PROVINCE OF KWAZULU-NATAL | **ISIFUNDAZWE SAKWAZULU-NATALI** | **PROVINSIE KWAZULU-NATAL**

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DISCUSSION DOCUMENT

OF THE PROVINCIAL HOUSING DEVELOPMENT BOARD

WITH RESPECT TO

LAND RELEASE AREAS

1 IDENTIFICATION OF THE PROBLEM

1.1 In terms of section 26(1) of the Constitution of the Republic of South Africa, Act 108 of 1996, “everyone has the right to have access to adequate housing”.

1.2 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”.

1.3 In terms of section 2 of the Housing Act, 107 of 1997, national, provincial and local spheres of Government must, *inter alia*, ensure that housing development provides as wide a choice of housing and tenure options as is reasonably possible, promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions, and take due cognisance of the impact of housing development on the environment.

1.4 Unfortunately, notwithstanding the demand for housing, the National Government has reduced the funding available to the Provinces for the delivery of housing and the PHDB is therefore unable to meet all of the demands of urban and rural communities.

1.5 The lack of funding has resulted in the PHDB having to spread the limited funding across the entire Province and has forced it to consider alternate options to the delivery of housing in accordance with the normal principles referred to in the housing subsidy manual.

1.6 The shortage of available housing has resulted in vast tracts of land within KwaZulu-Natal being invaded and informally settled. The eviction of persons who have invaded land has been made much more difficult as a result of the

promulgation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 which places far greater obligations on statutory authorities than previous legislation did.

1.7 It is common that once land has been informally settled, there is substantial densification of the settlement which often results in serious environmental problems being caused.

1.8 The densification of informal settlements also results in the proliferation of crime in these and surrounding areas and such settlements are difficult to police.

1.9 For all of the reasons set out above, the governance of such areas by the municipalities having jurisdiction over them is extremely difficult.

1.10 The future development of areas which have been informally settled also becomes more difficult than the development of a greenfields area. Additional costs are also incurred which detrimentally affects the funding available for the development.

2 THE CONCEPT OF LAND RELEASE AREAS

2.1 In order to overcome some or all of the problems referred to above, it is necessary to consider the concept of “land release areas”.

2.2 This concept entails the development in part of an area in order to provide residents with a formally planned area and secure tenure, basic levels of services and the right to receive further funding (by way of the balance of their PHDB subsidies) once such funding becomes available.

2.3 A land release programme can be viewed from two angles, namely:

2.3.1 for greenfields developments, in order to pro-actively deal with the threat of land invasions and the problems associated with rapid urbanisation;

2.3.2 for *in situ* developments, where people are residing in an area informally, which involves a reactive response to an existing situation in order to deal with some of the problems highlighted above.

2.4 Whilst the aspect of secure tenure is fundamental to the concept of land release areas, it should be noted that in many instances, people who have informally settled in an area actually have security of tenure as a result of legislation such as the Interim Protection of Informal Land Rights Act, 31 of 1996. The important difference is that in the case of an area developed as part of the land release programme, the beneficiaries of the project receive formal tenure to a clearly defined and surveyed site.

2.5 This concept has been used in Gauteng in terms of that Province’s Mayibuye Programme.

3 PRACTICAL FACTORS

3.1 Notwithstanding some of the perceived advantages of the concept of land release areas, it is very important to be aware of practical difficulties that can arise before considering the implementation of this concept in an area.

3.2 For example, numerous problems have arisen in KwaZulu-Natal in situations where persons have been issued deeds of grant on land which has not been developed. In many cases, those persons can no longer be found and it has now become necessary for the Department of Local Government and Housing to arrange for the deeds of grant to be expropriated so that they can be issued to new beneficiaries. Obviously, costs are incurred with regard to the expropriation and transfer process. It is therefore important that the level of services which is installed is sufficient to attract people to live in the area and begin constructing their own houses there, prior to subsidy residuals being received.

3.3 It is submitted that land release areas will prove unsustainable and unviable if there is not some commitment by the PHDB that funds will be available within a reasonable period and that the project can be developed. Alternatively, the municipality within whose jurisdiction the project falls, must be in a position to provide alternate funding if subsidies cannot be obtained within that reasonable period. The length of the period will depend on the particular circumstances pertaining to each project such as the level of services installed, and the nature of the top-structures already in existence. Consideration must also be given to the possibility of compelling municipalities, where appropriate, to utilise their dedicated housing funds to provide adequate services within a stipulated time-frame.

3.4 The viability of projects may be affected as a result of beneficiaries' subsidy eligibility changing over time. At the time that the land release area is established, a beneficiary may either not receive the full subsidy or may only receive a portion as a result of his or her income gained through employment. However, by the time the balance of the funding is received and the developer is able to complete the project, that beneficiary may be unemployed and as a result of the policy of the PHDB to not allow increased subsidies in these instances, less money may be available to the developer than was originally anticipated. This will obviously affect the viability of the project . The person will have transfer of the site and it will not be possible to compel that person to pay for services to be installed.

3.5 For the reasons set out above, and especially the problem of persons receiving tenure and then leaving the area, it is submitted that land release areas are more appropriate with *in situ* up grade projects than greenfield projects. This problem could however be overcome if use is made of the institutional subsidy route. An institution could rent out sites/top-structures to beneficiaries until the full funding is received. Beneficiaries could conclude lease agreements with an option to buy. If a beneficiary leaves the project area, then his or her name could be removed from the National Data base and a new beneficiary could be signed up as a replacement.

3.6 It may also be necessary to link *in situ* land release projects to greenfields projects in order to allow for the relocation of beneficiaries from the *in situ* area

as a result of its de-densification.

3.7 Careful consideration must be given to the contents of sale agreements. In particular, consideration must be given to specific clauses dealing with the payments of the purchase price of the site and\or the cost of installing services in due course if a subsidy is not received.

3.8 Land release areas should preferably be established on State, Ingonyama Trust or municipal land otherwise it will be necessary to pay for the land in advance and this will reduce the amount of funds available for the provision of services. If the land release area is established on State, Ingonyama Trust or municipal land, the purchase price of the land per site can be paid once the residual of the subsidy is received by each beneficiary. It will simply be necessary to structure the agreement between the developer or beneficiary community and the PHDB accordingly in order to provide for a payment by the PHDB to the land owner once funding becomes available.

3.9 Appropriate conditions of establishment must be determined.

3.10 It is absolutely essential that the whole concept of land release areas is properly workshopped. The beneficiaries must respect their boundaries otherwise sites will ultimately have to be transferred or sub-divided when full services are installed. For this reason, consideration must be given to the notion of “superblocks”. This implies that blocks are created which are defined by roads and lanes or other visible features, and these blocks are then registered as individual properties in favour of the institution, assuming the institutional subsidy route has been used. Sites can be planned within the superblocks and surveyed sufficiently to identify the boundaries of the site for the beneficiary. If beneficiaries do not respect the boundaries, then the planning for the area can be adjusted once the final funding is received and thereafter a general plan per superblock can be framed and registered in the Deeds Office. Individual sites could then be transferred to the beneficiaries. It is proposed that a superblock should not consist of more than 100 sites. An advantage of this approach is that problems within one superblock do not need to delay transfers within other superblocks within the project area.

3.11 It is submitted that for land release areas to operate on a sustainable and viable basis, a strong community structure and leadership will be required. In the case of greenfields projects, since this is unlikely, the municipality will have to be well-respected and active in the area.

3.12 It will be necessary to have an arrangement with the PHDB to allow a beneficiary to obtain a subsidy elsewhere if a project does not proceed. In those circumstances, a person could be required to sell his or her site back to the municipality or, if the site has not been paid for yet, to transfer it back to the municipality.

4 TOWNSHIP ESTABLISHMENT ROUTES

4.1 There are a number of township establishment routes which can be used in order to establish land release areas. For the purpose of this document, it is

assumed that it is intended to provide these areas for low income households.

4.2 Each of the township establishment routes described below offer both advantages and disadvantages but it is suggested that the most appropriate township establishment legislation for land release areas is the Development Facilitation Act, 67 of 1995. For the sake of completeness, the other possibilities will be considered below.

4.3 **Less Formal Township Establishment Route, Act 113 of 1991**

4.3.1 One of the fundamental advantages in this legislation is that it is well known by all the major role players in development including the Department of Local Government and Housing, the municipality and private developers and practitioners.

4.3.2 The legislation has also been in operation since 1 September 1991 and both officials of the Department of Local Government and Housing and other are therefore aware of the procedures which must be followed in order to successfully make use of this legislation.

4.3.3 Furthermore, most development involving low income housing has made use of this legislation for the purposes of township establishment.

4.3.4 Applications for designation in terms of this Act are relatively simple and designation can be achieved at the stage where only preliminary information is available, provided that the outside figure of the designated area can be accurately plotted and the Minister of Housing and Agriculture is satisfied that there is an urgent need to settle persons in a less formal manner in the area.

4.3.5 The legislation also allows for unwanted servitudes and restrictive conditions of title to be suspended, and ultimately removed, in a very simply manner. They are suspended upon publication of the designation notice and removed once the township register is opened. A perusal of the title deeds and Surveyor-General's diagrams of properties underlying the development therefore enables one to easily rid oneself of potential obstacles to township establishment.

4.3.6 In addition, several acts of Parliament, regulations and categories of laws do not apply to designated land unless they are specifically provided for These include the National Building Regulations and Building Standards Act, 103 of 1997, laws relating to the standards and requirements with which buildings should comply and laws requiring the approval of an authority for the sub-division of land.

4.3.7 One of the main disadvantages of using this legislation for the purposes of establishment land release areas is that it is necessary to open a township register before transfer of individual erven to beneficiaries of the project can take place. This means that not only must a general plan have been approved by the Surveyor-General's office but the underlying properties of the development, or the component properties of the project area, must be consolidated before the township register is opened.

4.3.8 In certain instances, the consolidation of the component properties of the project area can present serious difficulties and this is often the cause of delay with regard to the transfer of individual tenure on projects utilising this Act for the purpose of township establishment.

4.3.9 It is also important to note that although the Surveyor-General can approve a provisional general plan (which can also be used for the purpose of opening a township register and transferring individual tenure), the provisional general plan must be converted into a final general plan within five months of approval of the provisional general plan. This period can be extended to a period of nine months, on good cause shown.

4.3.10 In order to have a final general plan approved, it is necessary that the beacons of the individual erven have been placed. If the land release area has not been serviced therefore, it must be accepted that there is a strong likelihood that once services are installed, or even if existing services are upgraded, the project area will have to be re-pegged, which will result in additional expenses incurred.

4.3.11 The Act allows for settlement of beneficiaries to take place before the area has been surveyed and the beacons placed but this should be done with the permission of the Department of Local Government and Housing. However, since the municipality having jurisdiction over the project area normally determines the conditions of establishment, it is important that the municipality is intimately involved in the process.

4.3.12 Another advantage of this legislation is that it results in full ownership or freehold title being transferred to individual beneficiaries. It is therefore not necessary for the tenure to be upgraded at a later stage and apart from the possible survey costs described above, additional costs of a survey of conveyancing nature should not arise after tenure has passed.

4.3.13 It is of the utmost importance that beneficiaries respect the boundaries of the properties acquired by them. If in the period between the establishment of the land release area and opening of the township register, and ultimate development of the land, beneficiaries relocate themselves, then it will be necessary to sub-divide properties in order to rectify the settlement pattern.

4.3.14 This legislation applies throughout the Republic of South Africa including the area of the former KwaZulu and can therefore be used to establish land release areas in any part of the Metro.

4.3.15 The main disadvantage of this legislation for the purposes of land release areas is that it does not contain provisions of guarantees to be given such as is provided in the Development Facilitation Act. It also does not contain any interim procedure for the issue of tenure.

4.4 **KwaZulu Land Affairs Act, 11 of 1992**

4.4.1 Prior to the previous Constitution, the Constitution of the Republic of

South Africa, Act 200 of 1993, coming into operation on 27 April 1994, each of the self-governing territories were entitled to enact legislation with regard to land in terms of the Self-Governing Territories Constitution ct, 21 of 1971.

4.4.2 Most of the self governing territories simply adopted South African legislation in their areas of jurisdiction.

4.4.3 However, the former KwaZulu Government promulgated the KwaZulu Land Affairs Act, 11 of 1992 and it came into operation with effect from 31 March 1994.

4.4.4 This legislation applies specifically to the former area of KwaZulu and does not apply to the former area of Natal.

4.4.5 There are two principle issues which must immediately be stated. It is possible to use this legislation for the purposes of transferring tenure only, or in order to establish the township and then transfer tenure. In the first instance, in several areas of the former KwaZulu, township establishment has already taken place but individual tenure has not been transferred to beneficiaries. This legislation allows for beneficiaries to be issued with a deed of grant. In the second instance, this legislation has numerous regulations and these regulations set out the township establishment procedure of which must be followed if one wishes to use this legislation to establish a township in the area of the former KwaZulu.

4.4.6 One of the main advantages of a deed of grant is that it can be issued off a general plan without a township register being opened. This means that it is not necessary to consolidate the underlying properties of the project area before transfers to beneficiaries takes place.

4.4.7 When the boundaries of the municipalities of KwaZulu-Natal were proclaimed in mid 1996 in terms of the Local Government Transition Act, 209 of 1993, almost all of the former R293 townships were incorporated within the areas of jurisdiction of municipalities.

4.4.8 Although most provisions of Proclamation R293 of 1962 were repealed by this Act, the provisions relating to the issue of grant were specifically retained.

4.4.9 Certain areas therefore have already been planned and general plans have been approved over them. It is possible to issue deeds of grant off those general plans to beneficiaries of the project.

4.4.10 Problems do occur in situations where the actual settlement pattern does not conform to the boundaries as depicted on the general plan. In those instances, it will be necessary to relocate persons, transfer deeds of grant from one individual to another and possibly even expropriate the deeds of grant of absentee land owners in order to issue those deeds of grant to other beneficiaries.

4.4.11 Deeds of grant were formerly issued in the Ulundi Registration Office but this

registration office ha been amalgamated with the Pietermaritzburg Deeds Office and the procedures relating to the issue of a deed of grant are now very similar to those relating to the issue of a deed of transfer.

4.4.12 In situations therefore where the underlying properties have not been consolidated and that consolidation may prove difficult, if an existing general plan is in place and can be used without too much amendment, then a land release area could be established by issuing deeds of grant to beneficiaries.

4.4.13 Although the regulations relating to township establishment and the administration and control of townships have been in place for some time now, they have rarely if ever been used in the urban context. They have certainly not been used in the same way that :LFTEA has. One of the main reasons for this is that land is a matter of national competence and falls under the control and administration of the Department of Agriculture and Land Affairs . Until recently, the Minister referred to in the Act was the Minister of Land Affairs and the Minister's consent was required to all applications in terms of this Act.

4.4.14 However. On 19 June 1998, in government Gazette No 18978, Proclamation R63 of 1998 provided for the assignment of certain provisions of this Act and certain regulations promulgated in terms thereof to the Province of KwaZulu-Natal.

4.4.15 The township establishment regulations and town planning regulations have been assigned to the Province in their entirety. In the case of the Act itself, certain sections have not been assigned and these include those relating to permissions to occupy, the adjustment of land titles and the provisions relating to the making of regulations.

4.4.16 The effect of this proclamation is that applications for township establishment in terms of this Act will now be much easier in that one will be able to deal with provincial officials rather that national government officials. Experience has shown that substantial delays can be caused if it is necessary to obtain the consent of the Department of Land Affairs.

4.4.17 However, there are also several disadvantages. This legislation, although similar in many ways to LFTEA, is not well known by provincial officials, municipalities or private developers. The provisions relating to the issue of deeds of grant are known but those relating to the establishment of townships are not. It is therefore likely that developments will be delayed if they make use of this township establishment route, until the procedures and practices relating to the use of this legislation have been clarified and are well known.

4.4.18 Another disadvantage of this legislation is that it results in the issue of a deed of grant. Although a deed of transfer can ultimately be issued, an upgrading process must be followed which will result in further expenses being incurred.

4.4.19 Whilst it is generally accepted that a deed of grant constitutes ownership and differs in no material way from freehold title, there is still a perception that

a deed of grant is something less than ownership or freehold title.

4.4.20 As stated previous, the main advantage of establishing a township in terms of this Act would be that deeds of grant could be issued off a general plan. Given the fact that the Development Facilitation Act, 67 of 1995 has now come into operation in this Province, it is unlikely that this advantage of Act 11 of 1992 will persuade developers to use it rather than Act 67 of 1995.

4.5 **Development Facilitation Act 67 of 1995**

4.5.1 Although this Act came into operation on 22 December 1995, until recently, only Chapter I dealing with general principles for land development and conflict resolution have been applied in this Province.

4.5.2 The reason for this is that the development tribunal for the Province of KwaZulu-Natal referred to in terms of Chapter III of the Act had not been set up. The tribunal has now been established and development applications have been heard and granted in terms of the Act.

4.5.3 The main purpose of this Act is to introduce extraordinary measures to facilitate and speed up implementation of reconstruction and development programmes and projects in relation to land.

4.5.4 The establishment of development tribunals and their use in terms of this Act offers several advantages over other forms of township establishment legislation. One of the main disadvantages of LFTEA has been that there are virtually no time limits applicable to parties who must consider an application in term of that Act.

4.5.5 This has often led to interminable delays in developments.

4.5.6 The Development Facilitation Act introduces strict time limits and any party wishing to comment on an application must do so within a stipulated period failing which their comment will be ignored. This makes the programming of a project much easier since it reduces the amount of unknowns which have an effect on the development programme.

4.5.7 Another important advantage of this Act is that it introduces the concept of initial ownership. Initial ownership can be issued before a general plan has been approved and a township register opened. The outside figure of the development must have been determined and approved by the Surveyor-General and beacons must be placed in respect of individual erven. The land development application must also have been approved and a condition of establishment must have come into operation suspending servitudes and other restrictive conditions. However, it is not necessary that underlying properties should have been consolidated.

4.5.8 A further important requirement is that guarantees must be issued by the surveyor, conveyancer, professional engineer, local government body or other person determined by the designated officer, and issued by a

financial institution or other guarantor acceptable to the designated officer, in an amount sufficient to cover the costs of:

4.5.8.1 opening a sub-division register if the documents for such opening are not lodged within the prescribed period;

4.5.8.2 complying with the conditions of establishment; and

4.5.8.3 fulfilling the respective obligations of the land development applicant and relevant local government body to provide the engineering services required.

4.5.9 It is therefore important that you have a reasonable accurate idea of how long a land release area will be established before services are upgraded and the various equipments with regard to initial ownership are satisfied. It does not appear that initial ownership can simply be granted if it is never intended to satisfy the undertakings given in the guarantees. This may therefore prove to be an important control over the establishment of land release areas and should prevent the establishment of such areas for an indefinite period.

4.5.10 Another important advantage of this legislation is that it is possible to obtain approval for a registration arrangement independently of a full land development application. However, the requirements with regard to the conversion of initial ownership to full ownership will still apply and therefore serious consideration must be given before hand as to when it will be possible to convert to full ownership. Whilst the pending of the sub-division register (essentially the same as a township register) may not present any serious difficulties, it may be difficult to instal the engineering services timeously.

4.6 It is not intended to deal with the provisions of the Town Planning Ordinance of Natal, 27 of 1949 as this legislation is not considered appropriate for low income housing. Furthermore, the Provincial Planning and Development Act of KwaZulu-Natal which will rationalise and consolidate the laws relating to planning and development within this Province is expected to come into operation during 1999.

5 ENVIRONMENTAL CONSIDERATIONS

5.1 In terms of section 24 of the Constitution, “everyone has the right -

(a) to an environment that is not harmful to their health or wellbeing; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiably economic and social development".

5.2 Although the Environment Conservation Act, 73 of 1989 came into operation on 9 June 1989, the regulations with regard to environmental impact assessments were only published in September 1997 and came into operation at various times from then until April 1998.

5.3 It is important to note that these regulations will apply to future housing developments and therefore, prior to a housing development commencing, it will be necessary to obtain the consent of the Department of Environmental Affairs in terms of section 22(1) of the Environment Conservation Act. This will undoubtedly have an effect on the content of the application for township establishment and the minimum level of services which will be tolerated before consent in terms of this Act is given.

5.4 If opposition arises during the environmental impact assessment process, a development could be substantially delayed especially if the development is occurring in an environmentally sensitive area.

6 RECOMMENDATION

It is therefore recommended that:

6.1 The implementation of the land release concept, as a mechanism to combat land invasions, spread limited PHDB subsidies and overcome the ever-increasing densification of existing informal settlements, be approved;

6.2 each application for the establishment of a land release area shall be determined according to its merits and shall depend on:

6.2.1 a detailed feasibility study having being undertaken;

6.2.2 the preparation of a land audit;

6.2.3 the degree to which the application takes into account the problems and factors highlighted in this document;

6.3 this document be workshopped urgently to enable a policy and guideline document to be prepare thereafter.

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