



# **MANAGING AND CURBING UNAUTHORISED LAND OCCUPATION**

RFP/JHB/2015/020

Housing Development Agency

## **MAIN REPORT**



April 2016



Promoting active citizenship and good governance

Lead author

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Support from

**CS Consulting**

and

**Socio Economic Rights Institute of South Africa (SERI)**

April 2016

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## Executive Summary

### Managing and Curbing Unauthorised Land Occupation

*Where do you expect me to live? In the air?*<sup>1</sup>

South Africa is struggling to address the land and housing backlog. At present housing delivery rates, it will take more than 20 years to address the housing backlog.<sup>2</sup> The challenge is getting more difficult not easier. More people need land and housing as a result of increasing urbanisation, including population growth and in-migration. If we do not directly confront these challenges, unauthorised land occupations and the development of new informal settlements will increase; and it will be difficult to achieve the progressive realisation of the right to land and housing as found in our Constitution.

Both the property clause (Section 25) and the housing clause (Section 26) of the Constitution have relevance to the question of dealing with unauthorised land occupations.

Section 25 includes the following sub clauses:

- Section 25(1) prescribes a negative right not to be arbitrarily deprived of property;
- Section 25(5) deals with fostering conditions that enable citizens to gain access, within available resources, to land on an equitable basis;
- Section 25(6) deals with security of tenure and tenure reform; and
- Section 25(7) deals with land restitution or comparable redress for people disposed of property due to past racially discriminatory laws or practices.

Section 26 includes the following sub clauses:

- Section 25(1) provides for everyone to have the right to have access to adequate housing;
- Section 25(2) calls on the state to take reasonable legislative and other measures to achieve this right; and
- Section 25(3) prescribes another negative right where no one may be arbitrarily evicted from their home without an order of the court that considers all the relevant circumstances.

Grootboom, a landmark case in the evictions jurisprudence developed by the courts, defines land invasion as the act of a person or persons coming onto land for the purposes of residential settlement, without any right in law to do so.<sup>3</sup> Land Invasion” is “the act of taking occupation of land or buildings with the express intent of “coercing a state structure into providing housing on a preferential basis to those who participate”<sup>4</sup> “Land Invasion” is not an appropriate term to describe the occupation of land by displaced persons with nowhere else to go.<sup>5</sup> Where the occupation is undertaken by homeless people out of necessity this “detracts from the humanity of the occupiers, is emotive and judgmental and comes close to criminalising the occupiers.”<sup>6</sup> In this report we apply the terminological clarification provided by the Constitutional Court and refer to unauthorised land occupation, or occupation, in preference to land invasion.

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<sup>1</sup> Evelyn Benekase, Federation of urban and rural poor, personnel communication with Mr Eglin

<sup>2</sup> from South Africa’s Housing Conundrum, SAIRR, @liberty, No 4, 2015/6 October 2015/Issue 20

<http://irr.org.za/reports-and-publications/atLiberty/files/liberty-2013-south-africas-housing-conundrum>

<sup>3</sup> *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC), para 92 (also see annexure 1)

<sup>4</sup> Grootboom, para 92

<sup>5</sup> Port Elizabeth Municipality, para 20, footnote 22

<sup>6</sup> *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others*, 2012 (2) SA 337 (CC) (“Golden Thread”).para 4

The main legislation dealing with unauthorised land occupation is the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (PIE) no. 19 of 1998. PIE gives effect to section 26(3) of the Constitution's requirement that a court consider all the relevant circumstances before making an eviction order. The PIE Act provides procedures for eviction of unlawful occupants and prohibits unlawful evictions.

It is proposed that National government adopts a three pronged approach to managing and curbing land occupations. In order of priority, this three pronged approach includes:

**1: Pre-emptive land development Strategy: make planned, secure and basic serviced land available so that people in desperate need don't have to occupy land.**

Municipalities should acquire and prepare land for development through the formulation and implementation of comprehensive land acquisition and development strategies; and the negotiation for and, where necessary, the expropriation of identified land for incremental settlement (and other housing development) approaches.

Municipalities should also ensure that access to land is fair and transparent, through the development and implementation of land allocation procedures that have been developed through a rigorous participation process.

Municipalities should designate both Incremental Settlement Areas (in their Spatial Development Framework plans) and introduce Special Informal Settlement Zones (in their land use schemes).<sup>7</sup>

Municipalities should allow incremental settlement on the land through Managed Land Settlement (MLS) approaches. MLS is where government provides households with, at least, access to a planned and secure piece of land and basic services; and commits to the progressive upgrading of these areas over time.

**2: Upgrading Strategy: Upgrade or, where appropriate, relocate informal settlements so that peoples' land and housing rights are realised, and their quality of life is improved.**

Municipalities should develop and implement a Municipal/metropolitan wide upgrading of informal settlements programme; and per informal settlement, either, upgrade the area *in situ* to at least a level of basic services and tenure; or, as a last resort, relocate households to MLS areas.

**3: Rights-based Relocation Strategy: Comply with the legal and Constitutional imperatives - of not arbitrary evicting people from their home (s26.3) and progressively realising the right to housing (s26.1) - when it comes to dealing with people who have occupied land or buildings without authorisation.**

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<sup>7</sup> as per the *Spatial Planning and Land Use Management Act (SPLUMA)* act no.16 of 2013. SPLUMA requires municipalities, as part of their Spatial Development Framework, to "identify the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be applicable" and Section 24(3)(b) of SPLUMA 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 municipality" (emphasis added).

Municipalities need to build capacity to be able to follow the correct procedures and legal principles that fulfil their obligations in terms of the constitution when responding to land and building occupations, either on state (including communal land) or private owned land, including meaningfully engaging with the stakeholders concerned to try and find mutually beneficial solutions, and ensuring that appropriate alternative accommodation is provided when voluntary relocation is agreed to (in instances where people would be rendered homeless by eviction).

The implementation of such a three pronged approach will not be effective if there is a lack of political (and bureaucratic) will to make it happen. The political will of municipal councillors (and bureaucrats) for change needs to be built from the bottom, where communities demand change; from above, where legislation calls for and makes change possible, and; from within, where the politicians (and bureaucrats) concerned, reflect on and internalise the need for change.

As a way forward it is therefore proposed that the relevant National and Provincial Government Departments (including the Housing Development Agency - HDA) need to undertake the following actions:

1. Include the three pronged approach to managing and curbing land occupation in future National and Provincial policy statements, such as the new human settlement white paper, national policies on a cohesive and inclusive approach to land for human settlements, and the Integrated Urban Development Framework.
2. Develop a nationwide awareness raising and capacity building programme highlighting and promoting the three pronged approach to land occupation
3. Support Municipalities to develop land acquisition and development strategies
4. Support Municipalities to develop land allocation policies and procedures that conform to a National and Provincial land allocation framework policy
5. Support Municipalities to set Managed Land Settlement targets linked to new MLS targets at National and Provincial level.
6. Support Provinces to establish housing rights advisory units to support Municipalities to follow proper eviction procedures and promote the realisation of the right to adequate housing
7. Develop guidelines for, and require Municipalities to include incremental settlements (including informal settlements and managed land settlements) and special land use zones in Spatial Development Framework plans and Land Use Management Schemes in terms of the Spatial Planning and Land Use Management Act (no. 16 of 2013).

## Acronyms

- CWP: Community Work Programme
- CoGTA: Cooperative Governance and Traditional Affairs
- DHS: Department of Human Settlements
- DRDLR: Department of Rural Development and Land Reform
- ePHP: Enhanced Peoples Housing Process
- ESTA: *Extension of Security of Tenure Act No. 62 of 1997*
- HDA: Housing Development Agency
- HSDG: Human Settlement Development Grant
- IDP: Integrated Development Plan
- IPILRA: *Interim Protection of Informal Land Rights Act No. 31 of 1996*
- IRDP: Integrated Residential Development Programme
- ISA: Incremental Settlement Areas
- IUDF: Integrated Urban Development Framework
- MLS: Managed Land Settlement
- NDP: National Development Plan
- NEMA: *National Environmental Management Act, no. 107 of 1998*
- NUSP: National Upgrading Support Programme
- OUR: Occupation and Use Rights
- PIE: *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) no. 19 of 1998.*
- RDP: Reconstruction and Development Programme (referring to the predominant form of housing provided by the state using housing subsidy grants)
- SDF: Spatial Development Framework
- SERI: Socio-Economic Rights Institute of South Africa
- SPLUMA: *Spatial Planning and Land Use Management act No. 16 of 2013*
- UISP: Upgrading of Informal Settlement Programme
- USDG: Urban Settlement Development Grant

# 1. INTRODUCTION

## 1.1. Background to the study and interpretation of the brief

The Housing Development Agency (HDA) has commissioned research on managing and curbing unauthorised land occupation (or what was referred to in the original brief as 'land invasion') in order to:

- Explore and capture experiences of Municipalities in dealing with land occupations, including identifying what approaches various Municipalities have resorted to manage and curb land occupation, taking into account the various legal and capacity constraints that they face
- Capacitate practitioners working in land, housing and informal settlements on what is involved in managing and curbing land occupations.

The findings of the research report and workshops will be used to:

- Provide a holistic understanding of the complex nature of informal settlements, land occupation and the various approaches to management of land occupation by Municipalities
- To highlight and analyse the challenges of managing land occupations in Municipalities.
- Draw lessons from previous cases of land occupations in various Municipalities, taking into account their capacity and the approaches they adopted in managing occupations, as well as the dynamics and complexities they experience in applying the approaches.
- Propose recommendations of approaches to addressing challenges presented by unauthorised land occupations.

We have interpreted unauthorised land occupation to refer to the act of a person or persons coming onto land for the purposes of residential settlement, without any right in law to do so.<sup>8</sup>

We have also focused, as per the terms of reference for the study, on land occupation for residential purposes.

*Municipalities across the country are confronted by cases of land invasions as a result of the increasing housing backlogs, lack of basic infrastructure services as well as having to enforce evictions.*<sup>9</sup>

The report focuses on unauthorised occupation of vacant land. Many of the findings from the research are however also applicable to the occupation of houses and apartment complexes.

The report will focus on what Municipalities have been doing to proactively and reactively respond to unauthorised land occupation; draw lessons from this experience; and make

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<sup>8</sup> *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC),

<sup>9</sup> The Housing Development Agency (2015) *Request for Proposals: managing and curbing land invasions*, available at: [http://www.thehda.co.za/uploads/files/RFP\\_land\\_invasionsTOR.pdf](http://www.thehda.co.za/uploads/files/RFP_land_invasionsTOR.pdf)

recommendations for what municipalities can do better and differently to be more effective in managing and curbing unauthorised land occupation.

Recommendations will also be made as to what the relevant National and Provincial government departments (including the Housing Development Agency - HDA) can do to support and create an enabling environment for Municipalities to deal with unauthorised land occupation.

According to the Merriam Webster dictionary 'managing' is defined as "to work upon or try to alter for a purpose", while 'curbing' is defined as "something that controls or limits something else".<sup>10</sup>

Managing land occupations involves the processes and activities involved in dealing with land occupation as it is happening and responding to land occupations that have happened in the past. In other words - reacting to unauthorised land occupations. Curbing unauthorised land occupations involves the processes and activities involved in pre-empting and preventing land occupations happening in the first instance. In other words – proactively preventing land occupations.

Land Invasion means the occupation of people on land without the express or tacit consent of the owner of the land or the person in charge of the land, or without any other right in law to settle on or occupy such land.<sup>11</sup>

The original brief for this research work was titled "Managing and curbing land invasions", but given the more nuanced differences in the terms 'land invasion' and 'unauthorised land occupation' as described in the section on unpacking land occupation, it was decided to rather use the title "Managing and curbing unauthorised land occupation".

Consideration was given to remain with the term land invasion in the title as this is a term that most people are familiar with. However, it was felt that the term 'unauthorised land occupation', is preferable as it is more in line with the thinking of the courts, and it 'forces' the reader to relook at the question of 'land invasion' with new 'eyes'.

## **1.2. Outline of report**

Broadly the report is structured as follows:

- Section 1 (Introduction) provides a background to the report and explains how the report was written.
- Section 2 (Context) summarises what is understood as unauthorised land occupation and provides a short history of the land issue in South Africa.
- Section 3 (Contextual, Policy and Legislative review) looks at statistics and legislation relating to unauthorised land occupation, informal settlement upgrading and new settlement development.
- Section 4 (Analysis of Unauthorised Land Occupation) summarises the findings from a case study of how three municipalities are dealing with unauthorised land occupation; looks at the causes and effects of land occupation; the challenges and opportunities associated with dealing with unauthorised land occupation; as well as unpacking the

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<sup>10</sup> <http://www.merriam-webster.com>

<sup>11</sup> This draws on the definition in the PIE act (see section on legislation)

advantages and disadvantages of various approaches Municipalities have adopted in managing and curbing land occupation.

- Section 5 (The Proposal) outlines a vision for managing and curbing land occupation, and introduces a broad three pronged approach to dealing with land occupations before going into detail of what Municipalities can do as part of this three pronged approach.
- Section 6 (Way Forward) brings the recommendations together and outlines key recommendations, budget shifts and phasing that is required in order to manage and curb unauthorised land occupation.
- Section 7 (Conclusion) calls on the relevant Government Departments to adopt the three pronged approach in future policy pronouncements with an emphasis on the pre-emptive land development strategy of the three pronged approach.

See the following three annexures for more background information on managing and curbing unauthorised land occupation:

- Annexure 1: Legal Opinion
- Annexure 2: Case study
- Annexure 3: Managed Land Settlement

These annexures as well as a copy of the main report can be found at:

<http://www.thehda.co.za/information/>

### **1.3. Methodology of this report**

The following process was followed to produce this report:

- An inception meeting was held with the HDA to confirm the broad content of the research paper and methodology that would be used to produce the research report.
- Literature and policy and legislation dealing with land occupation was reviewed.
- Conducted case study interviews with 4 identified Municipalities – Buffalo City Metro, Cape Town, eThekweni, and Rustenburg - to find out how municipalities are and would like to deal with land occupation.
- Produced a legal opinion on managing and curbing land occupation.
- Developed and circulated a draft of the research report to the HDA for comments.
- Developed a final research report drawing on the literature review, review of legislation and policy, municipal case studies and the legal opinion.

The outcomes from this research report will form the basis of a workshop that is being organised by the HDA with identified stakeholders to present and discuss the research findings.

## 2. THE CONTEXT

### 2.1. Building on the past

We do not need to 're-invent the wheel' when it comes to managing and curbing unauthorised land occupation. For example, the analysis and the recommendations that are made in this report are very similar to what was discussed in the 1997 draft land policy.

*Government will not give priority [for housing development] to people or groups who participate in land invasions, nor will threats of land invasions be rewarded by special treatment. Rather, government undertakes to work with organised groups of landless people to resolve their problems.*

*Rapid urbanisation is creating enormous pressure on urban land. It is taking place in the absence of clear and coordinated policies and strategies to provide for speedy land delivery, management and development. In the absence of these actions, informal settlements and land invasions will continue to grow in number and complexity.*

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*Land invasions are increasing in the absence of suitable land being identified and assembled for affordable housing. They hamper efforts to release land in a planned manner and result in 'queue jumping' for the housing subsidy and for land. Government, while strongly discouraging land invasions, does not believe that the only solution lies in evictions, which are often a route towards confrontation and civil disturbance. Evictions as a solution to land invasions are a measure of last resort and should only be considered after all other possible alternative solutions have been explored, including commitments to organised groups of landless people for the delivery of land within specific time frames. Where evictions are the course of action decided upon, this should only be after due process has been followed.*

*In the final analysis, it is the delivery of appropriate land at a rapid pace that is the solution to land invasions.*

*From both a cost perspective, and from the need to minimise conflict and stabilise communities, it is preferable, that where it is possible and appropriate, in situ upgrading of tenure and regularisation of land rights is seen as a solution to land invasions. In particular, the upgrading of tenure in these situations, may provide individual households with sufficient security and ownership to give them independence from 'warlords' seeking to extract rent from them in return for land.*

*This position does not in any way imply governmental support for land invasion as a means of acquiring land. Government maintains its right to take legal action against land invaders. It is also determined that land invasions or threats of land invasion will not be rewarded with special treatment.*

*Finally, the high cost of urban land in well-located areas, relative to available subsidies, makes an investigation of urban land prices and the means to make the expenditure of subsidy funds most effective, an essential step. The DLA [Department*

of Land Affairs] is currently investigating mechanisms for the financing and release of better located land in urban areas for settlement by the poor.<sup>12</sup>

## 2.2. What is unauthorised land occupation?

*I'm living a miserable life. I'm suffering; no work, I'm not well educated, I'm living in a shack, no house, no water, no electricity and no toilets*<sup>13</sup>.

For most of this report we will use the term 'unauthorised land occupation', (or 'occupation' for short) rather than the term land invasion as used in the terms of reference, as the constitutional court has found that 'unauthorised occupation' is a more 'neutral' term in contexts where the occupiers have no reasonable alternative place to live. As such 'occupation' is a more humane term that recognises the humanity and human rights of those doing the occupation, while also recognising the rights of those whose property has been occupied without their authority to have their property rights protected.

The term land invasion is left for situations where people, who do have a realistic alternative place to live, invade land for other reasons. These other reasons could be to make a political statement or achieve a political end, or to disrupt the smooth functioning of the land market or municipal affairs in a particular area, or to 'get back' at a land owner who the land invader has a 'grudge' against, or for some other reason that is not totally related to being able to find appropriate alternative accommodation.

There are five broad ways that a person can access land in South Africa.

- Firstly they can access land through the market. They can buy land that has been put up for sale by the seller through the open market. The person who can afford to pay a price that the land seller is willing to accept is the one who gets to acquire and occupy the specific piece of land. It needs to be noted that there are two sub sets of this market land allocation approach:
  - formal land markets where the buyer and settler follow well laid out procedures as outlined in various legislation (such as the *Land Survey Act No.8 of 1997* and the *Deeds Registries Act No.47 of 1937*) relating to the sale and transfer of property and keeping records of such transactions in the deeds office
  - informal land markets where people buy and sell the rights to occupy a particular piece of land without necessarily transferring the title deeds of the land in question.
- Secondly they can access land through the state. They can receive a piece of land as part of a state subsidised land or housing intervention such as the construction of what has come to be known as a Reconstruction and Development programme (or RDP) house. In such instances, various allocation procedures and criteria are used to determine who specifically gets which pieces of land, ranging from first come first served on a housing waiting list to being allocated as a result of occupying a specific informal settlement. People can also access land through the land restitution and the land redistribution components of the states land reform programme.
- Thirdly a person can access land through customary allocation practices in communal areas. The person who satisfies the local land allocation customs used by the local

<sup>12</sup> Department of Land Affairs (1997) White Paper on South African Land Policy, from pages 68 and 69, available at: <http://www.gov.za/sites/www.gov.za/files/whitepaperlandreform.pdf>.

<sup>13</sup> Ncumisa (November 2014), a resident of Endlovini informal settlement near Dimbaza in the King Williams Town area of Buffalo City metropolitan municipality, available at: [http://www.incrementalsettlement.org.za/wiki/index.php?title=BCMM\\_Human\\_Interest\\_Case\\_Study](http://www.incrementalsettlement.org.za/wiki/index.php?title=BCMM_Human_Interest_Case_Study)

community is the one to gain access to the specific piece of land. Some of the procedures falling under 'informal' land market provision also have a strong element of community provision.

- Fourthly a person can access land through self allocation. They can invade land or occupy land without authority. The person who is first to move onto and stake a claim to the piece of the land in question is the one to gain access to the specific piece of land. The rights for the person to continue to stake a claim to such a piece of land depend on how they occupied or invaded the land and the response of the land owner or person in charge of the land.
- Finally a person can also inherit land which is passed down from one generation to the next. This form of land access could also be seen as a subset within each of the four preceding broad land allocation methods, where, for example, they could access land through formal inheritance laws associated with the formal deeds registration system, or through customary law inheritance systems.

There are many different ways that land occupation takes place, for example when a person:

- occupies an 'empty' piece of land and erects a some form of shelter
- occupies an existing building, that could either be a derelict building or empty building such as an unoccupied RDP house); or
- overstays a lease agreement<sup>14</sup>

Any type of land can be occupied without authority, including private land, state and public land and communal land (which is a special form of state land). According to the White Paper on South African Land Policy 1997<sup>15</sup>, public land includes land held by Provincial and National governments, as well as land owned by local authorities and land belonging to parastatals or other enterprises wholly owned by government. State land is land which is held by the National and Provincial governments, but excludes local authority and parastatal land. State land includes former South African Development Trust land and land already allocated to communities and individuals in the former homelands and former coloured reserves.

Reasons for land occupation are varied, and include, for example:

- People in desperate need of accommodation
- Children who have grown up with their families and who now need new accommodation
- People from rural areas/ other areas within South Africa moving to urban areas looking for jobs and opportunities
- Foreign nationals moving to South Africa and needing accommodation
- People with housing but who want alternative accommodation closer to work opportunities
- People removed from existing housing/ property as they cannot afford to stay there
- People who sold their RDP house and cannot afford to get a new house
- People in need of housing who invade multiple sites so that they can get their names onto multiple municipal upgrading informal settlement lists
- People needing temporary accommodation (e.g. students, temporary workers)
- Farm dwellers that form part of *Extension of Security of Tenure Act (ESTA) no. 62 of 1997* are not defined as being land invaders.

There are also examples of people invading or occupying land without authorisation, who it could be argued, in some instances, have the resources to acquire land and housing for

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<sup>14</sup> the focus of this report is on unauthorised occupation of 'empty' or greenfield land, but almost all of the findings and recommendations can be modified to respond to unauthorised occupation of buildings.

<sup>15</sup> available at <http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf>

themselves through more formal and lawful channels (e.g. buying land and housing in the market), but who for various reasons chose to occupy land and housing unlawfully. This includes some middle income households who seek to take advantage of the rollout of services for the poor. Examples of this are in Lenasia in Gauteng<sup>16</sup> and Greydell in Buffalo City Municipality<sup>17</sup>. However, it needs to be noted that even middle income households could be rendered homeless by an eviction because of the problem of under supply of formal accommodation.

Usually, the land owner or the person in charge of the land initiates eviction procedures on people who have occupied the land without authorisation, but the state also has standing to evict even if they are not the owner or person in charge, as per Section 6 of the PIE Act so long as it is in the public interest to do so. In instances where land being invaded is private land, and where the person being the subject of the eviction process does not have reasonable alternative accommodation, then the Municipality is required to join the evictions procedures, as they have a responsibility to assist in finding reasonable and adequate alternative accommodation.

Only the owner or people with the approval of the owners can lawfully reside on the land, but unlawful occupiers are protected against eviction if it would not be just and equitable to remove them. Those on the land can only undertake activities as approved in the municipal planning legislation. The land owners also need to get the necessary permits for certain activities in certain areas (such as environmental permits, heritage permits, liquor licence permits, etc.)

People invade or occupy land without authorisation for many reasons. Some occupy the land for residential purposes, while others occupy the land in order to undertake business activities or for using the land for agricultural purposes. In this report the focus is on instances where land is occupied for residential purposes – for a place to live.

The above can be summarised as follows:

- Trespass becomes land occupation when the trespasser enters the land for the purposes of residential settlement without immediately being challenged by the landowner.
- If the land occupier has occupied land without the authority of the land owner or person in charge, and without any other right in law to do so, this is unauthorised land occupation. Unauthorised land occupation is recognised and protected by Section 26 (3) of the Constitution and Sections 4 and 6 of the *Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act 19 of 1998*, in that an unlawful occupier cannot be evicted from the land without an order of court, which can only be made if it is just and equitable to do so.
- Where a person's primary purpose in occupying land is not to establish their home, this may be referred to as land invasion.
- Land owners may repel attempts to take occupation of their land, but if a person has taken possession of land without being immediately challenged by the land owner, then a court order is required to remove them, and they need to be provided with alternative

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<sup>16</sup> Gauteng Human Settlements Department (2013) Audit Report on Department Invaded properties at Lenasia South Extension 4 and extension 13, available at:

<https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0ahUKEwinuJWI4bXLAhUBSBQKHaxdDwgQFggyMAQ&url=https%3A%2F%2Fpmg.org.za%2Ffiles%2F131106lenasiasplit.doc&usg=AFQjCNFTrT6CbfpabXcolgnSqTC-9T4mKQ&sig2=P-A42BXzlGjH2Pjb3fHBoA&bvm=bv.116573086,d.ZWU>

<sup>17</sup> Daily Dispatch (2015) *Opinion: Big View on Airport Issue*, available at:

<http://www.dispatchlive.co.za/opinion/opinion-big-view-on-airport-issue/>

accommodation. An occupier can be said to be in possession of the land when they have come onto the land for the purposes of settlement without being challenged

- In all the cases above, the land owner must demonstrate that they have attempted to meaningfully engage.

## 2.3. A short history of land in South Africa

*We are tired of waiting for government to give us our promised land.<sup>18</sup> If we don't get land now we will take it ourselves #GiveUsLandNow<sup>19</sup>*

Land is very emotive issue in South Africa. Land has played a central role in South African history.

*Land in South Africa has a bitter and deeply divisive history. From the 17<sup>th</sup> century onwards, dispossession by white settlers of the land occupied by indigenous black societies was centrally important in creating a racially polarised and highly unequal society. Legislative frameworks were established to facilitate the segregation of racial groups to specific geographic locations. The 1913 Natives Land Act was definitive in the establishment of the so called "reserves" which over time comprised of only 13% of the land surface of South Africa. All land purchases or rent tenancy by black indigenous South African's outside of the reserves was regarded as illegal.*

*During the apartheid years (1948 to 1994), racial segregation intensified. The pass law system was implemented during the 1950's restricting Africans from accessing the urban areas unless they had employment. During this period, the Group Areas Act was passed which further demarcated South Africa into areas based on race. The pass laws and Group Areas Act were strictly enforced resulting in massive forced removals. Later, the apartheid government transformed the reserves into ethically determined "independent" homelands. Again, this was accompanied by waves of forced removals and land dispossession. Productive land was lost and small-scale farming that helped rural households to survive was undermined. In contrast, white commercial farmers were given massive financial support and subsidies, and overtime became highly productive. In 1994, 40% or approximately 16 million people were living in extreme poverty in the former homeland areas.*

*As a result of the history in South Africa, land remains highly contested and politically charged. There is an increasing urgency to address the racial imbalances in land allocation and ownership.<sup>20</sup>*

More recently, despite the very laudable and unprecedented achievements of the South African government in building houses for people who need it, the government is still struggling to fully deliver on political promises that started with the Freedom Charter which

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<sup>18</sup> for examples of statements that could be construed as 'promising' land see the Freedom Charter (1955), the Reconstruction and Development Programme (1994), the South African Constitution (1996), and various versions of the ANC election manifesto.

<sup>19</sup> This is a fictional tweet, drawing on observations of the authors of this report, highlighting the frustration felt by many when it comes to land hunger in South Africa.

<sup>20</sup> Ovens W. (2012) Improving Land Sector Governance in South Africa: Implementation of the Land Governance Assessment Framework, Urban LandMark, available at: [http://www.urbanlandmark.org.za/downloads/lgef\\_country\\_report.pdf](http://www.urbanlandmark.org.za/downloads/lgef_country_report.pdf)

stated that “*there shall be housing, security and comfort for all*”. Paraphrasing what many people are saying:

*Government has promised us land and housing. Some of us have got but many others are still waiting. Our patience is running out. If we don't get land and houses now we have no choice but to take the land ourselves.*

There is also an argument that can be paraphrased along the following lines:

*Our colonial and apartheid ‘masters’ stole the land from us. If our land is not given back to us we will take it back.*

The Land Reform Programme was introduced by the post Apartheid government to help address past land injustices, through a three pronged approach focusing on land restitution, land redistribution and tenure reform.

*By 1995, the new Department of Land Affairs had produced a ‘Draft Land Policy’ and a green paper in 1996, which ultimately culminated in a white paper on ‘South African Land Policy’ in 1997. The white paper envisaged that the state would restore the land rights of those previously dispossessed through a land restitution programme; upgrade the tenure rights of people living on communal land and farm dwellers, such as labourers and labour tenants; and address the divide between the 87% of the land owned by the white commercial farmers and the 13% in the former ‘homelands’ through its land redistribution programme.<sup>21</sup>*

This report on ‘Managing and Curbing Unauthorised Land Occupation’ does not go into the merits and demerits of this land reform programme. For example we do not explore the question of the suitability of the 1913 cut off date for restitution claims. These debates are left for other reports and platforms. What this ‘Land Occupation’ report does do however, is take the South African Constitution as its base to explore what implications this has for how to manage and curb land occupation.

### **3. CONTEXTUAL, POLICY AND LEGISLATIVE REVIEW**

This section unpacks the development context associated with unauthorised land occupation and then highlights various policies and legislation that have a bearing on unauthorised land occupation.

#### **3.1. Development context**

Globally we are becoming a more urban planet.

*Globally, more people live in urban areas than in rural areas, with 54 per cent of the world’s population residing in urban areas in 2014. In 1950, 30 per cent of the world’s*

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<sup>21</sup> South African Catholic Bishops’ Conference, Parliamentary liaison office (2010) *Briefing Paper 237: South Africa’s Land Reform Programme: Progress and Problems*, available at:

<https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjuxfev2rXLAhWCTBQKHwG3CvMQFggBMAA&url=http%3A%2F%2Fwww.cplo.org.za%2F%3Fwpdmdl%3D63%26%26ind%3D9&usg=AFQjCNHDb92R0A13Y7eDPriev7eoScEouQ&sig2=6LO9HJ3NRMcddRwco-Y77Q>

*population was urban, and by 2050, 66 per cent of the world's population is projected to be urban.*<sup>22</sup>

South Africa is part of this rapid urbanisation trend.

*The United Nations estimates that 71.3% of South Africa's population will live in urban areas by 2030, nearly 80% by 2050. South Africa's urban population is growing larger and younger. Two-thirds of South African youth live in urban areas.*<sup>23</sup>

Climate change is also likely to put pressure on people to move from one place to another as changes in climatic conditions changes people livelihood prospects in various regions. As the National Development Plan (NDP) says:

*If international trends are reflected in South Africa, migration patterns will become increasingly complex, involving diverse social groups and a combination of permanent and temporary migrants. There will be more youthful and women migrants, and a growing number of migrants moving from regions severely affected by climate change.*<sup>24</sup>

In South Africa, since 1994 the Government has provided more than 2.5 million houses and another 1.2 million serviced sites. Over this period, the housing backlog has nevertheless increased from 1.5 million to 2.1 million units, while the number of informal settlements has gone up from 300 to 2 225, an increase of 650%.<sup>25</sup>

It is not clear as to why, despite building so many houses and providing housing opportunities, the South African government has struggled to make a dent in the housing backlog. Some of the theories that could be considered include:

- Reduction in household size over time, associated with, for example, an increase in number of single headed households, or splitting into smaller social units.
- Decrease in multi generational family structures,
- Increase in numbers of people moving from rural areas (living in adequate traditional dwellings) and needing new accommodation – or in other words increasing urbanisation.
- Increase in numbers of households who are hedging their bets and occupying multiple informal structures, in hope that they will get a RDP house from one of these shacks
- Increase in the number of middle income households and foreign nationals<sup>26</sup> who buy up government subsidised housing, leading to the original occupants moving 'back' into informal settlements.
- Changes in the spatial patterns of where people are living, resulting in people moving from areas where they have received subsidised housing in the past to new areas where they perceive improved socio-economic opportunities, and they resort to living in informal settlements as they are unable to afford new alternative accommodation.

Further analysis and research is needed to test and verify these theories.

<sup>22</sup> United Nations (2014) *World Urbanization Prospects: the 2014 revision*, available at <http://esa.un.org/unpd/wup/highlights/wup2014-highlights.pdf>

<sup>23</sup> *South Africa plans for mass urban migration*, available at: [http://www.southafrica.info/about/government/iudf-270515.htm#.VtmIO\\_I97IU#ixzz41wHzPK5z](http://www.southafrica.info/about/government/iudf-270515.htm#.VtmIO_I97IU#ixzz41wHzPK5z)

<sup>24</sup> *National Development Plan: vision 2013*, available at: <http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf>

<sup>25</sup> *South Africa's Housing Conundrum*, SAIRR, @liberty, No 4, 2015/6 October 2015/Issue 20 <http://irr.org.za/reports-and-publications/atLiberty/files/liberty-2013-south-africas-housing-conundrum>

<sup>26</sup> Note that foreign nationals right to shelter are also protected by section 26 of the Constitution and under PIE.

In relation to the household size argument, Mary Tomlinson writes:

*households continually break themselves up into smaller units in the expectation that each new unit will become entitled to a housing subsidy. National, provincial and local government housing officials (interviewed by the author in 2014) all refer to this as the growth of an “entitlement syndrome” and say it has made the goal of eliminating the housing backlog simply unattainable<sup>27</sup>.*

This is a problematic perspective expressed by housing officials in that the Constitutional right to housing is a right and not a privilege, and the state is duty bound to progressively, within available resources, work towards its realisation. The fact that household unit sizes are reducing should not be a factor when it comes to realising the right to adequate (and appropriate) housing.

Another stronger argument as to why the housing backlog is growing is that governments housing delivery achievements are actually decreasing over time.

*In the early years of the [RDP housing] policy’s implementation, approximately 200 000 housing units per annum were being constructed. Delivery figures show that, from a peak of 235 600 units in the 1998/99 financial year, housing delivery has decreased to some 106 000 units in 2013/14.*

This slowdown in delivery rates is despite an increase in the percentage of governments total budget going to housing:

*In 1994 government spending on housing and community amenities accounted for 1% of gross domestic product (GDP). In 2015/16, according to the current budget, expenditure in these spheres will rise to 3.7% of GDP. Despite this rapid increase in the housing budget, the delivery of “free” houses has slowed, and currently averages some 118 000 houses a year. At this rate, it will take almost 20 years to build enough houses for the 2.1m households now on the waiting list.<sup>28</sup>*

One of the reasons for this paradoxical situation of an increase in proportion of the national budget going to housing and a reduction in the delivery of housing units per year is that the amount of money being spent on a single housing units has increased.

*Over time, the housing subsidy has thus grown from its original R12 500 per household to R160 500 per household in 2014. ... Today, moreover, this increased housing subsidy is intended to cover only the construction of a house, with land and service costs coming out of provincial and local government budgets<sup>29</sup>.*

Taking building inflation into account<sup>30</sup> and using R15 000 per house in 1995 as a base, the housing subsidy in 2014 should be closer to R100 000 (for services and top structure).<sup>31</sup>

On the matter of the number of land occupation and land evictions over time, it has proven difficult to find any statistics.

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<sup>27</sup> *ibid*

<sup>28</sup> *ibid*

<sup>29</sup> *ibid*

<sup>30</sup> assuming an average building cost inflation of 10% per annum

<sup>31</sup> Personal communication with Sean O’Halloran - Actuarial Analyst

The increasing number of protests around the country possibly could be used as a proxy indicator demonstrating the increasing ‘frustration’ of households in being able to access adequate land and housing for residential purposes. As the Back to Basics document of government<sup>32</sup> states:

*The so-called service delivery protests are a reflection of community frustration with these failures<sup>33</sup>, especially in economically marginalised communities who experience real or perceived indifference from government officials and politicians. While these protests have generated a negative narrative and perceptions for municipalities, we must recognise them as a serious indictment of our ability to serve our people.*

According to information provided in an invitation to a seminar on community protests organised by the Human Sciences Research Council:

*From 1997 to 2013, Public Order Police recorded 156 000 gatherings. In the same period, 4493 protest incidents directly linked to service delivery discontent were recorded. The attendant trend towards escalating protest frequency since 2009 is increasingly associated with violence. Around two thirds of recorded community protests labeled as ‘service delivery protests’ are found in the urban centres of three provinces, Gauteng, Western Cape and the Eastern Cape but localised protest dynamics differ from place to place.<sup>34</sup>*

## **3.2. Policy and legislation**

Policy and legislation that has a bearing on unauthorised land occupation is identified and summarised in this section.

### **3.2.1. Common Law and the Constitution**

The South African common law is made up of the Roman Dutch and English law, and since 1994, customary law. Common law is law that has been built up over time, through precedent in how the courts/ judges have dealt with matters before them in the past. Common law contrasts with statutes which are adopted through legislative processes and with regulations that are promulgated by the executive branch of government. The common law now has to be interpreted in conjunction with the constitution. A law passed by parliament overrides common law. The Constitution is supreme to all other laws. All law must be in line with the Constitution, and if it cannot be developed or interpreted to this effect, then it must be found to be unconstitutional. If a law is unconstitutional, the Constitutional Court can say so and ask the parliament to fix it within a certain time. It will also say what applies in the meantime.<sup>35</sup>

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<sup>32</sup> Co-operative Governance and traditional Affairs (2014) *Back to Basics: Serving our Communities Better*, available at:

<http://www.dta.gov.za/back2basics/wp-content/uploads/2014/10/LG-Back-to-Basics-Approach-Document.pdf>

<sup>33</sup> examples of failures referred to include: collapse of core municipal infrastructure in some areas; slow or inadequate response to service delivery challenges; inappropriate skills within some areas of government; and widespread corruption.

<sup>34</sup> <http://www.hsrc.ac.za/en/events/seminars/community-protests>

<sup>35</sup> modified from <http://www.paralegaladvice.org.za/docs/chap05/01.html>

Common law is a system of law defined by case law, or jurisprudence. This is law that has been developed by judges through decisions of courts over time. Our common law includes elements of Roman-Dutch law as well as the legal rules and practices developed by South African courts. Prior to our Constitution in 1996, property relations in South Africa were primarily governed by the common law. This situation has changed. Regarding housing, the right of access to adequate housing is enshrined in Section 26 of the constitution. Because this right has regularly been invoked in court, the legal framework in relation to the right to housing, evictions and alternative accommodation has progressively developed giving rise to a new cluster of relationships between occupiers, property owners and the state. In particular, the case law, or jurisprudence, has expanded the substantive and procedural legal protections afforded to unlawful occupiers. A number of legal principles now supplement the progressive legal framework. These must be upheld in an eviction and include the state obligations to meaningfully engage with occupiers and to provide alternative accommodation if people would be made homeless by an eviction.<sup>36</sup>

The South African constitution identifies a number of rights that have a bearing on the question of how to deal with unauthorised land occupation. These rights include the right to:

- Land access (section 25),
- Tenure security and land reform (section 25),
- Not to be arbitrarily deprived of property (section 25).
- Access to adequate housing (section 26),
- Not to be evicted from their home (section 26)
- Water access (section 27.1.b)
- A healthy environment (section 24.1)
- Prevent pollution (section 24.a.i)
- Information (section 32)
- Just administrative action (section 33)
- Participation in local government (section 152.1.e)

It is difficult to address many of these rights without land. Although there is no specific 'right to land', the right to housing implies that there is land on which this housing is located.

In relation to the right to land access, section 25.5 states that *'the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.'* (sections 25.6, 25.7 also relate to this right to access land)

In relation to the right not to be arbitrary evicted, section 25.1 states that *'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'*

Section 26(1) of the Constitution provides that everyone has a right to have access to adequate housing; Section 26(2) obliges the government to take reasonable steps, within available resources, to progressively realise the right to housing; and Section 26(3) provides that no one may be evicted from their home or have their home demolished without a court order that orders the eviction after considering *'all the relevant circumstances'*.<sup>37</sup>

<sup>36</sup> This sub-section is adapted from SERI (2016) *Evictions and Alternative Accommodation in South Africa 2000-2016: An Analysis of the jurisprudence and implications for local government*, second edition. SERI publication, Johannesburg..

<sup>37</sup> see for example Clarke (2013) *Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government*, Socio Economic Rights Institute, available at [http://www.seri-sa.org/images/Evictions\\_Jurisprudence\\_Nov13.pdf](http://www.seri-sa.org/images/Evictions_Jurisprudence_Nov13.pdf)

Section 33(1) of the Constitution states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

The right to dignity (Section 10) and equity (Section 9) are also relevant when looking at the right to land access and housing. For example, dignity is enhanced when a person can access a communal toilet rather than having to use the bush, and equity is promoted when more people have access to a similar level of basic services, compared to not having services to start with.

### **3.2.2. National Development Plan (NDP)**

The NDP does not mention land invasion or unauthorised land occupation specifically. It does however promote the upgrading of informal settlements with relocation only to be considered as a last resort.

*Recognise the role played by informal settlements and enhance the existing national programme for upgrading informal settlements by developing a range of tailored responses, including:*

- *Rapid assessment and appraisal of all informal settlements*
- *Mechanisms to recognise rights of residence and allow for incremental upgrade of tenure rights*
- *Minimum health and safety standards which would be progressively upgraded as regularised informal settlements are brought into the mainstream urban fabric*
- *Funding arrangements and programmes that would channel resources into community facilities, public infrastructure and public spaces, and not just into housing*
- *Dedicated capacity at local level for informal settlement upgrading.*<sup>38</sup>

The NDP also encourages the development of appropriate well located land for human settlement development:

*Municipalities must have clear strategies and allocate budgets to open up well-located, affordable land for new development.*<sup>39</sup>

### **3.2.3. Integrated Urban Development Framework**

The Integrated urban Development Framework (IUDF) of 2014 does not make reference to land invasions or unauthorised land occupations.

However the IUDF does promote the upgrading of Informal Settlements:

*Accelerate the upgrading of informal settlements: Informal areas are important areas of access to the city, especially for the very poor, including migrants from rural areas. Informal areas are generally located in areas which promote access, although in some cases they are found in environmentally bad areas. The NUSP should be accelerated, and provinces and municipalities in particular must play a central role to ensure that the targets are met. Priority should be given to tenure upgrade, provision of basic services, social services, spaces for economic activities and alternative*

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<sup>38</sup> National development plan 2030: Our future – make it work. page 289

<http://www.poa.gov.za/news/Documents/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf>

<sup>39</sup> NDP, page 287

*delivery models. Furthermore, where implemented, this programme should be reflected as a priority in a municipality's IDP and budgets. Provincial departments of human settlements should also provide sufficient budgets for the upgrading of informal settlements. As partnership with civil society and communities is critical for the development of sustainable models, municipalities should work together with civil society and locals to identify and implement innovative, relevant solutions.*<sup>40</sup>

The IUDF also promotes the acquisition and development of appropriately located new land for low income housing, where policy lever 5 dealing with efficient land governance and management calls for :

*municipalities being able to provide poor people with access to well-located land, close to economic opportunities and social amenities.*<sup>41</sup>

### **3.2.4. The White Paper on South African Land Policy of 1997**

There does not appear to be any recent government policy pronouncements that make specific reference to unauthorised land occupation or evictions. The Draft Policy on Land from 1997 which is quoted at length at the start of this report is an older policy statement that says:

*Evictions as a solution to land invasions are a measure of last resort and should only be considered after all other possible alternative solutions have been explored, including commitments to organised groups of landless people for the delivery of land within specific time frames.*

It appears that there are no more recent formal policies or legislation that significantly pick up on this draft policy statement.

### **3.2.5. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) Act 19 of 1998**

The main legislation dealing with unauthorised land occupation is the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (PIE) no. 19 of 1998. PIE gives effect to section 26(3) of the Constitution's requirement that a court consider all the relevant circumstances before making an eviction order.

The PIE Act provides procedures for eviction of unlawful occupants and prohibits unlawful evictions. The main aim of the Act is to protect both occupiers and landowners. The owner or landlord must follow the provisions of the PIE Act (except in areas where ESTA operates) if they want to evict a tenant. An unlawful occupier of the land is defined as a person who occupies land without the express or tacit permission of the owner or the person in charge and tacit permission is when the owner is aware of the occupant being on the land or premises but does nothing to stop this.

The PIE Act requires that the eviction of an unlawful occupier must be "just and equitable" after considering a range of factors. Some of the factors a court will consider include whether

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<sup>40</sup> Integrated Urban Development Framework (IUDF): draft for discussion (2014), page 47 available at: [https://www.westerncape.gov.za/sites/www.westerncape.gov.za/files/final\\_draft\\_01\\_october\\_2014\\_2016\\_iudf\\_6\\_1.pdf](https://www.westerncape.gov.za/sites/www.westerncape.gov.za/files/final_draft_01_october_2014_2016_iudf_6_1.pdf)

<sup>41</sup> IUDF page 61

the occupiers are vulnerable (the elderly, children and female-headed households), how long the occupiers have lived on the property and whether there is alternative accommodation available or if the government will provide alternative accommodation if the occupiers cannot themselves obtain an alternative place to live.

According to PIE, it is an offence to:

- 'Sell' land you don't have rights to (Section 3.2)
- Evict someone without a court order (Section 8.3)
- Obstruct officials in carrying out their duty (in evicting person) (Section 8.3)

Annexure 1 provides a much more detailed analysis of the PIE Act.<sup>42</sup>

### **3.2.6. The Trespass Act**

The *Trespass Act* (no 6 of 1959) applies only to people who enter or who are present on land or in buildings without lawful reason and without the consent of the owner or lawful occupier, for purposes other than residential occupation. This is because when two acts (such as the *PIE act* and the *Trespass Act*) deal with the same statutes the most recent law applies.

### **3.2.7. Expropriation legislation**

Expropriation legislation becomes relevant when looking at land occupation when it comes to the issue of acquiring land for the upgrading of informal settlements, for relocation, for alternative accommodation or to pre-empt the need for land occupation.

Property rights are protected by Section 25 of the Constitution of the Republic of South Africa (1996). Section 25(1) guarantees citizens the right not to be deprived of property except in terms of law of general application. Property rights can be expropriated in terms of Sections 25(2) 7 and (3). Section 25(2) permits the state to only expropriate property in terms of a law of general application for a public purpose or in the public interest. A law of general application is any legislation passed by Parliament. The state must pay the expropriated owner compensation for the property. Compensation is to be agreed upon or, if not agreed upon, approved by a court.

Land can be expropriated in terms of the *Expropriation Act no 63 of 1975*, when read together with Section 25 of the Constitution. The new *Expropriation Bill of 2015*<sup>43</sup> moved closer to becoming an Act when it was approved by the National Assembly on the 24<sup>th</sup> of February 2016.

### **3.2.8. The Housing Act no. 107 of 1997**

The Housing Act of 1997 specifically authorizes Local Government to expropriate land for the purpose of housing of its residents and requires that the process as set out in the Expropriation Act be followed. The Act says:

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<sup>42</sup> also see the following link for more on PIE

<http://www.passop.co.za/your-rights/housing-rights-pie#sthash.e6B6jfwk.dpuf>

<sup>43</sup> see [http://www.gov.za/sites/www.gov.za/files/151020-b4A-2015\\_a.pdf](http://www.gov.za/sites/www.gov.za/files/151020-b4A-2015_a.pdf)

*Every municipality must, 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;*

The Housing Act goes on to say:

*A municipality may by notice in the Provincial Gazette expropriate any land required by it for the purposes of housing development in terms of any national housing programme*

### **3.2.9. Housing related policy and legislation**

There is no specific policy or legislation from the Department of Human Settlements dealing directly with unauthorised land occupations. The new (preliminary draft) White Paper on Human Settlements is also silent when it comes to unauthorised land occupation.

There are however a number of programmes that deal with the upgrading of informal settlements. For more on this see the National Upgrading Support Programme<sup>44</sup> and the Housing Development Agency<sup>45</sup>.

The main programmes from the Housing Code<sup>46</sup> relevant for land occupation are:

- Emergency housing programme if people are to be evicted and provided with emergency housing
- Upgrading informal settlements programme if an informal settlement is to be upgraded or to be relocated (as a last resort).
- The Integrated Residential Development programme, especially the servicing phase, when land and housing is to be made available in advance of need.

### **3.2.10. Spatial Planning and Land Use Management Act (SPLUMA) no 16 of 2013.**

This report does not explore in detail legislation relating to the acquisition and development of new land. However legislation such as the *Spatial Planning and Land Use Management Act (SPLUMA) Act no 16 of 2014*<sup>47</sup>, the *National Environmental Management Act (NEMA), Act no.107 of 1998*<sup>48</sup>, and *National Building Regulations and Building Standards Act, Act no. 2013 of 1997*<sup>49</sup> are examples of legislation that becomes important when looking at upgrading of informal settlements and the development of new land.

SPLUMA states that Municipalities, in their Spatial Development Framework plans should “identify the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be applicable” (in section 21 (k)).

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<sup>44</sup> see <http://www.upgradingsupport.org/>

<sup>45</sup> see <http://www.thehda.co.za/>

<sup>46</sup> see <http://www.dhs.gov.za/content/national-housing-code-2009>

<sup>47</sup> for more information see: <http://www.incrementalsettlement.org.za/wiki/index.php?title=SPLUMA>

<sup>48</sup> for more information see <http://cer.org.za/virtual-library/legislation/national/environmental-framework>

<sup>49</sup> see [http://www.dti.gov.za/business\\_regulation/acts/building\\_standards\\_act.pdf](http://www.dti.gov.za/business_regulation/acts/building_standards_act.pdf)

The SPLUMA goes on to say that the land use scheme of the municipality should “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 a land use scheme.” (24.2(c))

Section 24.3(b) 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”.

One of the development principles of the SPLUMA goes so far as to say that: “land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas” (section 7(v)).

In SPLUMA, incremental upgrading of informal areas means 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.

### **3.2.11. Provincial legislation**

None of the provinces have any specific legislation dealing specifically with unauthorised land occupation.

There have however been attempts to develop provincial legislation dealing with informal settlements such as for example the *KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act, 2007*.<sup>50</sup> This Act was however ruled unconstitutional in 2009 as the Act allowed for the possibility of mass evictions without the possibility of suitable alternative accommodation being made available and therefore violating the PIE Act and the Constitution.<sup>51</sup>

There is also no provincial legislation dealing with the upgrading of informal settlements.

## **4. ANALYSIS OF UNAUTHORISED LAND OCCUPATIONS**

The following sections are used to analyse unauthorised land occupations:

1. Case studies on unauthorised land occupation
2. Causes and effects of unauthorised land occupation
3. Challenges and opportunities associated with unauthorised land occupation
4. Options for dealing with unauthorised land occupation
5. Conclusions from analysis of unauthorised land occupation

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<sup>50</sup>see:

<http://www.enviroleg.co.za/provinces/Kwazulu-Natal/06-07%20Elimination%20and%20Prevention%20of%20Slums%20Act,%202007.pdf>

<sup>51</sup> Business day (2009) *Slum law evictions ruled to be unlawful*, available at:

<http://www.bdlive.co.za/articles/2009/10/15/slum-law-evictions-ruled-to-be-unlawful>

## **4.1. Case studies on unauthorised land occupations**

### ***4.1.1. Introduction***

This section of the report deals with the approaches adopted by four selected Municipalities in South Africa in dealing with land occupations and forms part of the broader report on unauthorised land occupation. Note that this section also uses the term unauthorised land occupation, or land occupation or occupation when referring to what is commonly known as 'land invasion'. An explanation on why 'unauthorised occupation' is preferred over 'land invasion' has already been clarified at the beginning of this report. However, the responses from the four selected Municipalities have referred to the term 'land invasion' and this has not been changed in this section of the report.

The four Municipalities that were selected by the Housing Development Agency to participate in this research project are:

- Rustenburg
- City of Cape Town
- eThekweni Metro
- Buffalo City Metro

### ***4.1.2. Case study methodology***

The case study section seeks to highlight which approaches the four selected Municipalities are utilizing both from a reactive and a proactive perspective when dealing with unauthorised land occupation. Information relating to what policies have been employed and the types of institutional arrangements that have been put in place are documented in this section.

Managing unauthorised land occupations involves the processes and activities involved in dealing with land occupation as it is happening. In other words - reacting to land occupations. This includes for example:

- Immediately responding to situations where people are in the process of occupying land without authorisation.
- Evicting people from land they have unlawfully occupied.
- Upgrading land that people have already occupied.

Curbing unauthorised land occupations involves the processes and activities involved in pre-empting and preventing land occupation happening in the first instance. In other words – proactively preventing land occupations. This includes for example:

- Establishing and implementing clear land and housing allocation policies so that households are aware of what actions government is taking to house them and that the process is fair and transparent.
- Proactively identifying and packaging land so that it is ready for settlement development so that more settlement development projects are implemented giving people who would be tempted to occupy land without authorisation an option. Government will also be able to demonstrate to the courts that they have alternative land and settlements for people whom they are evicting from other portions of land. Examples of methods for proactively identifying and packaging land include:
  - planning for future land acquisition and development
  - buying and otherwise acquiring land for settlement development
  - encouraging land owners to sell their land.

- Allowing people to incrementally settle on land in a managed manner so that more people can be accommodated on this land, compared to if they used the funds available to construct services and build formal subsidised housing top structures.
- Keeping land and housing affordable into the future so people are able to stay on the land and not resort to further land occupations if they are evicted.
- Making it easier for people to move from land and housing they are presently occupying to other land and housing which better suits their needs and aspirations.

The methodology employed in the case study research was a threefold approach. Firstly, contact was made with the relevant officials in each of the four Municipalities who are dealing with unauthorised land occupations. In many cases, it was found that more than one Department had the responsibility of dealing with land occupations and that it was generally a multi-Departmental approach due to the complexity of the issues involved. Secondly, a briefing document was submitted to the relevant officials detailing the background to the study, the consulting team appointed and the terms of reference. Finally, a list of research questions was submitted to each Municipality with a deadline in which to submit responses. In the case of Buffalo City Metro, a meeting was convened with the relevant officials dealing with land occupations due to the location of the consulting team in East London.

The following questions were formulated for each of the four Municipalities to answer:

1. Provide the following statistics on land invasions in your Municipality
  - a. Number of invasions per year over the last three years
  - b. Number of households involved
  - c. Whether the land invaded was public, private or communal
2. What is the current demand for land and housing in your Municipal area and how much housing does the Municipality and other government agencies supply on an annual basis?
3. What legislation do you follow and what policies do you have in place as a Municipality for dealing with land invasions both reactively (managing) and proactively (curbing)? Kindly attach the policies you have.
4. What institutional arrangements does your Municipality have in place to deal with land invasions (e.g. a land invasion unit, upgrading informal settlement programme, etc)
5. What approach does your Municipality employ in dealing with current land invasions and what are the advantages and disadvantages of this approach?
6. Describe in detail what proactive steps your Municipality is taking to prevent future land invasions from occurring?
7. What do you think are the key challenges making it difficult for you as a Municipality to (i) reactively deal with current land invasions (ii) proactively curb future land invasions?
8. What opportunities do you see going forward that you think can be built on to manage current land invasions and to curb future land invasions?
9. What recommendations would you make to various stakeholders (e.g. national government, your municipality, the courts, etc.) on how best to manage current land invasions and curb future land invasions?
10. Which of these recommendations do you think are the most important and why?

11. What obstacles do you foresee in implementing these recommendations and what do you think can be done to overcome these obstacles.

Annexure 2 provides a table listing the responses from the three of the four Municipalities that responded to the case study questionnaire.

### ***4.1.3. Analysis of response from Municipalities***

Note that the term land invasion is used in this analysis as this is the term that was used by the Municipalities in the case study research. Limited responses to the research questions were received from three Municipalities, namely Buffalo City Metro, Rustenburg and eThekweni. To date, the City of Cape Town has not responded to the questionnaire despite numerous follow ups and a letter from the Housing Development Agency. The analysis of the information is thus limited to the three Municipalities.

#### Frequency of invasions

It is clear from the information supplied by Buffalo City Metro that they have experienced a large number of land invasions over the past three years. In fact, they state that land has been invaded 115 times over the last three years with more than 2000 households involved. The frequency of land invasions is much lower in Rustenburg with only four recorded land invasions over the past three years involving about 3228 households. eThekweni Metro is not certain about the number of land invasions that they have experienced. All Municipalities indicate that invasions occur on public, private and communal land. Based on the information provided, one cannot make definitive findings on the frequency and size of invasions pertaining to the three Municipalities. More detailed responses could have identified trends between the Metros and the smaller Municipalities with regards to the number, scale and frequency of invasions on municipal, public and private land.

#### Housing demand and supply

The housing demand in Buffalo City Metro is based on the current waiting list which contains 47 000 households. Based on an average density of 30 dwellings per hectare, the Buffalo City Metro would require approximately 1 566 hectares of land to deal with their housing demand. The current rate of delivery according to the 2014/15 Annual Report is 1254 housing units. This means that at the current rate of housing delivery, Buffalo City Metro would take about 37 years to deal with the backlog. The eThekweni Metro has a massive housing demand of 288 784 units with a land requirement of 9 626 hectares based on a density of 30 dwelling units per hectare. The current rates of delivery are in the order of 4600 units per annum which means that eThekweni Metro will only clear its housing backlog in about 62 years' time. Rustenburg Municipality has not provided any information on demand and supply of housing in its area of jurisdiction. What is not explored in the research is what other measures the three Municipalities are undertaking to deal with their housing backlogs such as upgrading informal settlements, providing serviced land, etc. An inference can be drawn that land invasions will occur on a regular basis due to the slow pace of housing delivery in the Municipalities.

#### Policies, acts and applicable by laws pertaining to land invasions

All the Municipalities selected as case studies take their legislative cue in dealing with land invasions from the Constitution and the *Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE Act, 1998)*. Rustenburg Municipality states in their response

that the founding provisions of the Constitution is on human dignity, the achievement of equality and the advancement of human rights and freedoms. Section 25 and 26 of the Constitution impose a duty on government, especially the Municipality, in dealing with the right to property and housing. *The Housing Act, 107 of 1997* confirms the powers and functions of the Municipality in housing development. The National Department of Human Settlements established the Upgrading of Informal Settlements programme to deal with development on land that has been invaded. *The PIE Act of 1998* recognises occupiers of land as having common rights over the land. It sets processes and procedures to be followed in the eviction of the land occupiers.

In response to the PIE Act, Buffalo City Metro and eThekweni Metro have developed specific policies to deal with land invasions. The Land Management Policy was formulated by Buffalo City Metro in 2007 to deal with illegal land occupations and to manage informal settlements in its area of jurisdiction. It acknowledges that the PIE Act will remain the legal framework for the management of illegal land occupation. However, the intention of this policy was to set out a more structured approach to responding to, and addressing problems associated with, illegal land occupation and informal settlements. The Land Management Policy approved by Buffalo City Metro is guided by the following principles: -

- *The Policy reflects the vision and commitment of the whole municipality, and all Directorates of the municipality will work to achieve the successful implementation of the Policy.*
- *The Land Management Policy and the Housing Policy are two elements of an integrated strategy to address the problem of homelessness in Buffalo City.*
- *The necessary resources to achieve the desired outcomes will be set in place to achieve the Land Management Policy's objectives.*
- *The Policy will integrate community participation into its processes, particularly in terms of problem identification and consultation around problem resolutions.*
- *The Policy will give Councillors and officials clear direction on how to address land management problems procedurally.*
- *The Policy will establish a clear framework for integrated coordination, strategizing and decision-making around land management issues in the Municipality. In this regard: Decisions on how to resolve any particular informal settlement problem will be made collectively by Directorates and Divisions that bear relevant responsibilities.*
- *Such collective decision-making imparts formal commitment and responsibility to the individual Municipal structures participating in the collective decisions.*<sup>52</sup>

The objectives of the Land Management Policy of Buffalo City Metro are outlined below:

- *Elimination of significant and high priority informal settlements by 2014.*
- *Elimination of all informal settlements as appropriate serviced land and housing becomes available, as soon as possible.*
- *Prevention of new informal settlements being allowed to develop.*
- *Prevention of existing informal settlements being allowed to grow in an uncontrolled manner.*<sup>53</sup>

In eThekweni Metro, the drafting of a new policy to deal with land invasion threats became evident at a workshop held on the Prevention of Illegal Evictions From and Unlawful Occupation of Land Act (19 of 1998). The Land Protection Policy was approved by the then Durban Metro in 1999. In the preamble to the policy, the Durban Metro and Local Councils acknowledge the following:

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<sup>52</sup> Land Management Policy, BCMM: 2007

<sup>53</sup> *ibid*

- *The unlawful occupation of land does not promote the optimum utilization of the land or of available services in the Durban Metropolitan Area (DMA);*
- *The unlawful occupation of land intrudes onto the rights of property owners;*
- *No person may be deprived of property except in terms of appropriate legislation and no law may permit arbitrary deprivation of property;*
- *The illegal occupation of land mitigates against attempts by the Metro and Local Councils to undertake planned land development and implement a sustainable housing development programme, and may result in conditions which threaten the health and safety of the occupiers or of adjacent communities.*
- *In acknowledging the above, Council takes note of the provisions of legislation in the form of the Prevention of Illegal Evictions From And Unlawful Occupation of Land Act (19 of 1998 – hereafter referred to as the Act) and recognises the need for a revision of the Land Invasion Policy (Metro Council Minutes 1996-02-12, pp282-287);*
- *The Act makes it a criminal offence for any person to be evicted from their home without the appropriate court authority, and provides for certain procedures to be followed in applying for such an eviction,<sup>54</sup>*

The emphasis of the Durban Metro land protection policy was on the prevention of illegal occupation of land. Informal structures which were accorded temporary status under the Land Invasion Policy (of 1996) would continue to be accorded such status. The policy also had a clause on the prohibition of receipt or solicitation of consideration in respect of unlawful occupation of land. It stated that in the event of it being brought to the attention of the Council that any person is directly or indirectly receiving payment of any money or other considerations as a fee or charge for arranging or organizing or permitting a person to occupy land without the consent of the owner or person in charge of the land, the Council will initiate legal proceedings against such person including prosecution in terms of section 8, read with section 3, of the PIE Act if necessary. This was a clear indication that eThekweni Metro would not tolerate the illegal occupation of land for money making purposes, a reference to shack lords who invaded land illegally and then sold the plots thereafter for financial gain. The Land Protection Policy also laid out procedures to be undertaken for invasions on Council land and non-Council land.

Rustenburg Municipality has developed a by-law to assist with land invasion matters. However, a copy of this by-law was not submitted with their responses. Buffalo City Metro and eThekweni Metro do not mention any by-laws which they have adopted to deal with land invasions. However, they have submitted a number of court judgements from the Constitutional Court, High Courts and Supreme Court of Appeal dealing with land invasion matters affecting various Municipalities. The outcome of many of these judgements portray the courts and the Municipalities as still finding their way in determining the best methods to deal with land invasions and trying to balance the rights of both the occupiers and the owners.

### Institutional arrangements

Both eThekweni Metro and Rustenburg Municipality use a combination of their Human Settlement Departments and the Protection Services to monitor the invasion of land and carry out demolitions of new structures. In this regard, they have dedicated staff dealing with land invasions in the form of Land Invasion Units. In the case of Buffalo City Metro, a multi-Departmental approach is adopted where the different Departments play specific roles in dealing with invasions. One of the concerns raised by Buffalo City Metro officials is that the forum established to deal with land invasions does not meet regularly and that there is a lack

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<sup>54</sup> Land Protection Policy, Durban Metro: 1999

of clarity on roles and responsibilities. Only one staff member from the Land Administration section is designated as the contact person when an invasion is imminent or when it is actually taking place. In contrast, eThekweni Metro allows Councillors and members of the public to report land invasions and they have a dedicated hotline in place in which to respond to these actions. This is in addition to its own staff who do regular patrols of existing informal settlements and vacant land.

#### Reactive steps in dealing with land invasions

From the responses provided by the three Municipalities, it seems that they follow similar procedures which are governed by the PIE Act. Land invaders are first warned of the illegality of their actions and thereafter, incomplete shacks/structures are demolished. In many instances where shacks/structures are complete, a court order is obtained to deal with invasions on Municipal or private land. One of the points raised by the Buffalo City and eThekweni Metros, is when do the courts consider a shack/structure to be occupied, thereby preventing immediate demolition of the said shack/structure. Rustenburg Municipality point out that there are both advantages and disadvantages of either effecting quick demolitions or obtaining a court order.

The Municipalities did not make much mention the Upgrading of Informal Settlements as a reactive step to deal with land invasions, although Rustenburg Municipality did say there Informal Settlement Unit deals with both land invasion and informal settlement upgrading. However, based on discussions with the HDA (and after a quick internet search), we are aware that the three municipalities<sup>55</sup> (as well as the City of Cape Town<sup>56</sup>) support the upgrading of informal settlements.

#### Proactive steps adopted by Municipalities to prevent invasions

The proactive steps adopted by the Municipalities include making ward committees and ward Councillors aware of the illegality of land invasions and adopting policies to deal with current and future land invasions. The removal and destruction of building material that has been obtained from demolishing illegal shacks/structures is also cited by Buffalo City Metro as a proactive step in preventing land invasions. Only Rustenburg Municipality stated that they have a rapid land release policy in place to make available land for human settlement purposes.

However, Municipalities are also obliged through various acts and regulations pertaining to local government to undertake detailed planning through their Integrated Development Plans, Spatial Development Frameworks and Housing Sector Plans for new human settlement development. This should include the full spectrum of services such as the acquisition of land, detailed environmental and spatial planning of new human settlement projects, the provision of bulk infrastructure and the application for subsidies.

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<sup>55</sup> The Buffalo Metropolitan City Municipality has developed a upgrading policy (see [http://www.incrementalsettlement.org.za/wiki/index.php?title=BCMM\\_Upgrading\\_of\\_Informal\\_Settlements\\_Policy\\_and\\_Strategy](http://www.incrementalsettlement.org.za/wiki/index.php?title=BCMM_Upgrading_of_Informal_Settlements_Policy_and_Strategy)) but this policy has not yet been formally approved by council. For Rustenburg Local Municipality see Plan for Upgrading Informal Settlements (2012) at: : [http://www.rustenburg.gov.za/~rustenbu/?q=filedepot\\_download/136/72](http://www.rustenburg.gov.za/~rustenbu/?q=filedepot_download/136/72). And eThekweni states on their website ( [http://www.durban.gov.za/City\\_Services/housing/Pages/default.aspx](http://www.durban.gov.za/City_Services/housing/Pages/default.aspx) ) that "The priority is to upgrade informal settlements where they are currently located/"

<sup>56</sup> see for example City of Cap[e Town policy on 'proactive relocking of informal settlements' found at: [http://www.capetown.gov.za/en/Policies/All%20Policies/Proactive%20Re-Blocking%20of%20Informal%20Settlements%20-%20\(Policy%20number%2013282\)%20approved%20on%2030%20October%202013.pdf](http://www.capetown.gov.za/en/Policies/All%20Policies/Proactive%20Re-Blocking%20of%20Informal%20Settlements%20-%20(Policy%20number%2013282)%20approved%20on%2030%20October%202013.pdf)

The fact that most municipalities (except Rustenburg) did not make reference to what land release and new settlement development policies and programmes they have in place and are using, indicates that some municipalities appear not to formally make the link between using new land development as a proactive tool in proactively intervening in a way that leads to households not having to occupy land without authorisation.

#### Challenges experienced by Municipalities

Municipalities experience a wide variety of challenges when dealing with land invasions. The first challenge is the lack of resources including not having dedicated staff and vehicles to monitor and react to new land invasions. Buffalo City Metro, due to its vast area of jurisdiction, states that it takes time from when an invasion takes place and to when it is actually reported. Also, they do not have a dedicated Land Invasion Unit as compared to eThekweni Metro whose sole purpose is to deal with land invasions. The lack of political will in dealing with land invasions is a problem cited by Buffalo City Metro. This can have serious consequences for staff in the Municipalities when some Councillors ignore land invasions and do not prioritise this issue. In some instances, land that is invaded is usually earmarked for new human settlement development and this has the potential to delay development even further.

eThekweni Metro state that there should be a one month time period included in the PIE Act in terms of which shacks/structures could be demolished. The issue of when a shack/structure is occupied also complicates the matter of whether it can be demolished or not. Another of the challenges cited by the eThekweni Metro is how differently<sup>57</sup> the courts treat Municipal land invasions compared to invasions on private land.

## **4.2. Unauthorised land occupation: causes and effects**

This section summarises the causes (reasons) and effects of unauthorised land occupation.

#### Reasons for unauthorised land occupation

People resort to land occupations for a number of reasons. The following provides a short list of some of these reasons. These and other reasons are further explored in the section on challenges.

- There is not enough new land available for people to access
- Land that is available is too expensive for what people can afford
- Land that is available is in the wrong place. It is too far from work opportunities and transport costs are too high.
- Once people have land, they often cannot afford to stay on this land. Rates and services charges are high, forcing them to move back into informal situations.
- People are frustrated at the slow pace at which government is delivering on its promise of land and housing for all and some people are taking matters into their own hands to house themselves. Rather than waiting potentially for many years to get a government RDP house, people occupy land without authorisation.

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<sup>57</sup> Further analysis is required to unpack this statement in more detail, but due to time constraints in completing this research paper this was not possible.

- People see land occupation as a quick and cheap way to 'jump the queue' or the housing allocation waiting list, which are viewed as corrupt and inefficient by many<sup>58</sup>
- Some groups of land invaders use land invasion to make political statements, showing potential voters that they are concerned about the needs of the landless and homeless and/or want to put pressure on government to address their needs.

This report focuses on people invading land for housing purposes, but it needs to be noted that occupation can also happen for other purposes such as using the land for agricultural purposes (e.g. grazing and growing crops), business purposes (e.g. running a shop or factory), undertaking mining operations, or for social purposes such as an education facility, community hall, sports field, etc.

### Effect of unauthorised land occupation

*Insufficient access to well-located land has resulted in people living in situations of informality and resorting to land invasion in search of services and socioeconomic opportunities. This has material consequences in terms of health and safety as well as political and legal consequences, including insecure tenure, vulnerability to evictions and the inability to claim rights to full citizenship.*<sup>59</sup>

The effect of people living in informal settlements and properties that they have occupied is that they often tend to live in very poor conditions, in informal settlements, with insecure tenure, without access to water and sanitation, adequate refuse removal and shelter that is prone to fires and leaks.

In some cases people who occupy land have little incentive to use their own resources to improve their living conditions as they continually face the threat that they will be evicted from these areas, and there is no incentive to use their own resources to invest in their houses. Over time this may lead to 'slum' conditions. On the other hand, evidence is widespread that people invest in their homes in informal settlements, sometimes substantially especially when they perceive their tenure to be secure.<sup>60</sup>

Tensions and conflict often rises between those that have invaded the land and the land owners as well as neighbouring land holders. Neighbouring land owners complain about noise, illegal activities, litter, vandalism, increase in theft, etc. For neighbouring property owners, their biggest fear is that their property prices will be reduced.

It is difficult for land owners and the Municipality to develop land that has been or faces the threat of being invaded.

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<sup>58</sup> Socio Economic Rights Institute (2013) 'Jumping the Queue', *Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa*, available at <http://www.seri-sa.org/index.php/38-latest-news/174-research-report-jumping-the-queue-waiting-lists-and-other-myths-perceptions-and-practice-around-housing-demand-and-allocation-in-south-africa-3-july-2013>

<sup>59</sup> *National Report by the Republic of South Africa for the Third United Nations Conference on Housing and Sustainable Urban development*, available at: [http://www.dhs.gov.za/sites/default/files/documents/related\\_docs/HABITAT%20III%20NAT%20REPORT\\_web.pdf](http://www.dhs.gov.za/sites/default/files/documents/related_docs/HABITAT%20III%20NAT%20REPORT_web.pdf)

<sup>60</sup> see work done by Urban Landmark on Tenure, available at: [http://www.urbanlandmark.org.za/research/secure\\_tenure.php](http://www.urbanlandmark.org.za/research/secure_tenure.php)

### **4.3. Challenges and opportunities associated with unauthorised land occupation**

This section on challenge and opportunities related to unauthorised land occupation draws on information collected from the Case Studies as well as from insights gained from the experiences of the authors of this report.

#### **4.3.1. Challenges**

Broadly land related challenges can be grouped into three categories:

- Political – relating to political views on how land occupation should be responded too
- Economic – relating to the socio-economic environment and how this affects households ability to access and develop land and housing
- Technical – relating to technical and bureaucratic procedures and systems which either make it easier or harder for new land to be developed or invaders to be evicted.

The following section outlines a number of these political, economic and technical challenges to land occupation as they relate to:

- Dealing with areas that have been occupied in the past
- Undertaking eviction procedures as occupation occurs (or in response to evicting them for relocation from an existing informal settlement or property)
- Pre -empting the need for people to occupy land

Challenges relating to dealing with areas that have been occupied without authorisation in the past:

- Some informal settlements are not being upgraded as some people within Government think they can build enough new RDP houses and move people into these houses. (However with the work of the HDA, NUSP and others these mindsets are changing).
- Informal settlements are prone to shack fires and other health and safety challenges as they are not serviced and houses are often of poor quality and poorly constructed.
- People living in informal settlements have insecure tenure.
- It is difficult to upgrade areas that have already been occupied as the winding paths and slopes often make it difficult to install roads and pipes in these areas.
- In many instances, households living in informal settlements connect illegally to municipal water and sanitation systems and electricity networks. This leads to conflict between informal dwellers and neighbouring communities.
- Some people living in informal settlements have interests in remaining “off the grid” as there are less controls and regulations associated with living in these areas..
- Groups of people from different areas/ cultures/ countries congregate in certain areas which can create problems of assimilation and integration of these people into society.
- It is difficult for the state to upgrade an area if they are not the owner of the land. Development processes need to be followed to acquire the land or get permission to develop the land.
- Some people actively seek land that is unsuitable for development (e.g. on steep slopes, next to rivers, in areas with poor soil conditions, or under power lines, etc.) as this is the only land available in well located areas. These people then sometimes do not want to be relocated or upgraded as t this upgraded or relocated land becomes more expensive for them to occupy (e.g. they have to pay rates and services), and in these upgraded or relocated areas they now have to abide by rules (e.g. build better and more expensive structures).

- Households living in upgraded or gentrified areas are often 'forced' out of these areas as they cannot afford the rates and service charges associated with living in these areas or they sell, in a process called downward raiding to people with higher incomes who also lack access to housing.
- It often takes a long time to find, prepare and develop alternative land for people that have to be relocated from informal settlements.
- People who have not invaded land and are not living in informal settlements, but who also need land and accommodation, complain that government is unfairly 'rewarding' people that have invaded land by prioritising the upgrading or relocation of these people.
- Neighbours complain that informal settlements cause their property values to go down.
- The bulk and connector infrastructure (e.g. water, sanitation, electricity, etc.) in and around informal settlements is often not at a size and capacity that can accommodate new households in the area. For example, in some areas sewer treatment plants are already at capacity and can't accommodate new upgraded areas or sewer pipes are too narrow to accommodate new households,
- Government is reluctant to provide services on land that they do not own making it difficult to provide basic services to these areas.
- The unauthorised occupation of land in many communal areas, especially those along main transport routes and on the edge of urban settlements, is a very serious problem. In many communal areas, systems and procedures for administering land occupation and development have broken down. Legally, there is no legislation dealing with administering who should be on the land. In some instances, however, traditional (or other community) leaders have systems and procedures that they use, drawing on custom or local rules for who can occupy which piece of land. In these instances the occupation cannot be described as unauthorised as the *Interim Protection of Informal Land Rights Act (IPILRA) no. 31 of 1996* gives statutory protection.

Challenges related to undertaking eviction and relocation procedures as unauthorised land occupation occurs (or relocating informal settlement dwellers from an existing informal settlement or property):

- The land owners or people in charge of the land who apply for the eviction order often do not follow the proper legal procedures when undertaking eviction procedures. These people often complain that the legal provisions are too 'strict' and onerous and try and find short cuts; or they simply ignore these procedures.
- People are often evicted without a court order.
- There is often no meaningful engagement with people prior to evicting them.
- There are instances where those people without the right to the land, 'sell/ lease' the land/ property to people who are desperate for land. This creates further levels of complexity when trying to deal with these areas. According to the *PIE Act* it is an offence to 'sell' land you don't have the rights too.
- Municipalities and other structures often have weak capacity to respond to land occupations making it easier for people to occupy the land without facing any response from Government.
- Government cannot compel another land owner to initiate eviction procedures, but they do have standing under section 6 of the *PIE Act* to apply for an eviction order on private land so long as it is in the public interest to do so.
- In communal areas there is no clear land administration system in place, so it is often difficult to control occupation on this land. There is no clarity on what procedures need to be followed to obtain, allocate and approve land development in communal areas. The role of traditional leaders and democratic structures is not clearly defined leading to situations where unauthorised land occupation on communal land sometimes slips through the cracks.

- There are not adequate centralised records where one can see how many evictions are taking place and the nature and success<sup>61</sup> or otherwise of these eviction procedures. This makes it difficult to plan future interventions to improve or minimise the need for eviction procedures

Challenges relating to pre-empting the need for people to occupy land in future:

- Homeless people claim that they do not have any alternative place to stay. They often claim that they need to live in a specific area so as to be close to jobs or at least to opportunities to get a job.
- The private sector is not building enough new houses in the low and affordable housing market as the profit margins are too low. People can't afford to buy these houses due to supply and demand factors.
- Government is not building enough new RDP housing projects to pre-empt the need for unauthorised land occupation. People claim they get frustrated at the lack of opportunities to access appropriate and affordable land and they claim therefore to have no alternative but to invade land.
- The costs of getting, holding and developing land are high for Government and the Municipalities.
- In relation to acquiring land, well located land is generally expensive.
- The Integrated Residential Development Programme (IRDP) makes provision for the purchase of land but it prevents any land being purchased for land banking and future development purposes. The land has to be purchased and developed as part of one project. This restriction was put in place at the time as it was acknowledged that the state is generally unable to protect their land against unauthorised occupation and to take care of their fixed assets.
- In relation to holding land in advance of developing it, these holding costs are expensive. This includes for example, rates and service fees, mortgage repayments if the land was bought with a bond, costs associated with fencing, bush clearing, patrols etc. associated with protecting and keeping the property secure and maintained.
- In relation to developing the land, development costs are expensive. People are often unable to afford to pay the purchase price that would allow the developer to recoup their development costs.
- In a few instances, people occupy land without authorisation when they know an area is to be developed as they think that government will more likely respond to them (and provide alternative accommodation) as they know that government wants to continue with the original development of the land in question.
- People sometimes occupy land when they know that government owns the land as they know that it will then likely be easier for them to get government to upgrade or provide alternative land and accommodation, rather than calling for new development while they are living elsewhere.
- People occupy flood plains, dolomite areas, etc. as they think this will mean that government will be 'forced' to confront their land and housing needs and as a result they will be able to 'jump' the housing allocation queue.
- There are claims that foreign nationals buy up or rent RDP houses from the original beneficiaries who then move back into shack areas. Foreign nationals cannot get housing subsidies so they are prepared to buy or rent RDP houses.
- Foreign nationals are unable to get subsidies so they have no option but to either buy or rent land/ houses as described in the previous point, or occupy land without authorisation
- There is a widely held belief that some unscrupulous politicians encourage unauthorised occupation of land to get more potential voters to move into a particular area.

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<sup>61</sup> were 'success' refers to lawful eviction procedures being followed, which includes, for example, meaningful engagement and alternative accommodation being provided.

- Municipal housing waiting lists are often not very well managed, are not being properly updated and are susceptible to corruption. Sometimes they do not exist. Municipalities often do not follow their own housing allocation policies. National government has attempted to develop a centralised housing needs register, but this has not yet reached a stage where it is being effectively and systematically implemented in many areas.
- There are contradictions in many of the allocation systems of government for various housing subsidy instruments. Some subsidy instruments like the Integrated Residential Development Programme are promoted on the “first-come-first-serve” basis, while others like the emergency housing programme are based on the “most-in-need-first-served” basis. Some people complain that the prioritisation of some informal settlement upgrading projects over others is done on the basis of “most-visible-and-most-loud-first-served”. In other words, for example, one Ward Councillor may ‘shout’ louder for an informal settlement in their ward to be upgraded compared to another Ward Councillor, or one informal settlement that is located along a major road being prioritised for upgrading over another informal settlement that is next to an existing informal settlement. The continued promotion of what many people perceive, in some instances, to be the ‘myth’ of waiting lists, confuses households when they see these other allocation procedures being used, when they have been led to believe that housing allocation is done according to a first-come-first served waiting list.
- Municipalities tend to conflate the allocation of land for housing purposes (for low income households) with the allocation of housing top structures. This leads to situations where only people that have been pre-screened for housing top structure subsidy approval are being allocated land.
- Government has appeared to be reluctant to use expropriation legislation to acquire land for human settlement purposes. There has been some confusion and uncertainty over how to calculate compensation for existing land owners when expropriating land. There has been a tendency for land owners to push up the price of land when they know that the state wants to acquire/ expropriate it for residential purposes.

### ***4.3.2. Opportunities***

Opportunities for dealing with unauthorised land occupation have been combined into one list (and not separated into past, present and future as the challenges section above was categorised). Opportunities include:

- The HDA is committed to finding ways to improve the way that land occupation is dealt with.
- There has been significant case law that can be drawn on to inform the obligations of the Municipalities, property owners and occupiers when it comes to dealing with unauthorised land occupation..
- There has been some experience from Metropolitan areas and Municipalities in successfully managing and curbing land occupation, and this experience provides valuable lessons for how to move forward.<sup>62</sup>
- The HDA is developing a framework for a coherent and inclusive approach to land, within which the issues and recommendations identified in this ‘managing and curbing unauthorised land occupation’ report can be included, thereby informing future land and human settlement policy and legislation.
- The National Department of Human Settlements is developing a new policy on Human Settlements (starting with a new white paper which is in the pre-draft phases at time of writing) that can incorporate reference to how to deal with unauthorised land occupation.

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<sup>62</sup>see section in this report dealing with municipal case studies.

- The Department of Rural Development and Land Reform is reviewing their policies and is also developing a new white paper on land that can incorporate reference on how to manage and curb land occupation.
- The HDA and others have and are developing training material on the upgrading of informal settlements which can form the basis of updated and modified training material that deals more comprehensively with land occupation.
- Some community based organisations and social movements are recognising that access to land is an important first step to progressively realising their right to access water, a healthy environment and housing.

Governments Medium Term Strategic Framework for 2014-2019 makes reference to government being responsible for addressing the basic needs of residents.<sup>63</sup> This emphasis on basic needs is more in line with the width approach to land and housing development.

The depth approach is one where the state uses its available resources to provide fewer people with a larger product and then progressively over time providing more people with this larger product. The RDP approach can be considered a depth approach when compared to other width approaches, in that it provides fewer people with full title deeds to a piece of land, water and sanitation to the house and a 40 m2 top structure. The width approach in contrast is one where the state uses its available resources to provide more people with a smaller product, and then progressively over time provides these same people with ever larger products. Incremental approaches such as informal settlement upgrading and Managed Land Settlement, which are discussed in much more detail in later sections of this report, are versions of this width approach.

#### **4.4. Options of dealing with land occupations**

This section looks at the advantages and disadvantages of a number of broad options that have and are being considered by Municipalities and other government structures when it comes to addressing unauthorised land occupation. These options draw on what Municipalities are doing as well as on what policy and legislation is saying should be done.

The findings from this analysis are then used to help inform and narrow down the recommendations to a three pronged approach that is made further in the report.

The broad options that have been considered and that have been identified include:

1. Ignore unauthorised occupations.
2. Evict people that invade or occupy land without authorisation.
3. Upgrade areas that have been invaded, or relocate as a last resort.
4. Build new houses
5. Make land available for managed land settlement

Table 1 summarises the key advantages and disadvantages of each of these options.

**Table 1: Summary of advantages and disadvantages of broad options for dealing with land occupation**

<sup>63</sup> Outcome 8 on Human Settlements in governments Medium Term Strategic Framework 2014-19 sets a target to 'Include access to basic water, sanitation, roads and energy infrastructure and services in new developments' and outcome 9 on Local Government sets a target that 'members of society have sustainable and reliable access to basic services'. See <http://www.poa.gov.za/Pages/default.aspx>

Description of option	Key Advantages	Key disadvantages
<p>1. Ignore unauthorised land occupations</p> <p>‘Turn a blind eye’ to situations where people are occupying land without authorisation and allow these areas to become informal settlements</p>	<p>It is cheap and easy.</p>	<p>It is illegal. It can make finding solutions in future harder.</p>
<p>2. Evict people that have occupied land without authorisation</p> <p>Follow eviction procedures, directly as they are outlined in law (including issues relating to meaningful engagement, and provision of alternative accommodation where appropriate), to timeously evict people as they attempt to invade or occupy without authorisation any new land or buildings.</p>	<p>It is usually what the land owner wants to see. It is easy to understand. If done correctly (with alternative accommodation provided to those in dire need) it can lead to positive outcomes for both land owner and occupier.</p>	<p>It can be expensive. It can take time to follow the legally required steps. If done incorrectly, it can increase tensions between stakeholders. If alternative accommodation is not available for those in desperate need, it can be unconstitutional.</p>
<p>3. Upgrade areas that have been occupied, or relocate them when land is not suitable</p> <p>Use the Upgrading of Informal Settlements Programme, the Urban Settlements Development Grant and other relevant programmes and grants to upgrade areas where people have already occupied the land; or relocate them as a last resort.</p>	<p>It helps address the land and housing needs of the occupiers. The land is often well located relative to where people want to live. It builds trust between the occupiers and the state.</p>	<p>It can be seen unfair when people use unauthorised occupation to ‘jump’ housing allocation waiting lists. It can be expensive to acquire the land. It can be expensive to retrospectively install services into the area compared to installing services in a greenfield site.</p>
<p>4. Build new houses for people who need them</p> <p>Follow the necessary planning procedures, and using existing land, servicing and housing programmes, build new houses so that people in need of land and housing do not have to resort</p>	<p>It is a well understood approach and is what many people expect. It is what government is familiar with It creates nice ‘clean’ neighbourhoods. Those that get a house get a quality product.</p>	<p>It is more expensive compared to a managed land settlement approach. For those that don’t get a house immediately they have to wait, often for a very long time, for government to get around to building them a house. For those that have to wait</p>

Description of option	Key Advantages	Key disadvantages
to land occupation and people in informal settlements can be moved to these new houses.		for a house, there is the temptation to take matters into their own hands and occupy land without authorisation.
<p>5. Make land available for managed land settlement.</p> <p>Identify land as part of broader municipal planning processes, and allow people to settle on this land in an organised manner with access to at least basic services and an understanding that the area will be part of an on-going upgrading or consolidation process.</p>	<p>In the short term it is cheaper than building fully packaged houses all at once.</p> <p>It allows government to reach more people in a shorter period of time with a fixed amount of money, compared to conventional RDP housing approaches. It makes it possible to separate out the allocation of land from the allocation of housing top structures so that a wider range of people can access land.</p> <p>It makes it possible for households to start to use their own resources much earlier in the development process to address their own housing needs.</p> <p>It allows businesses and churches, etc. to also start to contribute to helping households in need acquire adequate housing.</p> <p>It minimises the potential that homeless people will invade land.</p> <p>It is what many communities are starting to ask for.</p>	<p>It can be perceived as encouraging people to build more shacks.</p> <p>The land may not always be where people want it.</p> <p>It puts extra pressure on government to identify and acquire sufficient and appropriate well located land.<sup>64</sup></p>

## 4.5. Conclusions from analysis

Now that we have identified various options that government has pursued and considered in the past, and unpacked the advantages and disadvantages, we are able to draw some conclusions as to which of these approaches may be more suitable for helping municipalities and the state in managing and curbing unauthorised land occupation in future.

1. Option 1 on ignoring unauthorised land occupation should not be considered an option as it is in effect unlawful. It does not address the constitutional responsibility of the state to protect property and provide access to land and housing.

<sup>64</sup> see annexure 4 on Managed Land Settlement for more disadvantages and counter responses.

2. Option 2 on evicting people from land they have invaded or occupied unlawfully is an option that can be pursued when done correctly following all the legal prescripts and principles. The law is clear on how eviction should be conducted in a way that finds a balance between protecting the rights of the land owner and the rights of the person in need of land and housing.
3. Option 3 on upgrading of informal settlements is already supported by government and should continue to be supported. It provides a mechanisms through which the original land rights holder can be compensated for loss of use and for appropriate land transfer compensation amounts, while at the same time providing adequate housing (tenure security, basic services and over time shelter) to those who need it, often in locations well located relative to the residents needs. Caution, however, needs to be taken not to exclusively focus on such an approach to the extent that it is seen as a main or even only way for households to gain access to land and housing, and thereby incentivising households to occupy land without authorisation.
4. Option 4 on building RDP and other forms of housing (e.g. social rental housing) is the conventional approach that everyone is familiar with. History has shown, however, that predominantly relying in this approach has not lead to a situation whereby people living in informal settlements all move to these new houses. The demand for land and housing is of such a scale that it will take too long for this approach to be successful. Households in need of land and housing who do not get a house in the short term, often feel let down by the state and take matters into their own hands by occupying land without the authority of the land owner.
5. Option 5 on making land available for Managed Land Settlement provides a mechanism for the Government to more directly and speedily address their constitutional duty to provide everyone with access to land and housing on a progressive basis and within available resources. More people can at least gain access to tenure security and basic services, knowing that they form part of an on-going upgrading process to systematically improve their housing and living environment (this is termed by some as the 'width' approach), compared to providing a fewer people with a larger product, and then over time trying to provide more and more people with this larger product (termed the 'depth' approach).<sup>65</sup>

## 5. THE PROPOSAL

Based on the above analysis we are now in a position to outline a proposal with recommendations for how Municipalities (and Government more generally) can manage and curb unauthorised land occupation. This proposal is outline in the following sections:

1. A vision for unauthorised land occupation
2. Broad recommendations for dealing with unauthorised land occupation
3. Detailed recommendations for dealing with unauthorised land occupation
4. Institutional and financial implications of recommendations

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<sup>65</sup> for more on the width and depth argument see: Eglin R (2009) *Stark Choices confronting housing*, available at <http://www.afesis.org.za/sustainable-settlements/sustainable-articles/516-stark-choices-confront-housing.html> and also see Tomlinson M, (2015) *Why can't we clear the housing backlog?* Institute of race relations, available at [http://www.politicsweb.co.za/news-and-analysis/why-cant-we-clear-the-housing-backlog--irr?keepThis=true&TB\\_iframe=true&height=650&width=850&caption=Politicsweb+--+Daily+news+headlines](http://www.politicsweb.co.za/news-and-analysis/why-cant-we-clear-the-housing-backlog--irr?keepThis=true&TB_iframe=true&height=650&width=850&caption=Politicsweb+--+Daily+news+headlines)

## 5.1. Vision

Before suggestions are made on how Municipalities and Government can manage and curb land occupation, a vision is proposed that relates to unauthorised land occupation. This vision will be taken into account when deciding how best to deal reactively and proactively with land occupations.

The vision for land occupation is that there are no new unauthorised land occupations. People who need land and housing acquire access to at least a tenure secure portion of land within the broad area they would like to be located with access to a basic level of services. This is managed and coordinated through locally accessible land and housing reception/ advice centres located at the sub- Municipal or at least Municipal level.

Where people do try to occupy land without authorisation, land owners and the state rapidly respond and deal with these people following due process, with eviction as a last resort. Existing and potential land occupiers are directed to advice/ reception centres for assistance on accessing alternative land.

After a certain moment in time – at a point in time when there is sufficient alternative land and accommodation - no new informal settlements are allowed to be established, and all existing informal settlements as of this date are either on the path towards upgrading or in the process of being relocated.

## 5.2. Broad Recommendations

*The solution is simple, do not make promises if you can't fulfil them.*<sup>66</sup>

Now that we have: (1) Identified the challenges and opportunities relating to unauthorised land occupation; (2) Unpacked the advantages and disadvantages of various options that have been used in practice within Municipalities; and (3) We have articulated a vision for how we would like to see land occupation in future: we are able to draw on these options, analysis and vision to make recommendations as to what Municipalities and Government should be doing to manage and curb land occupation going forward.

Firstly, we outline in broad strokes what it is recommended Government does to manage and curb land occupation, and then we look in more detail at each of the specific broad recommendations that are made.

### **Adopt a three pronged approach**

Government should take a national position that ignoring the issue of unauthorised land occupations and allowing it to continue without an adequate response is no longer an option.

In particular, government needs to adopt a three pronged approach to unauthorised land occupation which looks at land occupation from the future, past, and present perspectives:

1. Pre-emptive land development strategy: In terms of the future, where people are considering occupying land without authorisation, government needs to plan for existing

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<sup>66</sup> Phendulwa (2014) a resident of Daluxolo Informal settlement in Mdantsane in Buffalo City Metro

and future land and housing needs by identifying and preparing land for development and allowing people to settle on and build incremental structures on this land. Such an incremental land and housing development approach needs to be seen as part of a broader housing programme, that includes the provision of housing top structures for those in desperate need, as well as social rental housing, rural housing and other forms of housing development. The following four key primary recommendations are made for government to adopt, which contribute towards proactively preventing land occupation happening in the first instance (Note: a number of secondary recommendations are also made but are not elaborated on in this report):

- a. Instruct Municipalities to establish and implement a land acquisition and development strategy, with a focus on acquiring and preparing land for Managed Land Settlement (and other settlement developments).<sup>67</sup>
  - b. Review and develop a national framework for land and housing subsidy allocation, and require Municipalities to adopt and implement appropriate land and housing subsidy allocation policies and programmes.
  - c. Develop national guidelines for how Municipalities can use spatial planning and land use management legislation to support MLS (and in-situ upgrading, and rural development) within incremental settlement areas.
  - d. Raise awareness of the advantages of Managed Land Settlement approaches and support Municipalities and others to use existing programmes and funds to implement such MLS type approaches.
2. Upgrading strategy: In terms of the past, Government needs to respond to land occupations that have already happened and where people are now living in informal settlements or unlawfully occupying buildings and houses by analysing the appropriate response and then either upgrading these areas where they are or relocating these people to appropriate alternative land and accommodation. In particular the National Department of Human Settlements (and the Housing Development Agency) should continue to raise awareness of the advantages of informal settlement upgrading within Municipalities and other Government structures, and improve the capacity of role-players to upgrade these settlements.
  3. Rights-based relocation strategy: In terms of the present, where people are in the process of, or have just occupied land, Government needs to follow the correct procedures as outlined in law when engaging with and relocating these households. In particular, the National Department of Human Settlements (and the Housing Development Agency), working with the Department of Rural Development and Land Reform, and the Department of Justice, should build capacity of role-players involved to follow the correct eviction and relocation procedures and monitor that these procedures are being followed.

This three pronged approach ensures that there is at least one solution or strategy for dealing with each of the key challenges identified in the challenges section. Table 2 shows how challenges related to occupation that has happened in the past, is happening now and potentially could happen in future is accommodated though the proposed three pronged approach. The table pinpoints the specific response (solution) that the National Department of Human Settlements (and the HDA) needs to follow to address the challenge.

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<sup>67</sup> Note that the focus on Managed Land Settlement (and Upgrading Informal Settlement) in this report does not mean that municipalities (and others) must stop with their other housing initiatives such as Integrated Residential Development Programme housing, Social Housing, Community Residential Unit housing, Rural Housing – communal land, etc. This report has focused on MLS as it is argued in the report that this is a neglected land and housing delivery method, that needs far more attention, to the extent that MLS becomes a dominant land and housing development approach in municipalities.

**Table 2: Linking proposed solutions to challenges**

	Challenge	Solution
Future	There is not enough land and housing available and being developed compared to what is required so people resort to occupying land without authorisation to develop shelter for themselves.	The National DHS and the HDA needs to support municipalities to: (1) make more land available for settlement development; (2) ensure that this land is allocated in a fair and transparent manner; (3) accommodate incremental settlement within their spatial planning and land use management systems; and (4) implement managed land settlement approaches as part of a broader human settlement development strategy.
Past	People continue to live in informal settlements without proper services and tenure security while they wait for government to build RDP houses for them or come and upgrade their informal settlements.	The National DHS and the HDA needs to raise awareness of the advantages of and improve capacity to upgrade informal settlements.
Present	Eviction procedures are not always properly followed by land owners when people are occupying land without authority.	The National DHS and the HDA, working with other appropriate government structures, needs to build capacity and ensure stakeholders follow proper procedures when dealing with unauthorised land occupation.

The motivation for such a three pronged approach is that it addresses government's Constitutional mandate (found in Section 25 of the Constitution) to provide land for people that do not have land and it also protects the land and property rights of those that have land. The approach helps Government address its constitutional mandate (found in Section 26 of the Constitution) to progressively, and within available resources, provide everyone with adequate housing. The approach also ensures that government addresses its constitutional mandate (found in Section 33 of the Constitution) that everyone has a right to administrative action that is lawful, reasonable and procedurally fair when they face the threat of eviction from land they have occupied without authorisation. The approach also makes it harder for people to resort to unauthorised land occupation in future as the state is providing an alternative managed land settlement approach to those that need it most.

This three pronged approach relates to the 5 options for dealing with unauthorised land occupation as described in the analysis section in the following way:

- Option 4 (proactively built new houses) and option 5 (make land available for Managed Land Settlement) have been combined into the **first prong** to prepare land in advance of need so that people do not have to resort to land invasion in future. It is proposed that emphasis be given to option 5 (managed land settlement) as this 'width' option leads to a situation where more people are able to more rapidly gain access to land and basic services.
- Option 3 (upgrading informal settlement) is the **second prong** that deals with land invasion that has happened in the past.
- Option 2 (eviction), when done lawfully and humanely, is retained as the **third prong** to deal with land invasion that is in the process of being undertaken (and for dealing with past unauthorised occupations where eviction and/or relocation is needed). Option 1 (do

nothing) is not considered as an option as it is seen as dereliction of the Government's constitutional obligations to address people's right to land and housing.

### **Follow principles when managing and curbing land occupation**

The proposed approach incorporates a number of principles:

- Prioritise the provision of new land with at least basic tenure and basic services so that people do not have to resort to land occupation.
- Where possible upgrade areas where people are already living, and provide alternative accommodation for people that have to be relocated from areas that are inappropriate for in-situ upgrading.
- In relation to eviction:
  - consider formal eviction as a last resort
  - follow legal procedures when evicting people
  - engage meaningfully prior to any eviction procedure
  - provide alternative and/or temporary accommodation to anyone that is evicted

Land occupation cannot be addressed through only one of the prongs: all three prongs have to be implemented concurrently. However, the third prong, pre-empting the need for land occupation, as it is suggested in this report, is the most important of these prongs, as without this it will be difficult to: (1) prevent further land occupations; (2) provide alternative accommodation for those that do invade land; and (3) relocate people from informal settlements when required.

## **5.3. Detailed recommendations**

This section outlines in more detail specific activities or recommendations associated with each of the three prongs to the proposed response to unauthorised land occupation.

### ***5.3.1. Pre-emptive land development strategy: Pre-empt the need for land occupation in future***

Due to the large number of possible pre-emptive responses to unauthorised land occupation, this section is further broken down into two sub sections:

- The first group of recommendations highlights four key primary recommendations;
- The second group of recommendations outlines a number of further additional secondary recommendations that a Municipality can consider.

The key recommendations that need priority attention include:

1. Acquire and prepare more land for housing development – so that people do not have to resort to invading land
2. Develop and implement clear land and housing subsidy allocation procedures – so that people have trust in the allocation process and do not feel tempted to take matters into their own hands
3. Accommodate Incremental Settlement Areas – so that Municipalities are able to implement more incremental approaches to development within the requirements of SPLUMA
4. Support Managed Land Settlement – so that government is able to at least provide access to a secure piece of land and basic services with commitment to consolidation and upgrading for a larger number of people in a shorter period of time

compared to if they tried to provide the same number of people with a fully packaged RDP house.<sup>68</sup>

Additional recommendations are not elaborated on further in this report.

## **1. Acquire and prepare more land for housing development**

If a Municipality is proactive in identifying, planning and acquiring (public and private) land for settlement purposes, then it will be easier for government to develop new land and housing projects and get ahead of the demand for land and housing.

There are a number of strategies a Municipality can adopt to obtain more land for settlement development. These recommendations are categorised according to strategies relating to:

- a. Buying or acquiring new land
- b. Encouraging land owners to make land available
- c. Reducing the holding costs of the land acquired

### a. Buy or acquire new land

- Identify areas for development in the Spatial Development Framework (SDF) within the Integrated Development Plan (IDP). Make sure that these areas are linked to public transport and are relatively well located.
- Develop a land acquisition strategy and programme that outlines a pipeline of projects indicating what actions are needed and by when, so as to get these projects implemented over time. This strategy needs to take into account acquiring land for the following type of projects that have emerged from the SDF:
  - Upgrading projects: Getting land where people are already living. This is often well located relative to urban opportunities.
  - Infill projects: Identifying smaller pieces of land often found within existing urban areas. Again, this is often well located.
  - Mega projects: These are projects that are usually developed on larger pieces of land involving large number of development approaches, from social rental housing to RDP and MLS. They also aim to include other sectors like education, health, transport, etc. in a manner that ensures the integration of these sectors into a cohesive human settlement. Land for Mega projects is usually a continuous piece of land, (even if this land is owned by different role-players), but it can also be developed on separate disjointed pieces of land but as part of a single programme. Mega projects tend to take place over a longer period of time. Mega projects are also usually on the edge of settlements where larger portions of land can be found. With good planning, however, it is possible to find ways to integrate and link these areas into the existing urban areas.
  - Catalytic projects: Identify catalytic projects. These can be upgrading, infill or mega projects. They are catalytic in that they help direct future development interventions in a desired manner. For example, an infill project could be catalytic if it helps link two previously separate suburbs.
- As per the approved land acquisition programme (as explained in the previous point), negotiate with land owners for the purchase or transfer of land. Consider land swaps and other mechanisms like land pooling and readjustment. Land pooling is where land

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<sup>68</sup> Emphasis in this paper is given to MLS, but this does not mean that municipalities must forget about other forms of land and housing development such as Integrated Residential Development Programme housing, social housing and others. The recommendations relating to acquiring land for development purposes, and improving the land and housing allocation system will also contribute towards improving the development of these other land and housing delivery approaches. The use of other human settlement development approaches is discussed further in annexure 5 on additional recommendations to curb land occupation.

owners agree to 'pool' or combine their land into a single development portion. Land readjustment is where the land owner (or group of land owners) and the Municipality collaborate in the development of the land, ensuring that the original land owner(s) is able to retain a portion of this newly developed portion of land that is valued at a similar price as the original portion of land.<sup>69</sup>

- Negotiate with Government and parastatal land owners who own land in identified development areas to acquire this land. For land that is being earmarked for low income households, negotiate for this land to be sold or donated to the Municipality at a discount rate.
- In instances where the land owners are not willing to reach a reasonable negotiated land transfer price, expropriate the identified land if necessary. Note that expropriation will be relatively easy to enforce if it can be shown that:
  - Government first tried to negotiate to get the land
  - The development is in the public interest (in terms of governments land reform and housing programme for low income households)
  - The development does form part of an official municipal IDP/ SDF/ land acquisition strategy
  - Compensation has been calculated at the present value of the land (not inflated price in anticipation of future residential land use), and also taking into account history of acquisition, etc
- Continue with improving and expanding government programmes to improve the performance of gap market housing thereby making it easier for people in existing low income housing (e.g. RDP houses) to move up the property ladder 'freeing' up land at the bottom of the ladder for low income households. This reduces the pressure for people to resort to unauthorised land occupation.
- Impose development charges for certain new development approvals (e.g. the approval of a new shopping centre, or high income residential estate) and use the income from these charges to support land acquisition and incremental settlement approaches. Consideration could be given to more formally 'twinning' new developments (e.g. a shopping centre) with new incremental settlement areas, so that the developers, unauthorised occupants and residents are aware of where their charges are going and are able to continue to provide ongoing support to these incremental settlement areas.
- Encourage inclusionary housing (within projects or in new projects) requiring developers of new or upgraded projects to ensure that there is an agreed amount of low income or incremental housing developed as part of the project (either within or away from the actual development).<sup>70</sup>
- National Human Settlement, in conjunction with treasury (and other appropriate government departments) needs to increase the budget allocation and resources that are allocated towards the acquisition of land. Presently the budget set aside for land purchase is just over 3% of the total funds set aside for land, services and top

<sup>69</sup> For information on land readjustment and similar tools see Eglin R (2009), *Make housing delivery easier by unlocking bulk Land for 'land first'*, available at <http://www.afesis.org.za/sustainable-settlements/sustainable-articles/502-make-housing-delivery-easier-by-unlocking-bulk-land-for-%E2%80%98land-first%E2%80%99.html> and see Global Land Tools Network (2012) *Handling Land: Innovative tools for land governance and secure tenure*, available at: [http://www.gltn.net/jdownloads/GLTN%20Documents/handling\\_land\\_eng\\_2012\\_.pdf](http://www.gltn.net/jdownloads/GLTN%20Documents/handling_land_eng_2012_.pdf) and also see UK Aid (2015) *Urban infrastructure in Sub-Saharan Africa – harnessing land values, housing and transport Literature review on planning and land use regulation Report 2*, available at: <http://www.africancentreforcities.net/wp-content/uploads/2015/09/DfID-Harnessing-Land-Values-Report-2-Planning-and-LUR-literature-review-20150607.pdf>

<sup>70</sup> Urban LandMark (2007) *Inclusionary Housing Bill Initial Regulatory Impact Assessment*, available at: [http://www.urbanlandmark.org.za/downloads/RIA\\_Inclusionary\\_Housing.pdf](http://www.urbanlandmark.org.za/downloads/RIA_Inclusionary_Housing.pdf)

structures.<sup>71</sup> This amount needs to be reviewed, especially in relation to the acquisition of well located land which tends to be more expensive.

b. Encourage existing land owners to sell or make land available for development

- Where the land is owned or vested in another Government department (compared to the Municipality), develop and/or modify policies making it possible for these structures to 'donate' or transfer these properties at a discount if the land in question is to be used for low income housing development or for land redistribution purposes.
- Implement a vacant land tax whereby land owners are charged a higher rate on property in certain well located areas if they do not develop this land within a specified time period.<sup>72</sup>
- Offer to swap land that the Municipality or Government owns in a non priority low income housing development area with land that the government wants to develop as part of a broader low income and incremental development programme that is owned by a private or other land owner.
- On a regular basis put out a call for land, inviting land owners to put forward their land for purchase by government.<sup>73</sup> Explore opportunities to offer some form of incentive (e.g. discounts on future rates of other property owned by the seller).
- Put out calls for land development partnerships. This can be targeted at developers and existing land owners who already have land and have plans (but possibly not the development resources) to develop this land. The developer/ land owner brings the land and/or expertise and the Municipality/ Government brings resources to the partnership. Also put out calls targeted at non-governmental organisations, community based organisations and others who have the plans and intention to support the development of low income and incremental housing but do not necessarily have access to land and resources. In making such calls for partnership, view this as an opportunity to partner with organisations and in situations where more innovative development solutions can be piloted and tested.<sup>74</sup>

c. Reduce the holding costs of land (so that Municipalities and Government. will be more willing to bank and access land in advance of need)

- Negotiate for a reduction in rates and services for land that has specifically been 'banked' as part of an approved land acquisition and development strategy. However Municipalities could argue that losing income, in the sense of rates foregone (especially

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<sup>71</sup> In 2014 the budget for land was R6.000 per site; services about R44,000 per site; and top structure R110,000 per site for a total of R160,000 per site. This also implies increasing human resources within the Departments that deal with land identification, acquisition and development.

<sup>72</sup> see Municipal rates policies and the urban poor - How can municipal rates policies promote access by the poor to urban land markets, available at: [http://sacitiesnetwork.co.za/wp-content/uploads/2014/07/report\\_municipal\\_property\\_rates\\_and\\_the\\_urban\\_poor.pdf](http://sacitiesnetwork.co.za/wp-content/uploads/2014/07/report_municipal_property_rates_and_the_urban_poor.pdf) and see Managing Urban Land: a guide for municipal practitioners, available at: [http://www.urbanlandmark.org.za/downloads/managing\\_urban\\_land\\_guide\\_guide\\_2012.pdf](http://www.urbanlandmark.org.za/downloads/managing_urban_land_guide_guide_2012.pdf)

<sup>73</sup> see for example The Housing Development Agency (2015) *Request for expression of interest: registration of private sector human settlement catalytic projects*, [http://www.thehda.co.za/uploads/files/tenders/private\\_sector\\_call\\_for\\_human\\_settlement\\_catalytic\\_projects\\_specification\\_may\\_2015.pdf](http://www.thehda.co.za/uploads/files/tenders/private_sector_call_for_human_settlement_catalytic_projects_specification_may_2015.pdf)

<sup>74</sup> see for example call for partnership from Minister Sisulu 's call for "building a nation through partnership" in her Human Settlement Department budget vote speech in May 2015, available at: <http://www.gov.za/speeches/minister-lindiwe-sisulu-human-settlements-dept-budget-vote-201516-7-may-2015-0000>

if some of this land is presently or could ultimately be scheduled to be used by middle to lower income houses), may not justify the reduction in rates charges.

- Prior to considering the purchase of land for land banking purposes, undertake a cost benefit analysis of the difference between:
  - Paying for fencing, security, eviction costs of potential land invaders, and paying for rates etc.; with
  - Putting in basic services and letting people settle on land in organised manner
- Reconsider the need for land banking and consider rather making this land available for incremental settlement development immediately so that people can legally move onto this land in a managed manner reducing the potential of the land being invaded if it was left vacant.
- Enter into a land availability agreement with the present owner of the land rather than purchasing land that has been identified for future land development. Continue to allow the present land owner to retain the land and pay rates on this land at non residential rates, until such time that the land is developed and made available for settlement, at which time it is then transferred directly to the end users of the land.
- Allow for interim uses of land such as urban agricultural activities like grazing and community gardens.

## **2. Develop and implement clear land and housing subsidy allocation procedures**

Households are potentially more likely to resort to land occupation as a way to house themselves if they do not trust the land and housing subsidy allocation systems being used by Government in their municipal areas.

In order to improve land and housing subsidy allocation systems and procedures around the country, the following recommendations are proposed:

- a. National government needs to lead a process to review all national, provincial and local land and housing allocation policies and systems
- b. National government needs to incorporate land and housing subsidy allocation into a national human settlement policy
- c. National government needs to develop an updated land and housing subsidy allocation framework
- d. National government must support Municipalities to develop municipal land and housing subsidy allocation policy as per the national framework policy

In summary, Government needs to review its existing land and housing subsidy allocation policy, and develop, in consultation with all relevant stakeholders, a more cohesive and integrated policy at the national level. Municipalities should then be encouraged, based on this national land and housing subsidy policy framework, to develop their own land and housing subsidy allocation policies.

Each of the above recommendations are elaborated on below.

### **a. National government needs to lead a process to review all national, provincial and local land and housing allocation policies and systems**

National government needs to identify and review any national and provincial policies or draft reports that deal with land and/or housing subsidy allocation.<sup>75</sup> The national housing subsidy allocation strategy has not been approved by government yet, so it is not a policy at

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<sup>75</sup> See for example:

<http://www.emalahleni.gov.za/online2/index.php/documents/file/94-national-housing-allocation-strategy>

the moment.<sup>76</sup> As a draft strategy, it only deals with the allocation of completed subsidy financed houses to households where targeted development approaches were not followed. In other words, it deals with allocating people to government subsidised houses once the houses have been completed. Targeted development approaches on the other hand, as are used at the moment, are where housing subsidy beneficiaries are identified up front before the project commences and they are screened and approved to see if they qualify for a housing subsidy very early in the development process. The houses are then built for specific targeted and approved households.

National government needs to also conduct a comprehensive review of all land and housing subsidy allocation policies and procedures within all Municipalities across the country. Such a comprehensive review should be preceded by a rapid review of a random selection of Municipal land and housing waiting lists.

These reviews need to be used as the basis for the National Department of Human Settlements to develop a comprehensive land and housing subsidy allocation framework that looks at allocating land to people and allocating housing subsidies to beneficiaries. The existing national allocation guidelines and/or strategy<sup>77</sup> are targeted predominantly at allocating people to Integrated Residential Development Programme housing subsidised projects, and does not dwell much on allocation to other forms of housing subsidies, nor does it deal at all with the allocation of households to land (as opposed to housing subsidies).

#### b. National government needs to incorporate land and housing subsidy allocation into national human settlement policy

The new Human Settlement white paper needs to include strong recommendations relating to land and housing subsidy allocation.

Human settlement policy needs to differentiate between (1) housing subsidy allocation and (2) land allocation, as these two forms of allocation need to be dealt with through separate but inter-related programmes and processes.

Housing subsidy allocation refers to allocation of government subsidised housing top structures and title deeds to housing subsidy qualifying households. For example, to qualify for a housing subsidy one must be a South African citizen, be older than 21, have dependents, and have a household income of less than R 3500 a month.<sup>78</sup>

Land allocation, in the context of this report, refers to allocation of land for low income housing that goes beyond allocation of land to housing subsidy qualifying households, and includes allocating of land also to non housing subsidy qualifiers, or to households that are yet to be part of a project that applies for housing top structure subsidies.

The allocation of land needs to be delinked from the allocation of housing top structures. The acquisition of land with some form of basic or interim tenure (i.e. not title deeds) is not dependent on households qualifying for housing top structures. It is only when individual title

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<sup>76</sup> personal communication with Louis v/d Walt from national Department of Human Settlement. The policy is being consulted with the South African Local Government Association and others.

<sup>77</sup> Johan Minnie, September 2008, "Guidelines for the allocation of housing opportunities" submission to MINMEC; an also see "Strategy for allocation of housing opportunities created through the national housing programmes" available at <https://pmg.org.za/files/docs/100811strategy.doc>

<sup>78</sup> There are also subsidy interments like the finance linked individual subsidy available for people that earn greater than R3 500/ moth but less than R15 000.

is provided and/or housing top structures are developed using government subsidies that housing subsidy qualifying criteria come into play.

### c. National government needs to develop an updated land and housing subsidy allocation framework

The allocation framework needs to differentiate between allocating (1) people to land and (2) subsidies to people.

- Allocating people to land: When it comes to allocation of people to new land, there are a many different categories of people that need to be considered when determining each Municipality's, and each project's land allocation system. This includes for example:
  - People from a municipal first come first served waiting list
  - People from a priority list calculated according to a need based points criteria, such as more points to poorer households, bigger households, household that have been living in an area for the longest, etc.
  - People from an specific informal settlement
  - People from backyard shacks
  - People from a specific ward
  - People from a specific age bracket
  - People from a specific special category (e.g. women headed households, people with disabilities, military veterans, etc)
  - People who form part of organised associations of people in need of land and housing such as savings schemes or employee associations
  - People that are moving into an area from another part of the Municipality, from neighbouring municipalities, or foreign nationals
- Allocating housing subsidies to people: The comprehensive land and housing subsidy allocation framework needs to recognise and accommodate the differences in allocation procedures due to different subsidy instruments. The following outlines who are usually targeted for allocation of housing subsidies per subsidy type:
  - Integrated Residential Development Programme (IRDP): Usually allocated to households that are high on the municipal waiting list, with a portion also allocated to people from specific informal settlements as part of a relocation or de-densification strategy for the informal settlements concerned, while a further portion is allocated from a backyard shack waiting lists.
  - Upgrading of Informal Settlements Programme (UISP): Usually allocated to people who are living in the informal settlement. Remembering that there are likely to be a number of residents of the informal settlement who do not qualify, but who will still benefit from any services and neighbourhood upgrading interventions. Allocation of subsidies for title deeds and top structures needs to happen using PHP or some other subsidy programme.
  - Social Housing: Usually allocated to people who satisfy allocation criteria and following allocation processes developed and implemented by social housing institutions (e.g. first come first served).
  - Community Residential Unit (CRU): Usually allocated to people who satisfy allocation procedures of the Municipality that is implementing the CRU project (e.g. if it's part of an in-situ upgrade, then people who are living in that area, or if it's a greenfield project then according to a first come first serve waiting list or similar agreed allocation criteria).
  - Enhanced Peoples' Housing Process (ePHP): Usually allocated to a group of households that have consciously come together for the purposes of arranging the construction of their houses themselves following the ePHP. This may for example be a group of self organised savings schemes.

- Rural subsidy - communal land rights: Usually allocated to households that are already living in these rural areas as part of what could be termed an '*in-situ*' rural housing upgrade project; but in other instances could also include people on a housing subsidy waiting list that is prepared by the traditional leadership structures following customary land allocation procedures, or community leadership following allocation procedures agreed by the community.
- Individual housing subsidy: Usually allocated to individuals who purchase a serviced site through either a government or private sector serviced site development programme.
- Special needs, military veterans, etc: These housing subsidies are allocated on a quota basis to special needs, often as part of a quota system in an IRDP or other housing subsidy programme; or as a standalone housing intervention or project .

When developing a land and/or housing subsidy allocation policy, the following considerations should be taken into account:

- Aim for a first come first serve approach, but this may be difficult in situations where the allocation system has to be established from scratch (i.e. there is no historical waiting list to draw on as a starting point).
- Prioritise those that are most in need
- Address real emergency situations (e.g. people are in flood plains)
- Provide for multiple criteria so as to not just rely on one criteria such as a waiting list, that will then discriminate against people in need, or people in organised groups, etc.

Consideration must also be taken not to be seen to 'prioritise' land and housing support for people who invade land. Land and housing subsidy allocation systems should not be designed such that it incentivises people to invade land and jump land and housing waiting lists.

Any land and housing subsidy allocation system should also encourage landless and homeless people to organise themselves into organised groupings that are able to work towards addressing their own land and housing needs. Individualised first come first serve allocation systems can have the effect of discouraging people to organise themselves into such groups. The presence of organised groups makes it easier for government to engage with people in need of land and housing. Households that rely on more first come first serve approaches tend to be more dependent on government giving them a house, rather than working towards helping themselves. The organised group can also be involved in the planning process, making it more likely that the settlements developed will better reflect the needs and aspirations of the ultimate occupants.

In determining the proportion of the total housing subsidy budget for the country/ province/ municipality, the comprehensive land and housing subsidy allocation framework needs to ensure that there is a fair and appropriate mix of subsidy instruments used. For example, one does not want a situation where more subsidies are allocated to, for example, rural housing, where there are more people in need of IRDP housing subsidies.

d. National government must support Municipalities to develop a municipal land and housing subsidy allocation policy as per the national framework policy

National and Provincial government need to then support municipalities to review their existing (if they have one) and develop a new or updated land and housing allocation policy that takes into account the national land and housing subsidy allocation framework policy.

Each Municipality must develop its own allocation policy that outlines the procedures and criteria that the municipality will use to allocate both 1) land and 2) housing subsidies. This

land and housing subsidy allocation policy needs to be developed within the framework of the national policy framework or guidelines.

### **3. Accommodate Incremental Settlement Areas**

It will be easier for Municipalities to accommodate more incremental settlement on land they have secured for this purpose if their spatial planning and land use management system makes provision for more incremental settlement approaches. The SPLUMA provides a valuable opportunity for a Municipality to be more proactive in accommodating more incremental settlement approaches to development.

The concept of Incremental Settlement Areas should also be applied by Municipalities to areas that are part of an informal settlement upgrading programme and to areas that fall under customary and communal land administration.

The following recommendations are made for how the SPLUMA can be used to facilitate more incremental settlement approaches:

- a. Municipalities need to designate Incremental Settlement Areas within their Spatial Development Frameworks,
- b. Municipalities need to incorporate appropriate land use purposes (or zones) within their land use management systems
- c. Develop National guidelines for Incremental settlement areas and appropriate incremental land use purpose zoning regulations
- d. Encourage and support Municipalities to pilot and learn from implementing incremental settlement provision under SPLUMA

#### a. Municipalities need to designate Incremental settlement areas within their Spatial Development Frameworks.

Incremental Settlement Areas (ISAs) are areas identified in municipal SDF's in which incremental upgrading approaches to development and regulation will be applicable. These areas can be informal settlements, managed land settlement areas, and areas falling under customary or communal land administration.

These ISA's give content to the clause in the *Spatial Planning and Land Use Management Act* (SPLUMA No. 16 of 2013) which states that municipalities, in their SDF plans should "*identify the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be applicable*" (in section 21 (k)).

ISA's can be designated on either public/state land or on private land. These ISA do not change the underlining land ownership patterns and neither do they, in themselves, change the underlining zoning (or land use purposes) in these areas. What ISA's do is that they indicate Government's commitment, moving forward, to accommodating more incremental approaches to settlement development in these areas. They signal to the public an intention on the part of government to change how land use management and building control will be administered in these areas by the Municipality.

Municipalities must, when reviewing and/or developing their Spatial Development Framework plans, which forms of the municipalities Integrated Development Plan, identify incremental settlement areas.

#### b. Municipalities need to incorporate appropriate land use purposes (or zones) within their land use management systems

Municipalities will also need to develop and incorporate, within their land use schemes and their land use management systems (that are approved as municipal by-laws as per SPLUMA), appropriate land use purpose categories or zones such as 'incremental residential purpose zone', or 'incremental general purpose zone' that allow for households to occupy a portion of land, undertake certain residential and small business activities, and build temporary shelter within these 'purpose zones'.

It is important that in these land use schemes and land use management systems that terms are clearly defined. For example, the term plot could be defined as a piece of land or stand within a layout that has been approved by the Municipality but for which no general plan has been approved, whereas the term 'erven' could refer to an erf on a layout which has been approved in a general plan and which has been registered in the deeds registry with erf numbers. Further the term shelter could refer to a shack which can be built without getting building approval, while the term dwelling could be defined as a structure for which building plan approval needs to be obtained.

Land use controls could indicate, for example, that the land can be used for residential use, business use (spaza shops, shebeens, etc.), and/or institutional use (community halls, churches, play areas, etc.). Building control could indicate, for example, that households don't need permission to build a shelter (where shelter is defined as a structure and unit of accommodation intended for human occupation, constructed of any material whatsoever, even though such structure or material may not comply with the standards or requirement for durability intended by the National Building Act, or any other definition as approved by a Municipality). Households should only be allowed to build a formal dwelling within a 'incremental residential purpose zone' or a 'incremental general zone' or any similar identified land use purpose zone if they have obtained the necessary building plan approvals.

Consideration should also be given to using the concept of ISA's to also help address the issue of security of tenure within these areas. For example, rules associated with ISA's could specify that households living in such areas must have their names recorded by municipality on a municipal data base, with their name linked to a geo-referenced point, plot or erf. Any changes in who the occupant is need to be reported to the Municipality and records are then updated.

#### c. Develop National guidelines for Incremental settlement areas and appropriate incremental land use purpose zoning regulations

The National Department of Human Settlements, working with the DRDLR and COGTA, should develop national guidelines for how Municipalities can manage development within incremental settlement areas, including developing guidelines for how to incorporate ISA's into the Municipal SDF, as well as how to include appropriate land use purpose zoning categories within Municipal land use schemes and land use management systems. The guidelines should also deal with how Municipalities could incorporate an element of land tenure administration into ISA's.

The starting point for the development of these guidelines is for the National DHS, working with other relevant Departments, to conduct a survey and evaluation of how municipalities are starting to use Spatial Planning and Land Use Management legislation and tools to accommodate and support incremental settlement development.

#### d. Encourage and support Municipalities to pilot and learn from implementing incremental provision under SPLUMA

Municipalities need to be encouraged and supported by the National DHS and other relevant Departments, to experiment with different spatial planning and land use management

approaches and tools, so that lessons and experience can be developed as to what works in different contexts.

#### **4. Support Managed Land Settlement**

One of the best ways to address the need for land and housing, for all those people who are landless and homeless, within the shortest period of time, is to identify and prepare land in advance of need, and allow people to settle on this land and build their own shelter, with access to at least basic tenure security and basic services. This is referred to as Managed Land Settlement or MLS. See annexure 3 for more information on MLS.

- a. Recognise Managed Land Settlement as a form of incremental settlement within national policy
- b. Municipalities need to develop and implement MLS policies and programmes and pilot, learn and share their experiences with other municipalities
- c. Municipalities need to structure themselves to adopt more of an area based programme approach to incremental settlement development
- d. Municipalities need to coordinate their incremental settlement approaches with their land and housing subsidy allocation policy
- e. All national, provincial and local spheres of government need to set MLS targets

In summary, government needs to include reference to Managed Land Settlement, in all its national policies, require Municipalities to develop their own policies and pilot projects around MLS.

##### a. Recognise Managed Land Settlement as a form of incremental settlement within national policy

National government needs to recognise Managed land Settlement as a form of incremental settlement development, along with upgrading of informal settlements, within (1) the coherent and inclusive approach to land for human settlement policy, (2) the new human settlement white paper and (3) its land acquisition and development strategy and programmes.

Managed Land Settlement is one side of the coin of the Incremental settlement development approach. Incremental settlement is where land tenure, engineering services, housing and other neighbourhood services and facilities are introduced and provided in a step by step manner over time. Incremental settlement can be contrasted with RDP housing where the full package of title deeds, services and top structure are provided all at once in one package.

The difference between Upgrading of informal settlement and managed land settlement is:

- Upgrading informal settlements is a form of incremental settlement starting from a context where people have already invaded the land
- Managed land Settlement is a form of incremental settlements starting from a context where the land is identified and prepared for incremental settlement before households are allowed to settle on this land.

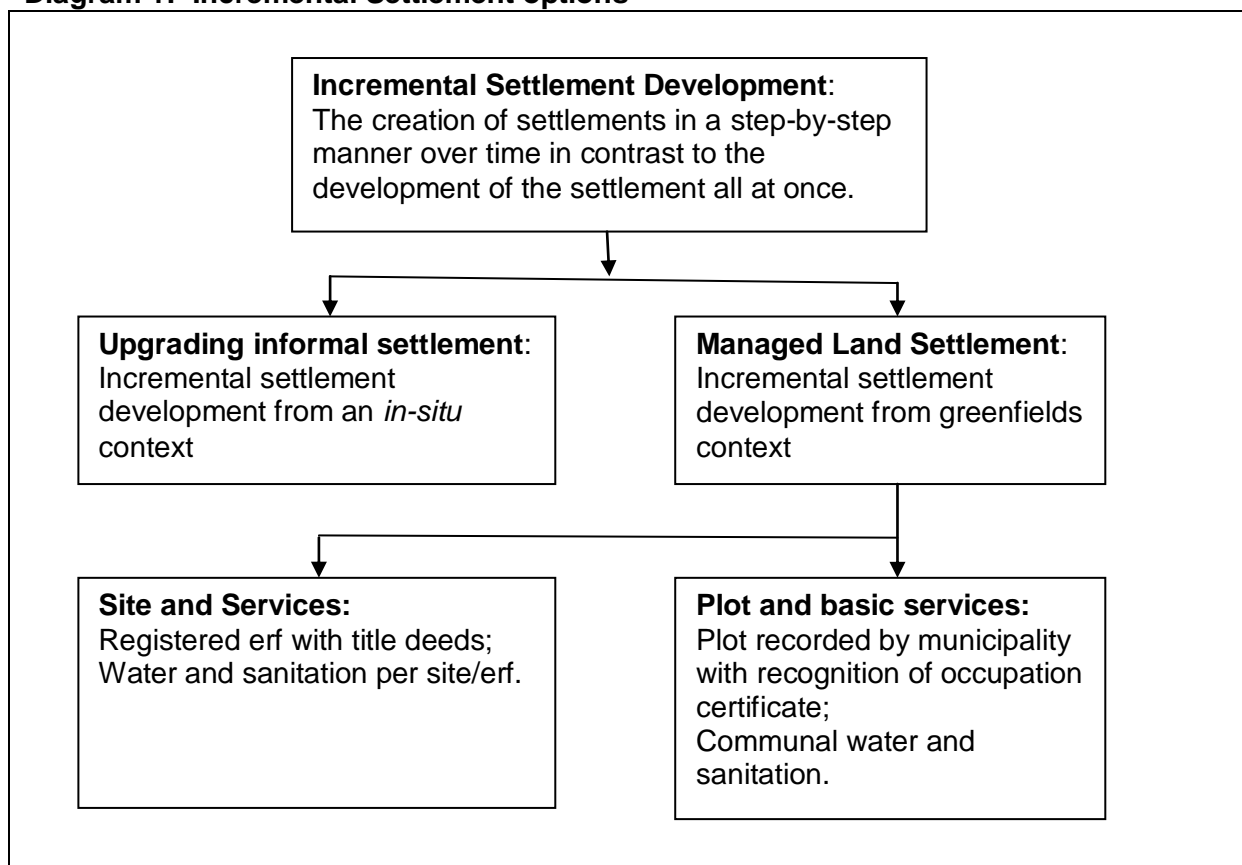
Managed Land Settlement is a broad term referring to a number of incremental settlement development approaches ranging from:

- Conventional site-and-service, where households are provided with title to registered erven that they then own; and with access to services (water, sanitation, refuse etc) to each site; to

- More innovative plot-and-basic-services, where households are provided with some form of basic tenure and with access to basic services.
  - Basic tenure could include, for example, an occupation certificate issued by the local government – based on contract law - agreeing that the person can occupy a given plot.
  - The plot is a portion of land, demarcated on a scaled map, kept by the Municipality, not registered with the surveyor general, showing plots within a broader surveyed erf and outer boundary.
  - The basic services could include communal ablution facilities and communal water standpipes.

See diagram 1 to get a sense of where MLS fits within the broader concept of Incremental settlement.

**Diagram 1: Incremental Settlement options**



The following provides a summary of the phases involved in the MLS approach<sup>79</sup>:

- Phase 1: Bulk preparation: Government and communities work together to identify and obtain land on which incremental settlement can occur. The necessary feasibility studies, bulk servicing programmes and land acquisition programmes are put in place and implemented so as to get the land ready for MLS.
- Phase 2: Basic development: Government (and/or households and other private and civil society organisations) provide some form of basic services and tenure recognition, like a recognition of occupation certificate (not necessarily individual title deeds, although this can be provided), so households have tenure security and some form of basic services.

<sup>79</sup> These phases are drawn from: <http://www.incrementalsettlement.org.za/introduction>

- Phase 3: Development support: Households use their own resources, with some form of assistance from government and others, where possible, to build their own houses and improve their neighbourhoods.
- Phase 4: Consolidation: Government provides further subsidies to help those who are unable, due to economic and other circumstances, to upgrade their houses, tenure and services.
- Phase 5: Maintenance and improvement: Households continue to maintain their houses and immediate environments over time; and government (and other role-players) maintain and improve the public spaces, facilities and services provided. This maintenance and improvement stage actually starts right from when households move onto the land and continues into the future.

One of the main criticisms of the MLS approach is that it encourages the creation of informal settlements and simply moves a person from one shack to another shack. It needs to be recognised however, that the United Nations definition of an informal settlement includes reference to: 1) inhabitants not having security of tenure to the land and dwelling they occupy; 2) the neighbourhood being cut off from or lacking basic services; and 3) the housing not complying with planning and building regulations.<sup>80</sup> In the first phase of a MLS project, all these components of an informal settlement are responded to up front, except for the dwelling complying to building regulations. MLS approaches, like the upgrading of informal settlement approach, sees the dwelling being upgraded and improved over time.

When the housing code is reviewed and updated, based on the new housing policy that is in the process of being developed, National government needs to recognise the two sides of the incremental settlement coin, and ensure that MLS is accommodated within any revised/new programmes developed.

b. Municipalities need to develop and implement MLS policies and programmes and pilot, learn and share their experiences with other municipalities

Municipalities, and other stakeholders such as NGOs and social movements need to be encouraged and supported to undertake MLS pilot projects, and the lessons from these projects need to inform future settlement projects.

National and provincial government needs to support municipalities to draw lessons from and share their experiences. The initiatives that Government has established to support the upgrading of informal settlements should be modified to support a broader focus on incremental settlement development which includes upgrading of informal settlement and managed land settlements. This includes for example:

- Various spheres of government ring fencing specific funding within national programmes to pilot and test various alternative approaches to incremental settlement development
- Developing specific training material on MLS to complement existing material on upgrading of informal settlement
- Rename the community of practice dealing with upgrading of informal settlements to community of practice for incremental settlement so that it can also deal with MLS

c. Municipalities need to structure themselves to adopt more of an area based programme approach to incremental settlement development

Municipalities should organise themselves to pursue more of an area, as opposed to a project based land and housing development approach. Conventional housing development

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<sup>80</sup> see United nations (2015) Habitat III issue paper 22 – Informal Settlements, found at [http://unhabitat.org/wp-content/uploads/2015/04/Habitat-III-Issue-Paper-22\\_Informal-Settlements-2.0.pdf](http://unhabitat.org/wp-content/uploads/2015/04/Habitat-III-Issue-Paper-22_Informal-Settlements-2.0.pdf)

projects, as once off interventions where government provides a full package of services at once - title deeds, services to the plot and a top structure - lend themselves to a project approach with a clear start and finish date for the project. Incremental settlement approaches on the other hand, occur over a much long period of time and involve a range of role-players, each intervening in the development approach at different times and with differing frequencies. Incremental approaches therefore need to be seen more as a programme (i.e. a number of projects developed over a longer period of time) within a given settlement area.

The call within the National Development Plan 2013 for government to shift from housing delivery to housing support fits well with this new emphasis on MLS.

*The state should gradually shift its role from a direct housing provider of last resort to a housing facilitator ensuring adequate shelter and greater access to a wider choice of housing options.*

Municipalities need to review the structure and functions of their Human Settlement Departments and look to the establishment of housing advice and support programmes and centres. The functions of these housing support programmes would be on things like providing training on how to build or organise the building of people's own houses, providing examples of house plans, information of where to access building material and builders, advice in establishment of bulk buying schemes, support in organising or accessing local savings and loan schemes, etc. Such housing support functions and programmes can be coordinated and linked to other small business development (like skills training and access to small business loans) and socio economic developmental support programmes (like community policing and home based care) .

d. Municipalities need to coordinate their incremental settlement approaches with their land and housing subsidy allocation policy

It is vitally important that a Municipality has an approved, credible and transparent allocation policy for any MLS project (see previous section dealing with allocation for more on this) otherwise any MLS area faces the risk of itself being 'invaded'.

Portions of MLS areas can be set aside by the Municipality for use as a location for emergency accommodation in instances where houses or shacks are damaged by floods or fire, or where occupiers face eviction from public or private land. This makes it easier for formal eviction procedures under the PIE Act to take place.

e. All national, provincial and local spheres of government need to set MLS targets

All spheres of Government (national, provincial and local) need to establish targets for the achievement of Managed Land Settlement, as part of their incremental settlement approaches to settlement development. The existing targets as found in Outcome 8 on Human Settlements in the Medium Term Strategic Framework 2014-19, provide a base from which these sub targets can be developed.

## **5. Additional recommendations**

A number of additional and further recommendations can be undertaken by Municipalities to pre-empt the need for people to feel the need to occupy land without authorisation. These include, for example:

1. Determine who owns the land - so the stakeholders know who to engage if they want to use this land for future development. This starts with conducting a land audit to determine who owns what land and ensuring that this data base is kept up to date.
2. Develop an updated and secure land and housing needs data base – so that the Municipality knows how many people there are that need land and housing and where this land is needed.
3. Keep people informed of land and housing development plans – so people know what the Municipality is doing to make new land and housing available.
4. Undertake conventional settlement development projects – so that a variety of land and housing solutions and options are provided for the variety of needs.
5. Support development of rural and other marginalised areas – so that people are able to live and work in these rural and other marginalised areas thereby reducing the potential that they will have to move to urban and other areas in search of jobs.
6. Prioritise job creation and economic development programmes – so that people can improve their own economic circumstances and buy land and housing for themselves
7. Implement a programme to keep some well located land affordable – so that people do not lose any land and accommodation that they are able to acquire due to not being able to afford to stay there. Examples of what could be included in such programme includes: public rental, expand indigent discounts on rates and services, the introduction of restricted equity co-operative ownership, etc.
8. Build capacity of the Municipality to perform development support functions and area based development – so the Municipality and government is able to coordinate the development functions required to support self managed housing development and facilitate the development of human settlements with schools, clinics, public transport, etc.
9. Build capacity of future leaders and professionals – so that government is able to implement the recommendations in this report.

This report does not go in to detail on any of these additional recommendations. This does not however mean that the Municipality should not consider these recommendations. All these additional recommendations are necessary if the Municipality wants to implement a comprehensive set of integrated interventions relating to managing and curbing land occupation.

### ***5.3.2. The Upgrading Strategy: Responding to occupation that has happened already***

The following recommendations are made for dealing with unauthorised land occupation that has happened already (i.e. dealing with informal settlements):

1. Municipalities need to develop and maintain a data base of informal settlements
2. Municipalities need to continue to develop, adopt, implement and regularly review informal settlement upgrading policies and strategies in accordance with national policy and programmes
3. Municipalities need to provide basic needs while preparing for upgrading or relocation
4. The National Department of Rural Development and Land Reform, in consultation with other relevant Departments, needs to introduce appropriate tenure solutions for incremental settlement areas
5. Municipalities need to support community organisation within and facilitate negotiation with informal settlements
6. Municipalities need to upgrade informal settlements where appropriate
7. Municipalities need to provide alternative accommodation or shelter in instances of relocation

8. Municipalities need to develop relocation plans and assist communities with relocation
9. Government needs to compensate private land owners for loss of use
10. Negotiate and collaborate with traditional and other leadership structures in communal land areas to establish a practical land administration system for these areas
11. Municipalities need to develop and implement appropriate land use management systems (provided for in SPLUMA) for dealing with incremental settlement areas

Each of the above recommendations are elaborated on below.

#### 1. Municipalities need to develop and maintain a data base of informal settlements

The Municipality needs to keep an updated data base of all informal settlements. Those that are responding and dealing with land occupation as it happens need to be responsible for keeping this data base updated. (See prong two on dealing with land occupation for more on this). The data base needs to record all land occupations and informal settlements, including those of only one or very few households. As the informal settlement is relocated or upgraded, this data base needs to be updated.

#### 2. Municipalities need to continue to develop, adopt, implement and regularly review informal settlement upgrading policies and strategies in accordance with national policies and programmes

Municipalities need to adopt and implement upgrading of informal settlement policies and programmes in line with the National Development Plan, the Integrated Urban Development Framework, the Upgrading of Informal Settlement Programme within the housing code and with other policies and programmes. Examples of such policies and programmes for Municipalities have been facilitated by the Housing Development Agency (HDA) and the National Upgrading Support Programme (NUSP).

There are two broad responses that Municipalities can take in situations where people have already invaded or occupied the land. They can either:

- Allow the people to stay in the area and arrange for the area to be upgraded by, for example, applying for UISP funding or making use of Urban Settlement Development Grant funding where it is available
- They can arrange to relocate people to another piece of land, as an option of last resort, by identifying alternative land and using the UISP programme, the Emergency Housing programme or other identified programmes under the housing code, or make use of urban Settlement Development Grant funding where this is available.

The starting point for municipalities is to undertake a review and categorisation of all their informal settlements and determine, for each informal settlement, what upgrading or relocation path that settlement needs to be placed on. The HDA has developed the following categorisation:

- Category A: Full upgrading
- Category B1: Interim basic services leading to eventual formalisation
- Category B2: Emergency basic services where relocation is not urgent
- Category C: Immediate relocation

There are various adaptations of this categorisation which include for example being able to upgrade the area without having to move any shacks (path stay), or (2) having to shift some of the shacks to upgrade the area (path shift), or having to move shacks on a temporary

basis to a transitional relocation centre, before these households are returned to the upgraded area (path: two step).<sup>81</sup>

During this categorisation process it needs to be recognised that for some settlements, various portions of the same informal settlement may be on differing paths as determined by local context (e.g. a portion of the settlement may need to be relocated as it is close to a river, while another portion may be able to be upgraded *in-situ*.)

If people are moved to a new piece of land this new land can either:

- Be fully developed (as per conventional RDP type housing projects); or it can
- Be developed to a basic level of services and and/or tenure recognition (see the section on new land for more on this). Note that the UISP makes provision for the programme to be implemented on greenfield land in that: "*the rules of this (UISP) programme will also apply to the development of the relocation areas with the changes relevant to the particular context.*"<sup>82</sup>

### 3. Municipalities need to provide for basic needs while preparing for upgrading or relocation

Even if an area is earmarked for *in-situ* upgrading (including the stay, shift or two step variety of such in-situ upgrading), it is likely to take time for some of the necessary planning and preparation work to take place for this upgrading to be implemented. As such, in line with the requirements of category B1 type informal settlements, the Municipality needs to determine if they need to provide interim basic services to the informal settlement concerned until such time as the necessary planning and other approvals can be obtained and a more permanent servicing and upgrading solution can take place.

In instances where an informal settlement is earmarked for relocation, it is likely that it may still take some time for the actual relocation to take place as the Municipality will need to identify and prepare any alternative land for occupation by the relocated households. As such, in line with the requirements of Category B2 type informal settlements, the Municipality is still responsible to provide emergency basic services for households in the informal area they are residing in until such time as they are relocated.

Such basic service provision should not be influenced by who owns the land. Temporary and emergency ablution facilities and communal water standpipes can be provided on private land. The eThekweni Metro has sought legal opinion on this and concluded that provisions in the Municipal Ordinance gives them the right to intervene on privately owned land in the event of there being health and safety threats. They first issue letters to the land owner advising them of their obligations to provide a service, failing which the Metropolitan municipality then intervenes<sup>83</sup>. The metro argues it has a constitutional mandate to provide people living in informal settlements, even those located on private land, with water and a healthy environment. This means that Municipalities can install communal water and sanitation facilities and provide refuse removal services as long as this is seen as a temporary and interim solution until a more permanent solution can be found.

### 4. The National Department of Rural Development and Land Reform, in consultation with other relevant Departments, needs to introduce appropriate tenure solutions for incremental settlement areas

<sup>81</sup> For one adaptation see the Buffalo City Metropolitan Municipality upgrading policy and strategy found at: [http://www.incrementalsettlement.org.za/wiki/index.php?title=BCMM\\_Upgrade\\_of\\_Informal\\_Settlements\\_Policy\\_and\\_Strategy](http://www.incrementalsettlement.org.za/wiki/index.php?title=BCMM_Upgrade_of_Informal_Settlements_Policy_and_Strategy)

<sup>82</sup> section 3.9.C. of the UISP programme in the Housing Code (2009)

<sup>83</sup> personnel communication with Mark Misselhorn from Project Preparation Trust who has done work on upgrading of informal settlement for the eThekweni Metropolitan Municipality.

From a tenure point of view, the options for turning unauthorised occupation into a more secure form of occupation are as follows:

Option 1: Move households off the land / property and either:

- Let them voluntarily find their own legally secure alternative piece of land by buying their own land or house, renting alternative property, moving onto communal land following due process, etc., or
- Arranging for the Municipality or another developer, through an organised relocation programme, to provide them with another legal option such as giving them an RDP house, moving them into a social housing institution, or into a Managed Land Settlement area (see option three on new land for more on this).

Option 2: Administrative recognition

- Take a Council resolution recognising that the identified informal settlement occupants can stay on a particular piece of land under certain conditions as explained in the Council resolution (e.g. that they will be relocated when alternative land and accommodation is ready) .
- Arrange for government to give the people involved access to services. For example use pre-payment electricity meters as a form of ‘recognition of occupation’<sup>84</sup>.

Option 3: Legal recognition

- Enter into a lease agreement with the land occupants
- Follow formal processes to plan and regularise the settlement and transfer title deeds to the occupants.
- Create a new form of legal tenure through new legislation, such as the Occupation and Use Right (OUR) certificates being proposed by the HDA for use in communal land contexts<sup>85</sup>. This type of OUR certificate can also be used in incremental settlement areas such as informal settlements and managed land settlement areas.
- Use provisions in SPLUMA for special zoning to legalise informal settlement land use

In determining which of the above options is appropriate for each specific context, the Municipality should investigate what relocation or administrative and legal recognition options would suit the context best, engage residents on these options and then make a decision on which option would be appropriate.

The Housing Development Agency can assist Municipalities in exploring these options and negotiating and reaching a decision with the stakeholders concerned.

The Municipality can also differentiate between ‘recognition of occupation’ versus ‘permission to occupy’ tenure arrangements<sup>86</sup>. ‘Recognition of occupation’ implies that the Municipality notes and keeps a record of who is living on what land, without necessarily formally agreeing that the households can stay on this land. The Municipality can also

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<sup>84</sup> For more information on and examples of administrative and legal recognition see the work commissioned by Urban LandMark on Incrementally Securing Land Tenure found at <http://www.urbanlandmark.org.za/research/x31.php>

<sup>85</sup> the OUR certificate concept forms part of a proposed nationally constituted and locally administered land records system that is proposed in a research report commissioned by the Housing Development Agency on “Communal land”. As of February 2016, this ‘communal land’ research report has been completed but has not yet been formally published.

<sup>86</sup> This differentiation between Recognition of Occupation and Permission to Occupy is elaborated in the Policy and Strategy for Upgrading of Informal settlements in Buffalo City found at: [http://www.incrementalsettlement.org.za/wiki/index.php?title=BCMM\\_Upgrading\\_of\\_Informal\\_Settlements\\_Policy\\_and\\_Strategy](http://www.incrementalsettlement.org.za/wiki/index.php?title=BCMM_Upgrading_of_Informal_Settlements_Policy_and_Strategy)

acknowledge that they will collaborate with the community concerned to develop and implement plans for the area that could involve either relocating households or upgrading the area over time.

With 'permission to occupy' (or similar systems) the Municipality not only keeps a record but they also give permission for the person to stay on the land concerned. If a Municipality is to provide 'permission to occupy' certificates, the Municipality must be very confident that it has the authority to give such permission. In other words:

- The land needs to be owned by the Municipality, or they need to at least have some form of land availability agreement with the land owner giving them this authority; and
- They also have obtained the necessary environmental, land use management and any other approvals for the person to reside on the land concerned.

#### 5. Municipalities need to support community organisation within and facilitate negotiation with informal settlements

In order for meaningful engagement to be possible with residents of informal settlements and/or occupied buildings, these communities may need to be supported in the establishment of legitimate community structures. These structures must not be imposed on the community but need to be based on structures that exist in the community.

When engaging in an upgrading or relocation process, the Municipality first needs to try and find negotiated solutions to the upgrading or relocation process, failing which mediators can be brought in to broker agreements, resorting only as a last resort to more formal eviction process (if relocation or a 'two-step' process) is needed.

#### 6. Municipalities need to upgrade informal settlements where appropriate

Based on the plans that have been developed for each informal settlement, as determined by the categorisation exercise, the Municipality needs to upgrade informal settlements using the Upgrading of Informal Settlement Programme, the Urban Settlement Development Grant and any other appropriate funding that is available (e.g. The Social and Community Facilities grant, Community Work Programme funds, etc.).

These upgrading plans need to be included within and monitored through Municipal Integrated Development Planning processes and municipal medium term and annual budgeting cycles.

#### 7. Municipalities need to provide alternative accommodation/ shelter in instances of relocation

In situations where Government is involved in evicting or relocating households from land that has been occupied, then they are not only required to provide basic tenure and basic services, but they are also required to provide at least interim water proof shelter.<sup>87</sup> However, in situations where Government proactively provides land with basic tenure and access to basic services, they do not have to immediately provide shelter from the elements as it can be argued that this basic tenure and services is a step on the path to the progressive realisation of the right to adequate housing. It is therefore in the interest of Government to rather aim for MLS approaches (as explained in prong three) rather than relocation, as it is cheaper for government to establish MLS areas (with tenure security and basic services) rather than MLS plus shelter for households that are part of a process of relocating households being evicted.

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<sup>87</sup> See annexure 1 on legal opinion on this.

## 8. Government need to develop relocation plans and assist communities with relocation

Municipalities need to develop relocation plans for those informal settlements or parts of informal settlements that need to be relocated for various reasons (e.g. on unsuitable land etc). The content of such relocation plans includes, for example:

- An outline how the municipality will communicate with the households affected by relocation prior to, during and post relocation;
- An indication of where the households will be relocated too;
- Programmes to assist the households in moving to the relocated land, including for example providing transport for belongings and building materials as well as food parcels and blankets etc.;
- An indication of what socio-economic interventions will be provided to help, for example, households enrol their children into new schools, and or deal with changes in possible income opportunities for households (e.g. if a household is relocated from an area where they were relying on recycling for income, they may need to be retrained in some other activity if recycling is not possible in the new area).
- An indication of what will happen to the land that people relocate from, including, in instances where this land will be left as open space what actions will be put in place to prevent other people moving back onto this land.

## 9. Government needs to compensate private land owners for loss of use

In instances where the land is privately owned, and in either of the options of dealing with land occupation namely, 1) moving the person to new land or 2) allowing the person to stay in the area, it is likely to take some time for these processes to be completed.

If the private land on which households have occupied, without the authorisation of the land owner, is to be acquired for the purpose of *in-situ* upgrading, then there will be a process that needs to be followed for Government to purchase or otherwise acquire this land. This will take time. During this time period, the existing land owner could claim compensation from Government for the loss of use of the land, provided that the land would have been put to a use other than the accommodation of the occupiers, and that the Government has not acted reasonably and expeditiously in implementing the upgrading process.<sup>88</sup> This is over and above the compensation that the original land owner will be provided with when the Government purchases the land.

If the occupiers are to be moved from the private land, it will also likely take time (if government is not ready and prepared) for Government to prepare the alternative land for occupation. During this period the private land owner could claim compensation from the Government for the loss of use of this land.

The Housing Development Agency, working with the Department of Rural Development and Land Reform, and any other relevant Departments should undertake research into what would be an appropriate method to calculate compensation amounts in these instances.

It therefore makes sense for the Municipality to be ready to deal with land occupations, on private or public land, so as not to incur these claims from private land owners. This can be achieved by the Municipality preparing land in advance of needs as outlined in the third suggested prong (of pre-empting the need for land occupation).

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<sup>88</sup> see page 5 in Annexure 1 on legal opinion for more information on this. There is no unqualified right to compensation for deprivation of property. The deprivation would have to be arbitrary – in that the state had prolonged the deprivation by acting unreasonably - to attract compensation. And there would actually have to be a real deprivation – an actual interference with use rights, not just a notional interference with the rights usually associated with ownership.

10. Negotiate and collaborate with traditional and other leadership structures in communal land areas to establish a practical land administration system for these areas

The Department of Rural Development and Land Reform, working with the Department of Human Settlements and the Department of Cooperative Government and Traditional Affairs, needs to urgently develop legislation to deal with land administration in communal areas.

The DRDLR is in the process of finalising a Communal Land Bill (2015), but it can be anticipated that there will be on-going legal challenges over the content of this Bill (especially as it relates to the role of traditional leaders in land administration and management), so it is proposed that the recommendations made in the report to HDA on “communal land”<sup>89</sup>, calling for a nationally constituted and a locally administered land records system be established and implemented (to complement the existing land registration system with its general plan provision and deeds registration system). In this way, Municipalities will have a mechanism, working with local leadership in communal land areas, to record and manage who has the right to be on which land in communal areas, and to manage what activities they are able to undertake.

11. Municipalities need to develop and implement appropriate land use management systems (provided for in SPLUMA) for dealing with incremental settlement areas

Municipalities need to designate areas earmarked for upgrading as Incremental Settlement Areas, within Municipal Spatial Development Framework plans. Municipalities need to develop rules that govern and administer how incremental settlement approaches will be accommodated and facilitated in these areas.

For more information on all this, see the recommendation relating to spatial planning and land use management found in the section on introducing and supporting Managed Land Settlement that is found in prong three on proactively making land available so people do not have to resort to unauthorised land occupation.

***5.3.3. Rights-based relocation strategy: Dealing with unauthorised occupation as it happens***

The following recommendations are made for what Government can do to deal with unauthorised land occupation as it is happening:

1. National government to develop a set of national principles and guidelines for dealing with unauthorised land occupation
2. Municipalities should develop a policy and strategy to deal with unauthorised land occupation
3. Municipalities should identify potential unauthorised land occupation hotspots
4. Municipalities to develop and implement an unauthorised land occupation response system
5. All spheres of government should support appropriately conceptualised and well capacitated municipal rapid response teams to deal with unauthorised land occupation.
6. Municipalities to identify and implement interim interventions while negotiation and eviction procedures are taking place
7. Municipalities must follow lawful procedures when involved in eviction

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<sup>89</sup> a draft of this paper has been completed for the HDA but was not yet publically available in February 2016.

8. Government must provide interim alternative accommodation and/or support in situations where people would be rendered homeless by eviction
9. Municipalities to provide relocation support
10. Government to take legal action against 'shack lords' that 'sell' land they do not own.
11. Government needs to compensate private land owners for loss of use
12. Government needs to maintain appropriate records of eviction procedures

This section should be read in conjunction with Annexure 1 that provides a legal opinion relating to managing and curbing land occupation.

Each of the above recommendations are elaborated on below.

### 1. National government to develop a set of national principles and guidelines for dealing with unauthorised land occupation

A national set of principles should be developed by the National Department of Human Settlements, working in collaboration with the Department of Rural Development and Land Reform, the Justice Department and any other relevant department, that should guide how any eviction procedure should be conducted where land is invaded or occupied without authorisation. The following provides examples of what these principles could be:

- Eviction must be just and equitable. In accordance with the *PIE Act* and Section 26 of the Constitution
- There needs to be meaningful engagement, including for example using mediation prior to resorting to court proceedings.
- Eviction should be a last resort.
- Government should be reasonable in its response and eviction should not lead to homelessness.
- Balance the right of the land owners to property protection with the right to housing.
- Special attention needs to be given to the needs of elderly /children/ disabled/ women headed households.
- If people are settled on the land then alternative accommodation, within reasonable distance needs to be provided. Determining if people are settled on the land will depend on local circumstances.<sup>90 91</sup>
- Reasonable accommodation includes tenure security, access to basic services (water, sanitation, refuse removal) and shelter from the elements (a water proof structure)<sup>92</sup>.
- Temporary accommodation should be provided. Temporary accommodation could refer to temporary location and/or temporary structure. The courts have not yet ruled on what constitutes adequate temporary accommodation. Temporary accommodation could be, for example, a community hall that must be vacated after a month, while a temporary structure, for example, could be one built out of wooden panels that can be easily disassembled if the shelter is improved.
- In any legal eviction proceedings, even those by private land owners, the Municipality must join the eviction proceedings (as a joinder), as the Municipality, as an organ of the state, has the duty to respond to the right to land and housing.

### 2. Municipalities to develop a policy and strategy to deal with unauthorised land occupation

<sup>90</sup> see annexure 1 on legal opinion.

<sup>91</sup> Note that the 'principle' that there is a 24 or 48 hour window of opportunity within which to a person can be forcibly removed without an eviction order is a myth. Each case needs to be treated separately taking all relevant circumstances into account.

<sup>92</sup> see annexure 1 on legal opinion

The Municipality must be encouraged and supported by the HDA and National DHS to develop a land occupation policy and strategy that must form part of a broader three pronged approach to dealing with land occupation as outlined in this report. Any attempt to just evict people from invaded land, without also implementing the other two prongs is doomed to failure. For example, without alternative accommodation, eviction will not be legally viable. Government can set minimum guidelines or regulations as to what needs to be the content of such policy.

The National DHS, with the support of the HDA, needs to work with the DRDLR to determine how best to deal with managing and curbing unauthorised land occupation on communal land. Any response will need to take into account the Interim Protection of Informal Land Rights Act (IPILRA) Act no. 31 of 1996.

The Municipality needs to involve traditional structures, and communal property institutions, and other community leadership structures where they exist, in determining who has rights to (1) be on communal land and (2) be allocated to new pieces of communal land

The Municipality's eviction policy and strategy needs to further unpack the differences and similarities between dealing with eviction from the following different types of land/ buildings:

- From public land
- From private land
- From communal land

### 3. Municipalities should identify potential unauthorised land occupation hotspots

On a regular basis (at least annually), the Municipality should undertake a process of identifying potential 'unauthorised land occupation hotspots' where they feel it will be more likely that land occupation will happen in these areas. The various Departments of the Municipality must be involved in helping to identify and motivate for such hotspots. Caution needs to be taken, however, at prioritising this intervention at the expense of identifying, acquiring and developing alternative land and land for managed land settlements. With limited resources, the priority should be on utilising municipal capacity to undertake activities associated with prong three that makes land available so people do not have to resort to land occupation.

The criteria that could be used to determine such hotspots include:

- An area that has recently been identified as a future development area
- Land that has recently been obtained by the state/ municipality
- A piece of land which is part of a two-step upgrading process, where people will be relocated to a transitional relocation area before the land in question is upgraded, so households can return in an orderly manner.
- A piece of land which is a large strategically located piece of land earmarked for significant future development.
- Land that has been purchased by the Municipality, HDA and/ or other Government agency for the purpose of 'banking' it for future low income and/or integrated settlement development.

Once these hotspots are identified, and depending on who owns the land, a number of activities, many of which have already been mentioned, can be undertaken including:

- Fencing these areas
- Arranging for regular patrols to be undertaken through these areas
- Conducting regular shack counts to be able to rapidly determine when new shacks are erected.

- Putting up notice boards highlighting that the Municipality will take legal action if unauthorised land occupation occurs.

Some organs of state<sup>93</sup> have resorted to the use of land occupation interdicts to allow it to automatically evict people who move onto land because they have nowhere else to go. These interdicts were declared to be unlawful eviction orders in the High Court and Constitutional Court decisions in the *Zulu* case as explained in more detail below.

In *Zulu v eThekweni Municipality*<sup>94</sup> the Court<sup>95</sup> had to decide whether an interdict restraining any person from 'occupying' a piece of land amounted to an 'eviction' order. The MEC for Human Settlements in KwaZulu Natal had obtained an order restraining any person from occupying well over a thousand properties, and directing the eThekweni Municipality and the Minister of Police to demolish any structure erected on the property from the date on which the interdict was granted. The order was subsequently used to evict Mr Zulu and the other occupiers of the Madlala Village informal settlement 25 times over a period of a year. The MEC and the municipality argued that Mr Zulu and his neighbours had not in fact been 'evicted'. They had merely been 'prevented' from 'occupying' the land. The Court dismissed this specious claim, branded the land occupation interdict an eviction order,<sup>96</sup> and referred the matter back to the High Court to determine the validity of the interdict.<sup>97</sup> The High Court promptly set the interdict aside, on the basis that it permitted eviction without a court order, in breach of the PIE Act and the Constitution.<sup>98</sup>

The Constitutional Court has also disapproved of the use of summary eviction in response to new land occupations. In *Grootboom*, Yacoob J said the following in dealing with the land occupation that took place in that case –

*Whether the conduct of Mrs Grootboom and the other respondents constituted a land invasion was disputed on the papers. There was no suggestion however that the respondents' circumstances before their move to New Rust was anything but desperate. There is nothing in the papers to indicate any plan by the municipality to deal with the occupation of vacant land if it occurred. If there had been such a plan the appellants might well have acted differently.*

*The respondents began to move onto the New Rust Land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter*

<sup>93</sup> section 2.8 in SERI (2016) *Evictions and Alternative Accommodation in South Africa 2000-2016: An Analysis of the jurisprudence and implications for local government*, second edition. SERI publication, Johannesburg..

<sup>94</sup> *Zulu v eThekweni Municipality* 2014 (4) SA 590 (CC) (Zulu).

<sup>95</sup> SERI (2016), *Evictions and Alternative Accommodation in South Africa 2000-2016: An Analysis of the jurisprudence and implications for local government*, second edition. SERI publication, Johannesburg, section 3.7

<sup>96</sup> *Zulu, v eThekweni Municipality* 2014 (4) SA 590 (CC), para 27. See also SERI (2014) 'Submission to the Lwandle Ministerial Enquiry', 8-11.

<sup>97</sup> The minority judgment of Van der Westhuizen J opined that the order should have been set aside without remitting the matter back to the High Court. Van der Westhuizen J found that the interim order was unlawful and unconstitutional as it sidestepped the PIE Act and the protections enshrined in section 26(3) of the Constitution (*Zulu*, note 95 above, paras 45-46 and 50). See also SERI (2014) *Submission to the Lwandle Ministerial Enquiry*, 9-10.

<sup>98</sup> *MEC for Human Settlements & Public Works of the Province of Kwazulu-Natal v eThekweni Municipality and others; Abahlali Basemjondolo and others v Ethekeeni Municipality and another* 2015 (4) All SA 190 (KZD)

*got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.*<sup>99</sup>

This passage indicates that the law does not approve of arbitrary eviction as a method of repelling new land occupation, at least where the land occupation is the result of genuine desperation. It also indicates that simply evicting new occupants is self-defeating, as the state will never realistically be able to prevent mass land occupation by people who are genuinely in need of land on which to live. The key to the problem is to supply more land, not undertake more evictions.

#### 4. Municipalities to develop and implement an unauthorised land occupation response system

Municipalities should encourage and facilitate processes for people to report unauthorised land occupations that they see happening. This can be achieved through, for example:

- Establishing an easy to use telephone hotline or office where people can report any unauthorised land occupation that they see; and
- Raising awareness within the community and the public on how they can go about reporting on and dealing with any land occupations.

In situations where people are invading (or have invaded) the land, the Municipality can work with leadership structures within the community and enter into some form of memorandum of understanding or similar agreement to get the community to help the Municipality and/or land owner prevent further land occupation in the area.

#### 5. All spheres of government should support appropriately conceptualised and well capacitated municipal rapid response teams to deal with unauthorised land occupation

The Municipality should establish a well trained and capacitated rapid response team that is immediately available to visit any area where unauthorised land occupation has been reported and take the necessary actions. This includes for example:

- Negotiate with the unauthorised land occupiers and the land owners to try and find a solution and way forward
- Seek mediation if a negotiated solution cannot be found
- Advise unauthorised land occupiers on where to go to seek land (This can be the land and housing reception and advice office as discussed in prong three)
- Seek additional resources to provide temporary accommodation for a limited period of time and food parcels, blankets, etc
- Follow the legal eviction process as a last resort

The skills set that needs to be available to this rapid response team includes the following.

- Negotiation and mediation - to facilitate negotiation with the occupiers
- Organisational development - to help build the capacity of the occupiers so they can more effectively participate in any negotiation process.
- Social services - to respond to the immediate social problems faced by the occupiers
- Legal advice to be able to ensure that any response from the Municipality is legally sound
- Removal - to support households that are legally being removed from the site to dismantle their structures and store and secure them in a safe place
- Protection - to protect the community and those doing the eviction, where this is legally being undertaken, from elements within and from outside the community concerned who do not want to see the eviction take place.

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<sup>99</sup> Grootboom paras 86 and 87.

- Town planning - to look at possible short, medium and long term strategies that can be considered going forward to deal with the land occupation.
- Engineering - to look at possible interim emergency services if the people are to remain for a long term

Note that not all skills need to be deployed at once, with certain skills being drawn on as required.

These skills can either be sourced in-house or contracted from outside. Careful consideration needs to be given to the payment system for any contract work relating to evictions as one does not want a situation emerging where contracted organisations cut corners in the eviction process if they are paid on removal and demolition of shacks.

The rapid response team of the Municipality needs to develop a good working relationship with and coordinate their activities with the police and justice departments.

This rapid response team must work within the law. Many of the problems that emerge during eviction procedures emerge when these teams take the law into their own hands and evict without court orders etc.<sup>100</sup> Civil society plays an important role in monitoring and ensuring that proper legal procedures are followed.

The information collected on land occupations must be fed into the data base on existing land occupations. Those that monitor land occupation need to keep the data base updated on a regular basis.

#### 6. Municipalities to identify and implement interim interventions while negotiation and eviction procedures are taking place

Additional activities that Municipalities and land owners can take to deal with land occupation as it happens and make it harder for people to occupy land in the first instance include:

- Erect fencing to make it harder for people to access the land.
- Install notice boards asking people not to occupy the land and telling them of the consequences if they do (take legal action).
- Put up lighting so that it's easier to see at night if people are occupying the land.
- Remove vegetation from the site so it's harder for initial land occupiers to hide behind any vegetation.
- Conduct patrols so that people can see if any land occupation occurs.
- Raise awareness within and outside Government of how to deal with land occupations.
- Have a procedure for reporting occupations from public and from government officials.
- Have people in-house or work with intelligence and other agencies to gather intelligence on possible future land occupations.
- Develop relations with stakeholders such as the police, large land owners, courts/ lawyers and develop cooperation agreements to coordinate and inform each other on how each party is and plans to deal with unauthorised land occupation.
- Negotiate with neighbours/ potential future occupants to help prevent unauthorised land occupation.

Some of the activities listed in the third prong dealing with new land development also apply to dealing with land occupation as it happens. This includes for example establishing a land

<sup>100</sup> For examples of challenges that can emerge when lawful eviction procedures are not followed and what can be achieved when they are followed see, The Peoples Law Journal (2014) *The Urban Land Question*, available at: <http://nu.org.za/wp-content/uploads/2014/10/PLJ-Land-web-final.pdf>

and housing advice office where people can go to get advice of where to find alternative land and accommodation.

It needs to be emphasised, however, that the interventions listed above should only be considered if the Municipality is seriously implementing the third prong of making land available so households do not have to occupy land without authorisation as there is alternative land available. This point needs to be taken into account when determining how best to allocate financial and human resources within the Municipality between the activities associated with each of the three prongs. The activities listed above can in no way replace the Municipality and the Government proactively making land available for households to occupy as part of an organised Managed Land Settlement process.

## 7. Municipalities must follow lawful processes when involved in eviction

The formal legal procedures need to be followed when a land owner is involved in the eviction process.

If the Municipality is the land owner, it must follow formal legal procedures when undertaking eviction procedures.

If the Municipality is not the land owner, it must inform the land owner what the formal legal eviction procedures are, and monitor that the land owner is following these procedures. The land owner in such instances could be other government spheres or departments, including situations where the land under question forms part of land under customary or communal land administration. The land could also be privately owned.

In instances where the Municipality is not the land owner, it needs to join and be a part of all eviction procedures.

An eviction is lawful when the owner or person in charge of the property undertakes an eviction in terms of the law and follows the legal requirements set out in the PIE Act or in terms of another relevant law.<sup>101</sup>

In the South African court system, an eviction process can be brought by an *action* or *application* procedure in either a High Court or Magistrates Court. The process below sets out both these procedures but focuses on the most common one, the application process.

Saying that an eviction is lawful does not mean that it is acceptable or right, only that the owner has followed the legal requirements as set out in the law.

The procedure for a lawful eviction set out in the PIE Act is important to know. If it is not followed correctly, it can mean that you have a procedural defence against the eviction. A court order granted without compliance with the PIE Act would be invalid, and would entitle you to a rescission (cancellation) of the eviction order.

We have summarised the eviction process below in 8 steps:<sup>102</sup>

1. Meaningful engagement
2. Eviction proceedings launched in court
3. Notice of motion or summons served on occupiers

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<sup>101</sup> More information on evictions see SERI (2015) *Resisting Evictions in South Africa: A Legal and Practical Guide*, available at:

[http://www.seri-sa.org/images/SERI\\_Dear\\_Mandela\\_Evictions\\_Guide\\_FINAL\\_FOR\\_WEB2.pdf](http://www.seri-sa.org/images/SERI_Dear_Mandela_Evictions_Guide_FINAL_FOR_WEB2.pdf)

<sup>102</sup> *ibid*

4. Occupiers file notice of intention to oppose
5. Section 4(2) eviction notice served on occupiers
6. Application heard in court
7. Eviction order served on occupiers
8. Eviction carried out by the sheriff

8. Government must provide interim alternative accommodation and/or support in situations where people would be rendered homeless by eviction

The Municipality could establish a system whereby, in instances of unauthorised land occupation, people are relocated to appropriate temporary accommodation, such as:

- A community hall that has been retrofitted to allow for people to occupy temporary 'rooms' for privacy etc.
- A specific portion of land where temporary shelters are erected with temporary ablution facilities, with the intention that the temporary occupiers of this land will find their own alternative accommodation or will be provided with alternative accommodation in due course .

The Emergency Housing Programme (EHP) is a potentially important policy instrument through which Municipalities could provide emergency and temporary accommodation for those in dire need. The EHP makes provision for a broad range of possible emergency housing options, including various types of temporary and permanent accommodation options. Municipalities need to plan for and develop emergency housing programme projects so that they are ready to provide alternative accommodation when eviction proceedings are implemented (either on, state/public land, or private land, or communal land). Provinces need to make municipalities aware of the availability of EHP funding and allocate funds for such relocation.

In the past, Municipalities often were unable to rapidly implement emergency housing programmes as they had not undertaken all the necessary town planning, environmental authorisation and other procedures required to develop new settlements. This defeated the objective of emergency housing which is supposed to rapidly respond to an emergency (e.g. a flood or a group of households facing eviction from private or other land). Municipalities should therefore identify in advance of need, areas where they will be able to implement emergency housing interventions.

It is recommended that land within Managed Land Settlement areas (see more of this in prong three) should be set aside for potential future emergency housing. However, care needs to be taken that communities do not invade land knowing that there is alternative accommodation for emergency housing available. In other words, no people should be allocated to this land until such time as it is needed for emergency housing.

It needs to be remembered that emergency housing does not have to (although it can) be a permanent housing solution. People who occupy land as part of an emergency housing intervention, can be allocated to other more permanent settlement solutions. This frees up the emergency housing area to other people who face emergencies.

Caution needs to be taken that the implementation of these interim and emergency arrangements does not lead to situations where these interim solutions turn into permanent solutions. This has tended to happen a lot in the past.<sup>103</sup>

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<sup>103</sup> see the examples found in Clark, 2013, "Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government" SERI, found at: [http://www.seri-sa.org/images/Evictions\\_Jurisprudence\\_Nov13.pdf](http://www.seri-sa.org/images/Evictions_Jurisprudence_Nov13.pdf)

While unauthorised land occupants are still staying on the occupied land (and also while they stay in alternative temporary accommodation or land) there are also a lot of interim arrangements that the Municipality can perform, ranging from:

- Providing food parcels and blankets/ clothes
- Providing access to soup kitchens
- Providing access to temporary ablution and water
- Places to store 'demolished' goods and household valuable.

#### 9. Provide relocation support

As part of the process of moving a person to alternative accommodation, the Municipality must provide relocation support (including, for example, access to transport to move belongings and building material, as well as food parcels/ blankets etc.).

#### 10. Government to take legal action against 'shack lords' that 'sell' land they do not own.

The Municipality needs to identify where there are shack-lords within their area who are 'selling' land they do not own or have control over, and take legal action against these individuals to prosecute them for selling/ renting land they do not own.

#### 11. Government needs to compensate private land owners for loss of use

The recommendations found in the upgrading section dealing with compensating private land owners for loss of use also apply in the context of dealing with land occupation as it happens.

#### 12. Government needs to maintain appropriate records of eviction procedures

In order for Government to monitor the success or otherwise of implementing the recommendations of its managing and curbing land occupation interventions, National Government, working with Provincial Government and Municipalities, needs to establish and maintain a record keeping system where the details of all eviction procedures across the whole country are recorded. This can include why the eviction was needed, what procedures were followed and the outcome of the eviction process.

Records should include photographs and written reports indicating what the settlement looked like at various times during the eviction process, so that a 'paper' trail can be kept of what steps and procedures were taken during the process, which can be drawn on if there are any disputes and which can be used to inform future eviction cases.

### **5.4. Institutional and financial considerations**

This section looks at 1) the institutional and 2) financial implications of implementing the three pronged approach.

#### ***5.4.1. Institutional implications of the recommendations***

Municipalities will need to reconsider how they organise themselves if they are to successfully implement the three pronged approach as suggested in this report.

Firstly, Municipalities should consider shifting from a project based approach to housing development to more of an area based approach to settlement development. The upgrading of informal settlements and managed land settlements are both programmes that have to be implemented in a particular area over a long period of time. This normally involves a range of role-players each performing different functions at different times. The Municipality could establish settlement managers, with dedicated staff and resources, who are based within specific identified incremental settlement areas to manage the incremental settlement process within that settlement area.

Secondly, in response the shift of Municipalities from being responsible for housing delivery to now being seen as housing facilitators as outlined in the National Development Plan, the Municipality should investigate how it can provide more of a development and housing support function. This is potentially better achieved through the establishment of housing and development support programmes and centres where the public and other stakeholders involved in development are able to engage the Municipality in a coordinated manner.

Municipalities should also consider how they should organise themselves to be able to proactively curb and reactively manage unauthorised land occupations. At least two units are required for the implementation of the programme that responds to land occupation, one reactionary unit that responds to land occupation as it happens and when eviction processes need to be followed; and another more proactive unit that facilitates and manages incremental settlement development processes, be they from the in-situ or from greenfield contexts.

The land occupation response unit would be responsible for responding to land occupation as it happens and for implementing eviction procedures where this is required. The staffing for this unit could include:

- Community development workers to facilitate engagement and mediation with the unauthorised land occupiers and invaders
- Social workers to provide counselling and advice to unauthorised occupiers
- Lawyers to advise and oversee any eviction proceedings
- Security staff to help prevent land occupation from occurring and provide security during any eviction proceeding

The incremental settlement unit would be responsible for informal settlement upgrading and for managed land settlement. The staffing of this unit could include:

- Community development practitioners to build capacity of communities and facilitate negotiation and participation.
- Planners to undertake informal settlement upgrading plans and plans for new MLS areas
- Engineers to advise on, plan for and oversee the instillation of necessary, bulk connector and internal basic and upgraded services.
- Building advisors to advise households on how to build both temporary and permanent structures
- Small business development specialists to support communities in their efforts to improve their livelihood prospects.

The Municipality should consider locating land and housing offices in locations where the public can gain access to the services and activities provided by these units. These offices could be established as either/or a combination of central offices, area based offices located in a specific settlement area, temporary offices only established when they are needed, or as mobile offices that are able to rotate or move from one area to another over time.

The public can then access these offices to:

- Report land occupations

- Go to get information of alternative land that they can access rather than invading land
- Obtain advice on how to develop any land that has been allocated to them or they have acquired
- Obtain information on land tenure and land use management matters, including for example, getting a record of any locally administered land record
- Go to keep records of occupation updated

Municipalities need to set appropriate goals relating to managing and curbing unauthorised land occupation as part of their longer term (e.g. twenty year) growth and development plans as well as their medium term (e.g. five year) Integrated Development Plans. The detailed recommendations made in this report can be converted into medium to long term goals or targets. These goals will assist Government determine how much it will cost to achieve and how long this will take.

At a Provincial level it is recommended that the following structures and units be established:

- Unauthorised land occupation support team to provide facilitation/ mediation services and to provide legal advice to municipalities around responding to land occupations
- Incremental settlement support team to oversee, advise, provide capacity building, and coordinate research and information sharing for both the upgrading of informal settlements programmes and managed land settlement programmes of Municipalities. This support team can also assist with the development of housing support functions that can be shared across Municipalities like bulk buying schemes, material voucher purchase programmes, material and services referral systems and data bases on recommended professionals, contractors, financial institutions and micro finance institutions, as well as access to information and tool libraries that households can access on how to manage the construction of their own homes.

### ***5.4.2. Financial / budget considerations***

This section highlights for the Municipality, and Government more generally, the costs that would be associated with implementing a programme to manage and curb land occupation. These costs are broken down according to:

1. Costs associated with upgrading informal settlements and Managed Land Settlement
2. Costs associated with eviction

#### **1. Costs associated with upgrading informal settlements and managed land settlement**

The administrative costs for staff to conduct town planning, engineering investigations, etc. are paid for from own costs of the Municipality. However, where possible, these costs need to be included in project development costs, funded from land and housing subsidies received from National Government.

The capital costs relate to:

- Buying and acquiring land
- Installing bulk and connector infrastructure
- Installing internal services

Activities associated with incremental settlement development including Upgrading of Informal Settlements and Managed Land Settlement (and other land development and housing development) will be funded from:

- Urban Settlement Development grant (USDG) for land purchase, bulk services, and internal services. In smaller Municipalities, the Municipal Infrastructure Grant (MIG) would be used.

- Human Settlement Development Grant (HSDG), especially the Emergency Housing Programme and the Upgrading of Informal Settlement Programme (which is also applicable for areas where people are relocated).
- Community Work Programme (CWP) which is an under-appreciated programme for use in incremental settlement areas and can be used for installing and maintaining communal ablutions, improving roads and storm water, home based care, community policing, community gardens etc.

## 2. Costs associated with eviction and relocation

Costs associated with the eviction mainly revolve around administrative costs, and include, for example:

- Legal costs
- Social welfare costs
- Facilitation costs

These costs generally have to be covered from the Municipalities own funds.

In terms of funding the administrative costs for dealing with land invaders, further research is needed to calculate and demonstrate that the costs associated with establishing institutional capability within the Municipality to reactively and proactively deal with unauthorised land occupations will be outweighed by the benefits of having a more stable environment where expensive eviction proceedings and land occupations will be reduced.

The capital costs associated with eviction relate to the costs of providing alternative accommodation. This can be covered by the Emergency Housing Programme. These costs can also be factored into costs associated with Managed Land Settlement.

Resources for Provincial 1) housing rights support units and 2) incremental settlement support teams will need to be funded from national and provincial sources.

## **6. WAY FORWARD**

*People living in shacks are full of ‘scars’ and they need ‘counselling’. People know how to break something down but they don’t know how to build something up. They are able to burn tyres and buildings but it’s much harder to develop a community. We need to change mindsets from breaking to building.*<sup>104</sup>

As a way forward, we recommend the following:

1. Key interventions - where we summarise a few of the key recommendations that we propose identified spheres of government should implement.
2. Political and bureaucratic will - where we highlight the need for political will to implement the above key recommendations, as well as all other recommendations in this report; and we propose what needs to happen for this political and bureaucratic will to be built.
3. Indicators - where we highlight the importance of building on existing Government indicators for human settlement development, especially those found in Outcome 8 of government’s Medium Term Strategic Framework 2014-19. We show how, by developing sub categories for each of these indicators, one can track and monitor progress made in preventing unauthorised land occupations from happening in future,

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<sup>104</sup> Atwell Masupa, 2014, resident of Phola Park informal settlement in Scenery Park - Buffalo City Metro. Personal communication with Ronald Eglin

4. Budget shifts - where we indicate what type of budget shifts will be needed within government so as to be more effective in managing and curbing land occupation.
5. Phasing - where we outline and summarise what activities need to be taken in the short, medium to long term to achieve the vision of an unauthorised land occupation free society.

## **6.1. Key interventions**

The following are the key recommendations that we propose the identified organ of state should implement in order for Government as a whole to be able to more effectively manage and curb unauthorised land occupation.

1. The National Department of Human Settlements should include the three pronged approach to dealing with land occupation in the National Human Settlements Policy (white paper) and Land Policy (white paper) that are being developed at the moment.
2. The National Department of Human Settlements, working in conjunction with the Department of Rural Development and Land Reform, and the National Department of Cooperative Government and Traditional Affairs, should require all Municipalities to develop a land acquisition strategy, that must form part of Municipal IDP and SDF, that includes as a significant element in this strategy, a commitment to MLS.
3. Provincial Human Settlement Departments, with support from the National Department of Human Settlements, should establish provincial incremental settlement units to support Municipalities in the upgrading of informal settlements and in Managed Land Settlement and assist Municipalities to establish development support services (and help coordinate such units between municipalities).
4. Provincial Human Settlements Departments, working with the National Department of Rural Development and Land Reform, and other identified Departments such as Justice, should establish Provincial housing rights units to advise Municipalities on their Constitutional obligations relating to land and housing and train Municipalities in how to lawfully deal with unauthorised land occupations.

## **6.2. Political and bureaucratic will**

The three pronged approach to managing and curbing unauthorised land occupation will not be successful without the necessary political and bureaucratic will for implementation. Political and bureaucratic will is increased when those politicians and bureaucrats understand the advantages and disadvantages of a proposed approach compared to the advantages and disadvantages of other alternative approaches.<sup>105</sup> For example:

- Political will for upgrading of informal settlements grows when the politicians see greater advantage in the upgrading of informal settlements compared to attempting to build ones way out of a housing crises through conventional RDP housing project approaches.
- Political will for following approved eviction procedures grows when politicians see greater advantages in allocating additional resources to formal negotiation, mediation

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<sup>105</sup> this analysis draws on <http://www.charneyresearch.com/resources/political-will-what-is-it-how-is-it-measured/>

and eviction procedures when dealing with unauthorised land occupations compared to either turning a 'blind eye' to occupation or of taking short cuts in negotiating and evicting people from the land.

- Political will for undertaking proactive land acquisition and development strategies grows when politicians see greater advantages in pursuing a MLS approach, compared to predominantly pursuing a conventional RDP project development approach to addressing the housing needs of the country; and trying to evict people whenever they occupy land without authority.

The same argument applies for bureaucratic will.

The political (and bureaucratic) will of Municipal Councillors (and bureaucrats) for adopting a three pronged approach to land occupation is built if these role-players feel pressure for such an approach from below, above and within.

- Pressure from below is increased when communities are demanding a three pronged approach to land occupation. NGO's and civil society organisations can play a role in helping to build this understanding and pressure from communities.
- Pressure from above is increased when National and Provincial legislation and regulations call on and makes it possible for Municipalities to adopt a three pronged approach. Changes in national policy will give national and provincial politicians and bureaucrats more 'ammunition' when calling for a three pronged approach to unauthorised land occupation.
- Pressure from within is built when politicians and municipal bureaucrats, through self reflection and analysis, reach their own conclusions that they need to pursue the three pronged approach to managing and curbing unauthorised land occupation.

National government should modify its (official and implied) messaging when it comes to land and housing. The following table (table 3) contrasts the old message with an example of a proposed new message.

**Table 3: Old vs. New messaging**

Old message	Example of new message
We will give you a house.	We will first help you get tenure secure land with access to a minimum level of water and sanitation.
You must just put your name on a waiting list and wait for us to build you a RDP house.	You must organise yourself as a community so we can work with your community to incrementally improve your living conditions over time.
We will ignore much of your land occupations if you do it on land that we do not see as important	We will act promptly and as part of a coordinated strategy to deal with unauthorised land occupations, recognising that this will only be successful when there is appropriate alternative land that people can access for residential purposes.

The development of the new Human Settlement White Paper<sup>106</sup> provides a unique opportunity to shift from the old to the new message.

The pre-draft of the anticipated new Human Settlement White Paper already starts to make this shift in the following ways:

<sup>106</sup> only a preliminary pre-draft version of this white paper was available to the authors.

- Upgrading informal settlements: The policy builds on the commitment of the National Development Plan to support upgrading of informal settlements by stating:

*Greater resources shall be shifted to support informal settlements upgrading on condition that they are located in areas close to jobs.*

- Land occupations: The provisional draft Human Settlement policy (white paper) does not make any reference to unauthorised land occupation.
- Managed Land Settlement: The policy makes reference to 'site and service' projects that with slight modification in wording could promote the broader concept of managed land settlement. The emphasis is in the original. Strike-through refers to wording to be removed and [bracketed sections] refers to proposed new wording.

*43.2.5. Households between the ages of **18 – 59, with a total income of ≤ R3 500 shall be provided with a self-help subsidy** that includes:*

*43.2.5.1. A ~~serviced site and raft foundation~~ [secure plot or erf with access to at least basic services] in a well-located settlement; and*

*43.2.5.2. Provision of professional assistance, if a household chooses to enrol to participate in a self-help project.*

*43.2.5.3. This group will be encouraged to complete on a progressive basis the construction of their homes through own funds.*

This draft has not yet been made publically available, so there is time to include reference to the three pronged approach to managing and curbing land occupation when the draft policy is made public.

### 6.3. Indicators

For the recommendations outlined in this report to be implemented, it is important that they are included in Governments goals and objectives. It is more likely that recommendations will be implemented (e.g. upgrading of informal settlements or the development of managed land settlement) if these are reflected in Governments own targets, against which progress can be measured.

Outcome 8 of the Medium Term Strategic Framework (MTSF: 2014-19), dealing with Human Settlements, already has a number of targets/ indicators that make reference to the upgrading of informal settlements.

The definition of adequate housing in the MTSF (shown below) is in line with what is being proposed in this report:

*... where adequate housing includes secure tenure, access to basic services and within sustainable settlements.*

Many of the recommendations suggested in this report can become sub targets of many of the existing targets already found in the MTSF. (See table 4 for examples of sub targets)

**Table 4: Target and corresponding sub target**

Existing target in MTSF outcome 8	Possible sub target
<i>Framework on coherent and inclusive approach to land developed</i>	<i>Where framework includes reference to managing and curbing unauthorised land occupation</i>

Existing target in MTSF outcome 8	Possible sub target
<i>10 000 of hectares of well located land rezoned and released for new developments targeting poor and lower middle income households</i>	<i>Of these, 33 333 hectares<sup>107</sup> are for managed land settlement developments</i>
<i>750 000 households in informal settlements upgraded to phase 2 of the informal settlements upgrading programme by 2019</i>	<i>Of these, 250 000 households (33.3%) in informal settlements relocated to land up to phase 2 of the UISP by 2019</i>
<i>563 000 title deeds issued to new homeowners in the subsidy submarket (Mechanism for security of tenure record for informal settlement upgrading)</i>	<i>Of these, 187 667 tenure security records (33.3%) issued to households involved in upgrading (including re-location where necessary)</i>
<i>all new state housing developments benefiting about 600 000 households have access to basic water, sanitation, energy and road infrastructure and services and ... for the upgrading utilising UISP, 750 000 households in informal settlements have access to basic water, sanitation, and road infrastructure and services.</i>	Note: this target already makes reference to basic services so does not need to be broken down further.

There are however, no targets in any of the 9 Outcomes dealing directly with land occupation in the sense of reducing the number of new land occupations, and committing to follow due process when undertaking eviction procedures, so these targets will need to be set from scratch.

## 6.4. Budget shifts

The proposed recommendations will lead to a number of budget allocation shifts for government over the short, medium and longer term.

Shifts as a result of upgrading of informal settlements.

- In the short to medium term, Government should continue with the existing trend to shift budget allocations towards the upgrading of informal settlements. This shift can be achieved in the short term by reducing the number of people that receive top structure subsidy allocations per year
- In longer term, as Government reduces the growth of unlawful informal settlements (primarily through being more effective in pre-empting the need for land occupation), the budget allocation to upgrading of informal settlements can be reduced.

Shifts as a result of improving eviction procedures

- In the short term, the budget for the administration of eviction procedures should be increased.

<sup>107</sup> for purposes of illustration we have assumed that a third of the target will be achieved through MLS. the exact sub target will need to be confirmed by the national Department of Human Settlement. The same applies to the other sub target suggestions in this table.

- In the longer term, as government starts to be better at pre-empting the need for unauthorised land occupation, budgets can be shifted away from eviction procedures.

Shifts as a result of increasing Managed Land Settlement

- In the short term, budget allocations should be significantly shifted towards the development of new Managed Land Settlement areas.
- In the medium to longer term, Government should shift budget allocations towards the incremental upgrading or consolidation of MLS areas, as more of these areas receive basic tenure and basic services and as a result need further consolidation assistance.

## 6.5. Phasing

The following phases are proposed to introduce government interventions to manage and curb unauthorised land occupation.

- Phase 1: Developing pilots and policies
- Phase 2: Piloting and learning
- Phase 3: Expanding pilots and rolling out programmes based on policies

Activities for each of these phases are outlined below.

Phase 1 (year 1)

- The HDA should bring key stakeholders together to agree on and develop a policy for a proactive and reactive land occupation response
- The HDA should develop training and awareness raising material on managing and curbing land occupation
- The HDA, working with the National DHS, should undertake preliminary awareness raising campaign to explain the land occupation policy / programme
- Municipalities, with the support of the HDA and NUSP etc, should continue with upgrading informal settlement programme for existing settlements
- The HDA, working with the DRDLR, and other appropriate departments (like Justice) should develop a national set of guidelines for how Municipalities and other land owners should undertake eviction procedures
- Municipalities should, with the support of appropriate National and Provincial Government departments, and in consultation with civil society organisations, should identify strategic and pilot test case eviction procedures (to demonstrate how proper eviction procedures should be undertaken).
- Municipalities should be required to develop and start to implement a land acquisition and development policy, strategy and programme. This programme needs to be based on a national land acquisition and development policy framework.
- Municipalities need to begin explore how they can put in place a programme to support all phases of the MLS approach on new land

Phase 2 (year 2 and 3)

- The HDA, working with Provincial Human Settlement Departments, should conduct further training and expand the awareness raising campaign on managing and curbing unauthorised land occupation
- Municipalities should continue with upgrading informal settlements with the support of the HDA and NUSP
- Municipalities should start to implement land acquisition programmes
- Municipalities should start to implement MLS approaches
- Municipalities should continue to upgrade those areas that on the upgrading path

- The HDA, and other development practitioners, should learn from pilot test cases (and other cases) of how Government has upgraded, evicted and promoted new development and make this information available to the public so future projects can be improved

#### Phase 3 (year 4 onwards)

- Once a Municipality is confident that it has sufficient and appropriately located and prepared alternative land, the Municipality will be in a position to, following lawful eviction procedures, evict people who invade land (recognising that there is a MLS approach to accommodate people who need land)
- Municipalities should continue to implement MLS like approaches learning from experience
- Municipalities should continue with upgrading approaches learning from experience
- The HDA and the National DHS, should evaluate experiences with implementing the three prongs of the managing and curbing unauthorised land occupation approach and make adjustments as required to this policy and its implementation.

## 6.6. Next steps

In the short term, as a way forward, the following steps are suggested:

1. The HDA should hold a workshop with identified stakeholders that deal with land occupations in one form or another, to introduce the concepts and recommendations that are emerging from this unauthorised land occupation research. This should include people from the National DHS who are involved in developing the new draft policy (white paper) on Human Settlements, and from the DRDLR involved in developing the new draft policy (white paper) on Land.
2. The HDA should work with the National Department of Human Settlements to organise a meeting between the relevant government departments to present and reach agreement on the three pronged approach to managing and curbing land occupation. Examples of departments to include are:
  - Human Settlements
  - Rural Development and Land Reform
  - Cooperative Governance and Traditional Affairs
  - Justice
  - Safety and Security
  - Environment
3. The HDA should develop a training course outline, develop training material, and arrange for training of trainers to be conducted with Municipalities and others on managing and curbing unauthorised land occupation. The training material should include, for example:
  - Summary documents on aspects of managing and curbing land occupation
  - An eviction checklist to be used by land owners and the Municipality when undertaking eviction
  - Produce a video on managing and curbing unauthorised land occupation that can be accessed by the public and used in awareness raising and training events.<sup>108</sup>
4. The HDA should develop and implement a 'simplicity challenge' to encourage stakeholders that have to deal with land occupation to find ways to manage and curb

<sup>108</sup> see for example video on upgrading of informal settlement here: <http://afesis.org.za/2014-08-05-09-06-19.html>

land occupation.<sup>109</sup> This includes the implementation of an awareness raising programme of this 'challenge'.

5. On completion of the preceding actions, the National Department of Human Settlements, with the support of the HDA, should bring key stakeholders together to share their experiences of attempting to manage and curb unauthorised land occupation, and seek their support for the recommendations outlined in this report. This can form the basis of a policy of managing and curbing land occupation. A preliminary list of stakeholders to invite includes, for example:
  - Dept. of Human Settlements
  - Dept. of Rural Development and Land Reform
  - Dept. of Cooperative Governance and Traditional Affairs
  - Dept. of Public Works
  - Dept. of Safety and Security
  - Dept. of Justice
  - Dept. of Environment
  - Dept. of Home Affairs
  - South African Local Government Association (SALGA)
  - South African Cities Network (SACN)
  - Traditional Leaders
  - Para-statal
  - South African Property owners Association (SAPOA)
  - Business associations
  - NGO's
  - CBO's and social movements

## 7. CONCLUSIONS

This report has argued that unauthorised land occupation will continue in South Africa, and will be difficult to stop, unless Government adopts a three prong approach to managing and curbing unauthorised land occupation, that includes:

1. Pre-emptive land development strategy: in response to unauthorised land occupation that could happen in future, Municipalities must: (1) implement land acquisition and development programmes; (2) develop and implement improved land and housing subsidy allocation procedures; (3) establish incremental settlement areas within the spatial planning and land use management system; and (4) implement Managed Land Settlement programmes.
2. Upgrading strategy: in response to unauthorised land occupation that has happened in the past, Municipalities must continue to upgrade informal settlements
3. Rights-based relocation strategy: In response to unauthorised land occupation that is happening in the present (and the past in certain instances), land owners and the municipality must follow lawful procedures when dealing with unauthorised land occupation.

Within these three prongs, priority needs to be given to prong one, the pre-emptive land development strategy. The 1997 White Paper on South African Land Policy still applies:

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<sup>109</sup> See for example the draft simplicity challenge found on the following website:  
[http://www.incrementalsettlement.org.za/wiki/index.php?title=Simplicity\\_challenge](http://www.incrementalsettlement.org.za/wiki/index.php?title=Simplicity_challenge)

*In the final analysis it is the delivery of appropriate land at a rapid pace that is the solution to land invasions.*

Without households having access to appropriately located and secure land with basic services, it will be difficult for Municipalities to upgrade informal settlements (as many of these settlements require an element of relocation), and it will also be difficult for land owners to evict unauthorised land occupiers, as it will be hard to find appropriate alternative accommodation.

The development of a coherent and inclusive approach to land, the land acquisition and development strategy, and the draft Human Settlement Policy (white paper) provide a valuable opportunity for such a three pronged approach to managing and curbing unauthorised land occupation to be embedded in Human Settlement and Land policy. We cannot waste this opportunity.

## **8. ANNEXURES**

For more background information on managing and curbing land occupation, see the following annexures:

- Annexure 1: Legal Opinion
- Annexure 2: Case study review
- Annexure 3: Managed Land Settlement

These annexures and a copy of this main report can be found at:

<http://www.thehda.co.za/information/>