



“iQhaza Lethu”
*An informal settlement upgrading partnership
initiative co-funded by the European Union*

Incremental Planning and Tenure Solutions in eThekweni Municipality (Feb. 2021)

The problem

Informal settlement areas fall outside of all current planning and regulatory frameworks since the underlying land is not yet proclaimed, subdivided and in many cases is also not yet owned by government (almost half of the land in informal settlements in eThekweni is still privately owned). The time and resources required to first acquire land and obtain all formal planning, environmental and other approvals is prohibitive given the scale of informal settlements in the City (over 285,000 households and more than 580 settlements). In addition, the prevailing densities typically make formal planning approvals impossible or else would necessitate massive relocations.

The provision of basic services and mitigation of threats and vulnerabilities (to both residents and the natural environment) cannot be delayed and government has a constitutional obligation to address these issues in a responsible and appropriate fashion.

Incremental planning solutions are therefore urgently required in order to recognise all informal settlements, establish planning trajectories for them, and to include them in municipal planning frameworks as required by the Spatial Management Land Use Act (SPLUMA).

Innovative solutions – Incremental Planning Procedures

iQhaza Lethu (IL) has accordingly supported the development of innovative and ground-breaking solutions for eThekweni Municipality. A comprehensive Incremental Planning Policy (or Standard Operating Procedures) has been developed and is now in final draft form having received inputs from all relevant City line departments. For the first time in South Africa a Metropolitan Municipality has a draft framework in place. The Policy addresses all aspects of incremental upgrading and in particular overcomes a range of issues/barriers which need to be addressed at policy level in order to unlock a more effective, city-wide approach.

The Policy’s framework and key elements have been shared with stakeholders at national level and National Government is supportive of the approach being taken. It is expected that the framework, once piloted, will assist other Metros and National Government in charting a way forward for more inclusive planning frameworks for the upgrading of informal settlements.

The land rights and planning protocols previously developed have been used as an input, as have the two Senior Counsel opinions relating to issues of private land and related incremental planning solutions. The

Policy, which enables compliance and operationalisation of the prescripts of SPLUMA relating to informal settlement areas, addresses a wide range of issues including: categorisation; incremental land use arrangements (at three levels – Temporary Development Area (TDA) for B2 settlements and two levels of Incremental Development Area (IDA1 and IDA2); spatial planning solutions; dealing with private land; levels of service appropriate to different categories of settlement. The Policy has been developed with extensive inputs from eThekweni’s Planning Department (Spatial and Land Use Management sections).

The Incremental Planning Policy (or Standard Operating Procedure) will be considered for adoption by the Municipality early in 2021 as part of the City’s Incremental Upgrading Policy and related Strategy/Programme Description.

Centrality of Categorisation

In terms of the new Incremental Planning Policy, Categorization is established as the primary means of determining an informal settlement’s developmental and planning trajectory as per the national categorization framework which has also been adopted by eThekweni Municipality [A = full conventional upgrade / formal housing project; B1 = incremental in situ upgrade with incremental services; B2 = deferred relocation with emergency basic services; C = imminent relocation]. All informal settlements must therefore be categorized. Some settlements may have a split categorization such as a dual categorization e.g. 75%B1, 25%B2 or even a three-way categorization (e.g. 70%B1, 20%B2, 10%C). Initially categorization is based on available desktop information (e.g. relating to household counts, site constraints and service provision), although as upgrading processes unfold, additional technical studies are typically undertaken which enable refinements of the categorization and which may result in adjustments (e.g. to the extent of undevelopable land within a B1 settlement from which households will eventually need to be relocated). The main categories of settlement which are the subject of this set of protocols are the B1 and B2 categories (incremental in situ upgrades and deferred relocations), it being noted that 77% of all informal households reside in category B1 settlements. The following table contains the national categorization framework with added details for planning arrangements, servicing and tenure (in red font):

- 1) **FULL CONVENTIONAL UPGRADE (category ‘A’):**
 - a. **Developmental pathway: Rapid formalisation consisting of full services, formal housing and formal tenure** (e.g. title deeds), requiring prior land acquisition and formal town planning and environmental approvals.
 - b. **Rationale:** 1) Site is viable (developable) and appropriate for purposes of formalisation AND 2) project is implementation-ready (full upgrading can commence rapidly - land is secured, feasibilities complete, plans approved etc.) AND 3) formalisation is appropriate and will not result in significant adverse consequences (e.g. significant partial relocations or other livelihood impacts).
- 2) **INCREMENTAL UPGRADE WITH ESSENTIAL SERVICES (category ‘B1’):**
 - a. **Developmental pathway: Provision of essential services and other incremental upgrading arrangements leading over time either to eventual formalisation or other permanent ‘less formal’ settlement solutions.**
 - b. **Rationale:** 1) Site is viable and appropriate for purposes of permanent settlement AND 2) project is **NOT** implementation-ready for formalisation (there will be delays due to such factors as land acquisition, de-densification or bulk services provision).
- 3) **DEFERRED RELOCATION WITH EMERGENCY SERVICES (category ‘B2’):**
 - a. **Developmental pathway: Provision of emergency basic services but **NOT** leading to eventual formalisation – more likely leading to eventual relocation** (when and if a suitable relocation site is obtained and developed).
 - b. **Rationale:** 1) Site is **NOT** viable or appropriate for purposes of formalisation or permanent settlement **BUT** 2) there is **NO** urgent need for relocation (absence of serious health and safety threats which cannot be mitigated in the short-term through basic services provision).
- 4) **IMMEDIATE RELOCATION (category ‘C’):**
 - a. **Developmental pathway: Rapid relocation to a site which is already or imminently ready and available.**
 - b. **Rationale:** 1) Site is **NOT** viable or appropriate for purposes of permanent settlement or formalisation **AND** 2) there is an urgent need for relocation due to serious health and safety threats which cannot be adequately mitigated in the short-term through basic services provision **AND** 3) an appropriate relocations destination is currently or imminently ready and available.

CATEGORISATION (as per national (NUSP) guidelines)	Settlements	Structures/ households	%age split
A (Full conventional upgrade i.e. formal housing project)	63	27 500	10%
B1 (Incremental upgrade with essential services)	342	220 000	77%
B2 (Deferred relocation with emergency services)	118	30 500	11%
C (Imminent relocation)	27	7 000	2%
Under investigation	31	2 000	1%
	581	287 000	100%

Spatial Planning

At a minimum, all settlements should be designated or at least reflected in the Municipality’s Spatial Development Framework (SDF) as per their categorization and notwithstanding the status of land acquisition and formal planning approval processes. This categorization should preferably be made public along with the key details of the categorization framework outlined above which indicate the intentions and protocols relating to planning, services, land ownership and tenure. Where a settlement has a split categorization, the dominant categorization should be reflected with the additional categorization reflected in brackets (e.g. B1 (B2/C)). Wherever possible the percentage of the settlement falling into different categories should be reflected (e.g. 70%B1, 20%B2, 10%C). Once instituted, the level of land use should also be spatially reflected in the SDF (i.e. TDA or IDA1 or IDA2) and the related land use protocols also made publically available. Once land has been acquired and there are full layouts in place demarcating each residential site (i.e. at the level of IDA2), then these layouts should also be reflected in the municipality’s ‘package of plans’.

New Incremental Land Use Categories

Three new levels of land use category have been proposed in the new policy. For each land use category, the land use arrangements are set down in terms of the planning arrangements, essential municipal services, land, tenure, buildings and essential social services (refer to the Policy for more details in this regard). The main basis for upholding ‘rules’ relating to land use categories will be social process, constructive engagement and social compact arrangements (as opposed to legal enforcement).

- a. Temporary development area (TDA): This would be applicable to category B2 settlements or portions of settlements (i.e. deferred relocations). The priority should be on the mitigation of imminent health and safety threats (e.g. fire, flooding, solid waste, sanitation) and provision of emergency basic services (e.g. communal ablutions and standpipes, fire protection and solid waste management, early flood warning or flood attenuation measures etc.). The level of investment will be affected by the expected delay until relocation can be achieved. In some cases, it is accepted that there will be a delay of many years. If the delay is long (e.g. more than five or ten years) and provided solutions can be found which enable the prevailing risks on the site to be adequately managed, then it may be appropriate for a B2 settlement (or portion of a settlement) to be re-categorized as a B1.

- b. Incremental development area level 1 (IDA1): This would be applicable to all category B1 settlements or portions of settlements (i.e. incremental, in-situ upgrades) as a minimum, 'entry-level' land use category. This should be regarded as a temporary, incremental planning solution. The level of service would typically be higher than for TDA1, services should be undertaken in such a way as to minimize abortive costs and form part of longer term permanent solutions, and efforts should be made to rework space to create main access ways (also known as re-blocking or the provision of a 'services frame').
- c. Incremental development area level 2 (IDA2): This land use level should be assigned as a next phase for category B1 settlements and may be regarded either as an interim arrangement leading to full formalization or else as an alternative 'less-formal' permanent or semi-permanent solution in and of itself, especially on sites where formal town planning and township establishment are not viable in the medium to long term (e.g. due to topographic constraints or high settlement densities). Assignment of IDA2 should be considered once the following preconditions have been achieved: once land has been acquired; once there is a detailed settlement layout (as household/site level); and subject to other social preconditions such as a list of all resident households and the absence of local contestations (e.g. relating to sub-rentals). This land use assignment should enable the possibility of incremental individual tenure solutions once they have been developed (e.g. a municipal certificate of occupation linked to a GPS point once land has been acquired and a municipal tenure certificate once there is a full layout and each certificate can be linked to a specific residential site boundary and occupying household).

Crosscutting land use norms for all settlements

Additional norms and protocols which should apply to all informal settlement land use types and which should also be supported by social processes and preferably reflected in social compacts at least for category B1 settlements and preferably also for B2 settlements where social conditions permit:

- *Payment for services*: Residents should be expected to pay for certain services. Currently the only service residents pay for is electricity (once their informal structure is connected). Other shared services such as communal ablutions and solid waste collection are currently provided free of charge. The cost of operating maintaining services within informal settlements is high and financially unsustainable for the Municipality and new solutions need to be explored.
- *Illegal connections*: Residents should desist from illegal connections including to the municipality's electrical, sewer or water grid. This relates closely to the issue of payment for services and operational sustainability thereof.
- *Further occupation of land*: Residents should assist the municipality in preventing further occupation of land and further densification of the settlement, especially where the settlement is already dense and further settlement makes servicing and upgrading more difficult. This includes leadership immediately reporting any new settlement to the Municipality's Land Invasion Unit and working constructively with the Unit.
- *Responsible use of municipal services*: Residents should use municipal services responsibly and with appropriate care (e.g. avoid throwing foreign matter into toilets, desisting from vandalism and illegal connections etc.). Community leadership should report incidents of vandalism or faults with services immediately to the Municipality and assist in discouraging such behaviour. Local, community-based maintenance approaches can be considered to assist in achieving this objective.
- *Solid waste*: Residents must ensure that their own household solid waste is placed in black rubbish

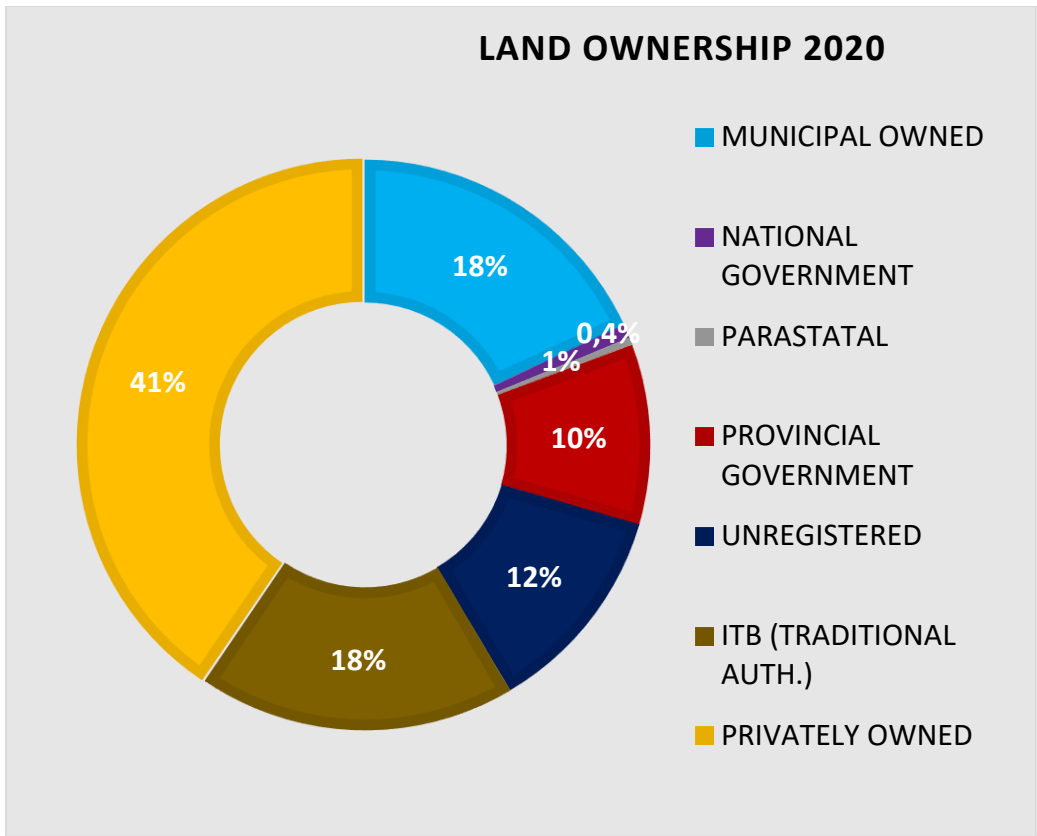
bags and moved to the nearest municipal collection point either inside or on the edge of the settlement. The Municipality will assist wherever possible in providing a certain number of black plastic bags to resident households and might in some cases assist with extracting solid waste from inside the settlement to the main collection point (subject to funding and resource availability), but the primary responsibility remains with each household to manage its solid waste responsibly.

- *Building materials:* Residents should desist from using highly flammable building materials such as plastic and cardboard. At IDA2, it should be agreed that residents endeavour to build to a higher standard (e.g. either using the norms for BNG housing where sites are relatively flat or else using the lightweight wood-frame housing typology recently developed for steep slopes in eThekweni and noting that the double story variations of this new typology in dense settlements can liberate space for services and access ways). Standard designs for selected typologies should be provided by the municipality to residents. Consideration should be given to establishing a PHP-type housing support programme to enable residents to build higher quality housing for themselves (subject to funding and resource availability).

Land ownership challenges

There are large numbers of settlements in the municipality, 41% of which are on private land (and 59% if Ingonyama Trust Board land is included). It is therefore impossible to acquire land before providing services (land acquisition even by means of expropriation is slow and very costly and service provision can't wait). Most settlements are old and well established with owners no longer enjoying beneficial use of their land

OWNER CATEGORY	AREA HA	% AREA
MUNICIPAL OWNED	1 791	18
OWNER CATEGORY	81	1
PARASTATAL	43	0
PROVINCIAL GOVERNMENT	1 010	10
UNREGISTERED	1 195	12
ITB (TRADITIONAL AUTH.)	1 786	18
PRIVATELY OWNED	4 016	41
TOTAL	9 920	100



Senior Counsel Legal Opinions regarding private land

Two Senior Counsel Opinions commissioned regarding the provision of Municipal services on private land which have informed the land rights and incremental planning approach adopted by the Municipality

SC Rosenberg opinion 2017: This opinion confirmed the both the rights and obligations of government (municipalities) to fund and provide basic/essential services (in advance of land acquisition) subject to there being a structured and transparent planning process which includes, at a minimum: settlement categorization; designation in the SDF; notification of landowners; the development of a bylaw for incremental development areas as a parallel process; establishment of a land acquisition programme as a parallel process. The Opinion was informed by extensive Constitutional and High Court precedent, Constitutional rights as well as the upgrading context and pressures in Metros such as eThekweni. Key findings of and extracts from the opinion follow:

- ***“the general constitutional duty to render these services is imposed upon local government regardless of the identity of the landowner, and subject only to the limitations of the legislative and regulatory framework for local government”***
- ***“In principle, the constitutional and statutory framework which has been outlined above and which pertains to local government permits the installation of essential services for informal settlements, where there is an urgent need for such services, in the case of privately-owned land.”***
- ***“The provision of services is part of (the municipality’s) constitutional and statutory obligations and would constitute a normal restriction on property use or enjoyment as found in open and democratic societies. This would not in the ordinary course constitute a deprivation of property rights.”***
- ***“The purpose of the constitutional obligation placed on local government to render services is to promote the public interest and socio-economic development and the other objectives of local***

government which have been referred to above. **Given that the private property is already occupied and cannot be used by the owner for its intended purpose in the medium to long term, the extent of any further deprivation is limited.** The installation of services does not remove the right to use and enjoy the property. That has been forfeited as long as the land is occupied.”

- “This does not mean that incremental upgrades cannot be undertaken without expropriation having first taken place. What it does mean, however, is that **the provision of permanent infrastructural services on private property can in most instances only be justified where there is a recognition of the permanent status of the informal settlement and the consequent obligation on the local authority to acquire the land in due course.**”
- “This does not mean that incremental upgrades cannot be undertaken without expropriation having first taken place. What it does mean, however, is that **the provision of permanent infrastructural services on private property can in most instances only be justified where there is a recognition of the permanent status of the informal settlement and the consequent obligation on the local authority to acquire the land in due course.**”

SC Annandale opinion 2019: Key findings and conclusions of this additional legal opinion are outlined below:

- The **registration of statutory servitudes based on an appropriate bylaw** emerges as a solution for the Municipality in *balancing* various rights and obligations and also affording additional protection for the municipality from any potential legal challenges from landowners (even though these have not so far emerged as a being a problem in eThekweni). Such servitudes are established by means of a bylaw and as such do not require registration in the Deeds Office as for normal servitudes. This is as per precedent in the Telecommunications sector (e.g. regarding cell phone masts) – Section 22 of the Electronic Communication Act.
- The provision of essential services may or may not be construed to constitute deprivation of property (it may well be that in many instances and given the context any such deprivation may ‘marginal’), but if it were deemed as such, then it cannot be arbitrary and needs to be both procedurally and substantively fair.
- Given that the current bylaws are not adequately tailored to incremental upgrading and essential services provision, **“It is therefore necessary for [the municipality] to enact a new bylaw which will expressly give it the right to enter upon private land and erect the services by way of the creation of a statutory or public servitude akin to that created by section 22 of the ECA and section 12 of the KwaDukuza Municipality Electricity Supply Bylaws.**

Solutions for dealing with private land

Based on the aforementioned legal opinions, it is envisaged that the Municipality will continue to provide basic/essential municipal infrastructural services for informal settlements on private land in B1 and B2 categories in advance of land acquisition subject to:

- a. Settlements having been categorized.
- b. Categorisation having been reflected in the SDF (or at least in progress).
- c. Notice having been served on the landowner, a period for response given and any objections considered and noted.
- d. A land acquisition programme being in the process of establishment.
- e. A statutory servitude having been established (or in the process of establishment) to protect municipal services.

It is desirable that the new incremental planning procedures be adopted as soon as possible since they set out and establish the municipal planning process regarding incremental upgrading and demonstrate that the municipality is proceeding in a rational, considered and planned fashion as opposed to acting in an arbitrary manner. They also demonstrate that the Municipality has taken into consideration the need to balance its constitutional obligations regarding the provision of basic services to the urban poor with a responsible approach to private land rights.

Notices to private landowners

Appropriate notices to private landowners must be utilized in cases where land has not yet been acquired. Historically eThekweni Municipality used notices based on the now defunct Municipal Ordinance. Based on more recent legal opinion, and the guidance of eThekweni's Legal and Human Settlements Units, a revised and improved notice has been developed. Once the envisaged bylaw for a statutory servitude is in place, a revised notice will be necessary in line with the new bylaw.

At a minimum, all private landowners of land on which category B1 and B2 settlements are located should receive notice which at a minimum:

- Indicates the intention to provide basic services and the nature of such services;
- Establishes the Municipality's right to construct, operate and maintain the services;
- Indemnifies the landowner from liability arising from the construction and operation of the services and from any maintenance thereof and in respect of any related environmental issues;
- Stipulates that the services provided remain the property of the Municipality;
- Stipulates that the landowner may not impede the provision of the services;
- Stipulates that the landowner has 30 days in which to lodge an objection
- Disavows any right of the Municipality to reclaim from the landowner any costs of removing any hazards or dangers on the site.

Ideally, the notice will hopefully in future indicate: the categorization of the settlement; the developmental trajectory for the particular category; the implications for the landowner, residents and municipality (as drawn from land use arrangements). Ideally the notice would thus also indicate (or reference) how compensation would be dealt with (i.e. by means of a parallel land acquisition programme). Much of this information would in any event be covered via an incremental upgrading bylaw for which there would be a process of public notice/comment (if such a bylaw is opted for in addition to these standard operating procedures.

Statutory servitudes

The use of statutory servitudes has been proposed (based on legal opinion) in order to afford additional protection to municipal infrastructure installed on private land. A statutory servitude established by means of a municipal bylaw does not require registration in the Deeds Office. The bylaw, combined with a suitable notice to a landowner, brings the statutory servitude into effect. This is as per precedent in the Telecommunications sector with cell phone masts on private land. Such notices would be served on all landowners on category B1 and B2 settlements where municipal services are intended. Whilst landowners are afforded the opportunity to object, and whilst the municipality is obliged to consider the merits of such objections, objections need not prevent the services from being installed and the servitudes being established. Servitudes are not registered in the Deeds Office but are established directly via the bylaw and notice. The process of drafting a bylaw which will establish a statutory servitude over municipal service lanes in informal settlements is well underway.

Land acquisition

It is envisaged that the Municipality establish a land acquisition programme for informal settlement upgrading in terms of which it identifies all land currently occupied and required for settlement (i.e. categories A and B1) as well as any additional land required for decanting whether via formal green-fields housing or serviced land release or TRAs (the latter being regarded as a last resort). This land acquisition programme should run in parallel with incremental upgrading and the provision of essential/basic services. The budget requirements and timeframes for acquisition should be determined. The scale and rate of delivery of the programme will be subject to resource constraints and budget prioritization amongst other factors. It is accepted that the costs associated with such a programme will be substantial and the programme will take many years to complete, noting that there are many competing budgetary pressures and that the provision of basic services to settlements should in general take precedence over land acquisition given the severity of health and safety threats which pertain in most settlements (e.g. relating to fire, disease, flooding, solid waste etc.) and the scale of settlements and affected households. It is also recognized that expropriation is a slow process and that further guidance is still expected from national government regarding expropriation at reduced or nil compensation and how this will be implemented on urban land which is informally settled.

Flexible developability 'envelope' for category B1 settlements

It is accepted that many informal settlement sites, whilst not ideal in terms of such factors as slope and population density, are nonetheless appropriate for incremental upgrading (category B1), accepting that many such settlements are well-located, old and well-established, and that there is a lack of alternative, suitably-located land for relocations. Although some of these sites are significantly constrained, there may be the potential for certain constraints to be mitigated and/or managed and/or overcome. Subject to further technical studies, it is therefore accepted that a more flexible 'developability envelope' should be considered for such category B1 settlements along with an IDA1 or IDA2 land use designation. In addition to a more flexible services 'envelope' (e.g. partially pedestrianized layouts and shared services), additional site constraint flexibility may be considered in respect of:

- *Steep slopes*: Slopes steeper than 1:3 (18 degrees) subject to appropriate storm-water controls, geotechnical and slope stability assessments, use of alternative housing typologies etc. (and noting that some areas as steep as to 1:1.5 (33 degrees) have been settled for long periods of time).
- *Floodlines*: areas within 1:100 or 1:50 year flood-lines - subject to further floodline assessments/delineations and appropriate risk mitigation/management measures.
- *DMOSS*: Consideration of relaxation of DMOSS designation strictly on a case-by-case and subject to vegetation studies and other environmental assessments and also taking into consideration the potential to reduce environmental impacts (e.g. solid and faecal waste contamination of streams and soil erosion) through the provision of improved engineering services on already-disturbed land.
- *Non-hazardous servitudes* (e.g. road, water and sewer servitudes): Relaxation of these where there would be no resultant health and safety impact or other material risk for the management/maintenance of municipal services.

Functional tenure security

Formal tenure (title deeds) is not viable in informal settlements due to a lack of formal town planning arrangements amongst other constraints. The following functional tenure security arrangements are therefore proposed:

For all settlements: Initially administrative recognition (non-individual functional tenure) which confers freedom from arbitrary eviction and is related to the categorisation of the settlement. Where possible, a list of residents linked to structure numbers should also be maintained in order to prevent further expansion of the settlement and manage any future relocation processes (where applicable). This list also affords greater functional tenure security to those residing on the site. It is however recognized that the social conditions in certain settlements may prevent such a list from being drawn up.

For category B1 settlements: Consideration should be given to establishing locally-administered forms of individual, incremental tenure when and the necessary capacity and systems have been established for local administration. These may include a municipal certificate of occupation (and once incremental planning arrangements are in place and there is a GPS point for each structure/households) and/or a municipal tenure certificate (once land has additionally been acquired and there is a full layout with a demarcated site boundary for each occupied site). The development and implementation of these innovations will be subject to technical solutions, local capacity and funding.

The potential for the utilisation of such locally-administered form or tenure on formal housing developments (category A settlements) will also be explored when funding and other resources permit, in order to reduce the high incidence of un-registered transfers of land and the high cost of transactions of formal property transactions.

Social compacts

As a general rule, social compacts are important in the context of incremental upgrading in terms of supporting land use arrangements (e.g. levels of service, responsible use of services, payment for services, tenure etc.). This is because the Municipality is not in a position to enforce land use 'rules' in informal settlements in the same way as is possible in formally developed areas. The use of social compacts is stipulated as national upgrading policy by the NDHS and NUSP and are now essential business plan requirements for UISP project pipelines and related HSG or USDG budget allocations. Social compacts should be regarded as essential on all category B1 settlements and highly desirable for category B2 settlements, except where social conditions do not permit (e.g. there is a high level of local contestation, problematic informal tenure conditions such as 'shack-lords', local instability etc. which may trigger unintended and severe negative social impacts such as violence and resultant dislocation of resident households).

Learning and way forward

eThekwini and PPT, collaboratively through the iQhaza Lethu Programme, have made ground-breaking strides in systematically addressing a range of incremental planning and tenure security solutions. The Incremental Planning Policy (Standard Operating Procedures) is the first of its kind in South Africa and will assist other Municipalities and National Government in overcoming a range of planning and tenure barriers which currently constrain the scaling up of incremental upgrading. Certain aspects of the Policy (e.g. the representation of settlements in the Municipality's SDF and the use of notices to private landowners) are already being implemented. The remaining elements will be implemented once the Policy is adopted early in 2021 along with the overall Incremental Upgrading Policy and Strategy/Programme Description of which it forms part. Various aspects of it will also be tested through certain of the iQhaza Lethu pilot projects (e.g. in respect of applying new land use categories).