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socio-economic rights institute
of south africa

URBAN LAND REFORM a proposed approach to urban tenure security

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Summary

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Hanns
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URBAN LAND REFORM

a proposed approach to
urban tenure security

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Introduction

The Nelson Mandela Foundation commissioned a series of papers on urban land reform in April 2019. Their aim was to inform debate about and propose a feasible approach to urban land reform which could, in the near future, be implemented. This document is a summary of the Socio-Economic Rights Institute's¹ paper on urban tenure reform.

The paper adopts Section 25(6)² and Sections 26 (1), (2) and (3)³ of the Constitution as its starting points. Shortly after the Constitution was enacted, a set of tenure security laws were enacted to give immediate effect to Section 25(6), pending the development of legislation providing permanent, positive rights.⁴ The Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act), which gave effect to section 26(3), is one of these laws. The long-term legislation has not yet been developed.

¹ SERI is a registered non-profit organisation and public interest law clinic that provides socio-economic rights assistance to individuals, communities and social movements.

² "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress."

³ Section 26(1): "Everyone has the right to have access to adequate housing".

Section 26(2): "The state must take reasonable measures, within available resources, to achieve the progressive realisation of this right".

Section 26(3): "No-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

⁴ See Kingwill, R., Royston, L., Cousins, B. and Hornby, D. "The Policy Context: land tenure laws and policies in post-apartheid South Africa." in *Untitled: Securing Land Tenure in Urban and Rural South Africa* edited by Donna Hornby, Rosalie Kingwill, Lauren Royston and Ben Cousins. Durban: UKZN Press, 2017.

Starting points informing the approach

The paper provides the following starting points for urban land tenure reform which both frame the debate and set the parameters for the proposals:

- **Constitutional alignment:** Equitable access to land, legally secure tenure, the progressive realisation of the right of access to adequate housing and protection against arbitrary evictions should be addressed in law and policy.
- **Protection against arbitrary eviction:** A significant body of case law has developed in relation to evictions and a set of legal principles about evictions and alternative accommodation now exist, including procedures for lawful eviction, alternative accommodation provision and meaningful engagement.⁵
- **The dominance of registered, individual title:** Urban (and rural) tenure policy privileges transfer of title in freehold ownership, even although there is a commitment in housing policy to tenure choice.⁶ A proactive plan for urban tenure reform does not yet exist. While the dominant system of property rights works for middle class and wealthy households, it is not effective for the majority of poorer South Africans.⁷ No formal alternatives exist for urban poor households except entry into the formal property system via a housing subsidy project.
- **Tenure diversity and tenure security continuum:** Because registered title dominates both discourse and delivery, the *de facto* tenures through which most people hold land lack recognition. In response to the dominance of individual title as a security of tenure intervention globally, the Global Land Tools Network advocates the idea of a tenure continuum to express the range of tenure forms.⁸ The former Special Rapporteur on adequate housing reported on tenure diversity or multiple tenure arrangements characterising reality “on the ground”, arguing against individual freehold as an ideal type of tenure or as the ultimate goal of tenure security.⁹
- **Recognition of off-register tenures:** Hornby *et al* estimate the number of people living outside the registered property system to be in the region of 60%,¹⁰ and call this system of land access “off-register” or social tenure. Multiple tenures co-exist in “off-register” situations in communal areas, commercial farms, informal settlements, backyard shacks, inner city buildings and RDP houses without title or with outdated title. Recent research findings constitute a body of evidence¹¹ that offer insights into how off-register tenure operates. This understanding is a requirement for increased recognition.

⁵ See Clark, Clark, M. and Wilson, S. *Evictions and Alternative Accommodation in South Africa 2000 – 2016: An analysis of the jurisprudence and the implications for local government*. Socio-Economic Rights Institute (SERI), 2016.

⁶ See Kingwill, R., Royston, L., Cousins, B. and Hornby, D. “Introduction: tenure concepts, practices and theories in South Africa.” in *Untitled: Securing Land Tenure in Urban and Rural South Africa*. Durban: UKZN Press, 2017. p8

⁷ Ibid.

⁸ UN-Habitat. *Handling Land: Innovative tools for land governance and secure tenure*. Nairobi: UN-Habitat, 2012.

⁹ United Nations Human Rights Council. *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, Raquel Rolnik, Human Rights Council. Twenty-second session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development 24 December 2012, A/HRC/22/46.

¹⁰ Hornby *et al*, 2017, Introduction.

¹¹ The body of evidence is by no means exhaustive. These findings and implications draw on research and advocacy from Urban LandMark, the Tenure Security Facility Southern Africa, the LEAP collective and SERI.

Urban tenure reform proposals

Having sketched the key points of debate and outlined the parameters informing the work, the paper then makes the following recommendations¹² for urban tenure security:

1. Realise the rights of access to adequate housing and secure tenure
2. Make better use of existing instruments
3. Recognise off-register tenures
4. Reform land administration

Realise the rights of access to adequate housing and secure tenure

In order to realise the rights of access to adequate housing and secure tenure, municipalities should proactively plan and budget for a reasonable response in housing chapters of integrated development plans (IDPs), including alternative accommodation provision. The National Department of Human Settlements, through revisions to, or rewriting of, the White Paper on Housing and the Housing Act, should ensure a reasonable housing policy in line with *Grootboom's* precepts. Provincial departments and municipalities should make better use of the EHP for alternative accommodation provision. The national Department of Human Settlements (DHS), the Social Housing Regulatory Authority (SHRA) and municipalities should cooperate to establish effective management systems for alternative accommodation. Two priority interventions for affordable access to land and accommodation to people in the most desperate need should be an affordable rental accommodation programme and Upgrading of Informal Settlements Programme implementation. In respect of the former, an existing instrument, the Community Residential Unit Programme (CRU), should be resuscitated for public rental provision. Alternatively, or additionally, social housing needs to “go deeper down market” using value capture financing mechanisms and inclusionary housing requirements in the Spatial Planning and Land Use Management Act (SPLUMA). Finally, the Department of Rural Development and

Land Reform (DRDLR) in consultation with DHS should review the Interim Protection of Informal Land Rights Act (IPILRA) for its application to urban areas and to make it permanent legislation.

Make better use of existing instruments

The recommendation to make better use of existing instruments is primarily directed to the Department of Human Settlements, Water and Sanitation and related housing institutions in respect of the legal and policy review currently underway. The recommendation entails working within the existing property system or what has been called “conforming to the requirements of the edifice”.¹³ In order to create the conditions necessary for more affordable rental, targeted at the below R3 500 per month household income bracket, the department should direct its attention to both existing and new rental housing stock. Curbing unfair rental practices, including unreasonable rental costs, should be the focus of the former, while the creation of new affordable rental stock is an important intervention to address the underlying reasons for building occupations in well located, inner city areas. Three policy instruments are available to the department: a rental policy framework and rental norms and standards; the Social Housing Programme; and the CRU Programme. Inclusionary Housing is a fourth, emerging instrument potentially available with a legal basis in SPLUMA. For existing rental stock, the DHS and SHRA should ensure that fair practices are addressed in the norms and standards of the Rental Act and that the policy framework accommodates truly affordable (public) rental including subject subsidies. For new rental stock, the DHS and SHRA need to resolve the future of CRU or, alternatively, the mechanisms required for social housing to be affordable. Finally, a more systemic review is required regarding the title deed backlog in subsidised ownership housing than has been conducted to date.

¹² Building on the approach to intervention developed in the Tenure Security Facility Southern Africa; the results of SERI's review of the evictions case law and informal settlement action research series; the categorisation of intervention provided in the publication *Untitled*; and proposals about law reform emanating from the High Level Panel report, LandNNES and the Presidential Advisory Panel.

¹³ Kingwill, R., Royston, L., Cousins, B. and Hornby, D. “Conclusion: Beyond the ‘edifice.’” in *Untitled: Securing Land Tenure in Urban and Rural South Africa* edited by Donna Hornby, Rosalie Kingwill, Lauren Royston and Ben Cousins. Durban: UKZN Press, 2017.

The Department of Public Works also has a role to play in making better use of existing instruments, as it is responsible for land expropriation. Expropriation should be used to secure the tenure of a person or community living without it because of past racially discriminatory laws or practices. They should be able to request the Minister to consider whether to expropriate the land on which they reside for their benefit.

Recognise off-register tenures

This paper recommends that off-register rights in informal settlements and inner-city occupied buildings should be increasingly recognised through legal and administrative means. Three possible options exist:

- Implement options for legal and administrative recognition of occupation
- Legalise unlawful land use
- Develop local land records

Framing administrative or legal mechanisms may require the innovative application, and perhaps enhancement or adaptation, of existing laws and practices. Planning law and local land management arrangements are generally useful starting points.¹⁴ Options for legal and administrative recognition include municipal council resolutions, extending infrastructure, provision of basic services, occupation letters, occupancy registers, shack enumerations, block layouts, utility bills, and so forth.

SPLUMA contains potentially progressive provisions for legalising informal settlement land use. SPLUMA and municipal planning by-laws should be used to

legalise unlawful land use through the special or transitional zones provisions as well as the provisions for incremental development areas.

Municipalities and civil society should pilot the development of local land records. Possibilities exist for innovation in recognising them legally. For example, it may be possible to write land records into SPLUMA zoning regulations.¹⁵

Reform land administration

While the previous recommendation can go some way towards improving tenure security in off-register contexts, the Land Administration reform proposals recognise that more fundamental transformation of the property system is required to legally recognise off-register rights. Law reform is a notoriously long-term project¹⁶ and more immediate benefits that secure the rights of occupiers require working “in the meantime”¹⁷ (the second recommendation above) and within the constraints of the current system¹⁸ (the first recommendation above). The High Level Panel report recommended the introduction of a Land Records Act to allow for the development of alternative systems of record keeping: enumerating rights, adjudicating rights, developing new systems of evidence to validate rights and developing systems of dispute resolution.¹⁹ Subsequent to the proposals on land records that went into the High Level Panel recommendation for a Land Records Act, the Land Network National Engagement Strategy (LandNNES)²⁰ research proposed the need for a Land Administration Act, of which recording off-register rights would be a part. Similar proposals are contained in the Presidential Advisory Panel report.

¹⁴ Royston, L. “In the Meantime ... Moving towards secure tenure by recognising local practices”. in *Trading Places: Accessing land in African Cities* edited by Mark Napier, Stephen Berrisford, Caroline Wanjiku Kihato, Robert McGaffin and Lauren Royston. Somerset West: African Minds, 2013.

¹⁵ See for example the proposals ULM made to the City of Johannesburg in this regard in Royston, L. *Promising Practices: a guide on incrementally securing tenure in Southern Africa*. Urban LandMark, 2013.

¹⁶ Berrisford, S. “Getting land governance right in sub-Saharan cities, more than land administration.” in *Trading Places: Accessing land in African Cities* edited by Mark Napier, Stephen Berrisford, Caroline Wanjiku Kihato, Robert McGaffin and Lauren Royston. Somerset West: African Minds, 2013.

¹⁷ Royston, L. “In the Meantime ... Moving towards secure tenure by recognising local practices”. in *Trading Places: Accessing land in African Cities* edited by Mark Napier, Stephen Berrisford, Caroline Wanjiku Kihato, Robert McGaffin and Lauren Royston. Somerset West: African Minds, 2013.

¹⁸ What *Untitled* calls “conforming to the requirements of the edifice”: Hornby *et al*, 2017.

Parliament, *Report of the High Level Panel on the assessment of key legislation and the acceleration of fundamental change*, 2017.

²⁰ LandNNES is a consultative civil society platform which brings together members with a common medium-long term perspective to create a force that increases possibilities for People Centered Land Governance.



Conclusion

In conclusion the paper identifies the following short-term actions that could be undertaken to operationalise the proposals:

- To operationalise the law reform proposals: land records test cases should be developed that contribute to building land records legislation from the bottom up.²¹ This could be done in partnership with LandNNES and/or specific NGOs in the urban sector.
- To operationalise the proposal to make human settlements law and policy constitutionally compliant: The white paper and legislative process envisaged for the current financial year in the DHS should incorporate urban land reform.
- To recognise off-register rights, the recommendation is that the DHS, DRDLR and the South African Local Government Association should partner with nonstate actors to push the limits of official recognition and extend the promising practices and innovative approaches that already exist. An urban land reform laboratory should chart the lessons that emerge from:
 - land records test cases;
 - participative informal settlement upgrading implementation; and
 - SPLUMA zoning to legalise informal settlement land use.

²¹ Kingwill R. "Inclusive Land Administration in the context of people-centred land governance." Discussion document for LandNNES, 2019.

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