneself from infection, the United Nations Special Rapporteur on the right to adequate housing stated that housing had become the 'frontline defence' against COVID-19 and a person's access or lack thereof, the difference between life or death. However, for the majority poor and low income urban citizens, access to adequate housing remains out of reach, with many residing in state-provided housing far from economic hubs, overcrowded informal settlements, others in backyard rentals with insecure tenure – especially those unable to pay rent due to job losses, while others are homeless and therefore nearly completely unable to protect themselves from infection.

"This call to stay at home has really signified the importance of a home; this is where various struggles intersect and it is where we really ought to be acting on... accelerating the release of state land to build affordable housing and simultaneously protecting the limited security of tenure that people do have, to maintain what they call a home."

(Mandisa – Ndifuna Ukwazi, DAG Urban Forum/Dialogue I)

[1] The lockdown was lifted almost three months later on 1 June, along with a decision to progressively move from Alert Level 5 to Level 1 – based on the rate of infection (active cases) prevalent in specific areas.

23%

(28 million out of 122 million hectares) of all **land** in the country is **owned by the state**.

77%

(94 million) is **privately owned**:

30.4%

Owned by individuals.

24%

Owned by trusts.

19%

Owned by companies.

2.9%

Owned by Community-based Organisations.

0.7%

Under co-ownership.

Sourced from the most recent national land audit.[2]

The Housing Act 107 of 1999, a key piece of legislation, and the National Housing Code in addition to several other acts and policies, provide the legislative and policy framework in which the right to housing should be realised. More recently, this has been supplemented by reforms in planning and land use management legislation. The Spatial Planning and Land Use Management Act (SPLUMA), Act No. 16 of 2013 places an obligation on government to address spatial injustice and apartheid spatial planning, seeking to advance social and economic inclusion through a coherent planning land use management system. SPLUMA, its focus on spatial justice and equality coupled with improved land management systems have placed renewed emphasis on the achievement of more equitable access to urban spaces. In other words, access for all to land and housing that is well-located, that allows for opportunities to achieve upward mobility and that is socially, economically, culturally inclusive in all facets.

Importantly, SPLUMA also gave renewed impetus to the call of civil society organisations, housing activists and communities at large for urban land to be utilised more efficiently, to change unequal land ownership patterns and to transform unequal spatial distribution across cities.

22.6% (722,667 ha) of the **3.2 million ha** is **individually owned by 6 million people**.

Nationally, whites own **49.5%** of urban land, black Africans own **30.3%**, Coloureds own **7.5%**, Indians own **7.7%**, **2%** is under co-ownership and **3%** is owned by 'other'.[3] The clear disparity in terms of race is most pronounced in the Western Cape where **70.7%** of urban land is owned by whites compared to **3.5%** of urban land that is owned by black Africans, a further **10.7%** owned by Coloureds, **8%** owned by Indians, **2.1%** under co-ownership and **5%** by 'other'.[4] These spatial disparities underscore the desperate need for concerted efforts aimed at greater inclusivity and spatial parity. The current focus on urban land reform is therefore paramount, also given rapid urbanisation and current population growth patterns, which will only serve to increase the need for affordable accommodation on well-located land in cities.

Moreover, the high cost of well-located serviced urban land has resulted in most state-provided housing being built on the urban periphery where land is more affordable. This has further entrenched spatial inequities inherited from the apartheid era. Nowhere is this unequal distribution of access to land and housing more evident than in Cape Town where land, particularly that in urban areas, is exceptionally costly and transacted in a property market that is highly exclusionary and unaffordable to the poor. Presently, Cape Town's housing backlog stands at **365 000** with housing in the inner city completely out of reach for the majority of Cape Town's low and middle income households. About two-thirds of households (**60 - 65%**) do not earn enough (**<R20 000**) to enable them access to finance to buy a house in the affordable segment (**R400 000 - R500 000**) of the formal property market. Moreover, **250 000** households live in some form of informal dwelling, with households living in informal settlements having increased by almost **40%** and in those in backyards by **256%**, between 1996 and 2016.

This disparity in accessing the inner city, mainly based on income and class, tend to be replicated in most other aspects of social and economic life, i.e. where one lives hugely determines the schools you attend (quality of education), access to transport to/from economic opportunities, access to quality healthcare, etc. Consequently, location within the city is a huge determinant of people's potential for social and economic advancement, and consequently, their ability to lift themselves out of poverty.

[2]Republic of South Africa. Department of Rural Development and Land Reform. (2017). Land Audit Report. Available at: https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf (Accessed: 10 December 2020). [3] IBID, page 12. [4] IBID, page 12.

"It is also a good idea to look at strengthening urban management and area-based management... it is essential to consider the holistic approach, to look at this integrated development approach where the edges of the city are not the only places where we find spaces for the urban poor."

(Charlton Ziervogel – CORC, DAG Urban Forum/Dialogue I)

However, the growing need for affordable housing in the face of limited state resources and capacity necessitates reconsideration of existing strategies to respond to the housing need. An over-reliance on government-driven housing delivery will not effectively respond to the country's housing needs. It is therefore paramount that alternative methods to the one-plot one-house strategy is considered and that more efficient means to redistribute well-located land for affordable housing be pursued. Strategies aimed at fundamentally transforming unequal urban spaces must include the rapid release of well-located land, plans and programs that support incremental self-build housing on serviced sites, alongside the necessary resources and inputs to facilitate self-build housing (e.g. monetary, technical, support for local small-scale contractors, densification, in-fill development, as well as other mixes of land use).

"This is no longer of a matter of choice. This is the highest necessity that we have at the moment and if we have to address the short-term COVID-19 responses with the long term issues, the issue of land and housing has to be addressed as a matter of urgency." (Adi Kumar, DAG Urban Forum/Dialogue I)

2 What is a Home? – Landless People's Right to Housing

The South African Constitution holds that no citizen may be arbitrarily evicted or forcefully removed from their homes, without an order of court. Evidently, the most supreme law of the country equates a house with a home and everyone must be able to live in their home without the fear or threat of removal, without just cause. The Constitutional court has gone a long way in defining the right to housing, in particular noting that a home is 'more than bricks and mortar'.[5] ***If this is the case, why is it that many people have found themselves forcefully removed, their homes demolished by state authorities and others evicted by private home owners, during a time of crisis where there is none more effective a safeguard than their home?***

[5] Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) ("Grootboom"), para 35.

The high prevalence of evictions and forced removals from backyards, informal settlements, private rentals, etc., during the national lockdown suggests that the definition of a house and/or home – held by various actors within society, i.e. the courts, citizens, government officials, law enforcement – is very different. To an informal resident with no or a very low income, a home may be a few zinc materials, and a few assets that can be completely demolished and thereafter confiscated without any recourse. While to a state official or law enforcement, a house may signify a formal structure, that derives its value from an exclusionary property market and which is protected by conventional interpretations of existing property law. These varied interpretations of a home invariably impact people's access to housing, with the poor and marginalised far worse off than those who are able to afford 'formal' housing, often only available at exorbitant amounts. Similarly, landless and homeless people find themselves unable to access well-located land, when they have little other choice but to use same for the purposes of shelter.

The dominant ideology around land and property seems to be its conception as a commodity and an asset that must be used and managed in such a way that it yields the highest financial value. Indeed, land and property/housing has become costly commodities to be sold and purchased in the free market economy. This while those most in need of decent housing are simply unable to efficiently participate in the formal property market, purchasing land at will and changing ownership patterns across races. At the same time, government entities (including all three government spheres, and parastatals) that own land have failed – for the most part – to make unused well-located public land available for development purposes, i.e. housing. Instead, public land is either disposed of to the highest bidder or held by state entities as an asset used to bolster their portfolio and ensure that they remain financially viable.

"This call to stay at home has really signified the importance of a home; this is where various struggles intersect and it is where we really ought to be acting on… accelerating the release of state land to build affordable housing and simultaneously protecting the limited security of tenure that people do have, to maintain what they call a home."

(Mandisa Shandu – Ndifuna Ukwazi, DAG Urban Forum/Dialogue I)

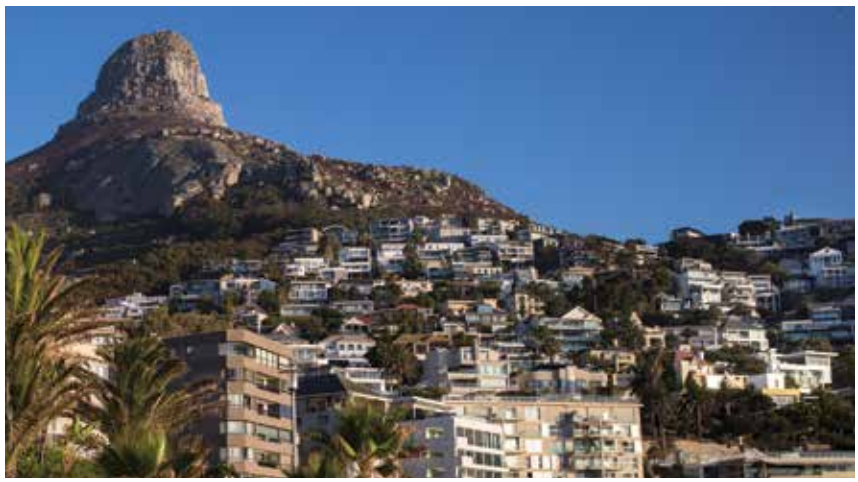
"A home is that space which we all deem private, special and a safe haven, where we feel equal, wanted, needed and loved. At home we share meals, thoughts, emotions, progression and successes. Here we also discuss religion, cultural rituals, education, morals and acceptable behavioural patterns. People connect going home at any time of day to restore and retain their existence. Others to become calm and relaxed, to find sustenance, to share family time, re-energise our thoughts and our bodies. At home we learn to share our wealth, warmth, kindness, create our future goals and raise our families. Under this roof we celebrate special days, cry, laugh, sing and dance with family and friends. In our homes we are taught to pray, meditate or make salaah. Here we continue our ancestral habits, religious beliefs, ancestral stories and song, food preferences and historical practices from. Here we learn to grow, dream, scream, clean, and foster new hope. Let's work together to equalise the need of for all."

(Participant – Community Partner, DAG Urban Forum/Dialogue I)

The state's response to landless and homeless people's efforts to house themselves has been to criminalise some, with such efforts labelled as illegal and therefore exempt from any legal protection. Consequently, their 'homes' are demolished without the required legal steps having been taken and no apparent consideration of where their 'next' home should be. Indeed, in a context where one's definition and real lived experience of the home differs significantly from that of local authorities, tenure of security and the ability to live in safety and decency can quickly become a matter of conflict and contestation.

Does this mean that any and every effort made by landless people to house their families ought to be advanced as acceptable responses to a lack of housing? Indeed, not without due consideration of all relevant facts. Instead what is required is on the one hand, a much **more nuanced understanding of the historical and contemporary drivers of landlessness**, while on the other hand, **a deeper consideration of the impact of the state's interventions**, i.e. removals or demolitions on those who genuinely lack alternative accommodation.

Perhaps what is most pertinent is a reconfiguration of how we, as a country, define and conceptualise the concept of house and home – in law, the political and economic and social contexts.



"Municipalities at this point, actually all levels of government, together with civil society and other actors are being required to really begin acting on a new vision. In an urban context, it's one that dislodges land from having purely market value to really deepening what this would mean in terms of, as we know, land having social value, historical and personal value. And I think that if we are to begin to disrupt those notions of a finite or limited understanding, we'll get closer to thinking about how we can expand access beyond whoever has the highest bid having access. This crisis has revealed that approaching land and indeed housing in that manner is not sustainable and what it has resulted in is short-term bandaging of the problem."

(Mandisa Shandu – Ndifuna Ukwazi, DAG Urban Forum/Dialogue I)

3 Public Participation in the Context of and Post COVID-19

Effective and meaningful public participation is a key foundational element of a truly representative and accountable democracy; one that is responsive to its people and inspires trust in its governance systems and institutions. However, if meaningful engagement and the ability to influence decision-making was difficult or problematic, especially for poor and marginalised communities, before the Coronavirus pandemic struck, it became exponentially challenging thereafter.

With the declaration of the national state of disaster and a lockdown, the almost exclusive reliance on communal meetings and mass gatherings in community halls and schools, especially in indigent areas, became a thing of the past. **COVID-19 has created a digital and electronic gap between indigent communities and the state, thus limiting the extent to which the former are able to impact development decision-making.** Instead virtual meetings requiring access to data, smartphones or sophisticated electronic platforms, have become the norm. In the current context, citizens who wish to effectively participate in democratic processes need access to these resources on a continual basis.

As with many other key socio-economic indicators across the country, those who are more affluent and who have the means to do so continue to participate, albeit to a significantly limited degree, in democratic governance through alternative tools. The rest of society, i.e. already poor and marginalised citizens yet again have been left behind with important decisions about their status and position during this time of crisis left to government officials, technocrats and politicians who may or may not be fully informed about realities on the ground and what communities perceive as priority issues. This was most evident in the lack of meaningful engagement of communities who were targeted for relocation as part of the government's planned decentralisation effort. Despite the local authorities' indications to the contrary, reports abounded of how little effort was made to communicate and clearly explain the processes and potential short and long term impacts on those who would have been most affected by the relocations. Similarly, in respect to homeless and landless people, they were merely informed of and subsequently compelled to adhere to interventions affecting them, with little space to deliberate prior to and engage around more sustainable housing solutions post the interventions.

Throughout the state of the disaster, although less so now than at the start, the government received widespread criticism for the apparent lack of openness and transparency in the decision-making processes of the National Coronavirus Command Council – the central body alongside the executive leading the country's crisis response. Moreover, a most pernicious consequence of the inability to meaningfully engage and have your voice and preferences count, in this context, is the inability to subsequently call government representatives to account. The current crisis has and likely will continue

> *"This isn't just about releasing land in the old crafted ways around providing RDP and BNG houses. It is essentially about creating and deepening that relationship between land and people. A different form of social compact is needed to create much more integrated neighbourhoods that can deal with the current crisis. And the current crisis, under the Disaster Management Act, finally allows us to address both the immediate needs of the pandemic, but also the longer-term entrenched patterns of spatial inequality."*
>
> (Adi Kumar, DAG Urban Forum/Dialogue I)

to severely impact options for public participation, with existing mechanisms and tools having proved almost entirely inadequate and improper for use during a national lockdown period.

The reality is that existing public participation policies and concomitant mechanisms and tools were not developed so that it would allow or could be swiftly adapted for meaningful engagement during a time such as this. This must be remedied.

Moreover, even before COVID-19, it was evident that budgeting for public participation is wholly inadequate and much needed resources and capacity were not afforded to municipalities and implementing agents to facilitate meaningful and inclusive engagement.

> *"When your participation can directly impact budget spend by government, then you're in the game."*
>
> (Charlton Ziervogel – CORC, DAG Urban Forum/Dialogue I)

In the absence of a concerted and intentional effort by the government to remedy this state of play, the current challenges will continue for as long as we are faced with COVID-19 and its resultant complications. Indeed, it is incumbent on the state to ensure that it effectively responds to the current crisis by developing and supporting innovations that would yield tools and mechanisms that will allow for broad and inclusive participation.

We are at an opportune moment because of COVID-19 – in addition to illuminating what the fault lines in relation to public participation mechanisms are, it has also given us solid data on how and what could be done to ensure a system that is more responsive, resilient and adaptable to an ever-changing (political) landscape.

As a start, the state must reconsider current policies, its related tools and mechanisms and indicators used to measure public participation and consequently how to adapt these so that they more readily speak to the current crisis and beyond. These efforts will likely require additional funding, meaning adequate budgeting for a reform process over and above funding for participatory processes is necessary.

Finally, communities must be supported both technically and financially to empower them to be active citizens that are meaningfully engaged in governance, leading on key aspects such as oversight and monitoring to advance and consolidate our participatory democracy.

"Government has to invest in public participation. When local government, in particular, prioritises its budget, the issue of public participation can no longer be relegated as a by-the-way. So government will have to explore other alternatives: community radios, social media, and we must make sure that the websites of municipalities are functioning so that there is an interactive process that is happening."

(Mike Makwela – Planact DAG Urban Forum/Dialogue I)

4 If Urban Land is the Key Frontier to Address the Housing Crisis, Why Hasn't It Been Released?

Urban land management is at the centre of the discussions around achieving spatially just, inclusive and sustainable cities. An effective and sustainable approach to urban land reform must clearly outline a process that gives effect to the state's intent to enable urban land reform and spatial transformation. Much needed reform of spatially unequal urban spaces necessitates questions around how the state manages urban land, who benefits from its management and how these processes need to be reformed to more adequately respond to the needs of urban dwellers. To achieve spatial transformation and in view of its Constitutional obligation to provide access to adequate housing to all citizens, the state can and must play a direct and proactive role in ensuring that well-located, both publicly or privately-owned, land is made available for human settlements and the delivery of affordable housing. This means that in the first instance, the state has a responsibility to release well-located, vacant and unused public land, so that it can be put to best use, i.e. in the public interest. Essentially, this means that state entities including the Western Cape Provincial Government, parastatals / State-owned Enterprises (SOE's), such as Transnet, Eskom, and the City of Cape Town that own vast tracts of vacant and well-located land, must rapidly release

such land – at discounted rates or on long term loan – for the development of housing for the poor. It is inconceivable that large land parcels owned by the public sector, and which the government of the day is merely the custodian of, should lie vacant and unused while thousands of citizens live in overcrowded informal settlements and backyards whilst others wait for 20 or more years to access state-subsidised housing that puts them far away from social and economic amenities.

Despite the government's political support and its commitment (expressed in various laws and policy documents) to make land available for human settlements, barriers to accessing and unlocking public land for housing continue to exist. In broad, factors that hinder the release of public land include the **legal and policy framework**, **market-related pricing**, the **identification and management of land by municipalities**, the **identification of state and non-core SOE's land**, difficulties around **negotiating the disposal of land by SOE's**, and **weak intergovernmental relations (IGR) structures**.[6] Other factors that act as blockages to accessing land include a **lack of clear long-term plans and strategies** detailing the government's intention with land and for what purpose land will be used. If such strategies exist – why were communities not involved in its development? Additionally, questions have to be asked about whether existing instruments (laws and policies) that regulate land release are too blunt, whether sufficient finances have been allocated to the urban land reform process, and whether the right entities/individuals are partners in pushing the urban land reform agenda, among others.

Another key question is whether there is sufficient political will to address landlessness, to what extent insufficient capacity amongst officials impact urban land management, bureaucratic challenges, or the technical aspects act as blockages to efforts to unlock land for housing purposes. These concerns mostly find expression in the development and implementation of Municipal Strategic Development Frameworks (MSDF's). SPLUMA requires that municipalities' planning documents, including MSDFs, Integrated Development Plans (IDP's), and Built Environment Performance Plan's (BEPP's) clearly explicate how they intend on addressing spatial inequality, i.e. including reflection on municipalities' land identification, acquisition, release and packaging strategies. **Three key challenges exist: firstly, the extent to which politics play a role, i.e. how political bodies exert their influence and power to guide/direct urban land management via the MSDF's; secondly, whether the municipality has a coherent and cohesive land management strategy, implemented consistently over time towards the achievement of spatial justice; and finally, the capacity and capability of officials implementing spatial development plans and strategies.**

"There is generally a complete lack of transparency around the issue of land that is being prioritised and the hindrances that block the release of land aren't being addressed at the moment. So we hope and maintain that there is a by-plan of land that can be released systematically that any of these commitments to releasing land do not fall into the black hole of legal departments and procurement processes but rather in the public realm, in the public courts so that we can participate in the decision-making around the release of this land."

(Adi Kumar, DAG Urban Forum/Dialogue I)

Political Interests and Ideological Convictions in Land Management

Land in the municipal space is a very powerful tool politically – it is a source of effecting change, but also a source of influence and leverage and land use rights are a very powerful player in local political dynamics. Where the municipality owns its own land, they have an opportunity to effect policy and to implement policy through that land – by making the land available for social housing thereby contributing to efficient service delivery, to attract economic development by selling the land, or to generate revenue, etc. In this way, land becomes highly influential and in fact a tool that is there for a range of objectives.

The decisions to make well-located public land, therefore valuable land, available with conditions linked to factors such as affordable housing, i.e. inclusionary housing is a political decision, which political entities may/may not choose to steer clear from. Similarly, the decision to set aside well-located land for a social

[6] According to the South African Cities Network.

housing pipeline is a political one: various political offices, (i.e. the municipal council, the Mayoral Committee for the Property Portfolio, the Mayoral Committee Member for Finance, the Municipal Property Committee, etc.) have a degree of influence in this process. Political interference in the development and implementation of MSDF's is therefore a real possibility. Moreover, the MSDF is council policy so the politicians, the councillors, either approve or disapprove the policy, which in fairness is their prerogative. However, many decisions, either based on development objectives, the public interest, but also self-preservation (especially where regime changes may be imminent) and self-interest such as other business interests, party affiliation and concomitant ideological beliefs, among others impact choices. **The reality is that in many instances decisions about what land will be made available or not and for what purpose, for reasons unbeknownst to affected communities, are often made behind the scenes in boardrooms and corridors where political convenience and expedience is at the order of the day.**

A Coordinated and Coherent Approach to Urban Land Management

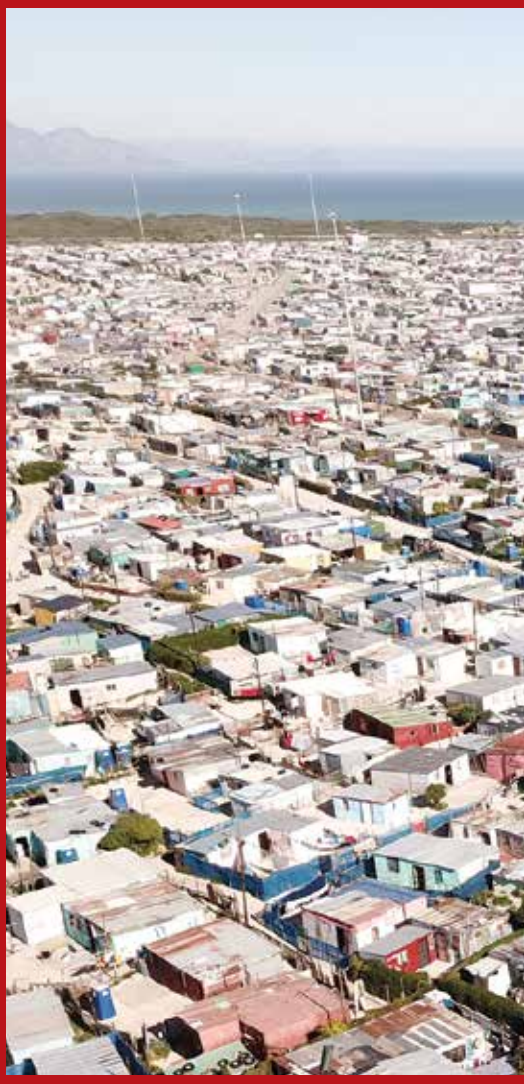
The key is for a municipality to be clear on what its objectives are, for those objectives to be aligned and how its objectives will be met. For this purpose, a coherent political directive emanating from political heads within the municipality is necessary. Such an approach to housing development must detail the municipality's portfolio of land, its (development) objectives, and how they intend to manage the portfolio to achieve said objectives. Moreover, as it concerns public land, municipalities must be very clear about how it is valued and how the best use in the public interest will be achieved. Faced with numerous competing objectives and varied interests within its boundaries, a strategic, well- coordinated and coherent approach to urban land is vital.

Capacity and Capability Constraints within Municipalities

Due to insufficient capacity and the capability to identify a pipeline, acquire and strategically package land, municipal strategic planning documents often fall short in clearly delineating municipalities' land acquisition and development plans/strategies. Municipal officials involved in planning and implementation of land management need to have the capacity to separate the strategic land parcels from that which have much less significance, and to dedicate committed capacity to strategic issues where real change can be affected. Such efforts require constant oversight and monitoring by municipal councils to achieve successful implementation. A huge challenge at municipal level is the constant shift in priorities, with new leadership bringing in new ideas, while complicated land processes require years of consistent, coherent, dedicated focus, and committed capacity to plan, strategise and, to implement within municipalities.

For these reasons, and others not mentioned here, the state, in particular local governments, appear simply unable to effectively address the spatial justice conundrum. **However, it is only when a systematic coherent long-term strategy, that takes cognisance of and seeks to address the challenges noted above is developed and implemented – in partnership with communities and other players in the housing sector – that the achievement of spatial transformation becomes a real possibility.**

> *"What land is suitable? In this crisis, I think the debate has moved on from whose land it is, but to the fact that which land has to be made available through the release of state land. In our view, any state-owned land that can provide relief efforts at the moment, whether it be national, provincial or state-owned enterprise land has to be released which needs infrastructure, bulk infrastructure and services and as far as possible, is adjacent and close to transportation and economic opportunities."*
>
> (Adi Kumar, DAG Urban Forum/Dialogue I)



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