Submission on
the City of Johannesburg
Temporary Emergency Accommodation Provision:
Draft Policy

Socio-Economic Rights Institute of South Africa
(SERI)

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1. Introduction

On 10 September 2019, the City of Johannesburg (the City) announced the commencement of its public participation drive on three draft policies: the housing allocation policy, serviced sites policy, and the temporary emergency accommodation policy. The three policies seek “to guide the department and provide clear processes in how the department proposes to allocate beneficiaries to RDP houses, how it proposes to implement the new directive of giving people serviced sites to build their own homes, and how to better deal with the very challenging aspect of providing temporary emergency accommodation to those in need.”

On 18 October 2019, the City again invited interested parties to comment on the housing policies. The Socio-Economic Rights Institute of South Africa (SERI) has read and considered the Temporary Emergency Accommodation policy and makes this submission to the Housing Department within the City in accordance with the invitation to submit written comments.

SERI’s submission provides background to the organisation and its work; comments on the content of the draft policy; and makes recommendations about how the draft policy could be amended or rectified.

2. The Socio-Economic Rights Institute (SERI)

SERI is a registered non-profit organisation and public interest law clinic that provides professional, dedicated and expert socio-economic rights assistance to individuals, communities, community-based organisations (CBOs) and social movements in South Africa. SERI conducts applied legal research, litigates in the public interest, facilitates civil society mobilisation and coordination, and conducts popular education and training. SERI’s core work relates to the advancement and protection of access to socio-economic rights in socio-economically marginalised (poor) communities.

One of SERI’s primary thematic focus areas is ‘Securing a Home’, which includes protecting and fulfilling the right of access to adequate housing; challenging unlawful evictions; promoting greater tenure security for the urban poor; informal settlement upgrading; advocating for spatial justice; and defending and promoting access to basic services such as water, sanitation and electricity, particularly in informal settlements.¹

¹ For more on SERI visit the SERI website: https://www.seri-sa.org.
Over the last 10 years SERI has been involved in legal, research and advocacy work around evictions, relocations, rental housing, allocation of state-subsidised houses, and informal settlement upgrading. We have published several resource guides, research reports and working papers, including the following:

- The Promised Land: Ratanang Informal Settlement (April 2019).
- Our Place to Belong: Marikana Informal Settlement (April 2019).
- Left Behind: Siyanda Informal Settlement (April 2019).
- Here to Stay: A Synthesis of Findings and Implications from Ratanang, Marikana and Siyanda (May 2019).
- Johannesburg (November 2018).
- Affordable Public Rental Housing (2016).
- Edged Out: Spatial Mismatch and Spatial Justice in South Africa’s Main Urban Centres (December 2016).
- From Taylor Road to Ruimsig and Fleurhof (July 2016).
- ‘Jumping the Queue’, Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa (April 2013).

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

- Goge v Metropolitan Evangelical Services (MES) and Another
- Occupiers of Erven 87 & 88 Berea v De Wet and Another
- Fischer and City of Cape Town v Ramahlele and 46 Others
- Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others
- Abahlali baseMjondolo and 30 Others v eThekwini Municipality and Others
- Dladla and the Further Residents of Ekuthuleni Shelter v City of Johannesburg and MES
- Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another
• *Dzai and Others v Ekurhuleni Metropolitan Municipality and Others*
• *Lyton Props and Robert Ross v Occupiers of isiQalo and City of Cape Town*
• *Melani and the Further Residents of Slovo Park Informal Settlement v City of Johannesburg and Others*
• *Mzimela and Others v eThekwini Municipality and Others*
• *Pheko and Others v Ekurhuleni Metropolitan Municipality*
• *Schubart Park Residents Association and Others v City of Tshwane Metropolitan Municipality and Others*
• *Zulu and 389 Others v eThekwini Municipality and Others*

Much of SERI’s work therefore involves the right of access to adequate housing enshrined in section 26 of the Constitution. In this respect, there is considerable overlap between SERI’s work in our ‘Securing a Home’ thematic area and the focus of the draft policy. In particular, SERI has been extensively involved in litigation that has contributed to developing the jurisprudence to which the draft policy makes reference. SERI has also undertaken research into the lived experiences of people who have been relocated by the City of Johannesburg. Finally, SERI has produced several research outputs with a direct bearing on the focus of the policy. It is in on this basis that SERI submits written comments on the draft policy.

3. **Comments on the draft policy**

3.1 **Undefined or vaguely used terms and concepts**

A number of terms or phrases are used in the document which are undefined or used so vaguely that they are open to interpretation. A selection of examples follows:

*Consistent and balanced approach*  
“Consistent and balanced approach” in the Preamble on page 7 with reference to what the City is aiming to achieve. The meaning of this phrase is unclear and open to interpretation. For example, if “consistent” refers to the specifications, norms and standards of alternative accommodation, then SERI would welcome this intention. If “balanced” refers to the idea of level playing fields then SERI would not because occupiers faced with imminent eviction do not engage with the City or a property owner as equal players. The intended approach should be expressed in terms more precise than consistent and balanced. Alternatively, the terms must be defined in relation to the context of evictions.
Being rendered homeless indefinitely or for a prolonged period of time
“(B)eing rendered homeless indefinitely or for a prolonged period of time” on page 7 paragraph 2; page 8 paragraph 1; and page 9 paragraph 1. While the reference to “being rendered homeless” is accurate for eviction cases, the balance of the phrase is not. In cases of eviction the anticipated period of homelessness is unclear: an eviction will either render an occupier homeless or not; an occupier will either have somewhere else to go or not. We surmise that the problematic part of the phrase (“indefinitely or for a prolonged period of time”) may relate to instances of disasters. If so, the phrase should be clarified accordingly and the two circumstances should be distinguished from one another.

Shared obligations
“Shared” obligations in the Introduction on page 8 with reference to assisting “affected persons who might be rendered homeless temporarily or indefinitely as a result of one or more criteria constituting emergencies”. Firstly, the Housing Act already delineates the responsibilities of the three spheres of government. It is unclear what this phrase might mean beyond this. Policy cannot contradict the Housing Act. Secondly, in practice there are specific conditions under which the meaning of “shared” responsibility is vague. In SERI’s experience one of these is municipal application to provincial departments of human settlements for funding under particular programmes, such as the Upgrading of Informal Settlements Programme or the Emergency Housing Programme. While the roles may be clear – municipality submits and provincial government approves – it is not always clear when the municipality has fulfilled its part, such as the conditions under which an application goes to provincial government. If this phrase is to be retained, it should be defined in the definitions section and clarified when used in the body of the document.

Appropriate and justified
Similarly, the words “appropriate and justified” on page 12, section 8, referring to qualification criteria, require clarification and specification. Alternative accommodation is either going to be provided or not. Occupiers either qualify in terms of the Emergency Housing Programme or they do not. If the City is using criteria outside of the EHP this should be made explicit and reasons for the deviation provided. The addition of an extra layer of discretion, implied by the use of these words, is problematic. The intention behind their use should be clarified or they should be deleted.

Self-created and queue jumping
“(S)elf-created” and “queue jumping” with reference to exclusions from the provision of alternative accommodation on page 13. Nowhere is it specified what situations would
constitute “self-created” circumstances. The policy should stipulate what they are. Alternatively, the policy should remove reference to self-created situations because the market and ultimately the state are responsible for homelessness. Queue jumping must be defined in explicit terms, as its meaning is unclear, or it should be removed.

**Causing exceptional housing need**

“(H)ave caused their exceptional housing need” on page 16, section 14 b) with reference to conditions for disqualification or limited assistance. It is unclear how this causation would be determined or applied. It does not matter who caused housing need or what happened to cause homelessness. The poor are not themselves morally responsible for homelessness. Ultimately homelessness is caused by state and private sector failure in the provision of affordable, formal accommodation, or by gendered power relation in families. The phrase is problematic because it inappropriately diverts responsibility from the market to the individual. It should be removed.

**Certain circumstances and sole discretion**

“TRAs will be offered solely at the discretion of the COJ and only in certain circumstances” on page 15, section 13 c), regarding the process to be followed in PIE related evictions. As it currently stands, the phrase is too open-ended. Legislation and case law are clear: the circumstances that need to be considered are a real risk of homelessness. The phrase should be amended for greater specificity and legal accuracy.

**Refusal to engage**

The final example in SERI’s response to imprecise terminology is “refusal to engage” on page 16, section 14 e). This phrase is unclear and, as a result, could lead to different interpretations between parties. If it is retained, it should be expanded to specify exactly what “refusal to engage” would constitute.

These examples of vaguely used or undefined words and concepts are indicative of a policy which is open to interpretation and discretionary application by different parties and therefore contestation. SERI recommends that the document should be reviewed to ensure that more precise language is used, key concepts are defined in the definitions section and the body of the document clarifies the terms when they are used. Alternatively, vaguely used or undefined words should be removed from the policy altogether.
3.2 Scope: disasters and evictions

The draft policy addresses both disasters and evictions, although they are substantially different emergency situations. The occupation context of evictions is a structural imbalance in the housing market, while disasters are generally unforeseen natural events. Homelessness due to evictions can be planned for and foreseen in advance. The City is uniquely placed to predict how many lawful evictions are likely over a planning cycle, because it is given notice of every eviction application made under the applicable law. Illegal evictions are harder to anticipate. However, it is, in principle, possible to gauge patterns of homelessness and predict how these will sustain themselves into the future. Disasters are less predictable, although it is possible, for example, to anticipate the frequency of extreme weather and its consequences. Including disasters and evictions as emergencies in the TEA policy is consistent with the Emergency Housing Programme. However, the following problems emerge in the draft policy as a consequence:

- The document makes reference to how people “may find themselves in emergencies” on pages 5 and 7. This phrase, while appropriate to disasters, is inappropriate to the circumstances of eviction which arise from structural conditions in the housing market.

- The duration of potential homelessness has already been addressed in section 3.1. It is another example of how evictions and disasters should be differentiated.

- In several places the document addresses the application of the emergency housing grant. However, it is not clear whether the grant refers to evictions as well. For example, in the Definitions on page 5 the policy defines the EHG as referring to “… households affected by disasters”; on page 17 in section 17 reference is made to “the disaster grant for temporary relief” and again on pages 20, 21 and 22.

- In the Preamble on page 7, the nature of the City’s response is seemingly contradictorily described as both proactive and reactive and as both predictable and unpredictable. Homelessness due to evictions are more predictable and easier to plan for than disasters that result in homelessness. The Preamble sets the tone for the policy and should accurately reflect the differentiated approach.

- Institutional responsibility, legal authority and the duration of TEA also differ. For example, Emergency Management Services responds to disasters in terms of the Disaster Management Act while the Housing department and the PIE Act pertain in evictions. For disasters “relief for up to 72 hours” (page 8) is applicable while TEA is
referred, somewhat confusingly in the Definitions as 12 months and elsewhere in the
document as 6 months.

Although the policy differentiates the process to be followed for disasters (section 12) and
evictions (section 13), it does not go far enough in avoiding the imprecision, lack of clarity and
potential contradiction that the scope permits.

SERI recommends that the City revisit the structure of the document to overcome the
constraints that arise from largely covering disasters and evictions in the same sections. For
example, the Introduction should clearly stipulate how the policy applies to different
emergencies situations, the policy should include an additional section which sets out the
differences between disasters and evictions and both disasters and evictions should be
defined in the Definitions.

3.3 Process to be followed
The draft policy prescribes a process that is “demand driven” or application led, and court
initiated. SERI assesses both as being too restrictive. Furthermore, there are aspects of the
prescribed process which appear to be contradictory.

Application led process
The process defined in section 13, page 15, which applies to emergencies resulting from
evictions in terms of the PIE Act (as opposed to disasters for which there is a separate process
outlined in section 12) is application led. Further, reference is made in the Definitions on page
4 to “affected persons” who are defined as people “who makes (sic) an application to COJ for
TEA assistance in the prescribed manner”. Again, in the Definitions, on page 5, reference is
made to “applying residents”. SERI’s contention is that relying on an application-driven
process alone is inappropriate. Applications can be one way of activating the City’s response,
but the City must anticipate and plan to prevent homelessness following on eviction resulting
from a wide variety of different situations. An approach that requires a court order limits the
possibility that evictees will be in a position to start their own process. Further, an application
led process appears to contradict the policy aim of being proactive: in the Preamble on page
7 the policy aims to “provide proactive measures”. The Preamble appears to be internally
contradictory as later in the same paragraph reference is made to how “the provision of TEA
can be proactive or reactive”. The subsequent phrase in the same paragraph makes
references to how the provision of TEA can also be “based on predictable and unpredictable
emergencies”. Considerable confusion appears to exist here and SERI suspects that it might
arise from the scope of the draft policy covering both disasters and evictions. While both are
considered as being emergencies in the Housing Code, the circumstances surrounding them are quite different.

Strangely however, the draft policy seems to opt for disasters being predictable on page 21 in section 20.3 (COJ: Housing role) at e) ii with reference to planning disaster mitigation measures which are to include “identifying communities / households that reside on inadequate land posing a threat to health and safety”. While SERI has no objection whatsoever to planning with the relevant Local Disaster Management Centre for disaster mitigation measures, it is unclear why such proactive planning should not include homelessness due to evictions. Were an amendment made to refer to “emergency mitigation measures” and were emergencies clearly defined to include evictions, this problem could be overcome. As it currently stands however, the section refers to “disasters and emergencies” at 20.3 d) with reference to the City managing “implementation of emergency interventions including establishing and maintaining a register or database of human settlements disasters and emergencies in the municipality” (emphasis added). Emergencies incorporate disasters and evictions, therefore the phrase should be edited to read either “emergencies” only or “disasters and evictions”. In Definitions on page 4 emergencies are defined as “emergency situations of exceptional housing need as referred to in Part 3 of the Housing Code”. Were the policy to incorporate the definition in Part 3 of the Housing Code in the definition of “emergency” then this kind of confusion could be avoided as it would be clear that both disasters and evictions constitute “exceptional housing need” included within the ambit of an emergency. In so doing, this section of the policy would be considerably improved as the City would be explicitly embracing the roles which Grootboom and PE Municipality confer on municipalities in respect of planning. To this end, SERI refers the City to the publication Evictions and Alternative Accommodation in South Africa 2000-2016: An Analysis of the Jurisprudence and Implications for Local Government (March 2016) in which the implications of the case law for the role of municipalities are spelt out.

SERI’s submission is that the process for lawful evictions should be both proactive in respect of planning ahead for relocations and reactive to applications that are brought to the City.

*Application for TEA initiated in context of court proceedings*

The draft policy indicates, in section 13 a), that an application is to be initiated “in instances where the COJ has been enjoined to eviction proceedings in terms of a court order to report to TEA or provide TEA where the unlawful occupiers face the risk of homelessness in the
event an eviction order is granted”. This is too restrictive as it does not accommodate the possibilities of proactive, programmed and non-litigious processes. It should be one of the ways in which an application is made but not the only way. Litigious processes are inherently adversarial, and the policy should accommodate a less confrontational approach as well. Secondly, as it currently stands the policy does not include people who do not have representation. Based on SERI’s experience, more often than not the City is not joined in eviction applications and where the case is unopposed, as is often the case, the order is granted with little regard for PIE rights. SERI’s current research shows that courts often grant an eviction without ever interrogating whether an eviction will lead to homelessness. Those who are able to secure representation are more likely to oppose the eviction and receive an order for a TEA report to be done.

In addition to the flaws with the above-mentioned restrictions, the policy lacks clarity about who initiates an application because the sub-clauses are written in passive voice on page 15 at both a) and b). Then at section 15 the policy reads that “all residents … must apply in the prescribed manner …”. This precision belongs in the process section. However, by seemingly stipulating that all residents must apply in section 15, the policy potentially excludes unrepresented occupiers from the process.

Similarly, it is unclear who initiates the assessment to which reference is made at 13 b): “(i)n the event an assessment has been made that lives would be in danger if occupation is continued on the property…”. Nowhere is the assessment process described. What is its purpose? What are its elements? Who is involved in the assessment process? These questions, in addition to the one about who initiates assessment, all require clarification as the risk posed by the lack of specificity about who makes the assessment and what it constitutes, is that it could be subjective to the party undertaking it. If the process is expanded to include non-litigious circumstances, then the need to provide clarity on the assessment process is even greater. SERI submits that both occupiers and the City should be able to initiate the assessment, that occupiers should be involved in the process, and that the language should specify that “the lives of occupiers would be in danger”.

While the process to be followed in evictions is silent, in section 13, on who the initiating party is, it is particularly outspoken about the discretion of the City. (See comments in section 3.1).

SERI recommends that the process should be broadened to accommodate the possibilities of proactive, programmed, non-litigious and less confrontational processes. In so doing the policy should clarify who is responsible for initiating an application and an assessment and what the assessment constitutes.
3.4 Meaningful engagement

The draft policy defines engagement in the Definitions on page 4 as “a process by which the COJ, Evictees, property owners and other stakeholders participate in meaningful discussions with a view to reaching a collective outcome that will benefit all or most parties”. Section 21 outlines meaningful engagement in detail. Meaningful engagement also arises at other points in the document.

Definition of meaningful engagement

SERI refers the City to the previously mentioned report on evictions jurisprudence where the principle of meaningful engagement is unpacked in relation to PE Municipality and Olivia Road. It is unclear why the draft policy defines “engagement” when the principle of “meaningful engagement” has been established in law. The draft policy should define “meaningful engagement” in the Definitions section. It should explicitly state the purpose of meaningful engagement as being to reach “mutually acceptable solutions”. It is unclear why the City chooses to use other phrasing (“a collective outcome that will benefit all or most parties”) when the purpose is provided in Olivia Road. Furthermore, the definition lacks a reference to homelessness which is the essence of the purpose of meaningful engagement.

When meaningful engagement should occur

On page 23 at section 21, the draft policy states that meaningful engagement will begin “as soon as is reasonably possible” and that it “can occur before and after the implementation of the Policy”.

SERI’s assessment of the jurisprudence\(^2\) shows that:

\[\ldots\text{ the Constitutional Court has emphasised that meaningful engagement should ordinari}\ldots\]

\[\ldots\text{ty take place before eviction proceedings have been instituted and matters have reached the courts.}\]^3

\[\ldots\text{In practice, this would mean that eviction proceedings should not be embarked on unless and until municipalities and property owners have engaged with anyone involved in eviction proceedings or otherwise affected by such}\]

\(^2\) p 32

\(^3\) Olivia Road para 30; Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZuluNatal and Others 2010 (2) BCLR 99 (CC) (Abahlali) paras 69 and 119-120. See also See also L Chenwi and K Tissington Engaging Meaningfully with Government in the Realisation of Socio-Economic Rights in South Africa: A Focus of the Right to Housing SERI and Community Law Centre (CLC) Research Report (2010) 21.
proceedings.4 Joe Slovo … indicates that meaningful engagement should also take place during the relocation process in instances where an eviction order has been granted. This principle is in keeping with the assertion in Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipality (Schubart Park)5 that engagement should take place at every stage of the eviction and housing process.6

While meaningful engagement should indeed begin as soon as possible, SERI is concerned that the balance of the clause is inconsistent with the case law and should therefore be amended in line with the jurisprudence cited above.

**What meaningful engagement entails**

At 21.1, which is vaguely sub-headed as “Engagement” in a section entitled “Meaningful Engagement”, the draft policy suggests it will address what the engagement process shall include (“The engagement shall include, but not be limited to…”). It does not. However, the case law provides exactly such content for the draft policy.

*Olivia Road* developed the concept of meaningful engagement and provided content for what it requires. Parties should engage about:

- the consequences of a possible eviction
- whether the municipality can alleviate some of the potentially dire consequences that result from eviction
- the obligations of the municipality in relation to any possible eviction
- how and when the municipality should fulfil its obligations
- the need to address questions of homelessness that may ensue
- potential temporary measures that may stave off homelessness while the state provides alternative accommodation
- whether the owner’s interests could be vindicated without an eviction order being granted, or whether the owner could contribute to the efforts of the state to provide an alternative.

SERI recommends that this content should be included at section 21.1 with a new heading “The content of meaningful engagement”.

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4 Chenwi and Tissington Engaging Meaningfully with Government 21.
5 Schubart Park Residents’ Association and Others v City of Tshwane Metropolitan Municipality and Another 2013 (1) SA 323 (CC).
6 Schubart Park para 51.
Although the list on pages 23-24 occurs under an inaccurate sub-heading, SERI nevertheless has the following concerns with it:

- i) “The willingness of the tenants to engage”. It is unclear how this clause relates to the sub-section. However, read with Section 14 e) where “refusal to engage” gives the City authority to disqualification occupiers from assistance or to limit their assistance, this clause creates a worrying impression. In SERI’s experience, apparent “refusal” to engage is never as simple as it may appear to the City. For example, something as simple as setting a time when people are at work or seeking work, can (and indeed has) led officials to deduce “unwillingness” or “refusal”. The draft policy needs to clarify what would constitute unwillingness or refusal.
- j) The City cannot decide on homelessness, as this clause indicates. In a litigious process the courts will decide on whether the eviction will lead to homelessness taking all the relevant circumstances into account. In a non-litigious process, which does not currently exist in the draft policy, whether or not the occupiers are living in conditions that will lead to homelessness must be objectively viewed. The policy should set out the parameters of this determination.
- l) “Whether mediation between Evictee and Owner is possible as envisaged in section 7 of PIE”. This clause is too vague. In SERI’s practice, the City generally does not facilitate mediation, citing lack of funds to procure mediation services. The clause is unclear about who determines whether mediation is possible and what “possibility” constitutes. Greater precision could be obtained by specifying what steps need to be taken and by whom to explore “possibility”.
- m) Homelessness is the issue in law not the “interests of the Owner and … the COJ”.
- n) The parties “need not necessarily reach an agreement on every aspect of the dispute”. While there is no problem with this statement in and of itself it should be accompanied by a more positive statement regarding where an agreement does need to be reached. The intention or purpose of the engagement process is always for people to be housed.
- n) “Parties should not make unreasonable demands or adopt an unreasonable attitude”. The phrases “unreasonable demands” and “intractable attitudes” need to be clearly defined if they are to be retained. The only demand from occupiers in the case of an eviction is to be housed. It is the only demand available to them. It cannot be unreasonable. Meaningful engagement requires that the complex questions of location and nature of alternative accommodation be addressed. They may be complex issues, but they cannot be written off as intractable.
• q) Willingness of owner to participate. The draft policy effectively provides owners with the option of not engaging. This detracts from the jurisprudence in Changing Tides and Matlaila. Matlaila makes the point that the onus is on the applicant to show that an eviction would be just and equitable and cites Changing Tides. The Judge also admonished the applicant for failing to engage.

The draft policy does not incorporate several other key issues developed in PE Municipality and Olivia Road. For example, engagement and mediation should encourage the humanisation of parties in a dispute and the qualities of sincerity and good faith must be brought to the engagement process. While seemingly addressing “soft” issues, these requirements make an enormous difference in practice to how the parties treat one another, especially in a litigious process. Another absent issue is that the meaningful engagement obligation flows from Section 26(2) of the Constitution as a component of a reasonable state response. Note that the Introduction on page 8 erroneously states that Section 26(1) and (2) rights are excluded from the policy.

At 21.2, “Presenting Alternatives to Evictees”, the sub-heading creates the expectation that the process for engaging occupiers on alternative accommodation options will be addressed. Once again, this expectation is not fulfilled as the sub-section actually addresses the presentation of permanent accommodation options. The sub-heading should be changed to read “Presenting permanent accommodation options to occupiers”. SERI has the following concerns with the draft policy’s approach to presenting permanent accommodation options to occupiers:

• b) should be joined to a) because it is vague as it currently stands.
• At c) and d) the City limits its role to information provision and excludes “facilitating any further interventions” and “… interact(ing) with the prospective landlord directly”. This is an unfortunate limitation as, in SERI’s practice, the process of obtaining accommodation with Joshco, for example, would greatly benefit from the City’s facilitation and interaction as it takes considerable time and in many cases homelessness has already resulted.

Inconsistencies regarding the spirit and intent of meaningful engagement
SERI has a general concern that the discretionary authority the draft policy awards the City in several places outside of section 21 is at odds with the spirit and intent of meaningful engagement. For example, on page 17, section 16 c) at “TEA buildings / Units”, “it remains at
the sole discretion of the COJ whether to offer affected persons a TEA building or a TRA”. While SERI does not deny that the City possesses the authority to make the offer either TEA or TRA, the phrase left on its own creates the unfortunate impression that meaningful engagement on the offer will be a rubber stamp on the City’s “sole discretion”. Occupiers must have the opportunity to respond without being labelled unreasonable or their responses intractable. Another example is the City’s discretion to limit assistance or disqualify occupiers from assistance if they “refuse to engage”, as addressed earlier in this-sub-section. “Sole discretion” and meaningful engagement are conceptually at odds with one another. The City should review its discretionary authority in the draft policy for consistency with the notions of sincerity, good faith and humanity which meaningful engagement requires.

3.5 Duration of temporary alternative accommodation

The duration of alternative accommodation is described as being “for a period not exceeding 12 months” in the Definitions on page 5. Then on page 13 in section 10 at “Duration of TEA”, a time frame not exceeding 6 months is given (10.1). It may be “extended or reduced at the COJ’s discretion” (10.4). SERI has the following concerns:

- The policy should establish a consistent duration. As it currently stands, the policy prescribes both 12 and 6 month periods. Reference to duration should clarify that the maximum period (be it for 6 or 12 months) is an initial period that would need to be extended should homelessness result after the initial period terminates. A proviso should be included that the residents must have somewhere else to go.

  The City’s considerable discretion in reducing or extending the initial period should be accompanied by greater transparency on what the conditions for either would be, in order to mitigate insecurity and uncertainty of an already vulnerable population.

- All references elsewhere in the document to duration (for example in Definitions on page 5), transition (for example in Principles on page 11) and exit strategy (on page 27) should also clarify that if the City terminates access to the alternative accommodation, then a court order would be required, as such termination constitutes an eviction.

- The exit strategy on page 27 appears to be incomplete. Further explanation is required as it does not currently make sense with the inclusion of management and maintenance. SERI supports the City’s responsibility to identify possible permanent solutions for resettlements in sub-section c) of the exit strategy, although it also
requires further elaboration, of the sort currently accommodated in section 21.2, with SERI's concerns about that section addressed.

3.6 Funding and own resources
The draft policy addresses funding arrangements in section 17. SERI finds the section to be unclear and has the following specific responses:

- Clause f) in the preceding section on TEA Buildings / Units appears to belong in section 17 and should be moved. It indicates that the City will make an application to the PDHS when it cannot meet the demand for TEA out of its own resources.

- In the preamble to the list on page 17, the draft policy makes reference to the disaster grant for temporary relief as a result of a disaster. Does the section therefore exclude evictions? It would appear so. However, in sub-point f) mention is specifically made of evictions. Section 18 – funding allocation criteria for EHG - appears to exclude evictions as well, as does section 19 on conditions for the EHG.

- 7 a) does not make sense and should be removed or edited.

SERI recommends that the EHG sections (17, 18 and 19) be edited for clarity and consistency regarding their applicability to evictions.

3.7 Qualifying criteria
Qualifying criteria are addressed in section 8 of the draft policy. SERI's concerns and recommendations with the vaguely used words "appropriate: and "justified" have already been identified.

Seven qualifying criteria are provided that presumably apply to both evictions and disasters. Their application should be specified. Furthermore, the policy should be explicit that the sole criterion in cases of eviction is being made homeless. This criterion is established in law and cannot be contradicted by the City applying its discretion on a case by case basis (as is currently the case in Policy Intent on page 10, bullet 2). SERI is concerned that the seven criteria constitute an extra layer of discretion that is inconsistent with the law pertaining to evictions. No additional qualifying criteria are required.

The Emergency Housing Programme establishes that the ordinary housing subsidy criteria do not apply to evictions. In this section the City appears to be indicating, although it is not entirely
clear, that the normal criteria do apply, but with the seven exceptions. Greater clarity is required.

When the policy makes reference to undocumented migrants it should not use the pejorative language of “illegal foreigner” in the highly charged xenophobic atmospheres of the inner city and informal settlements.

Furthermore, it is unclear whether the qualifying criteria are listed as “ors” or “ands”. One of the criteria should be sufficient to trigger an application. Accordingly, the criteria on the list should be separated by the word “or”.

3.8 Exclusions
Exclusions are addressed in section 8 of the draft policy. SERI’s has several concerns with the proposed exclusions.

- 9.1 should be clarified because as it currently stands it does not make sense.
- 9.2 is problematic because it is difficult to conceive of a situation where the onus rests on the owner, following Blue Moonlight.
- 9.3 presumably applies to situations where there is a lease. Once a lease is cancelled a tenant becomes an occupier with PIE protections. An alternative wording would be that the policy is not intended for people who are not unlawful occupiers.
- 9.5 is vaguely worded, as already indicated in section 3.1. It should be removed.
- 9.6 must be clarified as occupiers in “problem properties” are entitled to the same PIE protections as other unlawful occupiers, including the provision of alternative accommodation if homeless were to arise.

SERI recommends that the exclusions should be reviewed.

3.9 Case law on evictions and alternative accommodation
Section 11 addresses the legislative framework. It makes reference to the jurisprudence but does not outline the principles it has developed. These principles should be added in section 11 and they should also infuse the policy as a whole. SERI refers the City to the evictions jurisprudence report which identifies that the case law has developed the following principles:

- Procedural requirements for an eviction
- Meaningful engagement
• Rights of private property owners
• Municipal provision of alternative accommodation
• “Adequate” alternative accommodation
• Accountability of municipal office bearers to enforce court orders
• New land occupations and the use of land occupation interdicts

3.10 Adequacy of alternative accommodation

Nowhere does the policy establish what constitutes adequate accommodation. Adequacy could address issues of tenure security, location, levels of service, building specification and standards as well as adequate procedural requirements pertaining to site inspections by occupiers, building management and tenant committees. Adequacy must also address the rights to dignity, life and freedom of the residents. It must also address rights to privacy and security of the person.7

The nature of TEA is referenced briefly on page 17 at section 16 on “TEA buildings / Units”. At sub-point e) “affected persons may be differentiated for purposes of allocating TEA, for instance, families will be accommodated in family rooms whereas single may be accommodated in dormitory style rooms”. SERI’s practical experience, documented in Community Practice Notes,8 shows that families come in a wide variety of forms, and care should be taken not to separate families in any circumstances, no matter what their configuration. For example, a single mother with a child should constitute a family. Two sisters living together are also a family. Further, SERI’s research into the lived experience of relocated people shows that dormitory rooms expose women and children to gender based violence, couples to a lack of dignity and privacy, children to sexual activity of adults and everyone to threats of fire. Rather than exacerbate the vulnerability of already vulnerable people, the policy should attempt to mitigate it. A generous and expansive definition of “the family” should underpin the policy.

At “Implementation Plan / development for TEA” on page 25 in section 22 a) the draft policy states that “TEA buildings consist in managed care facilities” and at sub-point c) that the model “involves the provision of social assistance … to empower them …. with the possibility of

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7 Dladla and Another v City of Johannesburg and Others (CCT124/16) [2017] ZACC 42; 2018 (2) BCLR 119 (CC); 2018 (2) SA 327 (CC) (1 December 2017).

8 Community Practice Notes; Johannesburg Inner City Alternative Accommodation Series: From San Jose to MBV1 (July 2016); Community Practice Notes; Johannesburg Inner City Alternative Accommodation Series: From Carr Street to MOTH (July 2016). Community Practice Notes; Johannesburg Inner City Alternative Accommodation Series: From Saratoga Avenue to MBV 2 and Ekuthuleni (July 2016).
finding a permanent housing solution”. In keeping with the humanising intentions of meaningful engagement occupiers are not patients in need of care but people who cannot afford to house themselves formally due to market exclusion and, ultimately, inadequate state provision.

Building management and maintenance are key issues that have arisen in SERI’s experience with relocated occupiers.⁹ Management and maintenance occur only in the exit strategy in the draft policy, without elaboration. This should be rectified.

3.11 Understanding of obligations

SERI’s final comments relate to the City’s understanding of its Section 26 obligations in the draft policy.

The policy begins with the City’s recognition of its section 26 (1), (2) and (3) obligations in the Preamble on page 7. Here it appears that the City understands that all three sections are implicated. An eviction that would lead to homelessness is a violation of 26(1) and if eviction leads to homelessness the City is required to make a reasonable offer of alternative accommodation in terms of 26(2). However, in the Policy Intent section on page 10 at bullet 3, the draft policy states that “the policy should not be seen to mean the progressive realisation of the right to have access to adequate housing”. This appears to contradict the Preamble and is also at odds with the Emergency Housing Programme which sees alternative accommodation as the first step towards a permanent housing solution.

The draft policy makes reference to available resources in several places. For example, on page 10 bullet 4 the document reads that “the policy will be implemented in the context of competing priorities and available resources” and on page 17 at section 16 a) that “the COJ can only [ensure that there are sufficient TEA buildings/TRAs to cater for Emergencies] within its available resources”. The priority set by the law is to prevent homelessness. Nothing competes with this priority. “Available resources” may be relevant to timing and delivery, not whether preventing homelessness has to be done.

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⁹ Community Practice Notes; Johannesburg Inner City Alternative Accommodation Series: From San Jose to MBV1 (July 2016); Community Practice Notes; Johannesburg Inner City Alternative Accommodation Series: From Saratoga Avenue to MBV 2 and Ekuthuleni (July 2016).
4. Conclusion

In this submission, SERI has highlighted a significant number of concerns with the City’s draft policy on TEA. They include the use of undefined or vague words and ten substantive issues ranging from the way the policy addresses meaningful engagement to the City’s understanding of its obligations. The submission provides specific recommendations for each concern. Overall, SERI submits that the draft policy should be thoroughly reviewed and redrafted. The City should:

- Edit the document to make sure more precise language is used, key concepts are defined in the definitions section and the body of the document clarifies the terms when they are used. Alternatively, vaguely used or undefined words should be removed from the policy altogether.
- Revisit the structure of the document to overcome the constraints that arise from covering disasters and evictions in the same sections (with the exception of sections 12 and 13).
- Set out the differences between disasters (reactive and unpredictable) and homelessness due to evictions (proactive and more predictable).
- Develop a process for alternative accommodation provision for lawful evictions that is both proactive in respect of planning ahead for relocations and reactive to applications that are brought to the City.
- Review references to meaningful engagement to comply with the case law, including the definition, and redraft the section on meaningful engagement to ensure that it addresses the content it promises to. In particular, make sure that the policy sets out clearly what meaningful engagement entails. In general, ensure that the intention and spirit of meaningful engagement is reflected throughout the policy.
- Adopt a consistent approach to the duration of an initial period of residence in the alternative accommodation, make explicit the requirement for a court order and flesh out what is meant by the so-called exit strategy.
- Edit the EHG sections (17, 18 and 19) for clarity and consistency regarding their applicability to evictions.
- Resolve contradictory statements in the document about its obligations.
- Review the qualifying criteria and exclusions in the light of the specific concerns provided.
- Incorporate the principles developed in the case law.
• Establish what constitutes “adequate” alternative accommodation.

SERI recommends that these concerns be addressed to more properly respond to the Section 26 obligations which the City recognises it has in the Preamble.