Submission on the City of Johannesburg’s Special Process for the Relocation of Evictees (SPRE)

Socio-Economic Rights Institute of South Africa
(SERI)

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1. Introduction

The City of Johannesburg's Special Process for the Relocation of Evictees (SPRE) has been formulated as the City’s response to its constitutional obligation to provide temporary alternative accommodation to occupants who might be rendered homeless by an eviction.

The City invited various stakeholders, including the Socio-Economic Rights Institute of South Africa (SERI), to the presentation of this plan on 30 August 2016 in Braamfontein and 31 August 2016 in Alexandra. The policy document and the implementation guideline have been circulated through email to the various stakeholders.

SERI has considered the policy document (“the Policy”) with the accompanying implementation guidelines (“the Guidelines”), and makes this submission to the City of Johannesburg (“the City”) in accordance with the invitation by the City to submit written comments. This submission provides background to SERI’s work, responds to both the Policy and the Guidelines in detail and concludes with recommendations regarding some aspects SPRE. Our responses focus on:

- The SPRE Unit
- Qualification for alternative accommodation
- Application for alternative accommodation
- Meaningful engagement
- Presentation of options for permanent housing
- Nature of alternative accommodation
- Logistics of relocation

2. The Socio-Economic Rights Institute of South Africa (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 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.
SERI’s primary thematic focus areas are urban housing, access to basic services and informal settlement upgrading, informal trade, and the advancement of political space for organisation, expression, participation and articulation.

SERI has the following aims:

- To advance the currency of human rights and particularly socio-economic rights in South Africa.
- To promote the fulfilment of socio-economic rights by vulnerable communities in South Africa.
- To assist poor and marginalised groups to realise an adequate standard of living.
- To contribute to public governance through empowering local communities to understand their rights, government processes and to effectively engage in such processes, thereby holding government accountable.¹

SERI has been involved in litigation protecting housing-related rights from negative violations.²

SERI’s advocacy activities also address the right to housing and we have published a series of guides and research reports in relation to the right to housing and against illegal evictions.³

¹ For more on SERI visit the SERI website: www.seri-sa.org
² These include: Auto Cinema Investments v Occupiers of Stanhope Compound (‘Stanhope Compound’) eviction - Stanhope mining compound - Johannesburg - access to justice; Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another (‘Blue Moonlight’) private eviction - Berea - City of Johannesburg - alternative accommodation - Constitutional Court; Changing Tides (Pty) Ltd v Unlawful Occupiers of Chung Hua Mansions and Others (‘Changing Tides’) unlawful eviction - inner city of Johannesburg - Johannesburg High Court; City of Johannesburg v Changing Tides Properties and the Unlawful Occupiers of Tikwelo House (‘Tikwelo House’) amicus curiae - appeal against order to provide alternative accommodation - City of Johannesburg - Supreme Court of Appeal (SCA); City of Johannesburg in re: All pending eviction applications where the occupiers’ eviction may lead to homelessness (‘City of Johannesburg ex parte stay application’) stay application - evictions - City of Johannesburg - South Gauteng High Court; Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and MES (‘Dladla’) rights to dignity, privacy and adequate housing - shelter accommodation - inner city of Johannesburg; Hawerd Nleya and Others v Ingelosi House (Pty) Ltd (‘Ingelosi House’) application for leave to appeal - just and equitable eviction - Gauteng Local Division of the High Court - Supreme Court of Appeal; Hlophé and Others v City of Johannesburg and Others (‘Hlophé’) Chung Hua - enforcement application – contempt; Mthimkulu and Others v City of Johannesburg and Others (‘Mthimkulu’) emergency housing - City of Johannesburg - South Gauteng High Court; Occupiers of Erven 87 & 88 Berea v De Wet and Another (‘Kiribilly’) eviction rescission - lack of consent – Johannesburg; Occupiers of 10-18 Salisbury Street, Johannesburg v City of Johannesburg and Johannesburg Metropolitan Police Department illegal eviction - Johannesburg CBD - Johannesburg Metropolitan Police Department (JMPD) - fire brigade; Occupiers of Jeanwell Court v Khalil Ahmed Properties (‘Jeanwell Court’) inner city Johannesburg - rescission application - South Gauteng High Court; Occupiers of 50, 53 and 54 Soper Road v Motala and Others (‘Soper Road’) urgent application – eviction – inner city Johannesburg – rescission; Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Others (‘Schubart Park’) amicus curiae - Schubart Park – difference between ‘evacuation’ and ‘eviction’ of occupiers - Constitutional Court.
³ These include: A Resource Guide to Housing in South Africa 1994 - 2010: Legislation, Policy, Programmes and Practice (February 2011); ‘Jumping the Queue’, Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa (April 2013); Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local
Two of our most recent publications are directly relevant to SPRE: a policy brief on public rental accommodation, accessible here, and our second series of Community Practice Notes on Johannesburg Inner City Alternative Accommodation, accessible here, here and here.

An important aspect of this advocacy has been the call for South African cities to put in place plans and measures to progressively make available affordable accommodation close to city centres, and to implement a programmatic response to their constitutional obligation to realise the right to adequate housing.

3. Response

SERI welcomes the development of the Policy and Guidelines. The housing rights jurisprudence has developed a set of legal principles which should inform this policy, including the procedural requirements for an eviction, meaningful engagement and municipal provision of alternative accommodation. After years of litigation in the inner city it is clear that a programmed response to the provision of alternative accommodation is required.

We welcome the following aspects of the Policy and Guidelines:

- the City’s recognition of its constitutional and statutory obligations
- the intention to consider converting some of the temporary options into more permanent alternatives
- the situational assessment and enumeration process in the Guidelines
- the adoption of one process that addresses both “qualifying” and “non-qualifying” occupiers.

We address our main concerns in the sub-sections that follow.

Government (November 2013); Resisting Evictions in South Africa: A Legal and Practical Guide (March 2015); Tenure Security in Informal Settlements on Customary Land (December 2015). Community Practice Notes: Johannesburg Inner City Alternative Accommodation Series: From San Jose to MBV1 (July 2016); Community Practice Notes; Johannesburg Inner City Alternative Accommodation Series: From Carr Street to MOTH (July 2016). Community Practice Notes; Johannesburg Inner City Alternative Accommodation Series: From Saratoga Avenue to MBV 2 and Ekuthuleni (July 2016).

a) SPRE Unit

SERI welcomes the City’s intention to create the dedicated institutional capacity required for the relocation of unlawful occupiers and others affected by emergencies. However further detail is required on the SPRE Unit, its establishment, its role and responsibilities as well as its accountability mechanisms. We note in the Policy at section 6.1: Application for TEA that the SPRE Unit’s “powers, functions and objectives shall be properly recorded in a memorandum” separate to the Policy. The SPRE Unit is central to both the Policy and its implementation and as such the SPRE Unit should be fully detailed in the Policy.

b) Qualification for TEA

The Policy and the Guidelines address qualification at numerous places. Our general concern is that neither document fully appreciates the legal principle around alternative accommodation that has developed in the case law.

In particular:

- In the opening page of the Guidelines at page 1, paragraph 2, it appears that the City is attempting to incorrectly limit its obligation: “(w)here eviction proceedings are instituted at the instance of the COJ, there is no obligation on the part of the COJ to provide TEA”. In the case of unlawful occupation, homelessness triggers the City’s obligation to provide alternative accommodation and where homelessness would result, then the City’s obligation is indeed automatic.

- In the Policy at section 6.1 application for TEA and in the Guidelines at Step 4: assessment of applications, a bulleted list of non-qualification for TEA is provided. This list should be thoroughly reviewed for its applicability to unlawful occupiers. For example, having previously benefited from state-subsidised housing does not constitute grounds for exclusion of unlawful occupiers from alternative accommodation in terms of the Emergency Housing Programme. Non-application for TEA is not grounds for exclusion from access to alternative accommodation either. Further, time is unlikely to remedy the emergency circumstances of unlawful occupiers (“housing emergency can be remedied through the provision of time to vacate their current residence”): their circumstances are such that they cannot afford
accommodation and these circumstances are what led them to unlawful occupation in the first place. Furthermore, although we agree with the final bullet regarding the provision of reasons should someone not qualify for TEA, we suggest that the term "within reasonable time-frames" be added. Finally, an appeal step should be added to the assessment process.

- In the Guidelines at Step 6: qualifying and non-qualifying evictees on page 6, greater clarity is required on the scope and focus of the step. For example, the opening bullet misleadingly suggests that the step is about determining the nature of TEA to be provided but then goes on to address what appears to be qualification. Further on in that step the point is made that there is a “further distinction among non-qualifying evictees” (main bullet 2), but clarity has not yet been achieved about non-qualifying evictees in the first place. We submit that, concerning unlawful occupiers, the only grounds for non-qualification for alternative accommodation should be that the eviction would not render an occupying household homeless. However, it would be preferable if the City were to reframe qualification positively i.e. to emphasise qualification first and non-qualification subsequently. Regarding unlawful occupiers, qualification is clear: there is a positive obligation on the City to provide alternative accommodation if homelessness would result.

The final bullet at Step 6 identifies that "(n)on-qualifying Evictees who cannot fund their housing need shall be evaluated on a case by case basis". Two concerns arise. Firstly, unlawful occupiers who cannot fund their own housing need cannot be identified as non-qualifying. They are eligible for alternative accommodation by the very fact of not being able to fund their housing need, as the eviction would render them homeless. Secondly, they cannot be evaluated on a case by case basis as their right to alternative accommodation has been well established by the case law.

c) Application for alternative accommodation

Application for alternative accommodation is addressed in a number of different places in the Policy and the Guidelines. Generally, in the case of unlawful occupiers, access to alternative accommodation cannot be contingent on application to the SPRE Unit and lack of application cannot be a basis for exclusion from access to alternative accommodation. In particular:

- In the Policy at section 6.1: application for TEA, the onus is placed on the “Evictees who wish to receive TEA” to apply. We are concerned that the Policy does not fully
appreciate the implications of section 26 of the Constitution and the PIE Act: the provision of alternative accommodation is a municipal obligation, rather than a desire or a wish to “receive” accommodation on the part of unlawful occupiers. The wording is unfortunate and we recommend that, in application to unlawful occupiers, it be rephrased to more accurately reflect the principle of alternative accommodation that has been developed in the case law\(^5\). Further, while making application to the SPRE unit according to a CoJ prescribed process is not problematic in and of itself, lack of application cannot be the basis for exclusion from access to alternative accommodation. Further, registration with the ESP cannot be construed as excluding unlawful occupiers from access to alternative accommodation (“Evictees who wish to make an application for TEA must begin by registering with the CoJ’s Expanded Social Package (ESP) programme by prior arrangement with the SPRE Unit”).

- In the Guidelines at Step 3: application and screening process, a number of concerns arise. Firstly, registration on the ESP, while not problematic in and of itself, cannot be construed as a legal requirement nor as the basis for exclusion from access to alternative accommodation. Secondly, some of the requirements for documentation (at main bullet 4) are likely to be inappropriate to the socio-economic circumstances of unlawful occupiers, including for example, the provision, by people who are unemployed or informally employed, of bank statements and income statements. Further, proof of residence is a wholly inappropriate requirement in the circumstances of unlawful occupation. Thirdly, at the final two bullets in step 3 (“COJ to report illegal foreigners (sic) to the Department of Home Affairs ...” and "COJ Housing in consultation with Group Legal to determine the most suitable manner of accommodating illegal foreigners (sic) pending further directions from the Department of Home Affairs”) our concern is that the City cannot determine the lawfulness of a person’s residence in South Africa.

\[d)\] **Meaningful engagement**

We welcome the centrality of the principle of meaningful engagement in the Policy and the Guidelines. However, we are concerned, in parts, about its application and interpretation.

In the Policy at section 6.3: Meaningful Engagement and in the Guidelines at Step 5: Meaningful Engagement, the initiation of meaningful engagement appears to be contingent on a request having been made by the prospective TEA beneficiary. In the case of an unlawful

\(^5\) See for example
occupier, it is conceivable that there are circumstances under which an application for TEA has not yet been submitted and yet where meaningful engagement may be required. In fact, meaningful engagement may commence in order to communicate the need to apply for TEA. Further, in the Policy at section 6.3: Meaningful Engagement, the point is made that both non-application and unwillingness to engage are grounds for exclusion: “Where Evictees do not apply for TEA and/or are not willing to engage with the CoJ, despite its reasonable efforts to do so, Evictees may not be provided with TEA”. We submit that access to alternative accommodation is a constitutional right for unlawful occupiers who would be rendered homeless by an eviction, and that the notion of “unwillingness to engage” appears open to too much discretion to deprive unlawful occupiers from accessing alternative accommodation. Were the City to proceed in this direction, much greater clarity would be required about what constitutes unwillingness to engage.

Meaningful engagement is absent from the Guidelines at Step 7: acceptance of terms and conditions of TEA. It would be inappropriate to impose house rules and codes of conduct on relocated occupiers without first engaging them meaningfully on the content.

e) Presentation of options for permanent housing

We welcome the idea that the City will “use its reasonable endeavours to present the Evictees with alternative accommodation options for permanent housing…”, in the Policy at section 6.4 Presenting alternatives to Evictees. In an ideal world it would indeed be preferable if the City could avoid the provision of temporary alternative accommodation altogether. However, as SERI research has shown, the available accommodation in the inner city is either unaffordable or oversubscribed.6 Rental housing that is more affordable and that is provided at greater scale should be a priority for the City in relation to the presentation of options for permanent housing.7

Secondly, non-registration for state-subsidised housing delivery cannot constitute grounds for exclusion from temporary alternative accommodation (“Evictees who have not registered for or benefited from state-subsidise housing previously and who satisfy the qualifying criteria must apply for subsidies for permanent housing provided for under the National Housing Code”). At other parts of the Policy, the point is clearly made that SPRE will not reward “queue-

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jumping” (for example in the Policy section 3: Introduction “(t)he provision of TEA … does not promote queue jumping”). We are concerned about how this assertion applies in practice to SPRE: it should not imply that an unlawful occupier is excluded from temporary alternative accommodation if they have not registered. Neither should it imply that, if they have, then they are not eligible for temporary alternative accommodation but must wait patiently for a permanent housing option to be made available.

f) Nature of alternative accommodation

The Policy addresses the nature of alternative accommodation in several different, but related, respects:

- The temporary nature of alternative accommodation
- Alternative accommodation is not a home
- TEA buildings as managed care facilities
- Giving up possession of alternative accommodation
- Costs of alternative accommodation

We address each of these in turn.

- The temporary nature of alternative accommodation

The temporary nature of alternative accommodation is addressed in a number of different places including in the Policy at section 6.6: Eligibility for TEA. Here the approach is clear that the initial period is for six to nine months with the possibility of a twelve-month period on application to the SPRE Unit. At the end of a period of twelve months “Evictees who have not been able to access alternative accommodation may be relocated to a TRA…” (paragraph one) and “This (relocation to a TRA) will negate the need for a new court order to relocate an Evictee upon expiry of the period in the TEA building” (paragraph three).

Firstly, it is improbable that a period of twelve months is sufficient to access permanent accommodation in a housing delivery context characterised by (a) the combined effects of the principle of no queue jumping and insufficient RDP housing delivery across the country in relation to need and (b) both the oversubscription in, and unaffordability of, the existing social housing and private rental delivery systems in the inner city. It is irrational to expect that unlawful occupiers would find permanent accommodation within twelve months because it is precisely its absence that led to their unlawful occupation in the first place. Secondly, eviction without a court order runs counter to section 26 of the Constitution. It has to be just and
equitable to evict, so a court must consider the relevant circumstances, even if that consideration takes place one year later.

- **Alternative accommodation is not a home**

We note that in the *Principles of SPRE* section of the Policy, at *section 6.10.i*, TEA is identified as “… an institutional environment offering a time-limited programme of managed care and is not a residence or home in the sense contemplated in section 26 of the Constitution”.

A shelter is indeed a place of residence and, given the social and historical context of unlawful occupation to begin with, is the only place of residence available to an unlawful occupier who has been relocated. It is our contention that the provisions of section 26 of the Constitution apply in the alternative accommodation.

- **TEA buildings as managed care facilities**

We note that in the *Principles of SPRE* section of the Policy, at *section 6.10.i*, TEA is identified as “… an institutional environment offering a time-limited programme of managed care …”. Our primary concern with “managed care” concerns the application of house rules devised by managed care providers.

House rules are addressed in the Guidelines at *Step 7: acceptance of terms and conditions of TEA*. We have two concerns in relation to house rules. The first is that non-acceptance of the house rules or code of conduct constitute a rejection of TEA. In the case of unlawful occupiers who would be rendered homeless as a result of an eviction, non-acceptance of the house rules cannot constitute a rejection of access to alternative accommodation. Having said this however, we are also of the view that if the house rules do not infringe on the constitutional rights of occupiers, and if the process of engagement is meaningful, then non-acceptance of the house rules should not arise. If it does, then the process of meaningful engagement should seek to arrive at a negotiated outcome regarding the house rules, rather than settling on their outright rejection.

Our second concern is the statement, at bullet 3 of step 7, that "(e)victees in TEA buildings must abide by the house rules *applicable in the facility*" (emphasis added). Should the City decide to outsource the management of alternative accommodation, then the outsourced agent is not empowered to impose rules. The agent acts on behalf of the City and only the
City is empowered to make rules. These rules must not infringe on the constitutional rights of the relocated occupiers.

- **Giving up possession of alternative accommodation**

  We note that in the *Principles of SPRE* section of the Policy, at section 6.10.ii, absence for a period of seven days or longer may result in the “Evictees forfeiting his or her allotted space”. We submit that there are a variety of circumstances which might lead to a resident of alternative accommodation being absent for seven days or more, including for example medical care or a family death. In these circumstances, and others like them, it would be unreasonable to deprive someone of access to alternative accommodation. Instead, we recommend that a procedural solution should be devised concerning notification of absence and assessment on a case by case basis within agreed parameters in the house rules. It would be unreasonable were the assessment left to the discretion of the building manager.

- **Costs of alternative accommodation**

  We note that in the *Principles of SPRE* section of the Policy, at section 6.10.iii, “(a) minimal contribution to costs shall be payable by the Evictee staying at a TEA building or TRA in terms of this Policy”. While we have no in principle objection to payment, we are concerned about the vagueness of the determination of costs: “(t)he value of the contribution payable shall be determined by the SPRE unit in line with COJ’s parameters for making such determination”. We recommend that the Policy should make the CoJ’s parameters for determining the value of the contribution payable explicit.

- **g) Logistics of relocation**

  The logistics of relocation are addressed in the Policy at section 6.8: *Logistics of Relocation*.

  We welcome the identification of the need for a *reasonable timetable* for the relocation: “(w)here necessary, a reasonable timetable for the relocation should be made available to the Evictees”. SERI research supports the provision of a reasonable timetable and reasonable adherence to agreed time-frames\(^8\). However, we are concerned at the potential limitation of the phrase “where necessary”. It is hard to imagine the circumstances under which a

reasonable timetable would not be necessary. Given the hardship and trauma associated with relocation, we recommend that the Guidelines should address the relocation process logistics in more depth. In particular, we recommend that officials tasked with the responsibility of implementing relocation should be operating according to a relocation plan that has been developed in consultation with occupiers. While the nature of the emergency will necessarily dictate the timetable, more guidance should be given in the Guidelines on the possible contents of a relocation plan (including, but not limited to, a timetable) and its application to different emergency contexts.

We note the provision in this section for secure storage. While securely storing the property of unlawful occupiers on relocation is not an in principle problem, experience in the relocation sites that have been provided to date\(^9\) shows that, where residence in alternative accommodation spans several years, it becomes unreasonable to separate occupiers from their possessions for such a long period of time. Consideration should instead be given to the circumstances under which residents of alternative accommodation might reasonably expect to be able to use their property, furniture and so forth, once again.

4. **CONCLUSION**

SERI welcomes the development of the Policy and Guidelines as they signal a more programmatic approach to the relocation of unlawful occupiers who would be rendered homeless by an eviction. We welcome some aspects of the Policy including the consideration to convert some of the temporary options into more permanent alternatives, the situational assessment and enumeration process of the Guidelines as well as the adoption of a single process that addresses both “qualifying” and “non-qualifying” occupiers. However, we have several concerns about aspects of the Policy and Guidelines concerning the SPRE Unit, qualification for alternative accommodation, application for alternative accommodation, meaningful engagement, presentation of options for permanent, the nature of alternative accommodation and logistics of relocation. We have covered these concerns extensively in section 3.

In conclusion we draw out the recommendations contained in our response.

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The establishment, role and functions of the SPRE Unit should be fully detailed in the Policy.

The Policy and Guidelines should be amended to more appropriately reflect the legal principle around alternative accommodation that has been developed in the case law, especially to ensure that:

- the grounds for exclusion from access to alternative accommodation do not include:
  - previous receipt of a state housing subsidy
  - failure to register on the ESP
  - non-registration for subsidised housing delivery
  - failure to apply for SPRE
  - “unwillingness to engage”
- the City’s obligation to provide alternative accommodation is automatically triggered if an eviction would result in homelessness
- the City’s obligation is generally more positively framed.

The Policy and Guidelines should be amended to more appropriately reflect the legal principle around meaningful engagement that has been developed in the case law, especially to ensure that:

- meaningful engagement is not contingent on an application to SPRE having been made by an unlawful occupier
- what constitutes unwillingness to engage, on the part of an unlawful occupier, is clearly defined and that unwillingness to engage is not construed as exclusion from access to alternative accommodation
- meaningful engagement is introduced to the process for agreeing to house rules and code of conduct in the Guidelines.

The Policy and Guidelines should be amended to address the nature of alternative accommodation to more positively respond to the obligation especially in relation to:

- The temporary nature of alternative accommodation
- Alternative accommodation not being a home
- TEA buildings as managed care facilities
- Giving up possession of alternative accommodation
- Costs of alternative accommodation

More guidance should be given in the Guidelines on the possible contents of a relocation plan (including, but not limited to, a timetable) and its application to different emergency contexts.