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Office of the United Nations High Commissioner for Human Rights

Special Procedures Branch

Palais Des Nations

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Switzerland

Per email: registry@ohchr.org; srhousing@ohchr.org

Dear Sirs/Madam

**SUBMISSIONS BY THE LEGAL RESOURCES CENTRE (SOUTH AFRICA) TO THE
UN SPECIAL RAPPORTEUR – THE HONOURABLE BALAKRISHNAN RAJAGOPAL
ON HOUSING DISCRIMINATION AND SPATIAL SEGREGATION**

Introduction

1. The Special Rapporteur on the right to adequate housing has invited submissions to inform the report to the United Nations Assembly on the impact of housing discrimination and spatial segregation on the right to access to adequate housing.
2. The submission is structured as follows:
 - I. The Legal Resources Centre (LRC) and its mandate
 - II. The right to housing in South Africa
 - III. Legal Framework
 - IV. Case studies

- V. Responses to the Special Rapporteur's Questionnaire (Attached annexure)
- VI. Conclusion

I The Legal Resources Centre and its Mandate

- 3. The Legal Resources Centre (LRC) is an independent non-profit public interest law firm which uses the law as an instrument of justice. The LRC has been in existence since 1979 and operates throughout the country from its offices in Johannesburg, Cape Town, Durban and Makhanda. The LRC works towards the development of a fully democratic South African society based on the principle of substantive equality, by providing free and strategic legal services to the vulnerable and marginalized people and communities of South Africa.
- 4. Over the past 43 years the LRC has played a significant role in dismantling apartheid, abolishing the death penalty and corporal punishment, advancing and protecting the constitutional right of women, girls and people with disabilities, made important breakthroughs in the provision of healthcare and environmental justice and established and advanced the jurisprudence in land, housing and education rights.
- 5. The work of the LRC includes litigation and advocacy on:
 - 5.1 housing rights, including assisting vulnerable communities facing unlawful evictions;
 - 5.2 challenging failures to provide basic services including water, sanitation and refuse collection;
 - 5.3 spatial planning and just land use management;
 - 5.4 testing the right to affordable inclusionary housing;
 - 5.5 restitution of land rights that includes protection of labour tenant's rights;
 - 5.6 customary law and the status of women and property rights;
 - 5.7 whether developments on communal land benefit the intended beneficiaries; and
 - 5.8 environmental justice

II Legal Framework

6. The right to housing as enshrined in section 26 of the Bill of Rights in the South African Constitution provides that:
 - “(1) Everyone has the right to access to adequate housing.
 - (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
 - (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

7. Our Constitution further recognizes the protection of property rights, including measures designed to foster conditions that enable citizens to gain access to land on an equitable basis.¹

8. Apartheid national spatial development logic ensured that people of colour resided as far away as possible from the country’s economic hubs, but still within economically- feasible exploitation distance.

9. Post-apartheid town planning within South Africa has continued with the spatial discrimination in that; new low-income housing developments tend to be located on the periphery of cities in a phenomenon known as inverse densification, where the majority live far from economic opportunities, services and amenities. In South Africa this has been exacerbated by the rising cost of well-located residential properties coupled with a general failure of our government to implement social and affordable housing.

10. In 2015 the Spatial Planning Land Use Management Act (SPLUMA) 16 of 2013 came into effect, placing the objective of achieving spatial justice firmly as a principle for all future development decisions. The object of SPLUMA is to correct spatial development planning and land use laws and practices that were “based on racial inequality; segregation; and unsustainable settlement patterns...”²

¹ Section 25 of The Constitution of the Republic of South Africa,1996.

² SPLUMA recognizes that multiple laws have created social and economic issues that are reinforced through land use, management, and development, such as unfair discrimination and fragmentation. See SPLUMA, Preamble.

11. SPLUMA seeks to specifically redress imbalances of the past to create equity in spatial planning, and to address past spatial and regulatory imbalances that were the consequence of racially discriminatory legislation.
12. SPLUMA is a framework for spatial planning and land use management for planning at all levels of government, including the provincial and municipal level. The object of SPLUMA is to provide for a uniform and effective system of spatial planning and land use management within South Africa that promotes social and economic inclusion.
13. The High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, States that:

'Colonialism and apartheid have left South Africa with a deeply divided and inequitable distribution of people and economic activity. This spatial inequality traps disadvantaged communities in poverty and underdevelopment, creates inefficient cities, and robs poor, rural people of secure livelihoods. The Panel makes recommendations that seek to break this damaging spatial pattern that is built on past laws, which marginalized the black majority to the outskirts of the cities and to Bantustans to preserve key assets, economic opportunities and the wealth of the country for the white minority. The legacy of spatial inequality appears intractable despite the National Development Plan and the Spatial Planning and Land Use Management Act's (SPLUMA's) focus on it. This issue needs an integrated solution that goes beyond the mandate of any one government department or specific level of government. Thus, the Panel recommends creating a structure that can operate and craft solutions in an integrated fashion, while also recommending some specific urgent interventions to address barriers that continue to deny property rights to the majority and marginalize them from the core economy. The release of well-situated urban land to mitigate the legacy of the apartheid city is an urgent priority.'³

14. National planning for the purposes of SPLUMA consists of the compilation, approval and review of spatial development plans and policies or similar instruments including a national spatial development framework. The making and reviewing of these policies and laws are necessary to implement South Africa's national spatial planning. Further in terms of section (5)(3)(c) of SPLUMA the reviewing of policies includes measures designed to monitor and support other

³ Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (2017), page 32.

spheres of government in the performance of their spatial planning, land use management and land development functions.

15. In order to ensure that the objects of SPLUMA are realized it is necessary that SPLUMA tools be established and implemented. The SPLUMA tools being;- principles, policies, directives and national norms and standards be used to achieve important urban, rural, municipal, provincial, regional and national development goals and objectives through spatial planning and land use management.

16. The state's obligations have recently been affirmed in the case of *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others*⁴, where the Court stated:

"It is fair to say that the statutory and policy framework which finds its origins in the Constitution and the legislation mandated thereunder, renders it necessary for the state to redress the legacy of spatial apartheid as a matter of constitutional injunction. The constitutional and statutory obligations of these tiers of government to provide access to land and housing on a progressive basis, encompass the need to urgently address apartheid's shameful and divisive legacy of spatial injustice and manifest inequality."⁵

III Case Studies

a. Thicket Street- Apartment block development

17. Newlands, an affluent suburb of Cape Town has a tragic history of forced removals. One of the largest and most established communities (classified "Coloured" under Apartheid racial classification legislation) was removed from the picturesque area. What followed was massive and highly lucrative commercial and residential property development.

18. The planned development of a 236-unit apartment block in Thicket Street, Newlands was challenged by the Claremont Main Road Mosque (CMRM),

⁴ [2020] ZAWCHC 87 (31 August 2020).

⁵ Para 94- Adonis case

represented by the LRC. In addition, recent significant property development and the escalation in property prices in Newlands effectively excludes these former residents and their descendants from the area, from a social and economic point of view.

19. On behalf of our clients, the LRC lodged cases before the Municipal Planning Tribunal City of Cape Town (MPT CT) Western Cape and then to the SPLUMA Appeal authority to assert our clients' right to spatial justice.

20. The essence of the challenges is that the assertion that SPLUMA obliges municipalities to advance spatial justice as defined in the Act when considering development applications. In order to promote spatial integration, these applications have sought the imposition of a condition in planning approvals that a private Developer provides affordable inclusionary housing, within its development.

21. The argument before the Tribunal and Appeal Authority was that; it be made a requirement that the granting of development rights be conditional on making some provision for affordable inclusionary housing. This is a mechanism acknowledged in several parts of the world in order to achieve spatial integration, and to give indigent persons greater access to 'well located' land and economic opportunity. When regard is had to apartheid spatial planning and the exclusionary policies of the previous regime, the need for mechanisms for municipality to administer its spatial planning and land use is all the more pressingly urgent.

22. The development was approved without a compliant analysis of whether it addresses the objectives of inclusive, equitable, and sustainable settlement patterns mandated by the legislative and regulatory framework for land use management under SPLUMA.

23. The objection was dismissed. The CMRM then appealed the granting of the development rights, contending that in granting the development rights the City had failed to demonstrate that it has applied its mind to the SPLUMA principle of spatial justice, as well as other imperatives contained in the Cape Town Spatial

Development Framework. As a result, so it was argued, the Tribunal's approval of the development application goes against the very purpose of what the Act intended, rendering it unlawful.

24. The appeal decision reiterated the reason for dismissing the objection given by the Tribunal, that "*notwithstanding the principles contained in SPLUMA, the MPT is not in a position to delay decision-making in the absence of an appropriate Council policy framework and an agreed upon set of criteria and mechanisms to guide the implementation of inclusionary housing in private developments.*"

25. Private developers faced with challenges from civil society, for the inclusion of affordable housing in their development projects have been willing in some instances to attempt to make provision in their applications for some kind of spatial justice, or to make payment to the local authority to promote spatial justice. However, the local authority does not have the financial legal mechanisms to receive such funds and cannot become a tax collector.

b. Advocating for the release of well-located state-owned land to be used for low-income housing and mixed-use development.

26. A group of civil society organizations (including the LRC) working on land and housing in Cape Town, provided a joint submission to the Presidency, the purpose of the submission is to urge the national government to release three large and exceptionally well-located parcels of unused or underutilized military land in Cape Town that are either owned by the Department of Defense or under the custodianship for the Department of Public Works for the development of affordable housing.

27. The submission provides that allowing well-located state-owned land to lie fallow or underutilized is irrational and unreasonable when it could instead be used for transformation and redress, and to advance spatial justice through the delivery of affordable housing in line with the state's constitutional and legislative obligations to promote spatial transformation.

28. In the face of entrenched patterns of spatial apartheid, an exclusionary housing market, and the disproportionate health and economic ramifications of the COVID-19 pandemic, Cape Town is in the grips of an acute housing crisis that disproportionately affects poor and working-class families.

29. The crisis has only been compounded as the economic ramifications of the COVID-19 pandemic that has driven more people into homelessness. According to estimates, the submission puts forward that the sites could deliver approximately up to 67 000 affordable housing units thereby reducing the City of Cape Town's housing backlog by almost a fifth and the Western Cape Province's housing backlog by almost an eighth.

IV. Responses to the Special Rapporteur's Questionnaire (Attached annexure)

V. Conclusion

30. South Africa requires clear guidance on the implementation of its spatial plan, as 'apartheid-style' spatial planning continues to be carried out, to date with low-income housing being prioritized at the periphery of economic hubs. This has had the effect of exacerbating the cost of well-located residential properties, making it almost impossible, without the assistance of the State, for our society to reach equity in spatial planning, and to address the past spatial and regulatory imbalances.

31. "Where a person lives in a city matters – it determines a person's access to opportunities and the quality of services. Many peripheral areas in Cape Town have limited access to basic services, schools generally perform worse, gang violence is rife, substance abuse is more common, and social amenities such as hospitals and clinics are difficult to access. Poor and working-class people spend a disproportionate component of their income and time on unreliable transport - some as high as 45% of their income. Critically, research shows that there is a

direct relationship between where people live in South African cities and the likelihood that they will find employment opportunities.”⁶

32. South Africa has the necessary legislation to transform our spatial development planning, however, we lack in the implementation of actively transforming the racial spatial patterns within our cities.

Yours sincerely



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⁶ Submission on the release of well-located state-owned land in Cape Town Metropolitan Area for low-income housing and mixed -use development: Response to COVID-19 and longer- term Urban Transformation, 7 December 2020.

<https://jumpshare.com/v/ivLBsWM63C3lQu4iGO2c>