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WHEN LESS IS MORE – TINY HOUSING AS "ADEQUATE" HOUSING

A thesis submitted by

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In fulfilment of the requirements of the degree of

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Under the supervision of Professor Marius Pieterse

DEDICATION

To my family who will pretend to read this out of love. To Charl, my everything, who has wisely avoided undertaking to read this.

With special thanks to Marius, who has read this, and in doing so, has provided brilliant and encouraging insights which make this readable.

DECLARATION

By submitting this dissertation, I declare that the entirety of the work contained therein is my own, original work that has not been submitted for any degree or examination in any institution or published in any journal, textbook or media.

Petronell Kruger

4 December 2023

ABSTRACT

The modern housing landscape is in flux with three key phenomena impacting the "adequacy" – the legal standard by which housing provision is measured – of housing policy, in South Africa, and worldwide. First, the "classic" housing crisis persists: high levels of homelessness, housing backlogs, and challenges related to government housing subsidies and service delivery continue. Second, there is international recognition of the impact of climate change on housing, the consequent need for climate-resilient housing, and reduced climate footprints of housing construction, maintenance and ownership. Third, physical housing size is increasing, despite the number of household members and available space for housing decreasing.

This thesis considers these phenomena and contemplates the role of housing size within the evolving legal standard of "adequacy", especially where size was often linked to the promotion of the right to health in light of communicable disease outbreaks. The thesis explores how tiny housing movements and different global norms on housing size can challenge conventional standards of housing adequacy. It considers that smaller dwellings are more affordable, less resource-intensive and, within the correct policy context, can lead to easier access to housing. The study lens of tiny housing is chosen due to its popularity throughout different income groups, based on growing concerns about consumerism, sustainability and communitarianism (albeit through a westernised lens). Accordingly, it allows for a discussion on the role of housing down-sizing without necessarily invoking a sense of "racing to the bottom".

To achieve the research aim, the following research questions are posed and answered in turn: What is "adequate" as a standard to measure housing? Does size matter for the standard of adequacy, and if so, how? Can tiny houses, as a representation of very small housing types, be deemed adequate? If tiny housing can meet the adequacy standard, how should the law

facilitate the self-realisation of tiny housing, or, alternatively, as a viable form of public housing?

The thesis comprises six chapters. The first chapter introduces the above-mentioned phenomena and study lens. The second chapter examines the legal and social barriers and facilitators for tiny housing in both private and public contexts through a comparative study of selected jurisdictions, chosen to represent different social, cultural and geographic contexts in which housing size requirements developed. The jurisdictions were also selected based on data accessibility and availability. The third chapter is a content analysis of theoretical aspects of adequacy in international and South African housing and human rights law. The fourth chapter is a critical analysis of building regulations and planning laws in South Africa, tracing their history and assessing their current form, with a focus on how they structure the self-realisation of access to tiny housing as adequate housing. The fifth chapter considers government public housing programs, policy approaches to housing size and its trade-offs with other adequacy factors in enabling access to tiny housing for people without the means to self-realise the right to adequate housing. Chapter six presents the answers to the research questions as explored through the various chapters and presents the overall findings of the study.

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LIST OF ABBREVIATIONS

ACHPR - African Commission on Human and Peoples' Rights

ADR - Australian Design Rules

ANC - African National Congress

BNG - Breaking New Ground

BOCA - Basic National Building Code

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women

ESCR Committee - Committee on Economic, Social and Cultural Rights

ESTA - Extension of Security of Tenure Act

HIC-HLRN - Habitat International Coalition, Housing and Land Rights Network

HUD - United States Department of Housing and Urban Development

IBC – International Building Code

ICESCR – International Covenant on Economic, Social and Cultural Rights

IDT - Independent Development Trust

IRC - International Residential Code

NBR - National Building Regulations

NBRBSA - National Building Regulations and Building Standards Act

NHF - National Housing Forum

NIMBY - Not In My Backyard Movement

RDP – Reconstruction and Development Programme

RTC – Reclaim the City Initiative

RV - Recreational Vehicles

SABS – South African Bureau of Standards

SANS – South Africa National Standards

SBC – Standard Building Code

SPLUMA – Spatial Planning and Land Use Management Act

SR – Special Rapporteur

SSA - sub-Saharan Africa

TRU - Temporary Relocation Units

UBC – Uniform Building Code

UDHR – Universal Declaration of Human Rights

USA - United States of America

UISP - Upgrading of Informal Settlements Programme

VSB – Vehicle Standards Bulletin

VCP - Veterans Community Project

CHAPTER 1: INTRODUCTION

1.1. BACKGROUND

1.1.1. Adequacy as the current standard for the right to housing

Section 25 of the Universal Declaration for Human Rights provides:

> "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[1]

Despite developments in the sources, context and formulation of the right to housing in international law and domestic human rights systems, "adequacy" has consistently been the standard against which a state's duty to house its citizenry is measured. Adequacy is an ever-evolving concept, although there is broad agreement that it can be captured in the following seven criteria: (1) legal security of tenure, including legal protection against forced evictions; (2) availability of services, materials, facilities and infrastructure; (3) affordability; (4) habitability; (5) accessibility for disadvantaged groups; (6) location and (7) cultural adequacy.[2] A breadth of international, regional and domestic laws and commentaries have been dedicated to chiseling out what these criteria mean and how they interact.

In South Africa, the notion of adequacy is articulated in section 26 of the South African Constitution, where the right to access to adequate housing is guaranteed subject to the principle of progressive realization within available resources. Through the case law of the

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[1] 1948.

[2] Committee on Economic Social and Cultural Rights 'General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)' *E/1992/23* (1991), para 8 (hereafter "General Comment No. 4").

South African Constitutional Court, it has been established that "access to adequate housing" means that housing is more than just "bricks and mortar" but should allow the rights-holder access to basic services,[3] the benefits of city infrastructure,[4] and the ability to engage in the economy.[5] These characteristics help identify which approach to defining housing to follow: housing is not simply physical shelter from the elements or an economic good that acts as a commodity to be exchanged in financial transactions. Instead, housing is seen as a social or collective good, a package of services and a sector of the economy.[6] In other words, housing shapes social interactions, defines relations of production and distribution and is linked to access to amenities such as water and sanitation.[7]

The right of access to adequate housing also means that housing tenure is to be secure. Most obviously, there is a constitutional right not to be evicted from one's home or have it demolished without an order of the court, which can be made only after considering all the relevant circumstances.[8] As was stated in *Port Elizabeth Municipality v Various Occupiers* -

> "[A] home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock

[3] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), para 35 (hereafter "*Grootboom*").

[4] T Coggin & M Pieterse 'A Right to Transport? Moving Towards A Rights-Based Approach to Mobility in the City' (2015) 31 *South African Journal on Human Rights* 2, 303.

[5] See inter alia *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC), para 253.

[6] MD Mmakola 'Housing in Ivory Park: A Critical Assessment' (Unpublished MPA thesis, University of Stellenbosch, 2000) 5 quoting L Bourne *The Geography of Housing*, London: VH Winston and Sons (1981).

[7] Mmakola, ibid.

[8] Section 26(3).

> for any family, the more so for one that has established itself on a site that has become its familiar habitat."[9]

However, adequacy must be viewed through the lens of the indivisibility and interrelatedness of human rights, as the Constitutional Court reiterates:

> "There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in [the Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential."[10]

Space, size or roominess – the primary concern of this thesis - have all been terms used to describe the habitability element of housing. This component of habitability has been endorsed by the United Nations Committee on Economic, Social and Cultural Rights,[11] the World Health Organization,[12] the United Nations General Assembly,[13] and the United Nations Special Rapporteur on Adequate Housing.[14]

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[9] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), para 17 (hereafter "*PE Occupiers*").

[10] Grootboom (above n3) para 23. *PE Occupiers,* ibid, para 20 which acknowledges the "interrelationship between land hunger, homelessness and respect for property rights."

[11] General Comment No. 4 (n2 above) para 8(d).

[12] World Health Organisation's Health Principles of Housing, 1989, principle 2.2.

[13] UN General Assembly 'Global Strategy for Shelter to the Year 2000: resolution / adopted by the General Assembly' *A/RES/43/181* (1988), para 5.

[14] Commission on Human Rights 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination' (2003) para 60 where the Special Rapporteur endorses Habitat International Coalition, Housing and Land Rights Network 'HIC-HLRN "ToolKit"' (2006) which measures the deprivation of living space as an indication of rights regression (p 69).

South Africa has also indicated that it views adequate size as a key component of the right to housing by importing minimum size requirements for public housing[15] and including baseline size requirements in its national building system.[16]

However, despite an evolving and, arguably, progressive understanding of the meaning of the right to adequate housing, three phenomena exist which underscore the need to radically rethink how housing adequacy, and size as an element of habitability is approached: 1) the rate of unhoused persons globally is at critical levels; 2) the international community has accepted the existential crisis posed by climate change; and 3) consumerism and the rise of the cost of living has caused attitudes towards preferred housing size to fluctuate. These phenomena stand in tension with the conventional understanding of adequacy and in tension with one another.

1.1.2. Phenomenon 1: The continued housing crisis – Globally and in South Africa

The global housing crisis is dire and the approach to housing provision needs to be adjusted to urgently provide more housing units, affordably, using fewer resources, in locations with appropriate access to amenities and economic opportunities.

It is difficult to accurately quantify the figures underlying the global housing crisis. First, the concept of being unhoused has various interpretations: there is a spectrum of what being unhoused can mean, ranging from the relatively simple understanding of someone being physically unsheltered (having no roof over the head) to a multi-factor compound evaluation

[15] National Department of Human Settlements 'The National Housing Code: Technical and General Guidelines, Volume 2' (2009) 27.

[16] South African Bureau of Standards *SANS 10400 – The Application of the National Building Regulations South Africa* 3 ed (2016) as incorporated into law through the application of the National Building Regulations and Building Standards Act 103 of 1977.

of factors which weigh up a host of existing rights, values and interests – much closer to the legal understanding of adequate housing.

Second, despite much ado about the fourth industrial revolution, complex telemetry systems and real-time data collection, data on homelessness is still not readily available. Busch-Geertseme, Culhane and Fitzpatrick comment on difficulties in definitions and data as follows:

> "Having done an intensive search for existing data on homelessness at the national, regional and local levels in various world regions, we would contend that it is not possible at this stage to generate a defensible estimate of the global extent of homelessness. This is especially true in the Global South, but also in a number of European countries, for example, data on homelessness is extremely sparse. The basis for a global estimate is therefore still much too patchy for very large parts of the world".[17]

Third, where data is available, it is dynamic. For example, the emerging refugee crisis in Ukraine illustrates how quickly the housing landscape in a region can change due to external factors.[18]

Therefore, we are left with largely varying estimates. The United Nations Special Rapporteur in 2005 estimated that 100 million people worldwide do not have shelter, while more than a billion people are inadequately housed (or homeless by the extended definition).[19] The United Nations and other international organisations in the field of housing rights have

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[17] V Busch-Geertsema, D Culhane & S Fitzpatrick 'Developing a global framework for conceptualising and measuring homelessness' (2016) 55 *Habitat International* 55, 127-8.

[18] The United Kingdom reports a figure of 1000 refugees who require housing and an exponential growth rate of unhoused – D Parsley 'England asking for local authority help' *iNews* (15 July 2022).

[19] UN Commission on Human Rights. 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living Miloon Kothari' *E/CN.4/2005/4* (2005); The United nations have proposed a more recent figure of 1.6 billion people living in inadequate conditions – United Nations' Department of Economic and Social Affairs "High-level Panel Discussion on the Priority Theme 'Affordable Housing and Social Protection Systems for All to Address Homelessness'" *Chair's Summary* (10 February 2020).

reiterated this figure in 2019 and 2020 reports.[20] In sub-Saharan Africa (SSA), the World Bank estimates that the problem is markedly worse, with 53.6% of persons living in slums or inadequate housing in 2018.[21] Obiaha summarises some of the dire figures in SSA as follows:[22]

- 15 countries in SSA have a housing backlog exceeding 1 million;[23]
- 39% of the urban population in Ghana needs housing;[24]
- 56% of the population in Ivory Coast lives in slum dwellings;[25]
- Nigeria has 24.4 million people living in housing, meeting the definition of homelessness by the United Nations Commission of Human Rights;[26]
- 66% of Ugandans live in inadequate housing;[27]
- 70% of the urban population in Zambia live in informal housing;[28]

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[20] United Nations '58th Session of the Commission for Social Development' *CSocD58* (2020); Ruff Institute of Global Homelessness 'About us' (2019) <https://ighomelessness.org/about-us/>; United Nations General Assembly 'Guidelines for the Implementation of the Right to Adequate Housing - Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context' *A/HRC/43/43* (2019) uses the figure of 1.8 billion people being inadequately housed.

[21] World Bank 'Population Living in Slums (Percentage of Urban Population' (2018) <https://data.worldbank.org/indicator/EN.POP.SLUM.UR.ZS?end=2018&most_recent_year_desc=false&start=1990&view=chart>.

[22] EE Obioha.' Mission Unaccomplished: Impediments to Affordable Housing Drive in Addressing Homelessness in Sub-Saharan Africa' (2021) *Social Sciences* 10, 310.

[23] EM Bah, I Faye & ZF Geh 'Housing Market Dynamics in Africa' (2018) London: Palgrave Macmillan.

[24] Africa Research Institute 'Slum politics in Accra: Understanding Urban Ghana. Africa Research Institute' (2016) <https://www.africaresearchinstitute.org/newsite/event/slum-politics-in-accra-understanding-urban-ghana-launch/>.

[25] Habitat 'The Housing Need in Uganda' (2019) https://www.habitat.org/where-we-build/uganda.

[26] The United Nations Commissioner on Human Rights '2007 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons.' (2008) <https://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>.

[27] Habitat (n25 above).

[28] Mercy Initiative for Africa 'Homelessness Statistics in Africa' (2021) <https://www.mifacharity.org/founderscommitee>.

Closer to home in South Africa, the Human Sciences Research Council suggest that between 100 000 and 200 000 people are "true homeless" or roofless, i.e., have no shelter, even in the form of informal shelter.[29] Although, the 2022 National Census estimates that about 55 000 people are homeless[30] – a figure that may be brought into question given some noted inadequacies with census data.[31]

When South Africa became a democracy in 1994, the housing backlog was estimated to be 1.5 million units.[32] In 1999, the housing backlog was estimated to be between 3 and 3.7 million units.[33] Between 1994 and 2008, about 2.5 million units were built as housing demand continued to grow.[34] About 2.1 million housing units were still outstanding, estimated to have to service 12 million South Africans.[35] In 2021, the backlog was estimated to be 3.7 million, with an annual growth of 178 000,[36] and 23% of urban dwellers in South Africa living in informal settlements.[37] Service delivery is also very problematic, with more than one in eight South Africans not having access to adequate sanitation, water or connected to electricity networks.[38] In 2016, it was estimated that 1 in 7 households in South Africa lived in

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[29] C Cross, J Seager, J Erasmus et al. 'Skeletons at the feast: A review of street homelessness in South Africa and other world regions' (2010) 27 *Development Southern Africa* 1, 7.

[30] Statistics South Africa 'Census 2022' *Statistical Release 301.4* (2023) 62.

[31] D Everatt 'SA's 2022 census missed 31% of people - big data could help in future' *The Conversation* (18 October 2023).

[32] Department of Housing 'Presentation by NM Karsen, Deputy Director-General, on Strategies Identified to Address Policy Gaps, paper presented at National Housing Conference on Housing Strategy for the New Millennium' (1999) (hereafter "Department of Housing 1999").

[33] Department of Housing 1999, ibid.

[34] Department of Housing 1999, ibid.

[35] Department of Human Settlements 'Presentation to the Select Committee on Public Service' (2010).

[36] P Simbanegavi 'South Africa' Africa Housing Finance Yearbook (2021), 221.

[37] Simbanegavi, ibid.

[38] Simbanegavi, ibid.

informal dwellings.[39] In 2014, the government reported that over 2 million children lived in backyard dwellings (a form of informal dwelling).[40]

A significant percentage of South African households (more than 13%) rely on a government housing subsidy. The government subsidises 94% of housing stock under R300 000.[41] Private funding is almost impossible for low-income households as a 40m^2 house will cost an average of R436 200.[42] The heavy reliance on government funding is even more disconcerting in the context of ever-increasing resource constraints in South Africa, with 2019 also being the year that national debt exceeded three trillion rands and debt servicing became a critical expenditure from the government purse.[43]

In instances where housing is provided, policy initiatives have been broadly criticised for being very limited in providing what is deemed acceptable public housing.[44] Prevailing policies have focused heavily on ownership[45] even where the cost of home ownership is not sustainable for occupants,[46] with inflexible funding for projects which have led to the varying

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[39] H Dawson & D McLaren 'Monitoring the Right of Access to Adequate Housing in South Africa' (2014) *Studies in Poverty and Inequality Institute Working Paper No 8*, 63.

[40] Socio-Economic Rights Institute of South Africa 'Informal Settlements and Human Rights in South Africa Submission to the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living' (2018), 7 citing African Committee of Experts on the Rights and Welfare of the Child 'South Africa's Initial Country Report on the African Charter on the Rights and Welfare of the Child - Reporting period: January 2000 – April 2013' (2014), para 244.

[41] Simbanegavi (n36 above) 222.

[42] Simbanegavi (n36 above) 235.

[43] C Vandome 'COVID-19 in South Africa: Leadership, Resilience and Inequality' Expert Comment, Chatham House (2020) <https://bit.ly/3gsByUJ> .

[44] D Gardner 'Getting South Africans Under Shelter: An overview of the South African housing sector' *Report for the Housing Finance Resource Programme* (2003), 73.

[45] S Charlton 'State ambitions and peoples' practices: An exploration of RDP housing in Johannesburg' (Unpublished PHD thesis, University of Witwatersrand, 2013) 21.

[46] M Pieterse 'Rights-based Litigation, Urban Governance and Social Justice in South Africa' (2017) Johannesburg: Routledge, 43.

quality of housing and sometimes low-quality dwellings.[47] Public housing is frequently criticised for poor construction quality, lack of safety, and poor access to essential services.[48]

1.1.3. Phenomenon 2: Global acceptance of climate change and the two-way relationship with the housing market

The gravity of the global climate crisis has impressed on the international community the need to make several adjustments to resource use, including exploring diverse housing typologies that favour smaller houses with more sustainable building materials and located in areas that do not require extended commutes (and thereby fuel).

The acceptance of the climate crisis was set into motion in 1987 when the Brundtland Commission report by the United Nations World Commission on Environment and Development was published.[49] The report resulted in a series of meetings and Conventions culminating in the development of the Kyoto Protocol and the Paris Agreement – arguably the two most significant international documents addressing climate change. The Brundtland report acknowledges the burden of human economic activity on the environment and draws links between health, socio-economic circumstances and continued climate change.[50] The report acknowledges, amongst others, the problem with meeting the growing housing demand due to population growth and limited resources, the need to look for alternative housing solutions, and the easing of housing regulations (e.g., pertaining to self-help and informal

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[47] Charlton (above n 45) 146.

[48] Eg: T Manomano & P Tanga 'Housing needs: The quality and quantity of housing provided by the government for the poor in the eastern Cape province in South Africa' (2018) 54 *Social Work* 1, 19.

[49] United Nations General Assembly 'Development and International Cooperation: Environment' A/42/427 (1987) (hereafter "UNGA 1987").

[50] UNGA 1987, ibid, paras 11 – 26.

housing).[51] It simultaneously warns that the urban poor, in inadequate housing, are at increased risk of contracting diseases due to their exposure to environmental pollution.[52]

Building design, construction and developments were identified as key contributors to greenhouse gas emissions and an area for possible real change.[53] A "green" housing supply, therefore, needs to transform to have a lower carbon footprint (mitigation) to be resilient to climate events (adaptation) while not neglecting the volume of housing demanded.[54]

The need to mitigate the environmental impact of housing is apparent: the provision of housing contributes to carbon emissions (and broader pollution) through the manufacturing and production of building materials, the building of the house, the use of energy by housing occupants and the energy use in transport from homes to other locations.[55] Transportation accounts for 13% of global greenhouse gas emissions.[56] The production of housing and the energy expenditure in occupation accounts for 30%.[57] A 2011 study in the United Kingdom found that building size is the strongest predictor of residential energy consumption.[58]

Adaptation is necessary, as housing that is not climate resilient might be rendered unusable by climate events and ultimately worsen housing need. For example, in the United

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[51] UNGA 1987, ibid, paras 43 & 54.

[52] UNGA 1987, ibid, para 11.

[53] C Martin, G Campillo, H Meirovich & J Navarette 'Climate Change Mitigation and Adaptation through Publically-Assisted Housing, Theoretical Framework for the IDB's Regional Policy Dialogue on Climate Change' *Inter-American Development Bank Technical Note* No. IDB-TN-593 (2013), 4.

[54] Martin et al, ibid, 5.

[55] Martin et al, ibid, 7.

[56] Martin et al, ibid, 7.

[57] Martin et al, ibid, 8.

[58] GM Huebner & D Shipworth 'All about size? – The potential of downsizing in reducing energy demand' (2017) 186 *Applied Energy* P2, 230-1.

States, about 6% of public housing is in floodplains and vulnerable to severe weather events.[59] However, building regulations and codes have been noted as barriers to the adoption of new technologies, typologies and methods for building.[60]

Simultaneously, housing insecure persons were more likely to be impacted by the following impacts of climate change:[61]

- Energy insecurity in the form of increased energy costs;[62]
- The inability to relocate after a disastrous climate event[63] and the failure of response policies to address housing;[64]
- Inhabitable dwellings through uncontrolled heat or cold;[65]
- Increased outdoor exposure to air pollution that exacerbates respiratory and cardiovascular disease;[66]

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[59] B Docter & M Galvez 'The Future of Public Housing Public Housing Fact Sheet 5' (20 February 2020) *The Urban Institute* <*https://www.urban.org/sites/default/files/publication/101482/the20future20of20public-20housing20public20housing20fact20sheet.pdf*>.

[60] Martin et al (n53 above) 12.

[61] M Bezgrebelna, K McKenzie, S Wells et al. 'Climate Change, Weather, Housing Precarity, and Homelessness: A Systematic Review of Reviews' (2021) 18 *International Journal of Environmental Research and Public Health* 11, 5812.

[62] A Jessel, S Sawyer & D Hernández 'Energy, Poverty, and Health in Climate Change: A Comprehensive Review of an Emerging Literature' (2019) 7 *Front. Public Health*, 357.

[63] SB Shonkoff, R Morello-Frosch, M Pastor, & JL Sadd 'The climate gap: Environmental health and equity implications of climate change and mitigation policies in California—A review of the literature' (2011) *Clim. Chang.* 109, 485–503.

[64] B Ramin, & T Svoboda 'Health of the Homeless and Climate Change' (2009) *J. Hered.* 86, 654–664.

[65] LM Tanner, S Moffatt, EMG Milne et al. 'Socioeconomic and behavioural risk factors for adverse winter health and social outcomes in economically developed countries: A systematic review of quantitative observational studies' (2013) *J. Epidemiol. Community Health* 67, 1061-7; CJ Gronlund, KP Sullivan, Y Kefelegn, et al. 'Climate change and temperature extremes: A review of heat- and cold-related morbidity and mortality concerns of municipalities' (2018) *Maturitas* 114, 549. Ramin & Svoboda, ibid; Shonkoff et al (n 63 above).

[66] Ramin & Svoboda (n64above); Shonkoff et al (n61 above); A Sverdlik 'Ill-health and poverty: A literature review on health in informal settlements' (2011) *Environ. Urban*. 23,123–155.

- Increased importance of green infrastructure that is not equitably distributed.[67]

South Africa contributes more than 40% of the carbon emissions on the African Continent.[68] Data suggests that the building construction sector is a very high energy-use sector in South Africa, with estimates placing it as having the fifth highest energy impact outside of energy generation activities.[69] The poor in South Africa also face increased transport distances and personal costs (and more emissions from transport) due to urban sprawl resulting in a continuation of racist town planning and patterns.[70] To manage the thermal comfort of homes, high-energy (often flammable and dangerous) energy sources like coal, paraffin and wood fuel, are used.[71] Housing policy is also often in tension with climate change adaptation or mitigation strategies. For example, housing expansions in Johannesburg into wetland areas counteract conservation efforts, as well as the stormwater management effects of the wetlands.[72]

1.1.4. Phenomenon 3: Actual trends in housing size, cost and city density

Despite the pressing need to rethink housing due to the failure to meet housing demand and the climate crisis, global housing trends have developed in the opposite direction - decreased household sizes coupled with a trend of larger physical houses.[73] This trend has been noted

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[67] A Titz & SS Chiotha 'Pathways for Sustainable and Inclusive Cities in Southern and Eastern Africa through Urban Green Infrastructure?' (2019) *Sustainability* 11, 2729.

[68] C Du Plessis, D Irurah & R Scholes 'The built environment and climate change in South Africa' (2010) *Building Research & Information*, 244.

[69] Du Plessis et al, ibid, 246.

[70] Du Plessis et al, ibid 243.

[71] Du Plessis et al, ibid 243.

[72] K Hetz 'Contesting adaptation synergies: political realities in reconciling climate change adaptation with urban development in Johannesburg, South Africa' (2016) 16 *Reg Environ Change*, 1178–9.

[73] Mason Bradbury, M Nils Peterson & Jianguo Liu 'Long-term dynamics of household size and their environmental implications' (2014) *Population and Environment* 26, 74.

mainly in the Global North, but evidence suggests that higher-income Global South countries like Brazil and China are following the trend.[74] For example, between 1950 and 2002 average housing size in the United States has almost doubled (90m^2 to 210m^2) and nearly tripled in rural and urban China (8.1m^2 to 26.5m^2 and 6.7m^2 to 22.8m^2 respectively).[75] During the same time, in the United States, small households proliferated due to increased divorce and single occupancy, at a rate that is outstripping actual population growth.[76]

A study of city densities reveals that urban densities have reduced by about 22% from 1990 to 2000 alone, suggesting that cities are increasingly susceptible to urban sprawl and, therefore, to more resource usage. This decline is true for so-termed "developing country cities" six times out of seven, although interestingly was not observed in Johannesburg and Pretoria.[77] This exception in South Africa is attributed to the removal of apartheid regulations in sample cities.[78] Global patterns in density change suggest that urban densities peaked in 1890 and have since reduced three-fold, and that cities grew in area size 27% faster than their population growth in the 20th century.[79] In short, smaller groups live in increasingly large houses in less dense cities at increasingly high resource costs.

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[74] Ibid, Bradbury et al show that in the 1900s show that Egypt, Greece, Mexico, Trinidad and Tobago, Turkey, Panama and China have followed this trend. All countries in the study except the Seychelles and India saw decreased household sizes.

[75] Bradbury, ibid.

[76] S Angel, J Parent, DL Civco & AM Blei 'The Persistent Decline in Urban Densities: Global and historical Evidence of "Sprawl"' (2010) *Lincoln Institute of Land Policy* Working Paper 10SA1, 57.

[77] Angel et al, ibid, 58.

[78] Angel et al, ibid, 59.

[79] Angel et al, ibid, 94–7.

1.2. PROBLEM STATEMENT

There is a profound crisis in housing provision worldwide. In South Africa, the legacy of segregated housing has set up a housing system that fails to provide enough houses to South Africans, particularly black South Africans. The housing backlogs have not been reduced since the democratic transition, and the current housing stock does not meet the full adequacy standards. The country is not financially able to simply allocate more resources to the problem. Commentaries on housing policies also suggest that the government is struggling technically to evaluate housing needs and design the most effective responses.[80] This has further entrenched systemic racism.

Beyond financial resources, the lack of environmental resources is equally pressing. Globally, the current understanding of housing's impact on the environment and its contribution to climate change makes it imperative that, as a society, we rethink how we provide housing. The materials, size, location, and ultimate understanding of housing's purpose must change to reduce its environmental impact.

Increased climate events underscore the need for housing to be more resilient. Disaster events such as droughts, fires, and flooding are predicted to become more frequent and severe. Housing policy needs to reduce its role in contributing to the climate crisis and adapt to it. Housing stock should be created at a higher rate and with consideration of mobility. The Covid-19 pandemic highlighted the shocking inability of governments, South Africa's included, to respond to disaster events.

[80] Eg. The scale of housing targets have necessitated government reliance on mega projects where little scope for different housing types exist with flaws, such as having households possibly disqualify themselves from receiving the state subsidy where they take self-help measures like purchasing land (See P Adebayo 'A forced policy crossroads in South Africa: Revisiting incremental housing ideas post-COVID-19' (2020) 55 *Journal of Public Administration* 3.1, 575.

One linchpin to achieving radical change is in reducing the size of houses. Smaller houses mean fewer building materials, reducing the financial and environmental costs of building houses. It can also mean denser cities and more flexible housing types. In turn, this means that realising the right to housing would become easier for the government but also for people who face financial and other barriers to accessing appropriate housing for their needs.

1.3. TINY HOUSING AS THE STUDY LENS

This thesis will interrogate the problem statement through the lens of tiny housing. Smaller housing has already emerged as a social response to the pressures of current housing practices. In some areas of the world, like Asia, where space and affordability have been a standing issue, norms on size have developed differently and less restrictively. In other areas, like the Western North, the Tiny House Movement has emerged. Tiny housing offers an opportunity to reconsider how standards around housing adequacy should be interpreted or even changed.

Yet, the study of tiny housing is nascent, with little written on the legal barriers and facilitators to its effective implementation and use in public and private housing schemes. One obvious barrier is the perception of a positive relationship between the size of the house and the dignity, satisfaction, health and safety of the occupant. Law and policy can and do respond to these perceived relationships and offer regulatory barriers to reducing housing sizes through building and zoning laws. Government housing policies might prescribe house and neighbourhood characteristics that make downsizing impossible or that reduce its possible impact.

Despite trends in the increasing size of houses, the idea of using a smaller home where the economy of space is important has been around for millennia and across various cultures.[81]

[81] See L Kahn & B Easton 'Shelter' (1973) San Francisco: Shelter Publications Inc for an exposition of various forms of alternative dwellings across cultures and eras.

In the early 2000s, this idea of downsizing put on a trendy new hat and re-emerged as the phenomenon of tiny housing. Tiny housing's popularity started in the United States, where companies like Tumbleweed Tiny Housing pioneered the commercial production of this new hot commodity at scale and at a competitive cost (lower than standard housing).[82] An explosion of alternative suppliers occurred, and soon there was a tiny housing solution which catered to different income groups, needs and styles. Tiny houses have become such big business in the United States that market reports estimate a growth in the value of the tiny house market of more than $5 billion.[83]

This community of tiny house proponents found a common origin for the movement in an experiment lived and described in writing by American poet and philosopher Henry David Thoreau. In his 1854 book "Walden; or Life in the Woods", Thoreau advocates for a simpler style of living, resulting from his living in a tiny house and attempting to live self-reliantly for two years, two months and two weeks.[84] Inspired by Thoreau, Lester Walker and Sarah Susanka honed in on the idea of tiny living again in the 80s and 90s with their works "Tiny Houses: And How To Get Away From It All" and "The Not so Big House", respectively.[85] Walker provides a catalogue of tiny homes with accompanying diagrams, plans and photos as an influential showcase of alternative home ideas.[86] Susanka authored a series of books on tiny

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[82] Tumbleweed Company 'About us' (30 March 2020) <https://www.tumbleweedhouses.com/company/>.

[83] Technavio 'Global Tiny Homes Market 2020-2024' (6 March 2020) *Release Summary* <https://www.businesswire.com/news/home/20200306005287/en/>.

[84] J Stromberg 'Thoreau Leaves Walden Pond' *Smithsonian Magazine* 6 September 2011, <https://www.smithsonianmag.com/smithsonian-institution/thoreau-leaves-walden-pond-69655863/>; HD Thoreau 'Economy' in *Walden; or, Life in the Woods,* (1854) Boston: Ticknor and Fields.

[85] L Walker 'Tiny Houses: And How To Get Away From It All' (1987) New York: Abrams Press; S Susanka 'The Not So Big House' (1998) Connecticut: Taunton Press Inc.

[86] Walker, ibid.

housing and espousing design ideas that favour spatial economy. Susanka has been particularly influential in promoting tiny housing in the United States.[87]

Tiny housing has become quite mainstream, although not ubiquitous. Tiny housing's success was due to its various functions: First, tiny housing has been packaged as an affordable housing solution. These homes can be much cheaper to build and, therefore, easier for the government to finance or for individuals to access financing in the private sector.[88] The houses are correspondingly cheaper to maintain, and the cost of utilities is also lower.[89] In the United States, the median sales price of a home is estimated at $507 800.[90] The cost of a tiny house ranges from $10,000 – a basic model – to a very high-end, luxurious, and well-kitted home of $100,000.[91] The so-called bursting of the housing bubble in the US has been credited with the significant migration from normal homes to tiny house alternatives in the early 2000s.[92]

Second, tiny housing has been touted as a possible solution to the high environmental cost of housing production and occupation. The general narrative is that a tiny house takes fewer resources to build and maintain.[93] This is supported by literature,[94] although some

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[87] C Ferraro 'Small but perfectly formed' *Financial Times* (21 February 2009).

[88] E Keable 'Building on the Tiny House Movement: A Viable Solution to Meet Affordable Housing Needs' (2017) 2 *University of St. Thomas Journal of Law and Public Policy* 11, 115.

[89] A Mutter 'Growing Tiny Houses – Motivations and Opportunities for Expansion Through Niche Markets' (Unpublished Masters thesis, Industrial Institute for Industrial Environment Economics, 2013) 19.

[90] United States Census Bureau and the United States Department of Housing and Urban Development 'Median Sales Price of Houses Sold for the United States' (2024); Keable (n85 above) relies on the figure of $296 000 for single-family house as he comparative figure for the cost of tiny housing.

[91] Keable (n88 above).

[92] Mutter (n89 above) 20.

[93] Mutter (n89 above) 18.

[94] Mutter (n89 above) 18.

authors argue that other green housing can deliver similar benefits.[95] It has been estimated that tiny houses have a carbon footprint almost half the size then that of a standard house[96] and that occupants are more likely to adopt environmentally friendly habits that can further improve the sustainability effect of tiny houses.[97]

An Australian study on the life-cycle total of greenhouse gas emissions found that a tiny house contributed to a per capita reduction of at least 70% in greenhouse gas emissions over a life cycle and that a traditional house would have to house almost four times as many persons as the current national average to match the reduced emissions of a tiny house.[98]

Logically, these findings follow from the smaller house size: the house takes less material to consume, less energy to run, allows for fewer goods to be bought due to size limits, and, as has often been reported, also engenders a broader mind-shift from the occupant in understanding waste and consumption.[99] In a mixed-method study, Saxton investigated the ecological footprints of tiny house residents (private ownership) as compared to their footprint in previous housing and as compared to national averages and investigated the behaviours that led to those changes. On average, respondents downsized from 150m^2 to 22m^2. The study further found that tiny house residents have increased use of renewable energy (37%, as compared to the previous 2%), decreased travel distances (travelled on average 32 km less), purchased less personal and household appliances, recycled more (30% of respondent reported

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[95] A Eberle 'Life Cycle Assessment of a Tiny House' (2015) ME 515 Final Report, 25 Eberle suggests that when analyzing the global warming potential per area per person, an energy-efficient house was a better option.

[96] Ibid.

[97] M Saxton 'The Ecological Footprint of Tiny Home Downsizers: A Exploratory Study' (unpublished PhD Thesis, Virginia Polytechnic, 2019) 157.

[98] RH Crawford & A Stephan 'Tiny house, tiny footprint? The potential for tiny houses to reduce residential greenhouse gas emissions' (2020) IOP Conf. Series: Earth and Environmental Science 588, 022073.

[99] C Kilman 'Small House, Big Impact: The Effect of Tine Houses on Community and Environment' (2016) 2 *Undergraduate Journal of Humanistic Studies* 6.

more paper and plastic recycling behaviour) had adjusted food behaviour to eating less, and importantly eating less animal-based products and eating more locally sourced foods.[100]

Third, tiny housing takes less physical space and can take a mobile form, allowing for the better use of space within cities or allowing for more flexibility when creating housing in areas not suitable for long-term residential development (e.g. temporary housing as part of disaster relief, or housing in possible future flood zones).

Despite its rise in popularity, this new in-vogue house is complicated to define. The industry is still new, and most of the literature on tiny housing is generated by the tiny house community, which has little interest in generating universal parameters for what qualifies as a tiny house. Shearer and Burton conducted a mixed-methods study which, amongst others, contained a content analysis of popular tiny house and social media posts, focus group discussions with tiny house community members in Australia and an online survey (also targeting Australian tiny house proponents). They made the following suggestion as to the definition of tiny housing: tiny houses are generally smaller than $40m^2$, often built on a mobile foundation (but can be permanent), and have a specific underlying design ethos characterised by environmental sustainability, community and affordability.[101] Some form of legal recognition is also a component of the house, albeit in different forms and with complexities and barriers to a mainstream understanding of occupancy.[102] This thesis will adopt Shearer and Burton's proposed definition of tiny housing as it is currently the most rigorous study of its type and provides enough flexibility in its result to allow context-specific factors to come into play.

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[100] Saxton (n97 above), 84 – 94.

[101] H Shearer & P Burton 'Towards a Typology of Tiny Houses' (2019) 36 *Housing, Theory and Society,* 3, 305.

[102] Shearer & Burton, ibid.

In South Africa, backyard dwellings,[103] informal dwellings[104] and large occupancy rates in urban dwellings have been frequently observed,[105] and living in limited space is not novel. However, the Shearer and Burton definition assists in distinguishing tiny housing from these existing housing typologies in several ways: Tiny housing is designed and intentioned to be small and remain small, and its diminutive size is not the consequence of a lack of resources. Tiny housing is designed to meet the needs of occupants similarly to other forms of housing. It is not characterised by widespread failures in service delivery or poor physical safety as is often the case with informal housing in South Africa built with unstable and unsafe materials such as tin, corrugated iron, plastic and metal sheeting, which can pose, amongst others, fire and suffocation hazards.[106] Tiny housing also enjoys the security of tenure, i.e. occupants have legal protection from eviction and the violation of property rights, as would be the case for other forms of formal home ownership.

A major appeal in considering tiny housing as a case study for the bigger enquiry of examining the application of the standard of adequacy is the popularity of tiny housing and the diverse profile of persons (in terms of income, race, gender) who chose to advocate for tiny housing. Tiny houses have increased in popularity, with several reality shows, popular blogs

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[103] J Brueckner, C Rabe & H Selod 'Backyarding in South Africa' (2018) *Technical Report* 2, who comments that backyarding is a mostly urban phenomenon where formal and informal land use is often combined to increase housing supply without the need to redevelop existing structures at higher densities.

[104] Statistics South Africa 'General Household Survey: 2018' (2019) *Statistical Release P0318* provide that 13.1% of South Africans live in informal dwellings. This figure will include informal backyard dwellers.

[105] V Nkosi, T Haman, N Naicker & A Mathee 'Overcrowding and health in two impoverished suburbs of Johannesburg, South Africa' (2019) *BMC Public Health* 19, 1358 states that "[r]esearch covering the period between 2002 and 2014 showed that nation-wide, more than one-quarter of formal, low-cost dwellings in South Africa were overcrowded."

[106] P Narsai, M Taylor, C Jinabhai & F Stevens 'Variations in housing satisfaction and health status in four lower socio-economic housing typologies in the eThekwini Municipality in KwaZulu-Natal' (2013) 30 *Development Southern Africa* 3, 373; NP Mzolo 'Evaluating the implementation process of the Cornubia Housing Programme (Phase 1 A) in the eThekwini Municipality' (Unpublished Masters in Public Administration Thesis, University of Stellenbosch, 2016) 7.

and YouTube videos on the phenomenon. As an example, "Tiny House Nation" is a successful American reality show picked up by Netflix and has run five seasons to date.[107] The movement has gained such traction that it was the subject of an expansion pack for an ultra-successful computer franchise: The Sims.[108] In South Africa, video logger Garth Ensley hosts a YouTube channel promoting tiny housing and off-grid living.[109] He lives in a mobile tiny house that he built. A new South African company, Wanderlust Co, sells high-quality, luxury tiny houses on a trailer bed from R350 000 for the most basic model.[110] Some of the more costly units can put a buyer R650 000 out of pocket. Imported Tiny House kits are also available in a higher pricing bracket.[111]

Small housing solutions can easily be cast as "lesser" or inherently viewed as compromising a standard of living. The role of smaller sizes or alternative materials in a discussion on public housing can invoke a sense of "racing to the bottom". However, tiny housing has become in vogue in discussions on high-, medium- and low-income housing and has managed to divorce size and consumer wealth and privilege from one another. Instead, tiny housing challenges modern consumers to investigate their relationship with size and resources in a dialogue on personal responsibility and housing systems which includes, but is not limited to, social assistance.

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[107] L Birk 'Netflix TV and Movies August 2019 List Revealed' (15 August 2019) *Pop Culture*, <https://popculture.com/streaming/2019/07/24/netflix-everything-coming-august-2019/>.

[108] With over $5 billion in sales: G Wong 'The Sims 4 Celebrates The New Year With New Tiny Living Stuff Pack & Awesome Sales' (25 January 2020) *Geek Culture* <https://geekculture.co/the-sims-4-celebrates-the-new-year-with-new-tiny-living-stuff-pack-awesome-sales/>.

[109] TinyhouseSouthAfrica 'An Introduction to Tiny House Living in South Africa' (n/d) Youtube video <https://www.youtube.com/watch?v=ckauc9iurnk>.

[110] <https://www.wanderlustco.co.za/blogs/the-tiny-homes/the-j-bay>.

[111] An example of a kit for R415 000: ImportitAll < https://www.importitall.co.za/SOLAR-POWER-SYSTEM-Tiny-House-1800W-Off-Grid-Large-Base-KIT-House-not-Included-ap-B074FQ856V.html?utm_source=-google_remarketing&utm_medium=cpc&utm_campaign=remarketing&gclid=CjwKCAiA6vXwBRBKEiwAYE7iS40PEvO_9dLTmElHZAJbjWblHz3B4hctBwMg4rLRthiJOE-XV9kfXxoCXuEQAvD_BwE>.

This thesis' exploration of alternative housing solutions, which seek to challenge conventions on housing also held by privileged groups, aligns with a human-rights-based approach to housing that is dignity-centric. The United Nations Housing Rights Programme has made it quite clear that dignified housing does not look different for the poor:

> "To live in a place, and to have established one's own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity, has led the international community to recognize adequate housing as a basic and fundamental human right."[112]

1.4. RESEARCH AIM AND RESEARCH QUESTIONS

This study aims to investigate the evolving concept of "adequacy" in terms of international, regional and national human rights law and constitutional law understandings of housing. It will explore how the size of housing is to be viewed in light of existing (pre)conceptions on size and the legal components of adequacy, growing housing demand and considering the indivisibility and interrelatedness of rights which require action on climate change in all forms of human activity.

To achieve the research aim, the following research questions were derived from the background and justification for the study:

1) What is "adequate" as a standard to measure housing?
2) Does size matter for the standard of adequacy, and if so, how?
3) Can tiny houses, as a representation of very small housing types, be deemed adequate?

[112] United Nations Housing Rights Programme 'Housing Rights Legislation: Review of International and National Legal Instruments' (2002) *Report No.1* 92-1-131628-6, para 1.

4) If tiny housing can meet the adequacy standard,
    a. How should the law enable the self-realisation of the right to adequate housing for people with the means and matching housing needs to access tiny housing?
    b. How should the law enable access to tiny housing for people without the means to self-realise the right to adequate housing through the provision of public housing?

1.5. NOVELTY AND CONTRIBUTION OF THE STUDY

To the author's knowledge, this thesis will be the first comprehensive study on how the legal standard of adequacy applies to tiny housing. The study will examine and challenge prevailing prescripts on adequacy through the lens of tiny housing, which considers how the housing affordability, the housing shortage, and the climate change crisis necessitate new understandings of consumption in housing. This thesis will also be the first extensive academic commentary on using tiny housing in South Africa as part of the formal housing landscape. No equivalent studies exist for sub-Saharan Africa. Ultimately, the study will be useful for policymakers and advocacy groups when considering law reform in housing.

1.6. OUTLINE, METHODOLOGY AND DEMARCATIONS OF THE STUDY

Size in housing is effectively a determinant of housing adequacy and of human and planetary health. Throughout the thesis, the relationship between dwelling size and the right to health and the right to a healthy environment will be explored to a more limited extent than the right to adequate housing. Engaging with these two rights is necessary to answer the research questions and achieve the overall research aim. The extent to which the principles, laws, policies and case law which underlie these rights will be invoked will be determined largely by their role in shaping how size and adequacy are perceived in terms of the right to adequate housing. However, the focus on discussing the right to housing is required to manage the size of the study.

This thesis consists of six chapters. This first chapter introduces the general background for this research – the tension with the standard of adequacy in relation to the size of houses, environmental concerns and the ongoing failure to meet housing demand. It frames the study within a socio-economic rights paradigm, using corresponding norms, concepts, sources and implementation mechanisms. It sets out the justification and purpose of the study, motivating for tiny housing as an adequate case study to investigate these tensions and ultimately to evaluate the current role of size in housing, as well as the possible role of size. This chapter contains the research goals, questions and a broad description of the research methodology.

Chapter Two is a limited comparative study of purposefully selected jurisdictions with different approaches and histories in relation to incorporating size requirements in their housing programmes. The jurisdictions were selected to represent the richest sources of data: the United States and Australia due to the current popularity and existing law and policy formulation and and subsequent evaluation and discussion, and Thailand, Hong Kong and Japan as counterexamples based on available English literature and existing examples of micro living arrangements. This type of selection of comparative jurisdictions is known as theoretically informed sampling and has been deemed appropriate for use in legal comparative studies. Given the scant literature currently available on tiny housing, the chapter will rely heavily on grey literature, opinion pieces and news articles. The chapter will provide additional context to how tiny housing operates and will explore the legal and social barriers and facilitators to the use of tiny housing in both private and public housing provisions.

Chapter Three will provide a detailed theoretical contemplation of the notion of adequacy as the threshold for measuring the provision of housing, in international law, as well as in South African constitutional and housing law. This will entail a review of relevant literature and a content analysis of relevant international instruments, legislation, policy documents and reported case law.

Chapter Four will consist of a critical doctrinal analysis of building regulations in South Africa, both tracing the history of such regulations and analysing their current form, ascertaining the extent to which self-realisation of adequate housing is currently facilitated. While Chapter Two identified two main legal barriers to tiny housing, building regulations and zoning, the focus, in chapter four is on building regulations. This election is made to focus the chapter and to explore the anomaly of increased-size prescripts in public housing as opposed to private housing provision.

Chapter Five will describe the history of housing policy in South Africa and describe government public housing programmes and their implementation. It will provide the necessary historical and socio-economic context to evaluate the current formulation of housing programmes. The chapter consists of a critical doctrinal analysis of South African public housing law and policy. It will pay particular attention to policy approaches to size, the trade-offs between size and other factors of adequacy, and investigate the flexibility and diversity of housing policy. This chapter explores the use of tiny housing in providing housing to those who cannot access it independently.

The conclusion (Chapter Six) will draw together the reflections from each chapter to answer the research questions underlying the thesis. It will reflect on the ultimate research aim to reimagine or reinterpret adequacy to put housing provision within the current context of competing financial and environmental resources. The need for legal reform and, ultimately, shifting notions underlying the existing law more broadly will be discussed.

This is exclusively a desk-based study. The author will use secondary data research; therefore, ethical clearances will not be required as no primary data collection will be completed. An ethics waiver was obtained in 2020 from the University of Witwatersrand,

Johannesburg, South Africa, Non-Medical Human Research Ethics Committee, under waiver number HRECNMW21/04/03.

CHAPTER 2: COMPARATIVE EXPERIENCES OF TINY HOUSING

2.1. BACKGROUND

The purpose of this Chapter is to provide a baseline for the thesis, from which to investigate what possible role tiny housing might play in the fulfillment of housing needs in South Africa and which legal elements (often linked to social phenomena) need to be investigated and subsequently developed or changed, to adequately allow for this role. To achieve this purpose, this Chapter will do two things: One, build on the theoretical definition of tiny housing provided in the introduction and flesh out how tiny housing operates practically in different countries. In essence, it is to see who uses tiny housing, how, and under which circumstances. Two, identify legal barriers and facilitators to living in tiny housing. This will also entail looking at the motivations or principles which underlie these barriers, some of which might be practical, historical or social. This is done with the knowledge that access to housing cannot be divorced from social and class struggles.

Three regions will be considered: the United States of America (USA), Australia and select countries or territories in Asia (Hong Kong, Thailand and Japan). The USA is where the tiny housing movement has been the most active and arguably has the longest-standing history of legal and social resistance and change to the movement. As a result, there is also a small nascent body of nascent case law and policy responses to consider. In Australia, where social attitudes towards size and space in housing significantly influenced housing policy development, tiny housing has emerged as a rapid response to the cost-of-living crisis faced by, notably, younger people and women. Finally, Hong Kong, Thailand and Japan – three Asian jurisdictions selected on the basis of data availability – represent a counterexample in the development of the tiny housing movement. In these jurisdictions, space's social purpose and value differ, and subsequently, there are fewer (and sometimes no) legal hurdles to smaller

housing arrangements. This renders the tiny housing movement effectively superfluous in jurisdictions where small housing is part of the mainstream housing stock.

This Chapter will be limited to these three regions due to a scarcity of literature on other jurisdictions,[1] as well as to contain the scope of the study. Using these three jurisdictions offers a sufficiently diverse lens to lay the foundation for the thesis. The chapter accordingly does not purport to draw any quantitative conclusions or to represent a comprehensive global study of tiny housing. Secondary sources will be frequently cited due to the limited literature on tiny housing.

2.2. THE UNITED STATES OF AMERICA

2.2.1. Housing landscape

The trend for housing in the USA is living in an owned, big house in a low-density neighbourhood: Comprehensive USA census data from 1990 show that 64% of USA residents own their house, and white people have the highest ownership rate at 72%.[2] Houses are predominantly stand-alone units with five rooms and two to three occupants. The average stand-alone house size is 240m^2.[3] Five million mobile homes exist.[4] About 4,2 million households living below the poverty level live in owner-occupied housing, with 7,6 million living in rental accommodation.[5]

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[1] Limited access to foreign legal databases and the requirement for literature to be available in English. This type of selection of comparative jurisdictions is termed theoretically informed sampling, where the researcher selects cases both on pre-identified traits needed (here: varied levels of tiny house proponents, housing sizes and legal responses) and practicalities (data availability) – K Linos K'How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics' 109 *American Journal of International Law.* 3 (2015) 479.

[2] United States Census Bureau *Detailed Characteristics of Housing 1990 CH-2-1* (1992).

[3] United States Census Bureau MCD *Characteristics of New Housing* (2013).

[4] United States Census Bureau, ibid, 12, Table 12.

[5] United States Census Bureau, ibid, 13, Table 13.

Poverty in the USA is currently at a 60-year high (46 million people living under the poverty line) with historical rates of housing unaffordability: only 38% of extremely low-income households have access to affordable housing,[6] and more than 30% of Americans spend over half of their income on housing.[7] It is estimated that there is a shortage of about 5 million affordable housing units in the USA.[8]

The USA does not recognise an explicit right to adequate housing in its Constitution or federal law, and the United States Supreme Court has "indicated an unwillingness to imply one".[9] The USA has a federal housing act which creates an aspirational standard – not enforceable – of a "decent home and suitable living environment for every American family".[10] Housing provision differs significantly from state to state, with anti-homelessness legislation and trends of racial discrimination in housing markers of failings in providing adequate housing.[11]

2.2.2. Tiny housing in the USA

The modern tiny housing movement started in the USA during the 1980s. It gained popularity after the 2007-2008 USA housing crisis when reckless lending practices by banks caused large-

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[6] Monroe Group 'Affordable housing statistics' (n/d) <https://www.monroegroup.com/about-us/affordable-housing-statistics//>.

[7] K Evans 'Integrating tiny and small homes into the urban landscape: History, land use barriers and potential solutions' (2018) 11 *Journal of Regional Planning and Geography* 3, 35.

[8] N Friedman 'U.S. Housing Market Needs 5.5 Million More Units, Says New Report" (2021) <https://www.wsj.com/articles/u-s-housing-market-needs-5-5-million-more-units-says-new-report-11623835800??>.

[9] M Foscarinis & E Tars 'Housing Rights and Wrongs: The United States and the Right to Housing' in C Soohoo, C Albisa & MF Davids (eds) *Bringing Human Rights Home: Portraits of The Movement* (2008) Pennsylvania: University of Pennsylvania Press, 150-1.

[10] National Housing Act, 1949 (United States of America).

[11] See National Homelessness Center 'Housing: Not Handcuffs 2021 – State Law Supplement' (2022) which provides a breakdown of state laws that threaten adequate housing, including laws that criminalize sleeping in motor vehicles (Hawaii), public places (New Hampshire) or even attempting to "beg for" or "solicit" lodging (Wisconsin).

scale forfeitures of homes and triggered a global financial crisis.[12] Up to 88% of the global share of tiny housing and 66% of dedicated tiny house producers are found in the USA.[13]

Tiny housing in the USA has been used to, amongst others: counteract the growing negative environmental impacts of housing projects; address the growing unaffordability of housing; accommodate certain philosophical perspectives on reducing consumerism; and reduce homelessness.[14] A study on the motivations of tiny housing occupants found that more than half of respondents cited the following motivations for moving into tiny housing: affordability (72%), simplified lifestyles (66%), mobility (52%) and reduced environmental impact (50%).[15]

Data on private tiny housing ownership is difficult to determine nationally, but in New York City and San Francisco, respectively, 2.1% and 1.7% of the housing market is made up of tiny housing.[16] A 2020 report by HomeAdvisor suggests that these are not even the most popular cities for tiny housing: Using an Instagram scraper, the report analysed the geographic origin of tiny house posts on Instagram and found that the states of California, Florida and Colorado were the most popular tiny house destinations.[17]

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[12] C Willoughby, S Mangold & T Zschau 'Small Houses, Big Community: Tiny Housers' Desire for More Cohesive and Collaborative Communities' (2020) 9 *Social Sciences* 2,1.

[13] Maria Saxton 'The Rise of the Tiny Home Movement' (2019) *Rise* <https://www.buildwithrise.com/-stories/rise-of-the-tiny-home-movement>.

[14] K Evans 'Tackling Homelessness with Tiny Houses: An Inventory of Tiny House Villages in the United States' (2020) 72 *The Professional Geographer* 3, 362.

[15] LM Boeckermann, AT Kaczynski & SB King 'Dreaming big and living small: motivations and satisfaction in tiny house living' (2019) 34 *Journal of Housing and the Built Environment* 34, 67.

[16] iProperty Management 'Tiny House Statistics' (n/d) <https://ipropertymanagement.-com/research/tiny-home-statistics>.

[17] K Canales 'These are the tope 10 most popular US states for living in a tiny home' 28 November 2020 *Business Insider* <https://www.businessinsider.com/tiny-home-most-popular-us-states-2020-6?IR=T#10-utah-1> .

A project to create a database of tiny house villages to address homelessness in the USA shows that, as of July 2019, 115 tiny house villages for the homeless were documented (although only 34 could be confirmed to be operational at the time).[18] Of such villages, 10% consisted of mobile homes.[19] It is clear from this database that social amenities are prioritised when establishing these communities, with an over 90% access rate to computer and internet service and transportation access and a 58% rate of access to mental health facilities.[20] Access to basic medical services was made available to 34% of such communities either on-site or by arranging transport to health facilities.[21] 87% of such housing units were foundation-built, with an over 90% rate of private bathroom facilities and electricity. Communal kitchens and living areas were common (61% and 96%, respectively).[22]

Tiny housing is not only a private market phenomenon but is also found in the public housing sector. In Seattle, at least nine tiny house villages are being used as an alternative to traditional shelters.[23] These shelters are seen as bridges to permanent housing, however.[24] In motivation for their continued use of tiny house villages, the Seattle Human Settlements Department said that "[s]paces in tiny home villages represent approximately 12.5% of all shelter beds and safe places the City supports and make up less than 3% of all homelessness

[18] Evans 2020 (n 14 above) 364.

[19] Evans 2020 (n 14 above) 364.

[20] Evans 2020 (n 14 above) 367.

[21] Evans 2020 (n 14 above) 367.

[22] Evans 2020 (n 14 above) 366.

[23] Sharon Lee 'Tiny House Villages in Seattle: An Efficient Response to Our Homelessness Crisis' *Shelterforce* 15 March 2019 <https://shelterforce.org/2019/03/15/tiny-house-villages-in-seattle-an-efficient-response-to-our-homelessness-crisis/>.

[24] Lee, ibid.

response investments made by the City of Seattle."[25] Other cities, like Monterrey in California, have adopted similar projects,[26] with the view to a potentially more permanent solution. The United States Interagency Council on Homelessness tentatively accepted using tiny houses as a solution.[27] However, it did raise concerns about the role of tiny housing as a permanent versus temporary solution. It indicated that only meaningful public participation in a particular community could clearly define the potential role of tiny homes in each community.[28]

2.2.3. Social barriers to tiny housing

The Not In My Backyard Movement (NIMBY) has been a major impediment to introducing tiny housing in the USA. The phrase "NIMBY" was coined in the 1970s to reflect opposition to development proposals (housing and beyond) by residents in the proposed area for development based on concerns primarily relating to entrenching discrimination, such as preserving the wealth and class status of an area, preserving house and property values and maintaining open spaces.[29]

NIMBYs can broadly be said to target three areas of government function with the ultimate aim of preserving wealth and racial divides: Waste (trash) disposal (placing waste sites away from the rich, close to the poor), undermining the creation of socials service facilities (rehabilitation clinics, group homes and explicitly targeting sites that serve persons with

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[25] Lee, ibid.

[26] C Moore 'Are Tiny Homes a Reasonable Solution to Homeless' *Digital Trends* 20 September 2019 <https://www.digitaltrends.com/home/tiny-homes-homelessness-solution/>; Other cities also include: Austin, Newfield, Detroit, Nashville: M Plankett 'Tiny Houses Multiply Amid Big Issues as Communities Tackle Homelessness' *Washington Post* 26 October 2018 <https://www.washingtonpost.com/graphics-/2018/national/tiny-houses/>.

[27] R Pulster 'Asking the Right Questions About Tiny Houses' *USICH* (29 September 2016) <https://www.usich.gov/news/asking-the-right-questions-about-tiny-houses>.

[28] Pulster, ibid.

[29] G McNee & D Pojani 'NIMBYism as a barrier to housing and social mix in San Francisco' (2022) *Journal of Housing and the Built Environment* [online].

HIV/AIDS) and, of course, blocking affordable housing which often includes opening neighbourhoods to minority groups.[30]

It is, therefore, not surprising that NIMBYism has reared its head in the tiny house debate. Several tiny house communities or homeowners reported concerns about the use of tiny housing and the perceived reduction in value of property value of adjacent non-tiny homes.[31] Given that concerns over property values are a possible cloak for discrimination, it is important to pause and consider the weight that neighbouring property values should play in the implementation of tiny housing.

A case study of three tiny house villages found that small pockets of tiny housing did not decrease neighbouring property values.[32] A review of 17 studies which considered the impact of manufactured affordable housing on neighbouring property value found: affordable housing's impact on neighbourhood property values was almost negligible and could even improve property values where it assimilated into the neighbourhood quality and style of housing.[33] A USA study of attitudes towards affordable housing clearly shows racism and classism, rather than the actual effect on real estate value, act as drivers of opposition to affordable housing developments.[34]

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[30]MB Gerrard 'The victims of NIMBY' (2014) 21 *Fordham Urban Law Journal* 3, 495-522.

[31] A Jackson, B Callea, N Stampar et al. 'Exploring Tiny Homes as an Affordable Housing Strategy to Ameliorate Homelessness: A Case study of the Dwellings in Tallahassee, Florida' (2020) 17 *International Journal of Environmental Research and Public Health* 15-6; Emily Brown *Overcoming the Barriers to Micro-Housing: Tiny Houses, Big Potential* (Unpublished Planning, Public Policy and Management Capstone and Terminal Projects, University of Oregon, 2016) 46.

[32] K Evans 'Overcoming Barriers to Tiny and Small Home Urban Integration: A Comparative Case Study in the Carolinas' (2020) 41 *Journal of Planning Education and Research* 3, 279.

[33] M Thi Nguyen 'Does Affordable Housing Detrimentally Affect Property Values? A Review of the Literature' (2015) 20 *Journal of Planning Literature* 1.

[34] JR Tighe 'How Race and Class Stereotyping Shapes Attitudes Toward Affordable Housing' (2012) 27 *Housing Studies* 7, 963.

Despite evidence that tiny housing, or affordable housing in general, does not significantly impact property values, a comparative case study of two tiny housing villages in Missouri exposed the persistent obstacle posed by NIMBYism.[35] The case study considered Eden Village, a 31-unit tiny house village which provides permanent supportive housing for the "chronically homeless", and the Veterans Community Project (VCP), a 49-unit village which offers transitional housing for veterans.[36] The sites were chosen for their novelty and success as tiny house villages in the region. They were studied using interviews with several stakeholders and reviewing media and social media reports.[37]

The founders of Eden Village avoided zoning concerns by choosing a site zoned for manufactured homes and using that format of tiny housing. VCP also used a site that did not require rezoning. However, when Eden Village tried to establish a successive site, an industrial site was made available that had to be rezoned. Immediately, residents (commercial and residential) signed an opposition to the rezoning (more than 70% of the property owners).[38] The opposition led to a higher majority being required in local government to approve the zoning – a fatal barrier. A later attempt to create a second site where no rezoning was required proved successful. Perhaps, it should also be mentioned that the type of zoning applied would only allow "camping", which would permit a community of tiny housing on wheels.[39] This

[35] K Evans 'It Takes a Tiny House Village: A Comparative Case Study of Barriers and Strategies for the Integration of Tiny House Villages for Homeless Persons in Missourri' (2021) *Journal of Planning Education and Research,* 1-9.

[36] Evans 2020 (n 14 above) 2.

[37] Evans 2020 (n 14 above) 3.

[38] Evans 2020 (n 14 above) 5.

[39] Evans 2020 (n 14 above) 4.

experience is repeated in the literature: Quixote Village in Olympia, Washington State, received such significant NIMBY pushback that a lawsuit was instituted against the City.[40]

To counteract NIMBY concerns, a new zoning classification was introduced in Routledge, Florida. The classification introduced a zone called a pocket neighbourhood, whereby tiny houses are permitted in areas with a certain allowance for mobile units but a mandatory threshold for permanent structures.[41] In Routledge, this allowance was for 25% of pocket neighbourhoods to be tiny housing on wheels, tied down to be permanent structures.[42] The local ordinance that creates pocket neighbourhoods allows for tiny housing with a minimum floor area of 170 ft^2 for the first occupant and 100ft^2 per additional occupant. It also prescribes minimum space in sleeping areas (70ft^2) and a minimum ceiling height (7ft^2).[43] The neighbourhoods have a centralised common area with a minimum open space requirement (which can include common buildings), and all homes were required to have their main entrance in the common open space.[44] All residential units are to be subject to the governance of a homeowner's association.[45]

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[40] LI Scheibinz *Tiny House Permitting in San Luis Obispo* (Unpublished Senior Project, 2018, University of California Polytechnic, 2018).

[41] JG Rollin 'Living Tiny Legally' (Unpublished Honors Thesis, James Madison University, 2017) 82 (Hereafter "Rollin"); Rockledge, FL. Ordinance NO. 1680-2015.

[42] Rollin, ibid, 93.

[43] Rollin, ibid, 127.

[44] Rollin, ibid, 128.

[45] Rollin, ibid, 128.

2.2.4. Legal barriers and facilitators to tiny housing

2.2.4.1. Zoning laws

Despite the relative popularity of tiny housing in the USA, there are several legal impediments to tiny housing, often at the state level.[46] As already appeared from the above discussion on NIMBYism, zoning ordinances have proved to be a powerful variable in the ability to settle a tiny house.[47] Zoning was developed in the 1870s in Germany for public health safety reasons – to avoid overcrowdedness and fire hazards.[48] The aims of zoning initially expanded to include preserving aesthetics and reducing noise pollution and noxious odours. However, initially zoning was to ensure equal access to civic spaces and amenities for different classes.[49]

As zoning and its uses were adopted in Europe and America, it quickly expanded to fulfil social roles, often with discrimination as an outcome. It was used to "protect" certain classes from perceived sources of crime and to preserve property prices – often under the notion that mixed-income neighbourhoods led to decreased property values. Zoning was then used to purposefully segregate the population.[50] Developers and affluent homeowners advocated for increasingly exclusive zoning requirements: mandates on housing form (single-dwelling), minimum lot and house sizes and permanency requirements (to exclude more affordable

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[46] KM Vail 'Saving the American Dream; legalization of the Tiny Housing Movement' (2016) 54 *University of Louisville Law Review*, 361.

[47] VB Calder "Zoning, land use planning and housing affordability" *Cato Institute* (2017) 83, 3 define zoning regulations as binding measures that "direct and development of buildings, neighborhoods, and cities [… and] which typically determine the height, width, and architectural features of development […] landscaping, character, and use of property" and are often administered by local authorities.

[48] Evans 2018 (n7 above) 35 citing E Talen (2012). City Rules: How Regulations Affect Urban Form. Washington, DC: Island Press.

[49] Evans 2018 (n7 above) 35.

[50] Evans 2018 (n7 above) 35.

mobile homes). This echoes the NIMBY movement. These components naturally push up house prizes.[51]

The use of zoning ordinances in prescribing larger, stand-alone properties and restricting other forms of housing became significant in the USA as a public health intervention. Through these zoning ordinances, minimum floor space was often prescribed to avoid overcrowding in dwellings. However, the rationale for prescribing minimum floor space, while often couched as a health/welfare intervention, was often still a tool abused by local authorities to segregate neighbourhoods and exclude poor people from specific areas.[52]

In 1926, the United States Supreme Court confirmed the powers of States and municipalities to create zoning ordinances in *Village of Euclid v Ambler Realty.*[53] This happened in the context of a zoning ordinance being challenged by a private party claiming that the conditions and limitations of such an ordinance violated their right to liberty and property without due process, and that they were denied equality before the law in violation of the State and the Federal Constitution.[54]

The argument was based on the difference in market value the zoning ordinance affected.[55] The Court found that the restrictions by zoning ordinances can be justifiable based on their function to assert, amongst others, public welfare and avert nuisances, but this determination is context-specific.[56] The Court reviewed several cases relating to the exclusion

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[51]Evans 2018 (n7 above) 35.

[52] Vail 2016 (n46 above) 363.

[53] 272 US (1926) 397 (Hereafter "*Euclid case*").

[54] *Euclid case,* ibid, 384.

[55] *Euclid case,* ibid, 384.

[56] *Euclid case,* ibid, 388.

of industrial buildings from residential areas and found reasons for restrictions based on health and safety, security from injury, suppression and prevention of disorder and reducing unnecessary public expenses (e.g. street maintenance).[57] Ultimately the Court asked whether or not a zoning ordinance is arbitrary or unreasonable regarding the substantial relation of the regulation to the public health, safety, morals, or general welfare.[58]

Despite several subsequent judicial challenges, zoning powers were left unchecked for 50 years.[59] On several subsequent occasions, the power of local authorities to prescribe a minimum size requirement using zoning ordinances has been challenged for going beyond preserving "the general welfare" of the community (the scope of the permitted power conferred on local authorities as confirmed in *Euclid*). For example, in 1944, in *Dundee Realty Co. v. Omaha*, a minimum prescribed floor space of 92m^2 was challenged, but upheld by the Court on the grounds of promoting public health and preserving community aesthetics.[60] Again, in 1948, in *Thompson v. City of Carrollton*, an 83m^2 minimum was permitted,[61] and in 1949, in *Flower Hill Building Corp. v. Village of Flower Hill,* a minimum prescribed floor space of 167m^2 was unsuccessfully challenged.[62]

The case of *Lionshead Lake, Inc. v. Wayne Twp.* in 1952 marked one of the first departures, where a minority opinion challenged exclusionary minimum size requirements. In this case, the Supreme Court of New Jersey was asked to consider the validity of a zoning

[57] *Euclid case,* ibid, 391.

[58] *Euclid case,* ibid, 395.

[59] Vail 2016 (n46 above) 361.

[60] *Dundee Realty Co. v. Omaha*, 144 Neb. (Supreme Court of Nebraska) 448.

[61] *Thompson v. City of Carrollton*, 211 S.W.2d 970 (Court of Civil Appeals of Texas).

[62] *Flower Hill Building Corp. v. Village of Flower Hill* 199 (1950) (Supreme Court of New York) 344.

ordinance which fixed the minimum size of dwellings.[63] Depending on the type of dwelling unit, a minimum floor space of up to 71m^2 was prescribed.[64] The developer challenged this requirement based on the financial exclusion impact of such a requirement, and even led testimony that the sizing requirement was not, and could not, be met by current homeowners.[65] The local authority defended the zoning ordinance by relying on the evidence of a public health expert who testified that the minimum floor spaces are required to maintain "mental" and "emotional" health.[66] The Court held that "the minimum size requirements of the ordinance were not reasonably related to the public health, were arbitrary and unreasonable, and not within the police powers of the defendant."[67]

However, on appeal, the majority of the Supreme Court of New Jersey held –

> "We may take notice without formal proof that there are minimums in housing below which one may not go without risk of impairing the health of those who dwell therein. One does not need extensive experience in matrimonial causes to become aware of the adverse effect of overcrowding on the well-being of our most important institution, the home. Moreover, people who move into the country rightly expect more land, more living room, indoors and out, and more freedom in their scale of living than is generally possible in the city. City standards of housing are not adaptable to suburban areas and especially to the upbringing of children. But quite apart from these considerations of public health which cannot be overlooked, minimum

[63] *Lionshead Lake, Inc. v. Wayne Twp* 10 N.J. 165 (1952) (Supreme Court of New Jersey) (hereafter "*Lionshead case*").

[64] *Lionshead case*, ibid, para 169.

[65] Although, current homeowners were not expected to comply with the new requirement, the plaintiff used this as a yardstick to show how the zoning requirements would impact on future housing.

[66] *Lionshead case* (n63 above) para 170.

[67] *Lionshead case* (n63 above) para 170.

floor-area standards are justified on the ground that they promote the general welfare of the community."[68]

The Court held that the local authorities had broad powers to determine what constitutes the "general welfare" of the community and held that imposing minimum floor space requirements was "beyond controversy."[69] It also based its reasoning on the desirability of the local authority using zoning powers to exclude low-value houses (termed "shanties" by the Court), which can "deteriorate land values."[70]

The concurring judgment of Jacobs J did not depart from this exclusionary view of housing with several comments on preserving the aesthetics of neighbourhoods through enforcing minimum floor space requirements.[71] Jacobs J also linked space and health: "In the light of modern understanding, adequate living space must be considered as having reasonable relation to health, particularly mental and emotional health."[72]

However, Oliphant J and Wachenfeld J dissented, based on the exclusionary effect such minimum floor space requirements pose and on the idea that larger houses are not necessarily better for welfare (health).[73] They commented that "[i]t should be borne in mind that the threat to the general welfare and health of the community usually springs from the type of home maintained within the house rather than the house itself."[74] Their dissent did not challenge the

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[68] *Lionshead case* (n63 above) paras 173-4.

[69] *Lionshead case* (n63 above) para 174.

[70] *Lionshead case* (n63 above) para 175.

[71] *Lionshead case* (n63 above) para 177.

[72] *Lionshead case* (n63 above) para, the author would be remiss not to highlight Jacobs J also problematically endorsing the view of the public health expert (para 178) that ""the sense of inferiority due to living in noticeable sub-standard homes probably does more damage to the health of children than all the unsanitary plumbing."

[73] *Lionshead case* (n63 above) para 181.

[74] *Lionshead case* (n63 above) para 182, the quote continues:

idea of minimum requirements in principle. Still, they considered the nature of the area and the impact the ordinance might have on relatively lower-income households. They held the requirements in the case at hand to be arbitrary, capricious and designed to artificially change the socio-economic make-up of the community.

In the 1979 case of *Home Builders League of South Jersey, Inc. v. Township of Berlin,* again, a minimum floor area in a zoning ordinance was challenged.[75] The Court noted that "[m]inimum floor area requirements bear a direct relationship to the cost of a house", and the Court indicated its mandate to strike down provisions solely aimed at excluding lower-income families/occupants.[76] Regarding equating size to health benefits, the Court cited with approval the expert evidence of the trial court, which debunked this notion. The Court noted academic literature on this topic as well:

> "Prescribing minimum standards for size of a land parcel will indirectly but effectively control bulk and the density of population, thus securing light, air, and open space. In addition to preventing overcrowding of land and undue concentrations of people, the minimum land requirement secures safety from fire, panic, contagions, and other dangers. And further, the maintenance of large and open areas free from noise and bustle and the preservation of natural surroundings may be legitimate planning purposes in themselves. Minimum requirements as to dwelling size, however, accomplish none of the traditional purposes of the zoning power. Where the problem is size of the building occupying the land, the goals of physical planning can be achieved only in terms of maximums. Thus building bulk regulations are almost

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> "Certain well-behaved families will be barred from these communities, not because of any acts they do or conditions they create, but simply because the income of the family will not permit them to build a house at the cost testified to in this case. They will be relegated to living in the large cities or in multiple-family dwellings even though it be against what they consider the welfare of their immediate families."

[75] 81 N.J. 127 (1979) (Supreme Court of New jersey) (hereafter "*HBL case*").

[76] *HBL case*, ibid, paras 140-1.

> invariably formulated in such terms (height, cubage, percentage of lot coverage, floor area ratio)."[77]

The Court however conceded that there is a possible threshold under which health and welfare could be impacted.[78]

The Court also considered the notion that small homes would negatively impact the value of other properties in an area and cited several comments from experts:

> "Increasing the size of houses has nothing to do with improving the appearance of an area. Topography has a lot to do with it, and the presence of trees has even more. (Landscaping and maintenance obviously are also important.) Perhaps most important of all is lot size, and particularly lot size in relation to house size."[79]

> "Certainly beauty has no relation to size. The ordinance, moreover, contains no guarantee of design or site planning. In addition, if the initial cost of building to meet the minimum size requirement is high, a family budget may not permit the additions to exteriors, such as planting and painting, which may be aesthetically desirable."[80]

The court struck down the ordinances for failing to show a connection between minimum size and public health, safety and welfare.[81]

Despite much academic debate and these glimmers of judicial reason, minimum size requirements in terms of zoning ordinances in the USA largely remain unchallenged and act as

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[77] *HBL case*, ibid, para 143 citing CM Haar 'Zoning for Minimum Standards: The Wayne Township case' (1953) 66 *Harvard Law Review* 6,1051.

[78] *HBL case*, ibid, para 143.

[79] N Williams & E Wacks 'Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited' (1969) *Wisconsin Law Review*, 846.

[80] Haar (n77 above), 1057-1058.

[81] *HBL case* (n75 above) para 148.

a tool of economic segregation and a barrier to affordable housing, including tiny housing.[82] In addition to minimum size requirements , zoning laws often do not allow second units on a lot, set prohibitive parking requirements, and have lot coverage rules.[83]

2.2.4.2. Building regulations

Where zoning is concerned with the characteristics of the neighbourhood, building regulations are concerned with the characteristics of individual dwellings.[84] However, unlike zoning regulation in the USA, no specific case law is available where the relationship between building codes, size prescription, and housing access is challenged. Rather, housing scholars repeatedly and consistently cite building codes as a practical barrier to implementing tiny and other forms of varied housing.[85]

Local authorities in the USA prescribe building codes. Often, model building codes are adopted in part or wholesale by local authorities.[86] The four most popular model codes are the Uniform Building Code, the Basic National Building Code, the Standard Building Code and the International Building Code.[87] The Uniform Building Code (UBC), the Basic National Building Code (BOCA), and the Standard Building Code (SBC) were regional codes

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[82] Vail (n46 above), 365.

[83] D Withers 'Looking for a Home: How Micro-Housing Can Help California' (2012) 6 *Golden Gate University Environmental Law Journal* 1, 133; Lot coverage rules are rules relating to the allowable ratio of an occupied area (buildings and driveways) compared to the total area of the lot.

[84] R Tricker & R Algar *Building Regulations in Brief* (2006) 12 defines building regulations as binding rules "which sets out the minimum requirements and performance standards for the design and construction of buildings, and extensions to buildings".

[85]Evans (n7 above); J Ford & L Gomez-Lanier 'Are tiny homes here to stay? A review of literature on the tiny house movement.' (2017) 45 *Family and Consumer Sciences Research Journal*.4, 394-405; A Jackson et al.'Exploring tiny homes as an affordable housing strategy to ameliorate homelessness: A Case Study of the Dwellings in Tallahassee, FL.' (2020) 17 *International Journal of Environmental Research and Public Health* 2, 661.

[86] Vail (n46 above), 366.

[87] Vail (n46 above), 366.

introduced throughout the 90s and implemented with a focus on the specific hazards of the region (different requirements to counteract hurricanes, snow, earthquakes etc.).[88] The three organisations formed the International Code Council address and created the International Building Code (IBC).[89]

These codes have different mandates for minimum room and overall dwelling sizes, as well as prescriptions on characteristics like ceiling heights and emergency exit requirements, which can hinder tiny housing from being legally compliant. The UBC mandates that each dwelling must have at least one room exceeding 11m^2 and a minimum size of 14m^2 for a room where cooking and other activities occur.[90] There are minimum ceiling heights (2m) and a minimum area size of 20m^2 for "efficiency dwellings" (what are often termed "granny flats" in South Africa). The CBC and IBC have the same requirement for efficiency dwellings.[91] The SBC and BOCA codes have similar approaches to minimum room sizes. The IBC is less restrictive and mandates one room with a minimum room floor area of 11.2m^2 with no minimum size for kitchens.[92]

A possible reason why building codes have not faced the same history of legal challenge as zoning ordinances are that building codes often impose less onerous requirements – as is the

[88] R Leon & J Rossberg 'Evolution and Future of Building Codes in the USA' (2012) 22 *Structural Engineering International* 2, 265.

[89] Leon & Rossberg, ibid, 266.

[90] Uniform Building Code (1927) Section 1307(b) (Hereafter "UBC"); "Dwelling unit" is defined as "one or more habitable rooms which are occupied or which are intended or designed to be occupied by one family with facilities for living, sleeping, cooking and eating" (Section 405).

[91] International Building Code (2021) 1207.4.

[92] International Building Code, 1207.3.

case with minimum sizes – than some local ordinances.[93] Nevertheless, tiny house enthusiasts note the difficulty that complex and comprehensive building codes can create.

In response to this reality, the International Residential Code (IRC) – a body to allow for more diverse housing types - introduced Appendix Q, a document detailing how deviations from building codes to accommodate tiny housing can be approached.[94] It allows a local government to adopt special provisions and waivers for tiny housing.[95] It defines tiny housing as 400ft^2 (37m^2) or less in floor area.[96] It allows lofts to be excluded from minimum ceiling heights and reduces mandatory ceiling heights.[97] It also creates different criteria for stairs and ladders, and emergency exits.[98] Of course, while the IRC code is theoretically a facilitator to tiny housing, local governments still need to adopt the code with Appendix Q in order for its function to be realised.

In addition to the IRC code, tiny house enthusiasts often rely on permitted waivers and exceptions within building codes to ensure compliance.[99] For example, in California, local councils have the authority to grant special permission to build tiny houses outside of the

[93] Abeles, Schwartz and Associates & Beyer-Blinder Belle 'Evaluation of Applicable Housing Systems Technology' (1976) *Office of Policy Development and Research Division of Energy, Building Technology and Standards, US Department of Housing and Urban Development,* 61.

[94] International Residential Code, 2018, (IRC) (hereafter "IRC").

[95] See C Wenban 'The US tiny house on wheels movement with respect to a building code and relevance to Australia' (2018) 55 *Australian Planner,* 222" for a 2018 list of local governments that adopted Appendix Q.

[96] IRC (n 94 above) AQ102.

[97] IRC (n 94 above) AQ103.1.

[98] IRC(n 94 above) AQ104.2, AQ105.

[99] T Iglesias 'The Promises and Pitfalls of Micro-housing' (2014) 37 *Zoning and Planning Law Report Zoning and Planning Law Report* 10, 6.

standard prescripts of the California Building Code.[100] However, this process is costly and slow. The process can sometimes even require a public hearing.[101]

Some local authorities have responded to this practical barrier in more tiny-house-friendly ways. Spur, a town in Texas, is the self-proclaimed first tiny house-friendly town in the United States (passing an official proclamation to that effect).[102] In 2016, it passed the Spur Tiny House Ordinance,[103] which provide for tiny housing built on a foundation meeting certain specifications (or where mobile, the wheels/axles can be removed), has a driveway, address, located on a shared access route and is connected to water and sewer services.[104] The Ordinance does not prescribe a minimum floor size.

In Walsenburg, Colorado, after allowing zoning for smaller units ($600ft^2$ >=), the City passed a local ordinance specifically designed to accommodate tiny houses.[105] The Ordinance adopted a building with low minimum size requirements, which also allows for waiving certain requirements for tiny housing (defined as $100ft^2$ – $500ft^2$ dwellings on a permanent foundation).[106] The Ordinance waives, amongst others, minimum room areas, toilet, bath and shower spaces, emergency escape and rescue zones, and reduces the size of an exit door. The Ordinance is an initiative by the city to address a lack of housing and to allow permanent

[100] D Withers 'Looking for a Home: How Micro-Housing Can Help California' (2012) 6 *Golden Gate University Environmental Law Journal* 1, 125 – 152, 133.

[101] Withers (n81 above), 126.

[102] City of Spur 'Resolution establishing the designation of the city of Spur, as America's First 'Tiny' House friendly Town' (2014).

[103] City of Spur, Ordinance 677 – Pertaining to Tiny houses (2016).

[104] Ordinance 677, ibid, section IV.

[105] City of Walsenburg, Ordinance 1092 (2016).

[106] Ordinance 1092, ibid, 1.a.

(instead of temporary mobile) residences, which can link to local utilities and facilitate an increased tax base.[107]

It is also important to note that regulatory barriers are different for tiny housing designed to be mobile. The choice to use a mobile home as a tiny house can be made for various reasons, including escaping the regulatory ambit of building codes. In the United States, houses built on a permanent trailer chassis (termed Recreational Vehicles or RVs) do not fall under the purview of building codes.[108]

The United States Department of Housing and Urban Development (HUD) requires RVs to be built on a single chassis, to be less than 37m^2, to be self-propelled or permanently towable and to be designed for temporary use for recreation, travel, camping or seasonal use.[109] Where a home is a permanent living space, it can be regulated as a manufactured home under the HUD, subject to the unit being built on and connected to a chassis (despite the trailer and wheels being removed or even a foundation installed).[110] Twenty-two million people in the US live in such manufactured homes.[111] HUD is authorised under the National Manufactured Housing Construction and Safety Standards Act of 1974 to establish federal safety and construction standards and to prescribe enforcement regulations and procedures. HUD exempted homes under 400ft^2 (as RVs mentioned above).[112] It is important to note that

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[107] D O'Neil 'Walsenburg is Tiny Home Friendly!' (17 December 2015).

[108] National Fire Protection Association 'Applying the Building Codes to Tiny Homes' (2017) 5 (Hereafter "NFPA").

[109] 47 FR 28091, June 29, 1982, codified at 24 CFR 3282.8(g).

[110] NFPA (n108 above), 5

[111] B Vuleta '6 Remarkable Mobile Home Statistics You need to Know' (2020) *Movity* <https://movity.com/blog/mobile-home-statistics/>.

[112]Department of Housing and Urban 'Manufactured Home Procedural and Enforcement Regulations; Clarifying the Exemption for Manufacture of Recreational Vehicles' (2018).

manufactured homes are not *per se* smaller, and the average manufactured home size in terms of the HUD is 960 ft^2.[113] It is included in this discussion as it can be used as a tiny house.

One final comment on building regulations is noteworthy. The additional cost of building codes to housing naturally differs from code to code and is informed by a range of other factors, such as location. However, in the United States, it is estimated to increase house prices by up to 50% and is known to stifle alternative housing design.[114] Ultimately, housing affordability suffers. Evidence also suggests that NIMBYs use building regulations similarly to zoning ordinances to block access to neighbourhoods based on class and race.[115]

2.3. AUSTRALIA

2.3.1. Housing landscape

Australian housing norms echo those in the USA, as large, detached and owned housing is also favoured. Four out of five Australians live in detached houses with at least three bedrooms, while family size has decreased from 3.1 persons to 2.6 persons on average.[116] Australia has the second-largest average house size in the world (231m^2).[117] Studies suggest that Australians have the highest estimate of how much space is sufficient per person worldwide.[118] The size of the houses in Australia has been attributed to cultural norms which place more value on housing

[113] Vuleta (n111 above).

[114] D Listokin & DB Hattis 'Regulatory Barriers to Affordable Housing' (2005) 8 *Cityscape* 1, 21-67; R Bartram 'The Cost of Code Violations: How Building Codes Shape Residential Sales Prices and Rents' (2019) 29 *Housing Policy Debate* 6, 942.

[115] Listokin & Hattis, ibid,39; See also EM Noam 'The Interaction of Building Codes and Housing Prices' (1982) 10 *Real Estate Economics*, 394-404.

[116] J Wotton, H Skates & LShutter 'Tiny House – when size matters' (2018) 55:3 *Australian Planner,* 209.

[117] Wotton et al, ibid.

[118] Wotton et al, ibid.. By some estimates the largest - see MJ Cohen 'New Conceptions of Sufficient Home Size in High-Income Countries: Are We Approaching a Sustainable Consumption Transition?' (2021) 38 *Housing, Theory and Society* 2, 176.

than just its role as a dwelling: it serves an investment purpose and is viewed as an economic good.[119] Australians also view larger dwellings as a mechanism to ensure privacy and have previously seen the house as a space to fulfil all social functions.[120]

The Australian housing landscape was engineered explicitly for bigger, lower-density housing.[121] This is perhaps unsurprising, given that Australia is one of the least dense countries in the world, with a density of 3 persons per km^2 (as opposed to Hong Kong and Singapore with density of more than 2200% of Australia).[122] Prescribed house and lot sizes were seen as proxies for house quality and reducing overcrowding, which was subsequently viewed as increasing public health.[123] "Civic order" was maintained through land use and building regulations, as officials held that "you cannot raise an imperial race in the slums".[124] Size and class were, and arguably still are, closely linked. A further preoccupation with slum clearance in the mid-1900s saw this focus on large, low-density housing being retained with a particular concern for alternative housing forms (such as caravans) which were feared to signal the start of degradation into slum dwellings.[125] The legal structure in Australia, therefore, over a period of centuries, designed a definition of housing which rendered small housing forms

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[119] Wotton et al, ibid citing J Baird *By Design: Changing Australian Housing* (1984) Melbourne: Dominion Press Hedges & Bell.

[120] Wotton et al, ibid..

[121] A Butt & C Stephenson 'Tiny houses and planning regulation for housing alternatives: the context of regional Victoria' (2018) 55 *Australian Planner* 3-4, 159.

[122] United Nations Statistics Division 'Demographic Yearbook – Table 3: population by sex, rate of population increase, surface area and density' (2021) New York: UNSD (hereafter "UNSD").

[123] UNSD, ibid.

[124] UNSD, ibid citing K Murphy *Fears and Fantasies: Modernity, Gender and the Rural-Urban Divide* (2010) New York: Peter Lang.

[125] UNSD, ibid.

illegitimate[126] Instead, suburbs were the aspired form of housing, with large tracts of land and spatially separated housing being idealised.[127]

However, Australia's cost-of-living crisis is one of the worst in high-income countries, with three of its major cities being ranked within the top 20 least affordable places to live in the world.[128] The housing market has seen such a rise in price relative to wages, that home ownership has decreased significantly from the 1980s to date. Persons between 25 and 34 years of age saw a 15% decrease in ownership (from 61% to 44%), and persons aged 34 to 44 decreased by 13% (75% to 62%).[129] Unsurprisingly, this decrease in ownership is mainly among lower-income persons.[130] To remain in the home market, lower-income Australians seek homes in farther locations, reducing access to amenities through increased costs.[131]

The overall rate of homelessness has also increased sharply – with 5% more homeless people within the last five years. The increase is also skewed: the new homeless is 80% female and predominantly under 18 years of age.[132] The majority of total homelessness is experienced by the youth (under 34), with disproportionate homelessness amongst Aboriginal and Torres Strait Islanders.

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[126] UNSD, ibid.

[127] UNSD, ibid.

[128] H Shearer, V Bares, R Pieters, B Winkle & K Meathrel 'Planning for tiny houses' (2018) 55 *Australian Planner* 3, 147.

[129] S Brokenshire 'Tiny houses desirable or disruptive?' (2018) 55 Australian Planner 3-4, 228.

[130] Brokenshire, ibid, citing J Daley & B Coates 'Housing Affordability: Re-imagining the Australian Dream' (2018) *The Grattan Institute 2018-04.*

[131] Shearer et al 2018 (n128 above) 147.

[132] Australian Bureau of Statistics 'Estimating Homelessness: Census – 2021' (2023) [Online] <https://www.abs.gov.au/statistics/people/housing/estimating-homelessness-census/latest-release>.

The Australian Constitution does not contain a bill of rights, but its government does consider it bound by the international protections of the right to housing and includes a recognition of the right to housing in the Australian National Action Plan on Human Rights.[133] The country does not have federal human rights legislation (except for anti-discrimination laws). At the State level, limited protection to socio-economic rights is given, for the right to education and work only.[134]

2.3.2. Tiny housing in Australia

In Australia, the profile of persons seeking to live in tiny housing is predominantly women, with a strong showing from younger generations (millennials) who seek to move out of parental homes.[135] Interest in tiny housing has seen an expansion only since 2013 but is growing steadily.[136]

The tiny house movement in Australia coincides with the aforementioned cost of living crisis, with studies suggesting the affordability of self-owned housing as the main driver.[137] Interestingly, the norm of maintaining small households influences the choice of tiny housing, with tiny housing offering a mechanism for persons to escape joint living arrangements.[138] Another key factor was that tiny housing was often available closer to occupants' work or study

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[133] C Sidoti 'Housing as a Human Right' (2019) Address by Human Rights Commissioner, *National Conference on Homelessness*, 4.

[134] B Goldblatt 'Equal access to social and economic rights in Australia – the troubling case of ParentsNext' (2021) 27 *Australian Journal of Human Rights* 3, 598.

[135] Shearer et al 2018 (n128 above) 150.

[136] Shearer et al 2018 (n128 above) 148; The author could not source more concrete numbers on tiny housing occupancy.

[137] E Clinton 'Micro-living: why occupants choose to live in very small dwellings?" *Australian Planner* 55:3, 195; See H Shearer "Tiny Houses: Love, live or leave? What factors influence the Decision' (2019) *Conference Paper,* State of Australian Cities Conference and PhD Symposium which challenges conceptions about the relative affordability of tiny housing, but which maintains overall the cost is still lower than other forms of housing.

[138] Clinton, ibid.

areas and therefore chosen as a dwelling.[139] Finally, in Sydney, the choice of tiny housing was influenced by its relative availability compared to other housing stocks.[140] A qualitative study by Shearer shows the motivations for tiny housing occupants to include sustainability concerns, which contained both an environmental component and a social cohesion aspect.[141]

It seems as if the choice of tiny housing in Australia is a means for dwelling-seekers to realise their right to housing in a culturally appropriate way: self-owned (which, one study showed, respondents equated with the security of tenure),[142] private and accessible to economic opportunities with the one key trade-off being size.[143]

2.3.3. Legal barriers and facilitators to tiny housing: zoning laws and building regulations

There are similar social and cultural barriers to tiny housing in Australia as in the USA and, consequently, the legal barriers are similar too. Australia also does not have a regulatory landscape that is permissive to tiny housing: different local government authorities have varied and highly complex land use and building regulations which can range from prescribing land subdivision sizes, minimum house sizes, and restrictions on occupancy and contain several regulations on infrastructure that could hinder the use of tiny housing.[144] However, the

[139] Clinton, ibid, 194.

[140] Clinton, ibid, 194.

[141] Shearer 2019 (n137 above) 8.

[142] H Shearer & B Burton 'Tiny House: movement or moment?' (2023) 38 *Housing Studies* 13.

[143] Clinton (n137 above) 194.

[144] Wotton et al (n 116 above) 213.

Australian National Construction Code – the building regulation applicable to dwelling houses [145] - does not specify a minimum house size at the national level.[146]

A review of legal barriers shows the following region-specific obstacles: The use of backyard dwellings (granny flats or the equivalent of efficiency dwellings in the USA) is only permitted in Queensland if the second property is occupied by members of the same household as those occupying the primary property.[147] A household is defined by the Queensland Planning Regulations of 2017 as "1 or more individuals who—(a) live in a dwelling with the intent of living together on a long-term basis, and (b) make common provision for food and other essentials for living." The local government authorities also contain various requirements to obtain approvals.[148] In Victoria, a granny flat is defined as a "moveable building on the same lot as an existing dwelling and used to provide accommodation for a person *dependent* on a resident of the existing dwelling."[149] In New South Wales, the dependency and moveability requirements do not apply, and the property can even be rented to the public, but the main property has to exceed 450m^2.[150]

The use of free-standing tiny houses on presumably smaller lots is not supported in Queensland, where, for example, the minimum lot size (and only where considered an infill lot) is 300m^2. No minimum lot size exists in Victoria, although houses on lots less than 300m^2

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[145] National Construction Code (2019), A6.0 - Deemed class 1, 2 or 3 depending on its structure <https://ncc.abcb.gov.au/sites/default/files/ncc/NCC_2019_Volume_One_0.pdf >.

[146] 'A house can be too small' (2012) *Tiny Houses in Australia* <https://tinyhouseoz.wordpress.com/2012/09/24/a-house-can-be-too-small/>.

[147] *Tiny Houses in Australia*, ibid.

[148] Shearer et al 2018 (n129) 151.

[149] ESC Consulting et al 'A place for Tiny Houses: exploring the possibilities, Tiny House Planning Resources for Australia 2017' (2017) 17 < https://thedeck.org.au/resource/guides-and-templates/a-place-for-tiny-houses-explore-the-possibilities-tiny-house-planning-resource-for-australia-2017/>.

[150] ESC Consulting et al, ibid.

require special planning permits where "appropriateness" is measured based on the surrounding context.[151] This permit is waived on the city periphery, designated as "Urban Growth Zones, " but additional building requirements, including prescriptions on height, open space and minimum bedroom sizes, are prescribed.[152] In New South Wales, lot sizes vary between 250m^2 and 4 hectares.[153] There is scope in New South Wales and Victoria to use schemes similar to sectional titles to reduce lot sizes.[154]

The legal position of mobile tiny housing is unclear: most are classified as caravans but are subject to residential caps in relation to the maximum amount of time allowed to reside in the structure – often of less than two weeks a month.[155] In some states, the authorities have indicated that mobile tiny housing will be deemed fixed dwellings and thus be subject to regulatory approval.[156] The residential cap, too, can be traced back to historical concerns that caravans would become the feared "sub-standard" housing that minimum house sizes are to counteract.[157] Even if a mobile house can escape regulation as a fixed dwelling, it has to meet the Australian Design Rules (ADR) and the rules contained in the Vehicle Standards Bulletin (VSB). The most commonly applied regulation is the dimension required under the ADR which provides that a mobile tiny house should be 4.3m x 2.5m x 12.5m or face additional permit requirements, which can impact the unit's cost.[158] Weight restrictions can also be

[151] ESC Consulting et al, ibid, 21.

[152] ESC Consulting et al, ibid, 21.

[153] ESC Consulting et al, ibid, 21.

[154] ESC Consulting et al, ibid, 21.

[155] H Shearer & P Burton 'Towards a typology of tiny houses' (2019) 36 *Housing, Theory and Society* 3, 303.

[156] Brokenshire (n129 above).

[157] Butt & Stephenson (n121) 159.

[158] Wenban (n95 above) 224.

problematic.[159] Weetman notes that while there is considerable lobbying for tiny housing permissive legislation, mobile tiny housing is, in reality, quite infrequent (but issues of legality could force users "underground", so to speak).[160]

While formal tiny housing projects and policy developments in Australia do not have the same momentum as in the USA, there has been some initial progress. A very small-scale tiny house pilot for the homeless was launched by the Gosford local council in New South Wales, a first.[161] Four small homes of 14m^2 with certain common areas such as a lounge, a workspace and a garden were built.[162] This was possible through the local council's developmental approval – an obstacle that frequently kills fixed tiny housing initiatives.[163] To avoid this, proponents of tiny housing advised moving into unregulated spaces (in rural areas) or avoiding attaching homes to utilities such as sewage, water and electricity.[164]

In Fremantle, Western Australia, the City introduced a programme to increase urban density through novel, smaller housing. A committee was appointed to review applications for housing, which subsequently received waivers for adherence to building codes. The housing had to show the possibility of being used for infill development and had to be compatible with the character of the neighbourhood. Almost no formal requirements formed part of the

[159] Wenban (n95 above) 224.

[160] VW Weetman 'Resistance is fertile: exploring tiny house rpactices in Australia' (2018) 55 *Australian Planner* 3-4 235; Brokenshire (n129 above), 8.

[161] Weetman, (n95 above) 235.

[162] Brokenshire (n129 above) 9.

[163] *Tiny Houses in Australia* (n146 above).

[164] *Tiny Houses in Australia* (n146 above).

initiative, except for descriptions of overall space in the neighbourhood, mandating tree coverage and prescribing a maximum floor area of 120m^2 per unit.[165]

2.4. HONG KONG, THAILAND AND JAPAN

2.4.1. Housing landscape

Contextually, Asia presents a vastly contrasting housing experience to the USA and Australia. It contains 60% of the world's population, with only 30% of the landmass.[166] Half of the world's megacities are found on this continent.[167] Rapid population growth and high rates of urbanisation are estimated to continue.[168] This population growth competes with land scarcity caused by this growth, as well as existing geographic features (e.g. mountains, archipelago nations, dense rainforests).[169] The result is that the use of space is intensely negotiated, and different norms of space use and density exist.[170]

Three territories were selected for inclusion in this discussion based on their prominence in the discussion on literature relating to tiny housing. Hong Kong is often cited as a lens through which to discuss density, especially in light of the Kowloon Walled City having been the most densely populated place on earth until its demolition, and the current trend of "coffin homes", which often amount to renting a sleeping pod only.[171] In Japan, *Kyosho-jutaku* or micro homes form a long-standing and popularly used part of the housing

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[165] ESC Consultating (n149 above) 21.

[166] U Sengupta & A Shaw 'Introduction' in *Trends and issues in housing in Asia: coming of an age*, U Sengupta & A Shaw (eds), 2018, Routledge, India, 1.

[167] Sengupta & Shaw, ibid.

[168] IS Cho, Z Trivic & I Nasution 'New high-density intensified housing developments in Asia: qualities, potential and challenges' (2017) 22 *Journal of Urban Design* 5, 614 (hereafter "Cho et al").

[169] E Harris & M Nowicki '"Get Smaller"? Emerging geographies of micro-living.' (2020) *Area.* 52, 595.

[170] Cho et al (n168) 613-4.

[171] Cho et al (n168) 591.

market.[172] These micro homes are compared to western tiny housing, with its hyper-stylized and unique buildings celebrated internationally. Micro-homes are widely employed in all eight of Japan's regions, both in urban and rural spaces.[173] And finally, this discussion considers Thailand, where the Baan Mankong public housing programme is often equated to developing tiny housing in the United States, within a system where minimum size and density requirements in zoning and building regulations had to be navigated to permit this innovation.[174]

In Japan, only 29% of the land is habitable due to geographic features like inland water, forest, and woodlands. Japan's per capita habitable land is 800m^2, compared to 19 300m^2 in the United States. In addition, destruction in World War II meant that housing stock was destroyed, and rebuilding was focused on large cities, causing mass urbanisation. Homeownership has been stable at around 60%, with ownership rates correlating positively with age. The average dwelling size is 93m^2. The government invested in construction, and 76 million housing units were built between 1948 and 2020, with transfer to individuals facilitated through various programs. Japan's public housing stock forms a small part of its housing landscape, and social assistance still leverages private stock to ensure that persons are housed.[175] Japan has had significant success in combatting homelessness, with national estimates declining from 20 000 homeless persons in 1999 to 3800 in 2021.[176] Japan's

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[172] Ford & Gomez-Lanier (n85 above) 398.

[173] C Voon 'Why Japan's Futuristic Micro-Homes Are so Popular' 24 January 2016 *Hyperallergic* <https://hyperallergic.com/250380/why-japans-futuristic-micro-homes-are-so-popular/>.

[174] N Usavagovitwong, A Pruksuriya, W Supaporn, et al, 'Housing density and housing preference in Bangkok's low-income settlements' (2013) *International Institute For Environment And Development* Urbanization And Emerging Population Issues Working Paper 12, 54.

[175] J Yoshida 'Land Scarcity, high construction volume, and distinctive leases characterize Japan's rental housing markets' (2021) Brookings.

[176] Ministry of Health, Labour and Welfare 'National Survey' (28 April 2021) <https://www.mhlw.go.jp/stf/newpage_17922.html>.

population is 125 million.[177] In Japan, the Constitution provides limited socioeconomic rights and no right to housing.[178] While Japan is a signatory to the International Convention on Economic, Social and Cultural Rights, its provisions do not have a direct effect in domestic law, and it is seen as a political mandate.[179]

The territory of Hong Kong faces a significant challenge in terms of demand for housing versus supply. Hong Kong's land mass is very small, and large tracts are inhabitable due to inland water and steep mountains.[180] This has culminated in uncontrollable price hikes for private dwellings.[181] Hong Kong is one of the densest cities in the world, exceeding 6700 people per km^2.[182] Between 2009 to 2016, the increase in prices for apartments was 145% generally and 172% in the market for houses below $40m^2$.[183] This has led to an increased housing sub-division (living quarters divided into smaller units for rental purposes) where the average area per capita was less than 50 square feet ($4.65m^2$).[184] Nano flats – one-room

[177] Statistics Bureau of Japan 'Population Estimates by Age (Five-Year Groups) and sex' (2023) <https://www.stat.go.jp/english/data/jinsui/tsuki/index.html>.

[178] The Constitution of Japan (1947).

[179] T Webster 'International Human Rights Law in Japan: The View at Thirty' (2010) 23 *Columbia Journal of Asian Law* 2, 241-267

[180] A Baranski 'Reasons why housing in Hong Kong is very expensive' (2019) *Profolus* <https://www.profolus.com/topics/reasons-why-housing-in-hong-kong-is-very-expensive/>.

[181] LT Wong 'Tiny Affordable Housing in Hong Kong' (2018) 27 *Indoor and Built Environment* 9, 1159.

[182] EHW Chan, B Tang & W Wong 'Density control and the quality of living space: a case study of private housing development in Hong Kong' (2002) 26 *Habitat International* 161.

[183] Wong (n181 above) 1159.

[184] HKTHB 'Survey on subdivided units in Hong Kong. Document CB (1)1371/12-13(03)' (2013) Hong Kong Transport and Housing Bureau.

apartments - which measure less than $20m^2$, are a popular form of housing.[185] Hong Kong's average floor is $15.6m^2$ per person.[186]

The Hong Kong Basic Law – equivalent to a Constitution – provides limited individual rights, primarily civil and political rights. It does not guarantee the right to housing.[187] Public housing became a government priority in the 1970s.[188] It was associated with economic development.[189] Housing was seen as part of a social wage.[190] This led to counteracting the growth of slums, increased social cohesion (as persons settled in public housing were less likely to move) and increased individual autonomy.[191] It was also seen as a way to keep wages low.[192]

In contrast, Thailand has seen relatively low rates of urbanisation in East Asia. In a country of about 66 million people, less than 12 million live in urban areas (80% in Bangkok). There are 4100 people per square meter in urban areas, and each new resident grows the area by about $140m^2$. These numbers are below the regional average, despite Bangkok being the fifth biggest megacity in East Asia.[193] Only 5.8 million households do not own their homes and

[185] Wong (n181 above) 1161.

[186] ECM Hui & MCM Lam 'A Study of Commuting Patterns of New Town Residents in Hong Kong' (2005) 29 *Habitat International* 421–437.

[187] Hong Kong Basic Law (1990).

[188] J Lee & Y Mgai-ming 'Public Housing and Family Life in East Asia: housing History and Social Change in Hong Kong, 1953 – 1990' (2006) *Journal of family history* 76.

[189] J Lee & Y Mgai-ming, ibid.

[190] J Lee & Y Mgai-ming, ibid, 75-6.

[191] J Lee & Y Mgai-ming, ibid, 69 & 76.

[192] J Lee & Y Mgai-ming, ibid, 75-6.

[193] World Bank report East Asia's Changing Urban Landscape: Measuring a Decade of Spatial Growth (2015), 113.

UN Habitat estimate that 2.7 million people are not housed adequately.[194] The Thai Constitution protects the right of people to "enjoy the liberty of dwelling".[195]

While the learnings from these three jurisdictions are important as counterpoints to the experiences from the USA and Australia, there is almost no English-language literature describing their approaches to smaller housing as part of the "Tiny House Movement".[196] There are two possible underlying reasons for this: first, tiny housing, as a movement discussed in this thesis, has its roots in Western philosophy and developed as a social movement in the Western world. Its global appeal is not a matter of course. Second, the movement exists due to its opposition to prevailing housing practices and has a strong counter-culture philosophy. Smaller housing is already accepted within these jurisdictions and, therefore, it is arguable that no advocacy for its inclusion is needed.

2.4.2. The spectrum of size controls

2.4.2.1. Japan

Japan has considerably fewer regulatory controls than the USA and Australia. There is no minimum lot size, and space is only really mandated between dwellings for health and safety reasons.[197] Building codes are essentially the same across different regions.[198]

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[194] UN Habitat "Thailand" (2021) [online] <https://unhabitat.org/thailand#:~:text=87%20million%20-households%20in%20Thailand%20do,Thailand%2C%20urbanization%20is%20dominated%20by%20Bangkok.&text=87%20million%20households%20in,is%20dominated%20by%20Bangkok.&text=households%20in%20Thailand%20do,Thailand%2C%20urbanization%20is%20dominated>

[195] Constitution of the Kingdom of Thailand (2015) Section 33.

[196]There is some discussion on Soe Ker Tie Houses (butterfly houses) which are small dormitory pods in Thailand: C Slessor 'Soe Ker Tie Houses by Tyin Tegnestue, Noh Bo, Tak, Thailand' (2009) *Architectural Review* <https://www.architectural-review.com/today/soe-ker-tie-houses-by-tyin-tegnestue-noh-bo-tak-thailand> (accessed on 7 October 2021); Wotton (n 116 above), 215.

[197] Voon (n173 above).

[198] H Tomohiro 'Introduction to the Building Standard Law' (2013) Building Center of Japan, 35.

In 2000, Japan introduced a performance-based building code – the Building Standard Law – which provides minimum technical requirements for buildings (prescriptive requirements) but also allows for deviation from the requirements upon approval from designated evaluation bodies.[199] One such standard provides both the minimum ($25m^2$ per person with incremental increases for larger households) and recommended amount of living space per person ($40m^2$) to have a "healthy and culturally fulfilling life."[200] In reality, less than 50% of people in Japan live in dwellings meeting these minimum requirements, with only 31% of the population exceeding the recommended space per person.[201]

2.4.2.2. Hong Kong

In Hong Kong, only private sector housing supply is subject to statutory mechanisms to control density and building processes.[202] Statutory controls, like the Building Ordinance and all of its technical schedules, do not provide a minimum house size. Instead, market forces are expected to regulate house sizes.[203] Calls for introducing a minimum size were initially dismissed as it would impact the affordability of houses.[204]

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[199] Tomohiro, ibid.

[200] Real Estate Japan 'How much living space does the average household have in Japan?' (2017) <https://resources.realestate.co.jp/living/how-much-living-space-does-the-average-household-have-in-japan/#:~:text=As%20we%20mentioned%20above%2C%20the,recommended%20amount%20of%20living%20space> (Hereafter "*REJ"*).

[201] *REJ*, ibid, citing Ministry of Land Infrastructure, Transport & Tourism 'Square Meters of Living Space per person in Japan' (2015).

[202] Chan et al (n182 above), 162.

[203] Cap. 123 of the Laws of Hong Kong, Buildings Ordinance.

[204] C Yau 'Hong Kong housing minister dismisses calls for minimum size for new private flats, saying it will impact affordability' *South China Morning Post* (18 April 2018) *<https://www.scmp.com/news/hong-kong/economy/article/2142307/hong-kong-housing-minister-dismisses-calls-minimum-size-new>*

Households who live in public rental housing with an internal floor space of less than $7m^2$ per person may apply for a larger dwelling in terms of public schemes.[205] Density controls assume the number of persons per dwelling unit and limit the number of units in a particular area based on a detailed calculation. [206] This is meant as an infrastructure development tool and is not regarded as an enforceable standard.[207]

However, excessively small housing – sometimes the size of a bedroom or a carpark – without amenities like a bathroom or kitchen is the subject of much criticism.[208] In response, the government has announced that it will introduce minimum dwelling sizes ($26m^2$), which will apply to private sales.[209] This ensures that people have access to all the components required for living – space for ablution and cooking. However, this minimum size could be waived where developers can show that space is too limited.[210]

2.4.2.3. Thailand

In Thailand, the minimum size requirement for a dwelling unit is prescribed by the Building Control Act (1979) at $20m^2$ per unit based on an occupation rate of 3 persons per unit.[211] The Thailand National Housing Authority and the Community Organizations Development Institute (a community-based organisation) successfully petitioned the government to relax

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[205] A Ho 'The unlivable dwellings in Hong Kong and the minimum living space' *Hong Kong FP* (27 July 2015) <https://hongkongfp.com/2015/07/27/the-unlivable-dwellings-in-hong-kong-and-the-minimum-living-space/.>

[206] Hong Kong Planning Standards and Guidelines *Planning Department* (2023)<https://www.pland.gov.hk/pland_en/tech_doc/hkpsg/full/index.html >.

[207] Chan (n182 above) 174.

[208] B Yung & F Lee 'Right to Housing" in Hong Kong: Perspectives from the Hong Kong Community' (2012) 29 *Housing, Theory and Society* 4, 401-419.

[209] J Tsang & J Ng 'All private flats built in Hong Kong must be at least 280 sq ft in future under new government rule' *SCMP* (23 February 2022) <https://www.scmp.com/news/hong-kong/hong-kong-economy/article/3168256/all-private-flats-built-hong-kong-must-be-least?module=inline&pgtype=article>.

[210] Tsang & Ng, ibid.

[211]Usavagovitwong et al (n174 above), The Building Control Act (2008), section 8 empowers the relevant Minister with the Building Control Committee to regulate, amongst others, the size of buildings by regulation.

certain Building Control requirements to facilitate low-cost housing developments. Although the leeway seemingly did not apply to dwelling size, it applied to relevant matters such as technical requirements for sanitation systems and land use controls.[212]

A case study of different urban low-income housing settlements considered the real space to the household ratio in several housing projects, ranging from a household size of 3 people in a 41.25m^2 unit (Baan Mankong Wat Phrayakrai) to a household size of 5 in a 35m^2 average unit (Baan Mankong Bon Kai), down to an average size of 32m^2 servicing an average of 4.19 persons (NHA Bon Kai).[213] The study followed different housing typologies (such as apartments and row housing).[214]

Baan Mankong programmes mandate a community operative for at least 15 years, where land is bought or leased collectively.[215] These programmes also focus on high levels of open space per person and on the use of communal objects and facilities, and they have the highest subsequent rate of satisfaction reported by inhabitants.[216] An older study – in 1983 – suggests, amongst others, that informal housing sizes and housing provided in government housing programmes are not very discrepant (although more recent data is required).[217] The communal nature of the Baan Mankong programmes bears several similarities with tiny house villages in the USA.

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[212] Usavagovitwong et al (n174 above) 5.

[213] Usavagovitwong et al (n174 above) 18.

[214] Usavagovitwong et al (n174 above) 18.

[215] Usavagovitwong et al (n174 above) 322.

[216] Usavagovitwong et al (n174 above) 55.

[217] S Tanphiphat 'Recent Trends in Low-Income Housing Development in Thailand' Y Man Yeung (ed) 'A Place to Live: More Effective Low-Cost Housing in Asia' *International Development Research Centre 209e* (1983).

Thailand also has a history of raft houses – housing and commercial structures which float on water and are based on a "foundation" of logs or bamboo.[218] These raft houses still exist in 8 provinces, and a 2002 study shows the average size of a raft house in Uthaithani province as 26m^2. Raft houses are often found moored in backyards and are characterised by a sense of community cohesiveness, a focus on sustainability and a close connection with nature.[219]

2.5. REFLECTIONS

One of this Chapter's goals was to provide a baseline identification of legal barriers and facilitators to investigate in relation to tiny housing in South Africa. These barriers are, overwhelmingly, zoning and building regulations.[220]

Building regulations – often developed and prescribed nationally or regionally but administered locally – can contain several technical barriers to tiny housing. The most obvious is prescribing minimum interior floor space. This can be an overall requirement or by prescribing minimum sizes for certain rooms, such as rooms used for sleeping or cooking. This is an obvious barrier where a) tiny houses simply fall below that size requirement and b) a tiny house model often uses an attic sleeping arrangement or where one communal space is repurposed for all functions by using smart design. Technical requirements like ceiling heights

[218] C Denpaiboon, M Tohiguchi, H Matsuda & S Hashimoto **'**Typology and Life Style Analysis of the Raft House (Ruan Pae) in Riverine Settlements in Thailand' '(2002) 1 *Journal of Architectural Research and Studies* 112.

[219] Denpaiboon, ibid.

[220] The use of mobile tiny housing faces two big challenges: the distinction between a mobile tiny house and vehicles can be confusing and can lead to tiny houses being regulated as structures that have to be roadworthy. This includes weight and height restrictions that are reasonable if the structure is to be transported on roads, but can impact on design and affordability. The other challenge relates to a resistance to mobile housing by local authorities, often addressed through maximum occupancy periods and the treatment of tiny home owners as campers (See, inter alia, VM Weetman 'Resistance is fertile: exploring tiny house practices in Australia' (2018) 55 *Australian Planner* 2-3, 233; H Shearer 'Tiny Houses: Love, Live or Leave? What factors influence the Decision?' *State of Australia Cities Conference and PhD Symposium* (2019)*,* 4-5.

and requirements around stairs and ladders, emergency exit requirements (often prescribing the size of doors) can also have a restrictive impact.

Zoning regulations differ amongst local authorities. Where a development is to be approved locally, or an exemption requires an administrator's consent, there is space for NIMBYism, or simply lack of knowledge on tiny housing, to be a barrier. Zoning ordinances are also often difficult to challenge as certain barriers within those ordinances are justified by reference to concerns based on public health, nuisance laws, protecting property rights (specifically neighbourhood values) or town planning considerations relating to infrastructure. The barriers in zoning ordinances can include minimum house or plot sizes, land use codes and restrictions on occupancy and sub-division. For example, this can greatly impact the ability to use backyard dwellings or mobile tiny housing.

However, despite these obstacles, tiny housing has proven to be a resilient solution in all the jurisdictions studied. Tiny housing solutions have been driven by local persons, individually or through groups (e.g. civil society organisations with a role in public housing), and can very much be seen as an expression of agency in terms of housing adequacy. The jurisdictions have seen adaptations to chosen forms of tiny housing to overcome legal and political impediments. These adaptations range from fairly simple adjustments (eg. the use of particular building materials to trigger different housing classifications) to changing the nature of a tiny house from permanent to mobile or vice versa or selecting areas where zoning challenges or implementation of regulations are unlikely. Legal uncertainty has significantly impacted tiny house proponents' ability to access this form of housing. The uncertainty can stem from unclear definitions in law, inconsistent implementation of laws, or complex variations in local government regulations.

In Chapter 1, the tension between current housing practices versus the failure of meeting the volume of housing units needed and addressing environmental concerns in housing practices was noted. This Chapter shows that dwelling size, and the general approach to space, is a meaningful variable to addressing this tension. In many ways, the approach to dwelling size in policies and law is a result of the real physical and social environment in which people find themselves. Where the realities of that environment is changed – either through new threats to society like climate change, or reprioritizing existing threats, like the inadequacies and inequalities of how housing is currently provided – the understanding and legal and policy approach to size can also easily change. More importantly, the change becomes not only possible, but likely.

First, tiny housing is used in a variety of ways. It is used as a means for people to self-realise their right to housing in the private housing market, and it is used as a form of public housing to provide housing to those who do not have the means to access housing on their own. The modern tiny housing movement started largely as an instance of private housing with very specific philosophical undertones, predominantly anti-consumerist and based on elements of environmental sustainability. However, tiny housing has entered a phase of being adopted and tested also as a public housing solution, with success. Its use can lie in providing access to housing as both a means for self-realisation and through government provision.

Second, tiny housing gained popularity due to various factors beyond its original underlying philosophy. For this thesis, the unaffordability of housing as is, the need to reimagine how space is used to allow for housing closer to amenities and economic opportunities, and the need for more environmentally sustainable housing types are important. Where tiny housing is a response by local communities to government shortcomings in facilitating public or private housing stock matching their needs, the self-created and self-

driven nature of the tine housing movement can be seen as an expression of the agency and of this local community, and of the cultural acceptability of tiny housing.

Third, notions of housing size are informed significantly by the physical and social context of where the housing is provided. In terms of the physical environment, where space is freely available, formulations of acceptable housing sizes and densities are increased and often elevated to mark the existence of criteria like safety and health. The link between housing size and health is often overstated. Detailed technical specifications on how to create this "required" space then underpin law. On the other end of the spectrum, where space is limited, housing size is given less weight as a marker of adequacy and little to no legal prescriptions follow suit. While this approach, where absolutely no regard is given to the size of living spaces, is also open to criticism, it does underline the place-dependency of size-related regulation.

Socially, size is often used as a covert, sometimes overt, form of entrenching class divides. This often entails racial discrimination. Restrictive zoning and building laws act as tools for beneficiaries of inequalities to maintain physical segregation and control over resources. Where households are increasingly struggling to afford housing types reflecting previous social norms, tiny housing represents a response by local communities to government shortcomings in facilitating affordable public or private housing stock.

The differences in approaches to size between the jurisdictions studied show that, to some degree, it is a construct shaped by members of the society in which it operates. The extent of the differences suggests that the degree is significant. This observation is more credible when considering how tiny housing proponents have opted into this housing type for reasons beyond resource constraints. Where affordability is the issue, the measure is beyond the pure means to survival but around relative affordability (physical size versus independence, household size or lower commute times). Further, the suggestion in countries like Australia

that the barrier falls away in rural settings also shows that minimum size requirements act outside of objective health and safety measures.

Even when an argument for minimum size as an expression of habitability can be made, the motivations behind tiny housing initiatives and the differences in approaches to size per jurisdiction highlight how the notion of adequacy is multifactoral and that tensions between various factors can exist. How these factors are evaluated against one another and, weighted is context specific.

CHAPTER 3: ADEQUACY AS A LEGAL STANDARD

"At its best, [a size definition] offers real empirical grounding for establishing a right to housing […] At its worst, a definition of acceptable living standards [..] can serve as an exclusionary tool, keeping out those who can't afford a particular version of 'liveability'" – Markus Moos[1]

3.1. INTRODUCTION

This Chapter will provide a detailed exploration of the notion of adequacy. The formulation of adequacy as a legal standard for housing emerged in international law and was later adopted into South African Constitutional law. This domestication of adequacy as a legal standard happened through two avenues. First, the 1996 South African Constitution explicitly imported the notion of adequacy in formulating the right to housing in the Bill of Rights. Second, international law in the form of customary international law or international agreements to which South Africa is a party - is also recognised as law in South Africa, and courts are required to interpret legislation consistently with binding international law.

The South African Constitution[2] is regarded as a living document, and the role of courts to develop and grow the content of the Bill of Rights is not only accepted, but also explicitly mandated in the Bill of Rights.[3] Therefore, it stands to reason that the right to adequate housing is a right that has been developed and given more content by South African courts as the context

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[1] M Moos 'A Research Agenda for Housing' (2019) Cheltenham: Edward Elgar Publishing, 183.

[2] 1996.

[3] Section 39 states:

"(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

in South Africa and globally changes. This evolution is not inconsistent with the international experience. As seen in this Chapter, the right to housing in international law closely resembles a ship being built as it sails. Over time, the right was given more depth and clarity and can even be seen to have changed in its purpose and application.

One example of this evolution has been the introduction of the idea that rights are interrelated, interdependent and indivisible. This now-ubiquitous understanding of human rights only saw formal recognition in 1977 by the United States General Assembly.[4] However, the history of international human rights law and the development of new treaties and even new rights (e.g. the right to development) show this understanding to be a new development.[5]

This example of rights being viewed as interrelated, interdependent and indivisible is apt. This thesis is framed as an exploration of the notion of adequacy in the context of growing tensions between the realisation of rights and resource limitations, but also of the superficial and intermittent tension between different rights. The right to a healthy environment, the right to health and the right to adequate housing are all relevant rights when discussing the role of downsizing in housing.

This Chapter will trace the development of adequacy in housing predominantly through housing rights and jurisprudence. It will consider the values and interests associated with other rights, such as the right to health and the right to a healthy and sustainable environment, as important factors in the assessment of adequacy. The interplay between the right to adequate housing and the tension and complementarity with other rights will be thoroughly explored.

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[4] UN General Assembly 'Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms' (1977) *A/RES/32/130*.

[5] DJ Whelan 'Interdependent, indivisible and interrelated human rights: a political and historical investigation' (unpublished PhD, University of Denver, 2006), 4-12.

3.2. ADEQUACY IN INTERNATIONAL LAW

3.2.1. International treaties

The right to adequate housing was first recognised amongst a cohort of other rights in section 25 of the Universal Declaration of Human Rights (UDHR) in 1948, which provides:

> "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

During the drafting of the UDHR, the "right to medical care" and duty to "promote public health and safety" were initially separated from the "right to good food and housing and to live in surroundings that are pleasant and healthy."[6] The second draft collapsed this wording again and reduced the protection afforded to housing by reformulating this protection to the "right to the best health conditions possible and to assistance to preserve them" followed by a provision that "the community shall promote public hygiene and the betterment of housing and food conditions."[7] This suggests that the drafters saw a close link between public health and housing from the onset.

The text of Article 25 underwent several changes, with debates surrounding whether specific references should even be made to housing and medical care.[8] It also became clear that housing should contain an element of dignified housing, although the discussion on what that

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[6] GAR Do Nascimento 'The Long Road to the International Recognition of Economic and Social Rights: The Right to an Adequate Standard of Living' *The Age of Human Rights Journal* 11 (2018), 51.

[7] Do Nascimento, ibid, quoting Johannes Morsink 'The Universal Declaration of Human Rights – Origins, Drafting, and Intent' (1999) Philadelphia: University of Philadelphia Press, 294.

[8] Do Nascimento, ibid, 55 – 56.

means remained vague.[9] From the travaux préparatoires of the UDHR, it became apparent that the right to housing was coupled with the value of dignity, which seemed to have been intrinsically linked to healthy living conditions.

The size of housing or the need to be positioned to access amenities was not apparent in this discussion. Perhaps this was understandable, as the introduction of socio-economic rights at this stage was already a progressive legal development, and the memory of the Second World War focused the issue of homelessness and disease quite sharply.[10]

In 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted a similar formulation.[11] In Article 11 it provides:

> "The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent."

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[9] Do Nascimento, ibid, 56. Evidently, the United States wanted to provide more clarity to this term, but the USSR maintained that it was clear that –

> "human beings should not live like animals: they should not be forced to live in shacks, hovels or caves. They should be provided with adequate housing which would not endanger their health or that of their families."

However, the USSR also insisted on housing being stated separately as worker's right to housing was unequal in a lot of countries, and based on their own problems with housing after German occupation United Nations Economic and Social Council (1948): Commission on Human Rights, Third Session Summary Record of the Seventy-First Meeting, *doc.E/CN.4/SR*.71. 7-8.

[10] China and the USSR, which were quite vocal during the discussion on the text of the UDHR, alone suffered immense destruction from the 2nd World War: In the USSR more than 1700 towns and 70 000 villages were destroyed. In North China, millions of acres of land were destroyed due to Japanese attacks. Millions of ethnic Germans were also being expelled at a large scale from countries, and estimates place 70% of German housing in Germany destroyed. See Margaret MacMillan 'Rebuilding the world after the second world war' *The Guardian* (11 September 2009) <https://www.theguardian.com/world/2009/sep/11/second-world-war-rebuilding>.

[11] The International Covenant on Economic, Social and Cultural Rights (1966) (hereafter "ICESCR").

This is to be read with Article 2(1), which determines:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

However, article 12 separately provides for the right to health and contains measures that suggest it caters to components of public health, such as disease control.[12] However, the right to health is not to be divorced from the right to access adequate housing, as the drafting history of article 12 shows that a wide range of socio-economic factors are viewed as underlying determinants of health.[13] Access to "basic shelter, housing and sanitation, and an adequate supply of safe and potable water" is even seen as one of the six minimum core obligations identified in terms of Article 12.[14]

Article 11 of the ICESCR is also subject to limitations not present under the UDHR: there is a shift to state parties "taking appropriate measures" and to the progressive realisation of the right.[15] However, The Committee on Economic, Social and Cultural Rights (ESCR Committee) has provided more content on the right to adequate housing in its general comments. These comments are non-binding (soft law), but are useful in observing what

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[12] ICESCR, ibid, article 12(2)(c):

> "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: […] The prevention, treatment and control of epidemic, endemic, occupational and other diseases."

[13] United Nations Committee on Economic Social and Cultural Rights 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art 12)' (2000) *E/C.12/2000/4*, para 4 (hereafter "General Comment No. 14").

[14] General Comment No. 14, ibid, para 43.

[15] See J Hohmann 'The Right to Housing: Law, Concepts, Possibilities' (2013) New: York Bloomsbury, 18.

international consensus is as to the content of the right.[16] As a point of departure, General Comment 4 reiterates the connection between the rights to dignity and adequate housing.[17] This aligns with the comments made during the negotiations for the UDHR. However, unlike with the UDHR, the Committee then strives to give much more guidance on what this adequate (and dignified) housing will encompass.

It identifies several key aspects of "adequacy" in relation to housing, namely: (a) legal security of tenure, including legal protection against forced evictions; (b) availability of services, materials, facilities and infrastructure; (c) affordability; (d) habitability; (e) accessibility for disadvantaged groups; (f) location and (g) cultural adequacy.[18] Using these key themes, the ESCR Committee made the following observations:

- Regardless of the type of housing, informal settlement included, legal protection against eviction should be given to all persons.[19]
- Housing-related costs should be commensurate with income levels.[20]
- Inhabitants require adequate space and protection from health, structural hazards and disease vectors.[21]

[16] Hohmann, ibid, 20.

[17] General Comment No. 14 (n 13 above) para 7. See Moons N 'The right to housing in Flanders-Belgium: international human rights law and concepts as stepping stones to more effectiveness' (Unpublished PhD Thesis, University of Antwerpen, 2016) 69-70 for a discussion on human dignity's inherent link to human rights, and specifically the right to housing.

[18] General Comment No. 14 (n 13 above) para 8.

[19] General Comment No. 14 (n 13 above) para 8; (a) Legal security of tenure. Rajindar Sachar 'The right to adequate housing: working paper" E/CN.4/Sub.2/1992/15 (1992): "Put bluntly, there is something desperately wrong with legal systems in which the law must be broken in order for people to survive".

[20] General Comment No. 14 (n 13 above) para 8; (c) Affordability.

[21] General Comment No. 14 (n 13 above) para 8, (d) Habitability.

- Housing should be located to grant access to amenities and economic opportunity. Time and the financial costs of extensive travel should be considered.[22]
- Modernisation of housing should not occur at the expense of cultural values.[23]

The General Comment refers to the World Health Organisation's Health Principles of Housing (Health Principles)[24] in relation to determining habitability. The Health Principles speak to sanitation and related measures to protect against communicable diseases;[25] the reduction of exposure to harmful chemicals, undue hazards and pollution to avoid injuries, poisoning and chronic diseases;[26] reducing social and psychological stress;[27] access to amenities to improve the housing environment;[28] the informed use of a house which relates to proper habits and attitudes of residents;[29] and to the unique risks faced by specific populations.[30]

The Health Principles refer to "roominess" and to the need to avoid sleeping in close proximity to prevent communicable diseases such as tuberculosis, pneumonia, bronchitis and

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[22] General Comment No. 14 (n 13 above) para 8, (f) Location.

[23] General Comment No. 14 (n 13 above) para 8, (g) Cultural Adequacy.

[24] World Health Organisation's Health Principles of Housing, 1989, Geneva (hereafter "WHO").

[25] WHO, ibid, Principle 1. These include safe water supply, sanitary excreta disposal; disposal of solid wastes; drainage of surface water, personal and domestic hygiene, safe food preparation and structural safeguards against disease transmission.

[26] WHO, ibid, Principle 2. These include structural features and furnishings in housing; indoor air pollution; chemical safety; and use of the home as a workplace.

[27] WHO, ibid, Principle 3. These principles contains include no specific sub-principles but reference to proper ventilation, good lighting, privacy, properly furnished allows space for recreation (but it doesn't seem to require this happen in the actual confines of the house), reduced noise and access to greenery.

[28] WHO, ibid, Principle 4. These include security and emergency services; Health and social services; access to cultural and other amenities.

[29] WHO, ibid, Principle 5. These principles include no specific sub-principles but reference to upkeep of homes and the proper use of facilities and upkeep of cleanliness.

[30] WHO, ibid, Principle 6: Women and children are disproportionately more affected by hazardous home environments as they are typically present in the home for extended periods of time; the urban poor who are often in unsafe structures and exposed to environmental hazards; and persons with decreased mobility such as the aged, chronically ill and disabled.

gastrointestinal infections.[31] The Health Principles also address elements such as lack of ventilation,[32] stability of structures[33] and temperature resistance[34] as other issues to be addressed. However, they also call on states to increase "the supply and lowering the cost of components of housing, including sites, the establishment of the basic infrastructure and the provision of easier credit."[35] With their multiple goals, the Health Principles also warn that building standards should be used "in ways that support rather than hamper the prospects for housing improvements"[36] and that "[s]etting inflexible norms […] discriminate most heavily against the poor, who have the greatest need."[37] From this, we can see that adequate space is seen as a component of promoting healthy living conditions, which ties the right to adequate housing back to the right to health. Nothing in the general comment speaks to space, in and of itself, being a separate marker of adequacy or dignity. Interestingly, Craven notes that standards of habitability are –

> "certainly appropriate where construction firms are operating in the private sector for profit, [but] it is not necessarily so where housing is built by local communities or by the individuals for themselves. In such cases, excessively stringent conditions may serve to dissuade people

[31] WHO, ibid, Principle 1.7.

[32] WHO, ibid, Principle 2.2.

[33] WHO, ibid, Principle 2.1.

[34] WHO, ibid, Principle 2.1.

[35] WHO, ibid, Principle 8. It also calls on states to improve the housing situation by removing "inappropriate policies that may, inter alia, perpetuate unrealistic and obsolete standards that limit access to housing for the poor."

[36] WHO, ibid, Principle 9.3.

[37] WHO, ibid, Principle 9.3.

> from building their own homes and therefore contribute to a continued shortage of housing generally."[38]

One wonders if Craven would have adapted this observation given the subsequent development of private actors sometimes providing socio-economic services through state incentives. Hohmann notes that –

> "regulations intended to make housing safer and more habitable often fail to protect those whose housing lies in the informal sector. The informal sector by its nature, tends to fall foul of the law and increased regulation can result in evictions and demolitions and render previously housed homeless."[39]

Both of these comments most certainly align with any scepticism on an unqualified minimum sizing requirement.

Several other international instruments have given protection to the right to adequate housing as part of a suite of other protections.[40] The International Convention on the Elimination of All Forms of Racial Discrimination[41] mandates States to condemn racial discrimination by all appropriate means and without delay[42] and to promote and guarantee the "right to housing" to everyone equally before the law.[43] Interestingly, the Committee on the Elimination of Racial Discrimination has highlighted the need for government to also consider

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[38] M Craven 'The International Covenant on Economic, Social and Cultural Rights: a perspective on its development' (1995) Oxford: Clarendon, 346.

[39] Hohmann (n15 above) 25.

[40] Article 21 of the Convention relating to the Status of Refugees (1951); See LChenwi (2021) 'Housing for persons with disabilities in South Africa' 21 International Journal of Housing Policy 3 (2021) 321-345.

[41] United Nations International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (hereafter "ICERD").

[42] ICERD, ibid, Article 2.

[43] ICERD, ibid, Article 5(d)(i).

the unintended by-product of the actions of private persons in determining the residential patterns of cities.[44]

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in article 14, provides for the duty of State Parties to –

> "take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
>
> [ ]
>
> (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications."[45]

Article 14 was a late addition to CEDAW, and its inclusion was driven by an impetus to improve the conditions of rural workers, specifically plantation workers.[46] The Committee on the Elimination of Discrimination against Women linked the protection in Article 14(2)(h) to the need to protect access to basic infrastructure and services and security of tenure, such as by removing discrimination practices in registration and titling.[47] The Committee emphasises the empowerment of rural women to exercise their agency when determining housing policies and strategies. The Committee does refer to international housing standards, including the work of the Special Rapporteur on Adequate Housing (discussed below), specifically the Basic

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[44] United Nations Committee on the Elimination of Racial Discrimination 'General Recommendation 19, The prevention, prohibition and eradication of racial segregation and apartheid' A/50/18 (1995) para 3.

[45] 1979, article 14(2)(h).

[46] JB Martignoni 'Engendering the right to food? International human rights law, food security and the rural woman' (2018) 9 *Transnational legal theory* 3, 404.

[47] United Nations Committee on the Elimination of Discrimination against Women 'General Recommendation 34 on the Rights of Rural Women' CEDAW/C/GC/34, (2016) H.1. This is also the approach in para 69 of Committee on the Elimination of Discrimination against Women 'General Recommendation 37 on Gender-related dimensions of disaster risk reduction in the context of climate change' CEDAW/C/GC/37 (2018).

Principles and Guidelines on Development-based Evictions and Displacement. However, although very briefly, the Committee previously linked article 14(2)(h) to the protection of women's health by providing that adequate housing (as part of the suite of other elements in 14(2)(h)) is critical for the prevention of disease and the promotion of good health care.[48]

In 1988, the United Nations General Assembly adopted the Global Strategy for Shelter to the Year 2000 (Global Strategy) to address homelessness.[49] In terms of the Global Strategy, "adequate shelter" means –

> "more than a roof over one's head: It means adequate privacy, *adequate space*, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost."[50]

The Global Strategy recognises that adequacy varies from country to country and determines that the Strategy should be based on an "enabling" approach.[51] The Global Strategy makes a second reference to space, as part of a range of measures to determine if the adequacy of housing has improved due to economic growth.[52]

The United Nations Convention on the Rights of the Child was adopted in 1989.[53] It guarantees the right to housing in Article 27, which provides that States shall "take appropriate

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[48] United Nations Committee on the Elimination of Discrimination against Women 'General Recommendation No. 24: Article 12 of the Convention (Women and Health)' A/54/38/Rev.1 (1999), chap. I.

[49] United Nations General Assembly, *Global Strategy for Shelter to the Year 2000: resolution / adopted by the General Assembly*, A/RES/43/181 (1988) (hereafter Global Strategy).

[50] Official Records of the General Assembly, Forty-third Session, Supplement No. 8, UN A/43/8/Add.1 (1988), para 5 (hereafter "Official Records of the GA").

[51] Official Records of the GA, ibid, the Strategy clarifies that this enabling approach means facilitating all present and potential participants to assist in shelter production and improvement.

[52] Official Records of the GA, ibid, para 87.

[53] United Nations Convention on the Rights of the Child, New York (hereafter "CRC").

measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing" in accordance with "their national conditions and within their means."[54] This is to promote every child's right to a "standard of living adequate for the child's physical, mental, spiritual, moral and social development."[55]

The Committee on the Rights of the Child noted that the two most significant barriers to children accepting state shelter are the high levels of violence and insecurity of tenure, which render the housing inadequate.[56] It accordingly recommends focusing on housing that is safe, has access to water and sanitation, and cautions against the eviction of children even from illegal structures.[57] The right of children to enjoy the highest attainable standard of health also is linked to the provision of adequate housing: specifically, a housing environment that is free from "environmental pollution" and includes "non-dangerous cooking facilities, a smoke-free environment, appropriate ventilation, effective management of waste and the disposal of litter from living quarters and the immediate surroundings, the absence of mould and other toxic substances, and family hygiene."[58] Finally, housing provided to children should be culturally appropriate.[59]

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[54] CRC, ibid, Article 27(3).

[55] Article 27(1).

[56] Committee on the Rights of the Child 'General Comment No. 21 on children in street situations' CRC/C/GC/21 (hereafter "General Comment No. 21") para 50.

[57] General Comment No. 21, ibid, para 51.

[58] Committee on the Rights of the Child 'General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art 24)' *CRC/C/GC/15* (2013), para 49.

[59] Committee on the Rights of the Child 'General Comment No. 11 on indigenous children and their rights under the Convention' CRC/C/GC/11 (2009), para 25.

3.2.2. Special rapporteur on adequate housing

A Special Rapporteur (SR) on adequate housing was appointed by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1991. This mechanism is seen as the predecessor to the Special Rapporteur appointed by the Commission on Human Rights.[60] In 1994, the SR, specifically with the political change in South Africa in mind, published a progress report in which the SR addressed several misconceptions relating to realising the right to housing.[61] The SR speaks to a tendency to promote property rights over housing rights and addresses the misconception that the private sector, left unchecked, can adequately address the demand for housing.[62] The SR reaffirms that housing cannot be divorced from other social concerns.[63]

Subsequently, in 2000, the Commission on Human Rights appointed a Special Rapporteur on adequate housing as a component of the right to an adequate standard of living.[64] This "new" appointment set out to build on the work of the previous rapporteur. Immediately the (new) SR set out to frame the right to adequate housing within the context of the interrelatedness of human rights and proposed a broad-reaching definition of the rights: "The human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity."[65]

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[60] The Commission on Human Rights was later replaced with the United Nations Human Rights Council in 2006 –'UN creates new human rights body' *BBC News* (15 March 2006).

[61] Sub-Commission on Prevention of Discrimination and Protection of Minorities 'The right to adequate housing' *Progress Report* E/CN.4/Sub.2/1994/20 (1994), paras 6-8 (hereafter "Sub-Commission.1994 Progress Report").

[62] Sub-Commission.1994 Progress Report, ibid, para 22.

[63] Sub-Commission.1994 Progress Report, ibid, paras 45 – 64.

[64] Commission of Human Rights 'Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights.' E/CN/4/RES2000 (2000).

[65] Commission on Human Rights 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living' E/CN.4/2001/51 (2001), para 8; The definition was inspired by the

In his second report, the SR calls for the participation of residents in the formulation and implementation of housing, land-use and planning strategies and plans.[66] The SR also placed special focus on providing access to water and sanitation to all households without discrimination on housing and land status, emphasising that "deprived urban areas, including informal human settlements and homeless persons, should have access to properly maintained water facilities."[67] Having housing with sufficient access to water and sanitation was emphasised as a gendered issue[68] and linked to access to food and health.[69]

The SR endorsed the Housing and Land Rights Monitoring Tool Kit developed by the Habitat International Coalition and Land Rights Network (Toolkit), which contains 14 elements with specific indicators under each to measure the progress of states in reaching their obligations in relation to adequate housing.[70] The Toolkit also assists in defining how to measure regression and progression. It is designed to provide a concrete way for human rights monitors to determine what loss victims suffer if their right to housing is violated, with the purpose of assisting in policy analysis, writing reports, public dissemination or even calculating

Committee on Economic, Social and Cultural Rights' previous statements, as well as by the Indian National. Campaign for Housing Rights and the Habitat International Coalition.

[66] United Nations Economic and Social Council 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living' E/CN.4/2002/59 (2002), para 45.

[67] Commission on Human Rights 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination' E/CN.4/2003/5 (2003), para 44 (hereafter "CHR 2003 report").

[68] CHR 2003 report, ibid, para 42: The use of secluded places when lacking adequate facilities at home is linked to higher rates of sexual abuse and other forms insecurity.

[69] CHR 2003 report, ibid, para 42.

[70] CHR 2003 report, ibid, para 60.

compensation. One such metric is to consider a "reduction in living space" as a risk factor for physical and emotional wellness of persons.[71]

The Toolkit refers to "space to live in dignity and peace" as an element of habitability.[72] However, habitability is sketched as a more involved concept, linking this space to requirements such as providing protection from the natural elements, protecting against structural hazards and protecting against diseases. It links habitability to principles of self-determination, where this "space" has to be evaluated using local specifics "reflecting the criteria and consent of the people that are the subject of the self-determination."[73] Where habitability meets principles of non-discrimination, it is important that there are no separate or inferior minimum standards that are arbitrarily applied to different groups.[74]

The toolkit does not require States to build on minimum standards or codes for housing, but rather determines that measures should "improve in the direction of greater justice for all and protection for those vulnerable or victim to losing their tenure."[75] The Toolkit also provides that housing configurations, spatial design and site organisation are to be determined locally and in harmony with the community's cultural preferences and attributes, under the requirement of "cultural appropriateness".[76] Finally, the Toolkit acknowledges the negative impact of over-crowdedness on physical security and privacy.[77]

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[71] Habitat International Coalition, Housing and Land Rights Network 'HIC-HLRN "ToolKit"' (2006) <http://www.hlrn.org/toolkit/English/explore/All%20Elements.pdf> (hereafter "ToolKit"), 69.

[72] ToolKit, ibid, 361.

[73] ToolKit, ibid, 372.

[74] ToolKit, ibid, 374.

[75] ToolKit, ibid, 379.

[76] ToolKit, ibid, 651.

[77] ToolKit, ibid, 1004.

In 2007, the SR continued the exercise of trying to give concrete and meaningful content to the notion of access to adequate housing.[78] He proposed using structural, process and outcome indicators when evaluating the progression of states in meeting their obligations to provide access to adequate housing.[79] He formulated indicators across four essential elements of housing: habitability, accessibility, affordability and security of tenure.[80] In terms of habitability, the SR proposed introducing the following indicators:[81]

- Proportions of habitations (cities, towns and villages) covered under provisions of building codes and by-laws (process);
- Proportion of population (persons per room or rooms per household) with sufficient living space/average number of persons per room among targeted households (outcome);
- Proportion of households living in permanent structures in compliance with building codes and by-laws (outcome).

However, the indicators were also concerned with measuring the proportion of persons with protection of security of tenure. This protection can take the form of any legally recognised means, including contractual and statutory.[82]

In his 2011 report, which focused on access to housing during disaster-relief efforts, the SR noted how post-disaster recovery has two phases: a shorter term focus towards swift

[78] United Nations Human Rights Council 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living' (A/HRC/4/18 (2007) (hereafter "UNHCR 2007 report").

[79] UNHCR 2007 report, ibid, paras 10-12.

[80] UNHCR 2007 report, ibid, para 9.

[81] UNHCR 2007 report, ibid, annex II, 28.

[82] UNHCR 2007 report, ibid, annex II, 28.

action to address the security of tenure minimally,[83] and a longer-term effort to strengthen land ownership and security of tenure on a greater scale.[84] However, the SR warns against completely disconnecting these two phases.[85] The SR speaks of experiences where transitional shelters might be required but are not structured in such a way to allow for an incremental return to permanent housing. These transitional arrangements might unintentionally divert resources, ultimately leading to persons being housed in transitional housing for much longer periods.[86]

In 2012, the SR presented a report to the Human Rights Council on security of tenure. The SR speaks of regulatory frameworks that "often fail to meet the needs of the poor or of marginalised groups, putting formalisation out of their reach and rendering them or their homes de facto illegal."[87] A trend is noted in how non-compliance with these regulatory frameworks is commonly used as justification to evict long-established communities.[88] The SR calls for recognising and recording more diverse tenure forms and rights.[89] Again, in the Guiding

[83] The Committee on Economic, Social and Cultural Rights have acknowledged that even during this first phase with temporary accommodation, that additional elements beyond safety need to be considered, such as social cohesion in the form of keeping families together – The United Nations Committee on Economic, Social and Cultural Rights 'Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 26/2018' (E/C.12/72/D/26/2018) 8 March 2023, para 9.4.

[84] United Nations General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living' A/66/270 (2011) (hereafter "UNGA 2011 report").

[85] UNGA 2011 report, ibid, para 57.

[86] UNGA 2011 report, ibid, para 59-60; United Nations General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' HRC/13/20/Add.4 (2010), para 31

[87] United Nations Human Rights Council 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' A/HRC/22/46 (2012), para 82 (hereafter "UNHRC 2012 report").

[88] UNHRC 2012 report, ibid, para 82.

[89] UNHRC 2012 report, ibid, paras 88-91; United Nations General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' A/68/289 (2013), para 67.

Principles on Security of Tenure for the Urban Poor, the principles are reiterated that "regulations aimed at protecting public health and safety and the environment or at mitigating risk for the population should not be used as an excuse to undermine security of tenure."[90] Commenting on homelessness, the SR notes in 2016 that "[m]any municipalities use planning and zoning laws or regulations to prevent construction of shelters or affordable housing in their communities" and that "[h]omeless people are often denied opportunities to live in central locations; instead, they are compelled to live in remote, isolated and poorly serviced areas where there are no jobs."[91]

On the flip side, the SR commented that cramped spaces in the home could disproportionately impact women who engage in income-generating activities from home or who are more likely to spend the day at home engaging in the gendered role of child-rearing.[92] However, this gender perspective takes a much broader view of habitability and emphasises safety in and around the home.[93] No reference is made to dwelling size when discussing habitability in the context of discrimination against differently-abled persons.[94]

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[90] United Nations Human Rights Council 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context A/HRC/25/54 (2013), para 5, principle 3.

[91] United Nations Human Rights Council 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' A/HRC/31/54 (2015) para 25. The SR continues to note in para 29 that:

> "Instead of ensuring access for people in need of housing, land regulations, planning and zoning have rendered informal settlements "illegal", favoured commercial development over housing and failed to respect the social function of land as a public good. The legacy of colonialism in some countries has embedded inequality in land and property."

[92] United Nations Human Rights Council 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' A/HRC/19/53 (2011), para 48 (hereafter "UNHCR 2011 report").

[93] UNHRC 2011 report, ibid, para 48.

[94] United Nations General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' A/72/128 (2017) para 55.

In 2012, the SR called out subsidised housing developments where location, habitability and accessibility were neglected.[95] It would be a misrepresentation to say that size was not considered in this assessment – the SR specifically criticised certain small housing in South Africa (specifically, small units of $25m^2$ or smaller, with no walls or other forms of partitions to create privacy for residents) and Chile (overcrowded units of just over $30m^2$ in Santiago with $9.3m^2$ space per person).[96] However, size was not the primary criticism (it was a footnote). The housing programme was mainly criticised for concentrating low-income families on the periphery of cities lacking access to amenities and infrastructure.[97] The SR also warns that "some countries have attempted to regulate the quality standards, but this has often resulted in a substantive increase in administrative costs owing to the institutional capacity required for monitoring and an increased backlog in housing delivery."[98]

Perhaps the most profound and informative statement from the SR on the possible tension between habitability standards and security of tenure is found in the 2018 report to the United Nations General Assembly.[99] The SR frames informal settlements as both rights violations and as rights claims by the community.[100] The SR comments that informal

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[95] United Nations General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' A/67/286 (2012), para 42 (hereafter "UNGA 2012 report").

[96] UNGA 2012 report, ibid, para 43, referring to A Gilbert 'Power, Ideology and the Washington Consensus: The Development and Spread of Chilean Housing Policy' 17 *Housing Studies* 2 (2002).

[97] UNGA 2012 report, ibid, para 42. In contrast, steps by government actors to provide amenties to distressed persons who require state housing has been used as part of a multi-factoral test to see if government housing iprogrammes are appropriate - United Nations Committee on Economic, Social and Cultural Rights 'Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in respect of communication No. 133/2019' *E/C.12/72/D/133/2019* (2019), para 8.3.

[98] UNGA 2012 report, ibid, para 43.

[99] United Nations General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' A/73/310/Rev.1 (2018) (hereafter "UNGA 2018 report").

[100] UNGA 2018 report, ibid, para 11.

settlements "are 'habitats made by people', who are creating homes, culture and community life in the most adverse circumstances."[101] Therefore, it is possible to recognise the self-realisation of the right to housing and to protect security of tenure, while simultaneously holding states responsible for creating an environment where the full host of tenets of adequacy is ultimately realised.[102] This means that *in situ* upgrades and solutions are preferred to moving communities and disrupting their social cohesion.[103] Again, the use of regulatory frameworks as a tool of destruction is denounced:

> "Planning and zoning often serve to benefit more affluent communities, investors and development interests at the expense of those in need of housing. Planning must prioritise the allocation of appropriate land, services and zoning for residential housing close to services, employment and transportation and extend services and transportation to areas where informal settlements are located."[104]

States are also encouraged to consider spatial planning as well as the colour and size of units, access to facilities and diverse religious customs as part of culturally sensitive housing developments.[105]

The various appointed SRs have focused on negotiating housing conditions and programmes with those who occupy those spaces.[106] On identifying what effective negotiation

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[101] UNGA 2018 report, ibid, para 13 quoting Lorena Zárate 'They are not 'informal settlements' — they are habitats made by people' *The Nature of Cities* (26 April 2016) <https://www.thenatureofcities.com/2016/04/26-/they-are-not-informal-settlements-they-are-habitats-made-by-people/>.

[102] UNGA 2018 report, ibid, para 23.

[103] UNGA 2018 report, ibid, para 26.

[104] UNGA 2018 report, ibid, para 40.

[105] UNGA 2018 report, ibid, para 51.

[106] United Nations General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' A/HRC/37/53 (2018), paras 61-72; United Nations General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context'

looks like, in 2019, the SR provided that there is "no one-size-fits-all" model and that the agency of communities is to be respected when the communities' internal decision-making structures are followed (but with caution to exclude disenfranchised groups within communities), and when genuine dialogue takes place.[107]

In 2020, the SR again attempted to provide more concrete process indicators for adequate housing. On this occasion, the SR provided that where forced evictions are ultimately necessary, adequate alternative housing must be provided, with adequate being "housing of a similar size, quality and cost" in "close proximity to the original place of residence."[108]

Connecting with the 2011 disaster response theme, it is unsurprising that the General Assembly report of 2020 shifted focus to Covid-19 and housing. The SR notes that the Covid-19 pandemic has caused a re-evaluation of the functions of a home and that thinking of the home as a space for education and work has become normalised.[109] While the SR does not expand on this idea, it appears that inherent in this reimagining is the understanding that those new functions require space.

However, in a paradigm-shifting move, the SR remarks that Covid-19 exposed the existing fault lines in housing provision worldwide and that -

A/72/128 (2017), para 42-42; United Nations General Assembly 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' A/66/270 (2011), para 5; United Nations Economic and Social Council 'Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context' E/CN.4/2003/5 (2003), 47;

[107] United Nations General Assembly 'Adequate Housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context' A.73/183 (2019), para 56.

[108] Human Rights Council 'Guidelines for the Implementation of the Right to Adequate Housing" A/HRC/43/43 (2020), para 38(b).

[109] United Nations General Assembly 'Covid-19 and the right to adequate housing' A/75/148 (2020), para 57 (hereafter "UNGA 2020 report").

> "[a]dequate housing must not only be seen as having minimum standards, but also maximum standards, especially in the context of climate change, which calls into question spatially wasteful and excessive housing design and human settlements. It is dramatically obvious that too many people lack access to safe and adequate housing, and responses to the pandemic must be based on a recognition of that reality."[110]

The SR goes on to note that, between 2015 and 2022, the gross floor area of buildings increased by almost 10 %.[111] Importantly, the SR states:[112]

> "The increase in floor area per capita is driven by the increase of the size of dwellings and a decrease in the size of households, especially in developed countries. In general, larger households tend to have lower per capita greenhouse gas emissions, due to the sharing of living space and resources. It is predicted that the average global household size will fall from 4.0 persons (1990) to 2.5–3.0 in 2030 and to 2.0–2.8 in 2050, with single-person households expected to become the most prevalent by 2030. Studies have shown that changes in household size between 1995 and 2015 have caused approximately 11.3 gigatons of additional carbon dioxide equivalent. The globalisation and imposition of a western model of housing has been detrimental to the development of more localized housing solutions that are culturally and place appropriate."[references omitted.]

The SR recommends that, in order to ensure the adequacy of housing, environmental sustainability is a key factor, and that adequate housing should "not only entail minimum floor sizes per person, but also maximum floor sizes."[113] This is the most definite discussion on the

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[110] UNGA 2020 report, ibid, para 9.

[111] United Nations Human Rights Commission 'Towards a just transformation: climate crisis and the right to housing – Report of the special rapporteur on the right to adequate housing' A/HRC/52/28 (2022), para 36 (hereafter "UNHCR 2022 report") citing the UNEP, 2021 Global Status Report for Buildings and Construction, (2021), 13 & 29.

[112] UNHCR 2022 report, ibid, para 37.

[113] UNHCR 2022 report, ibid.

issue of size and adequacy from the SR, and it leaves much to be desired. Little is said to encourage States to rethink building regulations and codes that embody arbitrary minimum size requirements, and alternative housing solutions are not linked to this discussion. The idea of capping house sizes is a major shift in thinking, but even this suggestion is left with almost no guidance.

In the 2022 report to the Human Rights Council, the SR warned against regulatory measures which lead indirectly to spatial segregation.[114] The SR also calls on States and local governments to "pay more attention to urban policies, such as building or zoning regulations or urban renewal policies that may at first glance look non-discriminatory, but entrench spatial segregation, exclusion and housing discrimination."[115] The SR cites examples from the United States – similar to the discussion in Chapter 2 - where regulations were used to block tiny housing.[116]

3.2.3. African regional law

While the African Charter on Human and Peoples' Rights does not contain an express right to housing, the protection of access to adequate housing has been incorporated through the jurisprudence of the African Commission on Human and Peoples' Rights (ACHPR). In the 1996 matter of *SERAC v Nigeria*, the ACHPR considered an allegation by a Non-Governmental Organisation in Nigeria that certain activities by oil corporations, amongst others, destroyed homes.[117] The ACHPR decided that the right to adequate housing is a natural culmination of

[114] Human Rights Council 'Spatial segregation and the right to adequate housing' A/HRC/49/48 (2022) (hereafter "HRC Report 2022").

[115] HRC Report 2022, ibid, para 76.

[116] HRC Report 2022, ibid, para 33.

[117] *The Social and Economic Action Centre and the Centre for Economic and Social Rights v Nigeria* 155/96 ACHPR ("SERAC case").

the right to property,[118] the right to the highest attainable standard of mental and physical health[119] and the protection of the family as a basis of society.[120]

In 2010, the ACHPR published the Principles and Guidelines to Interpret Economic, Social and Cultural Rights in Africa (Principles and Guidelines),[121] which confirmed the reading in *SERAC v Nigeria* that the right to housing is included in a joint reading of these other rights. The Guidelines and Principles elaborate that the right includes gaining and sustaining a home and a community with access to natural common resources, including energy for household tasks.[122]

The Principles and Guidelines identified a minimum core obligation for this implied right, namely to provide security of tenure to all, including those who do not have a formal title to their home. It also speaks to comprehensive reviews of national plans, policies and systems to meet the needs of all categories of persons. Specifically, it speaks to ensuring the "habitability of housing, including providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, including violence, structural hazards and disease vectors," but mindful to ensure that "housing is affordable and that the attainment and satisfaction of other basic needs are not threatened or compromised by

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[118] African Charter on Human and Peoples' Rights, article 14 (hereafter "ACHPR").

[119] ACHPR, ibid, article 16.

[120] ACHPR, ibid, 18(1). SERAC case (n115 above), para 60:

> "Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing."

[121] African Commission on Human and Peoples' Rights 'Principles and Guidelines to Interpret Economic, Social and Cultural Rights in Africa' (2010) (hereafter "ACHPR 2010 Principles and Guidelines").

[122] ACHPR 2010 Principles and Guidelines, ibid, item 78.

the costs of housing."[123] It continues by mandating States to ensure that housing developments allow access to employment, health care services, schools, child-care centres and other social facilities.[124] The Principles place focus on ensuring that housing and building materials are culturally acceptable and appropriate.[125] There is also a focus on ensuring that access to adequate housing is enabled regardless of status, which inevitably will have to speak to single individuals (especially women) being adequately considered in national housing policies.[126]

The ACHPR also explicitly views access to adequate housing as an underlying determinant of health[127] and considers social programmes aimed at providing housing as a dimension of the right to family.[128] No specific reference to size requirements is made in these contexts.

3.3. ADEQUATE HOUSING IN SOUTH AFRICAN CONSTITUTIONAL LAW

Housing in South Africa should be seen through the historical dispossession of housing and land faced by Black South Africans under the apartheid regime. Forced, violent and arbitrary evictions were commonplace, with at least 3.5 million black South Africans forcibly evicted between 1960 and 1983 and displaced to locations removed from access to economic opportunities.[129] After facing eviction, families were forced to live in overcrowded conditions

[123] ACHPR 2010 Principles and Guidelines, ibid, item 79(i)-(j).

[124] ACHPR 2010 Principles and Guidelines, ibid, item 79(k).

[125] ACHPR 2010 Principles and Guidelines, ibid, item 79(l).

[126] The Principles and Guidelines speak specifically to ensuring single women and widows should also be appropriately compensated where their right to housing is violated.

[127] ACHPR 2010 Principles and Guidelines, ibid, item 63.

[128] ACHPR 2010 Principles and Guidelines, ibid, item 95(d).

[129] K Robinson 'False Hope or Realizable Right? The Implementation of the Right to Shelter under the African National Congress' Proposed Bill of Rights for South Africa' (1993) 28 *Harvard Civil Rights-Civil Liberties Law Review* 2, 508.

without access to basic services.[130] Section 26 of the 1996 Constitution is a response to this past and is designed to transform the housing landscape into one of dignity and equality. It reads:

> " (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."

The Constitutional Court has emphasised that the right to housing is interlinked and interdependent with other socio-economic rights and with the values of human dignity, equality and freedom.[131] The Court noted that, unlike in international instruments such as the ICESCR, which guarantees the right to adequate housing, section 26 goes even further by guaranteeing a right to access adequate housing.[132] However, the Court has not found it appropriate to determine what the minimum core of the right entails in the context of the Constitution.[133]

As is clear from the wording in section 26(2), the State must realise the right of access to adequate housing through legislation and other means. This will be discussed in detail in chapters 5 and 6. However, by way of a short summary, the State's duty to provide housing spans the three levels of government (national, provincial and local), and several national laws and policies have been implemented to give effect to this obligation.

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[130] Robinson, ibid, 509.

[131] *Government of the Republic of South Africa and Others v Grootboom and Others* (CC) 2001 (1) SA 46, para 19, 23-4 (hereafter "*Grootboom*").

[132] *Grootboom*, ibid, para 35.

[133] *Grootboom*, ibid, para 33.

3.3.1. South African Case Law

3.3.1.1. The first developments of "adequacy": a measure beyond the walls of the dwelling

The first Constitutional Court case to deal with the substance of the right to access adequate housing was *Government of the Republic of South Africa and Others v Grootboom.* Mrs Grootboom and other members of her community were evicted from their informal homes situated on private land.[134] In her founding affidavit to the Western Cape High Court, Mrs Grootboom detailed her living conditions at their initial living site: Mrs Grootboom, her husband, their child, and five family members lived in an informal structure of approximately 20m^2. The structure provided no privacy. The other respondents also suffered from regular waterlogging. This housing was demolished and burnt by the police. Mrs Grootboom and her community moved to a sports field and erected structures made of plastic and other materials, which fell grossly short of basic shelter.[135]

Much was said in the High Court judgment about the difference between shelter and housing – shelter being "a significantly more rudimentary form of protection from the elements than is provided by a house."[136] This was relevant as the High Court did not find a relief based on section 26 – it was convinced that the government had a rational housing plan and severe resource constraints - but based on the children's constitutional right to shelter, which must of necessity be extended to their parents.[137] The High Court identified the basic elements of shelter, in this case, to include provision of pit latrines, tents and a regular water supply. The Court also commented that the convenience of the relocated group and the proximity to existing

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[134] *Grootboom,* ibid, para 4.

[135] *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C), 281-2 (hereafter "*Grootboom HC*").

[136] *Grootboom HC*, ibid, 289 D.

[137] *Grootboom HC*, ibid, 287 H.

jobs were factors to be considered but that the "immediate interests regarding location may have to yield to other constraints."[138]

The case was appealed to the Constitutional Court. In a well-known passage, the Constitutional Court noted that access to adequate housing -

> "entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society."

The Court also commented that the State had an obligation towards persons who can afford to pay for housing by facilitating sufficient housing stock and creating a legislative framework to facilitate self-built houses through planning laws and access to finances.[139] This access is context-specific and will differ if the housing, for example, is rural instead of urban.[140] Importantly, the court emphasised that housing policy should be responsive to social, economic and historical context and should consider the housing crisis through short, medium and long-

[138] *Grootboom HC*, ibid, 295 B.

[139] *Grootboom* (n131 above) para 35.

[140] *Grootboom* (n131 above) para 36.

term lenses.[141] Housing policy should, therefore, not be viewed as static but be ever-changing.[142]

The Court also commented on the potential difference between temporary and permanent housing solutions. It referred to the Housing Act[143] and its definition of housing development, which includes providing permanent structures with internal and external privacy and convenient access to economic opportunities and to health, educational and social amenities.[144] Of temporary solutions, it commented that –

> "there is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the Act."[145]

The State, therefore, also had a duty to provide short-term housing solutions for persons in desperate need.[146] Four years later, in *City of Cape Town v Rudolph*, the City of Cape Town was sanctioned for failing to implement an emergency housing programme despite this finding in *Grootboom*.[147]

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[141] *Grootboom* (n131 above) para 43.

[142] *Grootboom* (n131 above) para 43.

[143] 107 of 1997.

[144] *Grootboom* (n131 above) para 51.

[145] *Grootboom* (n131 above) para 52.

[146] *Grootboom* (n131 above) para 66.

[147] 2004 (5) SA 39 (C), 84 D.

In *Port Elizabeth Municipality v Various Occupiers*,[148] a small group of people erected shacks on privately owned land. They indicated that they would leave the private property should they be provided with alternative and suitable housing. They rejected the first alternative suggested by the municipality due to the conditions of overcrowding and a lack of safety at the proposed site.[149] They rejected the second because it was too far from their places of employment and their children's schools.[150] The municipality applied for an order to evict the people.

The Constitutional Court stated that the right to access to adequate housing acknowledges that –

> "a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat."[151]

The Court considered the interplay between the rights to property and to housing and said that the stronger the right to the land, the greater the prospect of a secure home. Therefore, it held, there is a need to "strengthen the precarious position of people living in informal settlements".[152] The Court also spoke of the need to interpret section 26(3), and, arguably, the

[148] 2005 (1) SA 217 (CC) ("*PE Occupiers*").

[149] *PE Occupiers*, ibid, para 2.

[150] *PE Occupiers*, ibid, para 52.

[151] *PE Occupiers*, ibid, para 17.

[152] *PE Occupiers*, ibid, para 19.

rest of section 26, in case-specific and concrete ways without being overly prescriptive and mindful of the purpose of the broad language used by the constitutional drafters.[153]

The Court provided that "a distinction could be drawn between occupation with the landowner's consent but involving structures that do not meet by-law requirements, a health hazard, and occupation in the face of landowner opposition."[154] However, it is unclear from the rest of the judgment how these different circumstances should be weighted except to indicate that occupiers who plausibly believe that they are allowed to live in a space would evoke more sympathy from courts.[155]

The Court found in favour of the occupants. Specifically, it criticised the municipality for not reasonably engaging with the occupiers' concerns about the two proposed and rejected sites. The Court said that municipalities must understand "that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country."[156]

The Court also spoke in approving terms of self-made housing and the exercise of agency by the participants in developing innovative housing:[157]

> "Thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a

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[153] *PE Occupiers*, ibid, para 22. In para 31, the Court says:

> "Each case accordingly has to be decided not on generalities but in the light of its own particular circumstances. Every situation has its own history, its own dynamics, its own intractable elements that have to be lived with (at least for the time being), and its own creative possibilities that have to be explored as far as reasonably possible."

[154] *PE Occupiers*, ibid, para 26.

[155] *PE Occupiers*, ibid, para 26.

[156] *PE Occupiers*, ibid, para 56.

[157] *PE Occupiers,* ibid, para 41.

> stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. The tenacity and ingenuity they show in making homes out of discarded material, in finding work and sending their children to school, are a tribute to their capacity for survival and adaptation. Justice and equity oblige them to rely on this same resourcefulness in seeking a solution to their plight and to explore all reasonable possibilities of securing suitable alternative accommodation or land."

Boggenpoel and Mahomedy suggest that *Grootboom* and the *PE Occupiers* indicate a movement away from the "extremely limited" focus on the physical dimensions of a house, towards a construct of housing that is imbued with social, cultural, psychological and emotional factors.[158]

3.3.1.2. Adequacy as a standard to preserve dignity

The Constitutional Court took great care to formulate its judgment in *Grootboom* within the context of the pursuit of equality and dignity. In the very first paragraph of the judgment, the Court highlights:

> "The Constitution declares the founding values of our society to be "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms." This case grapples with the realisation of these aspirations, for it concerns the state's constitutional obligations in relation to housing."[159]

[158] ZT Boggenpoel & S Mahomedy 'Reflecting on Evictions and Unlawful Occupation of Land in South Africa: Where Some Gaps Remain' (2023) 23 *Potchefstroom Electronic Law Journal* ' 1, 22.

[159] *Grootboom* (n131 above) para 83.

It continued:

> "The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings."[160]

The Court's insight here shows a positive, essential relationship between dignity and adequacy. There can be no adequacy without regard to the dignity of the occupants, and the disregard of other rights and concerns of housing occupants would rob them of their humanity and transform them into mere vessels to be placed in buildings.

In *Dladla and Others v City of Johannesburg and Another,*[161] dignity in housing was an issue before the Court. The City of Johannesburg provided temporary accommodation for persons previously evicted from private property. The accommodation was provided by way of contractual arrangement with an evangelical group, that required occupants to live in separate dormitories based on sex, and prohibited residents from being inside the Shelter from 8h00 to 17h30 every day, with the gates of the Shelter being locked again at 20h00.[162] The City described this arrangement as a "managed-care policy" intended to facilitate the transition from

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[160] *Grootboom* ((n131 above) para 83.

[161] 2018 (2) SA 327 (CC) (hereafter "*Dladla*").

[162] *Dladla*, ibid, para 3.

homelessness to independence.[163] The effect of this rule was prejudicial on several grounds: night workers could not rest during the day, persons could not recuperate from medical procedures, and families were separated. The City effectively argued that temporary accommodation entitled the occupants to a lesser suite of constitutional rights.

The High Court found this arrangement unconstitutional, finding that this separation of families "cut to the very heart" of the right to dignity.[164] On appeal, the Constitutional Court effectively shut down the argument that housing can be provided to constitutional standards without due concern for the dignity of the housed:

> "The argument, reiterated several times by the City, that the Shelter does not constitute a "home", and therefore the applicants had diminished expectations with respect to dignity, freedom and security of the person, and privacy is without merit. Just because the Shelter does not constitute a home in the everyday, colloquial sense of the term does not mean that the applicants are not entitled to the protection of their fundamental constitutional rights."[165]

There was a divergence in whether the constitutionality of the lock-out rules could be assessed independently from the right to housing, or whether the rules also had the effect of rendering them constitutionally "inadequate". Although, Cameron J – who delivered a minority judgment – commented that:

> "The provision of housing entails not only the delivery of a building or tent. The conditions the state attaches to the accommodation are part of its provision. Therefore, any rules the Shelter

[163] *Dladla*, ibid, para 11.

[164] *Dladla,* ibid, para 19.

[165] *Dladla*, ibid, para 43.

implemented to regulate the conduct of its inhabitants necessarily informed the adequacy of the housing it was providing."[166]

In *Beja and Others v Premier of the Western Cape and Others*,[167] the City of Cape Town approved the upgrading of Silvertown Khayelitsha. It used undeveloped sites nearby to accommodate all the residents.[168] Unenclosed toilets were built as part of the development, close to public thoroughfares.[169] The City met with the community and indicated that the toilets had to be enclosed by the community themselves and claimed in the Court that no objections were registered. The unenclosed toilets impacted residents who did not have their own toilets and disproportionately impacted women.[170]

In an important statement on how communal interests cannot be used as a justification to override individual rights to dignity, the Court said:

> "A collective agreement of this nature, alleged by the City, *cannot amount to a waiver of individual fundamental rights to dignity and privacy*. These rights are of a fundamentally, individual nature, and in this regard the objects of the constitution would be subverted if a majority group within a community, even an overwhelming majority within a community, could agree to a program from which they stood to gain, even in circumstances where that program violated the fundamental rights to dignity and privacy of a small and vulnerable minority within that community." [171] [own emphasis added.]

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[166] *Dladla*, ibid, para 57.

[167] (2011) (10) BCLR 1077 (WCC) (hereafter "*Beja*").

[168] *Beja,* ibid, para 11-2.

[169] *Beja,* ibid, para 29.

[170] *Beja*, ibid, para 102.

[171] Beja, ibid, para 101.

The High Court found that the provision of unenclosed toilets violated a host of constitutional rights, as well as the Regulations Relating to Compulsory National Standards and Measures to Conserve Water.[172]

In *Daniels v Scribante*,[173] an occupant on a farm who enjoyed occupation under the Extension of Security of Tenure Act (ESTA)[174] lived in a dwelling which was not maintained and where the landholder had cut off basic amenities. The occupant intended to make basic improvements, maintain the property, and ensure access to water and communicated such intention.[175] The owner sought to block such improvements, asserting his property rights.[176]

The Court held that the very security of tenure is at stake when occupants are expected to live in inhumane conditions:[177]

> "The occupier's right to reside must be consonant with the fundamental rights contained in section 5 [of ESTA], particularly for present purposes – the right to human dignity. Put differently, the occupation is not simply about a roof over the occupier's head. Yes, it is about that. But it is about more than just that. It is about occupation that conduces to human dignity and the other fundamental rights."

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[172] *Beja,* ibid, para 149.

[173] 2017 (4) SA 341 (CC) (hereafter "*Daniels*").

[174] 62 of 1997.

[175] *Daniels* (n173) paras 4-7.

[176] *Daniels* (n173) para 37.

[177] *Daniels* (n173) para 31.

The *Daniels* Court linked dignity, both with the habitability of a house – formulated here in terms of amenities, as well as with security of tenure. The court also directly linked habitability with security of tenure:[178]

> "If you deny an occupier the right to make improvements to the dwelling, you take away its habitability. And if you take away habitability, that may lead to her or his departure. That, in turn, may take away the very essence of an occupier's way of life. Most aspects of people's lives are often ordered around where they live. Roisman puts it thus:
>
> > 'Security of tenure is fundamentally important because it is the basis upon which residents build their lives. It enables people to invest financially, psychologically, and emotionally in their homes and neighbourhoods. It provides depth and continuity for children's school attendance and for the religious, social, and employment experiences of children and adults. Security of tenure enables tenants 'to fully participate in social and political life'."

3.3.1.3. Security of tenure as a crucial factor to dignity and adequacy

In *Occupiers of 51 Olivia Road v City of Johannesburg,*[179] 400 people were evicted from a building in inner city Johannesburg that was deemed by the municipality to be unsafe and unhealthy.[180] The constitutionality of the City's housing programme was also challenged more broadly. The Constitutional Court ordered that the parties engage meaningfully with one another "in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned" and "in an effort to alleviate the plight of the applicants who live in the two buildings concerned in this application by making the

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[178] *Daniels*, ibid, para 33 citing FW Roisman 'The Right to Remain: Common Law Protections for Security of Tenure' (2008) 86 *North Carolina Law Review*, 820.

[179] *Occupiers of 51 Olivia Road, Berea Township, And 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) ("*Olivia Road*").

[180] *Olivia Road*, ibid, para 1.

buildings as safe and as conducive to health as is reasonably practicable."[181] The premise of this order was sourced from the constitutional value of human dignity and an understanding of the importance of procedural fairness.[182]

An argument by the City that reasonable engagement is not possible in all circumstances was rejected by the Court, which criticised the City's development of housing programmes without building in participation and consultation with affected persons.[183] The Constitutional Court emphasised the agency of people who are affected by the housing crisis. It warned that "[p]eople in need of housing are not, and must not be regarded as a disempowered mass" but should instead "be encouraged to be pro-active and not purely defensive. "[184] This leads back to the comments in the *PE Municipality*, case where the Constitutional Court spoke in approving terms of self-realisation of housing and innovation in the face of unaffordability in the existing housing space.

Concerning orders to vacate buildings for health and safety reasons, the Constitutional Court commented that:

> "It is common cause that the City in making the decision to evict the people concerned took no account whatsoever of the fact that the people concerned would be rendered homeless. This is regrettable. Municipal officials do not act appropriately if they take insulated decisions in respect of different duties that they are obliged to perform. In this case the City had a duty to

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[181] *Olivia Road*, ibid, para 5. In *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323, para 44, the Court also emphasises the need to engage with affected parties providing that:

> "What [cases concerning substantive involvement and engagement of persons] have enabled us to appreciate is, first, the interrelation between different rights and interests and second, that the exercise of these often competing rights and interests can best be resolved by engagement between the parties."

[182] *Olivia Road*, ibid, paras 10-12.

[183] *Olivia Road*, ibid, para 19.

[184] *Olivia Road*, ibid, para 20.

> ensure safe and healthy buildings on the one hand and to take reasonable measures within its available resources to make the right of access to adequate housing more accessible as time progresses on the other."[185]

In this, we see the possible interplay of security of tenure as a tenant of adequacy, which can outweigh habitability considerations. This appears, especially, as the duty to make adequate housing available is seemingly viewed by the Constitutional Court as one that the State needs to effect while preserving the housing status of occupants.

As Wilson notes, the *Olivia Road* judgment shows that obligations under planning and health regulations must be viewed alongside the State's duty to provide reasonable housing and that it is "not acceptable to adopt a manner of enforcing planning regulations which are at odds with the municipal duty to prevent homelessness."[186] The agency of people and the protection of tenure can trump a paternalistic view of the government that housing is inadequate. Meaningful engagement is the tool through which the community views on adequacy will be determined and weighted against the threat of homelessness.

In *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal*,[187] the representatives of a voluntary association representing thousands of persons residing in up to seventeen informal settlements in KwaZulu-Natal challenged the constitutionality of the provincial Elimination and Prevention of Re-Emergence of Slums Act.[188] The challenge related, mostly, to the powers of national and provincial legislatures –

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[185] *Olivia Road*, ibid, para 44.

[186] S Wilson, 'Planning for inclusion in South Africa: The state's duty to precent homelessness and the potential of "meaningful engagement' (2011) 22 *Urban Forum* 3, 265.

[187] 2010 (2) BCLR 99 (CC) (hereafter "*Abahlali"*).

[188] *Abahlali*, ibid, paras 1–3.

the applicants alleged the act dealt with land tenure (a national power) and not housing (concurrent in national and provincial).[189]

The majority judgment found that informal settlements (and slums) house "people who live on the margins of our society in squalid conditions […] without adequate infrastructure or secure tenure."[190] However, mindful of these sub-par circumstances, an evaluation of public interest, alternative resorts and meaningful engagement with the community is still required before discretion can be exercised as to whether or not to evict them.[191] This position stands in contrast with the minority decision, which found that evictions from "slums" could, and had to occur as a matter of course, without a judicial evaluation of these factors.[192]

Chenwi hails the majority decision in *Abahlali* as a reminder to the government to approach the challenge of housing in informal settlements in a pro-poor manner with appropriate recognition of people's existing circumstances.[193]

Pieterse comments that *Olivia Road* and *Abahlali,* amongst others, show that where habitability (health, safety, space) falls short of adequacy, but the alternative is homelessness, the courts "more often than not, in line with the status-quo-preserving tendency of the defensive invocation of negative rights" will act to preserve security of tenure.[194]

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[189] *Abahlali*, ibid, para 4.

[190] *Abahlali*, ibid, para 88.

[191] *Abahlali*, ibid, para 98.

[192] *Abahlali*, ibid, para 39.

[193] L Chenwi 'Slums act unconstitutional' (2009) 10 *ESR Review* 4, 14.

[194] M Pieterse 'Balancing Socio-economic Rights: Confronting COVID-19 in South Africa's Informal Urban Settlements' (2021) 39 *Nordic Journal of Human Rights* 1, 44.

In *Mpange v Sithole*,[195] the High Court was called to consider remedies for "tenants who are confronted with two equally unpalatable alternatives: on the one hand, homelessness and the other hand, residence in an unsafe and inadequate building for which they are paying rental".[196]

The applicants rented rooms from a landlord which did not allow for privacy, contained illegal and unsafe electrical connections and had insufficient and unhygienic sanitation facilities. Refuse accumulated, and the walls and windows were broken. The rooms were in a state of general decay and disrepair.[197] Among the undesirable elements of the house occupied by 113 tenants were: The use of board partitions only between rooms which compromised privacy; only two bathrooms with no fixed doors, and urine on the floor; uncollected refuse; lack of lighting; exposed electrical cables; a single water tap; and broken windows.

The Court considered the landlord's failure to maintain the property as a breach of the applicant's right to access adequate housing. It allowed for the remedy of reduction of rental.[198] The landlord rented out a warehouse and made little effort to transform the building into residential property, with no formal installation of amenities such as water or electricity. The Court provided that, where a landlord attempts to provide habitable accommodation, "he must at the very least ensure that municipal connections are available to those who will pay for water and electricity and that the municipality will provide same."[199]

The Court acknowledged the applicant's dilemma in the trade-off between seeking improved safety and health, and losing housing, stating that in this case, "[t]he only other option

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[195] 2007 (6) SA 578 (W) ("*Mpange*").

[196] *Mpange*, ibid, para 1.

[197] *Mpange*, ibid, para 7.

[198]Mpange ibid, para 89.

[199] Mpange ibid, para 31.

available to these applicants would appear to be homelessness living in the bush, on a pavement or some construction in a squatter camp – now euphemistically known as 'an informal settlement'."[200] The Court granted a rent reduction aimed at relieving the applicants, to an extent, without removing them from their shelter, despite the lack of habitability of the structure.

3.3.1.4. The threshold for the lack of habitability in adequacy

However, there have been instances where courts held that concerns over the habitability of housing can be sufficiently severe so as to warrant relocation.

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others*,[201] the City of Cape Town targeted the Joe Slovo informal settlement for reconstruction. This was due to unsafe and unhealthy living conditions. The settlement was prone to fires that previously led to the loss of lives and substantial property damage.[202] The City took steps to provide residents with basic amenities such as tap water, toilets, refuse removal, roads, and electricity and also took steps to formalise residence by designating house numbers.[203] However, these steps were insufficient, and conditions of overcrowding, unsafe building materials (which led to the fires) and lack of adequate sewerage created inhuman living conditions.[204] The City, therefore, targeted the Settlement for reconstruction.

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[200] Mpange ibid, para 34.

[201] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others (Centre On Housing Rights And Evictions And Another, Amici Curiae)* 2010 (3) SA 454 (CC) (hereafter "*Joe Slovo*").

[202] *Joe Slovo*, ibid, para 22.

[203] *Joe Slovo*, ibid, para 20.

[204] *Joe Slovo*, ibid, paras 23-4.

Initially, the community and City worked together to phase in the construction of new homes. Still, the residents of the Settlement became dissatisfied that the rental for the newly constructed homes would be more expensive than negotiated, that the new development contained fewer housing units for the lowest income individuals and that units were disproportionately allocated to people who did not already live in the Joe Slovo Settlement.[205]

The breakdown of the relationship led to the City pursuing eviction proceedings. One of the grounds that the city alleged for the unlawfulness of the occupancy was that the structures in the informal settlement did not comply with building regulations.[206] The residents alleged that the City's provision of services and previous tolerance of their occupation and negotiations indicated that the City had tacitly consented to their occupation.[207] Langa CJ rejected that the provision of services to vulnerable people automatically implied consent to occupation, instead holding that it simply amounted to the City performing its constitutional duty towards the residents of the Settlement.[208] The remainder of the Court accepted that consent was provided but found that it was later revoked.[209]

In his judgment, Langa CJ considered the temporary relocation units (TRUs) which would be provided to residents before being accommodated in the new development:

> "All the families to be relocated will be provided with alternative accommodation at the state's expense. This alternative accommodation is situated […] about 15 kms away. Each family will occupy a TRU which is at least 24m², which will probably be provided with electricity, and the

[205] *Joe Slovo*, ibid, paras 30-4.

[206] *Joe Slovo*, ibid, para 40.

[207] *Joe Slovo*, ibid, para 41. Moseneke DCJ disagreed with the characterisation of the applicant's argument to be that the provision of services amounted to consent, (para 154).

[208] *Joe Slovo*, ibid, para 78,

[209] *Joe Slovo*, ibid, para 280

> walls and roofs of which will be constructed of synthetic protective material. This material is fire-resistant. This will mean that the frequent deaths and destruction caused by fire in the Joe Slovo settlement will be averted. Each TRU will have access to ablution facilities that will be provided with water-borne sewerage and from which fresh water will be available. It is probable that much of this temporary accommodation will be at least in physical terms better than that at Joe Slovo. It is certainly more hygienic and less dangerous."[210]

Langa CJ also acknowledged the hardship of relocation but found that, "[t]here are circumstances in which there is no choice but to undergo traumatic experiences so that we can be better off later."[211] The interplay between access to amenities (here, location) and other factors of adequacy like safety and hygiene had to be considered. In this case, the trade-off between the increased distance to schools and workplaces, and the looming presence of health and fire hazards, were mitigated by the provision of transport by the City.[212]

However, the Court was critical of the City's exclusive "bricks and mortar approach" to housing provision (a reference to *Grootboom*),and indicated that more extensive consultation with the community would have been preferable.[213] The Court upheld the original eviction order and stated that in the present circumstances "eviction constitutes a measure to ensure the progressive realisation of the right to housing within the meaning of section 26(2) of the Constitution".[214]

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[210] *Joe Slovo*, ibid, para 104.

[211] *Joe Slovo*, ibid, para 106.

[212] *Joe Slovo*, ibid, para 106.

[213] *Joe Slovo*, ibid, para 112.

[214] *Joe Slovo*, ibid, para 114.

Ncgobo CJ commented on, amongst other issues, the spacing of housing in informal settlements and indicated that –

> "Space in these areas is at a premium. There is no infrastructure. Dwellings are not built according to municipal or building laws. Plots are arbitrarily drawn. The areas are invariably densely populated. There is no space left for community services. The layout makes installation of basic services either expensive or impossible. The dwellings are poorly built. The dwellings are largely unhygienic. They present fire risks. Indeed, fires are a common occurrence in these areas, with devastating effects on the residents. Residents of Joe Slovo have had at least three fires which left most residents homeless. As the dwellings in informal settlements are very close to each other, and some are attached to each other, when one dwelling catches fire, the rest of the settlement faces the risk of catching fire. Given the narrow access ways, many people find it difficult to escape the fires. Death in such fires occurs far too often. Firefighters find it difficult, if not impossible to access the area. The result is that the entire settlement faces the risk of being razed to the ground."[215]

This statement identifies some of the elements that "roominess" or "adequate space" can also improve, i.e. reducing the risk of building fires, improving access to emergency services and accessible exits in emergencies, and allowing space for community services. Ncgobo CJ also stressed the importance of meaningfully engaging with the community and endorsed a statement by a government official acknowledging the need for a "communication and engagement strategy agreed and implemented by all three spheres of government to ensure optimal community awareness and support for the project."[216]

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[215] *Joe Slovo*, ibid, para 197.

[216] *Joe Slovo*, ibid, para 242.

However, the Court still held the dignity of secure housing was an imperative consideration. Sachs J commented on the value of security of tenure that the families –

> "[a]cquiring a dignified house […] would represent more than getting a secure roof over their heads and access to water and electricity. It would mark an end to their life as permanent itinerants with a sword of eviction perpetually hanging over their heads. It would symbolise a degree, hitherto denied to them, of being accepted as members of organised civic society. However humble the home, it would be their own. The moral quality of their citizenship in terms of public acknowledgement and self-esteem, would be notably enhanced."[217]

Wilson and Dugard lament that the *Joe Slovo* judgment speaks to a more significant trend in Constitutional Court decision-making whereby the Court does not want to deepen the interests protected in socio-economic rights and thereby fails to give content to such rights.[218] They point to the comments by Moseneke DCJ about the "inconvenience" of relocation and held that the Court misunderstood the right to adequacy of housing as favouring "better constructed housing" over access to jobs, livelihoods, education and health care.[219] This dichotomy between a specification of housing that, in isolation, is valued as adequate and the real multi-factorial assessment that housing requires is also a feature of the tiny housing debate, where a size trade-off for access to other components of adequacy occurs.

In *City of Johannesburg v Changing Tides*,[220] a private company obtained an industrial building which people had already occupied unlawfully, or as the judgment refers to it: the

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[217] *Joe Slovo*, ibid, para 387.

[218] S Wilson & J Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' (2011) *Stellenbosch Law Review* 3, 679.

[219] Wilson and Dugard, ibid, 679.

[220] 2012 (6) SA 294 (SCA) (hereafter "*Changing Tides"*).

building was "hi-jacked".[221] The building was a health and fire hazard, and the City notified the company to comply with the National Building Regulations and city health by-laws. The Supreme Court of Appeal held that:

> "Where, as here, the occupiers are living in conditions of the utmost squalor at the risk of their lives and health, the court should be concerned that the process is expedited so that they are moved away from that situation as soon as possible."[222]

In removing people from a building which the court-described "death trap", the Court said, "infusing grace and compassion into the process of eviction does not mean that an eviction should be postponed for as long as possible, but may mean that it should take place expeditiously."[223] The Court ordered the City to obtain more information on the occupants, so as, amongst others, to enable choosing a suitable location for alternative accommodation.

In *Pheko and others v Ekurhuleni Municipality*,[224] a community was relocated in terms of the Disaster Management Act,[225] after the local authority declared a local state of disaster concerning dolomite instability (high risk of dangerous sinkholes).[226] The High Court ruled in favour of the municipality and stated that the evacuation (not eviction, in their view) was compliant with the law.[227]

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[221] *Changing Tides,* ibid, para 2.

[222] *Changing Tides,* ibid, para 54.

[223] *Changing Tides*, ibid, para 54.

[224] 2012 (2) SA 598 (CC) (hereafter "*Pheko*").

[225] 57 of 2002.

[226] *Pheko* (n224 above) paras 5-8.

[227] *Pheko* (n224 above) para 15.

In the Constitutional Court, it was held that the municipality had "a duty to protect [the occupants] life" and could not "let [the occupants] stay in a danger zone where they can be swallowed by the earth as it is."[228] However, the facts of the case dictated that an eviction occurred, and that a formal court process was required where the equity of an eviction – even in such circumstances – is considered. In this case, the municipality had a duty to identify suitable alternative accommodation to speak to such equity, and the Court provided a supervisory interdict which provided prescriptions that were more extensive than seen in previous cases: the Municipality was to identify land near the previous settlement and where the applicants would have the same level of amenities.[229]

An important point to note is that in all the cases where courts accept eviction based on habitability concerns, alternative accommodation was either available or to be provided. No doubt, where a policy would cause homelessness, or hinder access to components of adequacy like access to amenities, without alternative recourse, the level of scrutiny would be even higher. Even in *Schubart Park Residents' Association v City of Tshwane*,[230] where residents were removed from a "life-threatening" building that was on fire at the time of the removal, the Constitutional Court affirmed their right to re-occupation at a future date. The Court stated that "[the previous occupants] inherent right to dignity entitle[d] them to return to their homes absent a court order for their eviction", of which such an order was not present.[231]

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[228] *Pheko* (n224 above) ibid.

[229] *Pheko* (n224 above) para 53.

[230] 2013 (1) SA 323 (CC) (hereafter "*Schubart Park*").

[231] *Schubart Park*, ibid, para 49.

However, a small number of reported cases exist where even the lack of alternative accommodation did not dissuade the court from granting evictions from unsafe or otherwise uninhabitable structures.

In *Groengras*,[232] a group of people occupied the land over a fuel pipeline and in dangerously close proximity to high-voltage power cables.[233] The occupation seemed very organised, and building materials were transported in bulk. The Court used the very real danger of fatal fires should the fuel line be perforated and the dangers of electricity being conducted by the informal structures and causing electrocution, as well as the nature of the occupation (deemed a "land-grab") and the risk of disease breaking out to justify the eviction of the occupants.[234] The High Court considered the lack of alternative accommodation and stated:

> "I am fully conscious of the dilemma of the individuals concerned and I have great sympathy for those that are or may become homeless. But if, *inter alia*, the above considerations are weighed against the rights and needs of the occupants, I am of the view that there is a real and imminent danger of substantial injury and damage to persons and property if the unlawful occupants are not forthwith evicted from the property. This real and imminent danger need not relate to the applicants alone. It may relate to anybody and any property, as is evident from the situation *in casu*."[235]

While the then Transvaal Provincial Division's description of the perils faced by the community does seem to depict an extreme situation, it does not align well with the

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[232] 2002 (1) SA 125 (T) (hereafter "*Groengras*").

[233] *Groengras*, ibid, para 12.

[234] *Groengras*, ibid, para 34.

[235] *Groengras*, ibid, para 31.

Constitutional Court's previous concerns with the dignity of the poor. The Court weighs up the homelessness of the occupants with the property rights of the private landowner as follows:[236]

> "It is in the public interest that the rule of law be upheld and that this unlawful action creates a negative perception about South Africa and would, in all likelihood, discourage investor confidence which is sorely needed in the Republic. In my view this Court cannot close its eyes to the devastating effect land-grabs have had on the economy and the security of one of our neighbouring countries."
>
> "I am similarly of the view that the likely hardship to the owners or any other affected person if an order for eviction is not granted exceeds the likely hardship to the unlawful occupants if an order for eviction is granted."

In *Transnet Ltd v Nyawuza And Others*,[237] the court heard an application for the eviction of 74 unlawful occupants. The High Court had to consider if an eviction would be just and equitable in terms of the relevant circumstances. The Court considered the impact the occupants had on the safety and environment of other members of the community, based on the following facts: access to the settlement could only occur across railway lines which causes rubble on the train tracks and poses a risk of derailment and pedestrian death; the occupants use of river water caused pollution and their lack of electricity lead to the resort of open fires – which was increasingly problematic as the area had special conservation status.[238] In addition, the property

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[236] *Groengras*, ibid, paras 30-1.

[237] 2006 (5) SA 100 (D) (hereafter "*Transnet"*).

[238] *Transnet*, ibid, para 109A – F.

was located below a 100-year flood line.[239] The Court ordered the eviction despite no suitable alternative accommodation being made available immediately.[240]

These cases were exceptional in the weight given by the Court to the unsafe living conditions where alternative accommodation was unavailable. It is noteworthy that the number of occupants in these cases was very small and that the conditions of occupation posed a significant and very real risk of danger to the occupants and other people, in each instance.

3.3.1.5. "Adequacy" versus property, market and lifestyle-related interests

As is evident in *Groengras*, the property rights of others can be a significant consideration for Courts when weighed against the right to housing.[241] However, unlike the experience in the United States of America, where the property rights of neighbours can be effective in defeating tiny housing initiatives, public housing programs or the introduction of affordable housing (NIMBYism), the property rights of others hold less sway in South Africa when the rights of extremely vulnerable people are being realised.

In the *Kyalami Ridge* case,[242] the Alexandra township in Gauteng was affected by severe flooding and almost 300 homes were destroyed. Some of the victims were housed in a church hall, and others in army tents on government-owned land nearby.[243] Men and women were separated in the church hall.[244] Huts eventually replaced these tents, but flood victims

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[239] *Transnet*, ibid, para 109A – F.

[240] *Transnet*, ibid, para 113D.

[241] See *Groengras* (n 232 above).

[242] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (3) SA 1151 (CC) (hereafter "*Kyalami*").

[243] *Kyalami*, ibid, para 2.

[244] *Kyalami*, ibid, intervening Party, founding affidavit, para 15.

lived in "overcrowded and unhealthy circumstances without sufficient water and sanitation."[245] The huts, called 'zozos', were 12m^2 in size and often housed up to 2 families.[246] There were 12 taps and 12 toilets available to service 70 zozos.[247] This situation continued for more than ten months.[248]

The government undertook to assist the flood victims in a transit camp situated close to an affluent neighbourhood in Kyalami Ridge on government-owned land next to a prison. The temporary houses in the transit camp were initially communicated to be 20m^2 in size and earmarked to service only one family each.[249] However, the plans for the transit camp differed, and 200 houses of 30.47 m^2, at a density of 40 houses per ha, with no internal partitioning of houses, external toilets (1 per 4 units) and water, sewerage and electricity were built.[250] This could deviate very minimally from local sewerage capacity.[251]

Residents of the affluent neighbourhood claimed that the transit camp contravened the relevant town planning scheme and land and environmental legislation, and that the decision to establish the camp had been taken without affording a hearing to the residents.[252] The government relied on its constitutional obligation to assist the flood victims and argued that it

[245] *Kyalami*, ibid, para 2.

[246] *Kyalami*, ibid, intervening Party, founding affidavit, para 26.

[247] *Kyalami*, ibid, intervening Party, founding affidavit, para 28.1

[248] *Kyalami*, ibid, intervening Party, founding affidavit, para 30.

[249] *Kyalami*, ibid, intervening Party, founding affidavit, para 32.

[250] *Kyalami*, ibid, para 72.

[251] *Kyalami*, ibid, para 74.

[252] *Kyalami*, ibid, para 11.

was the owner of the land and therefore entitled and obliged to make the land available for such purposes.[253] This resulted in litigation.

After a finding by the High Court in favour of the Kyalami residents, the matter was appealed to the Constitutional Court.[254]

The Court held that the State as the owner could exert its property right, especially given that it opted to provide temporary housing in terms of its duties under section 26 of the Constitution.[255] A complaint by the residents of the neighbourhood that the State had a duty to engage with them (under the auspices of procedural fairness) as their interests – peaceful occupation and property values, which they asserted would be disrupted by large groups of people in transit – will be negatively affected, was dismissed. To that, the Court said:

> "The fact that property values may be affected by low cost housing development on neighbouring land is a factor that is relevant to the housing policies of the government and to the way in which government discharges its duty to provide everyone with access to housing. But it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation that government has to address the needs of homeless people, and its decision to use its own property for that purpose."[256]

In *Stock and Another v Minister of Housing and Others*,[257] the Court considered the construction of emergency housing adjacent to the applicant's property where the applicant wished to extend an industrial park. The court found that the development of housing *next* to

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[253] *Kyalami*, ibid, para 11.

[254] *Kyalami*, ibid, para 18.

[255] *Kyalami*, ibid, para 40.

[256] *Kyalami*, ibid, para 108.

[257] 2007 (2) SA 9 (C) (hereafter "*Stock"*).

the property did not violate the applicant's property rights.[258] The Court considered the housing crisis in Cape Town and the impact of halting the project on the democratic stability and sustainability of the city. It affirmed the principle that providing homes to the homeless is a critical development consideration.[259]

However, this does not mean that the Courts do not consider private property rights at all. In *Johannesburg Metropolitan Municipality v Blue Moonlight Properties,*[260] Blue Moonlight owned commercial property in Berea in the City of Johannesburg. Eighty-six people unlawfully occupied this property.[261] The Court had to answer whether the occupiers had to be evicted to allow Blue Moonlight the full exercise of its property rights and whether or not the City had a duty to provide alternative accommodation.[262] The Court affirmed Blue Moonlight's entitlement to the eviction order. The City was obliged to provide temporary accommodation "in a location as near as possible to the area where the property" was situated.[263] However, and ultimately in order to promote security of tenure, the Court also indicated that a measure of patience from the owner could be expected to ensure that the enjoyment of property rights did not limit the justice and equity considerations captured in eviction legislation.[264]

It seems unlikely that other NIMBY arguments, such as the change to the neighbourhood's overall aesthetic profile, will hold more sway in South African courts. The Constitutional Court, in *Schubart Park* and *PE Municipality*, spoke in decidedly damning terms

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[258] *Stock*, ibid, 19 H.

[259] *Stock*, ibid, 19 E.

[260] 2012 (2) SA 104 (CC) (hereafter "*Blue Moonlight"*).

[261] *Blue Moonlight*, ibid, para 1.

[262] *Blue Moonlight*, ibid, para 3.

[263] *Blue Moonlight*, ibid, para 104.

[264] *Blue Moonlight*, ibid, para 40 & 100.

of arguments which seemed to be couched in prejudice, damning the characterisation of housing insecure people as "obnoxious social ills" and reaffirming their need to be treated as dignified individuals.[265]

3.3.1.6. Non-discrimination in "adequacy," in the context of spatial inequality

In *Adonisi*,[266] a group of working-class residents in Sea Point, Cape Town, who formed the Reclaim the City Initiative (RTC), launched an application to review the sale of a derelict school building called the Tafelberg site.[267] At the heart of the challenge was a charge that the City of Cape Town still maintained spatial apartheid and that the Tafelberg property sale, as opposed to its development into affordable housing, was illustrative of the City of Cape Town's failure to adequately address the ongoing housing segregation in the city.

Expert witnesses for the RTC described "inverse densification", where the richer and predominantly white inhabitants of Cape Town live in central properties in low-density neighbourhoods, while the working and poorer class of Capetonians – often Coloured and Black people – live in densely populated areas with low access to amenities, often in informal settings.[268] This also strains poorer household budgets in terms of increased travel expenses to access far-located amenities.

The City of Cape Town argued that the progressive realisation of the right to adequate housing did not entitle parties to claim a specific type or location for housing.[269] The City also

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[265] *Schubart Park* (n230 above) para 50; *PE Occupiers* (n149 above) para 41.

[266] *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* 2021 ALL SA 69 (WCC) (hereafter "*Adonisi*").

[267] *Adonisi,* ibid, para 6.

[268] *Adonisi,* ibid, para 33.

[269] *Adonisi,* ibid, para 54.

pointed to several policies over the course of 25 years to address the issue of spatial apartheid, which it indicated pointed to compliance with its constitutional obligations.[270]

The Western Cape High Court described the duties of the provincial government as follows:[271]

> "In general terms it may be said that the Province enjoys all the rights customarily afforded to private land owners. However, its powers and duties in respect of its land are subject to the residual provisions of s25 of the Constitution and are also circumscribed by any applicable statutes [...]. This then obligates the State qua landowner, for instance, to address the historical perversity of the grossly unequal distribution of land, as part of its broader societal obligation, while simultaneously exercising its individual property rights. Clearly, a balancing act is implied in this regard."

While the Court was satisfied that the State (national) had discharged its legislative duty to the progressive realisation of housing through passing relevant legislation, it was clear that the provincial arm did not take any policy measures to allow working people access to affordable housing in central Cape Town or surrounds.[272] The Court also indicated that resource constraints did not preclude the City from beginning the process through devising a policy framework.[273]

The Province's failure to actively make land available for affordable housing was partially attributable to a policy approach which normalised class divisions in the city by focusing on extracting "the best possible price for inner-city properties", which led to the opinion that "the financial model for affordable housing in the inner city was 'simply not

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[270] *Adonisi,* ibid, para 56.

[271] *Adonisi,* ibid, para 111.

[272] *Adonisi*, ibid, para 476.

[273] *Adonisi*, ibid, para 478.

possible to apply'".[274] This is exacerbated by the rising cost of well-located properties in the City being "snapped up by developers" and making procurement of private property by the State "prohibitively expensive".[275] The Court, therefore, stated that "the only meaningful way in which this shortage of land for social housing projects can be addressed by the State, is to make use of such pockets of state-owned land as exist in and around the [city centre]."[276]

Of note, given this mandate to make housing available in "pockets", is the Court's evaluation of the obligation found in the Spatial and Land Use Management Act,[277] which places a duty on the State to develop "adequate, affordable housing on well-located land" to rectify spatial injustice.[278] The Province's own Spatial Development Framework incorporates *compact* housing solutions as elements of sustainability and resilience, and of efficiency when addressing housing inequality. In terms of sustainability and resilience, it observes that "land development should be spatially compact, resource-frugal, compatible with cultural and scenic landscapes."[279] The Framework further states that efficiency should be viewed with a focus on "compaction as opposed to sprawl; mixed-use as opposed to mono-functional land uses; residential areas close to work opportunities as opposed to dormitory settlements; and promotion of public transport over car use."[280]

The Court considered several contextual factors to evaluate the reasonableness of the (non) measures taken by the Province, including looking at the profile of workers in the Cape

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[274] *Adonisi*, ibid, para 487.

[275] *Adonisi*, ibid, para 100.

[276] *Adonisi*, ibid, para 101.

[277] 16 of 2013. The Act will be discussed in more detail in Chapter 5 below.

[278] *Adonisi* (n266 above) para 83.

[279] *Adonisi* (n266 above) para 84.2.

[280] *Adonisi* (n266 above) para 84.3.

Town city central, the lack of public transport infrastructure, the extensive travelling time to commute from other areas, the size of the provincial property portfolio, and the worrying increase in segregation in South African cities since the dawn of democracy.[281]

The Court focused its assessment of the adequacy of housing in the province through the historical lens of apartheid spatial planning. This history becomes an interpretive tool to give context to adequacy. It leads the Court to find that the tenets of adequacy in the context of the City of Cape Town demand a policy that facilitates access to compact, resource-efficient and in-fill housing in the City. This demand trumps the consideration that a site could be sold above market value to a private developer.

In *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others*,[282] the Constitutional Court had to decide whether constitutional damages (a special compensation ordered against a party for failing in a constitutional duty) could be awarded where the State fails to realise the right to adequate housing, even where resources can be proven to be available.[283] In this case, the applicants have been illegally denied title deeds over stands in an upgraded informal settlement and have sought relief in several court cases. At each turn, the Municipality failed to rectify its misconduct.[284] The claim ultimately failed.

However, the dissenting judgment by Majiedt J considered an offer by the Municipality of free-standing houses at an alternative location. The applicants rejected this alternative because it was "too far away from their place of work, schools and social networks."[285] The

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[281] *Adonisi* (n266 above) para 479.

[282] 2022 (8) BCLR 985 (CC) (hereafter "*Thubakgale*").

[283] *Thubakgale*, ibid, para 7.

[284] *Thubakgale*, ibid, para 16.

[285] *Thubakgale*, ibid, para 102.

Court considered this alternative, since the right to adequate housing under the Constitution does not give a party the right to choose its location.[286] However, the Court considered this so-called alternative and considered how it played into apartheid spatial planning by shunning the poor to remote places at the periphery of the City.[287] It held that the purpose of socio-economic right protection in South Africa is to remedy inequities created by apartheid and colonial policies.[288] When interpreting the right to adequate housing, the transformative and remedial nature of the right should be at the forefront, and counteracting spatial apartheid is a key consideration.[289] The Court considered the meaning of the term "adequacy" in international law and held:

> "In the context of South Africa's highly segregated urban areas and scarce access to resources, it should also mean that spatial justice must be considered in determining what constitutes 'adequate housing'."[290]

3.4. REFLECTIONS

Adequacy as a legal norm is clearly an evolving concept. As other values and rights in international human rights law gain more attention, and protection, aspects of adequacy are interpreted more progressively. Where access to adequate housing protection was initially closely, and perhaps narrowly, connected to health protection, adequacy has evolved beyond that to be seen as a key enabler of a whole host of other human rights.

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[286] *Thubakgale*, ibid.

[287] *Thubakgale*, ibid, para 104.

[288] *Thubakgale*, ibid, para 106.

[289] *Thubakgale*, ibid, para 107.

[290] *Thubakgale*, ibid, para 111.

In fact, the tenets of adequacy (the overall components set out in the General Comment 4 on the Right to Adequate Housing) inherently include the promotion of other human rights. The consideration of having housing with access to amenities speaks to the recognition of the importance of other socio-economic rights, such as the right to access water, food and education. Cultural adequacy speaks to protecting the cultural and communal norms of peoples. Habitability, as discussed extensively, links to concerns over the rights to health, physical integrity and life. All of the elements speak to the right to dignity of persons. Finally, acknowledging the access of disadvantaged groups underlies a concern for promoting non-discrimination.

The progression in how adequacy has been understood, often lies in the interrelationships between these tenets. The evaluation of whether housing is adequate is more akin to reaching equilibrium on a children's seesaw, than following a recipe with definite components. When thinking of possible housing typologies, this balancing of factors is important for determining what will and what won't, be regarded as legally legitimate.

The emerging understanding of climate change will cause a major shake-up in how this balancing occurs. Unlike the majority of the other protected interests within the human rights framework, which might not have received the same priority as present day but were still acknowledged and catered for to some extent in the concept of adequacy, the recognition of the climate disaster postdates the codification of housing protection. Even the South African Constitution – a relatively new instrument - predates the first binding climate commitments.

However, the relationship between adequate housing and climate change has already seen major developments. Extreme weather events which cause disaster response have resulted in key challenges to housing policy, which in turn have become considerations before the courts (even in South Africa). International and South African policy has also moved beyond treating

the proverbial symptoms of climate change (responding to those events only) and have made key thematic links to climate policy in acknowledging the contribution of the housing and related sectors to climate change, as well as the implications of climate change for current and future adequate housing.

The SR's comments on shifting the adequacy dialogue from one guaranteeing minimum protections only, to a discussion on resource cut-offs is revolutionary, and will have consequences beyond the right to housing. Perhaps most importantly, it is a reminder that adequacy will continue to evolve and respond to international need and concepts of human rights. It is therefore a fair and probable prediction that environmental concerns will become even more important in housing protection.

Some of this climate consideration will factor into how old understandings of adequacy are unmasked as arbitrary. Notably, the resistance to tiny housing founded on public health concerns is becoming increasingly incongruent with our current understanding of the relationship between housing and health. Habitability and how it is expressed in regulations (like building and planning regulations such as those discussed in Chapter 2) historically responded to two main factors: counteracting the spread of communicable diseases and protecting people from environmental hazards like pollution and toxins.

However, evidence on the role of housing environments and communicable disease risk points to overcrowding, rather than structure size, as the real vector for disease.[291] In contrast, inaccessibility of housing has significant health impacts. Studies have shown that insecure

[291] J Krieger & D Higgins 'Housing and health: time again for public health action' (2002) 92:5 *American Journal of Public Health*, 758–68; M Clark, P Riben & E Nowgesic 'The association of housing density, isolation and tuberculosis in Canadian First Nations communities' (2002) 31 *International Journal of Epidemiology* 5, 940–5.

housing is positively associated with increased risk of disability and death.[292] In addition, using a high proportion of income on housing – correlated, in part, to housing size - leaves less resources for accessing nutritious food,[293] education or health insurance.[294] Insecure tenure causes significant mental stress.[295] Therefore, more so than housing size, restrictions on size and housing type which bar access to housing are correlated to increased public health concerns and a decrease in the quality of housing for everyone, but particularly for vulnerable communities. Environmental hazards and pollution have an obvious link with climate concerns and are becoming an overconsumption issue.

At international and South African level, the evaluation of housing provided to people that might be secure in tenure, safe and sizeable, is often viewed as inadequate where the location of such housing makes access to amenities impossible. Adequacy is also increasingly recognizing the value of social support systems and networks as a key element. The South African jurisprudence is rich with examples where courts have listened to communities who prefer to live in precarious but well-located housing, as opposed to peripheral housing where social and economic opportunities are limited.

Agency has also emerged as a tool to assist states in conducting the balance exercise, by effectively asking communities about their own priority-setting. As international norms around vulnerable groups have moved from prejudicial, to charitable, to agency-focused, so too, legal conceptions of adequacy are increasingly tied to the subjective assessment of the

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[292] See A Marsh, D Gordon, C Pantazis & P Heslop 'Home Sweet Home? The Impact of Poor Housing on Health' (1999) Policy Press.

[293] A Ellaway, S Macintyre & A Fairley 'Mums on Prozac, kids on inhalers: the need for research on the potential for improving health through housing interventions' 54 (2000) *Health Bulletin* 336–9.

[294] SK Long 'Hardship among the Uninsured Choosing among Food, Housing, and Health Insurance' (2003) B-54 May *Urban Institute*.

[295] Krieger & Higgins (n291 above) 59.

communities who occupy housing. Where previously informal settlements were condemned, self-built housing is now seen as a rights' assertion. This paradigm shift does not absolve governments from their obligation to improve housing, instead adequacy moves from a binary determination, to evaluating and promoting adequacy on a spectrum from inadequate to optimally adequate. Security of tenure is not a result of where housing falls on this spectrum, but a contributor to it being viewed as adequate.

South African jurisprudence on adequate housing has shown a very clear priority to protecting security of tenure and has interlinked it with agency and human dignity, perhaps even to the extent of elevating these tenets of housing in terms of constitutional protection. Another notable priority for South African courts – alive to the discriminatory history of the country – is a clear mandate to view reversing housing discrimination as a guiding principle in making adequacy evaluations. The need to consider spatial justice when creating housing policy has been given increasing recognition, with more onerous obligations falling on the State.

This understanding of access to housing as intrinsically linked with issues of equality has led to several important principles: First, as a civil and political right, direct or indirect exclusionary housing policy that infringes the right to equality needs to be addressed immediately. Second, the SR clearly notes that a mechanism to do so is to remove regulatory barriers that entrench spatial segregation. The SR specifically relies on the example of tiny housing as a form of social housing which is impeded by unnecessary laws. Finally, in the context of South Africa, the Court made it clear that in developed urban areas where land is sparse – an increasing phenomenon – this means facilitating "compact" housing in "pockets" – conditions in which tiny housing is uniquely appropriate.

This overarching consideration of transforming the housing landscape from segregated to inclusionary inherently means that private property development cannot go unchecked. The property and other rights of the middle class, affluent and commercial actors, while not a factor in making an evaluation on adequacy, is given increasingly less scope (or tolerance). Where these rights hinder social reform, there is a move towards denying the legitimacy of these rights to limit access to housing – legitimacy often conferred through national housing policy, and building and planning regulations – and to even see these obstacles as inherently illegitimate.

In understanding that the right to housing is evolving and alive to social development and concerns – some of which Chapter 2 has already shown to be a driver for tiny housing in other jurisdictions – the thesis will now consider the policy and legal landscape in South Africa in relation to size, and by extension to housing types such as tiny housing. At the heart of this step is identifying whether South African policy and regulations have shown the same responsiveness and growth in response to shifting notions of adequacy in international law, and as interpreted by the South African Courts. Alternatively, it might become apparent that dated notions of housing adequacy persist.

CHAPTER 4: BARRIERS TO AND FACILITATORS OF SELF-REALISING HOUSING THROUGH ALTERNATIVE HOUSING SOLUTIONS IN SOUTH AFRICA

4.1. INTRODUCTION

The preceding chapters described three relevant principles for the discussion on barriers to self-realisation of housing in this Chapter. First, States do not have the financial or administrative means to provide public housing to all. Second, creating an enabling environment whereby self-help housing can be brought into the regulatory purview, or where housing through the private sector is made accessible, is built into the understanding of reasonable policies which provide adequate housing. Third, despite the preceding considerations, tiny housing has been subjected to significant regulatory barriers, which has impacted its viability as a regulatory complaint form of housing.

Two key legal barriers to access to tiny housing outside the public sector have been apparent: building and zoning regulations. The rationale for these barriers is often couched as public health interventions with the view of reducing density, which exacerbates the spread of communicable diseases. These barriers are also often abused to entrench discrimination in housing, by segregating housing based on race and socio-economic status.

The role of these instruments as mechanisms to preserve public health was exposed to be partially arbitrary and increasingly obstructive to the emerging need to protect human and planetary health. This is based on a wider view where resource overuse and the impact of lacking security of tenure on health more broadly lays a basis for less restrictive regulation of size. Overregulation has also been shown to undermine some of the other key principles of housing adequacy, such as affordability, location and security of tenure.

This chapter will provide a historical overview of planning and building regulations in the context of private housing in South Africa and engage in a content analysis of current building regulations and the way in which they regulate size. Building regulations are considered in more detail than planning laws to focus the chapter and to lay the foundation for exploring the anomaly of increased-size prescripts in public housing. The chapter will then consider the current private tiny housing market in South Africa and consider how planning and building regulations interact – or do not – therewith. Ultimately, the chapter will determine whether private tiny housing complies with current South African laws in principle, and contrast that finding with the reality of the tiny housing market.

4.2. REGULATION THROUGH THE YEARS

What follows is a descriptive historical, chronological and broad overview of planning powers and functions in South Africa, general characteristics and functions of building regulations, and a review of how such building regulations engaged with size in housing. The overview is organised by different historical eras, chosen to reflect key differences in governance in South Africa: the early and colonial era, the apartheid/pre-constitutional era, and the introduction of constitutional democracy in South Africa.

4.2.1. Early and colonial era

The colonisation of South Africa interrupted indigenous groups' planning and building practices. The initial regulation of the built landscape in South Africa under colonial powers dealt almost exclusively with safety and communicable disease concerns. Size was often treated as a component of proper ventilation and increasing size was often seen as the solution to overcrowdedness, which was brought to the fore by high rates of cholera in dense urban areas. Minimum size requirements did not seem to serve any additional function. We also see this thinking around the access to adequate housing being adopted into early international texts (See Chapter 3).

Given this purpose of size regulation, it is not surprising that public health legislation was often used (alongside local governance laws) to regulate aspects of housing which could include the stipulation of minimum size or dimensions of dwellings. These regulations existed against the backdrop of the British Colonial government's "Imperial Cleanliness" governance policy, which aimed to maintain "*cordons sanitaires*" - quarantine lines between ill and healthy, fit and unfit or dirty and clean.[1] Ultimately, this dichotomy was interpreted by the colonial government as a separation between white and non-white.

Regulations were used to "protect" white citizens in colonies by bringing them into the purview of "hygiene" measures, creating distance between them and other groups who were actively excluded from such measures, and closely regulating the spaces where these two groups interacted. Regulations were a political tool to ensure racial apartheid, as much as physical segregation of housing locations. This also underpins why enforcing minimum sizing later becomes difficult to disentangle from decolonialism and equality in democratic South Africa.

Pre-colonial spatial planning in southern African settlements showed that "[at] the height of their development, complex political, economic, legal and social relations characterised the organised and functional living environments of strategically located African settlements."[2] From the mid-seventeenth century, these living arrangements were disrupted by

[1] See A Bashford 'Imperial Hygiene: A Critical History of Colonialism, Nationalism and Public Health' (2004) 3 for a discussion of this doctrine in Australasia.

[2] M Strauss 'A historical exposition of spatial injustice and segregated urban settlement in South Africa' *Fundamina: A journal of Legal History*, 137.

prolonged periods of warfare amongst peoples, droughts accompanying famine, and, of course, colonialism.[3]

The Dutch introduced land registration and planning underpinned by administrative and agricultural reasons based on the notion that any land can be claimed – thereby interrupting ownership and access held by indigenous groups.[4] Segregation occurred without the use of legal instruments, and no planning control was implemented as it was deemed unnecessary.[5] However, a town plan was employed through the laying of street patterns.[6]

When the British took control of the colony (the early 1800s), a strong municipal government developed in cities, and British-trained town engineers were prominent in developing the local built environment.[7] Initially, British authorities did not see the need to introduce their own formal planning measures. Planning occurred through a system of employing restrictive covenants in title deeds which prescribed land use, density and racial profile of future owners.[8] This system flourished as it maintained land value for the white ruling class.[9] Planning powers, therefore, were a strong mechanism to ensure segregation between different racial groups. Once town planning received its first statutory recognition in England in 1909, English planning law was used as a blueprint for the Transvaal Township and Town-

[3] Strauss, ibid.

[4] Strauss, ibid.

[5] J Van Wyk 'Planning Law' (2020) 27.

[6] Van Wyk, ibid, 30.

[7] D Radford 'The Early History of the Tall Building in the South African City' *Construction History* 14 (1998) 53.

[8] Van Wyk (n5 above) 33.

[9] Wan Wyk (n5 above) 32.

planning Ordinance, the Cape Townships Ordinance, the Natal Private Township and Town-planning Ordinance, and the Orange Free State Township Ordinance.[10]

Laubscher, relying on the definition of building regulations as put forward by Tricker and Algar,[11] identified a diary entry by Jan van Riebeeck, then head of the United East India Company, in which fireproof roofing material was prescribed, as the possible first documented building regulation in South Africa.[12] This should not be viewed as the introduction of building regulation in South Africa. The consistency in shape and materials used by indigenous groups and the responsiveness to new technologies when constructing housing speak to a well-established system of local housing design. Still, poor documentation of these local building systems makes it difficult to comment on how buildings were regulated and on whether formal enforcement of standards was introduced. In addition, the entrenched racism in the development of modern South African laws also means that colonial laws and influences were often the dominant, if not the only, source of development in the law and governance of the undemocratic South African state.[13]

With this backdrop in mind, the first traceable building regulation in the territory that is now South Africa originates from Jan Van Riebeeck. Van Riebeeck was charged with establishing a refreshment station in the Cape of Good Hope (roughly located in current Cape Town) to replenish supplies on a Dutch trading route, which marks the establishment of the

[10] 20 of 1947.

[11] R Tricker & R Algar 'Building Regulations in Brief' (2006) 12.

[12] J Laubscher 'Tracing the origins of the Southern African building regulations, with specific reference to the period between 1650 and circa 1740: review article' (2011) 18 *Acta Structilia: Journal for the Physical and Development Sciences* 2, 91.

[13] C Gevers, K Govender, P de Vos, et al. *South African Constitutional Law in Context* (2014) Oxford University Press, Chapter 1 [ebook].

first Western colony on modern South African territory.[14] Through operatives in the United East India Company, the Dutch continued to develop building regulations in the Cape of Good Hope area.[15] Examples of regulations include prohibiting thatch roofs and guidelines on constructing alternative "flat roofs".[16]

Elements of building regulations (or of concerns that we would now expect to be addressed in building regulations) were introduced in statutes intended to govern colonial territories and were influenced heavily by significant events. The focus of these regulations was to protect public health. Therefore, size requirements were introduced as strict prescriptive requirements, acting as a mechanism to reduce overcrowding and thereby to reduce the spread of communicable diseases.

The minimum room height requirement under the British system was introduced in the London Building Act (1667) to prevent fires from spreading easily from one residence to another, after the Great Fire of London destroyed almost 80% of the City the preceding year.[17] The next major catalyst that shaped building regulation was the cholera epidemic of 1832.[18] Medical professionals could not identify the cause of the disease. Still, the majority of deaths occurred in cramped urban areas with poor sanitation and drainage, and a new spotlight was

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[14] John Noble *Illustrated official handbook of the Cape and South Africa; a résumé of the history, conditions, populations, productions and resources of the several colonies, states, and territories* (1893) 141 as archived at the University of California, <*https://archive.org/stream/illustratedoffic00nobliala#mode/1up*>; It is important to note that this area was populated by several indigenous groups with established building practices and that it is unlikely that Van Riebeeck's arrival marked the first true attempt to regulate buildings.

[15] Laubscher (n 12 above) 94; See for PKM van Roosmalen 'Designing colonial cities: the making of modern town planning in the Dutch East Indies and Indonesia 1905-1950' (2011) *International Institute for Asian Studies Newsletter No 57* examples of the implementation of building regulations in other Dutch colonies such as in modern-day Indonesia due to practical concerns of safety and public health.

[16] Laubscher, ibid.

[17] AJ Ley *Building control: its development and application 1840-1936* (Unpublished MPhil thesis, The Open University, 1990) 1.

[18] Ley, Ibid, 8.

shone on the conditions of lower-income people who tended to stay in small, overcrowded and unventilated areas.[19] Grappling with the protection of property rights of its citizens in the face of growing health problems faced in large United Kingdom towns, a Committee established to investigate building control in light of health concerns cited the principle that one is to use one'sproperty not to injure your neighbours, to establish that basic building prescriptions to promote public health may be introduced.[20]

However, national building regulations – whilst pursued – were ultimately defeated by concerns about the increases in the costs of houses.[21] Local building regulations, therefore, kept proliferating – and the later introduction of the Local Government Act in 1858 further promoted decentralisation.[22] In 1843, the Health of Towns Commission was established to investigate how regulations and laws could improve the health and safety of buildings.[23] Amongst the range of recommendations, the Commission recommended that cellars used for habitable purposes had to adhere to minimum size requirements and that more open space was required for ventilation.[24]

Public health ordinances were used to prohibit overcrowding with the explicit purpose of curbing the spread of communicable diseases. For example, an 1856 ordinance in the Cape of Good Hope prohibited overcrowding in dwellings where "insufficient space" would "evidently […] expose [occupants] to the ravages of the diseases." Similar provisions existed in Transvaal and Natal. This is perhaps best understood in the context of the developments in

[19] Ley, Ibid.

[20] Ley, Ibid, 12.

[21] Ley, Ibid, 24.

[22] Ley, Ibid, 70.

[23] Ley, Ibid, 49.

[24] Ley, Ibid, 50.

modern British building legislation, which started roughly in 1848 with the United Kingdom Public Health Act.[25] The Act was mainly in response to the growing cholera epidemic in Europe.[26] The Public Health Act introduced regulations which covered structure, dampness, sanitation, fire, light and ventilation in housing.[27] A model bye-law was issued in Britain in 1881, and its content deeply influenced building regulation in the Colony and in the future territories forming the Union of South Africa.[28]

A trend also developed of delegating the power to regulate overcrowding of buildings to local municipal bodies, along with broadly referring to "sanitary" and "safety" concerns. This shift was also seen in the Transvaal after falling back under British power after 1902. Adequacy of space was often discussed in terms of proper ventilation. Fire safety regulation was also a key concern, and clearly informed the regulation of building materials, placement and structure. Municipal Acts in the Cape of Good Hope illustrate this well, with additional concerns for fire safety expressed in public buildings where more than 400 people could convene (Graham's Town, 1869) to 300 people (Graham's Town, 1877; Kimberley, 1884) and 200 people (East London, 1880). Very specific provisions for size were provided at ordinance level in 1907 in the Orange River Colony[29] where a minimum of 300 ft^2 of airspace and 36 ft^2

[25]DM Gann, Y Wang & R Hawkins 'Do regulations encourage innovation? – the case of energy efficiency in housing (1998) 26:5 *Building Research & Information*, 284; WG Lumley 'The new sanitary laws' (1859), Public Health Act, 1848 (United Kingdom) < https://archive.org/details/newsanitary-laws00britgoog/page/n33/mode/2up>.

[26] The Health Foundation 'Public Health Act 1848 and the General Board of Health' <https://navigator.health.org.uk/theme/public-health-act-1848-and-general-board-health>.

[27] Gann, Wang & Hawkins (n 25 above) 284.

[28] The Local Government Board for the Use of Sanitary Authorities (1881) Chapter III <https://dlcs.io/pdf/wellcome/pdf-item/b29349084/0> (hereafter "The Local Government Board for the Use of Sanitary Authorities").

[29] This was the given name of the Orange Free State after falling back under British rule.

of floor space per person per house – roughly 11m^2 – was prescribed for "proper and adequate ventilation."[30]

This accords with the 1881 British model bye-laws, which for ventilation purposes, provide that "about 300 cubic feet will be a proper standard of space to secure to each person".[31] We see these numbers increase to the Transvaal province in 1938 to 400 ft^2 of airspace and 40 ft^2 of floor space per person per house – now 12m^2.

These regulations were predominantly for the benefit of white occupants. This discrimination is so entrenched that one sees the existence of a "hut tax" being introduced in different territories before and during the Union.[32] "Native Reserves" - or whatever the given nomenclature for non-white residents of a territory - were often regulated by separate acts.[33] Minimum requirements, such as those observed in the 1907 Orange River Colony and the Transvaal province in 1938, specifically excluded "native compounds".

To assist in understanding how local bodies approached building regulations, this author considered local bye-laws in municipalities located in Transvaal in 1903.[34] In Pretoria, the 1903 Municipal by-laws provided that in "every building used or intended to be used as a

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[30] Orange River Colony *Ordinances of the Orange River Colony, 1907* (1907) (hereafter "Model bye-laws") 98, 120, 138 <*https://repository.up.ac.za/handle/2263/56331*>.

[31] The Local Government Board for the Use of Sanitary Authorities (n 28) above.

[32] Eg. Cape of Good Hope, Act 37 of 1884; Natal, Law 12 of 1857.

[33] Eg. White River Health Committee – Native Locations Regulations, Administrator's Notice No 106 (21 Feb 1934) provides that-

> The urban local authority shall issue directions as to methods of construction, materials to be used provided that no dwelling shall be erected which is not sufficiently lighted and ventilated and does not provide 30 square feet of floor and 300 cubic feet of air space for each intended inmate over the age of 10 years and at least half of that amount for each intended inmate below that age.

[34] This territory was selected due to access issues during the Covid-19 pandemic and the dates were selected after preliminary reading indicating changes in the regulatory environment in Johannesburg and Pretoria as noted in Radford (n7 above) 41-58.

public building, the amount of floor space for the audience shall not be less than 250 superficial feet for every 100 persons."[35] Habitable rooms (not located in a roof) had to be at least 10 feet and 6 inches in height from floor to ceiling (3.2m).[36] This size regulation is couched amongst other regulations aimed at promoting ventilation in buildings. Except for this height dimension, no general size requirement was given for such rooms. At the same time, in Johannesburg, the local bye-laws provided that every habitable room shall be more than 70 "superficial feet" or 21.34 m^2, shall not be less than 8 feet 6 inches (2.59m) and shall be provided with proper and adequate means of ventilation.[37] This provision is under the heading: "The Open Space about Buildings; the Lighting, ventilation and other sanitary arrangements of buildings". In Volksrust, under public health byelaws, any room intended for human habitation had to be 1000 cubic foot (28.3m^2) in capacity.[38] There was also a practice of submitting building plans to local health boards for approval before construction.[39]

It is noteworthy that regulations became increasingly strict over time (See Tables 1 and 2 in the annexure). In the Cape of Good Hope, fire safety regulations (at the Ordinance level) initially applied to buildings with the capacity to contain more than 400 people (1869), then to a threshold of 300 people (1877) and then 200 people (1880). Similarly, in the Transvaal, the minimum airspace required per person was initially not prescribed (1903, 1906), then set at 300 ft^2 of airspace and 36 ft^2 of floor space (1912, 1926) and then increased to 400 ft^2 of

[35] Building Bye-Laws of the Municipality of Pretoria, Government Notice 1136 of 1903, Transvaal Gazette Oct – Dec 1903, 970, Reg 51 (hereafter "Building Bye-Laws").

[36] Building Bye-Laws, ibid, reg 89.

[37] Bye-laws of the Municipality of Johannesburg, Government Notice 546 of 1903 Transvaal Gazette Jan - Jun 1903 1159, Reg 104.

[38] Bye-laws of the Volksrust Health Board, Government Notice 263 of 1903 Transvaal Gazette Jan – Jun 1903, 535, reg 5.

[39]Bye-laws of the Volksrust Health Board, ibid, reg 1; Krugersdorp, Building bye-laws of the Municipality of Krugersdrop Government Notice 476 of 1903, 899.

airspace and 40 ft^2 of floor space (1939). It is interesting to see how regional authorities viewed stricter requirements as a sense of progression in regulating the built environment.

4.2.2. Apartheid/pre-constitutional era

The different territories in the Union of South Africa continued to develop their own planning measures, split broadly between township establishment and town planning.[40] Each territory developed its legal instruments with varying levels of sophistication and speed. The fragmented planning schemes eventually led to the government initiative of Guide Plans – broad organisational frameworks intended to coordinate land use transportation and infrastructure policies.[41] Despite being clunky, expensive and effectively devoid of true public participation, Guide Plans became the dominant mechanism for land-use planning in South Africa from 1971 to 1991.[42] However, the British ideal of a Garden City – a low-density city for "sanitation and health" – persisted as very influential in developing local town planning laws and practices, despite its inherent conflict with the expected growth in South Africa.[43]

However, this is the tale of white South Africa. Apartheid was fully entrenched in planning law. The Black Land Act of 1913 and its successors excluded black South Africans from urban areas and allocated land in so-termed "scheduled areas".[44] With the installation of the National Party as the government of South Africa, racial segregation became explicit national policy and laws, such as the Group Areas Act,[45] formally separated South Africans

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[40] Van Wyk (n5 above) 34.

[41] Van Wyk (n5 above) 34

[42] Van Wyk (n5 above) 44.

[43] GW Scholz, P Robinson & T Dayaram 'Colonial planning concept and post-colonial realities: The influence of British planning culture in Tanzania, South Africa and Ghana' In C Nunez *Urban Planning in Sub-Saharan Africa* (2015) London: Routledge.

[44] Van Wyk (n5 above) 45.

[45] 49 of 1950.

based on race. Guide Plans for "non-Europeans" marked for the race designation (NE) and the year of implementation set out large tracts of land away from the white population. A very influential model in these territories, the NE 51, was based on the British New Town Model which set out plot sizes between 280 m^2 to 300m^2 for free standing three-room houses, typically between 41m^2 and 52 m^2.[46] This was the initial plan for large present-day settlements like Soweto and KwaMashu.[47]

In terms of building regulations, this era marked a shift away from following British thinking by undertaking an involved process of drafting and fine-tuning building regulations locally. This marks the point from which South African building regulations started to look responsive to local needs, circumstances and concerns. It is also at this point that building regulations became more flexible to accommodate different technologies, designs and needs.

The need for uniform local building regulations became apparent due to the difficulty in implementing a wide range of standards. The South African Bureau of Standards was asked to draft model building regulations in 1954, resulting in the publication of such model-building requirements in 1958.[48] These model regulations were revised in 1966 (called "Standard Building Regulations"), and a metricated version was published in 1970.[49] Local authorities were not responsive to these models, and only about 15% of local authorities incorporated them

[46] Scholz, Robinson & Dayaram (n43 above) 76

[47] Scholz, Robinson & Dayaram (n43 above); R Boers 'The new National Building Regulations Controversial Aspects aired at Seminar' (1985) *The Civil Engineer in South Africa*.

[48] Boers, ibid.

[49] Boers, ibid; Laubscher, (n12 above), has the date for the Standard Building Regulations as 1970 and the metricated version as 1972.

into their building regulations.[50] This is despite prior interest expressed by local authorities and provincial administration.[51]

In 1975, a committee established by the Minister of Economic Affairs recommended that building regulations be made uniform.[52] Such uniform regulations aimed to reduce building costs in the medium to long term.[53] Soon after, the National Building Regulations and Building Standards Act (NBRBSA) was adopted by Parliament in 1977.[54] The preamble of the Act provided its goal as two-fold: to promote uniformity in the law relating to the erection of buildings in local authorities' jurisdiction areas and to prescribe national building standards.[55] The Act sets out that any provision which allows local authorities to create building regulations is repealed. Still, the local authorities retain control by virtue of being able to appoint or assign a building control officer under the NBRBSA and to approve building plans.[56] Local building regulations which had not "been replaced by or which is not repugnant to any national building regulation" could not be repealed.[57] The Act even determined that persons in local authorities who previously fulfilled this role were deemed to be building control officers for the purpose of the Act.[58] The NBRBSA also permitted local authorities to prohibit the erection of buildings

[50] Boers, ibid.

[51] LG Warren 'Building Science Specifications' (1954) 39 *South African Architectural Record* 123.

[52] Warren, ibid.

[53] Laubscher (n12 above) 39.

[54] National Building Regulations and Building Standards Act 103 of 1977 (hereafter "NBRBSA").

[55] NBRBSA, ibid, preamble.

[56] NBRBSA, ibid, s 5(1) and 7(1).

[57] NBRBSA, ibid, s 29(a).

[58] NBRBSA, ibid, s 5(4)(a).

based on considerations of good health and hygiene[59] or due to safety concerns relating to flooding, inadequate drainage or the presence of refuse.[60] Local authorities, therefore, still played a pivotal role in regulating buildings but with reduced powers to set standards.

Instead, section 17 of the NBRBSA provides for the Minister of Economic Affairs and Technology to make national building regulations which will regulate, amongst others, the following matters:

a) The procedure to apply for the erection of a building;[61]
b) The strength, stability and durability of the building;[62]
c) The safety of the building as it relates to the risk of fire, floods, moisture, the transmission of heat, sound, infestation by vermin, insects and pest "or other injurious factors";[63]
d) The provision of amenities such as water, sewerage, gas and electricity;[64]
e) "The ventilation and the provision for daylight in respect of buildings, including the provision of open spaces in connection therewith";[65] and
f) "Regarding the safety, health and convenience of occupiers or users of buildings or of persons otherwise present in buildings or having access thereto, and the compulsory

[59] NBRBSA, ibid, s 10(1)(a)(i).

[60] NBRBSA, ibid, s 10(1)(b).

[61] NBRBSA, ibid, s 17(1)(a)&(c).

[62] NBRBSA, ibid, s 17(1)(d) & (g).

[63] NBRBSA, ibid, s 17(1)(e)(f).

[64] NBRBSA, ibid, s 17(1)(h)&(k).

[65] NBRBSA, ibid, s 17(1)(i).

installing or supplying of equipment, installations or services in connection therewith".[66]

Deviations from the National Building Regulations may be permitted if an interested party applies in writing, provided the deviation does not relate to the strength and stability of the building.[67]

The South African Bureau of Standards (SABS) was tasked with drafting the National Building Regulations, which it produced in February of 1981.[68] The National Building Regulations Evaluation Committee then evaluated public comments on proposed building regulations. Some criticism emerged about the national building regulations being too prescriptive and not sufficiently performative.[69]

Modern building regulations are broadly categorised as prescriptive, functional or performance-based.[70] The prescriptive approach describes and specifies building parts, design and maintenance and creates a set of implicit attributes for each building.[71] The functional approach states certain high-level requirements for buildings but does not specify technical performance standards or a measurement of how to achieve the high-level requirements. The performance-based approach states certain functional requirements, provides user

[66] NBRBSA, ibid, s 17(1)(u).

[67] NBRBSA, ibid, s 18(1)&(2).

[68] Boer (n 47 above) 456.

[69] TL Webb 'Barriers to innovation in building and construction' (1981) 12 *South African Journal of Business Management* 4, 96.

[70] South African Bureau of Standards *SANS 10400 – The Application of the National Building Regulations South Africa* 3 ed (2016), Annexure C, C.1 (hereafter "SANS 10400").

[71] SANS 10400, ibid.

requirements and criteria and provides acceptable solutions and evaluation mechanisms to measure if the function has been met.[72]

In the original draft of the Regulations, the minimum floor area of a habitable room was $6m^2$ and ceiling heights were reduced by the Committee.[73] After working through more than 1000 pages of comments, the final regulations were submitted in 1985.[74] In the first year post-enactment of the regulations, the decision was made to move the performance measures (see discussion on deemed-to-satisfy rules to follow) to a separate code of practice, which is to be published by the SABS.[75] The SABS 0400, published in 1990, became the first iteration of this code. The building regulations were republished in 1990.[76] In 1991, the National Building Regulations were amended to make provisions for excavations and certain amendments to lighting and ventilation provisions, fire installations and environmental sustainability.[77] In 1991, the National Building Regulations' provision on building materials and tests was updated.[78]

The content of the building regulations, which have been mostly retained until the present, albeit with additions and amendments, will be discussed in more detail below.

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[72] SANS 10400, ibid.

[73] Boer (n48 above) 469.

[74] J Laubscher *An investigation of the National Building Regulations to promote uniformity and sustainability in the South African built environment* (Unpublished PhD thesis, University of Pretoria, 2011) 39; GN R441 in GG 9613 of 1 March1985.

[75] Laubscher, ibid citing LJ Bevis & D Misselbrook 'The Homebuilder's Handbook on the National Building Regulations' (1997) 2-3.

[76] Laubscher, ibid, 40.

[77] GN R432 in *GG* 13054 of 8 March 1991.

[78] GN R919 in *GG* 20314 of 30 July 1999.

4.2.3. Constitutional democracy

The Constitution of South Africa introduced constitutional reform to introduce democracy in South Africa. The 1996 Constitution contains a bill of rights, which includes justiciable socio-economic rights such as the right to housing and important constitutional values such as undoing systemic racism and achieving equality. The Constitution is also underpinned by the principle of co-operative government whereby three spheres of government (national, provincial and local) awarded legislative competence and/or executive authority and the power to administer different functional areas.[79] The purpose of co-operative government is to devolve power – and thereby counteract the previous concentration of power seen in apartheid South Africa – and to provide for more effective, context-specific decision-making given the large number of linguistic and cultural communities in South Africa.[80] Building regulations and planning fall within the executive and administrative competence of local government.[81]

The new Constitution is, therefore, very significant within this context. First, laws and regulations entrenching racism had to be repealed, and steps introduced to undo the legacy of apartheid. This includes laws based on racist notions or which have the effect of directly or indirectly discriminating on the basis of race. This led to an overhaul of patently discriminative planning laws and policies.

Second, the original powers of local government over building regulations are regulated by national legislation (the National Building Regulations), which predates the Constitution. However, in *City of Johannesburg Metropolitan Municipality v Chairman of the National*

[79] Constitution of the Republic of South Africa, ss 41 & 156.

[80] IM Rautenbach 'Constitutional Law' 7 ed (2081) South Africa:LexisNexis, 199.

[81] Constitution (n79 above) schedule 4B.

Building Regulations Review Board,[82] the Constitutional Court confirmed the inviolable and exclusive executive and administrative authority of local government over building regulation.[83] Therefore, the role of national regulation is limited to creating broad norms and guidelines within which municipalities can exercise their authority.[84]

Unlike the content of building regulations, which could be interpreted with a measure of agnosticism in the new constitutional dispensation, it was clear that South African planning law required a dramatic overhaul to promote the new constitutional values of the country. As the High Court described in *Adonisi*:

> "The policy of influx control, so systematically enforced by the apartheid government was, arguably, one of the most pernicious aspects of the implementation of its segregationist policies. A suite of legislation was passed which deprived African, Coloured and Indian citizens of rights of ownership in, and to occupation of, land while simultaneously determining where racial groups might reside and how these groups were to be moved, if they found themselves in areas which the legislature had proscribed."[85]

Despite this context, it took almost two decades for the State to formulate a proper planning policy framework. The Development Facilitation Act[86] was an initial but ultimately inadequate transitional step. The Constitutional Court ultimately impugned it for assigning the exclusive functional powers of municipalities to the provincial sphere of government, in contradiction to

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[82] 2018 5 SA 1 (CC) (hereafter "*COJ v Chairman of the National Building Regulations Review Board*").

[83] *COJ v Chairman of the National Building Regulations Review Board*, ibid, para 22-24.

[84] N Raboshakga & O Fuo 'Appropriate Internal Appeal Mechanisms for Approval of Building Plans: Exploring the Gaps Left by the Constitutional Court' (2020) *PER / PELJ* 23, 2.

[85] *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* 2021 ALL SA 69 (WCC) para 95 (hereafter "*Adonisi*").

[86] 67 of 1995.

the prescribed constitutional demarcation of executive authority over functional areas.[87] As Van Wyk states -

> "The fact that it took two decades after democracy to come into operation meant that South Africa had to operate under a fragmented, unequal and incoherent land management planning and land development system for far too long. The result was the continuation of a system that was discriminatory, inefficient, costly and confusing."[88]

The Spatial Planning and Land Use Management Act (SPLUMA)[89] was enacted as framework legislation to provide a "uniform, effective and comprehensive system of spatial planning and land use management" in South Africa, which promotes "social and economic inclusion".[90] It sets out principles and procedures for national, provincial and municipal authorities to create spatial development frameworks.[91]

SPLUMA sets out key principles applicable to spatial planning, land development and land use management. Amongst these principles, and most relevant here, are: ensuring spatial justice to the effect of redressing inequitable access to land by disadvantaged communities and persons; promoting sustainability by using land in a compact, environmental shock resistant and resource-sensitive way that limits urban sprawl.[92] Another key provision prohibits local

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[87] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC), para 70.

[88] Van Wyk (n5 above) 57.

[89] 16 of 2013 (hereafter "SPLUMA").

[90] SPLUMA, ibid, s4(a), (b).

[91] SPLUMA, ibid, s12.

[92] SPLUMA, ibid, s7 provides:

> "The following principles apply to spatial planning, land development and land use management:
>
> (a) The principle of spatial justice, whereby—
>
> (i) *past spatial and other development imbalances must be redressed through improved access to and use of land*;

authorities from relying solely on land and property value implications to make decisions on appropriate land use – an important provision when considering the widespread use of NIMBYism to oppose tiny housing developments.[93]

(ii) spatial development frameworks and policies at all spheres of *government must address the inclusion of persons and areas that were previously excluded*, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation;

(iii) spatial planning mechanisms, including land use schemes, must incorporate provisions that enable *redress in access to land by disadvantaged communities and persons;*

(iv) land use management systems must include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas;

(v) land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas; and

(vi) *a Municipal Planning Tribunal considering an application before it, may not be impeded or restricted in the exercise of its discretion solely on the ground that the value of land or property is affected by the outcome of the application;*

(b) the principle of spatial sustainability, whereby spatial planning and land use management systems must—

(i) promote land development that is within the fiscal, institutional and administrative means of the Republic;

(ii) ensure that special consideration is given to the protection of prime and unique agricultural land;

(iii) *uphold consistency of land use measures in accordance with environmental management instruments*;

(iv) promote and stimulate the effective and equitable functioning of land markets;

(v) consider all current and future costs to all parties for the provision of infrastructure and social services in land developments;

(vi) *promote land development in locations that are sustainable and limit urban sprawl*; and

(vii) result in communities that are viable;

(c) the principle of efficiency, whereby—

(i) *land development optimises the use of existing resources and infrastructure;*

(ii) decision-making procedures are designed to minimise negative financial, social, economic or environmental impacts; and

(iii) development application procedures are efficient and streamlined and timeframes are adhered to by all parties;

(d) the principle of spatial resilience, whereby flexibility in spatial plans, policies and land use management systems are accommodated *to ensure sustainable livelihoods in communities most likely to suffer the impacts of economic and environmental shocks* […]" [Own emphasis added.].

[93] SPLUMA, ibid, s7(a)(vi).

SPLUMA also regulates municipal land use schemes wherein land use zoning and regulations are to be captured.[94] While SPLUMA leaves detailed regulatory power to municipalities, it does prescribe that such power needs to be exercised in a way that gives redress to past injustices and that planning needs to be inclusive in so far as there needs to be consideration for, amongst others, housing that is sustainable and environmentally friendly, well-located, and affordable.[95] In *Adonisi*, this was interpreted to place a duty on cities with limited space to avail land innovatively and "make use of … pockets of state-owned land" which is located close to city amenities.[96]

Despite the mandate that building regulations fall within the exclusive executive powers of local governments, no major actual changes were immediately made to the building regulation landscape with the introduction of democracy. A possible reason for this is that the National Building Regulations did not contain any overt discriminatory measures and were recently overhauled through a comprehensive participatory review process including an extensive period of consultation.

In South Africa, the NBRBSA contain a list of items/areas that are regulated and fall under the purview of the national building regulations.[97] These items contains several procedural requirements such as how to obtain approval for building plans, building inspections and the powers of local authorities to enforce the regulations.[98] These items also contain several technical aspects of buildings which the government is to formally regulate, including fire

[94] SPLUMA, ibid, Chapter 5.

[95] SPLUMA, ibid, Preamble.

[96] *Adonisi* (n85 above) para 101.

[97] NBRBSA (n54 above), s17.

[98] NBRBSA (n54 above), s17(a),(b) & (s).

safety measures; floods, vermin, heat and sound control; water and sewage systems; ventilation; and aspects relating to the general health and safety of the public and occupiers.[99]

The National Building Regulations (NBR) is split into 24 separate parts and one overarching section, which assists with the interpretation of the NBR. The preamble to the building regulations contains a few important guiding notes: The NBR purports to promote a healthy and safe environment, and "other aspects of a building that might affect only the comfort or convenience of people, […] are not controlled by the NBR."[100] It continues to warn that compliance with SANS 10400 "does not necessarily indicate that it is a desirable building."[101] The regulations also specify that their drafting was based on the idea of minimal intervention, and therefore, functional requirements were preferred over prescriptive requirements so as to avoid impeding innovative building systems and designs.

Whether a building adheres to the regulations is determined by both its adherence to all the prescriptive regulations in the NBR and demonstrating adherence to the functional regulations, either by complying with the requirements of the relevant SABS applicable standard (found in SANS 10400) or "reliably demonstrating, or predicting with certainty, to the satisfaction of the appropriate local authority, that an adopted building solution has an equivalent or superior performance to a solution that complies with the requirements of the relevant part of SANS 10400".[102] This is done by a "competent person" who is to prepare and submit to the local authority a rational design or rational assessment.[103] A "competent person"

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[99] NBRBSA (n54 above), s 17 (e)-(k), (t)-(u).

[100] SANS 10400, (n70 above) preamble.

[101] SANS 10400, (n70 above).

[102] SANS 10400, (n70 above) AZ4(1).

[103] SANS 10400, ibid.

is someone "appropriately" registered under the Architecture Professions Act,[104] the Engineering Professions Act,[105] the Natural Science Professions Act,[106] or "any other relevant Act."[107] This last method of meeting the functional requirement is referred to as the "deemed-to-satisfy requirement" of the NBR.[108]

In the NBR, the regulations in relation to the dimensions of various types of building are contained in a separate section (Part C) from the regulations relating to public safety (Part D), lighting and ventilation (Part O), and fire protection (Part T). This is highlighted since building dimensions (size) were historically discussed under these components. This separation might, therefore, indicate that size considerations are not simply seen as a component of safety, ventilation or fire prevention. However, the regulations themselves do not provide any further insight into how the role of size may (or may not) be reimagined.

In terms of size/dimensions, the NBR simply provides the following:

> "(1) Any room or space shall have dimensions that will ensure that such room or space is fit for the purpose for which it is intended.
>
> (2) The floor area of any dwelling unit shall not be less than that necessary to provide one habitable room and a separate room containing toilet facilities."[109]

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[104] Act 44 of 2000.

[105] Act 46 of 2000.

[106] Act 27 of 2003.

[107] SANS 10400 (n70 above) AZ4(2).

[108] RB Watermeyer 'Promoting sustainable development in the construction industry through standardization' (2007) *ISO Focus*, 26.

[109] SANS 10400 (n70 above) C (1) & (2).

This section seems to provide the functional requirement in terms of size as measured as "fit for purpose". Part C1(3) then, importantly, provides how that functional requirement is to be fulfilled. It provides that:

> "(3) The requirements of subregulations (1) and (2) shall be deemed to be satisfied where the area and plan dimensions of any room or space, the room heights and, in the case of any dwelling house, the floor area comply with SANS 10400-C."[110]

This provision was incorporated into the 2008 version of the NBR only.[111] SANS 10400-C clearly provides that it sets out a "non-mandatory requirement, the compliance with which ensures compliance with a functional regulation."[112] It defines a functional regulation as a "regulation that sets out in qualitative terms what is required of a building or building element or building component in respect of a particular characteristic, without specifying the method of construction, dimensions or materials to be used".[113]

The NBR contains different requirements (both prescriptive and functional) for different classes of buildings; for example, the requirements for a hospital are different from those of an industrial building or a dwelling house.[114] Predominantly, buildings aimed at housing people are given an "H" designation. A dormitory (H2) is where "groups of people are accommodated in one room", a domestic residence (H3) consists of "two or more dwelling units on a single site", and a dwelling house (H4) is a "dwelling unit on its own site, including

[110] SANS 10400 (n70 above) C (3).

[111] GN R574 in GG 31084 of 30 May 2008, reg 77.

[112] SANS 10400 (n70 above) C (3.2).

[113] SANS 10400 (n70 above) C (3.6).

[114] SANS 10400 (n70 above) A20, table 1.

a garage and other domestic outbuildings, if any".[115] SANS 10400 also introduced a category 1 building which has different performance requirements.[116] A Category 1 building can, amongst others, be a dormitory, domestic residence or dwelling house that does not exceed 80m^2 in floor area.[117]

Any habitable room[118] has to have a minimum plan area (horizontal dimensions between unplastered walls) of 6 m² with no linear dimension less than 2m.[119] A habitable room is to be at least 2.4m in height (with certain allowances) except passages or halls, bathrooms or rooms containing a toilet pan and sections with an open mezzanine floor, for which the minimum height is 2.1m.[120] The overall plan area of a dwelling house shall not be less than 15m^2 for a temporary building, 27m^2 for a category 1 permanent building or 30m^2 for any other permanent building.[121] The population of a dwelling house is estimated at 2 persons per bedroom.[122] The commentary on the NBR notes that "plan areas given are very small, but this is necessary in the interests of providing affordable housing".[123]

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[115] SANS 10400 (n70 above).

[116] SANS 10400 (n70 above) C (6).

[117] SANS 10400 (n70 above) C (3.1).

[118] SANS 10400 (n70 above) C (3.7) provides that the definition of a habitable room is –

> room used or designed, erected, adapted or intended to be used by persons for sleeping in, living in, the preparation or consumption of food or drink, the transaction of business, the rendering of professional services, the manufacture, processing or sale of goods, the performance of work, the gathering together of persons, or for recreational purposes.

[119] SANS 10400 (n70 above) C (4.2.3) Table 1.

[120] SANS 10400 (n70 above).

[121] SANS 10400 (n70 above) C (4.4).

[122] SANS 10400 (n70 above) A (21), Table 2.

[123] SANS 10400 (n70 above), Annex B.

Interestingly, the NBR contains the following note:

> "With the present tendency towards smaller sites, it is likely that many more houses of a size much smaller than has been common in the past will be built. In considering the very small permanent building it should be remembered that size cannot be equated to quality and a small house will not therefore automatically detract from the value of surrounding larger houses."[124]

This is significant. The NBR specifically foresees developments like tiny housing becoming increasingly relevant and clearly envisages that such developments should find legitimacy in the current building regulatory landscape.

4.3. TINY HOUSING WITHIN THIS REGULATORY FRAMEWORK

The constitutional mandate to reverse spatial apartheid and to give effect to adequate housing – as explained fully in Chapter 3 – has had a clear impact on planning law in South Africa. The role of local governments in planning and building regulations, as well as the scope for local governments to further take up the regulatory space in terms of building regulations and exercise "urban autonomy", creates an exciting opportunity to explore alternative housing solutions that speak to local contexts, available materials and communal values.[125] Tiny housing can develop as both a public and private form of housing in different local contexts as appropriate. The development principles in SPLUMA also create an enabling environment for tiny housing, prescribing components to planning that can be addressed by the key features of tiny house developments.

The use of performance-based building regulations in South Africa is to be applauded as it does incorporate a lot of leeway for context-specific design-making. A purely prescriptive set of building regulations can be problematic for a variety of reasons: it can counteract

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[124] SANS 10400 (n70 above).

[125] See M Pieterse 'Urban Autonomy in South African Intergovernmental Relations Jurisprudence' (2019) 13 *ICL Journal* 2.

innovations in building design, materials and methods – particularly for vernacular houses,[126] and it can be unresponsive to environments and, therefore, costly to develop designs in certain areas.[127] While the NBR provide a baseline dimension requirement to measure one method of ensuring acceptable performance, the introduction of deemed-to-satisfy requirements allows for tiny housing to be legally considered a permanent housing solution. In fact, the NBR are expressly open to design innovations and amenable to the introduction of smaller housing units as a reality of new urban trends and to achieve affordability.

The use of deemed-to-satisfy requirements might be more technically onerous. It requires a "rational design" from a "competent person" (as described above). Usually, this person is appointed using the prescribed form as provided by SANS.[128] This form places certain obligations on both the prospective owner, as well as on the competent person. The prospective owner has to notify the competent person when the work starts and notify the local authorities should the competent person's mandate be terminated "prematurely".[129] The competent person, in turn, is responsible for making the assessment of whether the design meets the functional goals of the NBR and for providing "local authority with such drawings, details and particulars as are and may be required by the National Building Regulations", to monitor the strength, stability or serviceability of the building or any adjoining building, structure or property and to be available to stand in communication with the prospective owner.[130] However, the competent person is not expected to undertake detailed or day-to-day supervision of a project unless the

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[126] See Greg C Foliente 'Developments in performance-based building codes and standards' (2000) 50 *Forest Products* 12-21 which cites the example of prescriptive building regulations delaying the implementation of base isolation systems which were designed in 1960 to protect against earthquake damage.

[127] Foliente, ibid, 12-13.

[128] Currently, the A19 form.

[129] SANS 10400 (n70 above), form 2: Application for acceptance as an approved competent person in terms of regulation A19.

[130] SANS 10400 (n70 above), s2.

terms of their appointment specify such.[131] The local authority is then to accept the appointment of this person.[132]

While this process has more additional steps than simple compliance with the prescription of SANS 10400-C, it does not appear to be an abnormal process. However, there is a significant additional barrier to access – this step necessitated increased cost and time to find and pay for the level of skill to satisfy a local authority.

There is limited literature which speaks to a preference in the construction industry to rely on prescriptive requirements over functional requirements, as functional requirements have been viewed as "vague", and because deviations from those requirements do run the risk of rejection by local authorities.[133] It has also been noted that the enforcement of the prescriptive elements of the NBR is often overly strict, where local authorities tend to give eminence to prescriptive (easier to assess) requirements and often forget that deviation from provided solutions is permissible.[134] This process also favours larger developments in that the cost of such expertise, the knowledge of such administrative procedures, and relationships with decision-makers of larger developers and companies will have the effect of imposing a disproportionate burden on self-built dwellings (where one imagines certain culturally-specific housing types will be better represented) or on smaller, more innovative builders. However, in

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[131] Engineering Council of South Africa 'The Role, Responsibilities And Conduct Of Persons Registered With ECSA Appointed For Small Building Works' (26 April 2012) 2.1. <https://www.ecsa.co.za/regulation/RegulationDocs/030512AdvNt_Role_Respons_Conduct.pdf>.

[132] SANS 10400 (n70 above), form 2: Application for acceptance as an approved competent person in terms of regulation A19, section 4.

[133] Gann, Wang & Hawkins (n25 above), 280–296.

[134] JE Walufa *Evaluating Energy Efficiency In Building Control Regulations In Local Authorities In South Africa* (unpublished MSc in Building Sciences thesis, University of Witwatersrand, 2009) 30 citing RM Holden 'Building Plans Approvals Explained' (2006) <https://media.cylex.net.za/-companies/2329/2585/uploadedfiles/23292585_635352351240457573_buildingplansapproval-1.pdf>.

principle, the deemed-to-satisfy procedure does not seem excessively complicated, and there is demonstrated practice for its use.

The question then remains: Have tiny housing proponents/ or manufacturers used the deemed-to-satisfy requirements to build permanent tiny homes in South Africa? To answer this question, the characteristics of a sample of tiny houses currently available in South Africa (See Table 1 below) need to be considered.[135]

Table 4 - 1: Local Tiny Housing Products

Provider/Company	Products which qualify as a tiny house	Total floor area	Other dimension (comments)	Mobile/Permanent
A4AC[136]	Mobile Housing Unit	6 m^2	2.4m height	Mobile
My Container Home[137]	Design 1	12 m^2		Mobile – Shipping container
	Design 2	12 m^2		Mobile – Shipping container
	Design 3	24 m^2		Mobile – Shipping container
Pod Idadla[138]	Several designs	Ranging from 17.2 m^2 to several connecting pods between 34 m^2 and 68 m^2.		Semi-permanent – requires professional installation but can be placed on leased land
PanGoPods[139]	-	25m^2	Exact dimensions unknown	Mobile – Kept on trailer
Wanderlust[140]	All	16.25 m^2 / 20 m^2	Exact dimensions unknown	Mobile – no detachment
Wolf Pack[141]	Scarlet	28 m^2	2.6m height	Mobile – Detachable. Can add modules
1 on Albert development	Studio C	24 m^2		Housed in apartment building

[135] Based on a web-search using a popular online search engine. Data saturation was reached.

[136] A4AC 'Mobile housing unit' (n.d.) <https://www.a4ac.co.za/mobile-housing-unit> (hereafter "A4AC").

[137] Container Home SA 'Home' (2021) https://www.containerhome.co.za/.

[138] Pod iDladla 'Home' (n.d.) <http://www.pod-idladla.com/menu>.

[139] Biodiversity and Development Institute 'PanGoPod: an off-grid tiny home' (n.d.) <http://thebdi.org/pod/>.

[140] Wanderlust Co 'Home' (n.d.) <https://www.wanderlustco.co.za/>.

[141] Wolf Pack Co 'Housing' (n.d.) <http://www.wolf-pack.co.za/products/housing>.

	StudioD	21 m^2		Housed in apartment building
EcoLog Homes[142]	Eco Pod	19 m^2	3m height	Seemingly permanent

1 on Albert is a development in the City of Cape Town where micro-apartments (21m² to 48m²) are available at a premium. The apartments are clearly part of a permanent apartment building structure.

Container Home SA is a company that converts old shipping containers into various modules, including homes. The company provides a single container with a bedroom, bathroom and living space but also markets their products as attaching together to form larger areas or to attach to permanent structures as a "cheat" to the cost and effort of further expanding dwellings.[143] On their website, in response to the following frequently asked question, "Do container homes need planning permission?", the company responds: "Container housing often does not need planning permission because it is not considered to be permanent."[144] The PanGoPod company follows a similar line of reasoning by providing that "PanGoPods are mobile structures and in general, architectural plans and building approval are not required."

Pod Idladla provides a semi-permanent structure, which, it states, requires local council approval, but which can also be the subject of bond financing. Wanderlust Co provides a range of products, all designed to be mobile, but does reserve the possibility of connecting to local services and getting council approval. At the end of 2020, they launched their first product

[142] ITC SA 'Tiny Homes… Big Revolution' (19 March 2019) <*http://itc-sa.org/tiny-homes-big-revolution/*> (hereafter "ITC SA").

[143] Container Home SA (n137 above).

[144] Container Home SA (n137 above).

intended for permanent dwellings.[145] A4AC provide a range of products, including having briefly forayed into rural low-cost housing projects. The company offers a range of products for which it offers financing, and it manages the building application process (to be considered a subsidiary dwelling unit), but the product is still described as a mobile housing unit.[146]

The only tiny house product that specifically indicated that it is NBR and SABS compliant is the Eco Pod, which was first created in 2018.[147] This is made as a statement on their website, but no specific details are provided around this proclaimed compliance.

With the exception of 1 on Albert, the tiny houses available ranged from what seems like semi-permanent solutions (can be moved but requires special measures) to mobile homes. There is significant variance between the companies in relation to how they interpret their interaction with local authorities. The trend of companies providing mobile tiny houses seems to be an attempt to avoid any engagement with local authorities.

From the subset of products reviewed, there is at least some understanding from service providers that tiny houses can meet the NBR and SABS requirements and that their structures can be permanent. It is unclear why products that chose to be semi-permanent or mobile made this choice of typology, but it could speak to a range of factors, including increased mobility and the low cost to install, which are big selling points within the tiny housing community.

Tiny housing is technically feasible for private owners to use as the shift in building regulations from being of a prescriptive nature, to that of being performance-based, opened up

[145] [Instagram Post] Wanderlustcoliving, (23 October 2020) <https://www.instagram.com/p/CGr-vEPNp6vw/>.

[146] A4AC (n136 above).

[147] ITC SA (n142 above).

different housing typologies. However, there is still a strong focus from manufacturers on categorising the housing as mobile.

One possible reason for this is that the planning controls at the local authority level are employed in such a way as to exclude this type of housing. This can be due to a variety of reasons: Elements of NIMBYism[148] might be anticipated by the local authorities; personal preference of decision-makers might influence the rigor and fairness of the application; staff are not trained in evaluating deemed-to-satisfy compliance; or processes to evaluate such compliance is inadequate. Even more likely is that uncertainty from tiny house proponents on any of these elements might have a dissuasive effect.

Another possible reason is that the cultural shift in understanding adequate housing from either a supply or demand side has not yet occurred from the colonial perceptions of size to a more affordable environmentally sustainable and resource-friendly understanding of size. Consumerist culture – where success and status is linked to more and bigger items - impacts housing choices too.

Between SPLUMA and the flexible NBR, the legal landscape in South Africa is conducive to the self-realisation of the right to housing through a range of housing initiatives like tiny housing. However, local government practice and perceptions on housing need to catch up.

[148] See Chapter 2 discussion.

CHAPTER 5: STATE PROVISION OF HOUSING: SOUTH AFRICAN LANDSCAPE

5.1. INTRODUCTION

Chapter 4 reflected on the State's duty to create an enabling environment that allows the self-realisation of rights. However, the reality is that there will always be individuals and groups who will not have the means to access adequate housing without state intervention. The preceding chapters clearly set out the duty of the South African State to progressively realise the right to access to adequate housing for such persons, and reflected on the possible use of tiny housing or micro-living arrangements in other countries as part and parcel of such housing solutions.

This Chapter will reflect on the development and implementation of public housing policy in South Africa. It will discuss the State's approach to housing size, the perceived relationship between size and policy goals (for instance, views that size equals better housing quality) and the ways in which size interacts with other key elements of housing adequacy, such as potentially reducing affordability or impacting the location of housing close to amenities. It will reflect on how the understanding of the role of housing, and human rights more broadly and the context in which housing adequacy developed as an international and national standard influenced public health policy. It will also consider how the introduction of democracy, which expanded the protection of human rights to all South Africans, not only white South Africans, has impacted views on housing adequacy – particularly, in relation to the dignity of public housing recipients. The different historical phases of housing development in South Africa will be discussed chronologically.

The first phase marks the non-recognition of public housing and the development of an inherently racist private housing system. It covers the colonial period of 1652 to 1920, which

marked the disruption of local land occupation and settlement. Governance systems were created by Western settlers, and which excluded land titles to indigenous South African groups. This dispossession of land ultimately led to a class divide between settlers and local peoples. Racial segregation was introduced by law. Housing was not provided by the State as a right. Instead, it was provided by private parties to improve the efficiency of the labour force.

The second phase is where segregation was pursued as a matter of government policy, and where housing programmes were imagined as a public health intervention. The housing policy of the State was used to more efficiently segregate races and to effectively remove non-white South Africans from desirable city centres.

The third phase, in the early years of the democratic transition, introduces public housing as a programme to restore human rights to all South Africans. The government's housing programmes were a result of attempting to realise the right to access adequate housing and were designed at a large scale to attempt to rectify the housing crisis caused by racist historical policies. The policy focus shifted from private developer involvement to 'Big State' housing solutions and moved from incrementalism to the goal of providing completed and quality housing. This naturally meant projects of a very large scale that had major cost implications for the State and, over time, become increasingly difficulty to implement. This ultimately reduced the government's ability to provide sufficient housing units to meet ever-growing demand.

Finally, the current phase marks the development of housing policy where government solution appear to be reactionary and fragmented, in attempting to respond to the shifting and growing barriers to housing – amongst others, climate change and pandemic control in South Africa – while maintaining an understanding of adequacy in housing aligned with political promises rather than with emerging realities.

5.2. THE DEVELOPMENT OF PUBLIC HOUSING IN SOUTH AFRICA

5.2.1. Early and Colonial Era: dispossession and the creation of an inferior racist labour class

The arrival of Dutch settlers in the Cape of Good Hope marked the beginning of the colonial disruption of indigenous peoples' land ownership and settlement in the geographic region later known as South Africa.[1] Dutch settlers embarked on a campaign of large-scale land dispossession to settle their own farms in resource-rich areas.[2] The Dutch East India Company assisted imported white farmers with land and housing.[3] However, historical evidence suggests that slaves (trafficked from other territories) were potentially housed together with their so-called "owners" and did not live in separate accommodations.[4] Evidence suggests a similar arrangement for Khoi farm workers (not enslaved) living in the main house of farms.[5]

There is mention of tented camps being made available to Khoi cattle traders on the outskirts of the Dutch settlement as one of the first instances of housing assistance to non-Europeans.[6] Although the adequacy of the camps is not described, evidence suggests that it was not desirable as housing.[7] Lands previously used for grazing by the Khoi and San were

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[1] The nature of the various governance structures and settlement arrangements of the various different indigenous peoples differed and should not be treated as a monolith.

[2] GM Theal 'History of South Africa Under the Administration of the Dutch East India Company' (1897) Swan London: Sonnenschein & Co, 99 <https://archive.org/details/historysouthafr01theagoog/page/n5/mode/-2up?view=theater>.

[3] Theal, ibid, 77.

[4] SM Jackson 'Cape Colonial Architecture, Town Planning, and Crafting of Modern Space in South Africa' (2005) 51 *Africa Today* 4, 40.

[5] DN Rallis 'A Geographical history of segregation in South Africa: 1652 – 1976' (Unpublished PHD Thesis, Pennsylvania State University, 1992) 43.

[6] Theal (n2 above) 40.

[7] Accounts mention that there was a high turn-over at these camps.

claimed by colonization, as more European settlers were imported to farm, and as the population grew into a city beyond the initial settlement.

When the British took control of the Cape Colony in 1795, racial segregation became entrenched in several policies and became more systematic – pass laws made the movement of non-Europeans impossible, and systems of indentured labour (called apprenticeships) were used to tie indigenous people to certain farms as cheap labour.[8] No quality control was exercised over the housing of farm workers, and the farm owners had wide discretion in all aspects of the lives of the labourers on the farm – including the use of physical means to discipline perceived infractions.[9]

In 1877, mine compounds were created where cramped, shared housing was provided to black labourers working at mines to ensure that labourers were immediately available for work.[10] Housing was provided as an extension of corporate interests (keeping labourers close by) and was not considered a public concern.[11]

Overall, the pre-Union State took a very limited, largely non-interventionist role in housing provision. Land and housing provision was tied directly with economic growth. For settlers, this meant receiving land and materials for housing, to facilitate an initial agricultural boom and to allow for the export of resources, or for the availability of resources to service other colonial activities relating to wealth extraction. Basic shelter was provided to non-white persons in close proximity to sites where physical labour was required. There was no welfare

[8] B Matthews 'Dispossession to Democracy: Discovering the Historical Roots of Farm Attacks in South Africa, 1652 – 2008' (Ma Thesis, Dalhousie University, 2009) 36, 37.

[9] Matthews, ibid.

[10] Rallis (n5 above) 79.

[11] Rallis (n5 above) 105.

goal during this era. Housing (or shelter) was only given to labourers to give employers control over their labour force and thereby to ensure productivity. There is no indication that there was any type of quality control over these shelters, less so minimum size and density requirements.

5.2.2. Housing policy as a segregation tool: class, race and "health"

In 1920, the Union of South Africa created the first national housing scheme, in the form of the Housing Act.[12] The act was a response to the effects of World War I and Spanish influenza[13] and coincided with a broader international response to pandemics to strengthen public health initiatives such as creating public health authorities to pilot health initiatives in South Africa and other commonwealth countries.[14]

Before this Act, limited government-led house-building projects were undertaken (as can be seen from the focus on corporate rather than the public interest in housing non-white South Africans).[15] However, the need for legislative intervention was clear with the rise of – as was then the State's concern – unhealthy housing. The then Minister of Posts and Public Works, Thomas Watts, publically commented on the failings of a non-interventionist approach by the government in housing, bemoaning "trust in the law of supply and demand" and emphasizing the need to provide housing "within a reasonable distance of their work" to avoid the time and expense of long commutes.[16]

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[12] A Mabin 'A Century of South African Housing Acts 1920–2020' (2020) *Urban Forum* 31, 453; Housing Act No 35 of 1920.

[13] Mabin, ibid, 454.

[14] P Harrison 'Johannesburg and its epidemic: Can we learn from history?' (November 2020) *GCRO Occasional Paper* #16, 47.

[15] Mabin (n12 above) 456.

[16] Mabin (n12 above) 461.

The Minister, surprising in the context of the prevailing flagrant racist attitude of the government, also underscored that financial assistance should be given to municipalities to construct "native dwellings", albeit only as a fraction of the total assistance given to "Europeans".[17] In reality, this funding was provided on the condition that any settlement that results from this funding assistance had to be "racially segregated, separated from one another by open spaces and with separate access roads."[18] Furthermore, this funding was delayed to black South Africans, due to reported funding shortages and for the full enactment of racist legislation such as 1923 Natives (Urban Areas) Act.[19]

However, white South Africans slowly saw the emergence of a welfare state. Du Plessis documents the creation of one of the first settlements for poor white persons in Johannesburg – Jan Hofmeyr. Social concerns emanated from poor white Afrikaners who settled in Johannesburg, especially fears of racial desegregation in those areas. This led to a decision to develop a "model white improvement scheme" in 1933.[20] The poverty of white residents was also seen as a moral and health concern, and "proper" housing was seen as a way to rehabilitate their character. As Britten stated:

> "Once an aggregation of houses is transformed into a living community, the emphasis of its primary functional aim shifts from public health to social rehabilitation. Housing now ceases to be merely a protest against squalor, disease and poverty. It now means a new way of living,

[17] Mabin (n12 above) 461.

[18] Nelson Mandela Foundation '1920. Housing Act' O'Malley Archives (n.d.) <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01752.html>.

[19] Mabin (n12 above) 463.

[20] I Du Plessis 'Johannesburg's "model white housing scheme" in the civic social imaginary: The genesis of a white Afrikaner welfarist node, 1933-1937' (2016) 61 *Historia* 2, 13.

> new habits and new attitudes. Housing, moreover, now facilitates the canalisation and harnessing of the tenant's physical and mental powers for his community."[21]

Free-standing housing was chosen, as the City Council calculated that land was inexpensive and available, and that apartment blocks would produce "conditions of despair that could foster extreme political movements." At this stage, the Afrikaans National Party was not in government and political tensions between white English and Afrikaans groups were simmering. A strong focus was placed on developing infrastructure around the scheme, such as green space, children's play areas, lighting, tarred roads and stormwater drainage. Two and three-bedroom houses of respectively (55m^2 and 75m^2) with gardens were developed. During the development, additional minimum requirements were included to "ensure neatness".

In Cape Town, a similar tale was observed with the development of Epping Garden in 1938.[22] The Dutch Reformed church was involved in creating an isolated space for white poor persons away from the "dirt and racial mixing" of their previous dwellings. It was developed to be a low-density, green "garden city" and to thwart feelings of class dissension amongst white residents *inter se*, but also between white and coloured residents.

Space was given a moral character and functioned as a key separator between white and non-white South Africans. Larger housing sizes were said to promote "Christian" values and avoided unwanted pregnancies, illegitimate couplings or general mixing of the sexes in bedrooms.[23] Therefore, up to four-bedroom public houses were made available. Houses were placed on big plots, as that was seen as being psychologically beneficial and to help rehabilitate

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[21] H Britten et al. 'Report of a Committee of Enquiry Appointed to Enquire into Conditions Existing on the Cape Flats and Similarly affected Areas in the Cape Division. Department of Social Welfare' (1942) Government Printer: Pretoria, 23 as cited by A Teppo 'The Making of a Good White: A Historical Ethnography of the Rehabilitation of Poor Whites in a Suburb of Cape Town' (PHD thesis, University of Helsinki, 2004) 98.

[22] Teppo, ibid, 115.

[23] Teppo, ibid, 118.

inhabitants by inspiring a sense of sophistication and beauty. The plots also allowed for independence by allowing occupants to grow their own vegetables. The quality of these housing units was seen as a way of elevating inhabitants from "African or primitive" to "European and civilised."[24]

In contrast to the Jan Hofmeyr example pertaining to a development for the most disadvantaged white persons in Johannesburg, the establishment of the Dube settlement in the 1940s – designed for the most privileged black South Africans in Johannesburg - shows the racial double standard in housing. Within the bounds of municipal areas, housing was provided to black labourers in the formal of hostel rooms.[25] Outside of the municipal area, freehold rights of up to ten years could be made available to black South Africans. Dube was the second of such arrangements – and, to meet the demand of a growing professional class of black labour in Johannesburg created by increased manufacture and the departure of white citizens to fight in the World War – a 99-year lease was proposed.[26]

Dube was supported because of its profitability, and steps like providing electricity and reducing proposed housing density, were taken to make the properties more attractive to higher-wage-earning black South Africans. Houses in Dube were touted as "luxury" homes. These were initially intended to be three-bedroom houses with a "servants quarter". Yet, a unit costed about half of the home-ownership schemes for white residents.[27] When realising the project, the city authorities decided to increase density and reduce plot sizes (although these

[24] Teppo, ibid, 118.

[25] SM Parnell 'The Ideology of African Home-ownership: The Establishment of Dube, Soweto, 1946-1955' (unpublished Wits History Workshop paper, 1990) 5.

[26] Parnel, ibid, 6.

[27] Parnell, ibid, 16.

were still large at around 300m^2), however, half of the development was revised to bring in row housing and semi-detached housing.[28]

Outside of Dube, in Johannesburg, most houses were two or three-room dwellings that housed between 6 (Pimville) and 14 (Alexandra) people.[29] The exact size dimensions of the housing are unknown, as well as the number of dwellings erected per stand. Almost no resources were made available. In Pimville, 15 000 people were expected to make do with 63 taps and drains.

After the formal enactment of the apartheid policy by the elected Afrikaner National Party, the underlying ethos of racial segregation and oppression was further entrenched. In the 1950s and 60s, the State attempted to remove existing informal housing settlements completely.[30] It was estimated that over 3 million black people were forcibly removed from houses as the systematic destruction of houses became State policy.[31] Instead, segregated housing was provided, or housing space was allocated on the outskirts of cities on land that was deemed undesirable.[32] This was largely an attempt to oppose the perceived (social, political, physical) threat posed by unregulated, spaced informal settlements.[33] Black South African housing was also seen as being temporary – a place for workers to rest while the

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[28] Parnell, ibid, 18.

[29] A Stadler 'Birds in the Cornfield: Squatter Movements in Johannesburg, 1944-1947' (1979) *Journal of Southern African Studies* 6, 119.

[30] A Todes and N Walker 'Women and Housing Policy in South Africa: A discussion of Durban Case Studies' (1992) 3 *Urban Forum* 2, 117.

[31] B Ramashamole 'Sustainable Housing Development in Post Apartheid South Africa' (Unpublished LLM thesis, University of Witwatersrand, 2011) citing C Cross 'Local Government and social conflict: Implications for piloting South Africa's new housing plan in Cape Town's informal settlements' in Marie Huchzermeyer & Stephen De Beer *The Bredell Land Invasion: why did this happen, and what can we learn from it? A debate hosted by the Centre for Development and Enterprise*, 2001.

[32] Mabin (n12 above) 464.

[33] Todes and Walker (n30 above) 117.

government viewed their "real homes" as being in the designated areas set out by law. These houses were therefore often not geared towards family living, but instead mimicked hostels for single-person, male habitation.[34]

The type, size, density and level of access to facilities differed from site to site and was influenced by several factors: including the affluence of the closest municipality, the race of the relocated group, the reason for the relocation, the level of communal organisation and possible media scrutiny.[35]

In the late 1980s, when civil unrest, public revolt and increased protest against the Apartheid government peaked, the white government resorted to a self-help policy, where it claimed to refocus on creating market conditions favourable to facilitating private acquisition of housing.[36] In fact, this privatisation formed part of what the government termed "orderly" or "positive" urbanisation, which, in addition to giving primacy to market powers as a solution to the South African housing crisis, persisted in maintaining racial residential segregation as a policy objective. It also used health standards, along with trespass and squatter laws, as a substitute for pass and influx control – which had proven to be ineffective in enforcing apartheid – to restrict access to areas in and around designated white areas.[37] Housing and

[34] Todes & Walker (n30 above) 117; However, between 1950 and 1960 households as opposed to single person dwellings increased notably due to poor government influx controls with 20% in metropolitan areas and 12% in towns – See D Hindson 'Alternative urbanisation strategies in South Africa: A critical evaluation' (1987) 9 Third World Quarterly 2, 585.

[35] The Surplus People Project 'Forced Removals in South Africa, Cape Town: Surplus People Project' (1983) 20.

[36] Mabin (n12 above) 464.

[37] Hindson (n34 above) 590.

service levels were also designed to match the income levels of residents, thereby entrenching class divides.[38]

Informal, "illegal" housing for non-white South Africans became commonplace,[39] with insecurity of tenure being a *de facto* policy objective.[40] Perversely, the policy was successful in so far as it created a housing system which supplies a consistent stream of vulnerable and cheap labour to service the economy.[41]

The self-help policy, which operated on the assumption that persons would access private financing, was inefficient. The loan system was risk-averse due to, amongst others, the real struggles of families to repay loans, which ultimately meant that financing for housing was not available – and the self-help policy did not improve housing.[42] Other policy obstacles – beyond end-user financing – included the slow identification of land for development, poor infrastructure and the vulnerability of aspirant homeowners to corrupt suppliers.[43]

In 1990, the Independent Development Trust (IDT) was created to provide a small capital subsidy (R7500) to 100 000 housing sites.[44] This project embraced the international,

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[38] Hindson (n34 above) 590.

[39] Mabin (n12 above) 464.

[40] Hindson (n34 above) 590.

[41] Hindson (n 34 above) details a debate between the Urban Foundation and what he terms "reformers in government" (Reformers). The Reformers argue that deep state intervention is necessary so as to avoid overcrowding, pollution and deterioration of living standards. The Urban Foundation is sceptical of regulation to solve the housing crisis and favours a liberalisation approach whereby circumstances are created whereby people can move to cities and benefit from economic advantages and not risk the increased cost that regulatory intervention might cost.

[42] National Department of Housing 'The User Friendly Guide to the National Housing Code' (2000) Pretoria: Department of Housing (hereafter "Guide to National Housing Code").

[43] Guide to National Housing Code, ibid, 2.

[44] A Venter & L Marais 'Gender and housing policy in South Africa; Policy and practice in Bloemfontein' (2006) *Journal of Family Ecology and Consumer Sciences* 34, 72.

mostly Western, trend of incrementalism where providing a rudimentary structure is a policy goal with the idea that the site would then be upgraded by inhabitants.[45] The use of the IDT shows an election in policy priorities: the idea of providing plots of land and then relegating the responsibility to build one's house to the beneficiary (the so-termed 'site-and-service' model) aligned with the policy ask of pro-profit stakeholders.[46] A review of the implementation of IDT shows that housing of about 36m^2 was built on relatively small plots (80m^2) - a decision to deter backyard dwellings from developing – in the form of fully subsidised detached, semi-detached and multi-storey walk-up units.[47] Larger market rental and social rental family units were developed to be 43m^2. This is the first broad "size specification" in public housing accessible across racial groups.

This project was ultimately met with severe criticism, as representatives from those most in need of housing denounced the lack of breadth of the project ("toilets in the veld"),[48] as well as the general unaffordability of this policy approach for beneficiaries.[49] However, evidence suggests that at the time of its implementation, the site-and-service model was seen to be a response to the sheer size of the backlog in housing and that policymakers understood the model to be financially more feasible than a mass-rental housing system.[50] Another factor which underpinned the introduction of this model was the understanding that a policy priority

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[45] Venter & Marais, ibid.

[46] S Charlton & C Kihato 'Reaching the poor? An analysis of the influences on the evolution of the South Africa;s Housing Programme', 270 citing in U Pillay, R Tomlinson & J Du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) Pretoria: HSRC Press.

[47] Department of Human Settlements 'Design and Implementation Evaluation of the Integrated Residential Development Programme' (2016) 93.

[48] M Tomlinson 'South Africa's new housing policy: an assessment of the first two years, 1994-1996' (1998) International Journal of Urban and Regional Research (1998), 138.

[49] P Adebayo 'A forced policy crossroads in South Africa: Revisiting incremental housing ideas post-COVID-19' (2020) 55 *Journal of Public Administration* 3.1, 572.

[50] Charlton and Kihato (n46 above) 271.

was to ensure full freehold tenure and that visible policy progress required securing full individual home ownership.[51] The election of this model seems to be influenced in large part by what political actors thought would most publically appease the demand for service delivery.[52] The need for this visibility was partly to address growing concerns over violence in migrant labour hostels which had been elevated to the scale of a national crisis.[53]

The African National Congress (ANC) – the ruling party to take power four years later in the first democratic elections – held the view that this model was a shortcut and did not meet the real demands of a mass housing programme.[54]

5.3. POST-DEMOCRATIC HOUSING POLICY

"Ladies and gentlemen size counts! With an average of 4.5 persons per family, and backed by CSIR research we decided to announce a minimum size of 30 square metres for all houses built with the government's subsidy grant. […] We are in the business of building homes and not bus shelters. We would be abrogating our primary responsibility if we did otherwise. - Sankie Mthembi-Mahanyele (Media Briefing, 12 February 1999)."[55]

5.3.1. Reconstruction and Development

In 1994, the newly elected ANC government set out to change the socio-economic profile of South Africa with the introduction of the Reconstruction and Development Programme

[51] Charlton and Kihato (n46 above) 271.

[52] Charlton and Kihato (n46 above) 273.

[53] K Lalloo 'Arenas of contested citizenship: housing policy in South Africa' (1999) 23 *Habitat International* 1, 38.

[54] Charlton and Kihato (n46 above) 270.

[55] GA Jones & D Kavita 'Enabling markets to work? Housing policy in the "new" South Africa' (2000) 5 *International Planning Studies* 3, 410.

(RDP).[56] RDP was a coherent socio-economic policy framework, which was to underpin a host of legislative and policy proposals to eradicate the legacy of apartheid and recover the South African economy, which was significantly imperilled before democracy. At this stage, it was estimated that only 58% of South Africans had secure housing tenure and that a further 18% of South Africans had some security of tenure but under imperfect arrangements.[57] The housing crisis was characterised by insecurity of tenure, overcrowding, poor housing conditions and deeply entrenched racial segregation.[58] The RDP placed housing at the forefront of economic recovery and stipulated the provision of "at minimum, one million low-cost houses" by 1999 as a policy objective.[59] Significantly, it also provided that:

> "As a minimum, all housing must provide protection from weather, a durable structure, and reasonable living space and privacy. A house must include sanitary facilities, storm-water drainage, a household energy supply (whether linked to grid electricity supply or derived from other sources, such as solar energy), and convenient access to clean water. Moreover, it must provide for secure tenure in a variety of forms. Upgrading of existing housing must be accomplished with these minimum standards in mind."[60]

However, the RDP framework does not go further to provide size requirements and does explicitly note that the policy should factor in considerations of resource constraints and affordability by beneficiaries.[61]

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[56] Nelson Mandela Foundation 'The Reconstruction and Development Programme: A policy Framework' (1994) O'malley Archives <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/-05lv02120/06lv-02126.html> (hereafter "RDP Policy").

[57] Ramashamole (n31 above) 16.

[58] Ramashamole (n31 above) 28.

[59] RDP Policy (n56 above) para 2.5.

[60] RDP Framework (n56 above) para 2.5.7.

[61] RDP Framework (n56 above) para 2.5.6.

In the course of its implementation, the RDP made further additional policy undertakings to better align with the understanding of housing adequacy. Community and stakeholder negotiation became important to make housing acceptable to housing occupants and to promote agency, both in negotiating projects and in developing further minimum housing standards. The location of housing became key and it was recognised that public housing had to be located close to amenities and economic opportunities. Access to housing was also not to be seen as hegemonic – different types of housing, forms of housing tenure, or government support (like financing) to enable self-realisation were important, based on the individual and community needs of different peoples. Finally, in line with the democratic principles of cooperative governance, power was to be devolved from national to provincial and local levels where housing delivery was to occur.

Overall, RDP housing was heavily criticised: houses were located far from economic opportunities, outside of transport corridors, and ongoing technical assistance required for certain designs was not provided.[62]

5.3.1.1. White Paper on Housing

As a result of this new government undertaking in the RDP, the Government published the White Paper on Housing.[63] The White Paper emanates from the National Housing Forum (NHF), which was established in 1992[64] and acted as a negotiation platform for new housing policy in South Africa for two and a half years.[65] However, the views of the unhoused were not

[62] Adebayo (n49 above) 575.

[63] National Department of Health "White Paper: A new housing policy and strategy for South Africa" (1994) (hereafter "NDOH White Paper").

[64] NDOH White Paper, ibid, preamble.

[65] MR Tomlinson 'From Rejection to Resignation: Beneficiaries' Views on the South African Government's New Housing Subsidy System' (1999) 36 *Urban Studies* 8, 1350.

represented in the NHF. Instead, technical specialists and interested parties in housing delivery monopolised the process.[66]

The White Paper, in essence, attempted to set out a policy response to the country's massive housing backlog by creating a framework for the creation of integrated settlements with access to amenities that would ultimately lead to a permanent residential structure and adequate service delivery.[67] The goal of the White Paper was to supply over 300 000 housing units each year in the form of a 'starter house' which was ultimately interpreted to mean a dwelling of at least $30m^2$.[68]

A component of the White Paper that didn't see realisation, and that is of particular interest for the discussion in this thesis, was the following provision:

> "Government believes that it has a significant role to play in actively developing and supporting new and innovative approaches to social housing, especially where these provide for the self-management of housing stock within the ambit of such institutions. This is an area of housing opportunity that has long been neglected in this country, and may well require significant engagement with international expertise and experience."[69]

The White Paper continues to explain that this type of housing solution was to be provided by providing a central body, as opposed to an individual, with a subsidy to develop this type of housing subject to certain restrictions, to avoid simulating a for-profit arrangement. This shows

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[66] Tomlinson, ibid.

[67] K Tissington 'A Review of Housing Policy and Development in South Africa' (2010) 33.

[68] Tissington, ibid, 34.

[69] NDOH White Paper (n63 above) para 5.3.6.

manifest similarities to some communal tiny house arrangements observed in other jurisdictions.

The White Paper also makes brief mention of the State's goal to "facilitate and encourage environmentally sustainable development",[70] to "promote environmental sustainability and deal sensitively and responsibly with the impact of land development on the environment."[71] It further mandates a range of "environmental standards" which are effectively standards to prevent circumstances conducive to water pollution and communicable disease spread.[72]

5.3.1.2. 1995 Housing Subsidy Scheme

The funding vehicle for the new housing delivered under the RDP was the 1995 Housing Subsidy Scheme, which was a lump-sum grant adjusted for various levels of income below R3500 per month (the capital amounts of the subsidy ranged from R5000 – R12 500 initially, but was raised to R15000).[73] The subsidy was to be used to acquire a house or for upgrading a current structure, and was tied to the condition of ownership and the observance of minimum health and safety standards.[74] It was also tied to the ownership of vacant service stands as provided for by the State.[75] Finally, beneficiaries were to be older than 21 years, had to be married or cohabiting with a person, or had to have financial dependents.[76] This approach

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[70] White Paper (n63 above) para 5.7.1.3.

[71] White Paper (n63 above) para 5.7.1.8.

[72] White Paper (n63 above) para 5.8.2.

[73] Adebayo (n49 above) 575.

[74] Adebayo (n49 above) 575.

[75] Department of Human Settlements 'Simplified Guide to the National Housing Code' (2009), 19 (hereafter "National Housing Code").

[76] Venter & Marais (n44 above) 72.

removed some of the policy obstacles for women to access housing, and better accommodates housing as homes rather than hostels.[77]

Initially, this subsidy was tied to project-based housing – effectively, housing provided at a large scale by developers.[78] Developers were mandated to engage with beneficiaries through a participation process whereby negotiations and interviews with beneficiaries were required.[79] The scheme has been deemed ineffectual, and one common narrative tied to this relative failure is that the quality of housing (linked to the size of dwellings) was insufficient.[80] This concern is not unexpected, as the programme was geared towards the provision of a "starter house" dependent on further upgrades by the occupants.[81]

Tomlinson conducted a series of focus group discussions with beneficiaries of the subsidy scheme to assess the level of satisfaction with the scheme, and the level of beneficiary participation as mandated by the policy.[82] The results showed that beneficiary satisfaction was not *per se* linked to dwelling size and that recipients of larger houses did not necessarily express more satisfaction than persons who received smaller structures.[83] However, beneficiaries were dissatisfied with the size of the structures relative to the financial contributions they made to the project. At the same time, beneficiaries of the larger units (here 40m^2) reported that their conditions worsened due to the increase in living costs.[84] Overall, dissatisfaction with the

[77] Venter & Marais (n44 above) 72.

[78] Venter & Marais (n44 above) 72.

[79] National Housing Code (n 75 above) 19.

[80] Tomlinson (n64 above) 1352.

[81] Venter & Marais (n44 above) 74.

[82] Tomlinson (n64 above) 1350.

[83] Tomlinson (n64 above) 1353.

[84] Tomlinson (n64 above) 1353.

scheme was based on beneficiaries' view that the structures were not value-for-money and fell short of the promised results: beneficiaries felt they could produce similar quality structures outside of the programme, and that developers promised better quality (and bigger) structures during the initial phases of the project, which were subsequently not delivered.[85] The government also promised "four-room houses" to voters during the run-up to elections.[86] Satisfaction levels were highest in situations where there was a higher degree of consultation with beneficiaries, and where expectations were thus reflected in the actual end product and was not correlated to the modesty of the product delivered.[87] The study also revealed that beneficiaries preferred collective negotiation but individual implementation, so as to have more agency on the type of structure to build in every case.[88]

5.3.1.3. Piloting the 40m^2 minimum size requirement: The Free State example

In the Free State province, in an attempt to ensure decent housing, a housing policy was introduced that captured the - now-nationally accepted - minimum size standard of 40m^2.[89] The policy was abandoned, but the practice of building relatively larger houses continued, with the result that public housing in the Free State accounted for the largest number of housing units

[85] Tomlinson (n64 above) 1353.

[86] Tomlinson (n64 above) 1353.

[87] Tomlinson (n64 above) 1353.

[88] Tomlinson (n64 above) 1357.

[89] L Marais 'Does housing size matter? The politics and realities of housing size' (2007) *Town and regional planning* 51.

built under the 1995 subsidy scheme.[90] Almost 90% of the houses built in the Free State were larger than 40m^2, in comparison to only 28.5% of housing built in the rest of the country.[91]

Marais, in a review article, considered the trade-offs the minimum size requirement had as a consequence.[92] The increased size of units meant that the subsidy was almost exclusively used for the top structure of the house, and planning and infrastructure were severely neglected as a result.[93] Of severe concern was the lack of investment in sanitation. Almost half of the houses built used pit latrines (as compared to 16% in sites outside of the Free State).[94] The impact on the health of this failing sanitation system, as well as the disproportionate impact on women, persons living with HIV/AIDS and the environment, raises concerns over the adequacy of the housing.[95]

The focus on the top structure also meant that upgrades in informal settlements were difficult, and therefore the Free State virtually abandoned an upgrade approach.[96] Some municipalities resorted to compulsory deposits to access the subsidised housing to finance the increased size of the house – this approach directly contradicted the purpose of the subsidy scheme, since the low-income rates required to qualify for the scheme also excluded the ability to contribute to the deposit (about R2500) and therefore excluded persons from the scheme

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[90] L Marais 'Low-Income Housing in the Post-Apartheid Era: Towards a policy Framework for the Free State' (unpublished PhD Thesis, University of Free State, 2003) 50.

[91] L Marais 'Good intentions with negative consequences: the case of housing policy in the Free State' (2003) 33 *Africa Insight* 4, 54-60.

[92] Marais (n89 above).

[93] Marais (n89 above) 77.

[94] Marais (n91 above).

[95] Marais (n89 above) 77 citing R Tomlinson 'Housing policy in the context of HIV/AIDS and globalisation' (2001) 25 International Journal of Urban and Regional Research, 3, 650- 657 & L Marias & H Botha 'Issues for modern SA: Increasing urbanisation, is having a dramatic effect on the poor and the environment, and forcing a rethink of the housing policy (2001) 31 Africa Insight 2, 43-51.

[96] Marais (n89 above) 78.

altogether.[97] Other municipalities could not recover the funds required to plan the sites (again, the full subsidy was applied to the house) and overall delivery simply slowed.[98]

It is also worth noting, that despite the size-infrastructure trade-off, in a study conducted in Bloemfontein where 405 beneficiary households were surveyed, the most frequently cited desirable upgrade to the dwelling was an increase in size of the house (either in existing room size or increased room sizes).[99] However, winter temperatures in the house, dampness, and wall conditions were a higher source of reported dissatisfaction than the number of rooms.[100] In fact, Marais and Venter expressly asked respondents in a survey if they would prefer a bigger house with lower levels of infrastructure, or a smaller house with higher levels of infrastructure – overwhelmingly, respondents (<90%) preferred increased infrastructure over size.[101]

The experience of the Free State illustrates clearly that minimum size requirements can impact housing provision significantly. First, the additional resource drain on the State can make programmes ineffectual and unsustainable, often resulting in trade-offs on other aspects of housing, which may have a closer link with the adequacy of dwelling units (such as proper and safe sanitation). Minimum size requirements can also lead to the unintended consequence of making the maintenance of the unit unaffordable to beneficiaries. All of this, while evidence suggests that housing beneficiaries' expectations in terms of housing size are actually more about trust in political promises and that agency in the design of public housing programmes and transparency from the State are of more importance to them. Finally, it appears from the

[97] Marais (n89 above) 78.

[98] Marais (n89 above) 79.

[99] Venter & Marais (n44 above) 74-6.

[100] Venter & Marais (n44 above) 75.

[101] Venter & Marais (n44 above) 75.

surveys that size is of lesser concern in housing than the quality of the structure and access to crucial amenities (like water).

5.3.2. Breaking New Ground

In 2004, Breaking New Ground (BNG) was introduced as the new national housing policy.[102] Despite the widespread criticism levelled against RDP, the BNG policy proclaimed the RDP policy to have been successful insofar as "stabilizing the environment to transform the extremely fragmented, complex and racially-based financial and institutional framework inherited from the previous government, whilst simultaneously establishing new systems to ensure delivery to address the housing backlog", but cited a slowdown and lacking responsiveness in actual housing delivery as a basis for policy reform.[103] BNG was also responsive to a proclaimed recognition that the income threshold to access the subsidy was incorrectly based on the assumption that higher income households (between R3500 to R7000 per month) would be able to access private financing, which was not realised.[104] BNG further cited a withdrawal of support from large construction firms in the public-private approach to housing provision as an obstacle to the further continuance of the 1994 policy.[105]

BNG was concerned with correcting the criticism against the quality of housing provided under RDP – a criticism the government attributed to private developers' attempts to maximise profits and neglect product quality.[106] BNG therefore, unsurprisingly, was driven by

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[102] Department of Human Settlements '"Breaking New Ground" A Comprehensive Plan For The Development Of Integrated Sustainable Human Settlements' (2004) (hereafter "Breaking New Ground").

[103] Breaking New Ground, ibid, 9.

[104] Breaking New Ground, ibid, 11.

[105] Breaking New Ground, ibid, 12.

[106] K Tissington 'A Resouce Guide to Housing in South Africa 1994 – 2010: Legislation, Policy, Programmes and Practice' *SERI* (2011) 70 <https://housingfinanceafrica.org/app/uploads/SERI_A-Resource-Guide-to-Housing-in-South-Africa_Feb11.pdf>.

a policy imperative to have a stronger state role in the provision of housing, instead of its previous reliance on the private sector.[107] In particular, local government was to take the strongest role in managing this policy pivot.[108]

BNG took a "depth" rather than a "width" approach, by prescribing additional quality requirements for public housing and increasing the minimum size requirement to 40m^2, thereby striving to provide housing that would not require further upgrades by the households themselves.[109] This policy pivot seems to be a direct, albeit over-simplified, response to quality complaints levelled against RDP housing.

The increase in minimum dwelling size under BNG also seems disconnected from trends in housing: the BNG policy expressly recognised that the average household size (the number of people who live together) was decreasing, while the population growth had increased and the housing backlog had not seen a reduction.[110] In short, BNG envisaged providing bigger houses at a higher resource cost, while people were starting to form smaller households.

The BNG policy had multiple components. In 2007, the Inclusionary Housing Policy was created whereby the private sector was to facilitate access to affordable housing when developing and providing housing to higher income groups.[111] In 2009, the National Housing Code was revised to accommodate the policy goals of BNG and to formalise the restructuring

[107] Tissington, ibid.

[108] Tissington, ibid.

[109] Adebayo (49 above) 574.

[110] Tissington (n106 above) 72.

[111] Tissington (n106 above) 77.

of housing departments at all levels of government as well as housing support institutions.[112] The 2009 Code provided for several novel or continued housing programmes. The basic premises of these are now briefly relayed before closer attention is paid to how their implementation has been experienced.

5.3.2.1. Breaking New Ground Housing Programmes in theory

The provision of State subsidies persists under BNG in the Individual Subsidy Scheme that allows for credit- or non-credit-linked subsidies.[113] The recipients of services stand or housing supports under previous housing programmes (pre-BNG), can utilise – (a) the Consolidation Subsidy Programme to fund necessary services to finalise housing construction,[114] (b) the Enhanced Extended Discount Benefit Scheme to facilitate the transfer of public housing stock to certain qualifying individuals, and (c) the Rectification Programme which is applied not to individuals, but is allocated where buildings are compromised due to ineffective municipal engineering services.

The Integrated Residential Development Programme, implemented at the local level, provides for the creation or servicing of well-located stands or plots of land for various uses (residential, commercial, public) with the view to develop overall integrated settlements close to economic and social amenities.[115] This programme is designed to develop settlements that include all types of land uses and housing types (it caters for commercial, not-for-profit and public use stands too) and to cater for different income groups.[116] The programme does not

[112] National Housing Code (n 75 above) 10.

[113] National Housing Code (n 75 above) 30-31.

[114] National Housing Code (n 75 above) 35.

[115] National Housing Code (n 75 above) 11.

[116] National Housing Code (n 75 above) 20.

require the identification of housing recipients in advance.[117] Fundamentally, the programme only works in an unoccupied area – so settling a completely new township – or in a current settlement where an unoccupied parcel of land is available.[118]

The Upgrading of Informal Settlements Programme (UISP) aims to assist persons in informal settlements identified by local municipalities who qualify for the Housing Subsidy Scheme and who own a structure.[119] At the heart of this programme, the influence of international agencies can be seen in the policy goal to eradicate informal settlements (city vs slums).[120] UISP is aimed at *in situ* upgrades, with relocation only considered when the existing terrain is unsuitable for human residence.[121] *In situ* upgrades often involve retrofitting urban infrastructure (storm water drainage, water pipes, roads etc) around existing self-constructed dwellings, as well as upgrades to those existing dwelling structures. The programme takes a phased approach to try and avoid disrupting social cohesion, security of tenure and economic development within the settlement.[122]

Emergency Housing Assistance aims to provide temporary housing relief to persons afflicted by man-made or natural emergencies or relocated during the course of implementing the UISP.[123] Grants are provided to municipalities and managed through provincial housing departments.[124] Given that the nature of the housing is to be responsive to imminent threats to

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[117] National Housing Code (n 75 above) 9.

[118] National Housing Code (n 75 above) 14.

[119] National Housing Code (n 75 above) 15.

[120] Tissington (n66 above) 55.

[121] National Housing Code (n 75 above) 16.

[122] Tissington (n66 above) 55.

[123] National Housing Code (n 75 above) 21.

[124] Tissington (n66 above) 59.

life (eg. sinkholes, flooding, fires), the beneficiaries of this programme can be much wider and include non-lawful residents in South Africa, persons without dependents or minor-headed households, persons who earn above the beneficiary threshold for other programmes and persons who have previously received housing assistance.[125] The programme allows for cost coverage for several municipal services: water, sanitation, refuse removal and street lighting.[126]

There are several programmes aimed at providing rental housing. The Social Housing Programme aims to create low-cost rental housing stock, which is to be administered by an independent authority in locations that are well located in relation to access economic opportunities.[127] Individual home ownership is not a policy goal and restrictions are placed on "buy-back" models.[128] This assistance is only available in designated areas termed 'designated restructuring zones' which are areas identified by local governments for targeted investments.[129] Institutional Subsidies are the sister Programme, which facilitates low-cost rental stock through capital grant awarded to social housing institutes in other key locations where communities require housing (outside of designated restructuring zones).[130] The programme allows for the sale of properties after four years and has long-term management of the rental stock as a key funding criterion.[131] Finally, the Community Residential Units Programme aims to upgrade (and, where necessary, provide) hostel housing and backyard and

[125] Tissington (n66 above) 59-60.

[126] Tissington (n66 above) 60.

[127] National Housing Code (n 75 above) 24.

[128] National Housing Code (n 75 above) 18.

[129] National Housing Code (n 75 above) 19.

[130] National Housing Code (n 75 above) 25.

[131] National Housing Code (n 75 above) 9.

informal settlement rentals for very low-income individuals.[132] The programme does not envisage any private acquisition of units.[133]

The Rural Subsidy: Communal Land Rights is a programme which aims to provide subsidies to persons who occupy property on communal grounds.[134] The programme is designed to assist persons with old and new-order tenure rights as recognized in terms of the Communal Land Rights Act (11 of 2004).[135] Administration of the land will occur through the recognized traditional council in the area or, in the absence of such a council, by a land administration committee.[136] The Farm Residents Housing Assistance Programme is aimed to support persons who are employed on farmland and need assistance to have adequate housing located close by.[137] The programme is designed to address the plight of farm workers who are often marginalized and without assistance from farm owners and who are forced to live in settlements outside of the reach of municipal services and without other economic opportunities.[138] This programme provides a grant to farm owners to develop housing or to transfer a portion of farmland to a housing institution for development.[139]

[132] National Housing Code (n 75 above) 27.

[133] National Housing Code (n 75 above) 57.

[134] National Housing Code (n 75 above) 35.

[135] National Housing Code (n 75 above) 12.

[136] National Housing Code (n 75 above) 19.

[137] National Housing Code (n 75 above) 47.

[138] National Housing Code (n 75 above) 22.

[139] National Housing Code (n 75 above) 24.

Support programmes are also included in the 2009 Code, such as the Provision of Social and Economic Facilities Plan, which is not aimed at developing residential properties but at the provision of social and economic services such as schools, clinics and transport hubs.[140]

The National Housing Code also contains technical guidelines on how to apply interventions and sets out eligibility criteria for each of the programmes. It contains a technical guide named "The National Norms And Standards For The Construction Of Stand Alone Residential Dwellings Financed Through National Housing Programmes" which provides that "[all] residential developments that will be undertaken through the finance provided in terms of the National Housing Programmes must comply with the norms and standards contained in this section".[141] Despite actively acknowledging the desirability of maintaining a performance-based technical standards for housing and using this approach in various other aspects of the building characteristic, it still entrenches a minimum of 40m^2 gross floor area as the minimum size for any permanent residential structure provided by means of a housing subsidy. It also provides limited other technical criteria which need to be adhered to (such as providing different guidelines on bedroom sizes), which is not prescribed under the South African building regulations.[142]

5.3.2.2. Breaking New Ground Housing Programmes in practice

Given the multiplicity of interventions, it is perhaps not surprising that the BNG policy was bemoaned for its lack of policy direction and confusing nature.[143] Moreover, despite its breadth of proposed interventions, commentators note that the reality of housing policy post-2004 was

[140] National Housing Code (n 75 above) 19-20.

[141] National Housing Code (n 75 above) Volume 2, section 2.1.

[142] The National Norms and Standards do not apply to the UISP programme.

[143] Charlton & Kihato (n46 above) 259.

still to provide fully subsidised, detached, low-income family-style accommodation in continuation of RDP logic.[144] In fact, the policy vision of supplementing RDP-style greenfield housing delivery with smaller-scale alternative housing arrangements – which seem demand-driven – have, for the most part, not been realised in practice.[145]

A study in Alexandra in Johannesburg shows the preference for smaller, cheap, but most importantly, well-located housing close to amenities and economic opportunities over larger, more removed, owned properties.[146] Charlton reflects on how experimental models of housing – small units with common areas – have shown promise in not only bringing residents into the formal housing fray but in providing social and emotional inclusion within the city.[147] Such models – which bear marked similarities with certain tiny housing solutions – also bridge other policy divides beyond mere resources: they give access to housing to persons who might not qualify for housing assistance by the State, such as slightly higher earners or foreign nationals. Similarly, the evolution of backyard dwellings in Johannesburg, as both an economic opportunity for landlords and an ability to access housing for tenants in Johannesburg, reflects the real-life priorities of South Africans facing housing precarity.[148] Such dwellings, where formally constructed and planned, have shown to be a great mechanism to improve density in the city. These dwellings typically do not meet the 40m^2 standard and thereby underline that

[144] D Gardner 'Small-scale Private Rental' Urban Land Mark and Social Housing Foundation (January 2010) 12 <http://www.urbanlandmark.org.za/downloads/small_scale_rental_booklet_2010.pdf >

[145] Gardner, ibid.

[146] S Charlton 'Inclusion Through Housing: Limitations and Alternatives in Johannesburg' (2010) *Urban Forum* 21, 1–19.

[147] Charlton, ibid.

[148] Y Shapurjee & S Charlton 'Transforming South Africa's low-income housing projects through backyard dwellings: intersections with households and the state in Alexandra, Johannesburg' (2013) *J Hous and the Built Environ* 28, 653–666.

people are prone to trade off housing size in favour of improved location or improved economic opportunities.

In contrast, a continued preference for big government mega-projects where high numbers of units in individual projects are constructed on available land on the urban periphery was espoused.[149] An arguable driver for this practice is the space requirement to deliver 40m^2 dwellings where such space is typically only available at scale on the outskirts of the city. Incremental policy solutions were also self-defeating in certain circumstances. As Eglin notes, some persons were dissuaded from purchasing land in an effort to self-realise their right to housing as that could lead to the ultimate disqualification for eligibility to receive a state subsidy.[150]

The UISP – which set the policy goal of upgrading 400 000 informal settlements before 2014-[151] is one of the major departure points from the RDP programme and was supposed to be a major policy objective. This programme was first piloted in 2005.[152] Despite this programme being aimed at integrative and cooperative *in situ* policy solutions to housing, the State had continuously implemented the UISP through a lens of eradication of informal settlements that have led to forceful evictions on a large scale.[153] Tissington outlines how this lens of eradication is a result of viewing the urban poor as a security threat and a sense that

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[149] Adebayo (n49) above, 575.

[150] R Eglin 'Stark Choices Confront Housing' 2007 31 *The Local Government Transformer* 1, 2.

[151] S Croese, LR Cirolia & N Graham 'Towards Habitat III: Confronting the disjuncture between global policy and local practice on Africa's "challenge of slums"' (2016) *Habitat International* 53, 240.

[152] G Barlow Govender 'An Evaluation Of Housing Strategy in South Africa For The Creation Of Sustainable Human Settlements: A Case Study Of The Ethekwini Region' (Unpublished Phd, University of KwaZulu-Natal, 2011) 19.

[153] M Huchzermeyer 'Pounding at the tip of the iceberg: The dominant politics of informal settlement eradication in South Africa' (2010) 37 *Politikon* 1, 130.

informal settlements are to be viewed exclusively as temporary housing arrangements that need to be replaced in total.[154]

The State has continued to favour greenfield developments, and several practical barriers to implementing UISP have manifested: where preliminary enquiries into UISP have been launched, geotechnical concerns about the land on which the settlement is to be upgraded have proven a cost barrier. [155] Also, the housing type to be provided is fixed early in the project, without necessarily allocating the appropriate budget for such constructions available upfront.[156] The low levels of uptake on the UISP programme are even more concerning, given the evidence that it has the highest positive impact on economic growth of all the housing interventions.[157]

A study of a community where UISP was implemented showed that 69% of respondents believed that their quality of life and well-being had improved but that 44% were dissatisfied with the size of their dwelling, the quality of its finishing and plot size.[158] Size, therefore, is not irrelevant for UISP, but environmental factors and counteracting measures (roofing) were also major concerns, and resource constraints continue to be a limiting factor.

The Emergency Housing Program is also of particular interest, given the projected increase in climate-related events. Emergency housing is often used in instances where floods

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[154] Tissington (n106 above) 89 citing R Pithouse 'A Progressive Policy withour Progressive PoliticsL Lessons from the failure to implement 'Breaking New Ground'' (2009) *Town Planning* 54, 1-2.

[155] Tissington (n106 above) 97.

[156] Tissington (n106 above) 97.

[157] K Lockwood 'Unpacking the potential impact of the Covid-19 pandemic on the South African economy and the housing sector' *Centre for Affordable Housing Finance in Africa* (2020).

[158] N Zungu 'An evaluation of socio-economic benefits of an in-situ upgrading programme. The Case study of Namibia Stop 8 in Inanda (eThekwini Municipality)' (Unpublished Degree in Masters in Housing, 2016, University of KwaZulu-Natal) 97-8.

or fires displace occupancy.[159] Importantly, the local municipality decides whether an event or set of circumstances qualifies for emergency housing assistance.[160] The standards to provide temporary housing under this programme are very different from the criteria for permanent housing solutions and are aimed at providing "basic" structures with much lower criteria for services of utilities and durability requirements.[161] Amongst other deviations, the 40m^2 requirement for interventions is not present.[162] Transit camps, or temporary relocation areas, are created under this programme and have been steeped in criticism.[163] The main criticism – which undermines the otherwise acceptable logic of relaxing minimum standards – is that these so-called temporary arrangements eventually turn into semi-permanent or even permanent housing arrangements.[164] Emergency housing has also seen a history of falling short in relation to proximity to amenities and lack of services, and has attracted criticism for its use in situations which do not meet the true threshold of an emergency, for example, building stadia.[165]

5.4. SHOCKS TO THE POST-DEMOCRATIC HOUSING POLICY: WEAVING TOGETHER DIFFERENT POLICY REACTIONS

Housing policy inherently has to be resilient in the face of changing social, financial and physical environments. In South Africa, two major shock events - events that disturb an established norm of operation – have caused the government to engage in reactive policy-

[159] LR Cirolia 'South Africa's Emergency Housing Programme: A prism of urban contest' (2014) 31 *Development Southern Africa* 3, 397.

[160] Tissington (n106 above) 101.

[161] Tissington (n106 above) 101.

[162] Tissington (n106 above) 101.

[163] Tissington (n106 above) 102.

[164] Tissington (n106 above) 102.

[165] Cirolia (n159 above) 397.

making in the realm of human settlements. The first is the effect of the Covid-19 pandemic and the accompanying lockdown. The second is the accelerating climate crisis and the impact of changing weather patterns and extreme weather events on current and future housing units.

5.4.1. Housing and the Covid-19 pandemic response

South Africa's management of the Covid-19 pandemic was through the Disaster Management Act[166] which empowers the relevant Minister to make regulations or issue directions in relation to the disaster. Permissible measures include evacuation of persons to temporary shelters, controlling the occupancy of premises, and to provide, control or regulate the use of temporary accommodation.[167] Under this Act, South Africa entered into a "hard lockdown" on 26 March 2020.[168] This meant people were restricted to "their places of residence" except for accessing essential goods and services. As a counter-balance, evictions were prohibited.[169]

Naturally, this posed a conundrum for persons in densely populated and informal housing and for persons without dwellings. Covid-19 is a communicable disease, which requires social distancing and proper ventilation to counteract the rapid spread of the virus. However, the assumption is that lockdown measures aimed to restrict Covid-19 transmission also caused vulnerable persons to be likely to be infected by the virus in confined living arrangements.[170] The government's response to this conflict was to institute a de-densification

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[166] 57 of 2002 (hereafter "Disaster Management Act").

[167] Disaster Management Act, ibid, section 27(2)(d),(g) & (h).

[168] Amendment of Regulations issued in terms of section 27(2) (43148/ R.398) (25 March 2020), reg 11 (hereafter "March 2020 Amended Regulations").

[169] March 2020 Amended Regulations.

[170] The link between Covid-19 transmission and density has not yet been definitively proven: M Huchzermeyer 'Rethinking urban resettlement anddisplacement from the perspective of" home"' in R Beier, Aspire & M Bridonneau (Eds) *Urban Resettlements in The Global South lived Experiences Of Housing And infrastructure Between Displacement and Relocation*, (2020) citing K Cullinan 'Africa's Covid-19 slow burn: A warning against complacency' *DailyMaverick*, 15 September, 2020; M Kang, Y Choi, J Kim, J. et al.'COVID-19 impact on city and region: what's next after lockdown?' (2020) 24 *International Journal of Urban Sciences* 3, 297–315.

programme (although other terms were sometimes used by the State).[171] It is worth noting that the drive behind de-densification did not seem to properly correlate with the rate of infection in South Africa.

Given the actual volume of persons who required government assistance and the immediacy of such assistance, the scale of the current housing policy shortcomings – especially emergency housing provision – became apparent. TRUs were constructed and allocated on an *ad hoc* basis. Reports indicate small numbers of units per province: for example, 10 000 units were provided in the Western Cape in apartment-style settings[172] and less than 6000 units were made available in Gauteng to service two informal settlements. [173] It is unclear what the size of these units was.

A major concern was that the housing response – aimed at being temporary – not only failed in its ability to create infrastructure for the complexity of the disaster but diverted already-strained funds away from ongoing housing programmes.[174] The government's response again echoed "Big State" but failed in its lack of resources and ability to implement. Instead, commentators recommended that enabling self-realisation through decreased state intervention and regulation could be beneficial overall: Covid-19 offered an opportunity to embrace alternative housing types which can be more affordable, self-built and use less resources. This required, at least, a relaxation of stringent requirements around building

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[171] L Sisulu 'Minister Lindiwe Sisulu on government's response to Coronavirus COVID-19 pandemic' (29 April 2020) <https://www.gov.za/speeches/minister-lindiwe-sisulu-government%E2%80%99s-response-coronavirus-covid-19-pandemic-29-apr-2020> .

[172] Western Cape Government 'Temporary de-densification of Dunoon and Kosovo could benefit more than 10 000' (31 March 2020).

[173] CC Fatti, C Hamann & Y Naidoo 'De-densifying Gauteng: A Thought experiment' (29 May 2020) Gauteng City-Region Observatory (29 May 2020).

[174] Fatti et al, ibid.

characteristics. The Covid-19 disaster highlighted the lack of space within the current BNG policy to self-realise housing, which removes an avenue through which resilient and sustainable housing can be accessed without the same fiscal burden on the State. [175]

5.4.2. Accelerating climate events

Rising temperatures (about 4°C in the next 60 – 70 years under a high emissions scenario) will increase aridity, drought, extreme storms, and major floods in South Africa. Some of these effects have already been felt.[176] The Department of Human Settlements, in response to the growing disruption of housing caused by extreme weather events like floods, have moved the administration of the Emergency Housing Programme to the national government as of 1 April 2023.[177] This decision was made for a variety of reasons: some local municipalities are not functioning, local and provincial skills to assess disasters and plan relief are uneven, different emergency events occur in different provinces at different levels of intensity each year, the current programme often resulted in persons occupying temporary residential units for periods of time amounting to permanency and responses have been slow.

The Department of Human Settlements has announced that it will move away from focusing on TRUs and move towards using alternative building technologies to provide more permanent solutions. Disaster relief measures will also be more focused on enabling self-realisation: affected households will qualify for vouchers and building materials to self-build homes. Vacant government buildings will also become eligible to provide emergency

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[175] Adebayo (n49 above) 580.

[176] World Bank Group 'Country, Climate and Development Report: South Africa' (2022) 5.

[177] South African Government News Agency 'Human Settlements set to respond faster to help disaster victims' (31 March 2023) <vchttps://www.sanews.gov.za/south-africa/human-settlements-set-respond-faster-help-disaster-victims#:~:text=Emergency%20Housing%20Command%20Centre&text=%E2%80%9CIt%20-will%20have%20linkages%20to,to%20respond%20to%20imminent%20disaster>.

shelter.[178] It is also important for climate adaptation policies to be implemented before disaster climate events. A mixed-methods study in Mdantsane township identified UISP as the most embraced housing intervention in the local community to enable climate change adaptation.[179]

It is worthwhile for the state to consider that increased reliance on emergency housing programmes to cater for natural and other disasters (including relocations to facilitate other forms of housing assistance) completely displaces the protective function of permanent housing building regulations and disrupts infrastructure (and is ultimately more costly).

Instead, alternative housing typologies such as tiny housing can both provide a short-term proactive policy response: by providing more housing in locations previously deemed difficult for mass housing programmes (due to space constraints) and less cost that can be used to house climate migrants. As well as reduce the long-term environmental impact of housing, thereby mitigating the climate crisis.

5.5. REFLECTIONS: SIZE AS A MARKER FOR DEMOCRATIC SUCCESS AND THE CHALLENGE OF TINY HOUSING

The history of South Africa tells a tale of two policy drivers. Before the democratic transition in South Africa, housing policy was driven by political and economic concerns. The politics revolved around creating clear class divides and creating physical space between white and non-white people in South Africa. This "space" preserved social hierarchies created around race: distance between different race groups, and size and distance within the living arrangements of those "worthy" groups deemed morally superior. This goal was in tension with the economic concern: private entities wanted to exploit the created underclass for cheap labour, and the labour required physical proximity. This meant that arrangements to provide

[178] South African Government News Agency, ibid.

[179] ET Busayo, AM Kalumba & IR Orimoloye 'Spatial planning and climate change adaptation assessment: Perspectives from Mdantsane Township dwellers in South Africa' *Habitat International* 90 (2019): 101978.

temporary accommodation to the labour class were required. This meant that cheap, small spaces that allowed for transience were required.

When South Africa transitioned to democracy, housing policy was driven by a human rights mandate, as well as a political mandate. The previous trends in size and density were inadvertent markers to measure the accomplishment of equal socio-economic rights. Land ownership and detached housing in lower-density settings – mimicking previous patterns of the colonial British Garden City – emerged as the popular housing choice and were equated to dignified housing. However, space and resource constraints in cities meant that this housing type was implemented on urban peripheries and at the cost of major trade-offs in access to other socio-economic rights.

As outlined in Chapter 1, the changing landscape in South Africa and globally makes this approach unsustainable. The negative impact of Covid-19 on economies worldwide has been apparent – with South Africa facing a worse-than-average decline in economic activity.[180] The Southern Africa region is also estimated to face a slower recovery time than most other world regions.[181] In 1994, when the national government first attempted to address housing as a broad-based public issue, South Africa's GDP-to-Dept ratio was 44%.[182] In December 2022, the ratio went as high as 71%.[183] Extreme weather events threaten the economy further with an estimate that natural disasters will cost the economy 37% of GDP.[184] The housing backlog has also increased significantly in the last 20 years. In 2014 (with an estimated backlog of over 1.9

[180] N Makgetla 'The Covid-19 pandemic and the economy in Souterhn Africa' Southern Africa – Towards Inclusive Economic Development' WIDER Working Paper 113/2021 (2021) 5.

[181] Makgetla, ibid, 6.

[182] < https://www.macrotrends.net/countries/ZAF/south-africa/debt-to-gdp-ratio>.

[183] <https://www.ceicdata.com/en/indicator/south-africa/government-debt--of-nominal-gdp>

[184] <https://housingfinanceafrica.org/countries/south-africa/?.

million units), the estimated cost of eradicating the housing backlog was R800 billion.[185] In comparison, the 2022/2023 total budget allocation to the Department of Human Settlements (the highest housing budget to date) was R33 billion.[186]

Ultimately, the government needs to find a way to reduce its resource-spend on housing programmes. There have been a number of suggestions on how to achieve that: first, the government needs to prioritise facilitating diverse housing solutions and should remove technical barriers and bureaucratic delays and obstacles to make delivery (public or private) quicker.[187] The hyper-individualized focus on housing and ownership (e.g. Individual subsidies) should give way to more mobile and communitarian models.[188]

Policy documents show a theoretical attempt to respond to some of these pressures. They acknowledge the need to broaden the reach of housing policy by considering a wide host of housing typologies, which are responsive to public need and innovation, allow for self-realisation and respond to the growing climate crisis. However, this nuanced understanding of housing policy has not thus far translated sufficiently into action. The creation of an aspirational housing model through colonial influence, and then further entrenched through the National Party, still holds major sway in how the democratic government of South Africa chooses to realise the right to access adequate housing.

Accordingly, the government has indicated that it is moving in the opposite direction – instead of downsizing, it aspires to provide bigger and more resource-intensive housing in

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[185] Africa Check 'Factsheet: The Housing Situation in South Africa) (2014) < https://africacheck.org/fact-checks/factsheets/factsheet-housing-situation-south-africa>.

[186]Minister Mmamoloko Kubayi: Human Settlements Dept Budget Vote 2022/23 (2022).

[187] A Osman 'Op-ed: South Africa urgently needs to rethink its approach to housing' *The Conversation* (05 June 2017).

[188] Osman, ibid.

future. The national government has indicated that it will review government provided housing to include, amongst others, the provision of rooftop solar panels. One concerning component is that this is accompanied by a discussion to revise the minimum size of housing from 40m^2 upward to 45m^2.[189] The Ministers and Members of the Executive Council have asked for final specifications on these changes, as well as an outline of budgetary implications.[190]

This continued political appetite for free-standing structures means that the technical guidelines which prescribe a minimum housing size disproportionately impact the design of public housing. All free-standing structures under the Project Linked Subsidies, Individual Subsidies, Consolidation Subsidies, Institutional Housing Subsidies and People's Housing Process need to adhere to this size requirement. Tiny housing is, therefore, not a viable housing type for such public housing. Incorporating tiny housing, or more broadly micro-living arrangements (such as nano apartments) within the suite of public housing typologies, is limited as much by the political choice of the government to pursue free-standing housing, as by the policy mandate on size.

However, tiny housing can currently be employed as a policy solution outside of these free-standing housing types. Most notably, it can be used to provide rental accommodation, emergency housing and as a vehicle for the UISP. Especially in light of the announcement of changes in administering the Emergency Housing Programme, where the government has expressed a desire to provide assistance to ensure self-realisation. These are housing programmes which are becoming increasingly important to pursue in light of understanding the need to keep disruption of social and economic networks to a minimum, as well as

[189] SA News 'Govt set to revamp subsidized houses' (13 March 2023) https://www.sanews.gov.za/south-africa/govt-set-revamp-subsidised-houses.

[190] SA News, ibid.

understanding the increased need to have a large emergency housing stock in light of climate events.

CHAPTER 6: CONCLUSION

6.1. Overview of the thesis purpose, approach, and motivations

6.1.1. Background

This thesis aimed to investigate the evolving concept of "adequacy" in terms of international, regional, and national human rights law, and in constitutional law understandings of housing in South Africa. Specifically, it investigated the interactions between (pre)conceptions of size and adequacy as a legal standard.

The backdrop to the study was the evolving concept of "adequacy" amidst the growing international and national tensions between the failure to meet housing demands, the acceptance of the emerging climate disaster, and the trend of smaller household sizes (less people in the same dwelling).[1] Despite changes in the sources, context, and formulation of the right to housing in international and domestic human rights systems, "adequacy" has consistently served as the benchmark for a state's obligation to provide housing to its citizens. The concept of adequacy encompasses seven key criteria: legal security of tenure, availability of services and materials, affordability, habitability, accessibility for disadvantaged groups, location, and cultural adequacy. Various international, regional, and domestic laws and commentaries have contributed to defining and elaborating on these criteria.

This thesis specifically focuses on the aspect of size in housing, be it as a component of habitability or as a consideration or trade-off in relation to the other six criteria. The dimension of habitability has received endorsement and has been given content from and by several prominent organisations, such as the United Nations Committee on Economic, Social

[1] See Chapter 1, sections 1.1.2-1.1.4.

and Cultural Rights, the World Health Organization, the United Nations General Assembly, and the United Nations Special Rapporteur on Adequate Housing

In the South African context, adequacy is enshrined in Section 26 of the South African Constitution, which enshrines the right to access to adequate housing. It has been emphasized in the jurisprudence of the South African Constitutional Court that "adequate housing" transcends mere physical shelter and includes access to essential services, city infrastructure, and economic participation. Housing is seen as a social and collective good, as forming part of the broader economy and as affecting social interactions, production, and distribution of resources.

Adequacy is viewed through the lens of the interrelatedness of human rights, emphasizing that access to housing, along with food and clothing, is fundamental to human dignity, freedom, and equality. Ensuring socio-economic rights, including adequate housing, is essential for promoting race and gender equality. Furthermore, the thesis discusses South Africa's emphasis on adequate housing size, which is evident from minimum size requirements for public housing and national building standards.

The justification for this study is rooted in the profound global housing crisis, focusing on the South African context. The housing system in South Africa, shaped by historical segregation, has not adequately addressed housing needs, especially for black South Africans. Housing backlogs persist despite the country's democratic transition, and the current housing stock falls short of meeting adequacy standards. Financial constraints and technical challenges in evaluating housing needs hinder the government's ability to provide effective solutions, thereby exacerbating systemic racism in housing provision.

Additionally, there is a growing environmental crisis, where housing's impact on the environment and its contribution to climate change requires a fundamental rethink of housing

practices. Changes in materials, size, location, and the overall understanding of housing's purpose are necessary to reduce environmental impact. The increasing frequency and severity of climate-related events, such as droughts, fires, and floods, highlight the urgency of making housing more resilient to such disasters. The COVID-19 pandemic exposed governments' inadequate responses to disaster events also in the human settlements sector, emphasizing the need for adaptable housing policies.

This thesis therefore focused on one of the potential solutions, to reduce the size of houses. Smaller housing units require fewer building materials, which reduces both the financial and environmental costs of construction. This approach can also lead to denser urban areas and more flexible housing types, making realizing the right to housing more attainable for both the government and individuals facing housing barriers. This thesis argued that smaller housing is already emerging as a response to current housing challenges. Different parts of the world, like the select Asian jurisdictions discussed in Chapter 2, have developed unique norms regarding housing size due to space and affordability constraints. Meanwhile, the Western world has seen the emergence of the Tiny House Movement, offering a new perspective on housing adequacy standards.

However, there is limited research on the legal obstacles and enablers for implementing tiny housing in public and private housing schemes. The perception that house size is directly linked to occupant dignity, satisfaction, health, and safety, even when unwarranted, finds expression in building and zoning laws, as well as in government housing policies, and may impede downsizing efforts. Therefore, exploring the legal and policy dimensions surrounding tiny housing is imperative, challenging existing conceptions and offering insights into how housing standards can be reimagined.

6.1.2. Study lens

As described in more detail in Chapter 1, in this thesis, the element of size is considered through the unique study lens provided by tiny housing. Tiny housing involves compact living spaces designed for efficiency and sustainability. Although not new, this concept gained significant momentum in the early 2000s in the United States, driven by factors such as affordability, environmental concerns, and a desire for more efficient use of space.

Tiny housing has also been relevant for private and public housing policy. Tiny housing proponents advocate for removing regulatory barriers and creating certain facilitative measures (certainty regarding housing status and access to financing) to allow the self-realisation of housing rights. Governments have started to explore incorporating tiny housing in a host of public programmes, including emergency relief, transitional housing, and as a permanent housing type.

Tiny housing challenges existing assumptions on the acceptable size of housing, and on what limits should potentially be placed on the resources used to build and maintain housing, based on a variety of concerns as detailed in Chapter 1, and on the comparative experiences set out in Chapter 2. Tiny housing, therefore, allows for an investigation of size without necessarily invoking socio-economic status. In fact, the interest in the principles behind the Tiny House Movement spans income groups. Tiny housing allows for a more agnostic consideration of how house size and resource use in modern housing aligns, or falls short, of faults in the current housing regime. It offers a potential path to affordable, sustainable, and dignified housing in various contexts, including South Africa, and contributes to the ongoing dialogue about housing and resource consumption. In simple terms, tiny housing allows size to be explored without automatically invoking a fatalist sense that poor people must settle for something inherently less or risk settling for nothing.

6.2. Summary of Chapters

This thesis comprised six chapters.

Chapter 1 introduced the background of the study, provided context and a justification for the use of tiny housing as a study lens, set out the study aim and reason, and delineated the research questions, chapter outline, and research methodologies. It also provided details as to the ethics clearance provided for the study. Its contents are echoed in this concluding chapter.

Chapter 2 was a limited comparative study of purposefully selected jurisdictions: the United States, Australia, Hong Kong, Thailand, and Japan. It provided additional context to further investigate the role of tiny housing by highlighting how housing size and legal prescripts enforcing minimum housing size are correlated to the availability of space within the jurisdiction and to socio-cultural norms around size. It explored the motivations and mechanisms through which tiny housing was introduced in public and private housing, and teased out the socio-legal barriers and facilitators to tiny housing. Where objections of tiny housing exist, such objections are openly framed as class-based, and find expression in zoning and building regulations.

Chapter 3 provided a detailed theoretical contemplation of "adequacy" as the legal standard for housing. It traced the development of adequacy and considered aspects of adequacy relevant to the characteristics of tiny housing in both international and South African law. It showed the relationship between the identified socio-legal barriers in *Chapter 2* and the notion of habitability. It highlighted how habitability is to be weighed against, or in complement to, the other components of adequacy. It analysed the South African constitutional landscape in relation to adequacy, showing the critical relationship between security of tenure, human dignity and agency. These elements, in combination, are foundational to housing adequacy. In South Africa, reversing spatial segregation created by apartheid policies becomes

a key housing programme driver and necessitates trade-offs on other housing components. The courts identify access to amenities and economic opportunities as key indicators of such reversal and thereby weigh those elements accordingly when evaluating whether to interfere with housing arrangements. International and South African law provide limited scope for regulatory intervention where the habitability of housing is questioned. Agency is also an essential overarching factor: where people elect a type of housing, even if through the necessity of their circumstances, such election carries significant weight. Interfering with such choice is exceptional. Instead a facilitative environment should be created which assists persons in bringing their housing type into the fray of formality, and thereby allowing access to increased security of tenure and "plugging in" to city infrastructure and services.

Chapter 4 was a critical doctrinal analysis of regulatory instruments that determine the role of size and, by extension, the scope for tiny housing in South Africa. The historical development of the relevant regulatory instruments – as identified in Chapter 2 – is traced. Building regulations and planning laws were initially developed to echo colonial ideas of "hygiene," which was often underpinned by arbitrary and racist ideas of segregation. The Chapter focused more on building regulations to explore the anomaly of increased-size prescripts in public housing as opposed to private housing provisions. It showed that the goals of spatial planning in post-apartheid South Africa, as embodied in SPLUMA, narrows the scope for expressions of class based opposition to tiny housing through zoning laws and encourages interventions like tiny housing that can advance spatial justice, sustainability and resilience. It also shows how a shift to performance-based building regulations theoretically allows for the use of tiny housing, but that tiny housing has not become a mainstream housing type in South Africa. It identifies several possible reasons for this: legal uncertainty as to tiny housing is still prevalent, mechanisms to deviate from minimum size requirements are administratively

onerous and more costly, and social norms of smaller sizing have shaped views on the permissibility of tiny housing outside of consideration of actual legal prescripts.

Chapter 5 was a critical doctrinal analysis of historical and current government housing programmes and implementation in South Africa. It traces governmental approaches to size, trade-offs between size and other factors of adequacy, and flexibility and diversity of housing policy throughout several eras. It shows how inadequate small housing was used to house a labour class, defined by race, and how the democratic transition made a purposeful shift towards bigger dwellings as an assertion of human rights. It also shows the shortcomings of continued reliance on larger, less dense housing and the need to reimagine public housing to meet housing demand and be deemed climate change resilient.

Chapter 6, the current chapter, summarises the study background, lens, and research justification. It ties together the content of each chapter to answer the research questions (below) and to provide insight into future approaches in housing, including potential legal reform and future research areas. Ultimately, it will comment on the need to reimagine social ideas of size in housing to influence housing policy so as to make it more efficient and rights-responsive in the future.

6.3. Research Questions and Findings

To achieve the research aim, the following research questions were posed:

1. What is “adequate” as a standard to measure housing?
2. Does size matter for the standard of adequacy, and if so, how?
3. Can tiny houses, as a representation of very small housing types, be deemed adequate?
4. If tiny housing can meet the adequacy standard,
    1. How should the law enable the self-realisation of the right to adequate housing for people with the means and matching housing needs to access tiny housing?

2. How should the law enable access to tiny housing for people without the means to self-realise the right to adequate housing through the provision of public housing?

These questions have been answered as below.

6.3.1. What is "adequate" as a standard to measure housing?

Chapter three provides a detailed account of "adequacy" as a legal standard, the contents of which will not be replicated here. However, by way of reminder, the concept has been distilled to the following key elements: legal security of tenure, including legal protection against forced evictions; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility for disadvantaged groups; location and cultural adequacy. Adequacy is a determination made after considering the culmination of the interplay of these key elements. Within these elements, the protection of other broadly-based recognized human rights is suffused. For example, the availability of services and infrastructure protects a housing occupant's right to access schools (right to education), clinics and hospitals (health), and food vendors (food and nutrition).

Throughout its historical development, the notion of adequacy has evolved. The content, weight, and interplay of elements have evolved as new technologies and phenomena emerged, social norms changed, and the scope of human rights and acceptable legal protection developed. For the purpose of this thesis, there are four critical developments.

First, security of tenure emerges as the linchpin for adequacy. Repeatedly, commentators and the South African courts have warned against regulations that undermine the security of tenure in the pursuit of promoting other aspects of adequacy. Security of tenure and the right to dignity are in a two-way relationship: one cannot have dignity without secure tenure, and one cannot have secure tenure where the quality of the housing undermines dignity.

However, dignity is not simply the sum of the other elements of adequacy. The Special Rapporteur on Housing (SR) specifically acknowledges that public health regulations cannot be used to undermine the security of tenure, and the South African Constitutional Court's jurisprudence shows that eviction without alternative accommodation is often a more egregious violation to the right to housing, and other implicated rights, than otherwise inadequate housing.

Second, and linked to the security of tenure, is the emergence of agency as a driver for housing policy development. Agency cannot simply be distilled into a procedural consideration whereby engagement in public participation is guaranteed. Instead, agency shapes components of the physical house by allowing people to elect different housing forms based on personal need, philosophy, and resource level. It creates room for people to self-realise the right of access to housing. Most importantly, agency acknowledges the innovation and resourcefulness of people in asserting their right to housing. For the poor, faced with significant resource constraints, this can result in housing that is not traditionally sanctioned by law.

Third, where components of adequacy are weighed and traded off against one another, location is often a key consideration in ensuring access to opportunities and facilities, which ultimately promote other human rights as well. Housing people on the peripheries of cities therefore falls short of meaningful access to housing. The challenge for States in big cities, where space is at a premium, is to develop housing programmes that are alive to space challenges: fill-in housing, high-density units, or repurposed spaces. Often, this means rethinking housing size in radical ways.

Fourth, the growing recognition of the climate crisis means that housing programmes need to adapt so as to reduce resource use in the building process, the chosen building materials, and the resources spent in occupancy, as well as to be responsive to climate migration

necessitated by climate events like flooding (shorter term) or drought and rising sea levels (longer term).

It is within the context of climate change and the failure to meet housing demand that the SR introduced a radical departure from how adequacy is to be measured: adequacy is to include both minimum standards as well as recognizing that there are to be maximum standards or caps on how resources are to be consumed.[2] In a poetic sense, where we have always had a floor to the right to adequate housing, we are currently building its ceiling.

This idea of introducing maximum standards has been termed "sufficiency" amongst sustainability scientists.[3] In economic terms, concepts like doughnut economics, where a shortfall in meeting indicators (the middle of the doughnut) and an excess in resource use (the outside of the doughnut) are undesirable, but creating a band of sustainable use (the doughnut) is preferred.[4] Whether sufficiency needs to be couched as a new criterion under the standard of adequacy or accepted as a cross-cutting consideration under the other elements is open to debate. To maintain the research focus of the thesis, it will be assumed that elements of sufficiency in relation to size can be captured in the other elements of "adequacy." The impetus to preserve the environment impacts the overall habitability of all housing, is required to maintain services such as water, energy, and access to food, and will no doubt impact accessibility and affordability as the understanding of the impact of resource use in housing continues to develop.

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[2] See section 3.2.2.

[3] MJ. Cohen 'New Conceptions of Sufficient Home Size in High-Income Countries: Are We Approaching a Sustainable Consumption Transition?' (2012) 38 *Housing, Theory and Society* 2, 173-203.

[4] See V Dahl, JJ Moreno-Navarro 'Doughnut Computing in City Planning for Achieving Human and Planetary Rights'. In: Ferrández Vicente, J.M., Álvarez-Sánchez, J.R., de la Paz López, F., Adeli, H. (eds) *Bio-inspired Systems and Applications: from Robotics to Ambient Intelligence* (2022). IWINAC 2022. Lecture Notes in Computer Science, vol 13259. Springer, Cham or Acosta F. Linking Nevada to Doughnut Economics. *Sustainability*. 2022; 14(22):15294 for iterations of its proposed application in city planning.

The result of this evolution in how adequacy is understood means a radical departure from current housing trends. The fallacy that the State can meet housing demand using current Big State approaches requires debunking.[5] More, smaller, denser housing, with access to amenities, and created with an understanding of an inevitable level of climate migration, is required. States need to rethink how to build or allow for the building of diverse and innovative forms of housing. Repeatedly, the need to create a permissive, rather than restrictive, policy environment is highlighted in tackling the evolutions of adequacy.

6.3.2. Does size matter for the standard of adequacy, and if so, how?

Yes, size matters for housing adequacy. Most obviously, as documented in Chapter 3, size is a factor in determining the habitability of housing. The close relationship between the development of the right to housing and the right to health bears significance. Size as a relevant metric in adequacy emerges predominantly as a mechanism to protect people from communicable diseases (arguably the primary concern) and environmental hazards (secondary). Diseases like cholera – termed a "disease of cities" – and Tuberculosis ravaged dense populations, and pollution and injury became major health concerns, especially where housing was situated close to industries. It is, therefore, not surprising that size was first introduced in international law as a concern under the World Health Organisation's Health Principles in Housing. It is immediately linked with building characteristics aimed at preventing water and airborne disease, such as ventilation and sanitation requirements.[6]

International norms clearly provide that size is to be considered in the broader context of other elements of habitability, like avoiding overcrowding and are to be guided by the

[5] Also see Chapter 5, especially the discussion on housing during Covid-19 in 5.4.1.

[6] See Chapter 3.2.1.

importance of security in tenure when regulating components of size. As is typical with international law, an exact cut-off point is never given, and size is to factor into local housing policy with an appreciation of local contexts and a calculation of trade-offs with other elements of adequacy. States are also expressly warned not to overregulate habitability, as zoning laws and building regulations can regulate people out of housing and entrench discrimination and harm.

However, the case studies from Australia and the United States of America (USA) in Chapter 2, as well as the history of South Africa and the colonial policy background (Chapters 4 and 5), reveal that this warning is not heeded. Strict and, arguably, arbitrary size restrictions are frequently introduced in local laws under the guise of protecting public health. Size is regularly conflated with overcrowding in buildings and zoning regulations. This directly leads to the entrenchment of spatial racial and class segregation and becomes a major source of insecurity of tenure. This is not a case of unforeseen circumstances. Instead, segregation was often a design intention. A cynical interpretation is that current regulatory systems provide a convenient excuse to maintain discrimination in access to resources and opportunities.

Where maintaining minimum size requirements less obviously becomes of concern for adequacy is in its negative effect on "sufficiency" as described above. Where minimum size under habitability was linked to health and environmental hazards, the argument has to be made that maximum size requirements now fulfil that role. First, the environmental hazards initially foreseen – pollution, stability of structures, and moderate housing temperature – are now actively threatened by changes in the climate. The role of the construction industry and the maintenance of larger structures are major contributors to this problem.

Second, where more is known about communicable disease prevention and control and as the mortality profile of countries changes, the trade-off that larger dwellings have in terms

of location to access health facilities arguably becomes more relevant. Also, the distinction between the health of people and the environment has increasingly been shown to be false. In 2003, the One Health Approach became popularised as an expression of health that sees animal, human, and environmental health as cogs in the same machine.[7] Population-level health, which was previously protected by building and zoning regulations, now faces the threat of zoonotic diseases (e.g., COVID-19) and climate events (e.g., changes in malaria patterns).[8]

Naturally, it is also important to recall that bigger structures require more resources, which strains limited resources. Minimum size requirements then also impact access to housing more broadly, as the result is inevitably that fewer housing units can be made available.

Size is less an indicator of a legal standard than it is a construct of cultural acceptability, geographic characteristics, population density, and politics. As seen in Chapter 2, minimum size requirements are less prevalent and sometimes almost completely absent in jurisdictions with limited living space, either due to density or geographic features. It stands to reason that this trend should follow in other areas where cities are increasing in density and physical space is becoming limited, especially in major South African cities. Cultural acceptability is also seemingly variable, and attitudes towards housing and size in the case study can be seen to have shifted significantly within a few decades, based on socio-economic factors and changes in the outlook of housing occupants.

Finally, the politics of size might be the most important to detangle and the most difficult. In many ways, housing size has become a symbol of systematic oppression. Big versus small housing was a proxy for the "haves" and the "have-nots". In South Africa, housing

[7] JS Mackenzie & M Jeggo 'The One Health Approach—Why Is It So Important?' (2019) *Tropical Medicine and Infectious Disease*.

[8] Ibid.

size was imbued with a moral character and was associated with "proper" Christian values (the current and historic majority religion), cleanliness, and "civilisation".[9] Minimum size requirements are, therefore, tricky to address. In the context of the democratic transition, size becomes closely entwined with asserting dignity for people who were violently disposed of dignity for centuries. Maintaining minimum size requirements in public housing is, therefore, a signal to the population of "true democracy". This is not something to be lightly discarded.

However, it is impossible not to see from the case studies, and within the context of failed housing reform in South Africa, that overregulation in the context of resource constraints leads to further entrenchment of discriminatory housing practices. The effect of favouring greenfield developments with larger stand-alone houses and own gardens (reminiscent of English garden cities) on city peripheries has been subject to significant criticism. This propensity towards greenfield developments is not even in line with the theoretical policy approach of government, where policy documents have shown to be alive to the growing evidence on climate and social reform to embrace alternative, denser, and more innovative housing types.

6.3.3. Can tiny houses, as a representation of very small housing types, be deemed adequate?

Unequivocally, yes. The legal standard of adequacy does not dictate an actual minimum size metric. The 2022 report from the SR specifically recognises tiny housing as a viable housing type. There is a movement towards creating international guidelines on how to define tiny housing and how to regulate its characteristics.

[9] See discussion on "imperial cleanliness" in section 4.2.1.

Tiny housing also has several characteristics and consequences that speak positively to its meeting the standard of adequacy. Naturally, all the above-mentioned benefits of reduced size apply: less resource use and consequently improved overall "one" health. The relative affordability tiny housing can (not necessarily will) offer and the consequent link such affordability has with the ability of people to self-realise housing where they have secure tenure is very important in the context of the increase in housing demand and decrease of housing affordability. Its size also makes tiny housing well-suited for housing in dense cities where larger housing can only be accommodated at the cost of location, which translates into less access to amenities and economic opportunities. And finally, the agency it offers to people who cannot or do not want to occupy "normal" housing is important as we understand adequate housing to be closely linked to a more nuanced and developed sense of what agency means.

Tiny housing is already being used in other jurisdictions and in South Africa. In some jurisdictions, micro-living arrangements have naturally developed and occur without legal challenge or focused advocacy. In other jurisdictions where the minimum size of housing is impacted by building and zoning regulations, certain levels of government within those systems have taken steps to create space for tiny housing or have even incorporated it to a limited extent within public housing programmes. Significant social pressure is being mounted against the government to remove regulatory barriers, and "loopholes" are openly and commonly exploited.

It is this social pressure that elevates tiny housing from a housing type only – in Chapter 1, it was already highlighted that the economy of space in housing has been a consideration far beyond the modern tiny house movement – into a social movement. The role we see tiny housing play has shifted from a commentary on excess consumerism and a need to reconnect with nature, to a means by which systematic dispossession of housing through growing unaffordability is fought. It can be seen as an active challenging of class divides, such as the

examples from the United States where NIMBY and Tiny House proponents were directly at odds. But it can also be seen in the more passive assertion of the right to housing, which can happen under the banner of tiny housing with an acceptance of different levels of precarity. This quieter form of protest reminds of words of the South African Constitutional Court where it commented on an unlawful occupation of municipal property by a group of unhoused persons, stating it was an exercise in "survival and adaptation" and that "justice and equity *oblige* [the occupants] to rely on … resourcefulness in seeking a solution to their plight [of homelessness]".[10]

The question is, therefore, not whether tiny housing is adequate, but what is its value in housing programmes. This thesis is not intended to be an extended policy analysis and to suggest prioritisation of different housing policies, but it offers salient insights. Beyond showing that tiny housing clears the first hurdle – being adequate – it also has characteristics that are relevant in the context of the phenomena discussed in Chapter 1 - climate and failure to meet housing demand.

Tiny housing does meet the standard of sufficiency in a way that is not possible by current trends in Westernised jurisdictions. For example, one estimate of sufficiency indicates that individual living space should be capped at a maximum of $20m^2$ per person.[11] Other literature does not go so far as to specify exact size restrictions but makes a clear link between tiny housing, degrowth,[12] and, ultimately, sufficiency.[13] Tiny housing is also more affordable

[10] P*ort Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 41.

[11] Cohen (n3 above) 181.

[12] Planned contraction of energy and resource demands.

[13] A Samuel & Heather Shearer. "12 Tiny Houses and the Economics of Sufficiency" *The Growing Trend of Living Small: A Critical Approach to Shrinking Domesticities* (2023).

to build[14] and allows people to easier self-realise the right to housing or for States to deliver more housing units for public provision.

In the local South African context, we see cases like *Adonisi*[15] engaging with the complex issue of affordable housing shortages in dense cities and clearly delineating the *mandated* role of compact housing solutions to ensure true housing adequacy, especially in light of entrenched racial and spatial segregation. The Court calls for the use of "pockets" of land to innovatively facilitate access to housing. Tiny housing is one such form of compact housing that can meet this newly recognised component of adequate housing programmes.

Tiny housing also meets calls for innovation in housing and sustainability, as is seen in the White Paper on Housing and the National Building Regulations, as well as factors in the express acknowledgement of the Breaking New Ground Policy that household sizes have shrunk, but dwelling sizes have expanded.

6.3.4. If tiny housing can meet the adequacy standard -

6.3.4.1. How should the law enable the self-realisation of the right to adequate housing for people with the means and matching housing needs to access tiny housing?

The current building regulations in South Africa blend both performative and functional requirements, allowing for flexibility in meeting the National Building Regulations (NBR). Tiny housing proponents, therefore, have a legal avenue in pursuing this design type through what is termed "deemed-to-satisfy requirements".

[14] E Keable 'Building on the Tiny House Movement: A Viable Solution to Meet Affordable Housing Needs' (2017) 2 *University of St. Thomas Journal of Law and Public Policy* 11, 115.

[15] *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* 2021 ALL SA 69 (WCC).

However, as seen in Chapter 4, tiny housing has not yet been fully mainstreamed in the South African housing landscape. There are a number of possible reasons. One possible reason is that meeting deemed-to-satisfy requirements involves a more technically complex process. It requires a "rational design" from a "competent person," who is typically appointed using a prescribed form provided by the South African Bureau of Standards. These forms are typically behind a paywall. There are several hurdles posed by this. First, competent persons are specialists responsible for assessing whether the design aligns with the functional goals of the NBR and providing the local authority with necessary drawings and details. The local authority must accept the appointment. This process adds time to building project timelines and introduces additional costs. Literature suggests that the deemed-to-satisfy process is commonly used in building projects but that a preference persists for prescriptive requirements to ensure certainty.

In the limited cases of tiny housing being designed and built in South Africa, entities involved therewith specifically highlight concerns with legal certainty. However, there seems to be a growing understanding that this housing type is generally in conformance with South African laws.

One possible mechanism to address this degree of legal uncertainty and increased financial and administrative burden of following the deviation process under the deemed-to-satisfy process would be to incorporate a similar appendix in the South African building standards as the International Residential Code's Appendix Q.[16] Appendix Q provides a detailed set of building requirements based on the design idea of tiny housing which allows for smaller rooms, traditional tiny housing style lofts which often do not meet building requirements or are defined as stand-alone rooms, while still maintaining certain health and

[16] See section 2.2.4.2. for a discussion on the content of Appendix Q.

safety standards. Appendix Q was designed by tiny housing proponents and adopted with their advocacy in the United States.[17] Much like in the United States, where Appendix Q allows for local governments to adopt special provisions waivers and/or only partially adopt the document, a similar approach can be adopted in South Africa.[18]

Appendix Q, however, is intended to regulate permanent structures only. Tiny housebuilders in South Africa currently indicate a preference for providing mobile housing. This seems to align with the understanding of the current customer base and the underlying philosophy for choosing tiny housing as closely aligned with the original United States Tiny House Movement, where freedom to relocate and the need to be able to access more natural landscapes is important. Presumably, the form and cost of tiny housing designs will change as social attitudes toward size continue to evolve, and as the Tiny Housing Community in South Africa extends to include access and affordability concerns, as was witnessed in the movement development in Australia and the United States.

6.3.4.2. How should the law enable access to tiny housing for people without the means to self-realise the right to adequate housing through the provision of public housing?

With the shift to democracy in South Africa, the right bearers in South Africa shifted from a limited class of people based on race to all South Africans. Naturally, this has placed additional strain on the government resources, given that a majority of South Africans were previously excluded from this class of right-bearers. Careful consideration should be given to how adequate housing is viewed. As discussed in Chapter 5, the prevailing ambition of the detached,

[17] https://thetinylife.com/tiny-house-appendix-q/.

[18] See Chapter 2.

large house in a low-density neighbourhood is not sustainable, given the economic and climate challenges faced by the South African government.

To reduce the resource burden on housing programs, the government needs to prioritize diverse housing solutions, remove bureaucratic obstacles, and shift from neo-liberal individualized housing models to more mobile and community-oriented approaches.

An obvious area for reform is to amend the National Norms and Standards For The Construction Of Stand Alone Residential Dwellings Financed Through National Housing Programmes, which prescribed the minimum of 40m^2 gross floor area as the minimum size for any permanent residential structure provided through a housing subsidy. Performance-based building regulations – as applied in the private sector – are a more appropriate mechanism to ensure quality control and allow for local innovation and diverse housing types. This suggested reform is particularly important in the context of the government's propensity to favour greenfield developments.

However, a second area of change is for the government to employ the different housing types provided – and actively called - for by policy to address the growing housing demand and climate crisis. Even within the current policy landscape, tiny housing can find utility in policy solutions outside of free-standing housing types. It can be employed in rental accommodation, emergency housing, and the Urban Informal Settlements Program (UISP). The government's expressed desire to assist in self-realization, especially in light of changes to the Emergency Housing Program (EHP), underscores the importance of these housing programs to minimize social and economic disruptions and prepare for emergency housing needs driven by climate events.

Worryingly, and despite the various challenges set out in this thesis in relation to larger dwelling sizes, the government appears to be moving towards larger and more resource-

intensive housing solutions, including rooftop solar panels and revised minimum housing size requirements, which could impact public housing design. This is a policy decision informed by the politics of size that was systematically created over centuries of occupation and colonization in South Africa. Would it be possible to challenge a decision to increase the minimum size for free-standing public housing based on the standard of adequacy? At this stage of the evolution of adequacy, probably not. In the future, if the trend towards including considerations of sufficiency in housing programmes continues to grow, such a challenge could have significant legal traction. For now, the solution lies outside the bounds of law – in convincing policy makers that such a decision would be inefficient and regressive.

6.4. The way forward

The findings above highlight some of the policy suggestions to better integrate tiny housing into the local housing landscape. There are also significant extra-legal changes that are required in the form of rethinking the role and value of size in housing. This thesis outlined some of the key reasons to rethink size, linking it to resource use, affordability, location, and agency.

However, there are outstanding areas of research to be pursued as tiny housing becomes more popular. First, more focused research is required to investigate the attitudes of housing occupants in relation to size in South Africa. This will necessitate some form or larger scale engagement with housing occupants in precarious living situations, in public housing, and in lower-income private housing to weigh the different factors in evaluating housing adequacy accurately. Ideally, this type of research will take a mixed-methods approach by using quantitative and qualitative methods to provide policy insights with breadth and depth.

Second, the environmental sustainability of tiny housing and its relative advantage in reduced resource usage needs to be further investigated, specifically within a local South African context. It is likely that additional guidelines, which can be incorporated into a tiny

housing-specific regulatory document, would maximise the environmental benefit required. Similarly, and third, a comprehensive analysis of affordable tiny housing and the mechanisms to ensure such relative affordability needs to be undertaken and distilled into some form of guiding document.

Fourth, this thesis did not engage in a significant analysis of planning law and the barriers and facilitators within that field. This type of research would be key when developing more detailed approaches to incorporate tiny housing into private and public housing. The development principles articulated in SPLUMA provide a useful starting point for such research.

Fifth, there needs to be an overall investigation into the underlying policy rationale within the housing space (and, frankly, broader). The role of historical factors which perpetuated inequity needs to be properly unmasked, investigated and legal reform needs to be placed on the agenda. Where policy rationale was motivated by genuine contextual factors, it is important to reassess whether those factors still prevail given the development of technology and general change in circumstances.

What cannot be denied is that our current understanding of housing does not meet the human rights objectives of our global society, leaving too many out in the literal and figurative cold. Important sacrifices must be made. One such sacrifice requires a radical re-imagining of how we use the precious resources of the planet. Finally, less is truly more in ensuring the sustainability of Earth and bringing our fellow humans into the fray.

7. ANNEXURES

Supplementary Table 1: Extract of select old ordinances and laws (1861-1910)			
Year	Territory	Name of Act	Relevant provision(s)
1856	Cape of Good Hope	An Act For Preventing the Spread of Contagious or Infectious Diseases.	• Requirements to have effective drainage in dwellings (V) • Prohibition of allowing overcrowding in dwellings where "insufficient space" which will "evidently to expose them to the ravages of the diseases" (VI)
1859	Cape of Good Hope	Green Point Municipality Act	• An appointed Commissioner shall "cause suitable houses and building to be built" for persons holding, supervising or attending local markets. (XlII)
1869	Cape of Good Hope	Graham's Town Municipality Act	• Buildings which are deemed unsafe by three builders can be placed in a "state of security" or removed at the expense of the owner. • Buildings used by the public with the capacity to contain more than 400 people need "be provided with sufficient and proper means of egress in case of fire or other like casualty"(XXXVIII)
1866	Orange Free State	Occupatie Wet (Ordinance 2 of 1866)	• Upon taking ownership of newly claimed land, each owner must build a house of at least 20x10 feet. (Article 27)
1870	Zuid Afrikaansche Republiek (Transvaal)	Volksraadsbesluit, 4 Junij 1870	• For every four erven claimed, an owner to build one dwelling of 20 feet squared of well-baked bricks or stone.
1872	Natal	Amendment of the Municipal Corporations Act, No 19	• The Municipal Council is empowered to regulate class and material of buildings, the distances or spaces between, or characters of walls and part walls, and to make such regulations as may be deemed necessary, and to prevent the safe or unhealthy crowding together of buildings. (Article 64)
1877	Cape of Good Hope	Graham's Town Municipality Act	• Buildings used by the public with the capacity to contain more than *300* people need "be provided with sufficient and proper means of egress in case of fire or other like casualty" (VI)
1880	Cape of Good Hope	East London Municipality Act, No 23	• Buildings which are deemed unsafe by three builders can be placed in a "state of security" or removed at the expense of the owner. • Buildings used by the public with the capacity to contain more than *200* people need "be provided with sufficient and proper means of egress in case of fire or panic"
1884	Cape of Good Hope	Kimberley Borough Amendment Act, No 30	• The borough council of Kimberley will have the power to • cause all buildings used by the public, capable of containing more than 300 persons, to be provided with sufficient and proper means of egress in case of fire or other casualty • to regulate the materials of which all future. buildings shall be constructed, the distances, spaces, and character of party walls which shall be left between them

			• to ensure the height the foundation and the floors shall be above the level of the surrounding ground
1885	Cape of Good Hope	Queenstown Municipality Amendment Act, 19	• Municipal council tasked with inspecting building plans and taking action where buildings deemed dangerous (article 4)
1892	Cape of Good Hope	Cape Town Municipal Amendment Act, No 37	• The town council of Cape Town may make/alter or remove regulations relating to – • For regulating the structure of walls, foundations, roofs and chimneys of new buildings; for securing stability, the observance of sanitary precautions and the prevention of fires, and for purposes of health • For regulating the sufficiency of space about buildings to secure n free circulation of air, and the ventilation of buildings • For prohibiting the overcrowding of houses, dwelling places and rooms and the erection of objectionable buildings • Regulating drainage and sewerage (article 13)
1883	Cape of Good Hope	Liesbeek Ordinance Amendment Act, No 32	• The town council may make bye-laws or regulations for – • For regulating the structure of walls, foundations, roofs and chimneys of new buildings, and for securing the stability of such buildings, and due and proper sanitary provision therein • For prohibiting the overcrowding of houses, dwelling places and rooms, and the erection of objectionable buildings. • For regulating the proximity of new buildings to existing buildings, so as to secure free circulation of air and due Ventilation (article 44)
1893	Natal	Law No 17.	• Expand powers of local boards to: • To determine the class and characters of buildings, its building materials, and the distances or spaces between, walls • To make regulations of existing buildings to to prevent the unsafe or unhealthy crowding together of buildings, to define the face-lines of streets (Article 2(a))
1894	Natal	Amendment of the Municipal Corporations Act, 22	• The act empowers municipalities to regulate – • The front line of buildings (article 11) • To condemn and fix 'ruinous buildings' (dangerous buildings) at the expense of the owner (article 14) • The act also empowers the town council to make further bye-laws or regulations concerning: • the structure of walls, foundations, roofs, and chimneys of new buildings, for security, stability and the prevention of fires and for purposes of health • sufficiency of the space about buildings to secure a 'free circulation of air, and with respect to the ventilation of buildings • drainage and sewage (article 19)
1901	Natal	Public Health Act, 44	• The Governor may make regulations to improve public health, amongst others:

			• Compel proper ventilation of buildings and huts and prevent overcrowding. (Article 8)
1902	Cape of Good Hope	Native Reserve Locations Act, 40	• Governor to regulate: • the erection of private dwellings, including concerning ventilation, lighting, materials and manner of construction (Article 11(3)
1903	Transvaal	Municipal Corporations, 58	• The council can make bye-laws or regulations relating to: • Construction alignment and elevation of buildings, of compel demolition where the building is dangerous or unsanitary; • The amount of space to be allowed about buildings for securing proper ventilation; (Article 42)
1904	Cape of Good Hope	Uitenhage Municipal Act, 15	• The Council may make rules, regulations or bye-laws relating to: • For regulating the materials, structure of walls, foundations, roofs, and chimneys of new buildings, also their height and cubical contents, and the fixing of fireproof doors and shutters, at internal and external openings; for securing stability, the observance of sanitary precautions, the prevention of fires, and for purposes of health and public safety. (Article 125(3)) • Regulate the sufficiency of space to secure free circulation or air (Article 125(4)) • Regulate drainage, sewage, use of buildings and closure of buildings unsafe for human habitation (Article 125(5)-(7))
1906	Transvaal	Johannesburg Municipal Ordinance, II	• The Council can make regulations and bye-laws to: • Determining the structure of walls foundations roofs chimneys windows guttering and down-piping and all other parts of buildings whether new or already existing in order to secure stability sufficient height light and ventilation and the proper carrying off of rain-water as well as for the prevention of fires and for purposes of health. • Determine the sufficiency of the space about buildings in order to secure a free circulation of air and the proper ventilation of buildings. (Article 42)
1907	Orange River Colony	Public Health Ordinance	• A nuisance – which can be removed by a central authority - includes: • A house or part of a house in which each person doesn't have at least 300 ft^2 of airspace and 36 ft^2 of floor space and proper and adequate ventilation and window space (Article 14) • Central authority can make regulations • To enforce sufficient sewage, cleanliness and ventilation in proportion to the amount of people permitted inside a house. (Article 56) • Central authority can make regulations- • Regulating sewerage

			• Prescribing the amount of water-closets. • Regulating the sufficiency of air space about buildings and the proper lighting, ventilation and prevention of damp of buildings. • Regulating the building materials of several types of houses. (Article 108)

Supplementary Table 2: Extract of select old ordinances and laws (1910-)			
Year	Territory	Name of Act	Relevant provision(s)
1912	Province of Transvaal	Ordinance to Consolidate and Amend the Law relating to Municipal Government in this Province and the establishment of Health Committees therein, and to provide for matters incidental thereto, No 9	• A nuisance – which can be removed by a central authority - includes: • A house or part of a house in which each person doesn't have at least 300 ft^2 of airspace and 36 ft^2 of floor space and proper and adequate ventilation and window space (but excludes "native" compounds). • Overcrowding of dwelling houses is influenced by the house also being used for a dual purpose such as a workhouse. (Article 1) • The council may make bye-laws for: • ensuring sufficient air space and ventilation between houses and adequate through ventilation within houses. • (Article 29) • For drainage and sewerage. (Article 168)
1920	Province of the Orange Free State	Ordinance to grant further powers and Impose Further Duties On Local Authorities, No 7	• A local authority may make regulations • Regulating the building materials of several types of houses. (Article 2) • Prescribing the amount of water-closets. • Regulating the sufficiency of drainage, the number of lodgers, proper ventilation and cleanliness. • (Article 3)
1926	Province of Transvaal	An Ordinance To Consolidate and Amend the Law relating to Municipal Government, No. 11	• A nuisance – which can be removed by a central authority - includes: • A house or part of a house in which each person doesn't have at least 300 ft^2 of airspace and 36 ft^2 of floor space (but excludes "native" compounds). (Section 2) • the structure of walls, foundations, roofs, chimneys, windows, guttering, down-piping, and all other parts of buildings to secure stability sufficient height, light, and ventilation, and the proper carrying off of rain-water, as well as for the prevention of fires and for purposes of health (Article 58(a)) • the sufficiency of the space about buildings in order to secure a free circulation of air and the proper ventilation of buildings (Article 58(b)) • Overcrowding of dwelling houses is influenced by the house also being used for a dual purpose such as a workhouse.

			(Section 67) • May not permitting letting of houses without adequate ventilation • (Section 75) • For drainage and sewerage. • (Section 168)
1939	Province of Transvaal	An Ordinance To Consolidate and Amend the Law relating to Municipal Government, No 17.	• A nuisance – which can be removed by a central authority - includes: • A house or part of a house in which each person doesn't have at least 400 ft^2 of airspace and 40 ft^2 of floor space (but excludes "native" compounds). (Section 2) • Overcrowding of dwelling houses is influenced by the house also being used for a dual purpose such as a workhouse. • the sufficiency of the space about buildings in order to secure a free circulation of air and the proper ventilation of buildings • The council may make by-laws relating to – • for ensuring sufficient air space and ventilation between houses and adequate through ventilation within houses (Article 42) • for sewage and drainage (Article 143)

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