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URBAN TENURE SECURITY

A PROPOSED APPROACH TO
URBAN LAND TENURE REFORM

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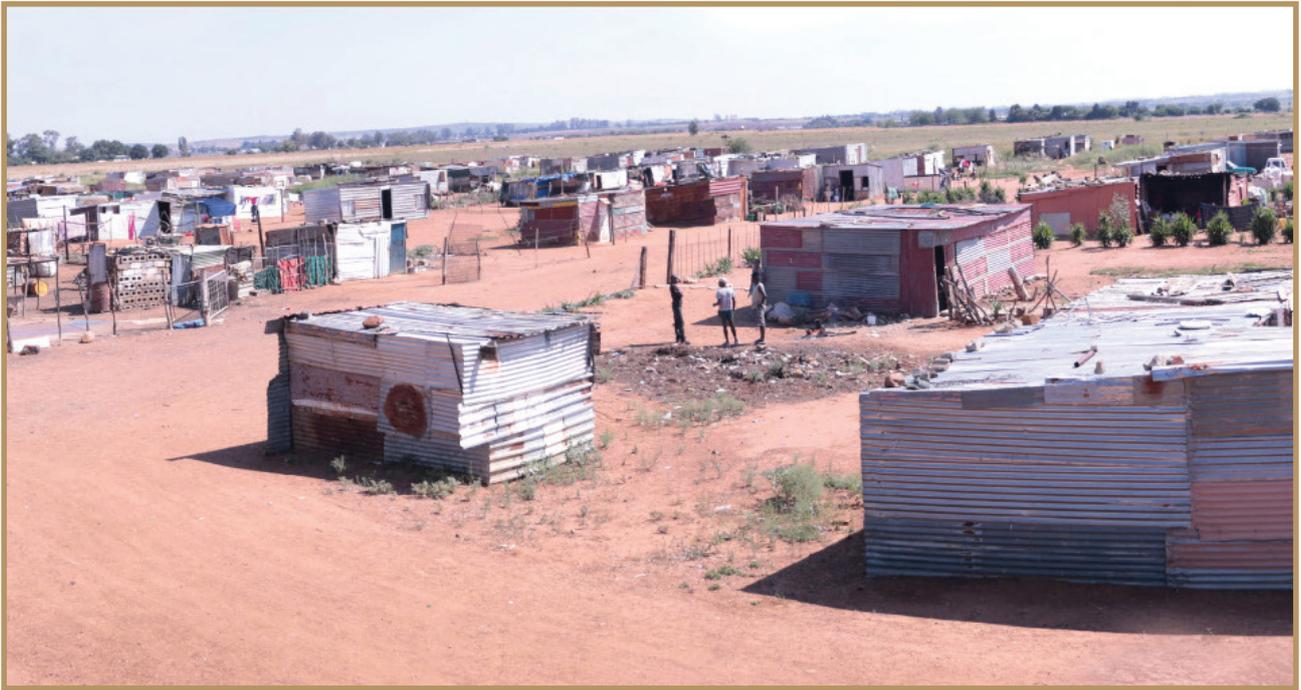
socio-economic rights institute
of south africa

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A EXECUTIVE SUMMARY



1 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.

2 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

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.

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.

- 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.

3 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 (IPIIRA) 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



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.

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.

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

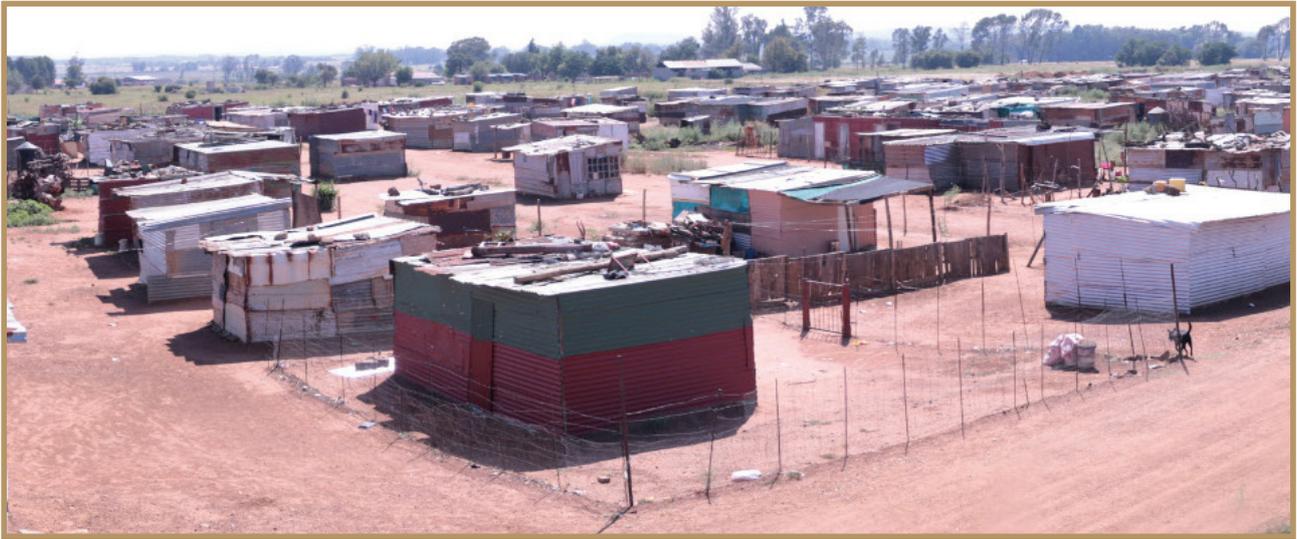
While the previous recommendation can go some way towards improving tenure security in off-register contexts, the Land Administration reform proposals recognise that more fundamental transformation of the property system is required to legally recognise off-register rights. Law reform is a notoriously 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.

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.

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.

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.



4 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.

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.

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



1 INTRODUCTION

1.1 Background and Purpose

The Nelson Mandela Foundation has commissioned papers on “Models of Urban Land Reform”, specifically in relation to land redistribution and tenure security, to help address an identified knowledge gap. The initiative is aimed at stimulating informed discussion and debate on different approaches to urban land reform in South Africa.

This paper, submitted by the Socio-Economic Rights Institute (SERI)¹, focusses on urban land tenure reform. The aim of the paper, as framed by the Foundation, is both to inform debate about and propose a feasible approach to urban land tenure which could, in the near future, be implemented.

1.2 Framing the scope and content of Urban Land Tenure Reform

This paper adopts relevant sections of the Constitution as its starting point. Section 25(6) of the Constitution reads as follows: “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.”

The intention of this clause was to guarantee the land tenure rights of “farm workers, farm dwellers and labour tenants living on privately owned land; residents in so-called ‘coloured rural areas’, most of these being former mission stations; people living under ‘customary’ systems of land tenure in the rural areas of the former Bantustans, now termed ‘communal areas’; and urban occupants living in diverse conditions of insecure in urban areas, bearing in mind also the expectation of high rates of urbanisation following the reversal of urban influx control”².

A set of tenure security laws were enacted to give immediate effect to Section 25(6), pending the development of legislation providing permanent, positive rights³. However, this legislation has not yet been developed. The laws are:

- The Land Reform (Labour Tenants) Act, 1996 (The Labour Tenants Act);
- The Interim Protection of Informal Land Rights Act, 1996 (IPILRA)⁴;
- The Extension of Security of Tenure Act, 1997 (ESTA); and
- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).

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

² Kingwill Rosalie, Royston Lauren, Cousins Ben and Hornby Donna. “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.

³ Ibid.

Section 26 reads as follows:

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.”

The Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) gave effect to section 26(3). Before making an eviction order Section 26(3) requires a court to consider “all the relevant circumstances” and the PIE Act requires that the eviction of an unlawful occupier to be “just and equitable” and that a court takes into account a range of factors, including whether alternative accommodation can be provided by the state⁵.

The historical context of the PIE Act, as well as Section 26(3) are important here:

“... the PIE Act sought to invert the legal order in relation to evictions: from a legal framework that targeted unlawful occupation and ‘land invasion’, to one that sought to prevent illegal evictions. The PIE Act thus had the potential to alter the legal system from one that disproportionately favoured property owners by

providing for speedy and effortless evictions in instances where they alleged that residents were in unlawful occupation, to one that provided substantial protections for unlawful occupiers by requiring that no eviction order could be granted unless the eviction would be ‘just and equitable’⁶.”

1.3 Paper Outline

Section 2 provides a series of starting points for urban land tenure reform which both frame the debate and set the parameters for the proposals. Section 3 makes four proposals: realise the rights of access to adequate housing and tenure security; make better use of existing instruments; recognise off-register tenures; and reform land administration. The conclusion summarises the proposals and identifies short term actions that could be undertaken to operationalise them.



⁴ IPILRA has to be renewed annually. Thanks to the efforts of land activists, it is.

⁵ Clark, Michael and Wilson, Stuart. 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 Ibid p13.



2 POINTS OF DEPARTURE

This section briefly outlines the points of departure that inform the urban tenure reform proposals in Section 3 as follows:

- Constitutional alignment
- Protection against arbitrary eviction
- The dominance of registered, individual title
- Tenure diversity and tenure security continuum
- Recognition of off-register tenures

2.1 Constitutional alignment

Constitutional alignment requires that equitable access to land, legally secure tenure, the progressive realisation of the right of access to adequate housing and no arbitrary evictions are addressed in law and policy.

From a human settlements perspective, it is important to note that the 1994 White Paper on Housing⁷ predated the Constitutional dispensation, including the final Constitution in 1996 and the evictions jurisprudence that followed⁸. The current process of legal and policy review in Department of Human Settlements, Water and Sanitation is an opportunity for alignment. From an urban development perspective, it is important that the Integrated Urban Development Framework addresses urban land reform for residential and non-residential land uses.

2.2 Protection against arbitrary evictions

Evictions are the most wide-spread threat to tenure security the world over and our history shows that the law is a powerful instrument to authorise them. Apartheid used evictions in service of the complete separation of race groups in urban and rural areas. Forced removals were instrumental in ensuring the apartheid vision: so-called “blackspot” removals from church land and mission stations or farms in white farming districts; evictions from pockets of urban freehold such as District Six, Sophiatown, Lady Selbourne, Marabastad and Cato Manor; and massive, large scale evictions to the former Bantustans⁹.

The Prevention of Illegal Squatting Act of 1951 was used by landowners and authorities to evict¹⁰. “Apartheid common law permitted a landowner to evict an occupier by simply proving ownership and the absence of consent. Although seemingly race neutral, the apartheid era eviction orders, which could be obtained with ease, combined with the statutory restrictions on black ownership, assisted the apartheid government with the racial segregation project”¹¹.

Against this historical context, section 26(3) and the PIE Act provide protection against arbitrary eviction. This protection is a foundational element of tenure security. Section 26 is one of the most frequently litigated rights in our constitution. As a result, a significant body of case law has developed in relation to evictions. The jurisprudence has developed a set of legal principles about evictions and alternative accommodation including procedures for lawful eviction, alternative accommodation provision and meaningful engagement¹².

⁷ The White Paper focused on the facilitating speedy land delivery at 4.6.7: “Efficient assembly and release of appropriately located land for housing is critical to achieving the desired rate of delivery of housing.” The White Paper made reference to housing as a human right at 4.4.2: “The challenge facing South Africa in housing, is to develop a strategy in the short term to direct scarce and insufficient State housing and other resources together with private, non-State resources, to ensure that all those in need (and particularly the poorest sector of society) are able to progress towards the realisation of an effective right in housing”.

⁸ It should also be noted that the White Paper was the result of negotiations at the National Housing Forum, where private sector interests predominated via the expertise of the Urban Foundation. The Bill of Rights (Section 2 of the Constitution) privileges a different set of interests.

⁹ Kingwill Rosalie, Hornby Donna, Royston Lauren, and Cousins Ben. “Conclusion: Beyond the ‘edifice.’” *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.

¹⁰ Clark and Wilson, 2016 and Wilson, Stuart. “Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality”, *South African Law Journal*, No. 2, 126 (2009): 270-290.

¹¹ Clark and Wilson, 2016.

¹² *Ibid.*

Following the *Grootboom* case¹³, in which the courts ruled that the state was in breach of section 26(2) of the Constitution because it had failed “to have any plan for vulnerable people evicted without the ability to find alternative shelter”¹⁴, the state adopted the Emergency Housing Programme (EHP) contained in Chapter 12 of the National Housing Code. An eviction or an eviction threat constitutes an emergency housing situation. In practice however municipalities have been slow to apply for EHP funding from provincial departments of human settlement. One of the reasons for this reluctance appears to be the difficulty of planning ahead for emergencies.

Another is that provincial governments prefer allocating funds elsewhere and prioritise funding other programmes, such as the ownership RDP or BNG subsidy houses. However, the courts have not accepted that an absence of available EHP funding constitutes an adequate reason for municipal failure to provide alternative accommodation. As a result, municipalities such as the City of Johannesburg have financed the refurbishment of inner city buildings for alternative accommodation¹⁵ out of their own sources of funding. Post relocation management of the buildings has been deeply problematic and, in some cases, residents feel worse off than they did in the buildings that they previously occupied¹⁶.

2.3 The dominance of registered, individual title

Registered individual title dominates approaches to tenure. Urban (and rural) tenure policy privileges transfer of title in freehold ownership, even although there is a commitment in housing policy to tenure choice¹⁷. Tenure is intricately linked with the delivery of subsidised housing. 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 Africans¹⁸. Title is registered in the Deeds Registry and is interlinked with other aspects of land administration such as land use planning and municipal revenue generation (property rates and services charges).

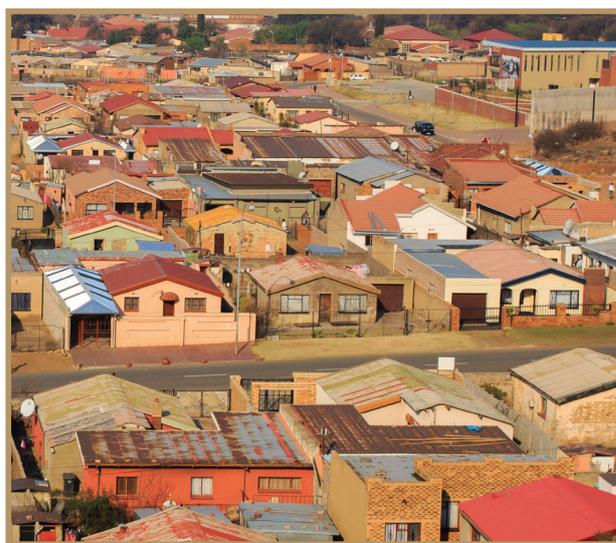
In practice, the housing subsidy programme, through the Discount Benefit Scheme and the RDP housing subsidy – the most used subsidy instruments - deliver title, or are meant to. A title deed backlog has developed with close to 50% of subsidy properties absent from the deeds registry, meaning that about half the beneficiaries of ownership subsidies have not yet received title deeds.

Despite the dominance of title, most people continue to live outside of the system of registered title deeds¹⁹. No formal alternatives exist for poor people except entry into the formal property system via a housing subsidy project.

2.4 Tenure diversity and tenure security continuum

Because registered title dominates both discourse and delivery, the 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 Network²⁰ advocates the idea of a tenure continuum to express the range of tenure forms²¹. The continuum was informed by context: more than 60% of urban dwellers in sub-Saharan Africa reside informally outside the cadastre and land registers; up to 90% of land parcels in developing countries lack any kind of documentary evidence; and less than 1% of sub-Saharan Africa have any cadastral surveys²².

Extending land titles on fully surveyed parcelled land to people who have historically been denied access to ownership was seen as impossible. The continuum



communicates an alternative conceptualisation: a land administration system which acknowledges tenure diversity to lesser or greater degrees. The former Special Rapporteur on adequate housing reported on tenure diversity²³ 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.

¹³ Government of the Republic of South Africa and Others v *Grootboom* and Others 2001 (1) SA 46 (CC).

¹⁴ Clark and Wilson, 2016 p10.

¹⁵ Ibid.

¹⁶ See Socio-Economic Rights Institute. Community Practice Notes: Inner City Alternative Accommodation series (2016).

¹⁷ See Hornby Donna, Royston Lauren, Kingwill Rosalie, and Cousins Ben. “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.

¹⁸ Ibid.

¹⁹ See Shisaka. “Investigation into the delays in issuing title deeds to beneficiaries of housing projects funded by the capital subsidy.” Urban LandMark. 2011.

²⁰ GLTN is an alliance of more than 60 global, regional and national partners contributing to poverty alleviation through land reform, improved land management and security of tenure, particularly through the development and dissemination of pro-poor and gender-responsive land tools.

²¹ See UN-Habitat. *Handling Land: Innovative tools for land governance and secure tenure*. Nairobi: UN-Habitat (2012) and Royston, Lauren and du Plessis, Jean. “A Continuum of Land Rights: Evidence from Southern Africa” Paper prepared for presentation at the 2014 World Bank Conference on Land and Poverty, The World Bank - Washington DC, March 24-27, 2014.

²² Royston and du Plessis, *ibid*, quoting Fourie 1998.

²³ See United Nations Human Rights Council (2012), 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.

2.5 “Off-register” tenures lack recognition

Hornby *et al* estimate the number of people living outside the registered property system to be in the region of 60%²⁴, and call this system of land access “off-register” or social tenure.

Occupations play an important role in urban land access, yet little is known about how tenure works in occupied land and buildings. Recent research has made inroads into rectifying this gap by exploring the multiple tenures that 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.

The following points identify some of the main characteristics of off-register (urban) tenure identified in recent research in order to make visible the tenures that currently lack recognition:

- Locally managed processes are in place for accessing, holding and trading land²⁵. Over many years informal settlement residents developed a body of land management practices that were organised but lacked official (legal, administrative, municipal) recognition. The procedures for land access were well known, the local land managers or authorities were relatively accessible, the evidence was affordable, people were aware of dispute resolution mechanisms and the arrangements were participative and allowed for ordinary members of the community to act as witnesses. The research also identified weaknesses in the local practices which, it concluded, intermediaries such as NGOs could assist in overcoming²⁶.
- Residents in a range of practice sites produced seven ‘routes’ towards greater tenure security: resisting evictions, recognising local practices in land management, stakeholder dialogues on tenure security, locating tenure security within slum upgrading, adapting and strengthening existing land management practices, administrative recognition mechanisms, and legal recognition mechanisms²⁷.
- The organising principles that define social tenure include local oversight, social recognition, processes being paramount and flexibility. These tenures do not lack coherence and they deserve recognition²⁸.

- Local tenure arrangements and land use management practices include how people organise their own defence when their housing rights are violated; how they arrange their own access to services, as minimal as that might be, in the absence of state provision; and how they attempt to regulate their settlement themselves to mitigate their considerable vulnerability. Multiple tenures co-exist on the same properties in informal settlements: the local settlement level tenure arrangements and land use management practices; protective tenure deriving from Section 26(3) and the PIE Act; and registered title of the underlying land. The relationships between these tenures were highly contested, not only in the courts where the rights to housing and property come up against each other, but also locally in a range of different ways: between settlements leaders and municipal officials and politicians and also between residents²⁹.

These research initiatives identified the policy and implementation implications and questions arising from the findings:

- Do the local arrangements constitute “promising practices” that could strengthen community agency and progress towards tenure security? Can state structures work with and ultimately recognise local land management practices that are used by residents in informal settlements? If adapted practice obtains official recognition, will residents have increased access to the benefits associated with improved tenure security³⁰?
- Further work would be needed to build up a significant body of “alternative practice” that could form the basis of advocacy and inform change. Community agency should be recognised and strengthened. Although imperfect, and open to elite capture, land management practices in informal settlements are often all that residents have, given limited municipal capacity and prevailing attitudes to informal settlements and their residents. The local practices and the leaders who govern them should neither be romanticised nor overlooked or replaced. Official interventions, if they materialise, can fail to stick, lead to disputes, or result in a void where local governance used to operate and municipal authority has failed to act. Adapted practice should also influence law reform but it should also increase access to services and other benefits in the meantime. For many residents of informal settlements, “the meantime” can be a lifetime³¹.

²⁴ See Hornby Donna, Royston Lauren, Kingwill Rosalie, and Cousins Ben. “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.

²⁵ See Royston Lauren “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. Reporting on seven years of evidence building in the Urban LandMarkets Programme and the Tenure Security Facility.

²⁶ Ibid.

²⁷ See Royston, Lauren *Promising Practices: a guide on incrementally securing tenure in Southern Africa*. Urban LandMark, 2013.

²⁸ See Kingwill Rosalie, Hornby Donna, Royston Lauren, and Cousins Ben. “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.

²⁹ See Royston Lauren, Khunou Kelebogile, Potter, Alana and Ebrahim Tiffany “Here to Stay: A synthesis of findings and policy implications from Ratanang, Marikana and Siyanda.” Report 4 in the series *Informal Settlements: norms, practices and agency*. SERI, 2019.

³⁰ See Royston, 2013 “Promising Practices”.

³¹ See Royston, 2013 “In the meantime”.

- The dominant system of registered title does not recognise off-register tenures or social tenure arrangements. Three approaches to securing land tenure and housing exist: conforming to the requirements of the dominant system of registered property; recognising social tenures; and radical legal and institutional overhaul of tenure³². Formalisation imposes another order and regulates according to a different set of norms or rules than the local tenure and land use management arrangements. An alternative approach is required which begins by recognising the local norms and regulations which already exist in informal settlements and the human agency that developed them³³.

These research findings constitute a body of evidence³⁴ that offer insights into how off-register tenure operates. This understanding is a requirement for increased recognition. It is briefly presented here as a short overview to motivate for proposal 3 below: recognise off register tenures.



³² See Kingwill et al, 2017.

³³ See Royston et al, 2019.

³⁴ The body of evidence is by no means exhaustive. The author has presented findings and implications from her own work or contributions she has made in collaboration with others at Urban LandMark, the Tenure Security Facility Southern Africa, the LEAP collective, SERI, LandNNEs, the High Level Panel.

3 PROPOSALS

Having sketched the key points of debate and outlined the parameters informing this work, the paper now turns to proposals by making a set of recommendations³⁵ for urban tenure security as follows:

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

3.1 Realise the rights of access to adequate housing and secure tenure

Sections 25(7) and 26 should frame the new Human Settlements White Paper and proposed Act, something which was not possible in the pre-Constitutional era of the National Housing Forum negotiations which led to the Housing White Paper in 1994.

Section 26, the PIE Act and the case law have together altered the relationship between the rights of occupiers and the rights of property owners. The court judgments balance the right of access to adequate housing and the right to property. The case law has set in motion new legal principles³⁶ and new relationships between state, occupiers and property owners in evictions matters³⁷ which should inform the new policy framework.

Section 26(1) obliges the state to progressively realise the right of access to adequate housing. The courts have not prescribed the content of this right but *Grootboom* set out that a reasonable housing policy must:

- Be comprehensive, coherent, flexible and effective;
- Have sufficient regard for the social, historic and economic context of poverty and deprivation;
- Take into account the availability of resources;
- Take a phased approach, including short, medium and long-term plans;
- Allocate responsibilities clearly to all three spheres of government;
- Respond with care and concern to the needs of the most desperate; and
- Be free of bureaucratic inefficiency or overly onerous regulations³⁸.

A more proactive approach would be for:

- Municipalities to plan and budget for alternative accommodation provision in the housing chapters of integrated development plans;

- Provincial and national government departments of human settlements to make better use of the EHP;
- The national department, SHRA and municipalities to establish effective management systems for alternative accommodation;
- The state at all three spheres to be more responsive to the systemic, underlying causes of building and land occupations – a dire shortage of well located, affordable accommodation. Affordable rental is one of these responses. Implementation of the Upgrading of Informal Settlements Programme (UISP) is another.

The municipal state has been slow to proactively assume the obligations in Section 26 opting instead to fund anti-land invasion units and go to court in response to occupiers invoking their constitutional and legal protections. A proactive response that supplies affordable access to land and accommodation to people in the most desperate need should be central to the state's approach to occupation. Two significant areas of intervention in this respect are the provision of affordable rental accommodation and the upgrading of informal settlements.

In terms of Section 26(3) the state has an obligation to plan for people who would be rendered homeless by an eviction. The Housing Act originally mandated municipalities to ensure access to adequate housing on a progressive basis, set housing delivery goals and identify and designate land for housing development³⁹.

The Municipal Systems Act then made planning instruments available to the municipal state including Integrated Development Plans (IDPs) and Spatial Development Frameworks (SDFs). This is the background for asserting that housing chapters of IDPs should be the starting point for planning for alternative accommodation.

SERI's review of the evictions case law identifies the arguments frequently raised by municipalities to "justify their inability, incapacity or delay in providing alternative accommodation to unlawful occupiers who would be rendered homeless by eviction proceedings" including deference/separation of powers, resource constraints, 'jumping the queue', intergovernmental competences, procurement policies as reason for delay, and qualifying criteria for alternative accommodation. The report reviews how the courts have responded to these arguments, demonstrating that guidelines and rules now exist to take both municipal concerns and the right of access to adequate housing into account⁴⁰.

Very little attention has been paid to Section 25(6) in the urban sector. Correcting this oversight should entail reading this section in conjunction with the provisions in Section 26 for progressive realisation of the right of

³⁵ 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 and LandNNEs.

³⁶ Clark and Wilson, 2016 Chapter 3.

³⁷ Clark and Wilson, 2016 Chapter 5.

³⁸ Clark and Wilson, 2016 referencing *Grootboom* paras 39, 42, 43, 44, 45, and 99 and Wilson, 2009.

³⁹ (1) ... as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to-

(a) ensure that:
(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
(b) set housing delivery goals in respect of its area of jurisdiction;
(c) identify and designate land for housing development

⁴⁰ See Clark and Wilson, 2016, Chapter 4.

access to adequate housing and the requirement to ensure that no law permits arbitrary eviction.

Section 26(3) and PIE have put in place a new protective framework for unlawful occupiers. However, PIE rights are limited to protection against unlawful eviction and occupiers must go to court to defend a violation and claim their rights. Section 25(6) requires consideration of permanent, positive rights. What would this mean in an urban context, given the problems with title and the invisibility of off-register tenure? Kingwill *et al* make the argument that the Interim Protection of Informal Land Rights Act should be made permanent (The Protection of Informal Land Rights Act?) and that new institutions should be created, such as a land rights ombud and adjudication bodies⁴¹.

3.2 Make better use of existing instruments

These recommendations are mostly directed to the Department of Human Settlements, Water and Sanitation and related housing institutions, and constitute proposals for the legal and policy review currently underway. They also relate to the need for the Integrated Urban Development Framework (COGTA) to explicitly address urban land reform. The recommendations entail working within the existing property system or what has been called “conforming to the requirements of the edifice”⁴².

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 Community Residential Unit Programme. Inclusionary Housing is a fourth, emerging instrument potentially available with legal basis in SPLUMA.

Rental housing policy framework and norms and standards.

The department should develop the rental policy framework and norms and standards required in Section 2 of the Rental Housing Act: Government must introduce a policy framework, including norms and standards, on rental housing to give effect to subsection (1) ⁴³.

The Rental Housing Act of 1999 and the institutional framework that it established in terms of provincial rental tribunals provide protections against unfair rental practices, an important arena of urban tenure security. The Gauteng Unfair Practices Regulations further bolster this framework. Judgments in the tribunal have achieved certain successes from a tenure security perspective regarding unfair rental increases, curbing efforts to punish tenant organisers, unfair profit making off electricity charges and unreasonable evictions for building renovation.

However, there is insufficient clarity of purpose to frame the decisions of rental tribunals in the adjudication process. Such clarity could have been provided by the Department of Human Settlements in terms of norms and standards in Section 2 of the Act⁴⁴. This omission is an important policy gap that could be remedied in the legal and policy review process currently underway if the department is not already doing so.

Social Housing and CRU

A related recommendation is that the department should, in collaboration with the Social Housing Regulatory Authority (the SHRA) and the National Social Housing Association (NASHO), expand the “deep down market” reach of the Social Housing Programme.

The Community Residential Unit is a municipal rental programme (stock built and operated by municipalities) that began as a hostel redevelopment programme. The programme targeted rental for very poor households. The human settlement sector review conducted by DPME and Human Settlements recommended that the CRU programme should be terminated due to poor performance⁴⁵. However, the CRU is currently the only programme, on paper at least, that targets “deep down market”. Were it to be terminated prior to the social housing sector taking on a deeper down-market reach, then a programmatic gap would exist.

Aside from the capital expenditure required to deliver new stock or refurbish dilapidated buildings, operating expenses are key concerns for the sector in a target group that cannot afford to contribute rental charges that cover the costs of expenditure. Sources of finances for “subject subsidies” are required. One possible option under discussion in the Inclusionary Housing conversation currently underway is to capture value generated by increases in property values as a result of public investment.

The fees charged to developers could be ring fenced in a municipal fund for investment in subsidising rental.

⁴¹ Kingwill et al, Concluding Chapter in Untitled.

⁴² Kingwill et al, 2017, Conclusion.

⁴³ Subsection (1) of section 2 is primarily concerned with the role of the state in rental housing and reads that government must:

a) promote a stable and growing market that progressively meets the latent demand for affordable rental housing among persons historically disadvantaged by unfair discrimination and poor persons, by the introduction of incentives, mechanisms and other measures that—
1. improve conditions in the rental housing market;
2. encourage investment in urban and rural areas that are in need of revitalisation and resuscitation; and
3. correct distorted patterns of residential settlement by initiating, promoting and facilitating new development in or the redevelopment of affected areas;
b) facilitate the provision of rental housing in partnership with the private sector.

⁴⁴ Wilson Stuart, personal communication June 2019.

⁴⁵ Presentation by Andreas Bertoldi at POLERT meeting of the Department of Human Settlements, Water and Sanitation, 21 June 2019.



However, the policy intent of Inclusionary Housing would need to be clarified as current research proposes taking the policy in a different direction: bolster social housing funding to target the R3 500 to R22 000 household income per month category.

Subsidised ownership housing

The Discount Benefit Scheme, later the Enhanced Discount Benefit Scheme, transferred old township rental stock into title. State subsidised housing (RDP or BNG housing) is a greenfield (or vacant land) housing development programme with free standing houses in proclaimed townships with individual, registered title. Most subsidies have been delivered under these programmes since 1994. RDP or BNG housing is widely seen to have been successful in delivering housing stock, in the region of three million units since 1994. The DPME and Human Settlements review concludes that it has been less successful in developing markets, leveraging private sector finance and building household assets⁴⁶. From a tenure perspective, one of its major shortcomings is the title deed backlog. A backlog in title deed registration in the context of land scale titling schemes, of which our national housing subsidy scheme is an example, is not unusual internationally⁴⁷ and has been ascribed to the capacity required to adjudicate, survey and register large numbers of individual title⁴⁸. UN Habitat sees the goal of achieving “complete title coverage” as highly unlikely: it would take centuries to achieve at the current rate⁴⁹.

South Africa’s title deed registration backlog alludes to the wider problem with title. But in the absence of alternatives, the state is faced with the dilemma of responding to a systemic problem within a framework that only permits it to use the existing tools at its disposal, such as the Land Titles Adjustment Act⁵⁰.

The current conversation about urban land reform and the human settlements legal and policy review may present an opportunity for a more fundamental rethink (See recommendation 4 below). To begin with, a more systemic analysis of the reasons for the backlog is required than has been conducted to date.

3.3 Recognise off-register tenures

Building on the Urban LandMark research and the proposals in *Untitled*, 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:

- Options for legal and administrative recognition of occupation⁵¹
- Legalise unlawful land use
- Development of local land records

⁴⁶ Ibid.

⁴⁷ Durand-Lasserve and Royston, 2002.

⁴⁸ Rakodi and Leduka, n.d., p 40.

⁴⁹ UN Habitat, 2012, p2.

⁵⁰ “The Land Titles Adjustment Act, No 111 of 1993 allows for administrative measures to ‘update’ title deeds (quitrent or freehold) whose ownership details in the Deeds Registry are not up to date, that is, the names on the registers are not the current owners, but in the name of past owners. It is a critically important requirement for “ownership” that land be registered in the name of the living owner. The Act and its predecessors allowed for administrative short-cuts to convey title to its present owners without requiring them to undertake expensive and time-consuming conveyancing. Thus magistrates and legal commissioners were given powers to adjudicate ownership. Over the years the state has incurred massive expenses in updating titles, but the process is not sustained by the new ‘owners’, and titles tend to revert rapidly to ‘informality’. These patterns are being reported in newly titled urban townships, thus multiplying the scale of the problem exponentially (see Kingwill Chapter x in this volume).” Extract from Kingwill Rosalie, Royston Lauren, Cousins Ben and Hornby Donna. “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.

⁵¹ Smit Dan and Abrahams Gemey. *Incrementally Securing Tenure: An approach for informal settlement upgrading in South Africa*. Urban LandMark (2010).

Options for legal and administrative recognition

“Officially recognised mechanisms that can be used to secure off-register occupation rights are either distinguished as either being administrative or legal in nature⁵². Administrative recognition requires policies or administrative practices to give residents more tenure security by, for example, council resolutions, extending infrastructure, provision of basic services, occupation letters, occupancy registers, shack enumerations, block layouts, utility bills, and so forth. Legal recognition entails using a recognised legal procedure to confer legal status on an area. It usually results in declaring the area in terms of the law – for example as a settlement area or an area zoned for informal housing”.

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 points⁵³.

Legalise unlawful land use

The Spatial Planning and Land use Management Act of 2013 (SPLUMA) contains potentially progressive provisions for legalising informal settlement land use. SPLUMA contains a number of provisions regarding

a land use scheme”. They must include “appropriate categories of land use zoning and regulation for the entire municipal area including areas not previously subject to a land use scheme”. Finally, they may include provisions for “specific requirements regarding any special zones identified to address the development priorities of the municipality”. Informal settlement land use can be legally designated in development planning by-laws and land use management schemes by creating an informal settlement residential zone or applying an informal settlement incremental upgrading designation. For example, the City of Johannesburg created a zoning category called “transitional residential settlement” to apply to informal settlements in its land use scheme. The land use category was defined as “land upon which informal settlements are established by the occupation of land and provision of residential accommodation in the form of self-help structures and some ancillary non-residential uses and regulated by the applicable Annexure⁵⁴. While legal declaration is not township establishment, it allows for public investment in services and potential improvements in tenure security.

Development of local land records

Lists of occupiers are widespread in occupied inner city buildings and informal settlements⁵⁵. They provide recorded evidence of who has a locally authorised right



informal settlements. It legally defines “incremental upgrading of informal areas” as the progressive introduction of administration, management, engineering services and land tenure rights to an area that is established outside existing planning legislation and may include any settlement or area under traditional tenure. The development principles require provincial laws to include provisions that will promote incremental upgrading and tenure: “... development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas”. Municipal spatial plans must include “previously disadvantaged areas ... informal settlements, slums... and address their inclusion and integration into the spatial, economic, social and environmental objectives of the relevant sphere”. Land use management schemes must “include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to

to be there. Local institutions (building committees, informal settlement structures) manage the currency and legitimacy of these lists with varying degrees of success. When these registers are used to identify PIE rights holders in the course of housing rights litigation or when municipalities co-produce them with local organisations, the lists become more secure land records, providing occupiers with proof of residence that they can use to defend their claims should they be threatened⁵⁶. These measures make inroads into improving tenure security but they are vulnerable to being undermined by political and local elites⁵⁷. Possibilities exist for innovation in recognising them legally. For example, it may be possible to write land records into SPLUMA zoning regulations⁵⁸.

Fundamental land administration reform would be required to legally recognise the recordal of off-register rights⁵⁹.

⁵² Ibid.

⁵³ Royston, 2013.

⁵⁴ However, when the City drafted its SPLUMA compliant land use management scheme, “transitional residential settlement” only appeared in the list of definitions and was not taken up in the draft land use management scheme. See SERI. “Submission on the City of Johannesburg Draft Land use Management Scheme”, 2017.

⁵⁵ See Rubin and Royston, 2017 and Royston et al, 2019.

⁵⁶ See Untitled for further examples.

⁵⁷ Kingwill et al, 2017, Conclusion.

⁵⁸ See for example the proposals ULM made to the City of Johannesburg in this regard.

⁵⁹ See Kingwill, 2019.

3.4 Reform land administration

While the previous recommendation can go some way towards improving tenure security in off-register contexts, the argument in *Untitled* is that “radical legal and institutional overhaul of tenure” is required for more fundamental transformation of the property system to legally recognise off-register rights. As the previous section briefly illustrated “off-register rights are administered by non-state (or hybrid) institutions”⁶⁰. SERI’s recent informal settlement series supports this finding with new evidence about the authorities informing land use management in the research sites: juridical, municipal, political and local. Law reform is a notoriously long-term project⁶¹ and more immediate benefits that secure the rights of occupiers require working “in the meantime”⁶² (the second recommendation above) and within the constraints of the current system⁶³ (the first recommendation above).

Land Records Act

Land records are a component of the land administration infrastructure that is needed to support all off-register rights including communal areas, CPI’s, farm dwellers and people living in informal settlements. The High Level Panel report recommended the introduction of 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 resolution⁶⁴. The proposal was for an integrated system that links to the Deeds Registry and can relate to forward looking development planning, land use management and environmental management.

Land Administration Act

Subsequent to the proposals on land records that went into the High Level Panel recommendation for a Land Records Act, LandNRES research deepened and expanded the perspective. Kingwill defines land administration⁶⁵ as including the adjudication of rights, recordal and registration, planning, land use management, valuation, taxation and land information. The system administers registered rights, while off-register rights are “formalised” through, in urban areas, relocation to a Greenfield subsidy project or informal settlement upgrading, and a disjuncture occurs between the formal systems and procedures and the way people have arranged tenure themselves.

Working from the problem statement that “the most critical land administration problem in South Africa is land tenure and the fragmented and archaic land information system”, the research proposed the need for a Land Administration Act, of which recording off-register rights would be a part.

The Presidential Advisory Panel report on Land Reform and Agriculture recommends that a Land Administration Framework Act be developed to enable land recordal (or a separate Land Records Act), a new system for adjudicating rights, as well as regulations for conflict and dispute resolution and for a national Land Rights Protector⁶⁶.



⁶⁰ Kingwill, 2019.

⁶¹ Berrisford, Stephen. “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.

⁶² Royston, 2013.

⁶³ What *Untitled* calls “conforming to the requirements of the edifice”.

⁶⁴ Parliament, 2017.

⁶⁵ Kingwill, 2019.

⁶⁶ See section VII in Advisory Panel on Land Reform and Agriculture. 2019. *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture*. For His Excellency the President of South Africa. Republic of South Africa.

4 CONCLUSION

This paper proposes an approach to urban land tenure reform which takes the Constitution as its starting point. Its focus is on the approximately 60% of people living in South Africa outside the formal property system. Using the *Grootboom* cue about what constitutes a reasonable housing policy, the focus should be on people living in the most desperate circumstances⁶⁷.

On this basis the paper proposed four interventions:

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



⁶⁷ The paper built on the following evidence base:

- the evictions case law review and informal settlement research series of the Socio-Economic Rights Institute (SERI);
- the advocacy work of the think tank Urban LandMark developed over seven years of engagement;
- the research findings about how tenure works in off-register situations described in *Untitled*; the conceptual and classificatory work undertaken in the work of the Urban LandMark programme and the Conclusion in *Untitled*, among other sources.

Most recommendations are directed at the legal and policy review currently underway in the Department of Human Settlements and Water and Sanitation. Some fall

within the ambit of the Department of Rural Development and Land Reform, as summarised in the following table:

Proposal	Break down of proposal	Responsibility
Intervention 1: Realise the rights of access to adequate housing and secure tenure	Proactively plan and budget for a reasonable response in housing chapters of IDPs, including alternative accommodation provision	Municipalities Existing instrument: IDPs
	Ensure a reasonable housing policy in line with <i>Grootboom's</i> precepts	National Human Settlements: New instrument: White Paper and Law
	Make better use of EHP	Provincial departments and municipalities Existing instrument: EHP
	Establish effective management systems for alternative accommodation	national department, SHRA and municipalities
	Affordable access to land and accommodation to people in the most desperate need: *Affordable rental accommodation provision and programme *UISP implementation	Municipalities, SHRA, NDHS Existing instrument: Review of Community Residential Unit Programme OR Social housing deeper down market OR Public rental Municipalities, provincial departments: Existing instrument: UISP
	Review Interim Protection of Informal Land Rights Act (IPLIRA) for its application to urban areas and to make it permanent legislation	DRDLR, in consultation with DHS: Existing instrument: IPLIRA
Intervention 2: Make better use of existing instruments	Rental housing policy framework and norms and standards for fair practices in existing rental stock	NDHS and SHRA Rental Act: norms and standards and policy framework for truly affordable (public) rental including subject subsidies
	Social Housing and CRU for new affordable rental stock	NDHS and SHRA Social housing deeper down market Resolution on CRU
	Subsidised ownership housing title deed backlog	NDHS: Systemic review required
Intervention 3: Recognise off-register tenures	Options for legal and administrative recognition	Municipal: council resolutions, extending infrastructure, provision of basic services, occupation letters, occupancy registers, shack enumerations, block layouts, utility bills, and so forth by-laws

Proposal	Break down of proposal	Responsibility
	Legalise unlawful land use	Municipalities: SPLUMA and municipal planning by-laws: special or transitional zones provisions; incremental development area provisions
	Development of local land records	Municipalities, NGOs: Pilot local land records
	Make better use of EHP	Provincial departments and municipalities Existing instrument: EHP
Intervention 4: Reform land administration	Land Records Act or Land Administration Act	Department of Rural Development and Land Reform and new Human Settlements Act and Housing Code in consultation with civil society

The short-term measures required to operationalise the proposals are:

- To operationalise the law reform proposals: land records test cases should be developed that contribute to building land records legislation from the bottom up. 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 Department of Human Settlements should incorporate urban land reform.
- To recognise off-register rights, the recommendation is that the Department of Human Settlements, the Department of Rural Development and Land Reform and SALGA should partner with nonstate actors to push the limits of official recognition and extend the promising practices and innovative approaches that already exist.

The following recommendations are made for the NMF:

- An immediate next step is for the NMF to convene an Urban Land Reform Roundtable with the DHS and its panel on “Inclusionary Housing and Land Reform” to present and discuss the papers it has commissioned as a contribution to the department’s review process. COGTA, Treasury, DRDLR should also be invited, along with social justice NGOs like SERI, Ndifuna uKwazi and the Social Justice Coalition.
- A short term measure is for the NMF to commission the proposed review of IPILRA.

- The NMF should develop an urban land reform promising practices “laboratory” or learning process that supports and documents the innovative aspects of the proposals to inform legal and policy change:
 1. Land records test cases
 2. Participative informal settlement upgrading implementation
 3. Recognise off-register rights, including SPLUMA zoning to legalise informal settlement land use.

5 REFERENCES

Books / chapters in books:

Berrisford, Stephen. "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: 73-90.

De Soto, Hernando. *The Mystery of Capital: Why capitalism triumphs in the west and fails everywhere else*. London: Bantam Press, 2000.

Hornby Donna, Royston Lauren, Kingwill Rosalie, and Cousins Ben. "Introduction: tenure concepts, practices and theories in South Africa." in *Untitled: Securing Land Tenure in Urban and Rural South Africa*. Durban: UKZN Press, 2017.

Kingwill Rosalie, Royston Lauren, Cousins Ben and Hornby Donna. "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.

Kingwill, Rosalie. "Square Pegs in Round Holes: the competing faces of land title." 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.

Kingwill Rosalie, Hornby Donna, Royston Lauren, and Cousins Ben. "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.

Royston, Lauren. "In the Meantime ... Moving towards secure tenure by recognising local practice." 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: 47-72.

Royston, Lauren. "Entanglement: a case study of changing tenure and social relations in inner city buildings in Johannesburg." 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.

Rubin, Margot and Royston, Lauren. "Beyond Ownership? Local land registration practices and their potential for improving tenure security in informal settlement upgrading." 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.

Journal articles:

Wanjiku Kihato C, Royston L, Raimundo J and Raimundo I. "Multiple Land Regimes: Rethinking land governance in Maputo's peri-urban spaces", *Urban Forum*, 24(1) (2013): 65-83.

Wilson, Stuart. "Breaking the Tie: Evictions from Private Land, Homelessness and the New Normality", *South African Law Journal*, 126(2) (2009): 270-290.

Research reports and submissions:

Clark, Michael and Wilson, Stuart. *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).

Marx, Colin. *Do Informal Land Markets Work for Poor People?* Urban LandMark. (2007).

Kingwill Rosalie. "Inclusive Land Administration in the context of people-centred land governance." Discussion document for LandNNEs, (2019).

Royston, Lauren. *Promising Practices: a guide on incrementally securing tenure in Southern Africa*. Urban LandMark, (2013).

Smit Dan and Abrahams Gemey. *Incrementally Securing Tenure: An approach for informal settlement upgrading in South Africa*. Urban LandMark, (2010).

Socio-Economic Rights Institute. *Community Practice Notes: Inner City Alternative Accommodation series*, (2016).

Parliament, *Report of the high level panel on the assessment of key legislation and the acceleration of fundamental change* (2017).

Tissington, Kate. *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice*. Socio-Economic Rights Institute (SERI), (2011).

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

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, (2012).

Conference papers:

Royston, Lauren. "Incrementally Securing Tenure: 'Promising practices' in informal settlement upgrading in Southern Africa." Paper prepared for presentation at the 2014 World Bank Conference on Land and Poverty, The World Bank - Washington DC, 24-27 March 2014.

Royston, Lauren and du Plessis, Jean. "A Continuum of Land Rights: Evidence from Southern Africa." Paper prepared for presentation at the 2014 World Bank Conference on Land and Poverty, The World Bank - Washington DC, 24-27 March 2014.

Wanjiku Kihato C, Royston L, Raimundo J and Raimundo I. "One Step at a Time: Using survey data to inform an incremental approach to land security in Maputo's peri urban areas." Paper prepared for presentation at the 2012 World Bank Conference on Land and Poverty, The World Bank - Washington DC, March 2012.

Legislation / policy documents:

Constitution of the Republic of South Africa, 1996.

Emergency Housing Programme, Part 3, Volume 4 of the National Housing Code (2009).

Extension of Security of Tenure Act 62 of 1997 (ESTA).

Municipal Systems Act 32 of 2000.

National Housing Code (2009).

Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE).

Prevention of Illegal Squatting Act 52 of 1951 (PISA).



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