Submission on the
City of Johannesburg’s Draft Inclusionary Housing Incentives, Regulations and Mechanisms, 2018

Socio-Economic Rights Institute of South Africa
(SERI)

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1. Introduction

On 28 February 2018, the City of Johannesburg (the City) published an invitation for interested parties to comment on its draft inclusionary housing policy, entitled Draft Inclusionary Housing: Incentives, Regulations and Mechanisms (the policy).[^1] The draft policy, which was published in terms of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), makes provision for various incentives, mechanisms and regulations associated with inclusionary housing in the City. In particular, the policy makes it mandatory for any property development in the City that consists of ten or more dwelling units to include at least 20% inclusionary housing.[^2]

The Socio-Economic Rights Institute of South Africa (SERI) has read and considered the draft policy. SERI also attended a presentation and discussion workshop, hosted by the City of Johannesburg and the South African Research Chair on Spatial Analysis and City Planning (SA&CP), on the draft inclusionary housing policy at the University of the Witwatersrand on 20 April 2018.[^3] SERI makes this submission to the City of Johannesburg in accordance with the invitation to submit written comments.

SERI's submission provides background to the organisation and its work; and provides more detailed comments on the draft policy. We also make various recommendations about how the draft policy 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 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.^[4]

Over the last ten years SERI has been involved in legal, research and advocacy work around evictions, relocations, affordable rental housing, allocation of state-subsidised houses, and

[^1]: See the City of Johannesburg, City of Johannesburg Inclusionary Housing: Incentives, Regulations and Mechanisms (2018): http://bit.ly/coj_inclusionary (the call for comment is also available from this link).

[^2]: See City of Johannesburg, City of Johannesburg Inclusionary Housing, para. 2.

[^3]: Acting Assistant Director of Metro Planning for the City of Johannesburg, Dylan Weakly, presented the draft policy and answered questions about its application and implementation.

[^4]: For more on SERI visit the SERI website: https://www.seri-sa.org.
informal settlement upgrading. We have published several resource guides, research reports and working papers, including the following:

- **Minding the Gap: An Analysis of the Supply of and Demand for Low-Income Rental Housing in Inner-City Johannesburg** (November 2013).
- **Edged Out: Spatial Mismatch and Spatial Justice in South Africa’s Main Urban Centres** (December 2016).
- **Minding the Gap: An Analysis of the Supply of and Demand for Low-Income Rental Housing in Inner-City Johannesburg** (November 2013).
- **‘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
- **Dzai and Others v Ekurhuleni Metropolitan Municipality and Others (Makause)**: Makause informal settlement - Upgrading of Informal Settlements Programme (UISP) - Ekurhuleni Metropolitan Municipality
- **Fischer and City of Cape Town v Ramahlele and 46 Others (Fischer)**: Marikana informal settlement - anti-land invasion unit - Supreme Court of Appeal
- **Lyton Props and Robert Ross v Occupiers of isiQalo and City of Cape Town (isiQalo)**: isiQalo informal settlement - eviction application - Western Cape High Court
- **Melani and the Further Residents of Slovo Park Informal Settlement v City of Johannesburg and Others (Slovo Park)**: Slovo Park informal settlement - Upgrading of Informal Settlements Programme (UISP) - City of Johannesburg Mzimela and Others v eThekwini Municipality and Others (‘Mzimela’) illegal eviction - urgent interdict - Cato Crest informal settlement - Durban High Court
- **Pheko and Others v Ekurhuleni Metropolitan Municipality (Pheko)**: Bapsfontein informal settlement - illegal eviction - Constitutional Court
- **Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Others (Schubart Park)**: Schubart Park - difference between 'evacuation' and 'eviction' of occupiers - Constitutional Court
• **Zulu and 389 Others v eThekwini Municipality and Others (Zulu) constitutional validity of court order - Constitutional Court**

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 draft policy. The draft policy is a fundamental component of regulatory framework governing housing and spatial justice in the City. It is in this respect that SERI submits written comments on the scheme.

3. **Comments on the draft policy**

SERI recognises and welcomes the spirit of the draft policy, which clearly attempts to address the acute lack of rental housing that caters for poor and low-income households in the City in a manner that promotes spatial justice. In particular, SERI welcomes the City’s recognition that affordable rental housing needs to serve the needs of low income households (households that earn less than R3 200 per month) and that private developers have a role to play in addressing the affordable housing crisis in the City. SERI is strongly in support of measures that ensure greater access to decent, safe and genuinely affordable accommodation for low-income households throughout the City.

However, despite the laudable objectives of the draft policy, SERI’s submission touches on a number of concerns with the draft policy. In this respect, SERI’s submission:

- argues that the draft policy fails to ensure that inclusionary housing units are made available to low-income households (households earning less than R3 200 a month);
- argues that the rental in inclusionary housing should be linked to household income;
- argues that the rental paid by the households in inclusionary housing units should include levies, utilities and any communal costs;
- argues that the incentives contained in the policy should be utilised to encourage property developers to develop greater percentages of inclusionary housing; and
- raises concerns about the lack of accountability or enforcement mechanisms in the policy.

3.1 **Rental**

The draft policy aims to compel private developers to dedicate a certain percentage of new housing developments as rental housing for “low income and low-middle income households”.

However, the primary emphasis of the draft policy is on low-middle income households (which the policy defines as households earning less than R7000 a month). This is evident from the fact that the draft policy limits the rental amounts in inclusionary housing units to R2100 a month.  

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5 City of Johannesburg, *City of Johannesburg Inclusionary Housing*, para. 1 (the definition of “inclusionary housing”).

6 City of Johannesburg, *City of Johannesburg Inclusionary Housing*, para. 1 (the definition of “low-middle income”).

7 See City of Johannesburg, *City of Johannesburg Inclusionary Housing*, para. 4.2 and n. 1.
SERI believes that this emphasis is misplaced because the highest demand for rental housing is from poor and low-income households (households earning less than R3200 a month).

According to the 2011 Census, approximately 122 000 people (34 000 households) living in the inner-city of Johannesburg earn below R3200 per month. This figure constitutes 49% of all households in the inner-city. The data shows that approximately 89% of these households rent. The figures are similar in relation to households living in the greater Johannesburg metropolitan area, with approximately 51% of households earning less than R3 200 per month. These figures are unsurprising when one considers the minimum wage in formal sector employment in various occupational sectors. The affordable rental range for these households, calculated as 30% of monthly income spent on rental and utilities, is rental of R960 or less per month. In fact, this accommodation has never been available in the City and, according to the Affordable Housing Company (AFHCO) (a large rental housing provider operating in the inner-city):

“the only options for such earners remain RDP housing units which are outside the City, shacks in townships and hijacked buildings in the inner city, where they are often exploited by slumlords.”

The figures above indicate that the highest demand for rental housing is from low-income households earning less than R3200 a month. However, nearly all of the state’s efforts to develop affordable rental housing have targeted households with a monthly income between R3500 and R15000. This suggests that the state has primarily targeted low-middle and middle-income households for rental housing assistance, while neglecting low-income households.

The draft policy runs the risk of making the same mistake. This is due to the fact that it fails to put mechanisms in place to ensure that low-income households will benefit from inclusionary housing. The only measure in the draft policy that seeks to ensure that inclusive housing is available to low and low-middle income residents, is the limitation of rental in inclusionary housing units to R2100 a month (excluding utilities). This rental range is unaffordable to low-income households. SERI is concerned that the draft policy, in its current form, is therefore unlikely to assist low-income households – the very group that the policy seeks to provide assistance to.

*The policy should include mechanisms to ensure that inclusionary housing is made available to low-income households*

SERI submits that the draft policy should include mechanisms to ensure that the majority of inclusionary housing units are made available to low-income households (households who

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11 Anna Cox, “Finally, homes for the poorest of workers”, *The Star* (4 July 2012).
12 This includes the state’s social housing initiatives. See SERI, “Affordable Public Rental Housing”, SERI Policy Brief No 1 (2016), p. 2.
13 In fact, “low income households” are not even defined in the draft policy.
earn less than R3200 a month). This could include a qualification criteria (and eligibility assessment), a percentage quota of how many inclusionary housing units should be made available to low-income households (as opposed to low-middle income households), limiting the rental in inclusionary housing units to R960 (or less), or circumscribing the application of the inclusionary housing policy to low-income households. We submit that without incorporating one of these measures into the draft policy, it will fail to address the rental housing needs of low-income households.

**Rental should be linked to household income**

The draft policy limits the rental amount in inclusionary housing units to R2100 a month (excluding utilities), which is 30% of household income for a household that earns R7000 a month.14 This rental amount is unaffordable to low-income households (households earning less than R3200 a month) and is therefore likely to exclude these households from the ambit of the policy. As mentioned above, the highest demand for rental housing is from low-income households. This means that the failure of the policy to make inclusionary housing available to these households would be a missed opportunity to address the acute lack of rental housing available to these households.

In order to address this issue, SERI submits that the rental amounts charged for inclusionary housing units should be directly linked to the household incomes of the families living in these units. There are provisions in the draft policy that indicate that this would be a more appropriate way to regulate rental in inclusionary housing. For example, the policy notes that affordable housing should not exceed more than 30% of a household’s income.15 There is also support for linking rental to household income in the United States, where the Department of Housing and Development provides that a household should not spend more than 30% of their gross monthly income on rent (including utilities).16

SERI therefore submits that the rental in inclusionary housing units should be calculated at a rate of 30% of the household’s income, which, in the case of low-income households, should not exceed more than R960 a month. This should include utilities. SERI recommends that the policy should include provisions that would enable the City to conduct a qualification criteria and eligibility assessment of the households that apply for inclusionary housing. This assessment should include an assessment of the household income of the family in order to determine the amount of rental that would be appropriate.

SERI further recommends that the policy include mechanisms that would guarantee a fixed rental for a period of at least one year, and mechanisms that would allow residents to request a rent review if their circumstances have changed dramatically (e.g. the breadwinner of the family loses his or her job). This would ensure that inclusionary housing remains affordable to

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14 See City of Johannesburg, *City of Johannesburg Inclusionary Housing*, para. 4.2 and n. 1.
15 See City of Johannesburg, *City of Johannesburg Inclusionary Housing*, para. 1 (the definition of “affordable housing”).
16 According to the United States Department of Housing and Development, a household should not spend more than 30% of their gross monthly income on rent (including utilities). If a family spends more than 30% on rent, it is considered over-burdened and would qualify for housing assistance: [http://portal.hud.gov/hudportal/HUD/src=/program_offices/comm_planning/affordablehousing/](http://portal.hud.gov/hudportal/HUD/src=/program_offices/comm_planning/affordablehousing/).
low-income households.

*Rental should include levies, services and other communal costs*

The draft policy sets the rental for inclusionary housing units that are located in private developments at R2100 a month and provides that this amount “includ[es] levees but exclus[es] utility bills”.\(^\text{17}\) The fact that rental excludes the cost of municipal services is problematic for various reasons.

First, the vast majority of inclusionary housing units that are located in private developments will be subject to sectional title scheme ownership. This implies that there may be various additional costs that the households living in inclusionary housing units may be liable for by virtue of occupying a unit in a sectional title scheme. These costs may include communal or common property costs for the maintenance of communal areas, and shared municipal services costs (if the building has a bulk services meter). Common property costs are ordinarily divided among the owners or lessees of sectional titles according to their participation quotas. Likewise, a building that has bulk municipal services meters ordinarily records the amount of water or electricity used by the entire complex, and divides this shared amount among the owners or lessees using their participation quotas.\(^\text{18}\) The cost of municipal services in sectional titles schemes is therefore not always linked to a household’s usage. Given that the majority of the residents in the private developments where inclusionary housing units will be located will be middle- to high-middle income residents, they are likely to have more disposable income to spend on services or common property costs. The households living in inclusionary housing units in private developments might therefore be saddle with prohibitively expensive utility bills that are not necessarily linked to their municipal services usage. This may place a considerable burden on the finances of households living in inclusionary housing units.

Second, the cost of utilities may already be unaffordable to many low-income households. The average cost of utilities for an average household is likely to exceed R1300 a month (according to conservative estimates).\(^\text{19}\) This means that rental and services, according to the existing wording of the draft policy, is likely to amount to R3400 or more a month.

SERI submits that the rental amounts charged for inclusionary housing units should include levies, services and any other communal costs that a building may charge. Only if all of these costs are included in the rental amount will inclusionary housing be genuinely affordable to low and low-middle income households. In the alternative, SERI submits that inclusionary housing units should be individually metered to ensure that the households living in these units are only charged for the municipal services they consume.

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\(^\text{17}\) City of Johannesburg, *City of Johannesburg Inclusionary Housing*, para. 4.2.


\(^\text{19}\) This amount was mentioned by a participant at a workshop on the City of Johannesburg’s Temporary Emergency Accommodation (TEA) or transitional programme hosted by Cadre Plan (a service provider of the City) in Johannesburg on 25 April 2018.
3.2 Incentives

The draft policy provides that the development of 20% inclusionary housing will be “mandatory” for any development that consists of ten or more dwelling units.20 However, the mandatory nature of the policy is noted alongside a number of incentives that are aimed at encouraging developers to provide 20% inclusionary housing.21 Although City officials stated that the incentives were included in the policy at a time when the City envisioned voluntary participation by developers,22 the presence of these incentives in the existing draft policy may create uncertainty about whether the policy is mandatory or voluntary.

The mandatory nature of the policy also means that each property developer that embarks on a development that consists of ten or more dwelling units would automatically qualify for the incentives listed in the draft policy. While SERI firmly believes that the development of 20% inclusionary housing should be mandatory, we note that granting all developers the incentive listed in the policy is a missed opportunity as the City could use these incentives to encourage property developers to develop even greater percentages of inclusionary housing.

SERI therefore recommends that the City clarify that the policy is mandatory for any development that includes ten or more dwelling units. SERI further recommends that the City utilise the incentives in paragraph 5 of the policy to encourage property developers to develop even greater percentages of inclusionary housing.

3.3 Accountability measures

SERI is concerned about the lack of accountability or enforcement measures in the draft policy. There are two stages during which accountability or enforcement measures are necessary:

1. the development stage (during which accountability mechanisms are necessary to ensure that inclusionary housing is developed); and
2. the post-development stage (during which accountability mechanisms are necessary to ensure that inclusionary housing units remain inclusionary “for perpetuity”,23 that social housing institutions, private developers and body corporates maintain these units, and that other conditions of the policy are complied with after development).

Development stage

The policy states that the developmental stage include planning, land use and development approvals. During this stage, the policy provides that the development of 20% inclusionary

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20 City of Johannesburg, City of Johannesburg Inclusionary Housing, para. 2.
21 City of Johannesburg, City of Johannesburg Inclusionary Housing, para. 5.
22 Acting Assistant Director of Metro Planning for the City of Johannesburg, Dylan Weakly, noted that the incentives were included in the policy at a time when the City conceived of the policy as a voluntary policy while answering questions at a discussion workshop hosted by the City of Johannesburg and the South African Research Chair in Spatial Analysis and City Planning (SA&CP) at the University of the Witwatersrand on 20 April 2018.
23 City of Johannesburg, City of Johannesburg Inclusionary Housing, para. 2.
housing will be a “condition for development” and states that the “City may take action against developers / owners who do not comply with the conditions for inclusionary housing outlined in land use / development approvals”.24

SERI submits that these accountability measures are insufficient to ensure that property developers actually develop inclusionary housing. We believe that these provisions are too vague and recommend that the policy should specify the types of action that the City will employ to hold developers accountable.

Post-development stage

The post-development stage relates to the period after the inclusionary housing units have been developed. The policy imposes a number of obligations on social housing institutions, property developers and body corporates during this stage. Some examples include the requirement that inclusionary housing units remain subject to the conditions for inclusionary housing “for perpetuity”.25 and that the requirement that access to common facilities should be unconstrained and that inclusionary housing units “must share spaces, such as entrances, lifts, communal spaces, shared amenities, with market units in the same development or property”.26 Another example, that are not explicitly mentioned in the policy, is the obligation on social housing institutions, property developers or body corporates to ensure that inclusionary housing units are maintained.

In spite of the various obligations imposed on social housing institutions, property developers or body corporates during this stage, the policy lacks any substantive mechanisms to hold these entities accountable if they fail to comply with the prescripts of the policy or their rental housing obligations.27 SERI is concerned that the lack of accountability mechanisms may jeopardise the effectiveness of the policy and hamper the ability of the policy to achieve long-lasting socio-economic change. SERI therefore strongly recommends that the policy be amended to include measures to hold social housing institutions, property developers and body corporates to account during the post-development stage. These could include stricter reporting requirements (on a wider array of issues, including the rental amounts charged, the maintenance of inclusionary housing units and continued access to shared facilities); the establishment or assignment of a body or agency to monitor the implementation of the policy; and the imposition of sanctions or disincentives for the failure to comply with the obligations laid out in the policy.

4. Conclusion

In this submission, SERI has highlighted a number of concerns in the City’s inclusionary housing policy. SERI’s primary concerns relate to:

24 City of Johannesburg, City of Johannesburg Inclusionary Housing, para. 2.
25 City of Johannesburg, City of Johannesburg Inclusionary Housing, para. 2.
26 City of Johannesburg, City of Johannesburg Inclusionary Housing, para. 6.1.4.
27 The only exceptions are that the policy provides for a reporting obligation (in terms of which social housing institutions, property developers or body corporates are required to report to the City to prove that inclusionary housing units are being rented out in accordance with the capped rental amount) and that social housing units, property developers and body corporates would lose their property rates incentives.
• the failure to ensure that inclusionary housing units are made available to low-income households (households earning less than R3200 a month);
• that rental in inclusionary housing is capped at R2100 a month (as opposed to being linked to household income);
• that rental in inclusionary housing excludes the costs of utilities;
• that the incentives contained in the policy are not utilised to encourage property developers to develop greater percentages of inclusionary housing; and
• the lack of accountability or enforcement mechanisms in the policy.

SERI has recommended that these concerns or omissions be rectified in a variety of ways in order to ensure that the policy gives effect to its intended objectives.