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LAND CLAIMS AND RESTITUTION IN SOUTH AFRICA - THE VALUATION PERSPECTIVE

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Restitution; basic value; Group Areas Act; skewed values; beneficial occupation

ABSTRACT

The subject matter of the paper is a description of the unique valuation research exercise currently being undertaken in South Africa to reopen the issue of compensation paid by the state in it's land acquisition/redistribution programme of 30 to 40 years ago and revolves around the effects of the infamous Group Areas Act.

Following the recent change of government in South Africa and the move to a new political dispensation, constitutional changes have provided for a measure of relief by way of land, or equivalent restitution, to those dispossessed of interests in property in pursuance of the previous government's racial policies. The provisions for this are embodied in the Restitution of Land Rights Act (22 of 1994).

The implementation of the provisions of this act include the investigation of original compensation paid to land owners and occupants when their interests were acquired from the 1950's onwards. In most cases original records are sketchy or non-existent and restitution will only follow claims.

In the 1960s a large urban area of Durban, mainly owned by members of the indian community was proclaimed for "white" occupation. This resulted in the acquisition of something like 3 000 properties by the state and the upheaval of tens of thousands of residents; being both owners and tenants.

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A panel of property valuers has been appointed to carry out historic research in an attempt to reconstruct the property market in the Durban area at that time and comment

on the quantum of the original compensation paid; in particular whether that compensation was "just and equitable" and if not what would be an appropriate method of redress.

This particular research exercise, which is currently in progress, is novel in that it is the first attempt in South Africa to investigate and advise on compensation/restitution in terms of the recent act and is regarded as a prototype for dealing with claims in other areas throughout the country.

The paper will introduce the historic perspective and describe the methodology adopted by the valuers panel in this research exercise with commentary on the findings and possible restitution measures, if applicable.

INTRODUCTION

This paper begins by briefly describing the events which led to the unique, racially orientated structure of the South African property market which prevailed from the 1960's to the 1990's, and is still very much in evidence today. It goes on to introduce some of the recent legislative measures to redress past inequities and the possible effect of that legislation.

The practical implications of the legislation are illustrated by a description of a current valuation research project involving a large tract of land in the City of Durban, Province of Kwazulu-Natal.

The paper concludes with observations on the complexity of the issues of valuation for compensation purposes facing valuers and the Land Claims Court.

HISTORICAL BACKGROUND

Although racially based legislation was a feature of South African life for decades it sprang to prominence following a change of government after the end of the second world war. The new, Nationalist, government implemented it's apartheid policies by the introduction of a rash of legislation in the late 1940s and early '50s, the more notorious of which included the Population Registration Act, the Prohibition of Mixed Marriages Act, and the Group Areas Acts.

The stringent enforcement of this legislation overturned the lives of many people and severely impacted on the property market. In terms of the Group Areas Acts, certain areas were designated for occupation by members of a defined racial grouping and proscribed to "unqualified persons". In some cases the designation of racial areas recognised the de facto majority occupation, in others the new racial determination completely ignored it. The act was enforced in that "non-qualified persons" were required to relocate to their designated areas and sell their property to a "qualified person" or the state. Indeed the state embarked upon a process of acquisition of land to put it's policies into effect.

Where the state acquired property, compensation was payable in terms of the relevant legislation and usually alternative land was available to those relocated. Compensation paid was based on market value. Alternative land, which was very often unacceptable to

affected communities, may have been available for rent or purchase. In addition, particularly in the case of informal land tenants, transport was often offered to enable physical location of personal effects and building materials recovered from dismantled structures.

The legislation of the day did allow for the matter of compensation offered to be challenged in the courts but this rarely happened due to the time-consuming and expensive nature of the process. No compensation was payable for financial loss, injurious affection or the mere fact that the property was being compulsorily acquired.

By and large it was mainly urban areas that were affected by this massive exercise in social engineering. It is not appropriate to discuss the motivations for the selection of areas to be designated in terms of the Group Areas Acts in this paper but it appears that in many cases one of the results to be achieved by the relocation of, particulary non-white, communities was that overcrowded, poorly serviced and slum properties would be vacated. Almost without exception it was the poorer, non-white members of the community who were displaced in terms of the Acts.

By the early 1990s, in response to internal economic and social pressures, and of course world opinion, government's sentiment had reversed and in 1991 the Abolition of Racially Based Land Measures Act was promulgated.

THE CONSTITUTION and LAND RESTITUTION

As part of the transitional arrangements to a new political dispensation in South Africa, the Interim Constitution was introduced, succeeded by the present Constitution. The Interim Constitution (Act 200 of 1993) provided for the restitution of land rights to dispossessed persons as a constitutional principle. The provisions for this are embodied in the Restitution of Land Rights Act (Act 22 of 1994).

This act provides for the establishment of an independent Commission and Land Claims Court to investigate and adjudicate on land claims. Whilst one of the objectives of the constitutional principle of restitution is the restoration of land lost by parties dispossessed by virtue of racial legislation, other forms of restitution such as monetary compensation and provision of alternative land are possible.

In many cases, particularly in urban areas, where the bulk of land claims appear to have been lodged, restitution of the original land lost may not be practical or economically viable. Significant urban development has taken place over the past 30 years, it’s nature and form influenced by settlement and work patterns, which in turn reflected the effects of the racial legislation referred to, and ownership may have been transferred many times. Accordingly restitution measures may have to be in a financial form. Indeed, many claimants have indicated that they would prefer a financial settlement to reinstatement of the original land right.

The Interim Constitution, the provisions of which are now embodied in the "final" Constitution, does provide that where land rights were expropriated in terms of the Expropriation Act (Act 63 of 1975) and it's predecessors, and full compensation was paid, then a claim for restitution would not succeed.

The so-called “Property Clause” of South Africa’s new Constitution (Act 108 of 1996), Section 25 reads as follows:

“(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or

decided or approved by a court.

(3) The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section .....”

This clause introduces a new element to the established principles of compensation in South Africa due to the implications of the term "**just and equitable**". This could extend the

scope of compensation beyond that payable in terms of the Expropriation Act and it remains to be seen how the courts will interpret the expression.

Simplistically, the basis of compensation in terms of the Expropriation Act is open market value with it's generally understood meaning. (The South African Institute of Valuers is a member of the International Valuation Standards Committee and subscribes to the internationally accepted definition of market value).

It should be noted that restitution could well go far beyond the limits of compensation only for land rights lost. In terms of present day expropriation legislation, apart from compensation based on market value of any real interest, compensation may also be payable for actual (provable) financial loss. In addition, a further payment known as *solatium* is made to reflect the inconvenience and distress arising from the fact that the acquisition is compulsory. Loss of work opportunities, residence rights etc. could also now come into the equation and only time will tell how the courts will respond to such claims.

This paper however looks only at compensation for rights in property, as defined later. Other claims are obviously beyond the scope of real estate valuers to comment on.

The Restitution of Land Rights Act introduced a new dimension into South African real property law in that when defining a **"right in land"** it included "*any right in land, whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of beneficiary under a trust arrangement and* ***beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question"***

The issue of labour tenants' rights, quite apart from restitution, is now subject to separate legislation but the highlighted section referring to ***beneficial occupation*** is one which is posing problems of interpretation.

Beneficial occupation is not defined in the legislation and legal opinion on it's meaning is not, at this stage, unequivocal.

Up until the introduction of this concept, compensation in expropriation cases was payable to those parties owning, or otherwise entitled to, an interest in land. Such interests included freehold (ie.absolute ownership), including sectional title; leasehold, being long-term and registered contracts and short-term, unregistered, tenancy arrangements; beneficiaries of servitudes; mortgagees; etc. In other words, these recognised interests in land were generally supported by written documentation conferring the right on the owner of the interest.

Beneficial occupation seems to extend the concept of an interest in land in that by virtue of continuous occupation for 10 years or more, albeit with or without the express consent of the owner of registered interests in the land, a further right or interest is created, which if taken away could give rise to restitution or compensation. If one considers that statutory and compulsory relocation of people began to take place nearly 40 years ago, it will be seen that the evaluation of claims for loss of this beneficial occupation, which would probably be largely undocumented, is likely to be extremely difficult to process.

OBJECTIVES OF THIS PAPER

The objectives of the paper are to describe the unique task facing the Land Claims Commission in adjudicating the countless claims for restitution and to explain the unique research and valuation process being undertaken by property valuers. In particular, reference will be made to a pilot exercise currently being carried out by a panel of valuers in the City of Durban, Kwazulu-Natal. The outcomes of, and recommendations arising from, this exercise may serve as guidelines for the processing of restitution claims in other parts of the country.

THE CATO MANOR CASE STUDY

In June 1958, in furtherance of it's policy of demarcation of land use and ownership on a racial basis, the government of the day proclaimed a large tract of land, known as Cato Manor and situated in the City of Durban, as a "white group area". This tract of land is located to the west of the city centre, being about 3,5 kilometres away at it's nearest point.

The effect of this proclamation was that henceforth real interests in property within the affected area could only be owned and occupied by members of the defined racial group; ie. "white" people. Any residents and/or property owners not within this racial grouping were constrained as to how they dealt with their land and at some stage would be required to physically relocate and dispose of their interest in the property to a member of the "white group", or the state.

The total area of land in Cato Manor affected by this proclamation, which was but one of many covering the whole of the Republic of South Africa, was 1827 hectares. Of this area 22% was owned by the Durban City Council, 28% by "whites", 48% by "indians and coloureds" and 2% by "blacks". Numerically however the bulk of the residents were black who, apart from outright ownership, also occupied in terms of informal letting and subletting arrangements with land owners. The total number of people affected by the Cato Manor proclamation is not known with any certainty but it is estimated to be between 100 000 and
160 000.

Contemporary with the Cato Manor proclamation other areas of land within, and outside of, the boundaries of the City of Durban were also proclaimed for ownership and occupation by defined racial groups.

Following the 1958 proclamation for Cato Manor a comprehensive survey and valuation exercise was undertaken by independent property valuers in 1962/3 who determined "basic values" as at the date of proclamation. These "basic values", as defined in the Group Areas Development Act, were used as a basis for compensation if and when the state acquired at a later date.

The bulk of the state's acquisitions took place in the mid 1960's although isolated cases dragged on to the 1980's when they were eventually acquired in terms of the then current Expropriation Act.

There was massive resistance in general to the Group Areas proclamations of the late 1950's and early 1960's, and in particular in the case of Cato Manor with it's large and influential indian community.
As at today the bulk of the Cato Manor area still has not been developed. A comprehensive development scheme affecting the whole area and providing for mainly lower income residential needs is however in progress, administered and controlled by a development association. This is a non-profit organisation comprised of the current landowners (principally governmental) and other stakeholders.

THE PROBLEMS

The Restitution of Land Rights Act makes provision for possible restoration of land lost by dispossessed communities and/or monetary compensation if it can be shown that original compensation was inadequate.

Many thousands of claims have been lodged in terms of this provision and somehow they have to be validated and evaluated nearly 40 years after the event.

As stated earlier, one consequence of the relocation of communities was that overcrowded, poorly serviced, slum areas were vacated, albeit that the conditions may in some cases have merely been transferred to other areas. Subsequent to removals, many of the older, and most of the informal/illegal structures, were demolished by the departing residents or the state/municipalities.

In many areas, in the 1950's, local authorities apparently compiled comprehensive records of both formal and informal building structures in their areas but for various reasons few of these exist today.

In the case of Cato Manor it seems that detailed surveys were carried out and records kept of all shack dwellings and their occupants/owners in the late 1940's and 1950's by the then municipal administration but these were destroyed in riots in 1959.

Likewise comprehensive records were kept of the Group Areas Act acquisitions by the state but bureaucratic policy was for these files to be destroyed after so many years. In the case of Cato Manor the only useful files found were in respect of 258 of the approximately 3 000 affected properties.

The problems now facing the Regional Lands Claims Commissions are thus:-

1) Validation of claims, especially if no formal records still exist

2) Confirmation of the total amounts of any compensation paid 30 odd years ago, both monetary and other (eg. "soft" rentals and purchase prices, preferential treatment in allocation of government developed sites or properties)

3) Establishing what the original interest in land comprised and the extent and condition of improvements (buildings etc.) at the time of acquisition

4) Establishing whether the original compensation paid was "just and equitable". If not what financial or other redress is possible today.

With a view to investigating and advising on item 4) above the panel of private sector property valuers was appointed. Clearly in doing their work it was also necessary to investigate item 3).
In the course of their research, which is still ongoing, a number of issues relating to items 1) and 2) also came to light.

VALUATION RESEARCH METHODOLOGY

Given the unique nature of the problems facing the Land Claims Commission in undertaking their task, and the brief to the valuers' panel, it was clear that detailed research had to be carried out into the original acquisition process and the enabling legislation.

In essence compensation payable was intended to be market related as at the date of proclamation, hence the appointment of the original property valuers (only one of whom could be traced) to establish the "*basic value*". Accordingly detailed research was carried out to identify market conditions and transactions in the target, and comparable areas, up to and extant at the date of proclamation. Whilst formal records of transactions could be easily located, accurate identification of improvements existing at the time proved nearly impossible. As a result, whilst vacant land values could be reasonably substantiated, where improvements existed much use had to made of municipal rating records and valuations - which were cost related.

A further problem identified by the panel was that immediately after the proclamation (and it might be argued even some time before it, it anticipation of the event) the affected area was blighted. The newly qualified persons, ie. the "white" group, were not interested in purchasing in Cato Manor except at a bargain price, and the existing non-qualified owners were not willing sellers. Thus free market conditions ceased to exist.

Indeed from the time of the implementation of the Group Areas Acts the property market throughout South Africa became skewed. The allocation and location of land to the "white" community was disproportionate to their numbers and economic circumstances.

One result of the Group Areas Acts for the "indian" community in the then Natal was that their rapidly improving economic circumstances and limited land availability meant that in many areas land prices were significantly higher than in neighbouring "white" areas even though in some cases the quality of the site was less.

As stated, the process of transfer of Cato Manor into "white" or state ownership took many years and it was largely due to acquisition by the state. The Group Areas Development Act provided that even though the acquisition may have taken place many years after the original date of proclamation, compensation was related to the "basic value" as at 1958. The act originally provided that if there was any enhancement in value over the "basic value" over time then a portion of that enhanced value should paid to the state. In practice, because of the blight mentioned this did not happen and the provision was repealed.

However the delay in acquisition by the state and the effect of the blight meant that where properties were acquired several years after 1958 then compensation based on depressed values was paid. Research in many suburbs in the Greater Durban area indicated, for example, that average residential plots values in "indian" group areas increased by an average of nearly 9% per annum. By contrast if a plot in Cato Manor was revalued prior to purchase by the state in, say, 1965, then it's market value is unlikely to have been much more, if any, than it's basic value as at 1958. It must be borne in mind that the valuer was required to view the plot as one which could only be purchased by a member of the "white" community and was in an area which was not sought after.

In the light of the above the valuers panel were obliged to construct a model to simulate what property values might have been in Cato Manor after 1958, had there been a fair and free market. This could only be done from a detailed analysis of the property market in the suburbs surrounding Cato Manor over the same time period. As stated, the entire property market was skewed from the implementation of the Group Areas Acts so all areas investigated were indeed subject to artificial demand and supply forces but care was taken to avoid suburbs with any evidence of extraordinary blight.

Analysis of the property market and analogous areas up to the date of proclamation in 1958 indicated that generally the basic land values applied by the original valuers in the early 1960's were realistic. It was found that inflation was minimal at that time and the timing difference between the effective date and the somewhat later dates of inspection/valuation (1962/63) was immaterial. Where the basic values were still applied in later years however an undervaluation may have resulted due to more significant movements in market values outside of the blighted area.

A more substantial element of undervaluation was found to have occurred with the improvements to the land. Understandably, following the Group Areas determination in 1958, affected property owners, knowing that they were to lose their properties, made little effort to maintain their buildings, particularly if they vacated prior to finalisation of compensation negotiations. In such event vacant buildings may have been vandalised or materials removed. Under these circumstances, when a valuation was carried out of a dilapidated/partially destroyed building in say, the mid 1960's, looking at the property with it's, then, "white" zoning, little value may have been attributed to a dwelling, which at the date of proclamation may have been a viable, well maintained unit.

VALUATION MODEL AND IT'S APPLICATION

Following their research, and in an attempt to deal with the problems presented above, the valuers panel suggested that a possible way of determining whether original compensation was "just and equitable" was to measure it against an estimate of what the value of the property was likely to have been at the date of acquisition if there had been no Group Areas Act.

As stated, in many cases the original improvements were destroyed/dismantled many years ago and often detailed records do not exist. It was decided therefore that the valuation model should attempt to replicate the likely market value on the basis of underlying land value, plus contributory value of the improvements, this being assessed on a depreciated replacement cost basis.

The underlying land value at the appropriate date could be estimated by reference to the research into land values in other similar, but unblighted areas. Where no detailed records of the improvements or their condition could be identified then an estimate of their possible contributory value would have to be synthesised based on the last known municipal valuation for rating purposes. (Valuations for rating purposes in Natal valued land and improvements separately, using a cost related approach for improvements).

Once the valuation model had synthesised a possible market value figure at the appropriate date this could be compared with compensation actually paid. If a shortfall results, which is possible from the mid 1960's onwards for the reasons given, then a compensating financial adjustment could be considered. Clearly this adjustment may then itself have to be indexed forward to the present time. It was suggested that an appropriate index would reflect the escalation of property values over the period. The research of the valuers panel identified this escalation.

VALUATION OF LAND TENANTS' RIGHTS

This element of the valuation exercise is still ongoing as at December 1997. As with the valuation of the freehold owned properties, it is anticipated that the tenants' interests will have to be considered in two components: -

1) the value of the right of occupation lost

2) the value of any improvements lost

It may be pointed out that in terms of the then legislation and practice, most of these rights and improvements would have been regarded as informal (and illegal) and compensation would not have been payable, except for possible ex-gratia payments for materials lost. Present day compensation practice would however often attribute some value to informal structures, usually on a depreciated cost related basis.

In probably nearly all cases the dispossessed tenants are unlikely to be able to prove loss of a legal interest, eg.formal lease or sub-lease, and the lost envisaged under 1) above would be that of *beneficial occupation* discussed earlier.

No conclusions have yet been reached as to how this new "interest" in land may be valued but it is likely to be somehow related to the underlying land value. It does however pose an interesting dilemma:

From a practical point of view, assuming that the fact of such beneficial occupation is proven, how does one evaluate the historic loss to:

1) Party A who occupied a designated site and paid a full market rent to the property owner ?

2) Party B who occupied an identical site next door, without the consent of the owner, or at no rental ?

3) Party C who occupied a dwelling belonging to the landowner and paid full market rent?

Parties A and C are unlikely to have had any formal tenancy agreements or any more security of tenure than Party B. Would all parties be eligible for the same compensation?

In dealing with the issue of loss of tenant owned improvements, which undoubtedly would not have been accounted for in the original compensation, it is suggested that average, depreciated cost related figures will have to be used. As records are non-existent the Commission/claimants will have to corroborate the details of the structure claimed for. The compensation figures will then have to be applied on a spot value basis related to dwelling size, rooms numbers, construction type etc.

CONCLUSIONS

The comprehensive research exercise carried out for the Cato Manor project indicates the complexity of the issues of compensation facing valuers and the Land Claims Court in pursuance of the objectives of the Restitution of Land Rights Act.

It remains to be seen whether, in their interpretation of the "Property Clause" of the Constitution, the courts adhere to the traditional concept of a market value base for compensation purposes or whether a broader interpretation is made. The South African valuation community is keenly awaiting the first few test cases to see what precedents may be set.

Whilst Cato Manor is a unique case, enquiry in other parts of the country indicate that the problems are the same in other areas where restitution claims have been made. In most areas detailed records of original property improvements do not exist, particularly where they were informal, and conditions in the property market have changed radically over the past 40 years.

Valuers may well follow a process such as that described to attempt to simulate how an unfettered market may have developed in order to evaluate whether original compensation was just and equitable but clearly no "standard formula" approach can be used. This means that the process of evaluating claims is likely to be time-consuming and expensive.

A major issue which still has to be addressed by the Land Claims Commission is how the claims themselves are to be validated, particularly where no physical or recorded evidence exists.

A further issue not discussed here is how to evaluate and offset concessionary land sales/leases etc. against restitution claims. This is likely to call for a similar research exercise as that described, on a case by case basis.

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