Submission on the
City of Johannesburg Draft Land Use Scheme, 2017

Socio-Economic Rights Institute of South Africa
(SERI)

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1. Introduction

On 29 June 2017, the municipal council of the City of Johannesburg (the City) approved the City of Johannesburg Land Use Scheme (the scheme). The land use scheme intends to give effect to section 24(1) of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) by replacing the City’s 16 prevailing town planning schemes with a single consolidated land use scheme which will apply to the entire municipal area. In August, the City published and invited interested parties to comment on the scheme. The Socio-Economic Rights Institute of South Africa (SERI) has read and considered the scheme and makes this submission to the Department of Development Planning within the City in accordance with the invitation to submit written comments.

The invitation to comment comes in the wake of the public consultation processes involving the legislative adoption of two complementary legislative mechanisms, namely the City’s Municipal Planning By-Laws (the by-laws) and draft Spatial Development Framework (SDF). SERI submitted written comments on both of these documents.

SERI’s submission provides background to the organisation and its work; and provides more detailed comments on the land use scheme. We also make various recommendations about how the scheme could be amended or rectified.

2. The Socio-Economic Rights Institute (SERI)

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, community-based organisations (CBOs) and social movements in South Africa. SERI conducts applied legal research, litigates in the public interest, facilitates civil society mobilisation and coordination, and conducts popular education and training. SERI’s core work

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relates to the advancement and protection of access to socio-economic rights in socio-economically marginalised (poor) communities.

One of SERI’s primary thematic focus areas is ‘Securing a Home’, which includes protecting and fulfilling the right of access to adequate housing; challenging unlawful evictions; promoting greater tenure security for the urban poor; informal settlement upgrading; advocating for spatial justice; and defending and promoting access to basic services such as water, sanitation and electricity, particularly in informal settlements.

Over the last 10 years SERI has been involved in legal, research and advocacy work around evictions, relocations, rental housing, allocation of state-subsidised houses, and informal settlement upgrading. We have published several resource guides, research reports and working papers, including the following:

- ‘Jumping the Queue’, Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa (April 2013).

SERI has also been involved in a series of important court cases dealing with land occupations, evictions, the provision of alternative accommodation, and informal settlement upgrading. These include:

- Abahlali baseMjondolo and 30 Others v eThekwini Municipality and Others (Cato Crest)
  Cato Crest informal settlement - illegal eviction - urgent interdict - Durban High Court
- Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another (Blue Moonlight)
  eviction - alternative accommodation - Constitutional Court

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4 For more on SERI visit the SERI website: https://www.seri-sa.org.
Much of SERI’s work therefore involves the right of access to adequate housing enshrined in section 26 of the Constitution. In this respect, there is considerable overlap between SERI’s work in our ‘Securing a Home’ thematic area and the focus of and principles underlying the land use scheme.

The legal and regulatory framework put in place by SPLUMA is underpinned by a number of progressive principles that should infuse land development and land use management. Land use schemes adopted in terms of SPLUMA have a critical role to play in giving practical application to these principles. For example, SPLUMA provides that land use schemes “must incorporate provisions that enable redress in access to land by disadvantaged communities and people”5 and that “must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas”.6 In addition, section 24(2) of SPLUMA expressly provides that a land use scheme must include provisions that promote affordable

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5 See section 7(a)(iii) of SPLUMA.
6 See section 7(a)(v) of SPLUMA.
housing and “permit the incremental introduction of land management and regulation in ... informal settlements, slums and areas not previously subject to a land use scheme”. The scheme is therefore a fundamental component of the regulatory framework governing land use planning, the promotion of tenure security and the upgrading of informal settlements. It is in this respect that SERI submits written comments on the scheme.

3. Comments on the land use scheme

3.1 Criminalisation of informal land use

Section 42 of the land use scheme criminalises any contraventions of, or failure to comply with, the land use scheme. This provision states that using land in a manner that is in conflict with the land use scheme constitutes a criminal offense in terms of sections 62 and 63 of by-laws that is punishable by imprisonment, a fine, or both.

As mentioned in SERI’s submission on the by-laws, a provision that criminalises unauthorised land uses is problematic as many South Africans have been forced to live on land informally as a result of past racially discriminatory laws and policies, and a lack of adequate alternatives. This land is rarely zoned for residential purposes, rendering the people living in these areas vulnerable to criminal prosecution. This provision undercuts the protections laid out in the Prevention of Illegal Evictions, and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act), unjustifiably limits the right of access to adequate housing, and violates the development principles that underpin SPLUMA. The situation is worsened by the maximum sentence of 20 years imprisonment for improper land use in section 63 of the by-laws. Such hefty punishments are grossly disproportionate in the context of people occupying or using land in a manner contrary to the land use scheme out of necessity.

SERI submits that the land use scheme should include an exception for people living in informal settlements in terms of section 42 of the land use scheme. In the alternative, sections 62 and 63 of the City’s by-laws should be amended to include such an exception. We submit that the special zones provide a way of legalising informal land use through the creation of an informal settlement residential zone and / or an informal settlement incremental upgrading designation (see part 3.3 below).

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7 See section 24(2)(d) of SPLUMA.
8 See section 24(2)(c) of SPLUMA.
3.2 Ownership and standing

The land use scheme, like the by-law, fails to recognise that many users of land are not the owners. For example, the land use scheme allows the owner of land certain rights – such as the ability to apply for the consent of land use from the council, to apply for an amendment of land use or to be notified of the creation of special zones - yet it is the use of land for a purpose other than in the land use scheme that is penalised with a maximum penalty of 20 years’ sentence. Land users are given no rights or ability to enforce rights in the land use scheme (only owners are given such rights), yet it is the land users who face criminal prosecution when they do not comply with the scheme.

SERI is concerned that the land use scheme places significant emphasis on the involvement of land owners, and fails to provide occupiers, land users and interested parties with sufficient spaces for participation. This concern is prevalent throughout the land use scheme but is particularly apparent in sections 39 and 45. These sections provide for only the owner of a property to apply to the council to authorise a particular land use (section 39) and provide that only owners of land should be notified of the proposed designation of special zones (section 45). In each of these instances, the occupiers and users of the land are either not given any participation rights or are granted considerably diminished participation rights. In spite of this, the scheme deems it sufficient for the council to serve notice on the occupiers of land in instances where the conditions for authorisation of land use were not complied with or to hold the occupiers or users of land criminally liable for improper land use. This highlights that the scheme is willing to recognise the occupiers or users of land when it is convenient for them to do so, but refuses to grant them the same recognition when it comes to participating in land use regulation and management. This is contrary to the consultative and inclusive spirit of SPLUMA.

In addition, SERI is concerned that the land use scheme unjustifiably limits the category of persons who can comment on the designation of special zones to the owners of land within these zones and “interested and affected parties”, thereby preventing the vast majority of the occupiers and users of land to influence the designation of special zones. This is due to the fact that section 45 of the land use scheme states that “interested and affected parties” should be consulted and their “response and uptake” to the designation of special zones should be considered.

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9 See section 40 of the land use scheme.
10 See section 42 of the land use scheme and the discussion of the criminalization of informal land use above at part 3.1 of this submission.
This section is problematic for a number of reasons. First, the provision is confusing given that the phrase “interested and affected parties” is not defined in the scheme or the by-law. Although the scheme and by-law refer to “interested parties”, the addition of “affected” in this provision raises questions about who this category of people are and how the council would determine whether a person is affected by the designation of a special zone.

Second, even if this category of persons refers to “interested persons” as defined in the scheme and the by-law, the provision is problematic as it disempowers the occupiers and users of land from making any submissions in relation to the land they occupy or use unless they comply with the strict definitional requirements laid out in the scheme and by-law and qualify for intervener status. These are serious barriers that could effectively exclude a large number of people on the basis of a largely arbitrary compliance exercise who, in reality, have a material interest in the decisions of the council in relation to the land they occupy or use.

Finally, the provision states that interested and affected parties should be granted the opportunity to make representations on the designation of special zones, however, it is unclear how these parties will be afforded this opportunity given that the section 45 only provides that for owners to be notified of the proposed special zones. Given that the scheme only provides for owners in these zones to be informed of the impending designation, it seems unlikely that many interested and affected parties would become aware of the proposed designation, not to mention be able to participate in the council’s decision.

SERI therefore recommends that the sections in the land use scheme dealing with standing, specifically sections 39 and 45, be broadened to include the occupiers and users of land and other interested parties, such as informal traders. In addition, it is recommended that notice be given at the property or land to which an application for development or amendment applies. Without notice given in this fashion, it is unlikely that interested and affected parties who occupy or use land will know about opportunities for participation.

3.3 Special zones and the incremental introduction of land use management

Special zones

SPLUMA, the by-law and the land use scheme provide for the creation of special land use zones. Section 24(3)(b) of SPLUMA states that a land use scheme may include provisions relating to “specific requirements regarding any special zones identified to address the
development priorities of the municipality”. Similarly, section 6(3)(b) of the by-law provides that a land use scheme may include provisions relating to “specific requirements regarding any special zones identified to address the development priorities of the City”. Special zones are therefore delineated geographic areas for which the council has carefully tailored the land use in order to encourage a particular type of development intervention or investment based on a municipality’s developmental priorities. To make effective use of special zones, the council has a wide array of different zoning techniques available to it, including special use permits, overlay zoning, incentive zoning or performance zoning.

Section 45 of the land use scheme fleshes out the process through which the council can declare an area a special zone. The provision seems to have a wide range of potential application.

*Incremental introduction of land use management*

SPLUMA and the by-law identify the urgent need to permit the incremental introduction of land use management and regulation in informal settlements, slums and areas not previously subject to a land use scheme. In this respect, the by-law deals with development applications and sets specific development goals. It recognises that informal settlements must be part of this development. However, the City has failed to include provisions that directly address the incremental designation option in the land use scheme. This is a serious oversight that should be rectified.

*Potential application of special zones and provisions regulating the incremental introduction of land use management*

Special zones and provisions allowing for the incremental introduction of land use management are potentially innovative tools that, if creatively employed, could make considerable advances in realising the principles underpinning SPLUMA, including the incremental introduction of land use management in areas that have not been subject to land use management, the advancement of greater access to land to disadvantaged communities, the incremental upgrading of informal settlements, the development of affordable housing and the promotion of tenure security for vulnerable communities.

\[11\] Emphasis added.
\[12\] Emphasis added.
\[13\] Although none of the techniques are expressly mentioned in the land use scheme, they are well-recognised techniques in land use management.
\[14\] See section 24(2)(c) of SPLUMA; and section 6(1)(c) of the by-law.
Special zones are particularly well-suited to addressing the challenges posed by informal settlements on state-owned or private land. This is due to the fact that the concept of special zones could be used as a planning mechanism to grant legal recognition to informal settlement land use. This approach of using special zones to secure tenure and provide services in informal settlements lay at the heart of the City of Johannesburg’s Regularisation programme between 2008 and 2013. In terms of this programme, the City sought to provide legal recognition of informal settlement land uses through the creation of special zones, entitled Transitional Residential Settlement Areas (TRSAs). The Regularisation programme was based on the Brazilian experience of improving favelas through upgrading by declaring informal settlement areas as special zones (ZEISS or special zones of social interest) where more flexibly land use management rules applied. A study tour to Brazil was undertaken in June 2008 to learn first-hand about the approach. Although the Regularisation programme had considerable potential, the programme was not implemented at scale. However, it seems evident that the City initially pioneered special zones in order to advance upgrading of informal settlements through the designation of TRSAs.

SERI submits that the land use scheme misses an opportunity to build on the provisions of SPLUMA, the City’s own Regularisation programme and good practice internationally, to expressly provide an avenue for the declaration of a special zone for informal settlements and provisions allowing for the incremental introduction of land use management and regulation in informal settlements. Importantly, the land use scheme leaves the door open for these approaches to be taken by including a definition of Transitional Residential Settlement Areas (TRSAs) in the scheme.

The scheme defines “transitional residential settlement area” as “defined 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 Annexure.”

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17 See section 1, Part II definitions of the land use scheme.
While the scheme defines the “transitional residential settlement area”, it does not return to it again. It is not clear why. As a result, it is not possible to determine what the City has in mind. This definition should be more fully developed in order to fulfil the potential of SPLUMA’s special zones and incremental designation provisions.

As it currently stands the declaration of a special zone is not a mandatory requirement for informal settlements in terms of the scheme. In this regard SERI recommends that explicit provision should be made in the land use scheme for the creation of a special informal settlement land use zone in order to legalise informal settlement land use. This provision should be a mandatory requirement. SERI also recommends that the scheme should include provisions that relate to the incremental introduction of land use management and regulation in informal settlements. This could be done by more fully developing the “transitional residential settlement area” provision beyond a definition.

5. Conclusion

In this submission, SERI has highlighted a number of concerns and omissions in the City’s land use scheme. SERI’s primary concerns relate to the criminalisation of land uses that are in conflict with the land use scheme in section 42, the failure of the scheme to provide consultation and participation rights to occupiers and users of land, the failure to include provisions that specifically provide for the incremental inclusion of land use management and regulation in informal settlements, the failure to capitalise on the innovative mechanism of special zones as a way to address the land use and regulatory challenges posed by informal settlements, and the failure to develop the “transitional residential settlement area” provision beyond a definition.

SERI has recommended that these concerns or omissions be rectified in a variety of ways in order to ensure that the scheme gives effect to the spirit, purpose and objects of SPLUMA.