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Partnerships for Livable Cities

**Urban growth management in sub-Saharan Africa: conflicting interests in
the application of planning laws and regulations in middle-income
residential developments in Nairobi**

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Abstract

Many housing developments aimed at the middle-income group in Nairobi do not comply with planning laws and regulations. The costs of non-compliance include loss of lives when buildings collapse. This paper investigates why there is non-compliance with building laws and regulations.

Qualitative interviewing is aimed at understanding perceptions of the planning system by both planners and developers, and how and why their interests differ. The study finds that, despite conflicting interests in the application of planning laws and regulations, non-compliance is tolerated or ignored because there is informal collaboration between planners and developers, which validates the indispensability of these developments.

Keywords: Housing developments, non-compliance, planners, developers, conflicting interests

Introduction

Urban planners have historically played a vital role in shaping the growth of towns and cities by assigning development zones and overseeing developments. Unmet demand for housing can be said to be at the heart of the phenomenon of non-compliance with planning laws and regulations.

It is evident that the population explosion in sub-Saharan African cities poses major housing challenges (Rakodi, 1992; Tipple, 1994; Rakodi, 1995; Schilderman and Lowe, 2002; among others), but it is also presenting investment opportunities to opportunist developers. Most of this population is in the low and middle-income groups, creating high housing demand, especially in the rental sector (Rakodi, 1992; Tipple, 1994; Rakodi, 1995; Schilderman and Lowe, 2002; Kessides, 2006; UN-Habitat, 2007). Cities struggle to meet this demand; evidence for this includes expansive informal settlements and poor infrastructure systems (Schilderman, 1992; Okpala, 1999; Otiso, 2003; Tibaijuka, 2007, among others), as well as poor adherence to planning laws and regulations in residential settlements for low and middle-income groups¹ (Kironde 1992a; Kironde, 1992b; Arimah and Adeagbo, 2000; Anyamba, 2011).

The phenomenon of non-compliance with urban planning regulations is an on-going concern for sub-Saharan Africa's cities; for planners, it creates informality, in that the resulting developments have aspects which do not comply with formal planning stipulations.

¹ *Poor adherence to planning law does not necessarily represent a struggle to meet housing demand.*



Figure 1: Some middle-income rental properties in Eastlands, Nairobi, flouting ground coverage and plot ratio regulations. Poor waste management is also noticeable (Author, 2014)

For the general population, issues presented by non-compliance include poor environmental standards for most of the city's population, as well as general environmental degradation (Matrix Development Consultants, 1993; Mbogua, 1994; Oyugi and K'Akumu, 2007; Tibaijuka, 2007; UN-Habitat, 2007); this leads to increased costs in public health due to exposure to poor environmental conditions (Oyugi and K'Akumu, 2007; Tibaijuka, 2007). The resulting settlements pose concerns that cannot be ignored, such as poor sanitation, poor solid waste management, inadequate water supply, and air and water pollution. Failure to address such concerns could have far reaching repercussions (Tibaijuka, 2007).



Figure 2: Collapsing buildings in Nairobi (the-star.co.ke, 2015)

Although non-compliant residential developments are rapidly expanding and are often fully occupied, they remain a problem nonetheless because they imply failure of the planning system to control urban developments in the interest of all, and disregard for the rule of law. This paper shows that unlike in developed countries where a strict adherence to planning laws deters private developers who are seeking to maximise profit at the expense of neighbourhood decline (Adam and Watkins, 2008), private developers in sub-Saharan Africa have ways of ‘negotiating’ with the system and are relentless in the provision of housing, albeit outside the formal guidelines.

Planning systems in sub-Saharan Africa: inadequate tools for effective development control

'Human settlements shall be planned, developed and improved in a manner that takes full account of sustainable development principles [...] Sustainable human settlements development ensures economic development, employment opportunities, social progress, in harmony with the environment.' Habitat Agenda (UN-Habitat, 1996. Chapter II:29)

The expectation of the Habitat Agenda quoted is a tall order for sub-Saharan Africa, given the magnitude of the problems in its cities, and the perverse impacts of planning. Planning for sub-Saharan Africa, which was adopted from the Global North, has been mainly spatially oriented, concerned with the orderliness of the physical environment in cities (Watson, 2008; Watson, 2009; Berrisford, 2011a). It has also been influenced by political and other vested interests (Schilderman and Lowe, 2002). These influences, coupled with limited resources and poor administrative systems, have greatly undermined the role of planning in those cities (Rakodi, 2001; Schilderman and Lowe, 2002; Anyamba, 2011). Although planning and planning systems in the Global North have evolved in the context of changing social, economic, political and environmental arenas, the same cannot be said about the Global South. Such systems were developed in different contexts in the Global North, and have thus failed to address the problems of a developing City like Nairobi, where there is a split between formal and informal settlements (Onyango and Olima, 2008; Watson, 2009; Anyamba, 2011, etc.) and the *de facto* standards of most developments are contrary to the *de jure* standards of planners' normative views. This paper looks at informality as a mode of governance, noting that informal

practices, like corruption, can permeate institutions, and undermine the role of the state.

This paper is aimed at answering the question:

- What are the characteristics of the relationships between planners and developers, and why do they foster non-compliance?

The paper culminates in an argument that non-compliance with planning laws and regulations by developers for the middle-income group does not necessarily result in inappropriate housing developments, and that planners would do well to support the efforts of these developers with a view to meeting housing demand by the middle-income group.

Informality as a mode of governance

a. Political economy drivers in planning and housing developments; the rise of informality

Becker (1978) inferred that human actors tend to engage in maximising behaviour, whatever the commodity. With regards to landed property, Guy and Hanneberry (2008) affirm Becker, arguing that capitalism requires buildings to be produced profitably, and operations towards this are determined by how people interpret their positions within a given social system. Healey (1991) asserts that the process of private property development is a passive reflection of the demands of industry, commerce, and households for accommodation. Healey (1992) points out that property investment is opportunity driven, and developers look for returns which reflect perceived risk-reward profiles. Adam and Watkins (2014) concur; they point out that developer behaviour is governed by market conditions, current and

expected. However, property investment calls for high levels of capital investment, from which substantial returns are realised in the long term (Healey, 1992). Berry et al. (1993), echo this, pointing out that real estate assets realise high rates of returns on invested capital, providing value appreciation and protection against inflation. It is therefore not surprising that many developers emerge in periods of boom, when speculation in landed property seems more certain. Investments in property are not limited to local developers; Healey (1991) aptly observes, 'globalization of real estate' has led to international investment. In sub-Saharan Africa, the effects of international influence are evidenced in emerging visions for developments which, as noted by Watson (2013), mirror those in developed cities like Dubai, Singapore and Shanghai. Such visions are likely to be realised, if at all, only through investments by property developers from developed cities which have now reached saturation point in terms of urban land and development (ibid.).

However, developers' reaction to market forces is not without criticism. Pure unadulterated greed (and sometimes ego) has been blamed for developers' actions, with developers being labelled as predatory, profit driven and ruthless in their pursuits (McDonald & Sheridan, 2009). McDonald and Sheridan revealed how in Ireland some developers bribed and convinced councillors to rezone land that was never meant for development (ibid.). Rydin, 2011, corroborates this, pointing out that developers are guided by effective demand, not need, and usually seek land at the right place and the right price to maximise their profits. Such self-interest means that there is disregard for social justice and equity, with the 'haves' having unfair advantage and control over the 'have nots'.

Healey (1998) has noted widespread negative views among politicians and other public officials, who reason that since developers generate a lot of profit from their

investments in real estate, they should contribute some of those profits to help counteract the adverse effects of their developments, for example towards provision of infrastructure and community facilities. About practices in Britain, Crook and Monk (2011) have defined this as planning gain, whereby planning policies enable planning authorities to negotiate with private developers who are seeking building approval for provision of physical and social infrastructure connected to their developments.

Although planners in a market economy have *de jure* dominance over land and resources, with powers to implement ordered space in given jurisdictions, plans do not necessarily precede *de facto* land use. Planning powers have therefore been perceived as 'negative' in that they seek to prevent development. The role of planners seems limited to implementing a predefined '*rational planning order*', setting and trying to enact a vision, devoid of recognition of the '*realpolitik*' of the political economy (Andersen et al., 2015:347). In a capitalist setting, where developers' investments are shaped by market forces, their realities and rationalities (and those of the population being provided for), and those of planning, are often mutually exclusive. Resourceful developers might not be willing to accept guidance in their quest for profitable investment, and yet planning does not always have 'positive' powers to ensure development. Whatever their motivations, private property developers play an important role in shaping urban growth.

b. Corruption in governance

'If a country has laws and institutions, but these do not adequately constrain the state ... corruption is likely to be pervasive since state custodians are not fully constrained by existing laws and hence, can easily abuse their public positions for private gain' (Mbaku, 2010:71)

A widespread system of informality is known to exist in African societies, and corruption is among the most rampant informal practices. It is embedded in daily governance, and routine administrative practices foster and accommodate the practice (Blundo and Olivier de Sardan, 2006).

There is consensus that corruption is the abuse of public power for private benefit; a practice that hinges on practices by people attempting to subvert or undermine existing rules to generate extra-legal income (Nye, 1967; Khan 1996; Friedrich, 2002; Bayart, 2009; Mbaku, 2010; Transparency International, 2015; among others). Nye defines corruption as *'behaviour that deviates from the formal duties of a public role (elective or appointive) because of private-regarding (personal, close family, private clique) wealth or status gains'* (Nye 1967:416). Similarly, Khan (1996) defines it as *'...behaviour that deviates from the formal rules of conduct governing the actions of someone in a position of public authority because of private-regarding motives such as wealth, power, or status'* (p.12). Both these definitions use the term *'behaviour that deviates'* in their definition, which poses a problem when and where corruption tends to be the norm rather than the exception. For this paper, Friedrich's (2002) definition of corruption makes most sense; *'...corruption may therefore be said to exist whenever a power holder who is charged with doing certain things, that is a responsible functionary or office holder, is by monetary or other rewards.... induced to take actions which favour whoever provides the reward and thereby damage the group or organisation to which the functionary belongs, specifically the government'* (p.15). This is echoed by Transparency International (2015) in their definition *'...the abuse of entrusted power for private gain. It can be classified as grand, petty and political...'* This definition encompasses anyone entrusted with power, from those in high offices, to low level officials. It covers widespread and systematic corruption,

which has become a basic mode of operation in some states. This definition is especially apt for this paper, because as Chabal and Daloz (1999) have noted, '*...corruption is not just endemic but an integral part of the social fabric of life in the African continent*' (p.99). This is echoed by other scholars, who concur that everyday corruption or petty corruption is part of the social landscape in Africa, indispensable for survival in post-colonial economies (Olivier de Sardan,1999; Bayart,2009). Mbaku (2010) has noted that corruption is the biggest constraint to Africa's development efforts. Suffice to say, corruption in urban growth management systems impacts on the effectiveness of the systems in promoting and steering private developers.

Types of corruption

Blundo and Olivier de Sardan (2006) have coined the term '*complex of corruption*' for '*all practices involving the use of public office that are improper – in other words, illegal and/or illegitimate from the perspective of the regulations in force or from that of users – and give rise to undue personal gain*' (p. 6). Such corruption includes practices such as nepotism, abuse of power, misappropriation, and influence-peddling, among others. According to Blundo and Olivier de Sardan (2006), amongst the basic forms of corruption is the payment of unwarranted fees for public services, where users of a public service are forced to pay for an otherwise free service or over and above the official fee to officials ('overbilling'). Alam (1989) noted that state regulators may exempt entrepreneurs from compliance with laws and regulations to reduce their costs, in exchange for proportionate monetary rewards.

According to Blundo and Olivier de Sardan (2006), impunity, another form of corruption, mostly arises from clientelism. Goodfellow (2013) found that persistent

political interference in Uganda impacted on the effectiveness of planning, with impunity extended to elite and popular groups who could give financial or electoral incentives to the politicians. In systems where impunity prevails over sanctions, implementation of laws and regulations is ridiculed; isolated implementation of laws and regulation is a penalty for failure to show allegiance, or refusal to pay up, or any other motivations that have little to do with just enforcement (ibid). Again, this type of corruption could explain how developers get away with non-compliance with planning laws and regulations.

Just as there are rules in formal practices, there are multiple rules in informal practices. Corruption in governance is an informal collaboration between state agents and the public, which undermines the functionality of government systems. It is a complex informal system lurking under the formal system, a mode of governance that works according to its own moral compasses and ethical codes. It is acknowledged that corrupt transactions are by mutual agreement by the givers and the takers, an outcome of a market with informally developed structures (Anders, 2005; Blundo and Olivier de Sardan, 2006; Olivier de Sardan, 2008; Mbaku, 2010).

This paper considers whether non-compliance with planning laws and regulations can be understood not as the individual acts of those 'short-circuiting' planning regulation, but rather as a systemic effect of governance practices that deliberately produce 'grey areas', within which there are possibilities for future developments of uncertain legal status.

Data generation

This research relied mostly on qualitative data from participants. Information was gathered from interviews with senior planners, frontline planners and developers. In total, there were qualitative interviews with 44 participants, comprising 14 planners, 4 planning consultants, 4 relevant government agents, and 22 developers (or their agents).

All participants have been given codes to preserve anonymity (see table 6 for codes);

Participant codes (Author, 2014)

Participants	Code
Senior Planners	SP
Operational Planners	OP
Planning Consultants/Advisors/Other government agents	PA
Developers	DV
Developers' Agents	DVA

Shortcomings in governance

a. Political influence and impunity

'... 'Orders from above' is messing up this city; it's messing up this country...'

(Interview SP7).

Political interests do not necessarily foster good practices in the planning system – these are interests that serve a few, but do not necessarily represent the desires of most of the affected population. It is like an invisible governance system working

alongside the official systems, and planners have been rendered helpless by political interference at many levels. Impunity appears to be an accepted way of life:

In this country ... you find that you're in a fix you find somebody to assist you. And most probably you'll not run to a bishop, you'll not run to a pastor, you'll run to a politician... who will fix things for you... (Interview PA13)

According to a retired planner, impunity became rife in the 1990s, following a change in government regime; he reckoned that in the early 1970s people were not carrying out illegal developments because punitive measures, such as demolitions, were being enforced, and also asserted that there were no illegal allocations of land, such as public utility land.

Councillors are supposed to present issues from their wards, such as issues with drainage systems, illegal developments, outstanding title deeds, and illegal invasions of public land. However, planners revealed that some councillors (and other politicians) were using their positions to push their private agendas and interests. Political influence is not limited to the boardroom, but follows planners into their offices and their operations. Today, planners are subjected to political interference as a matter of routine:

.... even in places like up-market areas you will find that you as a professional you're forced to approve something that is not approvable in those areas because of political influence, and there is nothing you can do about it. A call is coming from a high office and you know you don't have a choice. The planning process in Nairobi is very much affected by politics.... (Interview SP7)

Political interference seems to know no bounds, and comprises even those at senior levels in the planning offices. As one private planner and consultant expressed:

The director.... of City Planning works with the mayor, and the mayor asks for a favour for a friend – asks the director to assist in approving a six-storey development in Kileleshwa. The director knows it's bad but not too bad, and through her boss's request '...can you please, assist my friend...' she gets compromised by the political environment she's working in. The mayor is influencing the planner. The mayor uses polite language but sends a strong signal to the director to do what he wants '...kindly assist this person and give him what he wants...'; it's not written anywhere or said in those words, but it's implied that she needs to do what he wants (interview PA14).

Apart from political forces, impunity is also extended by unlawful cartels, such as a group called *Mungiki*, an outlaw group that protects its affiliates and associates from planning enforcement.

What I know in Eastlands, this is Mafia. In Eastlands if I'm a developer and I want to do my three storeys in an area that is allowed ground plus one, and the Karengata² of my estate says, 'no way, I will chop off the chairman's head'.... The chairman will or shall receive threats; '...mind your business - this is my business, mind your business...'. If a phone call is made to that chairman – '...take this, you have children to take care of, this is our Kenya, please don't step on my toes....' What is this phone call trying to communicate to you? (Interview PA14)

² Short for Karen-Langata, a residents' association operating in Karen and Langata high income development areas.

Most of the impunity is extended because money has changed hands, compelling planning officials to turn a blind eye to malpractices by developers, while developers and their agents have become seasoned to making informal payments to buy protection.

Owners 'talk' to the council officials before the building works start. You pay about 60,000 to 100,000 shillings to the council workers, so they will not bother the builders. For example, behind Thika Road Mall I have constructed buildings with seven floors, yet the approval was only for two to three floors. I have also constructed two blocks of six floors each, and one was not even approved.... The plots are only approved for single dwellings and a DSQ (interview DV10).

The evident lack of enforcement, even in areas close to the planning offices, coupled with inconsistent application of relevant laws and regulations, seems to have caused confusion for some developers, and spurred on others who are intent on non-compliance. It is indeed difficult for planners to enforce planning laws and regulations when some developers have 'protection' from people in positions of power and influence, and the remaining developers follow suit in defying planning laws and regulations. This defiance has resulted in widespread uncontrolled development in the city, while the planners look helplessly on.

Planners and developers believed the penalties on developers for non-compliance are not hefty enough to deter developers in their ventures. The Physical Planning Act specifies a maximum penalty of KSh100,000 (about \$1,149), and the court takes into consideration any mitigating circumstances before making a judgement. A developer expressed:

...If you're investing 20 million and you're charged only 100 thousand, you can pay. You can even be charged three times and you keep paying and you continue building... (interview DV9).

DV9 is a serial developer, and a contractor for other developers, and was talking about official penalties once non-complying developers are arrested. Weighed against the likely returns, the official penalties do seem puny; for example, charging 10 flats KSh50,000 per month would net KSh500,000 (about \$5,747) monthly rent as middle income residential apartments. But more than that, the reasons for the penalties are not respected, and developers continue to take risks after planning officials condemn their applications on the ground. Thus, the phenomenon of non-compliance in Nairobi remains unchecked: while the planners appear to tolerate it, or are helpless to stop it, developers appear to be having it their way. In a planner's words, the planning authorities have been proved to be 'barking dogs' with no bite.

There is another element to impunity, which is also a force in its own right, but compounds impunity – corruption. The section below will look at this practice further, and how it stimulates harassment by planners (towards developers).

b. Corruption and harassment

Kenyans have thought that if they want something and they cannot get it, then they can buy their way out (interview SP2).

Engrained corruption was a common theme among participants; corrupt practices, ranging from grubby 'envelopes' exchanging hands at construction sites between planners and developers or their agents, to sophisticated quid pro quo practices in

high offices by powerful and influential people. According to a planning consultant, more than 90% of the middle-income apartment blocks in Eastlands, for example, are owned by rich and powerful people who live in high end residential developments such as Runda, Lavington and Kitsuru – they are the ones with hundreds of million shillings to put up such developments, and who can afford to persuade planning officials to look the other way (interview PA17).

Regarding planning efforts, even government-initiated housing projects, such as the Site and Service schemes, were riddled with this practice – appointed officers turning a blind eye while those allocated serviced plots ignored type plans for single dwellings in favour of storied multiple dwellings. However, when the plots were bought by rich and powerful individuals, who developed storied apartment blocks (interview OP4X), corruption and impunity reared their heads, and other developers, by default, benefited from the same impunity that the powerful people enjoyed.

Planners at City Hall were of the view that Ward Officers in the field were in most cases turning a blind eye (interviews OP1, SP3). They attributed this to the fact that remuneration for subordinate staff is pathetically low, and so there is no official (as opposed to informal) financial motivation. Developers also acknowledged that planning officials are poorly paid, and that this pushes them to harass developers and their agents for side payments. Unofficial payments vary depending on the area and the size of development, and the amount is determined by the results the developer is looking for. In some areas, developers seem to have accepted making informal payments as part and parcel of their investments. Even when they try to comply, when they have approvals from the planning department, they are frustrated by the questionable practices of some planning personnel:

What they do is they just go to the site, collect the money and you keep on building. Some of them protect the illegal construction; they condone it and they even protect it.... they are supposed to report you (interview DV5).

It would appear, therefore, that it is not in the interest of planning officers on the ground for developers to follow planning regulations. A developer, and also a building contractor, revealed how planning officials in the field bluff with enforcement letters, with a view to soliciting informal payments.

Oh yes – they will come with enforcement letters.... Sometimes they say the building should be demolished. I ‘talk’ (*indicated money changing hands*) to the enforcement officer and if we can’t agree, I go to his senior and give however much it takes for them to forget the notices or orders. There are also fake enforcement orders made by council officials just to make money. Sometimes they threaten to demolish but will only come at night because they don’t have court orders to demolish, just to scare the owner so that they can pay up – they might knock down one wall. They can ask for up to 200,000 (*shillings*), and then you negotiate (interview DV10).

Planners reckoned that, because such officers have limited technical knowledge of the planning requirements, they are easily ‘persuaded’ by developers or their agents to look the other way (interviews OP1, PA5). This notion was reinforced by developers, who were of the view that those officials did not seem to have the technical knowhow to inspect or monitor developments, or to support developers. A contractor, who deals with them regularly, had this to say:

Problems originate with the ward inspectorate. They don’t know the building codes but they know about simple issues like dumping, helmets for workers,

scaffolding. They don't know the technicalities of building requirements. They harass developers on the minor stuff (interview DV10).

Such officers feed on the power and fear (of being brought to book) they generate over developers. A senior planner also expressed a concern that planning officers might also be lacking in commitment, instead being more concerned about enhancing their own interests.

At times the quid pro quo is not only in terms of instant rewards, but a long-term game with high stakes. Whatever the case may be, such officers are happy to look the other way:

...This guy is the owner of Equity Bank. He wants offices up there and he buys a big plot, even for one billion, to build his office headquarters. And he asks somebody to approve his plans. And he will ask what is happening to my plans. And this guy [*in the planning office*] will need to go to that big office to get a loan and so forth...³ (Interview OP4X)

Malpractices sometimes cause conflict between planners; there are those who want to do right but are either compromised by political influence and/or pressure, or out of a sense of loyalty to their colleagues. One planner disclosed how, following a field survey, they discovered malpractices by colleagues, which put them in a moral dilemma:

.... now I'm in a place I'm not able to analyse data because if I analyse the data I will put so many people into problems, and they might even lose their jobs (interview SP7).

³ It implied a **quid pro quo** arrangement

Before the online system for planning approval was introduced, there were middlemen prowling the corridors in the planning offices at City Hall who were adept at progressing applications from developers because they had established a rapport with officers in the planning sections – it was an industry created by those who wanted to mint money out of the developers, and by developers who wanted shortcuts in getting planning approval. Although the middlemen are being phased out by the online system, there are still pockets of solicitation of funds from developers and/or their agents.

Corruption is not one-sided though, and developers have a large part to play in it. According to DV10 (contractor/developer), when developers are complying and are not afraid to challenge harassment from the field officers, they are left alone.

I tell the foreman to give them my telephone number if they come to the site – they either leave a letter or call me. If they call, I ask them in which department they work and where can I report at city hall, so that when I go to city hall I'll be told what my problem on the site is. Most of them disappear, unless it's a genuine case, like you don't have a sign board, and [then] we have to pay for it (interview DV1).

'Disappearing' officers could well be explained by the notion that there are rogues who canvass building sites and departmental halls, homing in on vulnerable and desperate developers – they would not wish to be under scrutiny by the county.

Some don't even have offices. In fact, sometimes those people who left city hall a long time ago, sometimes you see them around harassing people, saying they are still employed by the council (interview DVA1).

Developers are harassed for payments, but they cannot claim to be innocent in all this. There is evidently joint-working with the planners to beat the system, and together they seem to be chipping away at it, while at the same time demonstrating consciousness of general guidelines.

The people on the ground are also careful - they will only support you if you're working within the harmony of the area. For example, even if you pay them and you want to put up apartments in Karen, they'll not allow you because their job will be on the line. They'll turn a blind eye within the realm of what is allowed in the area. They're not totally blind...(interview DVA6).

Indeed, they are not totally blind, and there are lines that cannot be crossed in terms of development. As DVA6 pointed out, for example, it would be difficult to ignore apartment blocks in an exclusively single dwelling residential area like Karen. Therefore, there is selective blindness, more pronounced in some areas than others. This could be for any number of reasons; problems in and of 'unmapped' areas, the vastness of non-compliance issues in those areas, not forgetting limited resources for planners.

As one planner aptly said:

.... City hall will not bribe itself; the officers who are being bribed will not bribe themselves, and they will not be bribed by other officers – they will be bribed by developers.... Because if you are willing to comply with the law why would you like to bribe? (Interview SP4)

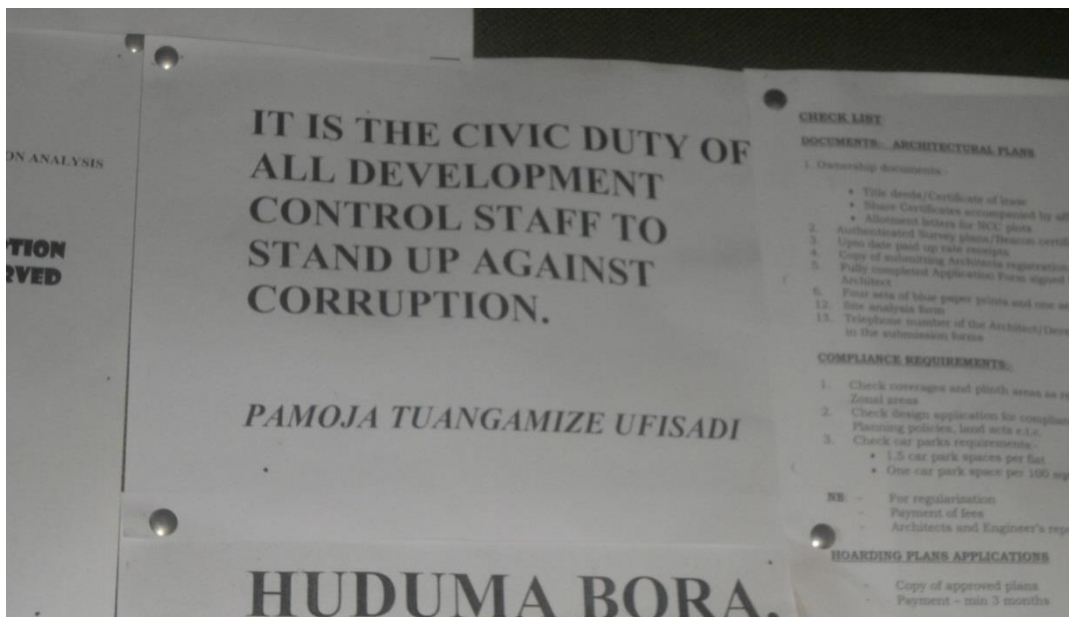
A senior planner told of how one developer went berserk in the planning office because he could not understand how the planner could say no to his 'gift' of money,

which was more than the planner makes in several months (SP7). However, there are those planners who will not turn such an offering away, and this fuels developers' belief that they can buy planners' loyalties. Planners in City Hall perceived their remuneration to be relatively low compared to other government sector workers, and several believed that unless salaries were reviewed, they would remain easy targets and prone to temptation by developers (interviews SP2, SP7, OP3).

.....a lot of the development we saw in this Upperhill area, we found the council officer is aware of the provisions of the law and regulations, but when he's put against the developer and the type of financial power the developer seems to command, the council officer simply melts, and it comes to a level where you're saying '...so what do you want?'.... (Interview PA4)

The quagmire that is corruption is a product created by both planners and developers, and the powers that be are aware of this.

Whichever side corruption emanates from, it has eroded the values of the planning function in Nairobi. It is not just that the majority of contravening developers are not known to the authorities, but also that those known can get away with it. Even when they are called to face the consequences, for example with planned demolitions, they run to the politicians for protection. Attempts have been made to eradicate corruption in the city county. Evidence of these attempts was seen in the county planning offices; for example, notices to members of the public cautioning them against paying bribes, and cautioning planners against accepting bribes (see Figure 24).



Translation of phrases in the poster;

'Pamoja tuangamize ufisadi' - Together we overcome corruption

'Huduma bora' - Excellent service



Figure 2: Notices at City Hall (Author, 2014)

The posters were put up amid cries of 'reforms' after the new Constitution came into effect in 2010. The posters are all well and good, but as witnessed in one of the offices in the course of this research, developers and planners are still engaging in corrupt practice; one developer was expressing anger at a planning official because he had apparently informally paid KSh200,000 (about \$2,299) to a planning officer who had been recommended by a councillor to process and progress his application for approval, but this had not materialised. What was interesting about this case was that the developer was not upset because he had paid extra informal money for the approval, but because he had not got the approval – he would not have minded paying extra for it.

Thus, the same people who were crying 'reforms' were the ones behind corruption, even when reforms are implemented. For example, at the Ministry of Lands, Housing and Urban Development, the Constitution facilitated a change in governance in relation to land administration, establishing a new Land Commission to oversee land

administration. However, the new Commission inherited most of its staff from the ministry. To borrow a participant's words:

It's just like you have a black shoe, and you turn the colour to brown. And that shoe is not different (interview PA8).

PA8 is right; it will take more than shuffling of staff – it will take a change in culture across the board to tackle corruption. The question is, do people want to change the culture or they are happy and comfortable with it (the human inertia referred to by Connor (1998))? The evidence suggests that there is insight into the scale and depth of the problem. It also suggests that there is some will to eradicate it. However, it also suggests that corrupt practices have become an accepted way of life in the planning system.

It was surprising that there was no denial of this on the part of planners – they acknowledged corruption as a cancer that devours integrity and ethical practices in the planning system. What was even more surprising was the high level of tolerance by the public, despite open invitations to object to such practices. And there lies the difficulty; on the one hand are the developers, who even while complaining about corrupt officials seem to have developed a mind-set that it is the only way to get results, and on the other hand there are planning officials who are only too happy to oblige. From small bribes to poorly paid officers looking to supplement their incomes, to sophisticated backhanders to those in positions of power, who ultimately want to accumulate and protect their wealth and positions – the cancer that is corruption persists and spreads. The negative impacts of corruption are known, yet it is accommodated and tolerated by the same people who claim to hate it. It would take a change in culture between the stakeholders to eliminate this practice. Developers'

agents should not have to factor in 'kickbacks' to planning officials while negotiating their fees, and those messages of anti-corruption practices which line the walls in county offices should count for something. It would appear that messages are put there so that the county can be seen to be fighting corruption, but in reality, not much is done to fight it. For any fight against this practice to be effective, it would have to start from the people in powerful positions. They need to lead by example, because otherwise it becomes difficult to advocate changes in culture and to enforce from within if conviction is not demonstrated.

There are myriads of reasons for this practice; for example, planners capitalising on fear and the possibility of retribution to hold power over developers, impatient developers who are happy to 'buy' their way through the system, middlemen only too willing to oblige, and the ignorance of field staff, coupled with a desire to supplement their low incomes. As one participant said:

You know allegations of corruption and impunity – these are situations that arise out of a vacuum or out of lack of proper ways of doing things. The moment you plug them, you also eliminate (interview SP3).

The problem is, there is evident lack of will or determination to eradicate this practice, starting from high offices, through to lowly paid staff in the field, and including developers. A willingness to change would have to be cultivated consistently and persistently over time. In the meantime, a major challenge to planning practice is that developers are not deterred in their development ventures, either because they have some protection (political or otherwise), or because they can 'buy' their way out of any impediments. The parallel organisation referred to by Anders (2006) and Mbaku (2010) has strongly rooted itself, undermining any efforts to eradicate corruption.

c. Poor joint working with developers, other government agencies and departments

'... the challenge is to develop more inclusive and effective forms of planning, rather than to give up on it all together' (Goodfellow, 2013:84)

Developers aired their frustrations that planners did not seem to pay any heed to their concerns, and so the planning department did not complement their efforts.

According to them, they were not effectively consulted for suggestions, and their complaints were ignored. A Kenya Property Developers Association (KPDA) representative complained that, although they were supposed to have meetings with planning officials twice a year, the meetings were not happening:

On their part...I think they're just too busy. We're trying to reschedule because we like to keep them on track but sometimes it's difficult.... we haven't had one in over a year...because of schedules and excuses and all sorts of things.... (Interview KPDA)

According to a KPDA representative, the organisation writes policy review documents and provides capacity training for its members i.e. it responds to the different capacity needs of the industry. Regular consultation meetings with the planners could therefore be quite productive for both planners and developers. Although there is some scepticism amongst planners that KPDA members just lobby for their own interests, it cannot be denied that even as they pursue their interests, they would be pushing planners to come up with good policies and general practices in planning that could benefit all. A senior planner acknowledged:

They can lobby for infrastructure, they can lobby for quicker approval processes, they can lobby for efficient and effective enforcement mechanisms (interview SP4).

It is through such forums that civil society organisations and other professionals in the industry could contribute to the evaluation and review of the planning system. As one developer aptly noted:

I don't think that in the building industry, that development is a preserve of the planner. There are times when the engineers are right, there are times when the architects will be right....and a developer often has a respectable view about what he thinks ought to be (interview DV1).

Developers' agents also complained that there are no avenues to give feedback to planners or to appeal decisions:

.... planning in Kenya is still housed within the government. We have not really become a planning society where we are so informed about the structure of planning and where, when you feel aggrieved, where you can go.... (Interview DVA4).

Making developers' agents, especially architects, structural engineers and even building contractors, more accountable would help to reduce the number of county planning staff required to monitor developments. However, at present there is no code of ethics for these professionals. As it is now, the system has created a 'new normal' of ignoring rules and regulations, and developers' agents are turning a blind eye as much as the planners - in practice, developers are aided and abetted by

professionals who should be guided by their professional ethics, but are not in part because planners do not acknowledge their value in influencing actions (or non-actions) by developers. One suggestion by a senior planner was to require:

..... that every development that is coming up in this city... has an architect on record. Just the way if you go to court you wouldn't find any case going on without an advocate on record.... *[then]* if one architect pulls out and puts it very clearly why he's pulled out.... then any other architect will find it very difficult to come in because the guidelines are very clear to all and sundry.... the architect should be able to tell the developer, even if you move to the next architect it doesn't mean that he's going to get preferential treatment in city hall.... (Interview SP3)

Developers' agents are potentially a powerful ally for planners in that they are in contact with developers, but may be more inclined to make sense of reasonable laws and regulations, than their clients. It is in the interest of such agents for developers to seek and gain approval, because then they are more likely to get commissioned for their input. As one agent put it:

.... if you *[a developer]* come to me *[because]* you want to develop a plot, I should have a question '...have you attended the council training before you came to me?' And I can't draw a plan for a person who has not attended, because the plan will not be approved by the council. And maybe at the same time there is a form which I will sign, or there will be a form that will be attached to your plan to say that you've attended the training (interview DVA5).

The theme of poor consultation is visible not only with respect to the public, but also between the planning department and other government agencies and departments that work towards similar ends. For example, it would appear that there are four government departments which are operating in the same space and on the same principles: the Physical Planning Department at the Ministry (whose remit includes land management, physical planning and implementation), the City Government (which houses another Department of Physical Planning), the Ministry of Local Government (mandated with developing urban development policies and assisting with planning), and the Ministry of Nairobi Metropolitan Development (mandated to give technical support and resources for planning and implementation). Granted that these bodies have different roles, but there is a lot of overlap in their remits. More coherent joint-working and amalgamation of resources could mean increased efficiency in service provision.

Apart from the wider government departments, there are also overlapping departments concerned with planning. For example, for the Site and Service projects, responsibility was given to a newly created department of Nairobi City Council (now Nairobi City County) called the Housing Development Department (HDD), which was based in Dandora. Problems started when, after the council stopped implementing the schemes, the HDD offices remained and were accessed by developers in the Eastlands of Nairobi, which were not part of the Site and Service schemes, for advice and planning applications. Given the extensive demand for developments in Eastlands of Nairobi, it makes sense to keep the former HDD office in Dandora open to the public as a way of decentralising the planning department. What does not make sense is that it seems to be operating within separate guidelines whilst controlling developments in the county's jurisdiction.

The Physical Planning department at the Ministry of Lands, Housing and Urban Development has a total of 31 qualified physical planners, spread out in Development Control, Policy Planning, Local Planning, Regional Planning, Forward Planning, Research and Development (interview PA11). So, whilst the Planning Department at City Hall is struggling due to a shortage of qualified staff (with a lot of employees doing the wrong jobs), the Physical Planning Department at the Ministry, which is privileged to have graduate planners, has a duplicate section, which unfortunately works independently from that at the county planning department. The planners in the Physical Planning department at the Ministry were criticised because, for all their qualifications, they do not seem to add much value to the functions of planning by the county; it was alleged that they discharge their duties from the comfort of their offices, without going to sites or bothering to authenticate the county planners' work.

A senior planner at the Ministry of Lands and Housing asserted that they can demand accountability from the city county regarding illegal developments:

Of course, in terms of advising we do have power. If we're not satisfied, we can require the council to stop those developments (interview PA11).

However, in practice this accountability channel does not appear to function. PA11 pointed out that approval for change of use is regarding the land, not the actual development, and time lapses between approval and development make it difficult to follow up and enforce the approval and its conditions. Like his counterparts in City Hall, he too blamed institutional incapacity to enforce, claiming there were not enough physical planners to monitor development.

Relations between the Lands Office and Planning Departments (both at the county and the Ministry) could also be better. When these planning departments approve a

development, the application is then submitted to the Commissioner of Lands. However, the Government Land Act and the Survey Act do not recognise the PPA2, the Physical Planning Act instrument used for notification of approval – the Physical Planning Act is considered weak because it does not give instructions regarding land administration (interview SP1).

There has also been some controversy between planners and their peers in the Estates Department of the ministry, with regards to the new Built Environment Bill. Government planners, as opposed to private practitioners, were opposed to this bill, claiming that they already had the Physical Planning Act to guide them. As a result, they did not want to team up with others in the formulation of the new law. According to colleagues in Estates:

It's because planners want to control planning and the use of land. Because that's where investment is, that's where the money is. They want to control that themselves, they don't want others involved (Interview PA2).

It is not only in ministries and planning departments that there is overlap and rivalry, but in subsidiary departments as well. For example, Nairobi City County, Nairobi Water Company, and the Kenya Power Company were operating with different 'master plans'⁴ (interview OP2). It would have made more sense for the different agencies to ensure their programmes are compatible and then team up in implementing their plans and in operations.

Clearly, developers do not necessarily apply for development approval because they believe in the relevance of guidelines for a sustainable environment or the effects of

⁴ This is in reference to organisational programmes and strategies rather than the city's land use masterplan

their development on infrastructure, but because getting approval may be a prerequisite for, for example, funding applications to financial institutions (interview OP1). Planners would therefore do well to forge and foster relationships with such institutions, as this could potentially improve compliance with planning laws and regulations amongst developers. Such institutions need not be involved for technical reasons, but because of their ability to exercise leverage over their clients and to liaise with the relevant planning section if they have any concerns.

What frustrates developers and their agents is that the different departments, such as water, public health, electricity and roads, are aware of developments, yet when it comes to guidance and the provision of infrastructural services they are not very proactive or supportive. This begs the question why planners have not attempted to rectify it by improving coordination between the departments involved in planning approval. For example, the planning department gives approval, subject to approval by the National Environment Management Authority (NEMA). But every so often NEMA has been known to turn down applications due to environmental implications, after the planning department has given development approval. A developer provided an example:

...There's a project I'm involved in – the scheme for 2000 apartments has already been approved. After we got the plans approved we went for EIA. There was a sewer passing through, and they said we have to cut our project by so many houses, and we had already got the approval... There was a sewer, there was a river – two things. Where the sewer was passing, from the river, instead of the sewer following the river there was space and in between the sewer and the river we had some developments. These people were

arguing that from the sewer to where the river was there should be no developments.... (Interview DVA1)

DVA1, among others, thought that the process would work better if all departments, including NEMA, gave their approval before the final approval from the planning department. They found it frustrating that NEMA could fail to approve a development after the planning department had passed it. They also felt that there was an overlap in the roles these departments were playing, and that the process could be more streamlined to avoid duplication. NEMA does its own research, for example, on alternative means of sewage disposal, so could advise and guide the planning department in zoning guidelines reviews, but there does not seem to be joint-working between them in this respect (interview OP2). This is frustrating, not only to forward thinking developers, but also to planners, who have to answer questions from developers, as one operational planner commented:

...there are also alternative methods of sewer disposal – there are these things we're calling the bio-digesters; those are things we're supposed to look at. If there is no trans-sewer and the developer is willing to use them...NEMA has studied those things and it has several models that they have approved. And I hear they work just as well. I know they're able to recycle water, I hear they're very effective... (Interview OP2).

Occasionally such technology is applied, for example in parts of Kileleshwa in zone 4 (where there is no sewer line) (interview OP2), but it could easily be rolled out to different areas to meet the needs of the growing population.

Conflicting interests within and between different departments have so far undermined effective joint-working. There seems to be lack of trust between

planners and other stakeholders: developers do not believe that planners have their best interests at heart, planners feel undermined by other professionals, and other professionals believe planners want to hold all the power for selfish gains.

Conclusion

'... there is a role for planners in balancing the workings of the capitalistic market in property development for the middle-income group' (Author, 2015)

Governance of the planning system in Nairobi is clearly not effective, and the results are visible for all to see. The *'weak nature of the state and governance regimes'* alluded to by Jenkins and Anderson (2011) is clearly at play.

Forester (1982) aptly noted that planners find it difficult to ignore those in power, because to do so may render them powerless. His argument that private economic actors and/or politics can overwhelm planners has been affirmed by this paper; politicians and other influential people do often undermine planning efforts. The impunity for developers that results affirms that planning responds to pressure from various sources (Adam and Watkins, 2008; Rydin, 2011). Also, as noted by Chabal and Daloz (1999), 'the big man' patronage system (and the manipulations it allows), which is characterised by interdependence between leaders and the general population, is present in Nairobi, like elsewhere in Africa.

Corrupt practices are two-sided and deeply engrained: developers offer informal payments to expedite the approval process, while middlemen and poorly paid planning staff are only too willing to oblige. Self-serving interests breed corruption and impunity, and unfortunately, influential people in positions of power have been

implicated in such practices. It is indeed difficult to enforce or mete out justice if there is selective toleration of corruption and impunity. It is even more difficult when the very people who are entrusted with power are making a mockery of the best practices they are supposed to be promoting, and are involved in violations.

There is an inherent lack of trust between planners and developers in Nairobi: planners on the one hand strictly lay down the law, but are frustrated because developers are defiant of the regulations, and on the other hand developers (and their agents) are bewildered and frustrated because they do not understand or follow the rationale of planning. The two groups have not developed common ground to discuss and resolve development control issues and concerns, and neither is happy with the workings of the other, to the detriment of the city-scape.

Although there is no trust between planners and developers in Nairobi, they do, nevertheless, collaborate informally and have developed a 'parallel order' (as alluded to by Anders, 2005), which tolerates non-compliance. There is a spirit of entrepreneurship amongst developers in and for middle income group, as well as resources (finance, skills and influence) that could be accessed by planners to complement their planning efforts. However, mistrust and self-serving interests stand in the way of joint-working.

Whilst the ideology of planning purports that local authorities have power over development, the reality is that private capital drives and directs what happens in the city. It stands to reason that developers present an untapped resource that could work collaboratively with planners and policy makers - incorporating them strategically by respectful inclusion could change cityscapes for the better.

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