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Land value capture implied in social mandate

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Summary

Following many years of apartheid land use planning the government of South Africa together with local governments initiated in 2001 the development project for Khayelitsha by way of experiment under a National Urban Renewal Program. A central business district was to be created in Khayelitsha around a transportation node. The project was to be based on development principles of partnership amongst the private sector, public sector and the community.

Khayelitsha Community Trust (KCT) was established by the City of Cape Town in 2003 as the enabling vehicle for the project with a strong social mandate to create a business community by the community for the benefit of the community. Development had already been underway prior to 2003 as the government had made investments in the area by constructing various service buildings which were to attract further investment. However after completion of a retail center in 2005 no further significant development has taken place.

The objective of this research has been to identify certain problems that have arisen in the development process of the Khayelitsha Community Trust since 2005. The research explores whether obstacles encountered relate to the use of the form of a community trust and whether the trust, with a multi-focus mandate, is in a position to capture the benefit of the long term vision for the Khayelitsha Business District for the benefit of the community of Khayelitsha.

The role of the trust in this context has been evaluated and explained within the contours of land ownership of the trust, organizational features of the trust and implementation of certain contractual arrangements relating to the projects. After comparing the main features of KCT with those of the classic community land trust, the accomplishments of KCT in reaching its distributive goals were reviewed as well as KCT's effectiveness in dealing with private commercial parties in developing the business district.

The research is structured as a single case study where data have been collected through semi-structured interviews and document review.

When comparing the KCT structure with the classic community land trust various differences become apparent relating to the regime for land ownership, the governance aspects as to appointment of responsible trustees and directors, accountability of management and certain community participation aspects. Where government does not control KCT questions arise regarding the accountability of KCT for the management of the land use and economic development of this critically located land for the benefit of the public.

The dual ownership structure used in the classic land trust model whereby the trust retains ownership of the land in perpetuity subject to a lease is not a central element of the KCT objectives; economic development for the benefit of the community is the central objective. The complexity of the development has however caused various forms of delays which have been discussed.

The objectives of KCT relating to the provision of affordable housing differ greatly from those of the classic community trust. In South Africa housing subsidies are granted so as to create wealth for the individual household, which can be leveraged in full by the household involved to enable it to move up the social ladder, including realization of the full equity to be applied towards improved housing or other purposes.

Khayelitsha Business District is an area which is in a transitory phase of development. Measures can be considered to avoid a transfer of critically located land at low prices due to current economic circumstances. A suggestion is made to consider the use of the long term ground lease to enable investors to make long term investments in economic ventures, and for Khayelitsha Community Trust to share in the benefit of a future “higher and best use” of this strategically located land.

Keywords

Community land trust, land value mobilization, subsidy retention, affordability, leasehold

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Abbreviations

CAHF	Centre for Affordable Housing Finance in Africa
CLCC	Community Land Cooperative of Cincinnati
CLT	Community Land Trust (classic)
CoCT	The City of Cape Town
FLISP	Finance Linked Individual Subsidy Program
IHS	Institute for Housing and Urban Development
KBD	Khayelitsha Business District
KCT	Khayelitsha Community Trust
KHousing	Khayelitsha Housing (Pty.) Limited
KManco	Khayelitsha Management Company (Pty.) Limited
KRetail	Khayelitsha Retail Company (Pty.) Limited
LAA	Land Availability Agreement
RMB	Rand Merchant Bank
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013
TVA	Tennessee Valley Authority
URP	Urban Renewal Plan

Table of Contents

Summary.....	iii
Keywords	iv
Acknowledgements	v
Abbreviations	vi
Table of Contents	vii
Chapter 1: Introduction	1
1.1 Introduction	1
1.1.1 Trustery	1
1.1.2 Background	2
1.1.3 Problem Statement	5
1.1.4 Research Objectives	6
1.1.5 Research Questions	6
1.1.6 Significance of the Study	7
1.1.7 Scope and Limitations	7
Chapter 2: Literature Review.....	8
Outline	8
2.1 Land and its attributes.....	8
2.1.1 Introduction	8
2.1.2 Land	8
2.1.3 Trends in ownership	9
2.1.4 Social function of land	10
2.2 Land value capture - “unearned” increment - betterment.....	11
2.2.1 Typology	11
2.2.2 Distributive function of land value capture	13
2.2.3 Special consideration for transportation nodes.....	13
2.3 Community land trusts.....	14
2.3.1 Community land trusts; history	14
2.3.2 Community land trust; ownership	17
2.3.2.1 Dual ownership structure.....	17
2.3.2.2 Initial land purchase	18
2.3.2.3 In perpetuity	19
2.3.2.4 Ground lease.....	19
2.3.3 Community land trust; organization.....	20
2.3.3.1 Primary obligation; balancing interests	20
2.3.3.2 Legal form; features	21
2.3.4 Community land trust; operation.....	22
2.3.4.1 Subsidy retention	22
2.3.4.2 Ongoing stewardship.....	23
2.4 Community trust in equitable transit oriented development.....	24
2.5 Community trust: government transferor relinquished control	25
2.6 Development of community trusts; beyond housing to commercial development.....	25
2.7 Leasehold as a planning tool	27
2.7.1 Leasehold	27
2.7.2 Characteristics of lease transactions with public parties	27
2.7.3 Policy instruments and legal framework	27
2.7.4 Conditions of public leasehold; premiums	28
2.7.5 Leasing as a transitional/short term planning tool.....	28
2.7.6 Long term leasing by private organizations with public goals	28
2.8 Conceptual framework	29

Chapter 3: Research Design and Methods	30
Outline	30
3.1 Working definitions	30
3.1.1 Land value capture	30
3.1.2 Community land trust.....	30
3.1.3 Leasehold	31
3.2 Case study methodology.....	31
3.3 Operationalization: variables, indicators, data collection	32
3.3.1 Objectives; main question	32
3.3.2 Variables, indicators, data collection	34
3.3.3 Data collection methods	37
3.4 Reliability and validity; limitations	38
Chapter 4: Research Findings	40
4.1 Development of the Khayelitsha Business District area.....	40
4.2 Main features of KCT in comparison to a classic community land trust.....	44
4.2.1 Ownership	44
4.2.1.1 Land acquisition	44
4.2.1.2 Dual ownership; to be held in perpetuity	46
4.2.1.3 Ground lease.....	48
4.2.2 Organisation	49
4.2.2.1 Corporate membership	49
4.2.2.2 Objectives.....	50
4.2.2.3 Not-for-profit.....	51
4.2.2.4 Participatory processes	51
4.2.2.5 Accountability	53
4.2.3 Operation.....	54
4.2.3.1 Subsidy retention	54
4.2.3.2 Affordability	55
4.2.3.3 Stewardship	61
4.3 Distributive Goals.....	66
4.3.1 KCT land use.....	66
4.3.1.1 Economic benefit from commercial land	66
4.3.1.2 Social benefit from residential land for the benefit of low income groups.....	71
4.3.1.3 Benefits for the community	74
4.3.2 Long term leasing as a finance and development tool to secure long term income	75
4.4 Khayelitsha Community Trust as a commercial counterparty.....	76
Chapter 5: Conclusions and recommendations	78
References.....	83

List of Boxes

Box 1: Main question	6
Box 2: Sub questions.....	6
Box 3: Land value capture:	30
Box 4: Community land trust	30
Box 5: Leasehold	31
Box 6: Public leasehold	31
Box 7: Main question	32
Box 8: Sub questions with explanatory notes	32

List of Tables

Table 1 - Variables, indicators, data collection.....	34
Table 2 - Highlights Land Availability Agreement	46
Table 3 - Highlights ownership	49
Table 4 - Highlights organisation	54
Table 5 - Highlights operation	62
Table 6 - Consolidated table comparison model community land trust and Khayelisha Community Trust.....	63
Table 7 -Values retail center	68

List of Charts

Chart 1 - Organizational structure KCT and its subsidiaries	41
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List of Figures

Figure 1 - Khayelitsha Business District 2002	4
Figure 2 - Khayelitsha Business District 2015	5
Figure 3- Possible future design for Khayelitsha transit node	6
Figure 4 - Conceptual framework	29
Figure 5 - Interlinks Cape Flats.....	42
Figure 6 - Transit oriented development area - Khayelitsha Central Business District	43
Figure 7 - Effect of resale restriction.....	55
Figure 8 - Bulk infrastructure for institutional housing completed in 2013	56
Figure 9 - Architects' impression of the Phase 1 institutional subsidy housing	57
Figure 10 - Big picture view housing and eligibilities for subsidies	60
Figure 11 - Big picture view social housing and housing market.....	60
Figure 12 - Adaptable planning	66
Figure 13 - Analysis of KCT proposal.....	67
Figure 14 - Trends in property values and average sales prices	72
Figure 15 - Trends in property values and annual appreciation (for 2012)	73
Figure 16 - Possible development for the Khayelitsha Business District	76

Chapter 1: Introduction

1.1 Introduction

Over time land has been seen as a central factor in determining one's place and future in society. The relationship of individuals to land is very much culturally dependent and is a concept that is subject to change over time. Different approaches are taken in various jurisdictions, often depending on the historical and political context (Jacobs, 2015). Land may be valued as an ancestral home, a means of achieving self-sufficiency and independence, and an inter-generational route out of poverty.

1.1.1 Trustery

In various cultures systems have developed whereby the concept of "trust" over land has become the central key for an equitable determination of access to land. Land and natural resources could not be owned morally by any party as they are not the result of human labour. The entitlement has not been earned and land therefore can only be held in trust for the benefit of all. The idea of trust and stewardship over land and natural resources has been expressed in various ways in various landholding practices (Davis, 2014). The introduction of the concept of "trust" enables creation of a system of rights and obligations with respect to land in which a balance is reached between private and public interests (Bordosi, 2010/[1978]).

For various reasons and in various circumstances urban problems can result in too many people living on small portions of undesirable land. The pressing demand for more other productive land generally results in the urban poor not having access thereto (Jacobs, 2015). Strategically located land will become scarce, the prices will increase, often at a rate exceeding the rise in cost of living, and as a result this land is not accessible for low income populations.

In this context the community land trust is considered a helpful tool; a trust as a public, semi-public or private body can be used as a vehicle for development of certain public lands in an equitable manner. By placing ownership of the land in a trust, the stewardship with respect to the land can be regulated in pursuit of social objectives and the value of land can be mobilized for the public good (Fainstein, 2012). This form of community land trust is not to be confused with a land trust with private beneficiaries and the objective to pursue private financial interest. It also does not necessarily imply common ownership (International Independence Institute, 1972). The community trust is established as a vehicle to regulate use of the land – in the face of expanding demands – for the long range welfare of all people, or practically speaking often for the benefit of the local or larger regional community (Institute of Community Economics, 1982).

The form of the community land trust was originally developed in the United Kingdom and became especially popular in the United States after 1969 as a vehicle to put a social priority on promoting housing for lower income families and a fiscal priority on protecting the public's investment in affordable housing (Davis, 2014). Historical precedents for allocation of entitlement under trustery for the public good can also be found in the American Indian tradition and in ancient China. Other similar urban land trust systems have been developed in the last century in Mexico, in India and in Israel (International Independence Institute, 1972).

From documents reviewed it appears that in South Africa, in its contemporary guise, the form of a beneficiary trust has proven useful as a vehicle for channeling funding for development, administering development programs and empowering previously deprived individuals (Feedback Research and Analytics, 2010)(Urban LandMark, 2011).

In this thesis the community land trust will be discussed in the context of the development of a central business district in Khayelitsha, Cape Town, South Africa. The placement of a commercial venture combined with residential development in a community trust as has been done for the Khayelitsha Central Business District is considered unique in South Africa (National Treasury of South Africa, 2010).

1.1.2 Background

The creation of Khayelitsha as an apartheid dormitory settlement 35 km. from the City of Cape Town in 1983 was based on a master plan of the Bezuidenhout government to relocate the black African community in the Western Cape, who were considered to be living “illegally” in urban areas of the Western Cape, to a new high density township. The township was planned in an inwardly oriented manner that maximized isolation, with four major entrance and exit points. Apart for the construction of a terminus railroad station no investment had taken place for many years (City of Greater Tyberg Area, undated).

After the end of apartheid, the City of Tyberg was established and the need to make a success out of the redevelopment of transport node was apparent, as the community of Khayelitsha represented 30-40% of the population of Tyberg. When the African National Congress, the ruling social democratic political party of South Africa, came to power in the City of Tyberg the development of the central business district for Khayelitsha was declared a Mayoral project.

Establishment Urban Renewal Program

Thereafter, in 2001, former president of South Africa, Thabo Mbeki announced the launch of the National Urban Renewal Program (URP) as experiments for an area based approach to address poverty and underdevelopment in specific areas, with the objective to improve integrated planning and implementation. Eight nodes were identified as anchor projects for area based development and these pilots included the development of the Khayelitsha Central Business District (KBD) next to the Khayelitsha railroad station (Donaldson and Du Plessis, 2013a). This inclusion in the URP resulted in the province and municipalities becoming obligated to prioritize action in this area. The overall objectives of the Urban Renewal Programme were the following: to crowd in public investment and public services, to attract and secure private investment, to develop and mobilize the social capital in the communities, to broaden economic ownership and black economic empowerment and to provide for an integrated planning approach. Each of the eight nodes contained different features. As will be discussed in more detail below, in Khayelitsha the crowding of public investment took place by the government initiating with a comprehensive business plan and the securing a collaboration commitment of the private sector to arrange for funding of the development. The enabling feature by the government did lie in the municipality making available the land on pre agreed conditions at the time the project would be put in place around areas of intensification along major transport and activity routes. This was the key element in the municipal spatial development framework of the City of Cape Town (Du Plessis, 2014, Donaldson and Du Plessis, 2013b).

As mentioned above, in 1999, the City of Tyberg had already established the foundations for the Khayelitsha Business District to be developed next to the railroad station. After the inclusion in the URP a period of active engagement between the city council and the community followed. The Khayelitsha Development Forum also played an important role to prepare communities to engage with opportunities of the development (City of Greater Tyberg Area, undated). This activity resulted in the signing of a stakeholders’ framework agreement in 2001 which made provision for the principle of an enabling entity representing the community. The agreement also identified the development principles such as partnership and risk sharing

amongst the private sector, public sector and the community, with an emphasis on local buy in, equity and empowerment of the community and the requirement of financial sustainability (City of Greater Tyberg Area, undated).

Following a period of call for investments and discussions with various financial institutions into 2001, a collaboration and cooperation agreement was entered into with Rand Merchant Bank (RMB), securing the expertise and funding for market research and packaging of funding proposals, pursuant to which the City and RMB established an operational team. Officials and politicians were thereafter very actively involved and by 2003 substantial public investments were made in the area including a Magistrates Office, a Social Welfare Office and a Housing Affairs building, a swimming pool and a cricket oval (Donaldson and Du Plessis, 2013b).

Creation of Khayelitsha Community Trust

In 2003, a specific development framework, together with a financial plan for the first phase of the development (phase 1) was agreed upon and formed the basis for an agreed institutional framework. This framework included the creation of Khayelitsha Community Trust (KCT) as the central vehicle, an enabling entity representing the community, to control the development process, to implement an empowerment strategy, to create development and management entities for project management and to enter into a Land Availability Agreement with the City of Cape Town (Human, A., 2010).

As set out by the municipality and agreed with the various stakeholders KCT's main tasks were to oversee the development of the district and to act as custodian for the community of Khayelitsha. The five trustees appointed at the time of incorporation represented the communities of Khayelitsha. A key feature of the project was the Land Availability Agreement referred to above. Under this agreement the City of Cape Town became obligated to transfer to KCT parcels of land as soon as KCT had "packaged" a development. This ensured that KCT incurred no holding costs for the land for the period that it remained undeveloped as the impact of unforeseen delays was a prevalent threat to the viability of construction projects (City of Greater Tyberg Area, undated).

The first priority under the development framework established in 2003 was the creation of a retail center next to the railroad station. This was completed in 2005 with loans from the private sector. The objective of the financing structure was that, following the repayment of the loans over 15 years, the trust as owner of the retail center would be obtaining a guaranteed income from the retail center to be used for projects to benefit the community of Khayelitsha such as social amenities as well as educational facilities and job training programs. Any improvements built on the land by KCT would remain in the trust and permit the community to capture the value added to the land as a result of the development (MCA Africa, 2006). In addition to the development of the retail center and other economic activities, the Khayelitsha Business District was in the initial stage to also include housing projects for low- and middle income households (the "Phase 1 housing") (National Treasury of South Africa, 2010).

Change in relationship with City of Cape Town

Currently, KCT functions as an independent trust without any formal institutional involvement of the City of Cape Town. At the time of its creation however the Board of Trustees consisted of city councilors employed by the City of Cape Town. Thereafter KCT became a municipal entity under the Municipal Systems Amendment Act, as a result of which municipal officers were no longer permitted to serve as trustees or directors, and five independent non-executive trustees were appointed. Also, in 2011 the City of Cape Town was obligated to formally change the relationship with KCT, due to accounting concerns raised by the Auditor General. The

change in the role of the City of Cape Town was reflected in an amendment of the Trust Agreement. The Trust Agreement now explicitly states that the City of Cape Town has no influence on the matters of KCT, nor the right to appoint any trustees. KCT has to function independently of the City of Cape Town and the City of Cape Town does not have any responsibility for any obligations of KCT (article 2.3 Trust Agreement).

Figure 1 - Khayelitsha Business District 2002



Aerial view of the 73ha2 next to the Khayelitsha railroad station (source: City of Cape Town-unpublished).

As will be elaborated upon further in this thesis, the placing of the project within the control of a community trust was the centerpiece of structure of the area based project. A multi-focus mandate was considered very important. The common structure for development of commercial or retail centers in emerging areas in South Africa was that external private parties develop, manage and own the retail center. In the case of Khayelitsha the choice for a community trust structure was made to solidify the accrual of the benefits increases in land value and land development rights for the benefit of the community (National Treasury of South Africa, 2010).

After construction retail center

During 2007-2009 the development of the Khayelitsha Business District lost its momentum as a result of a restructuring of the municipalities and the municipal elections. In addition a significant impact was caused by the economic downswing following the crisis of 2008 (Human, A., 2010). Since 2005 no additional significant private commercial development has taken place in the Khayelitsha Business District.

Figure 2 - Khayelitsha Business District 2015



Aerial view of the Khayelitsha Business District with the retail center, municipal building, Magistrates court, swimming pool, cricket oval and land to be further developed (source – Annual Report KCT, 2014).

1.1.3 Problem Statement

The objective of KCT was to develop the Khayelitsha Business District along the development principles of partnership and risk sharing amongst the private sector, public sector and the community, local buy in, equity and empowerment of the community and based on financial sustainability.

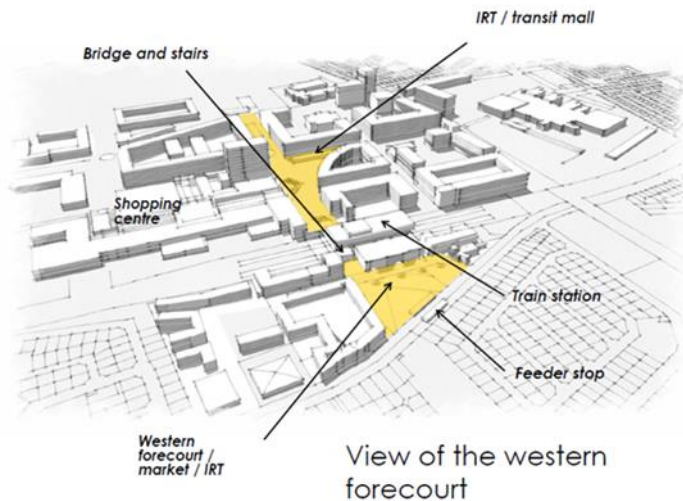
Khayelitsha Community Trust was established by the City of Cape Town in 2003 as the enabling vehicle for the project with a strong social mandate to create a business community by the community for the benefit of the community. Development had already been underway prior to 2003 as the government had made investments in the area by constructing various service buildings which were to attract further investment. However after completion of a retail center in 2005 no further significant development has taken place.

KCT has at this time not finalized a special development framework with the City of Cape Town and delays have occurred in the development of the approved institutional housing. Despite the great need for this additional social housing and continued communications to the community that additional housing is forthcoming, KCT has not been able to deliver the Phase 1 housing development.

Where government no longer controls KCT questions arise regarding the accountability of KCT for the management of the land use and progress of development of this critically located land. Packaging private investment for this area is a complex process. Therefore high operating costs and costs of delays may force KCT to sell this critically located land to private parties in an uncoordinated fashion at low prices to demonstrate progress.

Is the independent trust with its multi-focus mandate in a position to capture any benefit of the long term vision for the Khayelitsha Business District for the benefit of the community of Khayelitsha?

Figure 3- Possible future design for Khayelitsha transit node



(source: City of Cape Town, 2014, unpublished)

1.1.4 Research Objectives

The objective of this research will be to identify and describe certain problems that have arisen in the development process of the Khayelitsha Community Trust since 2005 and to explain whether these issues relate to the use of the form of a community land trust. The unique multi-purpose focus of commercial development combined with provision of low-income housing projects will be examined. The role of the trust in this context will be evaluated and explained within the contours of land ownership of the trust, organizational features of the trust and implementation of certain contractual arrangements relating to the projects.

1.1.5 Research Questions

Box 1: Main question

Main question

“In what ways does the use of the community trust structure enable the Khayelitsha Community Trust to mobilize the land value of the Khayelitsha Business District for the benefit of the Khayelitsha community?”

Box 2: Sub questions

Sub questions

“In what ways does the Khayelitsha Community Trust compare to the classic community land trust model in terms of ownership, organization and operation?”

“In what ways does the Khayelitsha Community Trust meet its distributive goals for the benefit of the current and future beneficiaries of the trust?”

“How does the business community perceive the status of Khayelitsha Community Trust as a community trust as opposed to a private commercial party?”

1.1.6 Significance of the Study

In order to prevent the strategically located land to be sold to the party with the highest and best use, instead of being used for a preferred social purpose, long term controls over strategically located land need to be established. This research may demonstrate that the community trust can be seen as an appropriate vehicle to allow for the development of an environment which includes, or will include, affordable housing and equitable commercial development, while retaining control over the future use of the land. Unique lessons may be learned from the novel approach of using a community trust structure for a large project of area development.

1.1.7 Scope and Limitations

In this thesis features of the community land trust will be discussed in the context of the development of a central business district in Khayelitsha, Cape Town, South Africa. Special consideration will be given to the combination of the establishment of a commercial venture with the development of community housing through the creation of a trust for the benefit of the local community. This project deserves special consideration as it is considered to be unique in South Africa (National Treasury of South Africa, 2010).

In reviewing the activities of KCT the scope of research will be limited to the further development of the retail center and the contemplated Phase 1 housing project for low- and middle income households on the KBD land. The municipal projects which have been developed on the KBD land by the municipality will not be taken into consideration as they were developed without involvement of KCT. With respect to further development various other projects have been mentioned, but no information is available as to actual meaningful steps having taken to further these proposals. The current status of planning regulations have not been reviewed independently.

Given existing confidentiality arrangements and the delicate status of negotiations with various parties KCT has not been in a position to share information with respect to their banking arrangements or the current new proposal for construction of institutional social housing. The influence of involvement of the financing banks and government have not been made the subject of this research. The research is primarily based on interviews with the KCT management team, representatives of the City of Cape Town, NGO representatives, a community leader, an institutional housing developer, property experts and value assessors and on certain secondary data sources.

Chapter 2: Literature Review

Outline

In this chapter the general concept of land value mobilization is reviewed and places this concept in the context of the community trust. Firstly the social function of land and the rights thereto are discussed in general. Terms of disposition are then discussed and how increases in the values of land can be mobilized over time for the benefit of the community. This is followed by a review of features of the community land trust structure which has been developed for this purpose. Given the fact that leasehold constitutes a central element of the community land trust structure, this instrument is then discussed separately in more detail. This chapter concludes with a conceptual framework, outlining the steps made in the theoretical review to be considered in the operationalization of the research.

2.1 Land and its attributes

2.1.1 Introduction

Land and land ownership have been the center of debate on social, political and economic issues for many years (Hong and Bourassa, 2003b). Land has been viewed as a community (inalienable) public asset or as a private asset, a commodity, which can be purchased through a formalized (or less formal) market.

The relationship between government and private individuals, as it relates to entitlements to land and the benefits relating thereto, are very much linked to the conceptual approach to property (Ingram and Hong, 2012). In short, measures proposed by government to capture any additional value have been viewed on the one hand as a taking of private property from landowners and on the other hand as a fulfillment of a social obligation of the landowner attached to the land; especially when resulting from communal infrastructure investments or changes in permitted land use by governmental regulation.

In order to evaluate the concept of land value capture a basic summary of the socio-economic context of property rights and the social function of land in various jurisdictions will be outlined below.

2.1.2 Land

Land has the unique characteristics in that it is required for all human activities, it is fixed in supply, unique in location and quality. Land is always owned, in the present and towards the future (Jacobs, 2015).

Private asset. Given its importance, the role of property has been the subject of debate over time. In the discussion of democracy as a form of government John Locke already argued in 1689 that people had a natural right to property resulting from the work invested in cultivating the land (Locke, 1988/1689).

The economic argument for private property was already advanced by Adam Smith in *The Wealth of Nations* in 1776 as being central to a market economy. When people own land they have something that has the potential to return value to them. The owner has a reason to take care of the land and individual ownership becomes key to the banking system, since land can be invested in and borrowed against. Finally Smith observed that the social institution of property provides a strong justification for civil government (Jacobs, 2013).

Freely constituted governments (democracies) found their justification in the capacity to protect individual freedoms, including the right to public property. It was with respect to this founding principle in the discussion of the U.S. Constitution that James Madison held that “government is instituted no less for the protection of property than of persons of individuals”.

The ideological meaning of property was also emphasized by Thomas Jefferson who argued that private property would serve as both the basis for informed democratic decision-making and linkage for residents to take their role as citizens and members of a community seriously. The role of private property was however not addressed in the U.S. Constitution as adopted. It was not until the codification of the Bill of Rights in 1791 that it was specified in the so-called “takings clause” that “...nor shall private property be taken for public use without compensation”. This provision confirmed that private property existed, that it could only be taken for a denoted public use and only when compensation was paid (Jacobs, 2013).

Shortly after this, in the French Constitution in the Declaration of the Rights of Man and of the Citizen of 1789, the following statement was included: “Property being an inviolable and sacred right, no one may be deprived of it except when public necessity, certified by law, obviously requires it and on the condition of a just compensation in advance” (Jacobs, 2013).

Public asset. The contrary view, that land should be a public asset found its way in the discourse through the labor theory developed by Karl Marx and David Ricardo (Fainstein, 2012). This was the basis for socialist and communist societies to establish their economies on the basis of public landownership in the beginning of the 20th century. After the collapse of the Soviet Union and the deterioration of pure communist ideology many societies have, without departing from the concept of state ownership, developed quasi-private entitlements to public land (Jacobs, 2013).

2.1.3 Trends in ownership

In the last decades a significant interest has developed in private property, since it is believed to have the potential of addressing many social and economic problems (Jacobs, 2013). International bilateral and non-governmental agencies have actively promoted the introduction of the social and legal institutions of private property.

The development of emphasis on private property in the international arena was in more recent years has been further strongly influenced by Hernando de Soto who argued that the creation of private property and the titling of private property is central to the alleviation of property in developing countries. This view is not based on an ideological argument, but is the result of the focus on individual households and the importance of real property as a household asset. According to de Soto formalizing the entitlement to real property enables individuals to leverage this asset towards individual economic development. His views were received with great enthusiasm and were adopted within the general policies promulgated by the UN and the World Bank. This has resulted in a very strong international dissemination of the private property concept (Albright and de Soto, 2008).

In many Western jurisdictions – and especially the United States - private ownership of land is accepted as inevitable because it stood as a pillar for the ideology as Contini has noted (International Independence Institute, 1972). The system of private ownership of land has led to high productivity and independence over a period of one hundred years. However in more recent times it has led to an increase in inequality where ownership is translated into corporate ownership and land is held in fewer hands. Affordability for middle-income families is strained and low income families are excluded. It is for that reason that in the United States, certain alternatives have been considered as experiments. In this context the community land trust has become a means to organize a different formula for landownership, whereby certain social – and economic factors can be taken into consideration (International Independence Institute, 1972).

2.1.4 Social function of land

In addition to considering the issues of “ownership” of the land, one should also consider the “breadth” of such a property right. Often property rights are seen as a right with the core function to exclude others. The core feature of those property rights would be that the owner is entitled to exclude others, without owing any obligation. This would include insulation from demands of others.

In all societies, limits to the exercise of property rights are recognized. In all legal systems frameworks that impose obligations on owners as well as grant rights to owners exist subject to common law or by virtue of constitutional exceptions.

In literature, the social obligation regarding ownership is at times also referred to as the “social function” of land. In Brazil, for example, the social function of land has been established as a constitutional principle in that the right of property is protected, provided it is not exerted against any social or collective interests, in the forms determined by law. The social function is an external limitation that the government must impose on the exercise of property rights. The current Brazilian constitution (1988) provides that “property shall observe *its* social function”. This social function is expressed as a structural element of property rights (Santos Cunha, 2011).

Proponents of the concept of the social function of land argue that these social obligations exist and can be enforced despite explicit constitutional protection of private property rights (Alterman, 2012). For example, social limitations and obligations can exist in the form of land use and environmental regulation, availability of land for public use and entitlements to compensation in the case of a taking.

The debate regarding the scope of governmental powers and limitations and entitlements relating to property are no longer primarily based on ideological grounds; the extent of the social obligation is to be shaped by the underpinning of the relevant property rights. The general basis for the applicable social obligations with respect to property would lie in society’s overarching ethical norms, which should guide the courts as well (Alterman, 2012).

As property rights are inherently relational, they involve responsibilities and obligations as well as privileges (Alexander, 2007). In discussing the recognition of a social-obligation norm Dagan has argued that recognition of the norm is not a question of preference or tradition but rather a concept of justice (Dagan, 2007). In his view, a theory of property that excludes social responsibility is unjust. This can be approached as being incompatible with the justification of ownership, and can also be seen as in disagreement with the best conceptions of citizenship and membership (Dagan, 2007).

Dagan’s basis for the underpinning of justice is based on the view of the self as an “autonomous self”; bound in communities by mutual agreement to associate with each other for strategic ends. In his view this contractarian perspective implies a reciprocity, where the long term burdens will balance out long term benefits (Dagan, 2007). According to Dagan the legitimacy of the social obligation finds itself in the fact that there will be a counter benefit at some point; an argument that also enables the social obligation to fit it in with the “takings doctrine” as it exists under U.S. law (Dagan, 2007).

Another approach is supported by Alexander (2009). He supports the thicker relationship of community with the practice in citizenship in the obligation, the giving, is made not with an expectation of reciprocity, but merely a sacrifice by virtue of membership of a community. (Alexander, 2009)

A more general concept that would limit landowners’ rights is known as “the right to the city” as formulated by Henri Lefebvre. This concept was formulated as “a superior form of rights:

right to freedom, to individualization in socialization, to habitat and to inhabit” (Lefebvre, 1996/[1968-1989]). He states that “the right to the oeuvre, to participation and appropriation (clearly distinct from the right of property) are implied in the right to the city” (Lefebvre, 1996/[1968-1989]). According to Fainstein this approach overcomes the objection to George’s argument that without the labour theory of value there is no rationale for taking return on land away from the individual landowner. Lefebvre’s approach provides a philosophical basis for adhering to George’s view that urban land belongs to all inhabitants (Fainstein, 2012).

In respect to the “right to the city” and claims to users’ “re-imagining the city” the entitlements to land are not limited to economic rights but are also considered to include general participation in the power to create the city and to participate in the life the city offers. In the South African context Bhana considers the conceptual approach to land value capture with reference to the specific “lenses” such as the “poor’s rights to the city” and “re-imagining the city” (Bhana, Hendricks, et al., 2011).

Under the Bill of Rights included in the South African Constitution in 1994, the concepts of rights regarding rights to equity, access to housing and administrative action are to be considered in each action of spatial planning. In interpreting any legislation the spirit and purport and objectives of the Bill of Rights must be promoted (Article 39 of the South African Constitution). These concepts included in article 25 of the Constitution (sections 25(5)-(9)) aim to legitimize and promote land and related reforms. This clause provides a balance in terms of rights which are secured and regulated (Van Wyk and Oranje, 2014). The South African Bill of Rights seems to emphasize the remedial function of land reform for past injustices and is not so much formulated as a codification of the social function of land (Alexander, 2009).

It has been argued that land value capture mechanisms which result in demands on landowners can be based on “justice and equity” to fund broad redevelopment and poverty alleviation programs (Fainstein, 2010).

The property rights debate has implications in the context of development of policies regarding land value changes. As summarized by Alterman, on the one hand, based on the conservative view, land owners should keep the full windfall as part of the general rules of the market. If a tax needs to be established real property should not be singled out as a category for a separate tax. On the other hand, under the social-oriented view, owners of real property owe duties to society to share part of the unearned increment. However, any increments due directly to landowner’s own efforts would be exempted (Alterman, 2012). Mobilizing the value of this unearned increment is often referred to as a form of land value capture. Land value capture instruments include the community land trust (Fainstein, 2012).

2.2 Land value capture - “unearned” increment - betterment

2.2.1 Typology

Land value capture concepts should be considered taking into account that:

“(l)and because of its unique nature and the crucial role it plays in human settlements, cannot be treated as an ordinary asset controlled by individuals and subject to the inefficiencies and pressures of the market. The unearned increment resulting from the rise in land values must be subject to appropriate recapture by public bodies, unless the situation calls for other additional measures such as new patterns of ownership or the general acquisition of land by public bodies”.

Preamble to the Recommendations of the United Nations (HABITAT) conference for National Action on Human Settlements, Vancouver, Canada, 1976.

Land value capture can generally be understood as a mechanism to mobilize for the benefit of the community at large some or all of the land value increments (unearned income) generated through actions other than the landowner's such as public investments or administrative changes in land uses, norms or regulations (Smolka, 2013). It is also held to constitute a generic term denoting the capturing of (i) the rise in values directly caused by planning or public works decisions (betterment) or (ii) any rise in land values – whether due to public decisions or to the general economy (unearned increment); stressing the fact that the rise is not due to the owners' own efforts or initiatives (Alterman, 2012).

Land value is generally held to be determined by location. Other additional factors include (i) public investment and infrastructure in the surrounding areas, (ii) population growth and economic development, (iii) applicable land use regulations, (iv) private investments in the land, and (v) the original productivity (Hong and Bourassa, 2003b).

In the context of fiscal restraint and reduced financial support for communities from the central government, the discussion has spurred the ability of municipalities to recover - for the benefit of the public - the land value *increment* realized by landowners as the result of public investment or other governmental action (Ingram and Hong, 2012).

As referred to above, the idea that the so-called "unearned increment" is to be allocated for the public benefit was initially developed by Henry George in 1879 who brought forward the concept of a "single tax" for such purposes. The concept that a single tax in the amount of the increment was to be charged has remained theory. However, in various jurisdictions instruments have been developed, other than property taxes, to capture certain increases in land value for the benefit of society.

The concept of "betterment" is often easily understood where the government has carried out specific action and has provided the individual concerned a spatial and measurable benefit. In that case, it is easily argued that the individual should pay for it. Various U.K. legislative proposals imposed a betterment charge on the increase in the land value resulting from the regulation of land use and the development (Booth, 2012). Over various decades attempts have been made to structurally implement these betterment charges but after various repeals through political dissatisfaction with these measures the "betterment charge" has been replaced by a community infrastructure levy, on the basis of which developers are to make contributions towards the costs of infrastructure (Booth, 2012).

In approaching the concept of betterment subject to value capture a distinction in terminology is often made. "Betterment" is generally understood to be a narrower concept than "unearned increment". The "unearned increment" is generally referred to as any increase in value of land that is not due to the owner's own initiative and efforts, including increases in market value attributable to general economic development. "Betterment" is understood to be the rise in land value directly caused by a planning decision or public works decision of government (Alterman, 2012). In order to capture the "betterment" or the "unearned increment" various instruments have been developed in various jurisdictions, which have been shaped so as to dovetail with the applicable concepts of property rights and government powers for intervention.

In order to facilitate the analysis in different systems, Alterman has proposed to categorize the instruments on the basis of their economic features. She recognizes the following categories: (i) macro value capture embedded in broad land regimes, such as land nationalization, long-term public leasehold, land banking and land readjustment, (ii) direct value capture of either the "unearned increment" or of the betterment and (iii) indirect value capture as a general instrument primarily to generate revenues (Alterman, 2012).

Direct value capture instruments seek a contribution on the basis that the public is to share the derived wealth. Within the betterment instruments Alterman distinguishes between development rights-based betterment, i.e. resulting from land use regulation and infrastructure-based betterment resulting from specific improved externalities.

Generally accepted forms of charging the unearned increment (as opposed to betterment) include a capital gains tax, a property transfer tax or basic annual property taxes. Infrastructure-based or development rights-based charges generally find their justification in (significant) economic benefits being realized as a result from government action.

2.2.2 Distributive function of land value capture

Another concept underlying land value capture is the concept of distribution. This approach ensures that excess increment in land value that would otherwise accrue for the benefit of individual landowners is turned over to the public sector. The distributive aspect of land value capture should be considered in the following elements of public action: (i) the original action which results in increments, (ii) the action to capture value, and (iii) the destination of the assembled resources (Furtado, 2000).

It should be noted that distribution does not necessarily imply a “re-distribution” of resources. Policies will often be focused on the primary purpose of “mobilizing” the increment back to the public sector, for example as a technique to finance the provision of infrastructure. In these instances the benefits of the value capture are reinvested in the same community and are “regressive”; they do not alter the distribution of wealth.

An element of distribution may be included to attain more progressive distributive policies, but it is not necessarily the basic principle of value capture. A redistributive approach to land value capture can also be seen in the goal of exacting the increased value not only to be realized financially, but to be applied for social and distributive purposes. The additional requirement of inclusion of a “pro-poor” element is proclaimed by Furtado (Furtado, 2000).

Fainstein has developed a vision on land value capture based on George’s ideas with respect to the unearned increment and the concept of justice and Lefebvre’s approach by way of the “right to the city”. In this approach, the concept of justice does not automatically lead to the most economic efficient result but looks at the objective of development as the improvement of the quality of life for the broader public and not the financial optimality which does not address redistribution (Fainstein, 2012).

According to Fainstein, public landownership combined with leasing is a means to prevent speculative development and to flatten the bid-rent curve since it will affect uneven development. When left to private markets with a system of property taxation, as is a more common value capture mechanism, there is no assurance that the revenues will improve equitable distribution (Fainstein, 2012).

Public land will result in elimination of the market in land for certain developments so that the locational advantage will not provide excess benefits to the private landowners. At the same time this will not necessarily preclude private owners from realizing benefits from investments in their improvements.

2.2.3 Special consideration for transportation nodes

As the existence or development of transit facilities can result in rising land prices, the distributive aspects of policies regarding value increases near transport facilities referred to above need to be considered to ensure (and protect) equitable access to proximity benefits of transport facilities. As noted by Fainstein, choices will then be made with the objective of

quality of life improvement for the broader public, as opposed to financial optimality which does not have any redistributive effect.

As mentioned above, a great international interest has developed in applying the concept of land value capture in the context of transit oriented development; transportation nodes are subject to extra consideration given the strategic importance thereof. Accessibility and agglomeration benefits of transit development are generally held to affect the values of land (Suzuki, Murakami, et al., 2015). Other factors include the stage of economic development and population growth which can lead to a strong demand for land in prime locations with good accessibility. Firstly, accessibility to other competing transport may affect land values immediately surrounding the transport node, being other transit catchment areas. Socio-economic and local market factors are path dependent and context sensitive and social segregation and spatial division of labor markets within cities and regions are concerns which shape transit oriented trajectories (Suzuki, Murakami, et al., 2015).

A local or provincial government often buys land around a planned transport node and holds it for sale once the infrastructure or transit system has been developed. The government then benefits from the increase in land value which can be captured and ring-fenced for alleviation of poverty including provisions of housing and basic services (Urban LandMark, 2011).

Depending on the financial circumstances, a government can also retain ownership or transfer ownership to a community trust and – instead of immediately capitalizing the benefits of future value increases, apply the benefits realized from the investments – as property values rise - through collection of increasing proceeds under leasehold arrangements towards social goals. In addition to realizing economic benefits over time, choices can be made for development with primarily a social objective. This could create access to a broader community to live, work and play in strategically located areas, which would otherwise be accessible only by the parties compensating for the “highest and best” use when left to the markets.

John Emmeus Davis has identified the combination of long term leasehold with a community trust as a viable approach for long term transit oriented development projects so as to ensure equitable access to housing near the transit areas (Davis, 2011).

2.3 Community land trusts

2.3.1 Community land trusts; history

In various different historical contexts the concepts of tenure through a community entitlement has developed as an instrument to safeguard access to land for the benefit of a greater community.

Retention of unearned increment

In England, following Ebenezer Howard’s publication of “The Garden Cities of Tomorrow” (1898), which was based on George’s land theories, the concept was created to develop garden cities, based on community ownership of the land and individual ownership of the improvements. These cities were to be established on land leased from municipalities, where “men of probity” would serve as “trustees”. The intention was to capture the social increment for public improvement, not private investment. Where George’s approach to recapture was to take shape as a “single tax” in the amount of an increment, Howard’s approach was based on municipal ownership of the land, thus enabling the community to benefit through revenues realised from leasing the land (Davis, 2014) .

In the United States Ralph Borsodi, another follower of George, published “This Ugly Civilization” in 1929 in which he argued that land should never be called “property”. The land was considered to be - as he called it - “trustery”; only the improvements were considered

“property” (Bordosi, 2010/[1978]). Based on these principles Bordosi founded a land community called the School of Living in 1936, where families settled on leased land paying annual lease fees. Subsequently other leased-land communities based on Bordosi’s model were created, such as Bryn Gweled Homesteads outside of Philadelphia, where the land was held in a non-profit corporation and leaseholds were plotted on which families could build houses to which they obtained individual title (Davis, 2014).

In Norris, Tennessee, a community was established on land leased from the Tennessee Valley Authority (“TVA”) for individuals working on the water dams. The land remained owned by the TVA and was leased for residential and commercial purposes. One of the first affordability criteria was introduced by stipulating that workers never needed to pay more than 25% of their income for housing.

In another setting, following active involvement in the civil rights struggle in the South, the brothers Slater King and C.B. King, cousins of Martin Luther King, in cooperation with Robert Swann, another ardent follower of the principles of Henry George, formed a cooperative called Koinoma Farm. The objective was to create a mechanism for long term security of entitlement to farm land for production, to promote self-sufficiency for low income families in a community supported by a larger network of sympathizers. The need for the development was especially driven by the threats of displacement of black farmers by their landlords from the land previously farmed by them after having registered to vote.

Robert Swann, in partnership with C.B. and Slater King, later developed other organizations, collecting lessons learnt from experiences in the United States, India and Israel with cooperative forms of land use. A factor of great influence on the development of the thinking on land trust structures was the basic structure of the community projects of the Gramadan Movement from India, where Vinoba Bhara established a system providing for land gifts to entire communities and not to impoverished individuals. After having observed these Indian systems during his travels Ralph Bordosi returned to the United States and, with Robert Swann, founded the International Independence Institute, which was to form rural development projects along the lines of those established in India (International Independence Institute, 1972). In addition to the International Independence Institute, later re-named “Institute for Community Economics”, New Communities Inc. was established to create a leasehold project for rural development for black farmers in the area of Albany, Georgia, USA (Model Guide (1972)).

During the period of development of the New Communities Inc., Robert Swann and his colleagues at ICE published “The Community Land Trust: a guide to a new model for land tenure in America” in 1972 (hereinafter the “Model Guide (1972)”) in which the above referenced lessons learnt from the leased land experiences in the US and Israel were reflected upon. This publication identified, with references to the experiences with the New Communities Inc., the main features to be considered when establishing a community land trust. The comprehensive publication covers, inter alia, the ownership structures, organizational systems, land selection and acquisition criteria, financing options, land use and social planning features and issues regarding distribution of the tax burdens.

Many of these characteristics of the community land trust are still considered basic features of the community land trust as it is known today.

Entrenchment in larger community

As of 1982, the significant elements of the community land trust were the leasehold structure and the composition of the governing board and its responsibilities regarding control of the land and its trusteeship. In short, ownership of the land was to be held by the trust and membership and board seats were to be held by individuals who form part of a larger community and do not live on the trust land or lease any trust land. This latter feature would distinguish the community land trust from the so-called “intentional communities” where housing developments were established and boards took only into account the interests of the residents. This novel structure of the boards would lock in continued participation in the venture by sympathetic outsiders living in the surrounding area. Over the years this concept developed further into a tri/partite structure of the Board of a classic community land trust. The composition of the boards will be further discussed in Section 2.4.2. It was the addition of this element that resulted in renaming the land trusts structure “community land trusts”.

Following the establishment of the New Communities, Inc. and the publication of Model Guide (1972) additional communities were created, but still contained features of “intentional communities”. These consisted of groups of individuals with shared political and social values, but lacking the open membership features and the balanced board model as set out in the Model Guide 1972. These “intentional” communities were also referred to as “enclaves” by Swann.

Introduction of preservation of affordability as a defining feature

It was not until 1978, with the development of the Woodland Community Land Trust, in Tennessee, U.S.A., that further features, embracing the concept of “trustery” were included. It was the first time that, in addition to the pillars of dual ownership and cooperation characteristics, affordability protection and preferential option for the poor were included. In the Woodland project, resale restrictions were first introduced where the homeowners would receive 90% of the appraised value of their homes, leaving 10% as a price reduction for the future homeowner.

Until 1980, the community land trusts were set up only in rural settings. The Community Land Cooperative of Cincinnati (CLCC) established in the heart of West End, an impoverished African American community in Cincinnati, constituted the first community land trust to be established in an urban setting. As a bulwark against gentrification, specific contractual controls over pricing and conveyance were placed in the ground lease and therefore were placed in the hands of the CLCC. The inclusion of the preemptive option for the CLCC to purchase the home and the resale formula embedded in the lease was a means to balance the private interests with the needs of the community (Davis, 2014).

Following the establishment of CLCC in Cincinnati a new generation of activists decided to update the guidelines included in the Model Guide 1972 and published the Community Land Trust Handbook in 1982 (hereinafter, the “Handbook 1982”). The refinements consisted, inter alia, of adding a focus on urban problems and the preservation of affordable housing, with a high priority on serving disadvantaged individuals and communities and adding stewardship elements to assist first time home owners to succeed. The permanent affordability was added as a defining feature of the community land trust, to be enforced through a preemptive purchase option for the trust and a pre-agreed resale formula, both to be embedded in the ground lease to be entered into between the trust and the owner (Institute of Community Economics, 1982).

The Handbook 1982 explicitly put forth a new approach. It was not only the land that was to be held in trust, but also the retention of the public investment in developing the land. What John Stuart Mill and Henry George called the “unearned increment” in the appreciating value

of land was to be captured. The 1982 Handbook also specifies that the community land trust has an affirmative obligation, as part of the trustery, to develop the property primarily for the benefit of the disadvantaged individuals and to support them in maintaining and retaining their acquired property (Davis, 2014). Balancing the interests of the land owner, the homeowners and the community to be accomplished in the areas of (i) ownership, (ii) organization and (iii) operation. Ownership structure referred to a dual ownership structure whether the trust owns the land and the resident owns the improvement. The trust is to be organized as a not-for-profit organization, where the governance lies with a board elected by the residents of the trust land and the lessees of the leased land. The operation of the trust centers around protecting permanent affordability, with a priority for the poor, by way of enforcing resale controls and to educate the lessees on remaining disciplined lessees and keeping the property in good state of repair and maintenance.

Where government is making land available to a community trust in anticipation of further development the affordable housing can be made available to eligible community members while at the same time safeguarding the “public” benefit of continuously granting affordable housing for the future against market pressures that would result from value increases in the surrounding area. As will be set out in Section 2.3.4 by using the community trust the initial subsidies granted by government can be locked in, and in a vibrant real estate market the community trust structure prevents the removal of “affordability” and “privatization” of the public investment (Voith and Wachter, 2012).

The “classic” community land trust as known in the United States includes the following characteristics as have been identified in the Handbook 1982 : (i) use of a non-profit structure, (ii) with dual ownership providing individual occupants with long term land leases, (iii) permitting occupants to build/own [housing] subject to resale at affordable prices, subject to pre agreed formulas so as to preserve the affordability thereof, (iv) with the perpetual responsibility for the trust to keep members of the trust accountable for the preservation thereof often under tripartite governance systems involving the house owners, the local government and the community (Davis, 1984).

In the current English context the community trust is seen as “a mechanism for democratic ownership of land by the local community. Land is taken out of the market and separated from its productive use so that the impact of land appreciation is removed, thereby enabling long term, affordable and sustainable local development. The value of public investment, philanthropic gifts, charitable endowments, legacies or development gain is thus captured in perpetuity, underpinning the sustainable development of a defined locality or community. Through community land trusts local residents and businesses participate in and take responsibility for planning and delivering redevelopment schemes.” (The Co-operative Development Society Limited, London, 2015, webpage).

In literature the discussions on the features of the community land trust have been categorized as addressing issues of (i) land ownership, (ii) organizational structures and (iii) operational measures (Davis, 2014). This approach will be followed in the following Sections.

2.3.2 Community land trust; ownership

2.3.2.1 Dual ownership structure

The community land trust is a property based affordable home ownership system where housing units are made affordable to defined classes of home buyers by reducing the price of the unit through retention of title of the land by the trust. Breaking down the various components of the community land trust the first key feature of the community land trust is the leasehold structure. The land is owned by the trust and is leased to the home owners through a

long-term ground lease. The ground lease gives the home owners exclusive access to the land but limits those rights in certain ways to maintain affordability for subsequent owners. The improvements built on the land by the lessee are owned by the lessee. The ownership arrangements balance the rights of the trust and the rights of the individual lessees.

The experience in general has been that parties who have never had a chance to own land will resist this leasehold structure; in their view ownership of the land is the only way to gain control over the land and their own lives. The concepts of landownership and private property rights are strong even though ownership has its pitfalls, especially for low income households where properties after being mortgaged are foreclosed upon and sold on to creditors. The benefits of a leasehold structure for individual households, such as prevention of land speculation, dealing with absentee ownership as opposed to benefiting the intended beneficiary, and control of use of land for desired purposes are often not easily understood (International Independence Institute, 1972).

In general, separation of ownership of land and building is seen as a defining characteristic of the community land trust. However, in jurisdictions where no such separation can be made a separate leasehold estate is created set apart from the property held by the trust. This results in a form of shared ownership established by agreement between the trust-lessor and the resident-lessee (White, K., 2011).

2.3.2.2 Initial land purchase

For the establishment of a community land trust various forms of land acquisition can be distinguished. Firstly, the local government or municipality can make land available at a subsidized, below market price. Secondly, unused land that is no longer useful for its intended purposes can be made available. Thirdly, socially concerned parties and individuals may be interested in divesting themselves from the responsibility and burdens of landownership, but may desire a sense of long term trusteeship to be exercised by a third party. This can be encouraged by way of granting tax incentives to accomplish this result.

Where a government participates in land markets, restrictions often exist on the ability of government to *sell* its interest in land. The interests at hand in weighing the considerations for sale of public land may also require that public interests are considered. The South African Municipal Finance Act (MFA) for example has a detailed list of requirements that need to be met. Provisions are included to combat corruption and mismanagement in smaller communities which often are resource-constrained (City of Greater Tyberg Area, undated). These provisions apply generally to all municipalities and include the requirement of a public hearing, where a determination can be made that the assets are not required for a basic municipal service and where consideration is given to the fair market value of the asset and the economic and community value to be received in exchange for the asset. Here also an assessment of the public interest needs to be made in evaluating the price at which the land is to be sold. The sale must be fair, equitable, transparent and competitive and consistent with the supply chain management policy which the municipal entity maintains (article 90 MFA).

Certain categories of land may be exempt under regulations of the legislative framework, such as dispositions for schools, health facilities, public societies, certain land donations, education and recreational facilities. In addition certain preferential policies may at times be followed, such as in the context of implementing the programs of a reconstruction and development program or for the cause of advancing persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender or disability. In these situation prices may be made subject to prescribed discounts. (See for example the outline of legislative frame work - final draft policy on sale and disposal of municipal land/property, Mogalakwena Municipality).

In general, it can be said that acquisition of land without support of a local government can constitute a major obstacle in the establishment of a community land trust (Davis, 2006; Davis, 2014).

2.3.2.3 In perpetuity

Community land trusts are established with the objective to secure long term affordability. The user is given exclusive access but the rights to the land are limited to ensure the affordability for subsequent users. In order to ensure long term affordability the trust owns - in principle - the land in perpetuity and will regulate the use and entitlements of the user through the ground lease. The user pays a fee to use the land. By taking the cost of land out of the housing cost, being the initial public funds used to acquire the land and/or build any improvements, the affordability can be secured for the initial buyer and subsequent buyer without the need to provide an additional subsidy to the subsequent buyer. The affordability for the subsequent buyer is protected through the use of certain resale restrictions, which will be discussed in Section 2.5.4.1. The community land trust can therefore be seen as a land bank - protecting against a continued rising of land prices (Curtin and Bocarsly, 2008).

In certain situations the provision of land to a community trust has been explicitly made subject to the preservation of affordability. The public investment should be made under the condition of subsidy retention and should not be lost nor used to displace people. However, the perpetual ownership of land may not in all situations be the only solution to retain the subsidy. Another option is the creation of affordable housing through the use of the so called “limited equity” structure. Here the community trust is granted the durable right to repurchase the property at an affordable, predetermined price when the owner decides to sell.

In other instances housing programs have been modified to become so called “expiring use” programs, where affordability controls disappear after passage of a certain period. The social cost of failing to provide for long term affordability becomes apparent once dwellings in entire neighbourhoods are no longer subject to these controls (Davis, 2014).

2.3.2.4 Ground lease

The ground lease referred to above forms the centrepiece of the community land trust concept. It is the instrument in which the rights of the lessor, the land trust and the lessee, the tenant are regulated. The ground lease addresses - in principle - the rights in the land only. The purpose of the lease will be identified in the lease; provisions will be included outlining the intentions and designating the permitted use of the land. The rights of the lessee are therefore limited and as a result the ground lease also constitutes a type of “planning” instrument, providing for parameters which would also be addressed by zoning provisions.

The ground lease is normally entered into for a long term - 99 years is often the longest permitted duration under various legal systems - so as to encourage and permit lessees to make investments in improvements. The intention is that the lease lasts for at least a generation or a lifetime, and often includes a right of inheritance. This right to inherit is often limited to members of the family (spouse or children), without the need to establish income eligibility requirements to ensure that families can pass on the home to the next generation -see for example Model Lease 2011, article 10 (The 2011 CLT Network Model Ground Lease, 2011). In view of the fact that the terms of use and arrangements regarding the management of the properties change over time, the community trust often stipulates that a succeeding tenant needs to enter into a new lease, which reflects the updated arrangements generally applicable between the lessor trust and its lessees (White, K., 2011).

In principle the lease can only be terminated by the lessee, since the trust has granted long term rights to use the land. However if the lessee breaches its payment or other obligation under the

lease, the trust can exercise termination rights, subject to certain rights of the lender/mortgagee, if applicable. In addition at times a very special termination right is included for the situation that a lessor trust needs to reorganise the land holdings. In these situations the trust can terminate the lease subject to appropriate compensation arrangements for the lessee. This would only apply to unusual circumstances (White, K., 2011).

The amount of rent to be charged under the lease can be based on various approaches. One approach is to take into account all the costs of the land minus the amounts received by way of gifts and subsidies, if appropriate. Costs that are passed on include (i) local taxes, (ii) amortization and interest on any borrowings by the trust, (iii) if applicable, certain development costs, (iv) a use charge. In addition to the rent, the ground lease may provide for a separate contribution towards a reserve account to be applied towards (un)expected future expenses (International Independence Institute, 1972).

Another approach for the rent calculation is the market oriented approach. The calculation is based on the fair market rental value, to be adjusted downward to make it affordable for the intended beneficiary group, but never to an amount lower than the sum that would be required to cover the costs of the trust (see Model Lease 2011, art. 4)

It should be noted that ground leases do generally not require the owners to recertify their income and subsequently renegotiate the leases where the income of the owners has increased dramatically. Also at the time of inheritance by the family there is often no requirement to satisfy the eligibility tests (see Model Lease 2011, art. 10).

Non-residential ground leases will generally follow the same basic principles. Special considerations tailored to the specific use will require inclusion of special arrangements such as, for example, specification of the permitted commercial use, restrictions so as to avoid harm or nuisance to the community or the local environment, special purpose oriented transfer restrictions, approvals of lessee built improvements and modifications thereof, revenue sharing arrangements to be reflected in the lease fees, limitations on subleasing and possibly certain socially oriented obligations such as creation of employment opportunities for local residents and contributions towards social programs (Davis, 2006).

2.3.3 Community land trust; organization

Special consideration is to be given to the special dynamics that are to be reflected in the system of governance.

2.3.3.1 Primary obligation; balancing interests

On the one hand the primary goal of the trust is the acquisition of the land and the trusteeship in holding the land. The original thought was that the trust should not be too deeply involved in the development of the community, site planning and institutional development other than to the extent required to safeguard the long term value of the land so that it will not be adversely affected. The actual use functions should be primarily determined by the users. A distinction was made between local control and the trusteeship function (International Independence Institute, 1972).

On the other hand a broader interest may also be at stake. The question therefore arose whether there would be a basis to include the wider community; this depending on the purpose of the trust and the nature of the resource subject to the structure. Arguments have been put forward to include the larger community, especially when the beneficiaries of the goals of the trust are also to include individuals and entities that do not reside on the land. The powers of governance of the trust are to be balanced between the interests of the parties actually using the land and the interests of the larger community of which it forms part. Therefore, by including a regional representation a benefit can also be derived from a broader support in the area and institutional

ties on this wider basis. Outside representation may also prevent internal fractions gaining control over the community (International Independence Institute, 1972). This balancing of interests is therefore to be considered when establishing the legal form of that structure.

2.3.3.2 Legal form; features

Community trusts can be incorporated in various forms. The choice of the form of legal entity needs to be weighed in the context of the laws of the jurisdiction within which the entity is to be established. The following characteristics would normally be considered:

1. the landowner is to be a private, not for profit corporation with “corporate” membership that is open to anyone *living in* the service area ;
2. the majority of the board is to be *elected by the members*;
3. in order to reflect the balance of interests the board *seats are to be allocated* equally amongst members representing (i) the households living on the subject land, (ii) households living in the greater area, but not living on the subject land and (iii) directors who represent the public interest (the so-called “tri-partite structure”) (Davis and Stokes, 2009).

In literature limited research has been reported on the impact of the participatory aspects and the involvement of the greater community. There is a lack of evidence regarding the governance features, how practices and decisions are taken as it regards the participation of residents and the larger community. Reliance on volunteers can affect the capacity of the community land trusts and therefore also the long term sustainability and governance by management. The localism agenda may also turn into a “survival of the fittest” of the better informed, while the marginalised remain at the fringes. Access to municipal funding and finances may also be constrained without adequate support of the communities being embedded in the governance structures (Moore and McKee, 2012).

One study conducted by Emily Thaden and Jeffrey Lowe (Thaden and Lowe, 2014) demonstrated that resident leadership was critically important. Often stewardship activities were also conducted so as to advance economic development of the residents. With respect to community membership a disparity between aspirations and the reality on the ground was identified. In order to actualize meaningful community control, resident and community engagement activities supplementary to corporate membership were deemed necessary. This was in each case influenced by the temporal climate surrounding the community land trust, being the circumstances under which it was created and the underlying philosophy at that time. The other significant factor was identified as the local socio-economic environment, which could according to Margaret Weir be categorized in elite-dominated, patronage-backed or incentive-driven places (Weir, 1999; referenced in (Thaden and Lowe, 2014)). These distinctions were considered useful in identifying the community land trusts’ orientation and strategy for engagement.

Recently accommodations to the classic model with features described above have been made by the National CLT Network in considering communities trust to be included in their network. Participation by local government can be included; at times more than one-third of the seats are taken by municipal employees or officers (Davis and Jacobus, 2008). In addition organisations lacking voting membership are recognised by the National CLT Network as CLT’s as long as the structure exists to ensure that the board is accountable to the residents in the area (Thaden and Lowe, 2014)(Davis and Jacobus, 2008).

2.3.4 Community land trust; operation

2.3.4.1 Subsidy retention

In its operation the community trust will need to balance the interests of the lessees to build wealth in respect of their homes and the objective of maintaining affordability for future generations.

Durable affordability and subsidy retention are concepts addressing the same issue, but tend to have a different emphasis. Durable affordability focuses on the homes remaining affordable for future buyers whereas subsidy retention focuses on public investments made by the government remaining available for future generations (Davis, 2006).

The subsidy retention has two elements to it, being (a) the buyer eligibility requirement and (b) the resale price restrictions. In each case the programme will have identified a group of beneficiaries which are to benefit of the underlying support towards housing costs. This will most often be an income related eligibility requirement, often with reference to the median income in the area.

In literature various mechanisms for subsidy retention have been discussed. In this context it should be noted that a clear distinction needs to be made between subsidy recapture and subsidy retention. *Subsidy recapture* is understood as a mechanism where the subsidy granted is recovered by the public authority; the amounts received as subsidies need to be repaid under certain circumstances, including a sale of the property at fair market value. *Subsidy retention* is a mechanism whereby the subsidy initially granted in respect of the first buyer-homeowner also benefits future purchasers (Cohen, 1994). References are also made to “*subsidy removal*”; this is the phenomenon where subsidies are granted to an individual but the full benefit is pocketed by the grantee at the time of sale of the unit (Collins, 2014).

When evaluating the effect of subsidy policies with respect to the next low-income buyer in circumstances where the real property prices are rising, one concludes that in the case of subsidy removal an additional (and most likely higher) amount is needed to bridge the gap between the amount that would be affordable for a next low income buyer and the fair market value of the home.

In case of subsidy recapture by the government an increased amount is also most likely required to provide for an affordable purchase as prices will have risen. The amount to be repaid by the seller to the public authority, when reapplied to subsidize the purchase by a new low-income buyer will most likely not be sufficient to cover the “affordability gap” as values of properties will have risen and incomes generally rise at a lesser pace (Collins, 2014). Subsidy recapture does not measure up to the test of subsidy recycling due to finance costs and rising prices which are not covered by increases in income within the targeted beneficiary group.

Subsidy retention would be the manner in which to yield a perpetual return on the investment in social housing. In using a resale formula no additional investment is needed to safeguard an affordable purchase price for the next low-income purchaser (Cohen, 1994).

Subsidy retention systems in housing transactions can take different forms. The most commonly used structures are deed-restricted ownership, limited equity arrangements and community trusts (Abramowitz and White, 2006).

In a system of deed-restricted homeownership, restrictions are put in the instrument of transfer, requiring that the property can only be on-sold to purchasers meeting certain requirements. They are often based on a percentage of general income levels (with reference to the area median income). The price is set at a level which is considered affordable for the income group and is calculated in accordance with the formula set out in the deed.

In limited equity arrangements, users hold interest in a cooperative as opposed to owning land and homes. They receive the right to occupy a certain unit and can exercise their voting right as a member with respect to matters pertaining to the properties. In this structure, the property is held by the cooperative, the financing burdens are carried by the cooperative and the affordability is safeguarded through a control on the price of the share/membership interest at the time of a transfer. As will be discussed below many variations on the purchase price formula are possible.

The community land trust structure differs from the foregoing structures in that the land is owned by the community trust and households only purchase the homes that are located on the land. As the purchase only extends to the improvement and not the land, the home becomes more affordable than a conventional home, which in the purchased price includes the cost of the land. In addition the resale price is structured to exclude the increase in the land value from the price (Davis, 2006).

The resale price formulas used in each of the three subsidy retention systems can be categorised as follows:

1. “Appraisal based values” where the resale price is limited to the original purchase price plus a percentage of the total appreciation accrued during the period between the original purchase and the resale.
2. “Indexed formulas”- where the original purchase price can only be increased with reference to an index such as for example , a percentage of (i) the rise in the consumer price index or (ii) the rise in the median income in the area.
3. “Itemised formulas” where the increase is tied into the value of the improvements made to the property and includes adjustments for inflation.
4. “Mortgage based formulas” where the purchase price is set at a level where the sum of the mortgage payments, interest and principal together with lease fees is affordable for the household within the targeted income level (Abramowitz and White, 2006, Abramowitz and White, 2006, Abramowitz and White, 2006).

As mentioned in Section 2.4.2.4, the resales are restricted through provisions in the ground lease.

Similar considerations to protect affordability can apply in the case of commercial development within the community trust. Commercial properties are normally valued on the basis of their income generating potential. Charging a certain level of rent is a manner of directing development within the project. Certain less profitable ventures can be granted an opportunity for development by arranging for lease structures that would allow for an initial development stage: “affordable” leasing for targeted ventures. The question arises to what extent provision of long term low market rent affects surrounding businesses and property owners. Assessments need to be made regarding an equitable way to pass the subsidy benefit on to the leaseholder (Axel-Lute, 2011). Another approach is to allow for commercial development in the context of creating a mixed use environment, and to provide for cross subsidization. The payment mechanics under the commercial leases can be subjected to increases over time, or supplemented by profit sharing arrangements or claw-back of benefits in case of a profitable transfer of lease rights (White, K., 2011).

2.4.4.2 Ongoing stewardship

In addition to protecting the affordability of the low-income housing at the time of purchase the ongoing stewardship referred to in Section 2.4.4.1 above includes a monitoring and assistance to enable the low income households to retain their interests in the housing units. In

order to safeguard the security of tenure many community trust structures require that the trust review and approve any mortgage based financing to protect against predatory lending practices. The ground lease often includes specific provisions protecting the ability of the trust to regulate the home's use and resale, also in the context of a foreclosure sale. The lender executes documents acknowledging certain rights of the trust to intervene in case of a default and/or foreclosure. The post-purchase services can include financial literacy training, assistance with maintenance and referrals to contractors and (mandatory) counselling for delinquent homeowners; each case addressing challenges over time of ownership for low-income households (Thaden and Davis, 2010). This "back-end" protection provided by the trust may produce a higher rate of success for owners than if such households would have been left to navigate through the obstacles in market home ownership. At times the trust can assist in repayment obligations under the mortgage loans, by temporarily curing a default in respect of required payments (Davis, 2006).

A study conducted by Emily Thaden of the National Community Land Trust Network demonstrated that, even following the economic crisis of 2008, foreclosure on mortgages covering resale restricted community land trust homes were very low relative to the conventional market. The community land trust sector consistently outperformed the market sector over the period from the end of 2008 until the end of 2010. Stewardship seemed to arrest the slide towards foreclosure, also in a time of economic downturn (Thaden, 2011).

An additional observation when evaluating the community trust as a subsidy tool for local government, in view of the foregoing roles of the community trust, is that the trusts' ongoing costs of owning land, managing ground leases and controlling and monitoring compliance with the lease provisions and enforcing resale provisions are often considered high from the government's perspective. However, as mentioned above, the community land trust model may result in lower default risks as the structure provides for opportunities for the trust to intervene in case of loan defaults. Revitalizing a neighbourhood and meeting inclusionary housing requirements could also be considered significant benefits for the greater community (Collins, 2014).

Criteria to evaluate housing subsidy systems have included the following: (1) scalability, (2) effectiveness in causing renters to become homeowners rather than subsidizing households who would become homeowners even without the subsidy, (3) targeting low income individuals, (4) efficient administration, (5) recapturing the subsidies when the buyers are no longer owner-occupants or low-income, as well as recycling funds across subsequent buyers, (6) neighbourhood impact, (7) lowering default risk and (8) minimizing restrictions on household mobility (Collins, 2014). In the research conducted by Collins in analysing the effectiveness of subsidies for low-income ownership, the community land trust's drawbacks, in comparison with other programs including a purchase price subsidy, were that it had limited "scalability", with high administrative costs. The community trust however scored high on effectiveness and recapture opportunities, with limited mobility barriers and a lower default risk (Collins, 2014).

2.4 Community trust in equitable transit oriented development

Transit oriented development refers to higher density development and infrastructure and investments that support a mix of housing choices, economic activity, employment opportunities and public services within walking distance of transit stations. (Hickey, 2013)

Equitable transit oriented development refers to development and investment decisions that assist households of all incomes to participate in the benefits of walkable, liveable transit rich communities. In general the production of affordable housing is seen as a significant challenge

when a large proportion of the population cannot afford to live in areas surrounding the transit nodes. The question whether proximity to public transit results in rising housing prices has been the subject of debate in literature. The ultimate effect of costs on property values depends on a wide range of factors, including the regional economy, the importance and usefulness of the transit system, walkable areas including retail and other amenities.

Whether value will be realised will be largely driven by the character of the local economy. Where existing economic activities deal in small volumes of low cost goods and only low rentals can be generated, the difficulty arises that rentals are too low to overcome the construction costs. Townships were established for non-economic reasons and do not possess the attributes needed for economic activities, such as access, markets and infrastructure, needed for economic activity to create an effective demand for commercial space (McGaffin, Napier, et al., 2015). The existence and improvement of the railroad station may not alter the level of spending. Increased spending however will result in a greater demand in the area for retail space which in turn will result in higher residual land values for the properties (McGaffin, Napier, et al., 2015).

Apart from possibly protecting against increased land prices over time, which may jeopardise the creation of a mixed use environment in due course, the community trust can be used to ensure the availability of land at a lower price than the then applicable fair market value.

“Community land trusts can be seen as a perfect complement to a transit oriented development - a vehicle for perpetuating a social equity commitment a long a sizeable public investment in light rail, smart growth, public parks and other infrastructure. [...] Without long term controls over the land only the highest and best use will survive a spike in property values in the future” (Davis, 2011, page 7).

2.5 Community trust: government transferor relinquished control

A significant benefit of transferring land to the community land trust - being a private organisation - can be that it protects the development process from political swings that occur in the case the control over land and land use management would be solely with government (Fainstein, 2012). This is especially relevant in the case where long periods for development are contemplated.

2.6 Development of community trusts; beyond housing to commercial development

As set out above, in the United States the use of the community trust resulted from the civil rights movement when The New Communities Inc. was established in 1969. The very first community trusts were established as agrarian collectives (Davis, 2011). In following years the community trusts concentrated mainly on the area of owner-occupied housing. The community land trust none the less developed further into a vehicle to be used for various types of housing and tenure, including limited equity cooperatives, condominiums, rental housing, mobile parks, single room occupancy or certain hybrid forms (Hickey, 2013). The community land trusts were structured to benefit from various tax exemptions as “charitable” organisations and therefore gained access to various financial resources from public funding and private donations (Curtin and Bocarsly, 2008).

Further expansion into the non-housing sector followed; agricultural use, transit oriented development, office space and service facilities for inner city neighbourhoods (Rosenburg and Yuen, 2012).

In the United States three roles for the community land trust in commercial development processes have been identified, which are (i) securing land and developing commercial

property, (ii) fostering community engagement and (iii) creating new commercial enterprises. Concerning commercial leases used by community land trusts the predominant model is a space-only landlord tenant lease where the tenant has no ownership stake, thereby minimizing tenant commitments to property management and reducing upfront tenant costs. Another option for the tenant is to construct a building with the community land trust retaining ownership of the land by way of a ground lease. In order to ensure that a project will bring what the community needs, a community land trust can incorporate extensive community engagement as opposed to permitting a developer to come in a pre-conceived plan for the area (Rosenburg and Yuen, 2012).

In the case studies conducted by Brown and Ranney benefits involvement in commercial development were identified, including: (i) support for a comprehensive community development and (ii) control over the area. The challenges that have been identified by them include financial development risk which - in addition to vacancy risk - can be significant where property often needs to meet specific tenant requirements. Furthermore the financial gains are uncertain especially in lower income neighbourhoods, where precisely for that reason private developers have not been eager to pursue these projects. Finally commercial development requires special core competencies in spatial development and in negotiating the development process with, often powerful, partners (Brown and Ranney, 2012). Community land trusts can often be well suited for community engagement and advocacy roles, but do not always possess the required in-house commercial real estate experience and expertise. In those cases the roles of land acquisition and development can be assigned to another partner, while the community land trust reserves a stewardship role for itself (Brown and Ranney, 2012).

Recent trends in the United States include the so-called municipalisation of community trusts where community trusts are initiated by or supported by municipal governments to ensure protection of the subsidies - also in times of fiscal scarcity (Davis, 2011).

A major initiative has been undertaken in the United States in a transit oriented development known as the Atlanta Beltline Partnership. Under the Atlanta Land Trust Cooperative a number of neighbourhood community trusts are to be created along a 22-mile light rail corridor of the Beltline, with the objective to ensure that low and middle income groups can share in the investment into transit oriented development without suffering the burdens of possible displacement. This effort has been initiated in addition to a projected tax increment financing program which is to set aside fifteen percent of all revenues for the Beltline Affordable Housing Trust Fund which will enable the community land trusts to play a role in this equitable transit oriented development. Given the importance of accessibility to the rail network, specific consideration is given to the use of the community land trust to address concerns of affordability and displacement of communities in the area (Hickey, 2013).

Large metropolitan projects are only viable in areas with a booming property market. On the contrary, with publicly controlled land, projects can start with simple development based land value capture such as a single commercial building, and subsequently develop multiple use units and further possibly expand into adjacent areas with land readjustment or urban redevelopment schemes. The key is for municipalities to make incremental steps to leverage internal and local assets (Suzuki, Murakami, et al., 2015). This could be accomplished by holding the land in a community trust combined with leasehold during the period of anticipating further development.

2.7 Leasehold as a planning tool

2.7.1 Leasehold

Leasehold is a special form of land tenure whereby one party, the legal owner of the land grants the right to the other party, the lessee to use and occupy land during a specified period, subject to the terms and conditions set out in the lease agreement. Absent any specific renewal rights the tenancy will terminate automatically upon the expiration of the term and all of lessee's rights will revert to the owner/lessor. In comparison to a transfer of full ownership the lessor/owner's rights are limited by the rights of quiet enjoyment of the lessee and other contractual rights of the lessee only for the duration of the negotiated period.

2.7.2 Characteristics of lease transactions with public parties

In assessing the components of leasehold the totality of elements comprising interest in "land rights/property" are often viewed as a "bundle of rights". Each of these rights can be assigned to different parties, thereby creating a system of assignment of rights between public landowners and private parties using the land. The degree of rights assigned to the lessee will determine the resemblance to public land ownership, communal ownership or private property. This will be based on the conditions included in the contractual provisions of the lease agreement with the lessee (Hong and Bourassa, 2003a). Specific land use provisions will be included in addition to operational rules and rights upon enforcement (Hong and Bourassa, 2003b). Leasing by public parties— given the flexibility of contractual arrangements – can be a very effective tool for land management. It permits (local) governments to achieve a considerable variety of public policy goals for a specific situation (Strong, 2003).

2.7.3 Policy instruments and legal framework

Leasing has been used by public entities to achieve various policy objectives including (i) management of urban growth and facilitating (economic) development, (ii) retaining the public's share of land value increments for infrastructure investment, (iii) reserving land for public purposes and (iv) stabilizing land and housing prices (Hong and Bourassa, 2003a).

These general goals have resulted in use of the instrument for example, so as to avoid sales of full ownership to land at low prices when the timing of a land sale is at a disadvantageous time. Other reasons have included waiting for a proper property tax system to be implemented or transferring land to local governmental authorities so as to enable local government to implement urban planning measures into the (sub) leases or to direct government conditions (Hong and Bourassa, 2003a).

The coexistence of public and private powers for government allows significant flexibility which can be beneficial in addressing specific needs in a particular situation. The extent to which a government can exercise rights under a private contract is a matter of applicable administrative law. With respect to the co-existence of a public statutory system and leasing arrangements certain legal doctrines have been developed in that government is not entitled to use its contractual powers in a manner that is contrary to the public policy goals established in the statutory framework, and that contractual rights can only be used at times when the statutory system is "inadequate" (Needham, 2003).

With references to certain public leasing systems Fainstein identifies the community trust as an available structure that enables the retention of the land value for the benefit of the community. As is the case in public leasehold, a community organization owns the land and enters into leases with the occupants of the property giving them ownership rights over the improvements. The not-for profit entity can attain the same objectives in that speculation is restricted and "affordability" can be protected. The benefit of rising land prices can be retained for the benefit of the community (Fainstein, 2012).

2.7.4 Conditions of public leasehold; premiums

The lease conditions determine the permitted use of the land by the lessee for a specific period of time, the amounts due to the lessor/government and the periodicity of payments as well as consequences for breaching the terms of the lease. The practical impact of the public lease instrument depends entirely on the terms set out therein. Short term leases can be used as transitory measures where land is not yet ripe for development or to prevent government from selling land at too low a price (Hong and Bourassa, 2003a); (Strong, 2003).

Payment mechanisms may differ greatly. Often lease terms require a lump sum premium payment. Premium is usually an amount of capitalised rent paid for the term of the lease up to the moment of renewal. In this situation additional payments are only required at the time of modification of the land use or renewal of the lease. Even so, in lieu of an upfront premium periodic payments - annual rents are also used (Hong and Bourassa, 2013a). A system of periodic payments can enable lessees to have access to land without the need to make a large initial investment or to obtain the required financing to make a substantial payment of premium.

Where lease payments do not necessitate a down payment and provide for annual (increased/indexed) rents, the lessor shares in the increase in land value. If the lease provides for an option at the end of the lease term, depending on the option pricing for the amount due on renewal, one can also speak of capturing value by the lessor at the end of the lease term.

2.7.5 Leasing as a transitional/short term planning tool

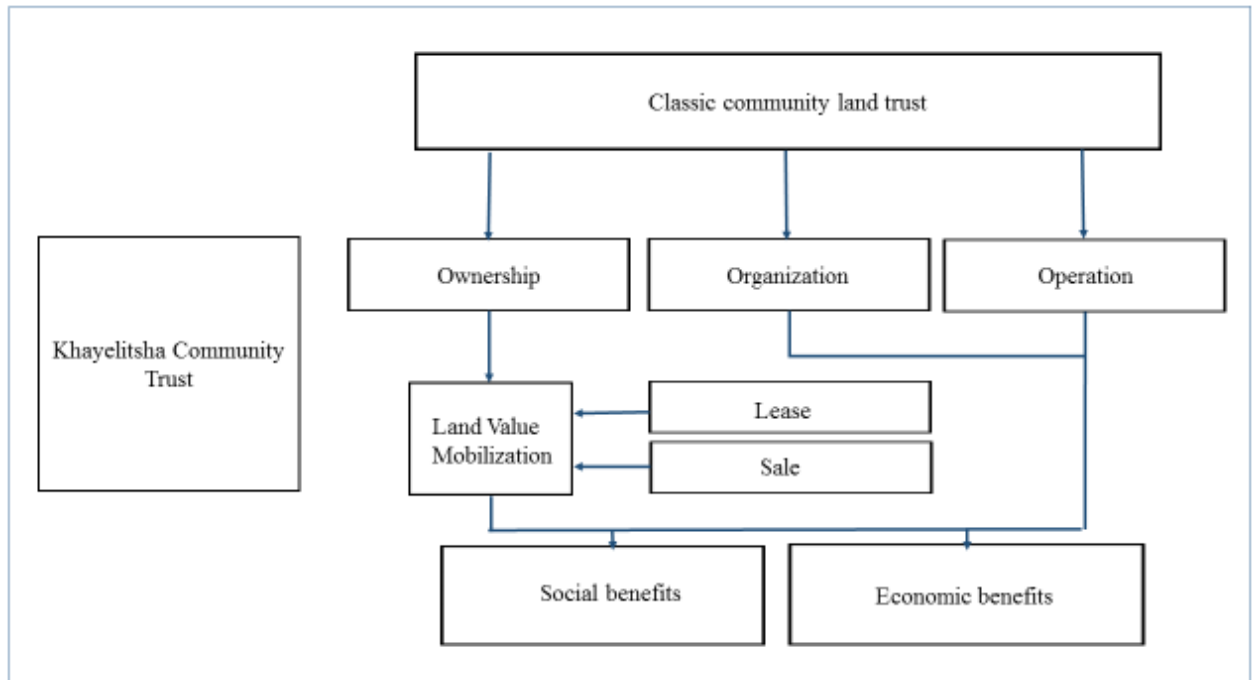
The tool of land leasing allows for flexibility in terms of duration of lease term, rates and imposition of other conditions. Therefore, according to Baxter and Strong the use of land leasing can be effectively used as a mechanism to transition to a different or unknown future use. Leasing allows for the reorganisation of land uses on the relevant land and therefore to preservation of access to potential increments in land value capture options for the future. Also transfer of land by way of leases to local public organisations allows the public to benefit from land price appreciation (Baxter, 2003; Strong, 2003).

2.7.6 Long term leasing by private organizations with public goals

The previous sections in this outline delineate considerations to be taken into account by government in balancing (i) the interests of investors so as to enable them to take certain economic actions and (ii) the interests of the public to continue having access to increases in value resulting from government action or general economic development. The use of the leasing tool can also be effective for other actors that are pursuing long term goals for the benefit of the community.

2.8 Conceptual framework

Figure 4 - Conceptual framework



(source: author)

Chapter 3: Research Design and Methods

Outline

Following the development of the conceptual framework as set out in Section 2.5 this Chapter 3 will firstly set out an explanation of the working definitions. Subsequently the choice for the case study methodology will be discussed. Thereafter the background for each sub question will be clarified. In the following section the conceptual framework set out in Chapter 2 is operationalized and the research technique and choice of data sources will be identified. In addition in this outline a description is included as to how the research was conducted.

3.1 Working definitions

In connection with the main research question the concepts of land value capture, community trust and public leasehold have been discussed in Chapter 2 on the basis of literature. For this thesis the following working definitions have been developed:

3.1.1 Land value capture

Box 3: Land value capture:

“A generic term denoting the mobilizing for the benefit of the community of any rise in land values – whether due to public decisions or to the general economy (unearned increment); stressing the fact that the rise is not due to the owners’ own efforts or initiatives”.

The elements of this definition have been distilled from the following observations developed in literature by Martin Smolka (Smolka, 2013) and Rachel Alterman (Alterman, 2012). The term “mobilizing” of the benefit is used as uncovering the benefit it is not necessarily done only by way of monetization. Using the verb “to mobilize” was introduced by Smolka whereas it includes “to use” and “to make available” the increased value benefit for the public good.

3.1.2 Community land trust

Box 4: Community land trust

“A conceptual framework under which a legal entity (i) is a not-for-profit organization, (ii) that leases and/or purchases public land from the municipal authority pursuant to a sale and/or lease agreements in respect of land to be developed and managed by the trust in perpetuity, (iii) for the benefit of present and future members of the community or the trust by preserving “affordability”, (iv) under the direction of a governing body responding to the needs of the beneficiaries in accordance with its mandate.

The elements have been distilled from the definitions developed in literature in for the classic community trust model (Davis, 1984) as supplemented by practice (UN-Habitat, 2012).

The working definition is drafted on the basis of the foregoing to fit the case at hand. Democratic safeguards, such as elected officers, are not workable where the group of beneficiaries is very broadly defined, not specifically verifiable and where it includes many stakeholders, present and future with respect to general public goals to be achieved.

3.1.3 Leasehold

Box 5: Leasehold

“A transaction system which allows a land owner and a user to negotiate the delineation and assignment of multiple land rights through contractual arrangements whereby ownership is retained by the lessor and rights relating to the use under certain conditions are granted to the lessee.”

Box 6: Public leasehold

“A leasehold system whereby the government grants the exclusive use of land to a user for a specified period of time, where the lease conditions can be structured to realize a benefit “for the community” as land values increase and the increments can thus be captured by the government.”

Public leasehold is rarely defined and the working definition for purposes of this thesis is based on findings in literature referred to in Chapter 2. Government goals for public leasing include (i) generation of revenues, (ii) facilitating urban development, (iii) reserving land for public purposes, (iv) stabilizing land and housing prices and (v) avoiding sales of land at low prices when a market for land values and the optimal timing of disposal is still undeveloped.

In this thesis the author will consider the concept of land value mobilization by way of leasehold to the lease transactions entered into by Khayelitsha Community Trust.

The community trust was established by the local government, the City of Cape Town, under control of the City of Cape Town, to accomplish certain public goals - for the benefit of the community. As mentioned above it was contemplated initially that the trust would be an entity under control of the City of Cape Town through the appointment of councilors on the Board of Trustees. The agreement of the City of Cape Town to transfer land to KCT at pre-agreed prices over time was entered into at a time that the City of Cape Town still had “control” over KCT. The board of trustees consisted of councilors, acting with a social public mandate. In discussing leasehold, any land value mobilization mechanisms and issues applicable to government acting for the public good can be applied to the considerations of KCT acting under its social mandate of development the KBD for the benefit of the Khayelitsha community.

3.2 Case study methodology

As indicated above, in recent years limited consideration is given to the desirable approach for development and use of value capture instruments around transportation nodes for areas in an early stage of (commercial) development. In order to ensure the mix of uses and a mix of incomes for the future, long term control over the land and buildings needs to be established. If left to the market the “highest and best use” will dominate the area and preclude the municipality from ensuring the desired mix – albeit that this desired composition can only be established over time given the economic opportunities at the outset.

The combination of a lease with a community controlled governance system could be a tool to accomplish certain public interest goals.

In that respect, the case of the Khayelitsha Business District is unique in that it was established as a community trust. The feasibility of a successful combination of a community trust with possible leaseholds by the trust is very much affected by time and place. The review of the effect of the structure will take place in the contextual setting of Khayelitsha. The study may

generate new theoretical knowledge in respect of this combination and find conditions that influence the effect thereof. It may also affect the notion that other studies may have in respect of these structures.

The research will constitute a “case study” as it is “an empirical enquiry that investigates a contemporary phenomenon within its real-life context in a situation where the boundary between phenomenon and context is not clearly evident”. The study will be single embedded, since it is unique in its structure. It will consist of explanatory questions; there is no control over the actual occurrence of events and the study has a focus on contemporary events (Yin, 2003). The focus is to illuminate a set of decisions, why they were taken, how they were implemented and with what results (Schramm, 1971, referenced in (Yin, 2003)).

The purpose of the study is to investigate how the community trust has been designed as a vehicle to realize financial benefits and social goods for the Khayelitsha community from the development of parcels of land; *why* this choice was made as opposed to a commercial exploitation; *how* it was implemented in the various transactions and with *what* results.

The study will be structured as a single-case study with a holistic design. It represents - possibly - a critical case in testing a formulated theory in that it will involve a review of indicators with reference to certain community trust features generally applicable to housing community trusts in combination with the instrument of leasehold. Arguments could also be made that it constitutes a “unique” case in that the application of a community trust governance system for this type of development is unique for South Africa; in the United States a few combinations of commercial and housing development within one community trust exist.

3.3 Operationalization: variables, indicators, data collection

3.3.1 Objectives; main question

The objective of this research will be to examine whether the combination of the community trust structure with leasehold can be a useful tool for land value capture for the benefit of the community of Khayelitsha. This objective has resulted in the following research question:

Box 7: Main question

Main question:

“In what ways does the use of community trust enable the Khayelitsha Community Trust to mobilize the land value of the Khayelitsha Business District for the benefit of the Khayelitsha community?”

Box 8: Sub questions with explanatory notes

Sub questions:

“In what ways does the Khayelitsha Community Trust compare to the classic community land trust model in terms of ownership, organization and operation?”

The classic community land trust described in literature is discussed as it constitutes a fully developed mechanism to regulate land use for the social benefit of current and future generations with the preservation of affordability and therefore an important structure to consider in evaluating the structure developed for KCT.

“In what ways does the Khayelitsha Community Trust meet its distributive goals for the benefit of the current and future beneficiaries of the trust?”

The goal of Kahyelitsha Community Trust is to develop the land included in the Khayelitsha Business District to realize financial commercial benefits and certain social benefits for the Khayelitsha community. The question arises whether this is being achieved.

“How does the business community perceive the status of Khayelitsha Community Trust as a community trust as opposed to a private commercial party?”

KCT and its subsidiaries participate in economic transactions as commercial parties with a multi-focus mandate. The experience of third parties in dealing with a community trust is being reviewed to assess whether the social mandate constitutes an impediment for effective transacting by KCT with the business community.

3.3.2 Variables, indicators, data collection

The conceptual framework included in Chapter 2.8 forms the basis for the operationalization of the research. An overview of methods used for the sub questions is set out below.

Table 1 - Variables, indicators, data collection

Subquestions	Concepts	Variables	Indicators	Analysis method/Data source	Respondents
Sq. 1. In what ways does the Khayelitsha Community Trust compare to the classic community land trust model in terms of ownership, organization and operation?	Community Trust Structure	Ownership	<ol style="list-style-type: none"> 1. Land acquisition 2. Dual ownership 3. Perpetuity 4. Ground leases 	<i>For all elements:</i> <u>Primary data</u> Interviews <u>Secondary data</u> * Literature * Trust Agreement * Annual reports * Founding documents	<u>Interviews</u> 1. Officers of KCT ¹ 2. Officials of Shareholdings Dept CoCT ² 3. Official community based organization 4. Project manager of NGO
		Organization	<ol style="list-style-type: none"> 1. Membership 2. Objectives 3. Not-for-profit 4. Participatory processes 5. 		
		Operation	<ol style="list-style-type: none"> 1. Subsidy retention 2. Affordability 3. Stewardship 		

¹ KCT – Khayelitsha Community Trust

² CoCT – City of Cape Town

Sub questions	Concepts	Variables	Indicators	Analysis method/ Data source	Respondents
Sq.2. In what ways does the Khayelitsha Community Trust meet its distributive goals for the benefit of the current and future beneficiaries of the trust?	Land Value Mobilization	Increment in land value – general	Values of land around transportation nodes generally increase in value as they are developed (retention of financial upside)	<u>Primary data</u> Interviews <u>Secondary data</u> *Real estate records *Trade publications *Property reports *KCT Annual reports <u>Documents</u> * Land Availability Agreement *Correspondence	<u>Interviews</u> *KCT management *CoCT Planning Dept *Property experts *Officer community based organization
		<u>Economic benefits</u> Capturing increased values; commercial lease terms and rentals; transfers of land	Conditions for amendments to commercial leases over time; generation of revenues		
		<u>Social benefits</u> Housing Retaining gains; protection of affordability; subsidy mechanism	1. Shielding from market forces 2. End-of-term options; 3. Sale restriction 4. Affordability	<u>Primary data</u> Interviews <u>Secondary data</u> proposals; (rent-buy) arrangements	<u>Interviews</u> *KCT management *Institutional housing developer
		For the benefit of the community (mobilize merit good)	1. Proceeds of exploitation flow to community 2. Public services being provided 3. Local employment. 4. Protection affordability	<u>Primary data</u> *Interviews <u>Secondary data</u> *Trust Agreement; policy documents; *Financial/annual reports;	<u>Interviews</u> *KCT Management *Planning officer CoCT *Member of Board of Trustees *Shareholdings Dept.

Sub questions	Concepts	Variables	Indicators	<u>Analysis method/ Dat source</u>	<u>Respondents</u>
Sq.3. How does the business community perceive the status of KCT as a community trust, as opposed to a private commercial party?		Governance	Perceived capacity issues (vs. commercial enterprise)	<u>Primary data</u> Interviews	<u>Interviews</u> *KCT Management *CoCT Planning Dept *CoCT Shareholdings office *Institutional housing developer

3.3.3 Data collection methods

As described in the table above the data collection consisted of (i) document analysis and (ii) semi-structured interviews. In addition a few fieldtrips were conducted for general observation.

Document analysis

The documents reviewed included property records in the Register of Deeds in the City of Cape Town, which contained limited information. In addition annual reports, property information, policy notes, project plans, and websites were consulted. In respect of KCT limited documentation was made available. The basic documents, the Trust Agreement, the Land Availability Agreement, annual reports were provided. Requests for specific financial information, valuation reports and information regarding lease transactions were not made available. This as a result of confidentiality agreements and sensitivity in view of pending discussions.

The Office of Shareholdings of the City of Cape Town KCT made copies of Business plans available, together with copies of certain municipal actions regarding the discontinuance of funding of operational expenses after 2018. Internal policy documents of KCT on appointment of trustees and decision making could not be produced by KCT.

In respect of KCT the Trust Agreement, related policy documents and annual reports will be of interest. Given the role of KCT as being the result of a municipal initiative, reports in respect of KCT prepared for or by the City of Cape Town are of interest for a review the initial objectives for the choice of this trust structure.

Interviews

Semi-structured or unstructured interviews were conducted with stakeholders and experts to obtain input on specific topics. The stakeholders and experts were initially approached through introductions from various parties. They were selected purposively on the basis of their knowledge of the subject of the study. The snowball sampling method was followed for the interviewees with respect to various topics. Where the preferred contacts for the interviews were not available, other interviewees were approached with knowledge in respect of the subject matters (convenience sampling).

Interviews took place with one Trustee of KCT, three members of the KCT management team, a representative of a large overarching community based organization, two officers of the Planning Department of the City of Cape Town, an urbanist working with an NGO, a township project manager working with an NGO, a project manager of a housing development organization, a property valuer and a real estate expert. A list of respondents is attached as Annex 1. Questions were posed to certain experts who were not available for an interview during the fieldwork period by way of personal email communication. The interviews and the conclusions drawn therefrom have not been verified with the respondents.

Observations

Khayelitsha, the Khayelitsha Business District and the surroundings of the Khayelitsha railroad station were visited. The meetings held with the management team of KCT took place at their offices in Bellville, a municipality located East of Cape Town, which was not in the vicinity of Khayelitsha. A brief visit was made to the small location office of KCT in Khayelitsha.

The objective of the field observations for the author was to become familiar with the status of completion of the project, the spatial surroundings of the greater area, especially in relation to

the traffic passing through the transit area and the commercial center next to the railroad station. Also the location of the KCT offices in Khayelitsha (not being in the Khayelitsha area) seemed relevant in assessing the position of management and the administration in connection with the place of operations of the KCT trust and the location of the community.

3.4 Reliability and validity; limitations

Regarding the data collection a triangulation of results was envisaged by the sequence of interviews and expert consultation. Data obtained in interviews were taken together with information obtained through secondary data such as annual reports, founding documents, real estate records, internal documents and presentations, copies of contracts, newsletters, development proposals and value reports, all as made available by the respondents or accessed from public registers or through the internet.

Various key informants were selected on the basis of their position, activities and responsibilities. Validation by way of member check on certain sections has been sought but it appears difficult to ask individuals to confirm in writing the accuracy of statements made during the interviews on a confidential basis.

The different sources of data referred to above were consulted in respect of various issues to determine whether the findings would point in the same direction to add to the validity. This triangulation has not been supplemented by a confirmation for each stakeholder group up to the point of saturation to confirm the validity of the point of view for each stakeholder group.

Recordings of the interviews are being kept in the records of the researcher.

The interviews with representatives of KCT were used as the basis for the other interviews. The same topics were then brought up in interviews with other respondents.

The limitations of the research conducted include the following:

- In general, the status of development of the Khayelitsha Business District was not as far developed as the researcher had expected prior to leaving for South Africa. Very limited information was available prior to engaging in meetings with members of KCT management.
- Certain features of the trust have been reviewed to assess whether the mechanisms are in place to realize the envisaged benefits for the community. Significant external factors affecting the process, such as economic development in general and the social and economic problems in the Khayelitsha area, have not been isolated by way of the use of control variables.
- The study consists of a single case study. As only one community trust is being studied no conclusions can be drawn in relation to the extent to which the use of community trust structure impacts on the realization of social and economic community benefits directly. The study is limited to an assessment of certain mechanisms which can lead to the realization of these benefits.
- The time limitation did not permit a comprehensive review of issues involved. As certain information was not made available, there is a danger that the research is incomplete, even insufficient to make very general observations. KCT was not willing to share all information requested. Especially information that touched upon more sensitive issues did not seem to be forthcoming. This can be attributed to the fact that KCT finds itself in a difficult financial and political position. No cooperation was given in contacting the financing parties with whom KCT has negotiated, and still is

negotiating, its financial arrangements. No details were made available in respect of the new project under negotiation to develop the institutional housing project. One party involved in the previous proposal for the institutional housing project, that seems to have failed, was willing to disclose the structure of this previous proposal and the difficulties in the negotiation process.

- Constraints further include missing data, outdated information, new applicable legislation, confidentiality issues, documentation - especially KCT reporting - having a “good news scope”.
- For the land value capture discussion the assumption normally is that land located around transit nodes, given the proximity and agglomeration benefits will increase in value. In order to demonstrate this for purposes of land value capture discussion property information was sought. No information was readily available in respect of trends in prices for vacant commercial land after making various inquiries with various property experts. For the subareas surrounding KBD only aggregated residential values for residential properties, including the land and the housing, are available, and only up to 2012. This information used has been assembled by the Centre for Affordable Housing Finance in Africa using the property specific information provided by Lightstone Realtors, the only source that has a complete database on individual property values linked to the public registers. It should also be noted that the property market for residences in the Khayelitsha area is distorted as a result of the considerable extent of subsidized housing and therefore trends in values may not show accurate value developments.
- In selecting the respondents for the interviews by way of “snow ball” sampling, bias is implied. The individuals interviewed in various positions generally were willing to recommend other parties representing other stakeholders. The implied danger is that individuals consulted may not have representative views for the group of stakeholders that they form part of. Also, one may be referred to other persons which are known to share the same views as the person making the recommendation. The introductions by knowledgeable representatives did however lead to very interesting contacts which would otherwise most likely not have made themselves available for an interview.
- Lack of understanding of the historical development of the KCT project, which started up in a different political and business climate, may have affected the interpretation by the researcher of certain developments as these developments may be strongly qualified by the historical context which is unknown to the researcher.
- Another general limitation is the status of the researcher as “an outsider”. The lack of familiarity with South Africa will affect the structuring and understanding and results of qualitative research conducted by a novice, first time researcher in South Africa (Gokah, 2006).

Chapter 4: Research Findings

This chapter will discuss the findings of the researcher resulting from (i) document review and (ii) fieldwork conducted from July 1 to July 16, 2015 in the City of Cape Town. Section 4.1 will include an introduction to the case study. Section 4.2 will set out the main features of Khayelitsha Community Trust and certain relations with its stakeholders in light of features found for the classic community land trust. Section 4.3 will analyze whether the distributive goal is currently being realized by Khayelitsha Community Trust within the existing framework. Section 4.4 will discuss whether the use of a community trust to accomplish its goals is beneficial or whether it constitutes impediment for effective transacting with the business community.

In analyzing the Khayelitsha Community Trust the aspects of landownership, organization of the trust and practical operation in implementing certain objectives have been explored. The findings discussed in the Chapter 4 are based on interviews and document review, including various forms of secondary data. Anonymous literal quotes have been included to preserve the “flavor” and intensity of the statements made by the respondents.

4.1 Development of the Khayelitsha Business District area

Position in the region

The post-apartheid planning by the Metropolitan Spatial Development Framework for the Cape Town area included the promotion of corridors and nodes with a fixed urban edge and a metropolitan open space system as a structure to achieve spatial integration for the City of Cape Town area. The activities include corridors and urban nodes in which commercial and industrial development are followed by higher-density housing, to build thresholds which in turn would promulgate the creation of efficient transportation systems. The Urban Renewal Plan for Cape Town included the development of the Khayelitsha Central Business District (KBD) which in 2001 was declared as one of the Anchor Projects by the Urban Renewal Program. (Donaldson and Du Plessis, 2013a)

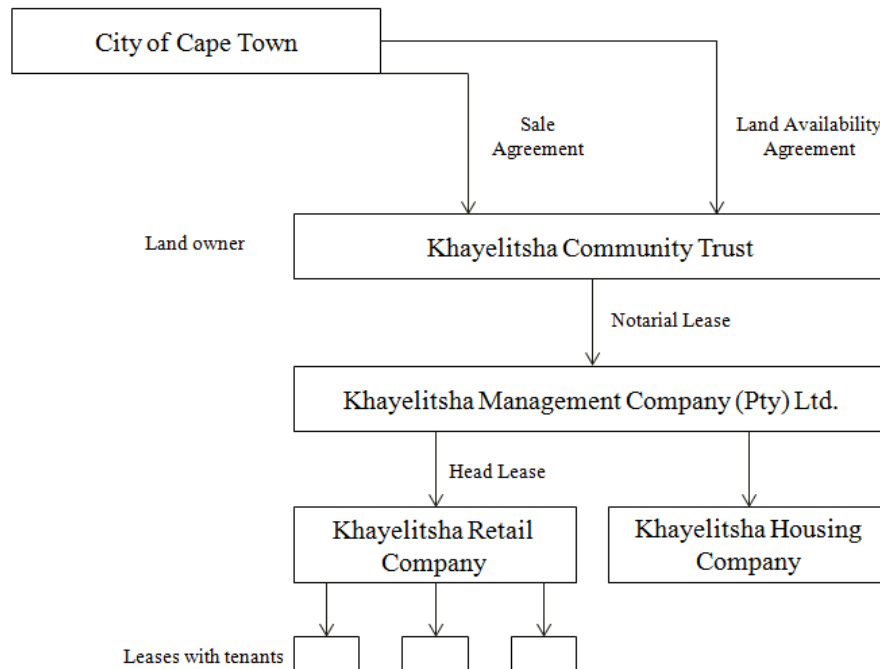
Khayelitsha Community Trust

In 2003, the Khayelitsha Community Trust was formed pursuant to a trust agreement (such agreement as amended on 14 July 2011, hereinafter at times the "Trust Agreement") to represent the community of Khayelitsha and to become the equity holder in the development for the benefit of the community. In addition to establishing KCT further structures were established by way of using various subsidiaries to divide responsibilities. A number of investors were approached for the initial phase of the project but only the Rand Merchant Bank (RMB) was willing to participate at such time.

In 2004 the portion of the land required for the retail center was sold by the City of Cape Town (hereinafter at times CoCT) to KCT pursuant to a Sale Agreement and the remaining undeveloped properties included in the 75 ha. district were made available by CoCT to KCT pursuant to a Land Availability Agreement (such 75 ha. hereinafter, the "KBD Land"). The development rights to all undeveloped land were also transferred (given) to KCT. RMB provided a loan to enable the KCT to purchase the retail portion of the land from CoCT.

A special emphasis was put on developing the retail center. Given the growth of the black middle class the retail center was seen an important contribution factor for economic development in that goods and services could be made available where consumer demand for more products rose. Townships were a becoming an interesting market for national retailers.

Chart 1 - Organizational structure KCT and its subsidiaries



(source: author)

The retail center was completed in December 2006. Prior to the establishment of KCT, the Home Affairs Building, the Social Services Building, the Magistrates Office, sports facilities and a taxi transport interchange had already been completed. The second phase was to include the development of additional mixed use office complex, extensions of the transport interchange and the railway station area and informal trading areas. Currently KCT is in the process of building affordable residential development (368 units), initializing and upgrading the redevelopment of the retail center and the facilitation of the establishment of a private hospital (KCT Annual Report, 2014).

From 2002 until 2007 the development of the KBD district included placing 70% of the services and road infrastructure, the completion of the retail center, the Home Affairs Building, the Magistrate Offices, the Social Services Building, the Cricket Oval and the swimming pool. Due to various factors the momentum for the development was lost in that and the related integration of budgets and the municipal project office was redeployed. (Human, A., 2010).

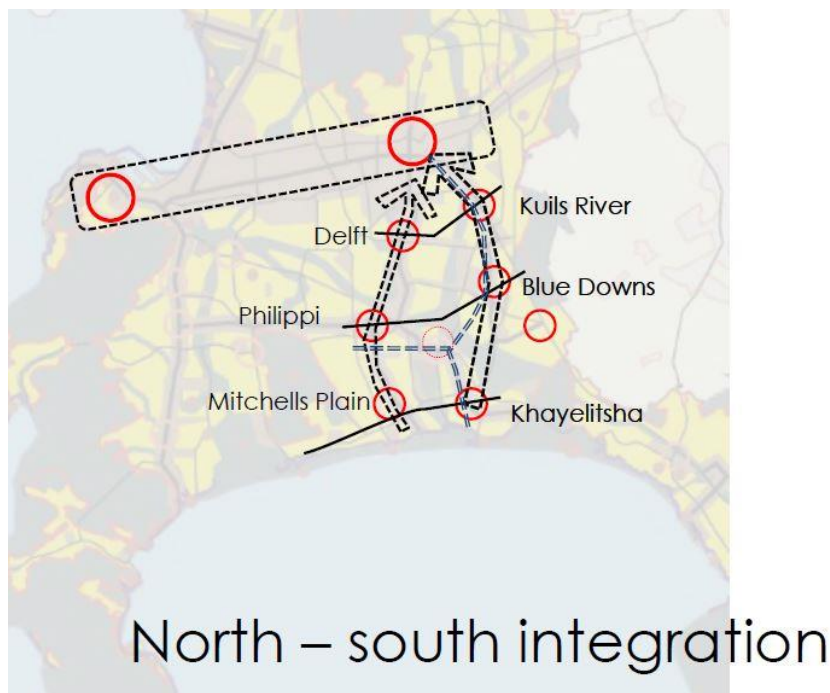
Following the enactment of the Municipal Systems Amendment Act in 2003 KCT became a municipal entity and resulted in it becoming obligated to operate within certain parameters included in the Municipal Finance Act. Councilors and officials were no longer permitted to serve as directors in a municipal entity and had to be replaced by independent trustees. Subsequently in 2011 the Trust Agreement for KCT was amended to reflect that the City of Cape Town as founder of the trust was to relinquish control over the trust and had no interest in any assets of the trust nor was it responsible for any obligation of the trust.

Spatial Planning

During the last years various planning proposals have been submitted by KCT to the City of Cape Town, but from the point of view of the City of Cape Town these had been prepared with insufficient engagement with the City of Cape Town (Respondent 4). The result has been that at this time no framework exists that would guide the development and up to now has resulted in uncoordinated development (City of Cape Town, 28 May 2014).

The City of Cape Town sees significant opportunities to develop and transform the Khayelitsha Business District into one of the primary economic nodes in the Metro South Region of the Cape Flats. The repositioning of the Khayelitsha Central Business District should be viewed in the context of the greater “North South Integration” envisaged for the Cape Flats.

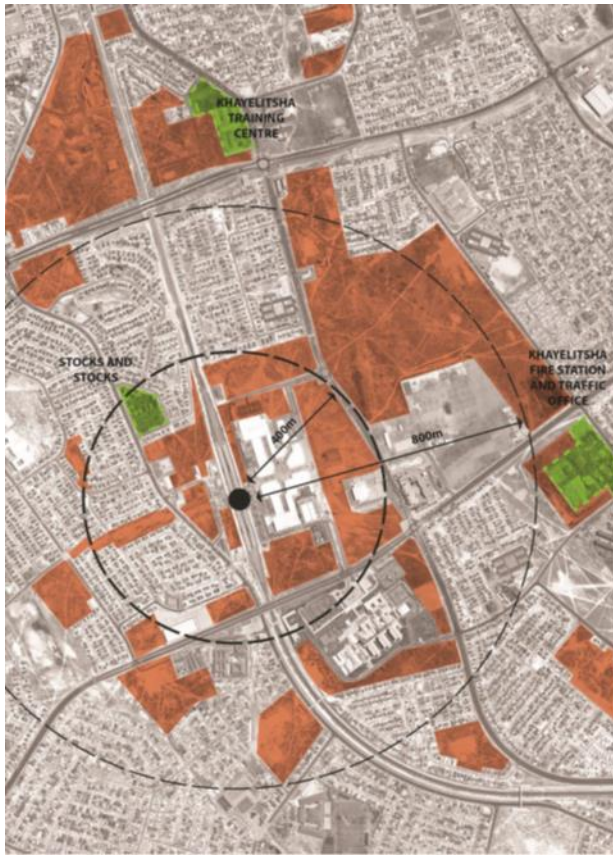
Figure 5 - Interlinks Cape Flats



(source – City of Cape Town , 2014)

The focus of the City of Cape Town is on the commercial activities and structured as a transit oriented development where the key principles of development are an integration of transport and land use planning, with the Khayelitsha Business District serving as an “attractor”/ destination. Given the potential of access to public transportation, in train connections and taxi interchanges opportunities exist for increased densities with reduced parking requirements.

Figure 6 - Transit oriented development area - Khayelitsha Central Business District



*The opportunities are facilitated through the fact that (i) approximately 70 ha. of undeveloped land is available of which most is within 800 m from the railroad station i.e. within walking distance and (ii) the majority of the land is in public ownership/or in partnership.

(source – City of Cape Town, 2014)

Development for the benefit of the Khayelitsha community

The choice for a community trust structure for the development of the KBD was made to solidify the accrual of the benefits increases in land value and land development rights for the benefit of the community (National Treasury, 2010) and has to be viewed in the context of the political and business environment of the time of establishment. In South Africa, in its contemporary guise the form of a PDI beneficiary trust has been used since and proved useful as a vehicle for channeling funding for development, administering development programs and empowering the victims of underdevelopment (Feedback Research and Analytics, 2010).

“The objectives of KCT stretch beyond the development and management of the KBD, all the way to empowering and uplifting the greater Khayelitsha area. Thus, business planning must be strategic and aim to ensure that the Trust and its investment companies become financially self-sustaining, so that additional revenue can be used in the funding of socio-economic development initiatives in Khayelitsha. These goals have been formulated for the short, medium and long-term” (KCT Annual Report 2010/2011, p. 9).

Entitlement to the land is the core foundation of the project. In the initial stages additional funding is required but in the longer term the revenue stream should generate benefits for the

community. In less favorable scenarios portions are sold off and substantial benefits are diverted to the parties interested (Founding documents, 2000).

4.2 Main features of KCT in comparison to a classic community land trust

This initial analysis forms part of the outline of the research to clarify the frame of reference when reviewing the various questions in respect of KCT. The analysis of the KCT features is based on provisions in the Trust Agreement, founding documents, and interviews with management. A summary of this comparison is included as Table 3 in Section 4.2.4.

4.2.1 Ownership

<i>Subjects</i>	<i>Classic community trust</i>	<i>KCT</i>
Land acquisition		
Dual ownership		
Perpetuity		
Ground Lease		

4.2.1.1 Land acquisition

Classic community land trust model

In the classic community trust model the land is purchased by the trust and made available to enable a third party to construct a building on the land. Land acquisition strategies include seller financing where the purchase price is paid in installments over time. In addition transfer by way of land donations by private parties may be encouraged through tax incentives. Public interventions for acquisition can take place by the use of eminent domain, where the land is expropriated for public use. Another method could be that land is transferred by developers to satisfy inclusionary zoning requirements imposed by local municipalities. Lastly when land is to be purchased in the open market, this can be financed by way of traditional real estate bank financing.

Land is often made available to community land trusts by municipalities at a low cost. If land is to be purchased for a fair market value, the repayment obligation may constitute a significant constraint on the community trust (See Section 2.3.2.2).

The premise for a dual structure is that the landowner trust retains title to the land and the lessee constructs a building or house on the land and becomes the owner of the improvement, which can be sold or inherited subject to certain restrictions. The structure dual ownership with a ground lease is considered a central feature of the classic community land trust structure.

KCT

In the case of the KCT development a special arrangement was entered into. In 2005 the City of Cape Town (CoCT) and KCT entered into the Land Availability Agreement dated August 20, 2005 (the LAA) pursuant to which CoCT agreed to transfer to KCT development land so as to enable KCT to develop the area constituting the Khayelitsha Business District located next to the Khayelitsha railroad station. Under the Land Availability Agreement, KCT became entitled to purchase portions of the land as and when they are being used or are to be used in connection with the development of particular components of the identified projects, subject to certain terms and conditions. The transfer of land was agreed to with reference to an

institutional framework setting out various institutional matters and development objectives (Annex D to the Land Availability Agreement).

KCT is entitled to purchase this land at values agreed in 2004 based on 2003 values which land prices are not subject to further increases. Under the Land Availability Agreement the City of Cape Town was entitled to terminate the agreement and assign the land to a third party if KCT had not commenced development within five years after the signing of the agreement (art. 4.5 LAA). In respect of the other portions of land KCT is entitled to development. The City of Cape Town can only make such land available to other parties if there is a unreasonable delay in commencement by KCT of further phases of development, provided that (i) the City of Cape Town has first further consulted KCT on the further development and they have failed to come to an agreement and (ii) the alternative development does not affect the financial interests of KCT's subsidiary in KBD Management (Pty) Ltd. (art 4.6 LAA).

The purchase price due under the Land Availability Agreement is far below the current market value and the provision of land to KCT under the Land Availability Agreement can be considered "highly subsidized". The Land Availability Agreement predates the MFMA which now requires an open tendering process and that the municipality consider the fair market value of property at the time of transfer (art 90 MFMA).

As the project has stagnated various times the City of Cape Town has indicated that they have reviewed their position to determine whether they were entitled to terminate KCT's rights. The Shareholdings Department of the City of Cape Town (Respondent 1) indicated that the City of Cape Town was bound to transfer the land at the pre-agreed prices since the conditions therefore had been satisfied. Other respondents suggested that the City of Cape Town may still be trying to terminate the Land Availability Agreement or may be entitled to terminate such agreement (Respondents 4 and 5) at the same time acknowledging that this would politically be very difficult (Respondent 4). It was also suggested that KCT had not been properly supported by the City of Cape Town and that the City of Cape Town was in part responsible for the continued failure by KCT to deliver. Possibly the City of Cape Town contemplates to argue that over the years they have made significant amounts available to cover operating expenses, but that KCT has failed to deliver and that under the contemplated timeframes this could constitute a basis for the City of Cape Town to terminate the Land Availability Agreement and take back control. It was noted that politically this would be very difficult.

Respondent 4:

"Sorry, I've been very negative. I think, if it had been structured properly, and I don't think KCT alone are to blame, because I think the City has been hands-off. It's been convenient to watch them fail. Because now they can say: we've been spending for the last seven years, six times seven, R42.000.000 [USD 2,940,000] has been going into it - and we haven't seen anything come out of it."

[...]

"And now we will take it back, thank you very much. You're clearly incompetent. Clearly incompetent. Evidence is there. We've provided you with everything you need. We've facilitated things, and you can't put it together. But I mean, that's a very - you have to be in a very strong political position to do that. I don't think - I think it'll be a very difficult political situation to navigate through, but it needs to happen. It cannot continue like this. Because who's suffering? The community of Khayelitsha. They're losing out on opportunities,"

[...]

Table 2 - Highlights Land Availability Agreement

Land Availability Agreement between KCT and the City of Cape Town

- *CoCT to transfer land as and when required for development*
- *CoCT has certain planning approval rights*
- *Land is purchased at 2003 prices*
- *KCT has no holding costs*
- *No termination clause is applicable*

4.2.1.2. Dual ownership; to be held in perpetuity

Classic community land trust model

Under the classic community land trust model, the trust is to retain the land in perpetuity and grant rights to use the land under long term ground leases. The land, once taken out of private hands and placed in trusteeship should never be returned to the speculative marketplace. The retention of the ownership of the land enables the trust to protect the affordability of the use of the land against rising land prices. The lease structure protects against speculation, absentee ownership and exploitation of the subsidy benefits.

In jurisdictions where no legal separation exists between the ownership of the land and the ownership of the improvement of the land other structures can be used so as to separate the entitlement to the improvement and the land retained by the trust. Through the ground lease discussed hereinafter, compliance requirements with the bylaws and other rules established by the trust can be introduced -- so as to establish a general plan within which each player will adhere to the contemplated mechanisms for the framework.

KCT

In respect of rolling out various projects outlined in the framework of the Land Availability Agreement certain general approval rights that can be exercised by the City of Cape Town are included prior to making the land available to KCT (Art. 4.2.2 LAA). The question arises whether under this agreement the City of Cape Town may impose special conditions. It is the view of the Property Department of the City of Cape Town that apart from regulatory and planning conditions the Land Availability Agreement cannot be used to impose special requirements. (Respondent 11) This would be consistent with a subsidiarity approach referred to in Section 2.7.3.

The City has granted KCT discretionary authority to determine whether it sells or leases the land to third parties; no conditions need to be imposed on the user/buyer (art. 4.2.4 LAA). If lease agreements are entered into, conditions can be imposed on the future functioning of the developments that are to be included. If title to the land remains with KCT, additional enforcement rights may exist or can be created, in addition to any standard contractual provisions. The use of the land could be tailored to the transitory phase of the Khayelitsha Business District.

Respondent 4:

"I don't think we had - at the time when it was conceived, it had never been thought of[...] that you could lease it. For goodness' sake, you give this to [.....] to property

management and development, you said to them: okay, we'll give you the lease for fifty years. See the value. We're going to take the money and put it back into the community. End of fifty years, you know what? We've got an asset. [...]

The founding documents of KCT do not specifically include statements that would require KCT to retain ownership of the land. However, if the land is to produce benefits for the community over time it is felt by certain respondents that the land is the central component and should only be transferred to third parties if that it is the best alternative. Forces of development and gentrification may create opportunities to sell the land and use the proceeds to pursue other goals for the benefit of the community.

In connection with the development of the KBD Land the Trust Agreement empowered certain development entities to be set up by KCT to enter into contracts in connection with the development and enter into contracts regarding land rights and usage rights with third parties (Article 5.5.5 of the Trust Agreement). In respect of restrictions on transfer an earlier presentation indicates that in 2003 the intention was that the "bare dominium" of certain buildings was to reside with the community. (Human, A., 2010)

Respondent 3:

"My view is that the Trust must be in control of the land, otherwise what does it have ... Because imagine a case where you sell the land, and then know what you have? When I came here, there were talks about the shopping center, offers on the table to sell it, people to buy it, being considered".

[...] "so tomorrow you wake up and you say hypothetically I have got a hundred million Rand in the bank and then what. What will that Trust do with that money?"

Respondent 11 :

"the long-term intention is for KCT to offer shareholding in the retail centre to external parties (property companies, retail developers and even to local community groups). Income so derived to be placed in a trust fund to finance community projects. It is however also necessary for KCT to retain a shareholding as a means to finance its operational expenses and become independent from City grants. KCT should be small and lean organisation and should through shareholding and operating arrangements "outsource" the management of the centre" (personal communication).

The Trust Agreement specifically addresses the transfer of ownership of the residential land to purchasers of residential units (Article 5.5.4 of the Trust Agreement). The document also refers to rental programs, but this is currently not being considered by KCT.

Respondent 2:

"[...] we don't want people to rent forever. They must have an asset, an ownership under their name, which is empowering economically and socially to their community, to the people themselves". [...]

"rental-buy scheme, it has a got a kind of rehabilitation element to it. People will qualify, they will rent for a, normal rent for a period of about four years, and then after that, if one has not defaulted, that one automatically qualifies for a bank finance and a financial assistance, to buy the house and then we are fine".

A respondent for the City of Cape Town emphasized that rental housing has many beneficial features, especially in areas around transportation nodes, where residents often desire a certain level of housing mobility. However the current institutional structure in South Africa does not

support effective management of rental developments. Construction of rental developments in infill pockets, where there are no significant economies of scale is very costly and requires significant investments in comparison to large greenfield sites. Rent-to-buy programs, resulting in a mix of rental properties where the purchase option has not been exercised, and sold properties owned by the residents complicate the managerial duties to be taken on. In view of the foregoing, and the resulting high operating costs, the City of Cape Town is considering terminating the council-run CRU rental program (Respondent 10).

4.2.1.3 Ground lease

Classic community trust

Through the ground lease the classic community trust will grant the lessee the exclusive right to use the land subject to the restrictions set out in the lease. In order to ensure a long term commitment from the user the term of the lease normally is long: 49 years or 99 years, with reasonable renewal rights. This to encourage the user to make investments and to entitle the user to the full use, also for the benefit of future generations. As described in Section 2.3.2.4 the ground lease will address permitted use, transfer requirements and restrictions, rent obligations and compliance with bylaws.

KCT

In the case of the Khayelitsha Community Trust the lease that is currently in place is the Notarial Lease dated 29 March 2006 entered into between KCT and Khayelitsha Management Company (Pty.) Limited (KManco) (see Chart 1). KManco entered into a head lease with Khayelitsha Retail Company (Pty.) (KRetail), a 100% subsidiary, which entity acts as the developer/business owner of the retail center. The rental income of KRetail is to be applied by KManco to repay the outstanding 20-year loans made by RMB to finance the construction of the retail center.

Following the repayment of the loan in 20 years or the termination of the lease in 2025, whichever is earlier the property, the exclusive use of the land will revert to KCT as well as the rights to the retail center built on the land (Annual Report 2014, p.93).

In the classic community trust the market risk that is taken by the trust is limited; the owner of the building has full responsibility with respect to the improvement over the duration of the lease. The obligations of the trust are often limited to granting the exclusive use of the land. Other than is the case in the classic community land trust, the activities of the KCT trust currently are focused on the development of commercial real estate. Residential development is also contemplated, but as set out in Section 1.1.2 has not been implemented yet.

The activities taken on by KCT and its 100% (direct and indirect) subsidiaries are not limited to making available the land and assisting the users in their ventures. Through the financing of the construction and development of the commercial center by a 100% subsidiary of the trust the group has taken on full construction and development risk for the retail center. However, these risks have been spread out over separate entities to allocate responsibilities and to separate the rights of the bank under the mortgage in respect of the property and the lease from the risks of the retail center business against other trade creditors.

Regarding the contemplated residential development, the intention is that the plots of land will be sold to KCT, to be purchased at 2003 prices. These properties will be subject to “rent-to-buy” arrangements where affordable housing will be created; ownership of the land will not be retained by KCT’s indirect subsidiary Khayelitsha Housing (Pty.) Ltd. (KCT Housing) in the longer term as the residents will be entitled to purchase the home including the land subject to

certain conditions. See for the detailed description of a rent-to buy project - the most recent published proposal - Section 4.2.3.2. To the extent the institutional housing will continue as rental property, KHousing will take on the full operational risk for the community housing project, unless assumed by a housing developer engaged in connection with the project.

Table 3 - Highlights ownership

<ul style="list-style-type: none"> • <i>Retention of ownership combined with lease possibly not considered</i> • <i>Retention of interest also possible in partnership structures, but the not tied into increases of land values and often subject to operational results of user enterprise</i> • <i>Housing development requires outright transfer of property interests so as to enable the resident to build wealth</i>

4.2.2 Organisation

<i>Subjects</i>	<i>Classic community land trust</i>	<i>KCT</i>
<i>Control</i>	<i>Membership organization</i>	<i>Beneficiary trust</i>
<i>Objectives</i>		
<i>Not-for-profit</i>		
<i>Participatory processes</i>		
<i>Accountability</i>		

4.2.2.1 Corporate membership

Classic community land trust

The classic community land trust is an independent not-for-profit membership corporation which targets its activities and resources towards charitable activities, such as providing affordable housing for low-income households. The classic community land trust operates within a physical geographical boundary. Members can include (i) persons who own homes and lease land owned by the CLT, (ii) other persons who live in the community, (iii) representatives of the local government.

The CLT is democratically governed and members residing within the CLT community elect the board of directors and vote on important matters such as the purpose of the trust and changes to the resale formula referred to below. The composition of the board of directors often requires a tri-partite governance system with equal representation on the Board of the lessee members, members of the larger community and representatives of local government.

The composition of the board reflects the view and characterization of the interests in the land. The concept of community property blends the concepts of private property, corporate ownership of private property, public control of private property and private control of public property.

KCT

The KCT trust has no members; the beneficiaries are the residents of the Khayelitsha community and various stakeholders with interests in the Khayelitsha identified in the Trust Agreement (art.1.3.1 Trust Agreement). KCT is not a democratic organization.

The Trust Agreement for KCT does not provide any specific framework to include the beneficiaries of the Trust in procedural matters regarding the governance of the Trust. The Board of Trustees however has an obligation to act for the benefit of the beneficiaries. The

beneficiaries have no power to control or direct the Board of Trustees, which acts under a fiduciary obligation to act for the benefit of the beneficiaries. This fiduciary obligation may imply an obligation to consult with the pool of beneficiaries. The Trust Agreement contains no specific provisions to that effect. The Board of Trustees controls KCT trust matters and has all decision making power and responsibilities. The management team has assumed the obligations to develop proposals for the projects and to tend to day-to-day management of the trust. Any action and representation of KCT is required to be taken by the Board. The subsidiaries have their own directors who can act separately. In respect of major decisions, approval of the Board of Trustees of KCT is sought.

The KCT Board of Trustees is self-appointed. No specific requirements exist in respect of the composition of the Board. Initially the Board comprised a group of professionals with different skills and each with a specific commitment to the Khayelitsha community, but not necessarily from Khayelitsha. The members of the Board of Trustees include specialists in certain areas, such as property development, law, finance and human resources. Recently – also under pressure from the local development organization - the Board has been expanded to include two members from the local development organization. However, the role of the local development organization does not always align with the trajectory for KCT.

4.2.2.2 Objectives

Classic community land trust

The objectives of the classic community trust can be broadly defined as "holding the land in stewardship for all beneficiaries present and future while protecting the legitimate interests of the current users." For the provision of housing this would mean affordable home ownership under stewardship of the CLT for low (to-moderate) income households by mechanisms of subsidy retention for any subsequent buyer. As noted in Section 2.8 commercial development may also form part of the objectives of a community land trust.

KCT

Where the objective of the community land trust normally is quite specific, KCT obtained a mandate that intentionally was drafted with a multi-focus purpose given the experiment for an area based development initiated under the Urban Renewal Program.

"The overall objective of the Khayelitsha Community Trust is to uplift the community of Khayelitsha. To achieve this, the Trust will procure the establishment of commercial, residential and community facilities in Khayelitsha. Initially, the Trust will procure the development of a business district ("the business district") which will comprise retail, industrial, residential, municipal and office components as well as facilities and amenities for use by the community of Khayelitsha and visitors to Khayelitsha. The trust also aims to facilitate and procure similar developments in other areas within Khayelitsha" (art 4.1 Trust Agreement).

The actual content of the objective is delineated by the circle of beneficiaries which is also defined in the Trust Agreement and includes current and future members of the community (art.1.3.1 Trust Agreement).

Respondent 5:

"The beneficiaries of the trust are the Khayelitsha community. It is very broad term. Which is why we contemplate, when you talk beneficiation, you look in thing such as education skills and that. So that of - generally having people participating in one way or the other. Or on matters of public amenities that would be essential to the change we

spoke about earlier, then in that space for KCT as a broad beneficial area. Now you have to create things that speak to that broadness."

4.2.2.3 Not-for-profit

Classic community land trust

For the classic community trust the assumption often is that the provision of low income housing will under many jurisdictions constitute a "charitable" activity or special category of commercial activity. These should be eligible for tax reductions or exempt tax status as its objectives are not to generate a profit, but to achieve a socially desirable goal.

At times, the taking on of responsibilities that would otherwise fall under the government's realm can also be a basis for tax reduction, as the government's "burdens are lessened".

KCT

KCT trust is a tax exempt organization; it conducts its commercial ventures through the indirect 100% subsidiaries KCT Retail Properties (Pty.) Ltd. and KCTHousing (Pty.) Ltd. which are both for profit corporations. KCT indicated that certain social grants to be received by KCT Housing (Pty.) Ltd. for low income housing are tax exempt. The City of Cape Town shareholdings department further indicated that under current law a project which includes a commercial venture so as to enable cross subsidization for other projects would no longer be possible, as commercial development would not be considered a municipal service, even if established with the intention to benefit the public (personal communication – Respondent 1).

4.2.2.4 Participatory processes

Classic community land trust

Generally, community engagement with the activities of the community land trust is limited to the rights of members to vote on certain matters and to appoint the majority of the Board of Directors. If the Bylaws provide for committees the member involvement may be greater. The ultimate decisions and responsibility will remain with the Board; at times subject to prior membership meeting approval. As described in Section 2.3.3.2 above in order to establish meaningful community control or engagement for the standard community trust additional measures are often deemed necessary (Thaden and Lowe, 2014).

KCT

KCT trust has been established as a beneficiary trust, with no written by laws or regulations setting out mechanisms for appointment of the Board of Trustees, consultation procedures or other mechanisms for beneficiary engagement. The community participation and consultation procedures have not been established in any specific document; at times public meetings are held by KCT, the KCT Annual Report is made available and also discussed at public meetings. In general the community consultation processes take place on an irregular basis. To date KCT has not been able to deliver on certain developments and complications in reaching out to the community arise as a result of having created expectations by their consultations.

The appointment of a special consultant for community participation affairs has been met with some skepticism; the general feeling is that KCT does not sufficiently reach out to the community. The consultant deals with specific stakeholders such as the wards, sub-councils and other community groups (KCT Annual Report 2014). A complicating factor is that

“communities” to be consulted in respect of various matters differ, depending on the content of the issue at hand. .

Respondent 5:

"That's what makes us unique so...That's what makes us stand out for the last twenty years. We solicit a unison voice on the matter of people of Khayelitsha, all of us. Wherever then you go. You speak on your own, but you know, that we speak from the same hymnbook, in terms of what we stand on certain things". [...] "KCT needs to go down to the people; that people understand, that know KCT, then what they are about. And that is not happening".

For the issues regarding spatial development such as the housing project participatory meetings are held by KCT with various groups of stakeholders. As explained by Respondent 4, in addition, the municipal planning regulations require specific participatory consultation. If development is approached through an approval of a municipal development framework, the municipality coordinates the participatory process, subject to a 30 day notice-period before a hearing where the municipality deals with the public commentary and where necessary adopts the framework to subsequently approve the development plan as a statutory document. In this approach the participatory process forms part of the political aspects of the development process and decision making by the municipality. The other approach - which has been followed by KCT- is to engage in consultation regarding a development application. In this instance the consultation is done through KCT concerning the application for a specific project, prior to submitting the project. Compliance with certain participatory aspects is then certified at the time of this application. This approach reflects a “bottom-up” approach for the development process (Respondent 4).

Consultation processes in development are considered by many to cause delays; especially in respect of projects with a long delivery schedule.

Respondent 1:

"And that is a big thing I think that has happened within the democracy of South Africa. This community consultation and getting consensus to move forward, so the city has delayed processes that they would have wanted to have undertaken" [...] "So anything that is done through them or with them is going to achieve better results, than if we establish something, somebody doesn't like it and is picketing, or worse, it is burnt down or whatever" [...] "Now there is a person from the KDF who sits on the board of trustees of KCT. I think that's bringing about a closer coordination. It's not ideal yet, but I don't think that [...] it is possibly a good thing this tension, because they know there would be a rushing off into a direction that may be wrong. It's constant check on what is being done."

The view of the community may change over time and require further action after establishing a new consensus (Respondent 6). This causes stagnation in the delivery process. This has, for example, been the case in respect of the chosen typology for the institutional housing contemplated for Phase 1. Even though the internal systems have already been put in the ground, suggestions are made that changing the plan and outline should be an option, even though it may involve losing the initial investments made with this initial construction (Respondent 5).

Participation in the decision making is mostly seen as a safeguard to ensure ownership for the project delivered (Respondent 1). Some suggested that the participation process is misused at times by community leaders to create a platform for themselves addressing concerns that are not the immediate concerns of the intended beneficiaries of particular projects.

Respondent 6:

"I think there is another interest [for KDF]. [...] I think at times personal. I have seen people who are part of KDF who are there for personal gains. They assume that there was a link to community interest, but for me I don't see they are representing community interest. " [...] "KCT does not consult the communities, so there is a big gap, yes." [...] "Politically, they are recognised. However, individuals are clueless of their roles. You see, they cannot distinguish between politics and development. So in most cases they will bully, they will use bully tactics to get what they want. And you will find that most people who come to Khayelitsha will be bullied because they do not understand maybe the local politics and they will agree to what KDF is saying."

4.2.2.5 Accountability

Classic community land trust

Financial accountability is based on the governance systems of the membership corporation. Many corporations have legal and statutory financial reporting requirements to comply with. Management and shareholder approval of financial statements are often required. In addition certification by independent accountants is often required so as to ensure adequate supervision for the benefit of the members.

The Board of Trustees is accountable to the membership meeting for actions taken. Often membership approval is also required for certain fundamental matters and in addition the membership is entitled to appoint (a majority of) the Board of Directors and to discharge certain directors. Without the ability to appoint and discharge directors, accountability to the membership does not have teeth.

KCT

Apart from preparing Annual Reports, KCT is obligated to submit business plans to the Shareholdings Department of the City of Cape Town in connection with the grants received for operating expenses. These include cash flow statements, including very optimistic assumptions.

The Annual Reports are audited, with exception of the detailed income statement. Reference is made to an outsourced internal audit function in the Business Plan 2014/2015 but no further details were provided in respect hereof. The absence of the auditing of specific costs and expenses would constitute a weak link in the quality of the audits.

The detailed reporting delivered by KCT is the result of the required compliance with the Municipal Finance Management Act which was applicable during the period that KCT was considered a municipal entity. KCT has continued to report in the same manner. The monitoring by the City of Cape Town will however end when it ceases to provide funding for the operating expenses by 2018.

One respondent closer to the KCT expressed that the financial operations of KCT were not transparent; this based on a certain transaction not being traceable and that the annual overhead expenses in excess of R 6,000,000 (USD 420,000) seemed very generous and that there were no visible results (Respondent 4).

No specific body exists that can hold the Board of Trustees of KCT accountable for their actions or failure to act. The City of Cape Town has conditioned its contribution towards the funding of operating expenses referred to above to KCT meeting certain milestones set out in the funding resolution. (Council of the City of Cape Town, 25 March 2015, recommendation from the Executive Mayor: 19 March 2015).

Table 4 - Highlights organisation

<ul style="list-style-type: none"> • <i>Broad KCT objectives and intended beneficiaries result in a very large scope of responsibilities and broad focus</i> • <i>Whereas members of CLTs have vested financial interests in lease with community land trust which requires a direct accountability of the Board of the CLT towards the residents , KCT beneficiaries are far removed from the development process</i> • <i>KCT Board of Trustees composed by co-optation; appointment and removal of Trustees by the Board itself; no mechanism for accountability to public/communities</i> • <i>Participatory processes not structured; inability of KCT to deliver to community complicates process; each consultation raises expectations</i> • <i>Scepticism exists as to effectiveness of community consultation</i>
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4.2.3 Operation

<i>Subjects</i>	<i>Classic community land trust</i>	<i>KCT</i>
<i>Subsidy retention</i>		
<i>Affordability</i>		
<i>Stewardship</i>		

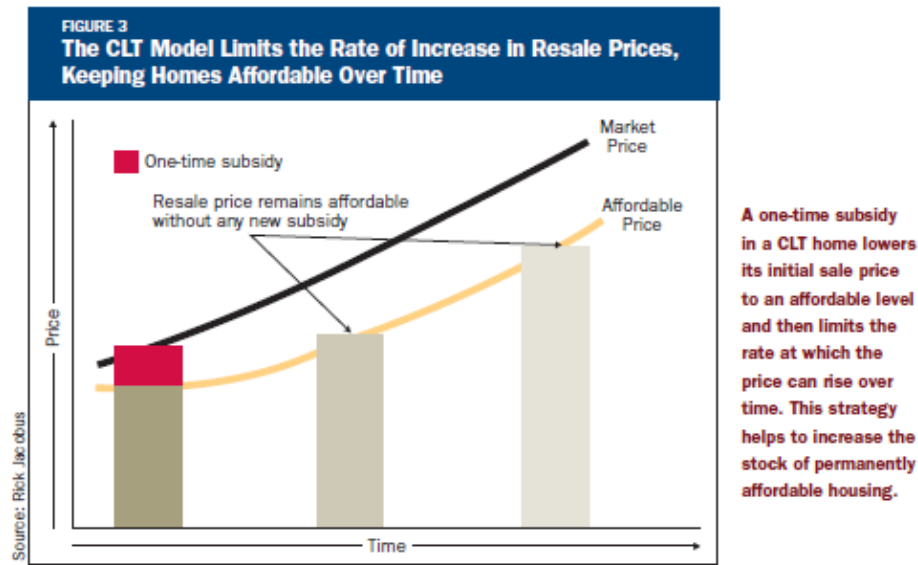
4.2.3.1 Subsidy retention

Classic community land trust

As noted in Chapter 2 the mechanism of subsidy retention as practiced through the ground lease of the classic community trust consists of keeping the factor land out of the housing cost of the user. The CLT structure leverages the public investment to a maximum number of low income households.

When subsidizing for example through soft mortgages the gap between affordability and housing costs increases rapidly in an environment of rising land and property prices. In the CLT structure the user will benefit from the use of the land at a low cost; and not share in the increase in land value. The subsidy retention is materialized by eligibility requirements applicable to the lessee users of the land combined with restrictions on the resale price of the homes so as to ensure that the home and use of the land can also be affordable for the subsequent low income user/lessee. The same analysis could apply to the lease of commercial land. Local businesses could be supported by a sliding lease rent scale enabling the community to create new businesses.

Figure 7 - Effect of resale restriction



(source:(Davis and Jacobus, 2008))

4.2.3.2 Affordability

Classic community land trust

As described in Section 2.5.3.1 various mechanisms exist in the community land trust ground lease to protect the affordability of the housing through a combination of eligibility requirements for any purchaser. The eligibility requirements are most often drafted by reference to the median area income. Eligible households may, for example, earn up to 60% of the median income. Obviously, the applicable eligibility percentage very much depends on the composition of the population of the area. In addition to the eligibility requirement the affordability is protected by restricting the price at which the unit can be sold. The various resale formulas are discussed in detail in Section 2.3.4.1.

KCT

Certain subsidy retention mechanisms have been included in certain South African subsidized housing programs but not so as to preserve the subsidy benefit in perpetuity in respect of the specific parcel of land. The benefit is made available to an individual household. The BNG (Breaking New Ground) housing benefits made available to the very poor - a free house - contains a resale restriction of 8 years. After the 8-year period the beneficiary is free to sell the property and to realise the full equity in the house.

The approach for land use by KCT to provide low income housing differs very much from the classic community land trust model. In the case of the community land trust the land continues to be owned by the trust. The trust permits beneficiaries to build on the land or to rent existing buildings, subject to resale restrictions that keep the housing affordable for the subsequent residents. The residents are permitted to retain the benefit of certain improvements that have been done by them.

The provision of affordable housing in the KCT context focuses on enabling qualifying beneficiaries to become owners of the properties to be delivered. Ownership is transferred to give the beneficiaries access to capital and forms a basis for upward mobility in society in general. *For purposes of this paper the advantages and disadvantages of the systems of subsidized housing will not be analyzed. Challenges encountered by KCT in implementing low income housing will be explored. The two subsidy systems referred to by KCT, being the institutional subsidies and the FLISP subsidies (as hereinafter defined) will be briefly described.*

The questions arise whether the availability of low priced public land made available under the Land Availability Agreement could enable KCT to provide affordable low income housing and what the circumstances are that have affected the process to date.

Institutional housing; Housing Company project for institutional housing with a rent-to-buy feature

Land values in the KBD area for residential purposes are not subject to general conditions in that housing prices in the Khayelitsha area are not market related (heavily subsidized); and transactions do not take place in a regular transparent market. The amount of building costs per specific unit was not made available by KCT as the negotiation on the development with a regional housing company (hereinafter, Housing Company) terminated in March 2015. The first 368 units, the "phase 1 housing", have to date not yet been built. The internal systems have been placed in the ground; the top structures need to be completed.

Figure 8 - Bulk infrastructure for institutional housing completed in 2013



(Source - Annual Report KCT 2014)

The intention of KCT had been to build the phase 1 housing with the use of institutional subsidies that are available to households with an income of less than R3,500 (USD 247)³ per month. The project at hand was a cooperative effort with Housing Company to provide for one or two storey freestanding residential units. Inconsistent information was provided by KCT as to the actual building costs; figures varied from building costs R160,000 (USD 11,300) (selling

³ All South African Rand are converted at 1 R = USD 0.07 (and amounts have been rounded)

at R200,000 (USD 14,130) to R220,000 (USD 15,545) with KCT Housing (Pty.) Ltd. generating a profit) to current building costs at R300,000 (USD 21,194).

In order to meet the required budget for funding the KCT units the funding proposals by Housing Company consisted of institutional subsidies available to it as a qualifying housing institution together with a top-up loan made available by Housing Company to fund the portion of the building costs not covered by the subsidy.

(The cost of similar housing built with a top up loan by Housing Company amounted to R235,000 (USD 16,600) per unit. This Village project consists of 850 units which have been or are to be completed within a 2-year period. The respondent from Housing Company confirmed that the formula and the price per unit for the KCT project would have been the same as has been the case for the project units, consisting of 1 and 2 storey units. The cost of the land and the internal systems that are placed by the City are not included in the purchase price and included as subsidy to the beneficiary. The cost/value of land will come into play at the time of a sale by the beneficiary).

However, the negotiations between KCT and Housing Company came to a halt. This has been viewed by some as a missed opportunity (Respondent 1). Housing Company was in a unique position in that could offer a total package whereby it obtains upfront funding for the construction from its parent. ("Parent Housing Company"). The Parent Housing Company banks against the individual subsidies that will be available upon completion of construction. In addition Housing Company in cooperation with Parent Housing Company provides a so called "top-up" loan as described below which supplements the subsidy of approximately R110,000 (USD 7,770) with an individual loan to fund the purchase of a house of better quality.

In order to ensure the bankability of the project, i.e. the ability of the beneficiaries to repay the top-up loans, Housing Company needs to be actively involved in the selection of beneficiaries. Under this Housing Company structure, the beneficiary rents the property for a 4-year period after which it title is obtained and then the top-up loan is paid off over the course of 25 years.

Figure 9 - Architects' impression of the Phase 1 institutional subsidy housing



(source – KCT Annual Report 2014)

Impediments to Housing Company construction and development

- The Housing Company respondent emphasized that in order to meet the contemplated budgets construction is to take place efficiently with a clear demarcation and allocation of financial risks and control over the construction process. KCT and Housing Company did not come to agreement on the allocation of roles and responsibilities. If Housing Company were to take on financial responsibility it needs to have full control. KCT bargained for a role in the development process. This resulted in Housing Company only considering a role as development manager and not taking any development risks.
- If Housing Company were to take on the development and bear this development risk, it also would need to have control over the parties selected for various components including the selection of the beneficiaries so as to put together a bankable package that is acceptable for the prefunding of the construction. This role of credit assessment of beneficiaries had been allocated by KCT to a third party which used different criteria.

It is not exactly clear whether any problems resulted from the requirement of KCT to engage local entrepreneurs to obtain a role in the process or any sharing of profits.

Process after Housing Company negotiations

KCT would now be in the process of seeking other funding, but had not yet been successful. The discussions between KCT and Housing Company have not progressed further; some respondents suggest that the Housing Company project has been abandoned and that other options have to be or are being considered.

Affordability impediment

The local community based organization has also objected to the typology of the current proposed structure and financing structure as it applies to the beneficiaries. It is their view that since the beneficiaries will most likely be “over-indebted” under the proposed Housing Company system the current approach should not be pursued since the beneficiaries are being “trapped to fail” (Respondent 5). Generally, households with a monthly income up to R3,500 (USD 247) are considered not to be able to obtain financing in the market.

An analysis on affordability prepared by CAHF suggests that a household with an income of R3,000 (USD 212) – R3,500 (USD 247) would be able to pay installments of R750 (USD 53)– R875 (USD 62) (i. e. 25%) of their income – enabling them to borrow R72,479 (USD 5,120) - R83,392 (USD 5,891) for a loan with a 20-year term at 11.25%. The profile document for the Housing Company project referred to above indicates that in respect of homes built at a price of R235,000 a top-up loan would be made available providing for monthly installments over a 25 year period at R1,200 (USD 85) per month. This is in excess of the standard threshold for housing expenses not to exceed 25% of the total household income.

It should also be noted that affordability is however not only determined by income. Also the credit situation of potential buyers is to be considered. A study by the Center for Affordable Housing Finance shows that many potential buyers even in the gap sector described below are subject to emolument attachment orders under which deductions are made from their incomes to settle certain financial obligations (Centre for Affordable Housing Finance in Africa, 2014b).

One respondent asserted that many households who indicate having an income of less than R3,500 (USD 247) at the outset actually have or obtain additional sources of income – also as a result of additional members being added to the household - and that the default rate on an

existing project is actually very low, with parties prepaying their top-up loan where possible to reduce their interest obligations.

Respondent 5:

"Even on rent-to-buy, a new model now, and the new models gives you access to new wage brackets? So even so, you can still be rent to buy, but even that has to be in a bracket that you know they can afford and pay. But to entrap the ones that you know that cannot... . "

Respondent 7:

".. people earn three-five, but we found that 99 percent of the time they have additional income from whatever it may be. They have additional income. You know what we see that, is if you drive through our villages, as you build one you'll see all the digital sets or TV-units turning up, these all are luxuries. You'll see a large car, the beneficiary itself might be earning three-five, but the boyfriend or the girlfriend is earning seven-, eight-, nine-, ten thousand Rand a month. "

Gap housing anticipated for phase 2 (850 units); FLISP

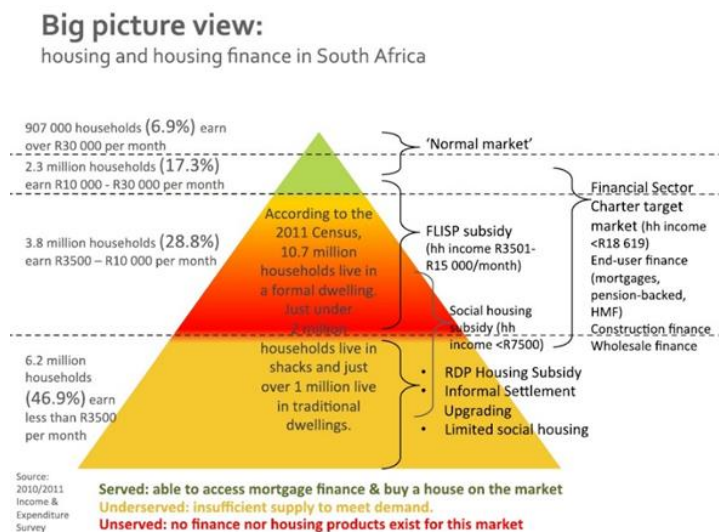
A category in the market that requires special attention is the so called "gap market" being household earning between R3,501 (USD 257) and R15,000 (USD 1060) per month. Households earning in excess of R15,000 are considered to have full access to property financing. In addition to the planned 368 phase 1 units, KCT is also contemplating construction of 850 units of gap housing in 3 sub phases within the phase 2 project (KCT Business Plan 2014-2017). A higher density area is contemplated close to the retail center and the railroad station. The challenges are that construction of multi-storey buildings is costly, especially when they are to be built with the ability to increase to 4 to 6 floors (Respondent 4).

The subsidy that is available to this income category is a Financed Linked Individual Subsidy Program (FLISP) as defined by the Department of Human Settlements. The subsidy depends on the income of the applicant and is to be applied to purchase a house costing not more than R300,000 (USD 22,000). It is available to households with an income of R3,501 (USD 247) to R15,000 (USD 1,060), who have not received any state aid before (Centre for Affordable Housing Finance in Africa, 2014b).

KCT has indicated that the FLISP subsidy is difficult to fit in a financing package for development projects since it is an individual subsidy that will be paid out at the time the house is purchased and ties into financing made available by a bank. Therefore, the FLISP subsidy is often applied for after the initial financing has been granted by the bank and can then be applied by the beneficiary to reduce the mortgage financing that has already been made available by a financial institution. The coordination of these subsidies for a large number of houses to be delivered in the future with the need for up front financing constitutes a formidable challenge (Respondent 7).

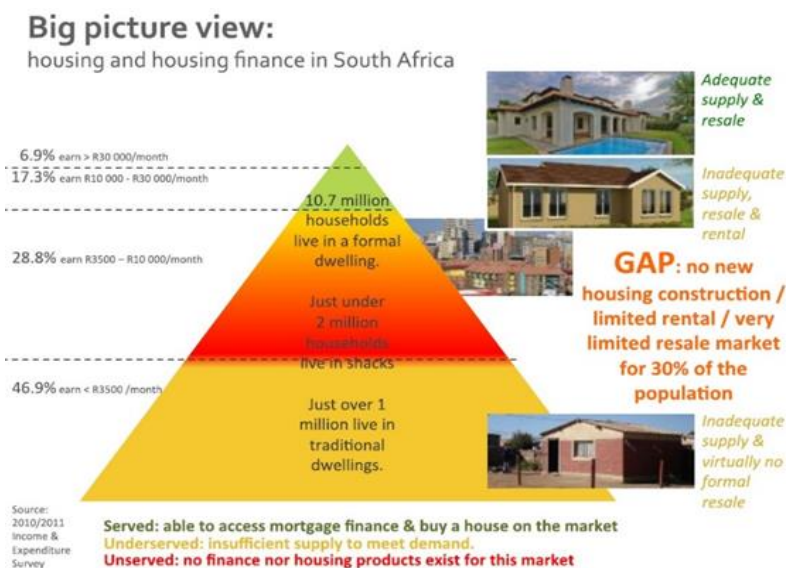
The difficulties in implementation may be reflected in the figures for the period between April 2012 and March 2014. During this period only 1696 FLISP subsidies were extended nationwide in South Africa - a fraction of what was included in the budget (Centre for Affordable Housing Finance in Africa, 2014a). (Centre for Affordable Housing Finance in Africa, 2014a)(Centre for Affordable Housing Finance in Africa, 2014a)(Centre for Affordable Housing Finance in Africa, 2014a). In 2013 the availability for the FLISP was extended to purchasers of existing homes, which will possibly result in greater access to the subsidies. In a recent survey it is stated that on average the cheapest newly built house available on the market is approximately R370,000 (USD 26,140), affordable only to the very top of the FLISP target market (Centre for Affordable Housing Finance in Africa, 2014a).

Figure 10 - Big picture view housing and eligibilities for subsidies



(Source: Center for Affordable Housing Finance in Africa, 2015)

Figure 11 - Big picture view social housing and housing market



(Source: Center for Affordable Housing Finance in Africa, 2015)

Cost of delays; delivery period

A major factor attributable to high(er) building costs is the delay in achievement of regulatory and administrative steps in the housing delivery. Delays in steps up to the mortgage bond application and delays in the delivery process result in a period of 5 years to see a new housing development from inception to sale. A delay of 24 months generally increased development costs by 175% which translates into an increase of 124% of the original selling price. The interest cost per unit increased by 160% and the internal rate of return declines by 70%. These figures are based on research conducted by a major South African investment fund referred to as such in (Centre for Affordable Housing Finance in Africa, 2014b).

Respondent 3:

So take this institution of subsidy housing, if you would look and ask, these economies and property, financiers, what would you invest in, in the current economy, taking into account the development chain. May take four to six years, so four years from now, what will be the demand?

[...] “Francois Viruly. He runs Viruly Consulting. He is a lecturer at the UCT. Any lectures and he is a consultant to support this property owner association and other developers. He often makes this joke that, any successful development has had two previous developers that have failed to sell their houses and then the third guy gets it at a low price, you know?”

4.2.3.3 Stewardship*Classic community land trust*

In addition to setting the parameters to grant local income households access to affordable housing, many community land trusts have taken additional measures to support the members of the community in maintaining their interests in their homes through counselling and at times financial support. When there is a downturn in the market low income households may rapidly suffer the consequences. In many cases the classic community land trust model will provide back-end services and require specific provisions to be included in the financing documentation of the lessees to grant the trust certain rights of intervention to protect the subsidy increment against foreclosure by the bank and at times the trust will also have the right to cure certain defaults of the lessee/homeowner.

KCT

In the standard set up for housing projects as developed by Housing Company certain back-end services are also included. Whether the efforts extend to financial support is hard to determine, as the financing is provided through the housing developer/seller and the enforcement of financing terms are within the same hand. No intervention in a default situation with a third-party bank is at hand.

Respondent 7:

“What we have decided to do as a company is we are looking at several workshops where we get these groups of people into a room and we drive the education side of it and we drive these people to understand what it is they are getting themselves into, what is this agreement, what are your obligations in terms of the agreement, what are your rights in terms of the agreement. We really get them to a point where they start understanding that “I’ve got to pay this R 1000 (USD 70) a month, because I understand after four years I can sell my house and I can make a profit of R200,000 (USD 14,130), 250,000 (USD 17,660) and I can actually move on to a better life.” . Yeah, we sort of looked at the whole thing from the start in getting the persons mindset correctly. The end result is that you have decent, loyal payers”.

Table 5 - Highlights operation

- *No subsidy retention through resale restriction*
- *Affordability through individual subsidies; not tied into property*
- *Subsidy thresholds not in line with current economic realities*
- *Packaging of subsidies for upfront construction funding extremely challenging*
- *Benefit of subsidy available to only very few households*
- *Delays are extremely costly*

Table 6 - Consolidated table comparison model community land trust and Khayelisha Community Trust

Subjects		Classic community land trust (CLT)	Khayelitsha Community Trust (KCT)
OWNERSHIP			
	Land acquisition	Often land donated by municipalities; purchase of land at fair market value constitutes constraints on provision of affordable housing	KCT to purchase land at 2003 prices; requirement to dispose at current fair market values (Under current law no longer possible)
			No holding costs; land purchase only at the time the development has been “packaged”
	Dual ownership	CLT retains ownership of land in perpetuity; permits CLT to take cost of land out of the equation of housing costs for user	KCT can continue to own or elect to lease commercial properties
			Land designated for low income housing is sold to residents to enable wealth creation
	Ground lease	CLT is compensated for the use of the land only	KCT is compensated for rental of space in commercial center
		CLT does not bear building costs, risks regarding building fully borne by user	KCT retains operational risk on commercial properties currently leased
		CLT can regulate general matters applying to community through conditions in land lease	KCT has limited control over land use and compliance following sales of land
		*	
		*	
		*	

Subjects		Classic community land trust (CLT)	Khayelitsha Community Trust (KCT)
ORGANIZATION			
	Control	Membership organization; composition of board and taking of significant measures subject to membership vote	Beneficiary trust, with Board of Trustees acting subject to fiduciary duties
	Composition Board	Tripartite - with representation of residents, local community and public interests	Addition and removal through co-optation. Additions often preceded by consultation and advertising.
	Beneficiaries	Primarily member-residents	Members of the Khayelitsha community including current and future residents of Khayelitsha, natural persons employed or owning businesses from time to time, natural persons benefitting from use of the KBD land and persons and entities designated by the Trustees
	Objectives	Holding the land for the benefit of current and future users with a focus on providing affordable housing	Development of a business district and upliftment of the Khayelitsha community with a multi-focus approach towards reaching economic and social objectives
	Participatory process	Often limited to membership rights to vote; for meaningful participation additional measures are added	Participation through management and independent communications consultant
			No formal process is followed
			Certain steps required through municipal planning legislation
			Complexity in participatory development has caused delays
			Consultation of beneficiaries has created expectations and KCT to date has failed to deliver
	Accountability	Financial reporting requirements	Financial reporting requirement

Subjects		Classic community land trust (CLT) (continued)	Khayelitsha Community Trust (KCT) (continued)
	Accountability (continued)	Reporting at periodic membership meetings, with requirements for approval by membership vote; given financial interests of members they are granted a substantive measure of control over the affairs of the CLT	Informative meeting to discuss annual report
			No accountability other than resulting from municipal requirements of the City of Cape Town as KCT is receiving funds to cover operating expenses
OPERATION			
	Subsidy retention, value capture	Investment in land is leveraged for the benefit of current and future users; users do not realize equity resulting from increase in land values	Commercial user may share benefit of land values increase with KCT in case of a lease. Purchaser of commercial land will take full equity. Resident obtains full benefit of the value increase of the land and residence; intention is to build wealth with resident
	Affordability	Eligibility requirements and resale restrictions protect affordability for future users	Eligibility requirements apply to individual subsidies for first purchaser; restriction in resale period but no restrictions applicable
	Stewardship	Back-end services of CLT often includes financial support and right of CLT to intervene in case of default by user to protect interests of CLT and user in the land	If any, limited to workshops to improve financial awareness

4.3 Distributive Goals

<i>Land value mobilization</i>	<i>Land use</i>	
	<i>Economic benefits</i>	<i>Operating profits</i> <i>Development risk</i> <i>Market constraints</i>
	<i>Social benefits</i>	<i>Effect of subsidies on pricing</i>
	<i>Opportunities for leasehold</i>	

4.3.1 KCT land use

As has been outlined above, the objective of KCT is to develop the KCT business district (“KBD”) on the land made available to it, to include a mix of retail, industrial, municipal and office components, for the benefit of current and future members of the Khayelitsha community.

For the KBD the question arises how benefits can be realized from the increasing land values over time to also benefit future generations. When looking at the value capture questions a distinction needs to be made between capturing an economic benefit and capturing a social benefit. In the case of KCT this would be capturing the economic benefit of increases in values resulting from commercial development and the social benefit to be captured from obtaining (and maintaining) land at a lower cost so as to facilitate low income housing.

The ambition of the City of Cape Town is to develop the KBD from a “district node” to a “sub metropolitan” node to become a vibrant multi storey central business district over time. (City of Cape Town, 28 May 2014). This prospect of transformation of the area necessitates very careful consideration of any disposal transaction for this strategically located land.

Figure 12 - Adaptable planning



(source: City of Cape Town, 2014)

In this recent analysis of the opportunities for Khayelitsha the City of Cape Town has emphasized that the development of retail activities is to be the driver of the development of the KBD area. In redeveloping the existing center the proposals by the City of Cape Town would require a workable flexible plan, to be developed in close cooperation with the planning authorities with the goal to “maximize land value capture” (City of Cape Town, 28 May 2014).

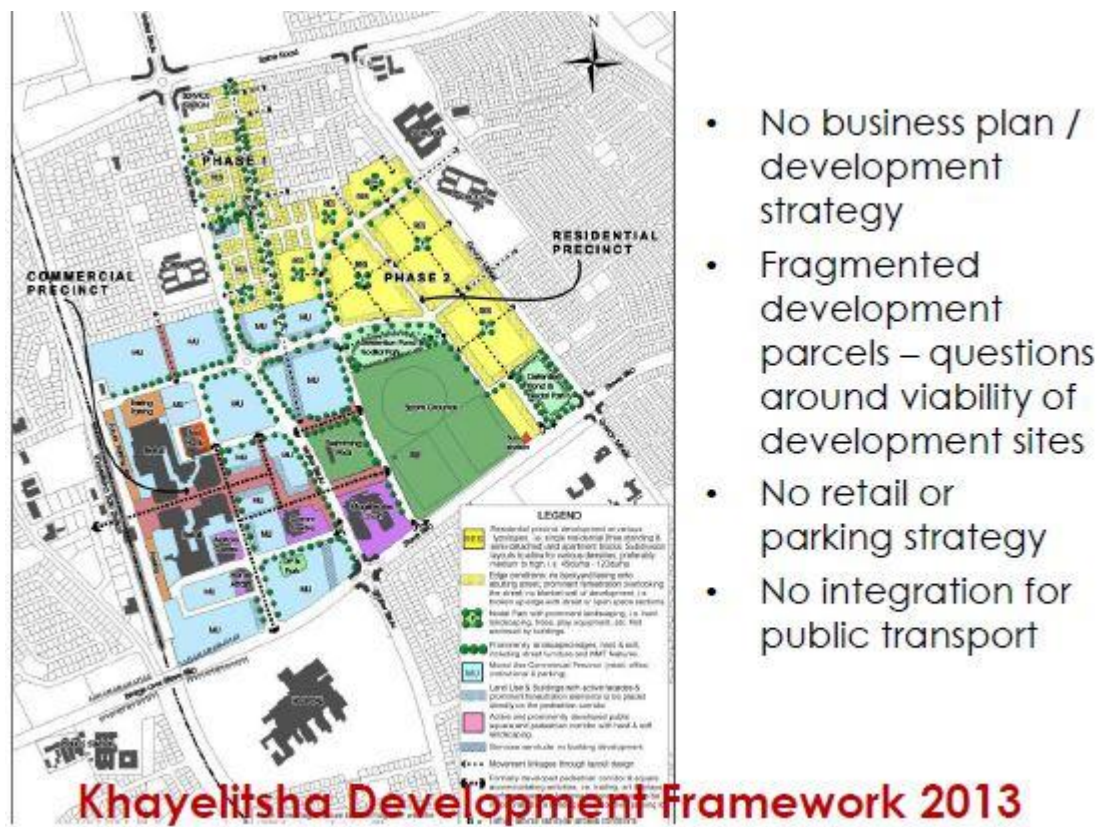
4.3.1.1 Economic benefit from commercial land

The Land Availability Agreement that was entered into between the City of Cape Town and KCT in 2004 provides for a sale of parcels of the 75 ha. of land over time to KCT in connection

with certain development projects broadly outlined in a development framework included in the document.

At the time the Land Availability Agreement was entered into the directors of KCT were councilors of the City of Tyberg (predecessor of the greater City of Cape Town). KCT was given substantial freedom in structuring the development and was to act independently from the City of Tyberg, in a manner consistent with the thought of empowerment of the Khayelitsha community. No specific requirements were set out as to the terms of sale or lease to third parties of the land to be developed. However, the Land Availability Agreement did contain a rudimentary development framework.

Figure 13 - Analysis of KCT proposal



(City of Cape Town, 2014)

The entire development was to be driven by the Khayelitsha retail center - and the assumption has been made that the commercial center would be attracting other investment and government services and would be exploited at a profit. These profits would be available for the Khayelitsha community to cross-subsidize other social activities of KCT.

In order to place a discussion on sharing a benefit in increase in land prices in context, it should be evaluated whether land prices are indeed rising, or expected to rise, as certain development occurs in the area.

In the case of KCT certain infrastructure improvements have been made in the immediate area, government buildings have opened and an office complex is about to open in an adjacent lot. However in general very little information is available in respect of commercial land values in the Khayelitsha area. The valuation of the retail center of KBD outlined in the Annual Report 2013/2014 raises a few questions as discussed below.

KCT retail center

Land values of the retail center itself were set out in the KCT Annual Reports of 2010 and 2014 as follows:

Table 7 -Values retail center

Asset/valuation base*	2010	2013	2014
Land	R1,634,196 (USD 115,452) Historical cost	R 57,000,000 (USD 4,026,908) (open market for existing use)*	R 57,000,000 (USD 4,026,908) (open market for existing use)*
Buildings	Not referred to in AR	R176,900,000 (USD 12,497,545) (income capitalization valuation-discount rate 8%)	R204,900,000 (USD 14,475,675) (income capitalization valuation - discount rate 8%)

(source: KCT Annual Reports 2010 and 2014)(not adjusted for inflation)

* it is not clear why the more customary residual land value method was not used.

Further inquiries on the KCT valuation of the retail center led to the following observations:

- A respondent representing the City of Cape Town indicated that the valuations were now updated on an annual basis , whereas before they were carried at historical cost, and thereafter updated less often, by an external independent valuer so as to support the "going concern" analysis. This was possible now that the retail center had been showing an operating profit.
- A real property valuer noted that the discount rate at 8% used for the income capitalization was unusually low - that a figure closer to 20% would be used by their firm.
- This real property expert indicated that it was unusual to list land and buildings separately. The land was originally purchased for the City of Cape Town for R 1,634,196 (USD 115,452) - KCT Annual Report 2010/2011. A request for a copy of the valuation for 2014 by the external valuer was not honored.
- The separate valuation of the land based on comparable sales in the open-market for existing use was also questioned as this KBD land has been built up with a shopping center.
- Information regarding the value of the retail center does not necessarily apply to other parcels of land within the KBD since it will be developed for other possible uses. Restrictions apply to other retail operations as a result of the exclusivity clause for the benefit of the major anchor tenants in the retail center.

Capturing benefits from increases in value

In analyzing the township markets the absence of economic activities influences the property markets. In these areas the growth of formal shopping centers are the exception to the absence of growth. This is caused by various factors including the increased living standards and income of the township population. Large retail centers can draw large parts of the townships as their catchment areas (McGaffin, Napier, et al., 2015).

Respondent 4:

"the only thing that is viable is Khayelitsha City at the moment is retail. And there's huge demand. You can see it because the other commercial, you know, developments, they are not coming in, that are responding to this demand. And the nature of the plan for this CBD depends on how you deal with retail, establishing this improved shopping centre."

In general the increases in value over time of the retail center are reflected in increased rentals paid overtime by the tenants in the retail center. KCT did not provide the details as to the rents paid and the adjustment schedules, but indicated that standard escalation clauses were included. These escalations do not necessarily reflect or approximate the increases in value. The lease rentals with the anchor tenants were set for 10 years with fixed escalations; other tenants signed 5 year leases. KCT indicated that the escalation of rents at times did not cover an increase in operating expenses such as utility charges for the operation of the center. No insight was provided however in the details of the cost coverage under the leases. One would expect that the rental payments would cover costs and would contribute to a reserve to address future larger maintenance expenses.

The commercial center has shown a positive operating result since 2012 (Annual reports, Respondent 1). In prior years the operating result suffered from the repayment obligations under the acquisition financing made available by the Rand Merchant Bank. The current profits resulting from the operation of the retail center have enabled KCT to cover part of its operating expenses including expenses regarding the general development and the development of low income housing. The grants received from the City of Cape Town for operating expenses are not sufficient to cover the entire overhead (Respondent 4). As a result no funds are available to cross-subsidize other social projects unrelated the development.

Respondent 4:

"[...] all the issues around value capture, about insuring that the benefits they accrue from economic development are transferred locally, to communities, we've failed. Because number one, we haven't been delivering. After the shopping center, there's been nothing."

Development risk

In developing the commercial center through a subsidiary as opposed to transferring the project and the development risk to a third party investor and retaining a shareholding interest, KCT is currently not in a position to realize a steady excess return as this is fully impacted by the fluctuating operational results. The existing circumstances at the time of establishment were difficult and no outside investors, other than Rand Merchant Bank, were willing to make any commitments.

At this time further development by KCT or its subsidiaries is further considered

Respondent 4:

"They can do that, but they're not set up to be developers. They don't have the skills, they don't have the experience. They don't have the connections." [...] "think the role of the trust should be more directed towards making sure that the profits are invested back into the community. They should be partnering with those companies who are able to develop. Because they're not developers" [...] "And you need to make sure that they make a sufficient profit to be viable and to be attractive, but at the same time that you capture

[italics added by author]." [...] *"And I also think that KCT aren't partnering because they believe they can show the community they can do it themselves."*

In taking on the development responsibilities the assumption has been made that profits would be realized. From within KCT doubts were expressed as to the desirability of the structure since KCT is not a developer. Other respondents highlighted that exploitation of a retail center is a very sophisticated process that requires very special skills and connections. Parties might be better served if the retail center was developed in a form of partnership where KCT would share in the profits (Respondent 4).

Control of the land was actually seen as critical so as to ensure the longevity of the interest. As far as the retail center contributing to profits and further development is concerned, not enough consideration was given to the effect of heavy financial obligations in respect of the loans made by Rand Merchant Bank, the inability given the financial position to respond to economic cycles, escalating operating expenses that are not covered by fixed increases in lease payments and the risk of economic obsolescence at the time of full repayment of the debt (Respondent 3).

Respondent 3:

"There also has to be something left over to share. There has to be a diminishing risk for the funding institution, so the bank has to feel this comfort that this loan will be covered for the duration of its term and really for the duration of that term, of that loan, there is no shareholder wealth. Because all shareholder wealth must service the loan. We never got to speak about what is at the end of that. So seventeen years later, what will the building look like" [...] "And also what will be the life cycle, the demands of the building. Will buildings still be operating efficiently, what improvements would need to be made, that would eat into your capital, or eat into every savings on that loan that you manage to gain over the years."

Offices; other commercial properties on KBD land; effect on values for the area

It has been generally held that the commercial property markets in townships are very dependent on the location attributes such as access, infrastructure and markets. Values will not significantly increase if economic activities deal with low-cost goods so that only low rentals can be supported and not make formal development viable. (McGaffin, Napier, et al., 2015) This appears to be true for the KCT case.

Respondent 3:

"If you look at the Khayelitsha Community Trust. The retail center, the development there of, was the basis and maybe even the driver and the test case of this entire experiment. That is the Khayelitsha Community Trust. But if you ask what has happened since then, especially from a private sector, I can't think of anything, I can't see anything [...]"

All they do is give a nod to the private sector that this space is being infiltrated, is being accessible, is becoming safe maybe, for the banks and other private investors, to put their money, but there is a lot more involved more in attracting developments that lead to sustainable growth. So shopping centers, you put it there and the retailers are very happy, they are not going to move out, they do very good business, but how does it benefit the community other than that the community has a place, that is more convenient for them buy bread and milk. So beyond that, if you think about the mandate

of the Trust and how profit is made, because the Trust doesn't have shareholders as any other organization which owns an asset at large would have shareholders, so where does the shareholder wealth go? And how is the shareholder wealth distributed?"

To date, investment in addition to the retail center has consisted of public sector projects which have been implemented in an uncoordinated fashion (City of Cape Town, 28 May 2014). No additional investments have been made through the private sector after the construction of the retail center. Some projects are currently being negotiated, but again not in a coordinated fashion, since no robust development plan has yet been finalized and coordinated with the City of Cape Town. A current development framework for the KBD was never agreed with the City of Cape Town (Respondent 4).

In respect of office space it has been noted that as a general matter business services need to be close to corporate clients and need to draw on skilled labor. (McGaffin, Napier, et al., 2015) Apart from the government offices no significant private investor interest currently exists for office space in the KBD.

Respondent 4:

"Retail yes, commercial office: not a drop. There's not an environment to attract them here, there's not the business - if they'd be competing here, they would be competing with Century City, or Bellville, or Summerset West. Summerset is ten minutes down the road on the N2. Much better controlled environment".

(Note: the Business Plan submitted by Khayelitsha Community Trust to the City of Cape Town for 2014/2015/2016/2017 states otherwise - with reference to a feasibility study prepared by UrbanEcon. After inquiring with UrbanEcon at the suggestion of the Property Department of the City of Cape Town, it seemed that the studies apparently were prepared in 2008 – before the financial crisis, but are still being referred to.)

In respect of further development mixed reactions were given by various respondents. It was emphasized that the presence of governmental offices and offices of NGO's were beneficial in that they give a nod to the investment community, but that their presence does not add much to the development of a local economy.

4.3.1.2 Social benefit from residential land for the benefit of low income groups

In general land value capture takes place (i) at the time of certain government intervention actions, such as at a time of rezoning the land or granting certain special, development rights to permit a more profitable use by the land owner, or (ii) at the time infrastructure is provided by the authorities. In these situations the capturing of the value by the public sector takes place with the purpose to reinvest the funds with a re-distributive effect to provide the infrastructure for the local community. The focus here is capturing of the financial values mostly from commercial properties and middle or higher income housing in situations where a vibrant market exists. The benefits are also to have a redistributive effect and are to be made available to the poor.

It should be noted that the low income population generally is not subject to conventional land value capture measures, although it has been argued that all income categories, should be subject to property taxation (Smolka and De Cesare, 2011)(Smolka and De Cesare, 2011)(Smolka and De Cesare, 2011).

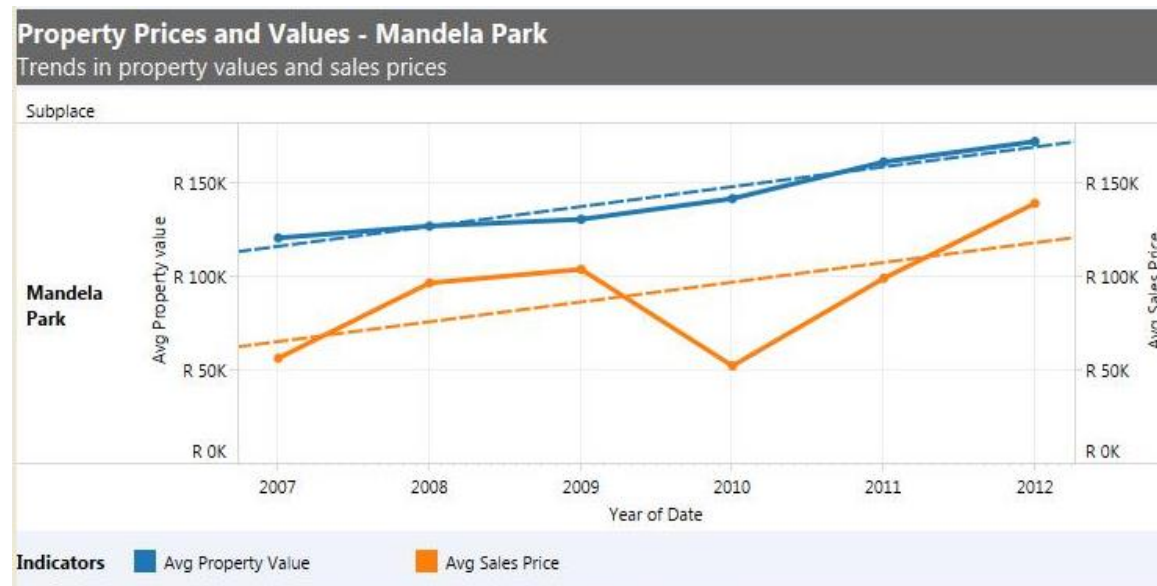
Value capture however should not be limited to financial benefits that are “extracted” from the land; the concept also comes into play when the values of (publicly owned) land are mobilized in such a manner that “affordable” housing can be made available to the lower income groups. Creation of affordability of housing takes place in various jurisdictions with different approaches. In South Africa the affordability is created by subsidizing the provision of housing for the very poor to create a financial benefit that can be leveraged by the individual households for various purposes, ultimately also to enable the beneficiaries leverage the asset and/or to move up the “housing ladder” (Croese, Cirolia, et al., , 2015).

Housing trends data for sub areas in Khayelitsha

For purposes of this paper - given the scope and timeframe- no independent study could be conducted in respect of land values. In order to illustrate certain phenomena for residential properties aggregated data are included below. The data used have been compiled by Lightstone Valuers in cooperation with the Center for Affordable Housing Finance in Africa and are published on an interactive dashboard "Citymark - market intelligence" (<http://www.housingfinanceafrica.org/citymark/>). On this website generally data were only available for the period up to 2012 for the sub areas surrounding the KBD. Values are provided by Lightstone Valuers on the basis of seven valuation indicators such as churn, bonded sales, registration of new properties in and around the areas.

Set forth below are trends in prices for residences in Mandela Park- a sub area adjacent to the KBD. Other sub areas surrounding the KBD show similar developments.

Figure 14 - Trends in property values and average sales prices



(source: Citymark, retrieved August 28, 2015; not corrected for inflation)

These figures demonstrate that the residential market in the low income area is distorted. In reviewing whether there is any mobility in the housing market one immediately notes that transactions are taking place at a price significantly below the attributed value.

The difference between the sale prices and the attributed values could result from various factors including (i) the fact that buyers can only offer cash since banks do not make lending available for these categories, (ii) sellers are not aware of the potential value and (iii) the law of averages where there are many properties and very few sales - which may result in

distortions. The lack of credit access would be considered a significant factor which constrains prices [correspondence, Centre for Affordable Housing Finance in Africa, August 11 2015].

Set forth below is a table showing the appreciation percentages for 2012. Recent trends show that the largest increases in equity have occurred during the last few years in "the lower end of the market". For transactions relating to houses under R250,000, the average equity (as a percentage of average sales price for the City of Cape Town in 2012) was 117% and for houses between R250,000 (USD 17,660) and R500,000 (USD 35,324) the average equity was 77% (Centre for Affordable Housing Finance in Africa and South African Cities Network, 2014).

Figure 15 - Trends in property values and annual appreciation (for 2012)



(Citymark, retrieved August 28, 2015)

It should be noted that the cause for increases in housing values may be triggered by various factors; including, probably most significantly, the improvements made to the houses by the residents themselves.

In order to analyze the affordability of gap housing, one can also look at the ability of future purchasers to monetize the equity in their existing residences to be applied towards the purchase of the house "next up the housing ladder" (Centre for Affordable Housing Finance in Africa, 2014b). In that respect the appreciation of residential properties is very relevant. Access to the credit market improves as the monthly installments are lower in a situation where a purchaser has been able to apply the equity realized from the previous (BNG) house towards

the purchase of a house of better quality. The approach of unlocking the equity would only be available in the case of purchasers of gap housing who are not benefitting from the FLISP subsidy described above. Obstacles may however exist in the fact that many RDP/BNG houses have not been formally titled and thereby preventing homeowners from selling their houses in the formal market at the fair market value. Unlocking the equity of the initial home assumes the existence of markets and availability of credit (Centre for Affordable Housing Finance in Africa, 2014b).

As has been discussed above, the provision of affordable housing is facilitated by KCT as it is entitled to purchase land from the City of Cape Town at very low prices. The approach to provision of housing is not geared towards subsidy retention, but it provides housing to the beneficiary and will enable the beneficiary to realize the equity in the house, including the subsidized cost of land, at the time of sale of the housing unit.

Once up the ladder, these households can become part of the conventional systems of land value capture, through payment of development charges and inclusion in the city property tax base (Croese, Cirolia, et al., , 2015).

4.3.1.3 Benefits for the community

The Trust Agreement, which names the members of the Khayelitsha community as beneficiaries of the development, does not specifically identify the benefits that were envisaged, but does make reference to economic and social empowerment as one of the goals. In addition to generating revenues for community projects, opportunities exist to create employment by requiring tenants to employ local residents. In the current construction projects the engagement of local contractors has high priority and a threshold of 9% of local spend for the social housing project has been set. For the retail operations local job creation was not a formal requirement by KCT. It was held that:

Respondent 3:

"But it was typically not a requirement, but it is a preset development perspective and an imperative, because you try to create a lifestyle where you live, work, play. So what is the point of getting people from other areas, pockets [...] come and work here. So we try to sensitize I think, it is imperative that developers and landlords try to sensitize." [...] "The trust continues to fulfill its mandate through the added income that it would gain or have access to, even those arrangements, so the trust is not a real developer. It is not a retailer, but it can access an extent, its longevity, income making ability for the benefits of the beneficiaries and that is the Khayelitsha community."

"[...] must go back to the community in various, in very measurable ways, so it will then be scholarships fund, support of agents, communities and institutions, which are in dire need. Being in support of infrastructure, infrastructure management and improvement, in and around the district. For the trust we have, it still has obligation in my view of creating those vehicles and of managing those vehicles, in a very measurable and transparent way. "

In view of the very large general group of beneficiaries a need was expressed to provide benefits servicing the community in general. Educational opportunities and scholarships were mentioned. Another respondent referred to free internet access for the township.

Respondent 4:

"all the issues around value capture, about insuring that the benefits they accrue from economic development are transferred locally, to communities, we've failed. Because number one, we haven't been delivering. After the shopping center, there's been nothing."

The intended financial community benefits have not been realised to date. Progress has been made, but certain respondents are frustrated with the pace of development and the lack of progress.

Respondent 4:

"But the trust have kept it complete? ...

and even within KCT themselves, you get the trust that operate on one level, that operate in a very - in my opinion in a very murky environment, the business interests in there."

4.3.2 Long term leasing as a finance and development tool to secure long term income

The Land Availability Agreement speaks of KCT selling or leasing the land in connection with future development. From the documents reviewed it is not clear whether at the time of inception of the KBD development plan the long term ground lease was considered as a means of land use. It has now been suggested, by parties other than KCT, that this could still be an option for the additional properties to be developed.

Parties could be granted a long term lease which provides for either a lump sum payment up front or periodic lease payments subject to escalation provisions. The lease terms would be such that the lessee would be sufficiently incentivised to build a structure and take the development and exploitation risk on the property for the (20/30/50-year) lease term; tangible financial benefits could be realised for KCT and its beneficiaries, without taking on the development risk (Respondent 4). At the end of the lease term the property would return to KCT including the improvement on the land. Retaining control over the land, albeit subject to the rights of non-disturbance of the lessees, would enable KCT to realise the benefits of an improving environment during and at the end of the lease term.

Especially as a transitory measure the long term ground lease constitutes an instrument that can allow for change in use in the future.

Respondent 4:

"I don't think we had - at the time when it was conceived, it had never been thought of[...] that you could lease it. For goodness' sake, you give this to [.....] to property management and development, you said to them: okay, we'll give you the lease for fifty years. See the value. We're going to take the money and put it back into the community. End of fifty years, you know what? We've got an asset. [...] Fifty years - very few buildings in our country last fifty years. We don't build them to last fifty years. So if that's fine. Good. At the end of the fifty year period, we're putting it out to tender again. Fifty years' time, hopefully there will be business people in Khayelitsha

Figure 16 - Possible development for the Khayelitsha Business District



(source: City of Cape Town, 2014, unpublished)

Therefore leasing could be a viable alternative when the goal would also be to generate funds over the long term to fund KBD community projects for generations to come. After inquiring, the City of Cape Town confirmed that it is currently also considering the instrument of long term leasing in general.

Respondent 11 :

"There are examples [in the City of Cape Town] of long term leasing arrangements but these are mainly in respect of sport fields etc. Property Development is currently looking at the utilisation of long term commercial leases as a way to secure long term income from its assets". (personal communication)

4.4 Khayelitsha Community Trust as a commercial counterparty

The community trust is viewed in different manners when dealing with the representatives of the business community. A general observation made was that it was not clear as to its role which results in lack of clarity in the allocation of responsibilities with third parties.

In view of the broad scope of its responsibilities, the Board together with management is often perceived to lack the expertise and manpower to take on the development projects regarding the commercial center and the low income housing projects.

Not always was the lack of expertise seen with members of management; the board of trustees was also seen as not being knowledgeable and making the wrong decisions. At times a suggestion was made that other personal interests came in to play and that these may have influenced the decision making, although no specific incidences could be referred to (Respondent 4, Respondent 7).

Another view is that the role of the Trust, even through its subsidiaries, is not to act as a developer, but to outsource the activities to third parties with the relevant experience.

Respondent 4

"[...] think the role of the trust should be more directed towards making sure that the profits are invested back into the company. They should be partnering with those companies who are able to develop. Because they're not developers. And whether it is one of the big developers - shopping centre developers, for the commercial shopping centre - who knows what they're doing, who've developed and managed shopping centres for ages, that know their side of it.

[...] And I also think that KCT aren't partnering because they believe they can show the community they can do it themselves. That's a very arrogant position. I've got some development experience, but I would never claim that. You need that. There are only five or six commercial developers in the whole of South Africa who can make it work. Others have tried to enter that market, and they've failed. And they've failed because it's very difficult.

Respondent 7

"They have got a prior commitment that they've got to adhere to and the establishment of that trust came out of peoples' need for housing and the people that are needing this housing is obviously already lined up. And that is where the clash really comes in, is the free determined mandate as you may say, and the political promises that have already been made, but a lot of it doesn't come out on the table, unfortunately, it doesn't happen. So all of those things are happening behind the scene and this is what is driving the trust, due to wanting to have more control other than ourselves. We have more control, the community itself will probably think that we are benefiting too much from whatever the project is ... has to deliver. So yeah. That's a clash.

[...]

"The social mandate and crossing over of projects within one organization is not beneficial. The commercial development of the retail center and the development of housing for low income housing should be operated more efficiently, by two "independent silos". Separate capacitated dedicated teams for each commercial arm."

Chapter 5: Conclusions and recommendations

Introduction

The objectives of this research are to identify and describe certain problems that have arisen in the development process of the Khayelitsha Community Trust since 2005 and to explain whether these issues relate to the use of the form of a community land trust.

The unique multi-purpose focus of this commercial development combined with provision of low-income housing projects has been examined within the contours of land ownership of the trust, organizational features of the trust and implementation of certain contractual arrangements relating to the projects. A comparison of the characteristics of the classic community trust with the KCT trust is included in Table 6 in Section 4. Apart from examining applicable restrictions on the use of the land under a community trust structure, certain governance issues for the KCT situation have been further assessed. The status of the KBD development within the URP is first briefly touched upon

Objectives URP and KCT

According to the projections of the City of Cape Town Khayelitsha is to become a sub-metropolitan node as originally envisaged in the Urban Renewal Programme (URP). To date limited progress has been made. The objectives of the URP, being (i) promotion of local economic development to relieve poverty and unemployment, (ii) provision of a safe and secure environment by fighting crime, (iii) creating opportunities for education and skills development and development of a quality urban environment with user friendly access to transportation for the KBD area require a long term approach.

The process of development of the KBD stagnated primarily as a result of changes in the municipal political environment and the economic crisis in 2008. KCT has not been able to create an enabling environment for local economic development by private investors. Many causes can be identified as having resulted in additional challenges in general and, given the multitude of problems in the South African political, social and economic environment, it is impossible to pin point to any specific causes. Bottom-up efforts to stimulate and shape local economic and social development as supported by the URP initiatives had political implications and created complex situations. In addition, the interaction between project oriented focus and broader social economic empowerment issues to be dealt with by KCT simultaneously have resulted in “sub-optimal” progress.

Given the limited progress of the project only the development of the retail center, and plans for low income housing and a few transaction proposals could be considered in their context in this research. As a result of the contextual complexity of the KBD project and the limited research conducted, the ability to draw conclusions is limited and this study results in general observations regarding the structure used by KCT for the area based development.

Scope of social mandate; organization and perception of trust

The objectives of Khayelitsha Community Trust, established to implement the area based program for the KBD include uplifting the Khayelitsha community and solidifying the accrual of benefits from the development of the land for the community. The initial draft institutional framework (2000) provided for involvement of stakeholders, investors, the community and the City of Cape Town, with the City of Cape Town having direct influence in the enabling vehicle. A choice was subsequently made for KCT as an independent trust where the Board of Trustees

would include a few government representatives actively involved in the implementation of the development of the public land for purposes benefitting the community of Khayelitsha.

The desire existed, by way of empowerment, to move the control over the land from political swings. This and the objective to realize certain participation and decentralization goals and the realization of certain specific economic and social objectives would justify the use of the classic community land trust structure (Fainstein, 2012).

Up to 2004 the area based model management unit at the City of Cape Town was in a position to take an integrated approach of municipal involvement for finance and planning and worked in cooperation with the members of the Board of KCT. Inclusion of government - as currently exists for the community land trust model (Davis and Jacobus, 2008) - is however no longer possible. The Municipal Finance Management Act of South Africa prohibits participation of municipal government as officers of KCT. The complex KBD project currently lacks a control mechanism with institutional support. Controls as exist in a membership corporation have not been a viable option for the KCT structure. The rights in a membership corporation often safeguard economic interests of members as users/lessees of the land on which they have built their buildings (Institute of Community Economics, 1982). Voting rights for residents in a beneficiary organization of 500,000 to 1,000,000 residents as beneficiaries would not be a workable structure.

Given the foregoing impediments and challenges ahead a Board of Trustees that is appointed by cooptation as is the case for KCT, without accountability mechanisms towards the community at large, does not appear to be a workable proposition. The community of Khayelitsha ultimately is the party suffering from stagnation and delays. A specific project oriented focus, in partnership with government and investors, with acknowledgment that the result may not be perfect, has been identified as better approach to advance development and to realize benefits for the members of the community of Kahyelitsha. Governmental departments continue to strongly influence the development of the KBD area by conditioning their planning approvals. However the City of Cape Town has expressed that it is not politically viable to continue rejecting proposals made by KCT. Termination of the Land Availability Agreement has been considered, but appears not to be an option. The timing and ultimate decision on the selection of projects remains a prerogative of KCT.

A fundamental issue remains therefore whether these decisions for area based planning should be left with a body that is not accountable to the community by way of statute or as a result of certain democratic principles. The decision of the City of Cape Town to cease providing grants for operating expenses in 2018 also terminates the formal basis for a continued financial accounting and reporting by KCT to the City of Cape Town and would seem to exacerbate the lack of accountability. Continued contribution towards operating costs tied into reaching pre agreed milestone on KCT and the City of Cape Town would seem to have been preferable to guide the timing of steps to be taken. This, as pressure to deliver on the promise of economic betterment in the Khayelitsha area will increase. A reintroduction of “municipalization” (Davis, 2011) to advance cooperation and effective use of the strategic public land for the benefit of the community appears desirable.

In addition to the broad mandate, the participatory process is considered to be a delaying and complicating factor. For the classic community land trust the experience has been that a limited focus on the provision of affordable housing in a specific location has contributed to the success of implementation of a meaningful participatory process (Thaden and Davis, 2010). When considering a narrow project oriented objective for KCT, development of retail center and development of two low income housing projects, the scope of participation and the delineation of “the community” has not been clearly tailored towards the intended beneficiaries for these

projects. It has been argued in literature that participatory development often does not recognize multiple and local realities and often includes an uncritical celebration of the community as if communities are capable of anything (Williams, 2004). Where empowerment of the community of Khayelitsha is pursued as one of the broader general objectives the question arises whether involvement of the poor in various stages of the development constitutes authentic participation with the objective of empowerment. As mentioned above, the scope of participatory development is often limited in the pursuit of efficiency in a project (as is the case for the classic community land trust). The primary focus of participation in cases is not necessarily to assist the poor and marginalized to become enabled and take charge of the development (Osikhena and Chikadzi, 2014). In the case of KCT, the relinquishment of authority over the development process by local government to the trust may result in greater participation by beneficiaries in the decision process by that affects them. The principle would be that the closer decision is to the people the more likely it is that they will participate. As expressed by certain respondents, the drawbacks identified in literature with respect to control at a very local level exist. In addition the “decentralization” is also prone to elite capture of the “public” goods by the local power holders (Osikhena and Chikadzi, 2014). The lack of required technical capacity and the inability to effectively negotiate with experienced private counterparties were eluded to by various respondents. The broad objective of the trust through its social mandate complicates the focus for the decision making process. Certain respondents recommended that focus should firstly be on development and management; the ability of reaching social objectives will follow once the underlying development is commercially viable.

The trust, as a self-coopting private organization in charge of a development project with societal significance, without accountability safeguards, was established in 2003 with an empowerment objective. However, government participation falling away and government further being formally required to relinquish any influence in the organization, seems to have lead to an unintended consequence of lack of any democratically based influence on the decision making. Participatory processes are not suitable mechanisms to establish accountability.

Distributive goals; economic and social benefits

KCT was to develop the KBD land into a business district comprising of retail, residential, industrial, municipal and office components as well as social amenities for the benefit of the Khayelitsha community. The land use policy implemented by way of retention of ownership of the land subject to leasing arrangements to capture future land value is not a centerpiece of KCT’s approach for development, as is the case for the classic community trust. When granting the rights to the KBD land to KCT the land was to be developed as a mixed use venture for the benefit of the public, with KCT having the option to *sell or lease* the land. Apart from developing commercial land for its “highest and best use”, retention of ownership combined with leasing would also allow for release of land for social accommodations at lower prices, whereas profitable ventures can continue to be charged on the basis of estimated economic benefits (Fainstein, 2012).

However, economic development and attracting additional private investment in KBD often appear to require a transfer of land. The current fair market value at which the land has to be sold is based on current use and does not allow the trust to benefit from anticipated future values. Especially given the current economic conditions and lack of progress KCT seems to find itself being at times forced to sell at the current low prices. One other form of capturing the value of the land, also for future generations, is being considered; where KCT will contribute the land and investors will finance the construction of the top structure. The

mobilization of future value increases of the land is then shared and financial benefits realized by KCT can be made available for community projects. This partnership arrangement differs however from the objective of the dual ownership of the classic community trust since KCT is also participating in the operational risk of the current enterprise and this may create negative financial results resulting in foreclosure upon the common venture, including the land. In assessing which transaction structure would be optimal for a specific situation, requires a long term analysis. Entering into a lease agreement for the land may be economically disadvantageous for the short term, but can result in capturing and securing long term (increasing) revenue streams for the benefit of the community of Khayelitsha.

Fragmented development through individual transactions transferring full ownership will preclude KCT from controlling the common future use of the land required for future integrated equitable development of the KBD area. As mentioned above capturing land value through a long term ground lease under the social mandate for the benefit of the future community could be the optimal long term solution. The ground lease structure can be used, apart from a ways of controlling prices, as a planning tool by the owner (Davis, 2011, Hong and Bourassa, 2003a). The City of Cape Town has addressed the planning issue by requiring that an integrated special development plan is agreed for the KBD before any further projects are developed. This approach, which requires the development of a masterplan/ framework strategy is in contrast with the gradual bottom-up approach preferred by KCT, where, also given the limited resources, it can only take a step at the time. A lease structure would have allowed KCT to direct the further use at the time of future expiration of the ground leases. Both approaches have their own merits as adaptable planning requires a future vision, but also need to provide a workable solution for the situation at hand in the current environment. Whether the future development as envisaged by the City of Cape Town will actually occur remains uncertain.

As previously noted, the affordability and subsidy retention considerations guiding the operations of a classic community land trust do not come into play in the provision of institutional housing by KCT. In 1994, upon the introduction of the South African constitution a right of access to accommodation was included. The political message however has been that all South Africans will have a house. Given the extent of the political message, transfer of ownership to the resident has been seen as a prerequisite. In these cases the economic benefit of increased value is not retained to safeguard affordability for the future, but is transferred in full to the owner/resident. The community trust structure is not used to safeguard and leverage the land value towards future affordable housing. Affordability is not retained for the benefit of the future users of the land. Leasing as a means to mobilize this benefit of increased land is currently not a feasible system for affordable housing given the significance of the proclaimed goal of wealth building. Any change would require a strong political shift.

Funding of social projects from economic benefits is a central KCT objective. It can be questioned whether the subsidizing of local social community projects should take place through the ring fencing of proceeds realized from economic development in the same area, especially when the potential for economic upliftment is not forthcoming. Reliance on cross subsidy mechanisms depoliticizes and possibly marginalizes the claims of the local community to a fair share of societal economic benefits. Reliance on internal funds as opposed to equitable external governmental support for these projects may be illusory in areas at the very initial stage of economic development.

Further research

This research has raised many further questions which could lead to further research in respect of structuring through the use of a trust. These could include the following:

- Under what circumstances can area based development be de-politicized by transferring control to a private body such as a trust and what accountability measures should be implemented?
- How can the concept of “community” be properly delineated in area based development for purposes of participation and what forms of participation are appropriate? How can they be formalized for a beneficiary based organization?

After obtaining a limited insight in the dynamics of the decision making within KCT and the position of the City of Cape Town it became apparent that KCT is now in a position of an “orphan entity” which is not beneficially owned or directed by anyone. For the use of a trust as an empowerment vehicle for residents with significant decision making powers the introduction of suitable accountability safeguards needs to be considered.

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Annex 1

Interviews

Respondents

- 1 - Office of Shareholdings of Deputy Mayor of the City of Cape Town
(09.07.2015)
- 2 - Management KCT
(01.07.2015)
- 3 - Management KCT
(13.07.2015)
- 4 - Department of Planning and Urban Design of the City of Cape Town
(07.07.2015)
- 5 - Member of Board of Trustees of KCT
(14.07.2015)
- 6 - Project manager townships for NGO
(13.07.2015)
- 7 - Project manager housing developer
(04.08.2015) - by telephone
- 8 - Urbanist
(01.07.2015)
- 9 - Property Valuer
(15.07.2015)
- 10 - Department of Planning and Urban Design of the City of Cape Town
(06.07.2015)

Personal Communications

- 11 - Property Department City of Cape Town
- 12 - Real property expert
- 13 - Centre for Affordable Housing Finance in Africa
- 14 - National Community Land Trust Network, Portland, OR

