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To whom it may concern,

**RE: NDIFUNA UKWAZI'S SUBMISSION ON THE DRAFT WESTERN CAPE  
INCLUSIONARY HOUSING POLICY FRAMEWORK**

1. Ndifuna Ukwazi is a non-profit activist organisation and law centre that combines research, organising and litigation in campaigns to advance urban land justice in Cape Town. Our primary mission is to expand and protect access to affordable housing towards realising a more equal, spatially just and inclusive city.
2. On 14 May 2021, the Western Cape Provincial Government ("the Province") published its draft Western Cape Inclusionary Housing Policy Framework ("the Policy Framework"), that seeks to support municipalities within the Province to develop their own inclusionary housing policies, and invited interested parties to comment and/or object to this draft by 13 July 2021.
3. Since 2017 Ndifuna Ukwazi, along with other civil society organisations and activists, has leveraged the public participation processes that exist in the land use process to campaign

for inclusionary housing as a form of urban governance of land markets in Cape Town. This strategy has aimed to achieve greater equity through compelling the City of Cape Town (“the City”) to adopt its own inclusionary housing policy. We have been campaigning for inclusionary housing as a targeted tool to respond to racial exclusion, to address various aspects of the housing problem and to regulate the private sector.

4. Ndifuna Ukwazi has read and considered the Province’s invitation to comment, as well as the Policy Framework, and makes this submission to the Province in accordance with the invitation to submit written comments.
5. Ndifuna Ukwazi welcomes the introduction of the Policy Framework and its aims to further the Spatial Planning and Land Use Management Act 16 (2013) (“SPLUMA”) principles of spatial justice, sustainability and efficiency; “[t]o assist municipalities and promote consistency” across the province and to “build public support for inclusionary housing.”<sup>1</sup>
6. We provide in our submission an outline of our concerns with the draft Policy Framework with the objective of seeing an improved and strengthened Framework urgently in place in the Western Cape. Our concerns centre around who will truly benefit from inclusionary housing, and the need for the Policy Framework to be clear and intentional about racial targeting and deeper affordability to ensure spatially just municipal inclusionary housing policies.
7. In summary, Ndifuna Ukwazi’s broad recommendations are as follows:
  - 7.1. The Policy Framework should be amended to reflect a racially targeted approach which prioritises Black families<sup>2</sup> for the affordable units generated out of inclusionary housing policies.

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<sup>1</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 7.

<sup>2</sup> Save as otherwise stated, ‘Black people’ refers to, and includes African people, people of Mixed Descent and classified as ‘Coloured’ under the apartheid system, and Indian people (as per the definitions in equity legislation such as the Employment Equity Act, 55 of 1998).

- 7.2. The Province should lower the upper affordability threshold of R22,000 and take a stronger position on the need for income brackets to further break down this broad category. There should be a proportional spread of households across the income bands (based on the number of people falling into the various brackets in a specific context) to ensure that municipal policies provide truly affordable housing.
- 7.3. The Policy Framework must take full cognisance of both the impact of rates, levies and taxes on ensuring truly affordable housing particularly as well as the impact of the COVID-19 pandemic and the resultant economic downturn on what is affordable.
- 7.4. The Policy Framework must be clear that municipal policies must ensure that inclusionary housing units are affordable in perpetuity.
- 7.5. The Policy Framework should provide clearer recommendations and guidelines to municipalities on the details of when which form of contributions should be made (on-site, off site and fees in lieu) to ensure municipal policies that create well-located affordable housing.
- 7.6. The Province must provide interim guidelines for municipalities to implement in lieu of policy, or while policy is being developed.
- 7.7. The Policy Framework must outline recommended time frames based on international experience for the drafting of municipal policies, to ensure timely policy drafting and support the ability of civil society to hold municipalities accountable through the drafting process.

- 7.8. If the Province continues with a land value capture framing, the Policy Framework must provide the clear legal mandate for this mechanism to avoid legal challenges.
  - 7.9. An implementation plan for the Policy Framework is included to ensure follow through action, at least from the Province.
  - 7.10. The Policy Framework should outline the additional resources and support that the Province can develop or resource in order to assist municipalities implementing well-crafted and spatially just inclusionary housing policies.
  - 7.11. The Province should investigate international best practice in terms of management and stewardship of inclusionary housing units in order to understand both the risks of placing private developers as profit driven actors in this role, as well as the management and stewardship solutions that have been established elsewhere.
8. Please see attached our submission to the Draft Western Cape Inclusionary Housing Policy Framework.

Yours faithfully,

**Ndifuna Ukwazi**

**(Per: Jonty Cogger, Attorney and Robyn Park-Ross, Researcher)**

**[Sent electronically]**

## NDIFUNA UKWAZI'S SUBMISSION ON THE DRAFT WESTERN CAPE INCLUSIONARY HOUSING POLICY FRAMEWORK

### A. INTRODUCTION

1. As mentioned in our cover letter, Ndifuna Ukwazi is a non-profit activist organisation and law centre that campaigns to advance urban land justice in Cape Town through research, organising and litigation. Our primary mission is to expand, promote and protect access to affordable housing towards building a more just and equal city.
2. Over the last six years Ndifuna Ukwazi has been involved in legal, research and organising work around evictions, relocations, rental housing, the allocation of state-subsidised houses, and the promotion of social, transitional and inclusionary housing. We have been involved in a series of important court cases dealing with land occupations, evictions, the provision of alternative accommodation, and the state's constitutional and legislative obligation to combat spatial apartheid and promote spatial, economic and racial justice and equality through expanding access to affordable housing.
3. It is from this perspective that Ndifuna Ukwazi has considered the Province's Western Cape Inclusionary Housing Policy Framework ("Policy Framework") and makes this submission.
4. At the outset, we welcome and support the introduction of the Policy Framework. We are particularly encouraged by the efforts of the Province to "better enable inclusionary housing as a mechanism to contribute towards spatial transformation in the Western Cape with a focus on its towns and Cape Town.<sup>3</sup>" Ndifuna Ukwazi is strongly in support of measures that will assist in urgently seeing inclusionary housing policies implemented in the relevant towns and cities within the Western Cape.

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<sup>3</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 7.

5. However, despite the bold intentions of the Province's Policy Framework, we have some concerns that centre around who will truly benefit from inclusionary housing.
6. Our submission is structured based on the the essential elements of any inclusionary housing policy:
  - 6.1. First, inclusionary housing must provide greater access to land and housing for those who need it the most,
  - 6.2. Second, it must be affordable,
  - 6.3. Third, it must be affordable in perpetuity,
  - 6.4. Forth, it must be well-located,
  - 6.5. Thereafter, we raise some additional comments, and
  - 6.6. Finally, we provide concluding remarks.

## **B. INCLUSIONARY HOUSING MUST PROVIDE GREATER ACCESS TO LAND AND HOUSING FOR THOSE WHO NEED IT THE MOST**

7. Twenty-seven years after apartheid, racial and class exclusion remains a persistent barrier to access to equitable services. The legacy of spatial inequality in many towns and cities in the Western Cape means that the majority of Black<sup>4</sup> residents live in densely populated under-resourced townships, informal settlements on the periphery of

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<sup>4</sup> Save as otherwise stated, 'Black people' refers to, and includes African people, people of Mixed Descent and classified as 'Coloured' under the apartheid system, and Indian people (as per the definitions in equity legislation such as the Employment Equity Act, 55 of 1998).

the city; while wealthy mostly White residents live in well-resourced, low density, well-located areas.

8. In this context, access to an affordable home in good locations - close to jobs, hospitals, good public schools and other social amenities - remains an unrealised pipedream for the majority of the working class. For instance, nurses, police officers, firefighters, and government employees - despite playing an essential public role - are forced to live far from work opportunities in areas more prone to gangsterism, poverty and crime.
9. The lasting effect of living in peripheral locations is to trap the poor in a cycle of poverty, by reducing access to educational opportunities, and making jobs harder to find and keep. Toilets are temporary, water is shared, schools have worse outcomes, gangs and violence are rife, public facilities such as hospitals and police stations are under-resourced and jobs are hard to find and keep. Poor and working class people spend a significant portion of their limited income on unsafe and unreliable public transport to work. In Cape Town, low-income earners spend on average 45% of their income on commuting compared to a global average of 5 -10%.<sup>5</sup> Given the layout of segregated towns and cities as a result of apartheid era planning and the Group Areas Act, we can reasonably conclude that the resultant problems of disproportionate hours commuting, more congestion, pollution on the roads and an unsustainable dependent economy. also arise in other municipalities in the Western Cape.
10. This inverse densification and urban sprawl costs poor and working-class families more everyday and costs the local municipalities more in the long term. It is unsustainable socially, economically and environmentally. Quite literally, where one lives determines the opportunities one can access, the quality of services one receives, and one's enjoyment of fundamental human rights.
11. The state's response to the need for affordable public housing has been to provide it on the urban periphery. Government-subsidised housing, which prioritises the *number* of

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<sup>5</sup> City of Cape Town Transport, Transport Development Index, 2016.

units built over their *location*, has focused primarily on cheaper land. And cheaper land, generally, means poorly located land.

12. While it is understandable that the state would try to maximise the number of housing units it is able to provide, this approach has had two problematic consequences:

12.1. First, the provision of state-assisted housing alone is simply insufficient to meet the backlog. In 2019, the Western Cape provincial housing backlog stood at over 600,000 families, of which 365,000 are in the Cape Town alone<sup>6</sup> while the current rate of government subsidised housing delivery is roughly 6,000 units per year.<sup>7</sup>

12.2. Second, because the delivery of housing is not in well-located areas, it entrenches spatial inequality. It puts more and more poor, working-class Black people on the urban periphery, away from access to opportunities. And it deepens the segregated nature of the city.

13. The Constitution and the Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”) clearly establish a firm mandate for local municipalities to address the legacy of spatial apartheid that is rooted in racial and economic exclusion. The preamble of the Constitution states this mandate in affirmative terms in the commitment to “Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”<sup>8</sup> This mandate stems from the acknowledgment that segregation and land deprivation were cemented and effected through land use management schemes and other spatial planning mechanisms and laws during the colonial and apartheid eras. The Constitution expressly recognises South Africa’s history of forced removals and landlessness in the property clause

<sup>6</sup> Shamiela Fisher ‘CITY OF CT COMMITTED TO TACKLING HOUSING BACKLOG’ (2019) Eyewitness News, <https://ewn.co.za/2019/02/25/city-of-ct-housing-backlog-sits-at-365-000-continues-to-rise-mayor>

<sup>7</sup> Centre for Affordable Housing Finance in Africa ‘Cape Town Housing Market Report 2020’ (2020)

<sup>8</sup> Preamble of the Constitution, 1996.

(section 25), and places obligations on the state to proactively redress past injustice in relation to land and housing.

14. This is clearly evident in several provisions of SPLUMA, but importantly in that it gives effect to two fundamental rights in the Bill of Rights, namely: section 25(5) of the Constitution which requires the state to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis; and section 26(1) of the Constitution which provides for the right to access adequate housing. In terms of section 26(2), the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
15. SPLUMA requires that, “spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons.”<sup>9</sup> Importantly, land use schemes must “include provisions to promote the inclusion of affordable housing in residential land development.”<sup>10</sup>
16. Moreover, the Western Cape Land Use Planning Act 3 of 2014 (“LUPA”) requires that “past spatial and other development imbalances should be redressed through improved access to and utilisation of land”<sup>11</sup> and that “spatial planning mechanisms, including zoning schemes, should incorporate provisions that enable redress in access to land by disadvantaged communities and persons.”<sup>12</sup>
17. The principle of spatial justice requires that unlimited residential development in well-located areas that do not have regard to the imbalances of past racial and class exclusion is detrimental to the vision of people-centred, inclusive and sustainable human settlements. The provision of affordable housing in well-located areas is

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<sup>9</sup> Section 7(a)(iii), Act 16 of 2013.

<sup>10</sup> Section 24(2)(d), Act 16 of 2013.

<sup>11</sup> Section 59(1) (a), Act 3 of 2014.

<sup>12</sup> Section 59(1) (c), Act 3 of 2014.

therefore essential to the underlying SPLUMA'S (and LUPA's) vision for spatially just cities.

18. We would submit that the intended purpose of town planning legislation in the post-apartheid era must be to break with past racially discriminatory planning practices by **incorporating** previously excluded informal settlements and bantustans into the planning system and **redressing** the inequality in access to land-based opportunities. These two goals (namely inclusion and redistribution) are key to understanding the role of inclusionary housing within the municipal zoning scheme.
19. This mandate should be also viewed in the context of how colonial and apartheid era state actors (including spatial planners) relentlessly wielded zoning systems as a tool for racial oppression and segregation, with the result our communities are still segregated from one another by race and class. In stark comparison, post-apartheid state actors have largely failed to meet this by enacting and implementing concrete plans to redress centuries of spatial inequities.
20. It is thus undeniable that SPLUMA and LUPA intends to adopt a transformative vision for spatial planning and land use management as a break from the past, and thus intends for local municipalities to dismantle **systemic racism in the built environment**.
21. A well-crafted inclusionary housing policy has the potential to both expand the supply of affordable housing while simultaneously promoting social, racial and economic inclusion. However, the success of inclusionary housing will hinge on the ability of the municipalities' and Province's policy to get the details of how much housing, how affordable, for how long and for who.
22. In light of the concrete mandate to reverse spatial apartheid, we submit that in order to effectively advance the joint constitutional rights of adequate housing and equitable access to land, an inclusionary housing policy - at any level - should promote these broad principles:

- 22.1. It must advance the **right to housing** for residents. It should be targeted at residents **who need housing the most**. These are residents who are cannot access or sustain housing through an unregulated property market, are vulnerably housed, facing eviction and displacement or do not yet have decent homes;
- 22.2. It must respond to existing racial and spatial inequalities by increasing opportunities for families who have been excluded on the basis of race, and in the Western Cape, predominantly Black families. It should provide **access to housing** for people who were forcefully removed, displaced, denied or dispossessed of land and housing. It should contribute to racially diverse and mixed income buildings and precincts;
- 22.3. It must be appropriate for a **range of household sizes** and not only singles or couples. The size should not exclude the majority of households which are between 3 and 5 people, and welcome children, and women headed households.

### ***Racial targeting***

23. Inclusionary housing units should be racially targeted, increasing opportunities for families excluded from well-located affordable homes on the basis of race. Inclusionary housing should be a tool to correct racial segregation in our towns and cities. The Policy Framework does recognise the need for inclusionary housing to provide for a diversity of people who will benefit, including saying that municipalities should look at how their policies can benefit women, the youth and people living with disabilities.<sup>13</sup>
24. It also does recognise the need for “a fair, or better, a *pro-poor*, distribution of units across income bands within the affordable housing target range [as] important for ensuring a diverse range of beneficiaries who are representative of *groups historically and presently*

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<sup>13</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 30.

*marginalised from living in the better located parts of our cities and towns. Consideration should also be given to local households currently being pushed out of gentrifying areas.”<sup>14</sup>*

25. Despite a clear recognition of the need to benefit vulnerable groups of people, the Policy Framework is silent on the need for inclusionary housing to be racially targeted to break down persistent apartheid segregation. It raises the legitimate question of whether inclusionary housing can effectively correct the wrongs of the past if it does not squarely address the most dominant societal feature - entrenched racial and spatial inequality.
26. There are a number of important reasons, listed below and otherwise, why a clearly stated racially targeted policy in terms of intended beneficiaries is necessary:

26.1. *First*, SPLUMA sets out clear obligations to address racial inequality in access to land and housing opportunities. While SPLUMA does not give effect to section 9(2) of the Constitution,<sup>15</sup> which is the constitutional basis for affirmative action legislation (including the Employment Equity Act, 1998 (EEA)) and Broad-Based Black Economic Empowerment Act, 2003 (BBBEA), it does specifically give effect to section 25(5) of the Constitution, which mandates the state to “take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”<sup>16</sup>

26.2. It is undeniable that section 25(5) of the Constitution has an equality remedial / restitution function, which is similar, or comparable to, the mandate imposed in terms of section 9(2) of the Constitution. This is especially true when you compare the preambles of the SPLUMA, the EEA and the BBBEA.

<sup>14</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 29.

<sup>15</sup> Section 9(2) of the Constitution states: “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

<sup>16</sup> Section 25(5) of the Constitution.

- 26.2.1. *The preamble of the EEA* states that: “Recognising - that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.”<sup>17</sup>
- 26.2.2. *The preamble of the BBEEA* states: “Whereas under apartheid race was used to control access to South Africa’s productive resources and access to skills; Whereas South Africa’s economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills; Whereas South Africa’s economy performs below its potential because of the low level of income earned and generated by the majority of its people; and whereas, unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race.”<sup>18</sup>
- 26.2.3. *The preamble of SPLUMA* states: “Whereas, many people in South Africa continue to live and work in places defined and influenced by past spatial planning and land use laws and practices which were based on- racial inequality; segregation; and unsustainable settlement patterns ... Whereas, the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities; And Whereas, it is necessary that - a uniform, recognisable and comprehensive system of spatial planning and land use management be established throughout the Republic to maintain economic unity, equal opportunity and equal access

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<sup>17</sup> Preamble of the Employment Equity Act, 1998.

<sup>18</sup> Preamble to the Broad-Based Black Economic Empowerment Act, 2003.

to government services; the system of spatial planning and land use management promotes social and economic inclusion.”<sup>19</sup>

- 26.3. While this is uncharted territory in terms of remedial measures in spatial planning law, we are of the opinion that SPLUMA creates a mandate to redress race-based inequalities. This does not mean that other eligibility criteria should be discounted, however the explicit reference to race in SPLUMA cannot be ignored, as the Policy Framework has done. To this end, we would strongly advise against “class” being used as a proxy for “race” in this context.
- 26.4. However, given that remedial / restitution measures, including a municipal inclusionary housing policy, adopted pursuant to SPLUMA fall outside of the ambit of section 9(2) of the Constitution (that establishes a clear mandate for measures like the EEA and BBBEA), it would be necessary to establish whether such measures amount to unfair discrimination in terms of section 9(3) of the Constitution that states: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”<sup>20</sup>
- 26.5. The test for unfair discrimination has been firmly established in *Harksen v Lane NO*,<sup>21</sup> which sets out a two-fold test: (1) does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established; (2) if the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed; and (3) If the unfair discrimination arises out of a law of general application, is it justified?<sup>22</sup>

<sup>19</sup> Preamble to Spatial Planning and Land Use Management Act, 2013.

<sup>20</sup> Section 9(3) of the Constitution.

<sup>21</sup> 1998 (1) SA 300 (CC).

<sup>22</sup> *Ibid* at para 53.

- 26.5.1. In terms of step one of the above test, a local municipal inclusionary housing policy that seeks to benefit Black people, women, the youth, and people living with disabilities would amount to discrimination on the grounds of race, gender, age and disability.
- 26.5.2. In terms of step 2, the above discrimination would be presumed unfair, which imposes a rebuttable presumption on the state to refute. In *Harksen v Lane NO and Others*, the Constitutional Court distilled three criteria to guide the enquiry into fairness: “(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not; (b) if its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important social goal, such as . . . the furthering of equality . . . this purpose may . . . have a significant bearing on the question whether the complainants have in fact suffered the impairment in question . . . ; (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.”<sup>23</sup>
- 26.5.3. Special emphasis must be paid to criteria (b) and the purpose of the measure. Such an instance would be comparable to the case of *City Council of Pretoria v Walker*<sup>24</sup> brought by a White man who alleged indirect racial discrimination in the manner in which the Pretoria City Council charged differentiated rates for municipal services in its enforcement of payment for a suburb with predominantly White residents compared to a nearby township with predominantly poorer, Black residents. The court

<sup>23</sup> *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para 50.

<sup>24</sup> 1998 (3) BCLR 257 (CC).

held that the imposition of the differentiated rates was not unfair in the context of a government duty to remove disparities in service provision to historically unequal areas.<sup>25</sup>

26.5.4. A similar conclusion on the need for redistribution was reached in *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another*,<sup>26</sup> where a provincial schooling restructuring scheme to promote equality amongst schools was found not to be unfair.

26.5.5. The benefits and goals of inclusionary housing need not be restated again, but it is obvious that a strong case could be made that it serves a legitimate public purpose in promoting equity along with other spatial planning objectives like sustainable development and resource efficiency. In short, we believe that specific selection criteria for vulnerable groups (including one based on race) is defensible.

26.6. *Second*, it would seem that the racial reservation of inclusionary housing units is an obvious and glaring omission in light of several statements about the need for equity, diversity, integration, spatial transformation, and redress. To this point, “spatial transformation” is defined as “[t]he legacy of apartheid – communities segregated from one another *based on race* (and class)...”<sup>27</sup> Moreover, “Settlement Restructuring” is defined as “the need to transform ... the Apartheid form of our urban settlements where the poorest live the furthest away from opportunities - spending the most time and money accessing these opportunities or being caught in spatial poverty traps - and residential areas are defined and separated by class and race.”<sup>28</sup> It states quite clearly that “[t]he objective is to open up opportunities for more affordable housing in identified areas and to promote more integrated communities in those areas that are less starkly divided

<sup>25</sup> *Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at para 49.

<sup>26</sup> 2002 (9) BCLR 891 (CC).

<sup>27</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 5.

<sup>28</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 5.

by income and race and more inclusive of key workers and young professionals in particular.”<sup>29</sup> With this in mind, it is not clear why the Policy Framework would skirt racial identity as a basis for selection criteria.

26.7. *Third*, and importantly, the Policy Framework has all of the hallmarks of a remedial / restitution measure designed to advance and protect rights of people and communities disadvantaged by past unfair discrimination. There is thus no reason why the Policy Framework should ignore race, or be race-neutral, if it has already identified other groupings that should take preference, such as women-headed households, the youth and people living with disabilities. An important insight from affirmative action case law is that a specific remedial measure is defensible (i.e. will be fair and rational) as long as it does not impose absolute preferences that exclude other groups.<sup>30</sup> Thus, a municipal inclusionary housing policy can explicitly benefit specified vulnerable and marginalised groups as long as it does not present an insurmountable barrier to White beneficiaries (e.g. able-bodied white male) to access a inclusionary housing unit and who fall within the eligible income category.

26.8. *Fourth*, as a matter of practical implementation, a “colour-blind” or “race-neutral” inclusionary housing policy could either be misunderstood by municipalities and developers or open to abuse, thereby eroding the stated purpose of being a pro-poor redistributive policy intervention. This is especially since the selection and allocation of units will be administered by developers with minimal oversight from municipalities.

27. With all of that said, and not diminishing the importance of clarity and purpose, we appreciate that introducing a new remedial measure where no similar regulation exists in the Western Cape is a bold and innovative move, which has the potential to cause some concern among some members of the public (especially developers) not prepared to

<sup>29</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 10.

<sup>30</sup> Du Preez v Minister of Justice and Constitutional Development & Others [2006] 8 BLLR 767 (SE).

accept that change and restructuring of the urban environment is necessary for healthy and equitable towns and cities. This should however never be a reason to avoid the right course of action and we encourage the Western Cape and all municipalities to take care to educate members of the public of these benefits so that people do not act out of fear and ignorance. **The Policy Framework must be amended to reflect a racially targeted approach which prioritises Black families for the affordable units generated out of inclusionary housing policies.**

### C. INCLUSIONARY HOUSING MUST BE AFFORDABLE

28. In this section, we argue that inclusionary housing must be *truly affordable based on incomes rather than prevailing market prices*, and in this context, would mean prioritizing households earning between R3,500 and R18,000 per month.<sup>31</sup>
29. The Policy Framework lays out that municipal inclusionary housing policies will aim to benefit *employed people in the gap market* as households that earn between *R3,500 and R22,000 monthly*,<sup>32</sup> although this may change depending on the specific demand and land market conditions in a municipality. At the same time, it defines the “Gap Market/ Housing” as “That portion of the market that (as a household) earns too much to qualify for grant housing assistance (currently > R20k per month) however too little to be able to afford a bond on an available open market unit. This also includes households whose credit worthiness is too poor to qualify for a bond, although partial state assistance may be available.”<sup>33</sup>
30. We are encouraged that the first of the three steps laid out by the Policy Frameworks for municipalities to ensure they create “evidence-led, correctly targeted and feasible to implement” policies is determining *who* should benefit by doing a Housing Market Study which determines what the housing gap is for the municipality.<sup>34</sup> This is an important

<sup>31</sup> Based on the CoCT MSDF definition of affordable housing

<sup>32</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 3.

<sup>33</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 3.

<sup>34</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 23-24.

recognition that the creation and implementation of inclusionary housing policies must always be led by the people it intends to serve.

31. However, in understanding that these studies will need to be done at a municipal level, we are concerned about who will truly be able to afford the units created from municipal policies that take their direction from the Policy Framework. We assert that;
  - 31.1. Households should not spend more than one-third of their income on rent or a mortgage,
  - 31.2. Just because a product (housing unit) is cheaper than the market, does not make it affordable,
  - 31.3. Inclusionary housing should be targeted at residents who do not earn enough to rent or own in well-located areas,
  - 31.4. Inclusionary housing should contribute to mixed class buildings and precincts, and
  - 31.5. Inclusionary housing must reach deeper to target a range of low incomes and not just the top bracket.
32. We discuss affordability concerns below by looking at the reality of the housing affordability context in Cape Town, with an understanding that this will differ in other towns and cities across the Western Cape.
33. The draft Policy Framework definition of affordability and proposed target group may result in municipal inclusionary housing policies that do not place sufficient emphasis on addressing the most pressing housing need which is located in lower income earning categories.
34. In the Cape Town context, the suggested affordability range would include a particularly large segment of the population (over 73% of the population according to the City's own

estimates or over 80% of the population according to other estimates).<sup>35</sup> The lowest income earning categories are most in need, have the least supply of housing,<sup>36</sup> face the highest competition for existing housing stock (largely due to downward raiding from middle income households),<sup>37</sup> and are most dependent on state-subsidised housing stock.<sup>38</sup>

35. The average sale price for a home in Cape Town in 2019 was R1 513 254 (the highest in South Africa) and the largest share of the Cape Town residential property market was aimed at developing luxury properties valued at over R1.2 million (41% of the market provides for the luxury property market).<sup>39</sup> In early 2019, Cape Town also registered the seventeenth highest year-on-year property inflation in the world at 9.1% (higher than any other city in Africa).<sup>40</sup> The effect of property inflation is even more worrying when delineated by market share and area. Property prices at the highest end of the market have decreased slightly, but property prices in middle-priced and lower-priced markets continue to increase.<sup>41</sup> In lower-priced markets the year-on-year inflation is “in the double digit territory.”<sup>42</sup> In practice this has meant that the number of available affordable housing units in Cape Town has actually decreased in recent years.<sup>43</sup>

<sup>35</sup> See City of Cape Town, *Draft Human Settlements Strategy*, p. 19, where the City relies on Stats SA General Household Survey data from 2015 to 2017 (it is unclear why the City chose to rely on these specific dates when more recent data is available and the context of increasing poverty and deepening inequality have become more pressing since these dates). See, in comparison, data based on the 2011 Census, NIDS 2014/2015 Household Survey and AMPS 2015 Household Survey in Centre for Affordable Housing Finance in Africa (CAHF), “Cape Town’s Residential Property Market: Size, Activity and Performance” (2018), p. 45, available: <https://housingfinanceafrica.org/app/uploads/Cape-Town-Residential-Property-Market-FINAL-REPORT-Feb-2018-2.pdf>.

<sup>36</sup> In 2020, only 19% of all residential property in the Cape Town was valued below R300 000 (a figure which is arguably already out of range of most households earning less than R3 500 a month). See, in relation to the supply of affordable housing in Cape Town, CAHF, “Cape Town Housing Market Report” (2020), p. 1; and see, in relation to the affordability levels of the lowest income category, CAHF, “2020 Yearbook: Housing Finance in Africa” (2020), p. 220.

<sup>37</sup> See CAHF, “2020 Yearbook: Housing Finance in Africa” (2020), pp. 221-222.

<sup>38</sup> In 2020, 87% of the houses valued at under R300 000 and 41% of the houses valued under R600 000 were state-subsidised houses. See CAHF, “Cape Town Housing Market Report” (2020), p. 3.

<sup>39</sup> CAHF, “Cape Town Housing Market Report” (2020), p. 1.

<sup>40</sup> Knight Frank, “Global Residential Cities Index: Q4 2019” (2019), p. 2: <https://content.knightfrank.com/research/1026/documents/en/global-residential-cities-index-q4-2019-7111.pdf>.

<sup>41</sup> First National Bank (FNB), “Cape Town Sub-Regional House Prices” (August 2019), p. 1: <https://www.fnb.co.za/downloads/economics/reports/2019/CapeTownSub-RegionalHousePricesAug.pdf>.

<sup>42</sup> FNB, “Cape Town Sub-Regional House Prices” (August 2019), p. 1.

<sup>43</sup> See CAHF, “Cape Town’s Residential Property Market”, p. 45.

36. According to 2011 Census Data, 75% of households in Cape Town earn less than R18,000 a month (the figure rises to 92% for Black households) and most people cannot afford to pay more than R3,000 a month in rent or R281,000 to own.<sup>44</sup> In 2019, Stats SA reported that the median income of a South African is R13,546 per annum, or just R1,129 per month.<sup>45</sup> These figures clearly put rent and homeownership in well-located areas close to economic nodes out of reach for most middle-class South Africans, let alone the poor or working-class. They raise concerns about the targeted income range and what working-class households actually earn and can afford to spend on housing.
37. The enduring effect of Cape Town's property bubble, beyond inflation increases in property values, and soaring rents mean that only the very wealthy can afford to live in well-located areas close to economic nodes. As a result, middle class residents and private property developers are increasingly eyeing traditionally working-class neighbourhoods – driving property prices in those areas. The overall effect has been that poor and working-class families are increasingly forced out of well-located areas to the urban periphery as a result of gentrification or large-scale evictions.
38. It is therefore concerning that the draft Policy Framework provides such a high upper threshold for affordability and fails to use measures to provide a spread of units across the wide income bracket of R3,500 - R22,000. In this omission the Policy Framework's definition of affordability and proposed target group runs the risk of developers providing only units at the top end of the affordability bracket (for example, households earning R15,000 to R22,000). For this reason, **we urge the Province to lower the upper affordability threshold of R22,000 and to take a stronger position on the need for income brackets to further break down this broad category. There should be a proportional spread of households across the income bands (based on the number of people falling into the various brackets in a specific context) to ensure that municipal policies provide truly affordable housing.**<sup>46</sup>

<sup>44</sup> See Ndifuna Ukwazi, *Inclusionary Housing: Measuring Access to Residential Development by Race and Class* (November 2018).

<sup>45</sup> Based on 2015 figures in Stats SA, "Inequality Trends Report" (2019).

<sup>46</sup> Precedent from social housing can be used as a guideline for recommended income brackets and the proportion of units that should be provided across these bands.

39. As a further consideration, the economic fall-out as a result of the COVID-19 pandemic has exacerbated existing challenges like spatial inequality, has increased the urgent need for well-located affordable housing, and has dramatically affected households' ability to afford housing in Cape Town, and across the Province. We are concerned about whether the COVID-19 impact has been sufficiently considered in the assumptions on which the Policy Framework is based. In many respects, the economic burden of the pandemic and its aftermath has been, and will continue to be, disproportionately borne by the poor and working-class. Data shows that the economic impact of the COVID-19 pandemic, the consequent economic recession and the national lockdown have led to significantly higher rates of unemployment, diminished incomes and higher rates of hunger.
40. The South African National Income Dynamics Study – Coronavirus Rapid Mobile Survey (NIDS-CRAM), a survey of a representative sample of 7,000 South Africans, found that between February and April 2020, 3 million South Africans lost their jobs, and a further 1.5 million lost their income (through being furloughed).<sup>47</sup> This represents a 18% decline in employment, with the number of employed persons dropping from 17 million in February to only 14 million in April.<sup>48</sup> The study also found that 1-in-3 (33%) of income earners in February did not earn an income in April, representing a massive decline in employment and other income generating activities.<sup>49</sup> The vast majority of these job losses were concentrated among already disadvantaged groups, including those in the informal economy, women, the youth and less educated. Women were particularly hard hit, accounting for up to 2 million of the 3 million job losses.<sup>50</sup> Concerningly, none of the people who lost their jobs between February and April were reemployed between May and July

<sup>47</sup> See NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1" (2020), p. 3, which can be found, alongside all the NIDS-CRAM working papers at the NIDS-CRAM website, available: <https://cramsurvey.org>. See also, for a summary of the results, Spaul, "The jobs reckoning is here: 3 million jobs lost".

<sup>48</sup> NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1", pp. 3-5.

<sup>49</sup> See NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1", p. 4. The NIDS-CRAM data confirms preliminary data from Statistics South Africa ("StatsSA"). See StatsSA, "Results from Wave 2 Survey on the Impact of the COVID-19 Pandemic on Employment and Income in South Africa" (May 2020), available: <http://www.statssa.gov.za/publications/Report-00-80-03/Report-00-80-03May2020.pdf>.

<sup>50</sup> NIDS-CRAM, "Overview and Findings: NIDS-CRAM Synthesis Report Wave 1", p. 5; Spaul, "The jobs reckoning is here: 3 million jobs lost".

and only half of those that were furloughed were reabsorbed into the labour force.<sup>51</sup> This indicates that the losses could be long-lasting and potentially even permanent.<sup>52</sup>

41. This economic devastation has profoundly impacted poor and working-class people's ability to pay for and retain access to housing. A nationwide survey of 80,000 tenants in South Africa, indicates that the pandemic has negatively affected the tenure security of many poor and working-class households.<sup>53</sup> The survey found that 78.8% of tenants' income has been negatively affected by COVID-19 and that this has affected tenants' ability to pay their rent. In fact, only 37% could afford to pay their rent in full and 22% could not pay their rent at all.
42. The economic impact of the COVID-19 pandemic was also unevenly distributed spatially – with people in rural and peri-urban areas (i.e. people living on the outskirts of cities in townships or informal settlements) being disproportionately negatively affected by losses in jobs and income-generating activities.<sup>54</sup> In fact, according to the second wave of the NIDS-CRAM survey people living in peri-urban areas were twice as likely to be unemployed than people living in the suburbs.<sup>55</sup>
43. These findings indicate that the COVID-19 outbreak will have a devastating impact on the right of access to adequate housing for many poor and working-class households and, consequently, heighten the urgent need for well-located affordable housing. The City has already noted a rise in households occupying vacant land out of necessity - a dynamic that clearly indicates that the property market has been unable to respond adequately to the housing needs of residents.<sup>56</sup> The altered dynamic requires an urgent rethink and a reassessment of how housing demand can be given effect to in an economic context

<sup>51</sup> NIDS-CRAM, "Synthesis Report Wave 2" (2020), p. 1, available:

<https://cramsurvey.org/wp-content/uploads/2020/09/1.-Spaull-et-al.-NIDS-CRAM-Wave-2-Synthesis-Findings..pdf>.

<sup>52</sup> NIDS-CRAM, "Synthesis Report Wave 2", p. 1.

<sup>53</sup> The survey and report were compiled in May 2020 by a residential rental proptech platform - *Flow*. See Flow, "How COVID-19 has affected South African tenants", *Flow Findings Research Report* (May 2020), available: <https://flow.rent/tenants>.

<sup>54</sup> NIDS-CRAM, "Synthesis Report Wave 2", p. 4. See also I Turok, "Four lessons to learn from the state's management of COVID-hit townships", *Business Day* (4 October 2020), available:

<https://www.businesslive.co.za/bd/opinion/2020-10-04-ivan-turok-four-lessons-to-learn-from-states-management-of-covid-hit-townships/>.

<sup>55</sup> NIDS-CRAM, "Synthesis Report Wave 2", p. 4.

<sup>56</sup> CAHF, "Cape Town's Residential Property Market: Size, Activity and Performance", p. 61.

seriously affected by the COVID-19 pandemic and, in particular, how the pandemic has affected the economic ability of poor and working-class families to afford decent, safe, well-located housing.

44. In this context, it is our view that **the Policy Framework does not take enough cognisance of the impact of rates, levies and taxes on ensuring truly affordable housing particularly in the context of the COVID-19 pandemic and the resultant economic downturn.**

#### **D. INCLUSIONARY HOUSING MUST BE AFFORDABLE IN PERPETUITY**

45. In this section we argue that inclusionary housing must be retained in perpetuity. Whether it is rental stock; or for ownership, the cost of inclusionary housing should not increase substantially higher than inflation or incomes year on year. Transparent, fair, binding, cost effective and feasible regulatory and institutional arrangements must be put in place to ensure that inclusionary housing is protected in perpetuity.
46. The draft Policy Framework indicates that “Preserving the affordability of inclusionary units is...a key policy concern.”<sup>57</sup> The Policy Framework states that inclusionary housing can be rented or owned but that either way, “the units must be provided in such a way as to ensure that they are secured as affordable housing stock over the long term, if not in perpetuity. The ‘long term’ will need to be clearly defined by the municipality.”<sup>58</sup>
47. While it is encouraging that the Province indicates that the long term affordability of the affordable units is important, ultimately the way this is framed in the Policy Framework gives municipalities full leeway to define what “long term is”. This provides a risk that municipalities will make inclusionary housing affordable for only a relatively short period of time, such as 10 years, and argue that this is long term. **The Policy Framework must be**

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<sup>57</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 6.

<sup>58</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 34.

**clear that municipal policies must ensure that inclusionary housing units are affordable in perpetuity.**

#### **E. INCLUSIONARY HOUSING MUST BE WELL-LOCATED**

48. Inclusionary housing should be developed in buildings situated in well-located areas. It should be located in areas that are growing in terms of economic investment, wealth and jobs. These areas should already have good transport links, established infrastructure and quality services such as hospitals and schools. These areas tend to be in the city centre and surrounds; along transport corridors and nodes; and given development trajectory across South African towns and cities, these are areas that were designated as “white’s only” under apartheid law. It should contribute to mixed-use buildings and precincts and a liveable, dense and sustainable city.
49. We support the form of spatial targeting outlined in the Policy Framework. The Policy Framework recommends that the whole town or city is designated as a “trigger area”<sup>59</sup> to avoid disincentivising development in well-located areas, stating that “[d]evelopments of a size above the threshold, seeking to up zone properties or seeking additional density, in this “trigger area” will be required to make an inclusionary housing contribution.”<sup>60</sup>
50. The Policy Framework then outlines that the City of Cape Town Municipal Spatial Development Framework (“MSDF”) and municipal inclusionary housing policy should then differentiate where on-site, off-site and fees in lieu are preferable. It is recommended that developments falling into restructuring zones or SPLUMA identified well-located areas should provide on-site inclusionary housing. Developments within other areas should provide off-site and fees in lieu contributions that should be directed at developing inclusionary housing in the well-located areas.

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<sup>59</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 26.

<sup>60</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 26.

51. While we support these recommendations, we are concerned about the difficulties posed by using restructuring zones as a proxy for what is well-located. While that was the policy intention, restructuring zones have been applied inconsistently and loosely across municipal areas. For this reason we recommend that additional factors are considered, including previously ‘Whites-only’ areas under apartheid and the spatial outcomes of the municipalities housing market sydt. This study can be used to assess high performing areas to ensure that redress is targeted to these areas.
52. In addition, we are concerned about the lack of detail regarding when and where off-site and fees in lieu contributions would be triggered, and where they should be provided. **The Policy Framework should provide clearer recommendations and guidelines to municipalities on the details of when contributions should be made in which format to ensure municipal policies that create well-located affordable housing.**

#### F. ADDITIONAL COMMENTS

53. In what follows, we make a few comments in addition to the substantive comments made above.

##### *Interim guidelines*

54. The Policy Framework makes it clear that interim inclusionary housing conditions are legally permissible. It states “[t]he powers granted to municipalities under the Constitution to regulate municipal planning provide sufficiently broad authority to impose an inclusionary housing requirement. Similarly, the duties and obligations of municipalities to achieve the purposes set out in the Constitution, the Housing Act and the SPLUMA support their introduction of inclusionary housing requirements.”<sup>61</sup>

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<sup>61</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 20.

55. The Policy Framework also states that while it would be desirable for a By-Law amendment to provide specific authority to impose inclusionary housing conditions (cross referenced with policy), that this is not necessary. It states: “The implementation of a municipal inclusionary housing policy is not, however, contingent on such an amendment. The existing empowering provisions of municipal planning by-laws with respect to setting conditions may, in principle, be applied in the interim. It is emphasised that, in such instances, the municipality must ensure the legality of its decision with reference to the specific application in question and the empowering provisions of its by-law.”<sup>62</sup>
56. This was confirmed by the settlement order in the matter between *The Trustees for the time being of the Ndifuna Ukwazi Trust v the City of Cape Town* (Case No.: 15767/2019) (“the Vogue Order”) where the Judge President Hlophe ordered that:
- “1. It is declared that, in terms of s 100(2) of the City of Cape Town Municipal Planning By-Law, 2015, the Municipal Planning Tribunal and the Appeal Authority are empowered to impose a condition requiring the provision of affordable housing, in accordance with the requirements of the law and having due regard to all relevant considerations.”*
57. The High Court’s confirmation of the City of Cape Town’s (“City’s”) powers in terms of section 100(2) of the By-Law put to rest a series of contradictory and inconsistent Municipal Planning Tribunal (“MPT”) decisions where Ndifuna Ukwazi had repeatedly argued that the MPT was sufficiently empowered under the existing framework to impose inclusionary housing conditions in land use applications.<sup>63</sup> Most municipalities in the Western Cape have similar By-Law provisions for conditions of approval and therefore can reasonably assume that no barrier exists to impose affordable housing conditions.<sup>64</sup>

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<sup>62</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 20.

<sup>63</sup> For instance, see: Old Christian Barnard Hospital (City Park) Case ID: 70372908; De Zitch (Case ID: 70367536); and Site B (Case ID 70411932); and Zero2One development (Case ID: 70330240).

<sup>64</sup> Eg, see section 66 of the Stellenbosch Municipality Land Use Planning By-law, 2015.

58. We agree with the Policy Framework in that as long as municipalities fail to promote greater and more equitable access to affordable housing, local land use schemes will be vulnerable to review.
59. While the Vogue Order did not specify what types of conditions are legally permissible, we are of the view that amendments to local planning By-Laws would be necessary for off-site and fee-in-lieu inclusionary housing conditions. **To this end, we suggest that, in addition to the guidance provided for municipal inclusionary housing policies, that the Policy Framework should also include interim guidelines for municipalities.**
60. Noting that the City of Cape Town's policy drafting process has taken close to two years and is still ongoing, it is crucial that interim guidelines exist to ensure that justice is not delayed while municipalities draft their policies, but all importantly to provide clarity to development actors including private developers. This clarity is essential to ensure the reduction of the potential risk posed to development through objections and delays caused by the lack of a clear municipal guidance on the application of inclusionary housing in lieu of formal policy.
61. We provide an example of what we consider to be the most appropriate interim condition, and one that has been used voluntarily by some developers in the Cape Town context:

**On-site**

1. The proposed development must contain a fair and feasible number of affordable units which either amounts to 20% of the units or a contribution proportionate to 50% of the additional value gained through the land use application process. If this is not financially possible, the applicant must produce a feasibility report indicating what percentage of units or percentage of additional value gained is feasible.
2. The inclusionary housing units must be spread through the development;

- 2.1. Building plans submitted in terms of the National Building Regulations and Building Standards Act No. 103 of 1977 shall comply with condition 1 and indicate the location of the units.
3. The affordable units must have a minimum floor area of 35m<sup>2</sup>; and the units must include at least one bedroom, a kitchen and a bathroom
4. The affordable units should be reserved for qualifying tenants with a total combined household income of between R3,500 and R18,000 per month (2021 value)
  - 4.1. This should be further broken down into income bands. We suggest the income bands of R3,500-R5,500; R5,5001-R11,300; R11,301-R18,000<sup>65</sup>
  - 4.2. The units must be spread evenly across the three income bands, i.e. 33% of the affordable units must be made available to rent to households in each of the income bands;<sup>66</sup>
  - 4.3. Monthly rental or bond repayments may not be more than 30% of total household income (inclusive of rates and taxes);
  - 4.4. The rent or value of the property may not escalate annually beyond inflation (based on the Consumer Price Index)
5. As a means to redress spatial and housing segregation on the basis of race, and to advance the principle of spatial justice, inclusionary housing units in the proposed development may be reserved for Black households, women, the youth and people living with disabilities with priority being given to qualifying households that were historically excluded and disadvantaged, which qualifying beneficiaries; and
  - 5.1. Shall be drawn from the City's housing waiting list, or
  - 5.2. Shall be drawn from a lottery system or another suitable mechanism;
6. The affordable units must be retained as such in perpetuity using a suitable management mechanism, to the satisfaction of the municipal Director: Human Settlements, OR

<sup>65</sup> This is an interim solution until the municipality can establish the spread of household income in its context

<sup>66</sup> This is an interim solution until the municipality can establish the income bands proportionally to households earning those incomes

- 6.1. If rented, the qualifying household income criteria and rent may not escalate annually beyond inflation (based on the Consumer Price Index); or
- 6.2. If sold, a restrictive condition must be included in the deed of sale capping the sale price to comply with the City of Cape Town definition of "affordability" (up to R500,000.00 or less) and must only be sold to qualifying households.

***Timeframes for municipalities who adopt an inclusionary housing policy***

62. While the Policy Framework provides legal and policy certainty, we are concerned that it provides for open-ended implementation, and as such, could be tightened by providing general timeframes for each recommended step. This concern arises from the excessive time taken by the City of Cape Town to complete the Economic / Financial Feasibility Study identified at paragraph 6.1.2 of the Policy Framework.
63. The Policy Framework already provides the "building blocks" for municipalities preparing an inclusionary housing policy. We see no reason why general, suggested, time frames based on international experience should not be used to give municipalities an indication of the length of time each step should take.
64. We do not have recommended time frames but suggest that international experts, who are readily available and eager to assist policy-makers, be consulted to ascertain fair and reasonable time frames to ensure the timely implementation of municipal policies.

***The land value capture framing***

65. The Policy Framework is presented partially as a land value capture ("LVC") mechanism. While we do not necessarily disagree with this way of framing inclusionary housing, we are concerned that it opens a local municipality up to litigation by a developer because it makes it appear that an exchange is taking place whereas inclusionary housing is essentially a land use regulation.

66. For instance, the Policy Framework defines “density bonuses” as “a zoning tool that allows developers to increase height and/or bulk in a project by allowing building heights or Floor Area Ratios greater than the zoned maximum, *in exchange for* a public or a social good” (our emphasis). The Policy Framework is also replete with references to municipalities “leveraging” land markets to capture value for social good.
67. The cue for whether presenting inclusionary housing as a LVC mechanism is legal appears in the legal mandate section and whether there is, in fact, a clear legal basis for municipalities to leverage land values for socially beneficial outcomes like inclusionary housing. A proper analysis of the legal mandate for inclusionary housing will reveal words such as “manage”, “regulate”, “control” “regulation” and not “leverage” or “capture”, “recapture” or “exchange”. While the difference may be slight, we have to be mindful of local government authority and act within the parameters of what is currently legally permissible and not what we wish to be permissible.
68. This is not to suggest that municipalities do not have the authority to regulate property (and land markets) to advance spatial transformation, generally, and inclusionary housing in particular. Our concern is rather that the lack of clear legal mandate to present inclusionary housing as a LVC mechanism creates an easy target for legal challenge. And the first thing that such a court application will ask is where is the authority for municipalities to exchange density bonuses / rights for inclusionary housing units. In order to avoid unnecessary litigation, we suggest that the Policy Framework be tightened to only include the legal mandate in terms of the Constitution and SPLUMA.

***Anticipating a lack of municipal political will***

69. We acknowledge that the division of planning powers between the Provincial Government and Municipal Government as outlined in the Constitution limits the purview of the Policy Framework to be prescriptive or instruct certain municipalities to adopt an inclusionary housing policy. However, we can anticipate that there will be a lack of political will from

municipalities to take up the recommendation from the Policy Framework to investigate whether inclusionary housing is needed in this context.

70. Acknowledging the limits of what is in the Province's control, **the Policy Framework can be developed to ensure follow through towards seeing inclusionary housing truly implemented, at least from the Province. We suggest that this could take the form of a implementation plan for the Policy Framework** itself including;

70.1. The human and financial resources it will dedicate to the follow through of the finalising of the Policy Framework;

70.2. The additional support documents and resources for municipalities that the Province will create to build on the Policy Framework (including the resources needed, delegation of this work and timelines); and

70.3. A way forward in terms of the Province proactively approaching municipalities (where the Province identifies inclusionary housing could be a viable tool) to provide at least education about inclusionary housing and the Policy Framework (including the resources needed, delegation of this work and timelines).

#### ***Additional resources for municipalities***

71. In line with the suggestion to include a form of implementation plan in the Policy Framework, we make the following suggestions for **additional resources and support that we feel could assist in municipalities implementing well-crafted and spatially just inclusionary housing policies**;

71.1. *Fees in lieu guidelines*: guidelines based on international best practices and lessons that outline how municipalities can create, manage and utilise a ring-fenced fees in lieu fund for inclusionary housing contributions. This should

include legal clarity and procedure for establishing such a fund and recommended conditions for how the fund should be run and when and where the money can and should be spent.

- 71.2. *A draft Provincial inclusionary housing calculator:* even a basic inclusionary housing calculator which provides basic inclusionary housing conditions would assist smaller municipalities to quickly develop a policy. This could be based on the City of Cape Town’s feasibility work, tailored to the more general conditions of the towns and cities considered as viable inclusionary housing municipalities by the Province.

***Management, administration and stewardship of inclusionary housing units***

72. The Policy Framework currently puts significant faith in the ability of private developers to justly and fairly administer inclusionary housing units, both for rental and ownership. For rental units the Policy Framework indicates that “Developers/ landowners may choose to retain the inclusionary housing units in their ownership and rent them to households that fall within the agreed targeted income range and meet the criteria discussed above, along with any additional criteria introduced by a municipal policy.”<sup>67</sup> While the Policy Framework makes consideration for relying on Social Housing Institutions (“SHIs”) to play this role, it is our understanding that currently this is not realistic due to the nature of inclusionary housing incorporating a small portion of affordable units across separate private developments.
73. With inclusionary housing units for ownership, the Policy Framework recommends two options, both of which rely on private developers as the primary actor. The Policy Framework outlines these options as either “[a] developer could sell a unit outright to a qualifying household. That household would independently secure finance from a bank

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<sup>67</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 35.

and may qualify for and make use of the FLISP subsidy”<sup>68</sup> or “[a] developer could run an instalment sale or lease with an option to buy programme.”<sup>69</sup>

74. The importance of the management, administration and stewardship of the inclusionary housing units in defining the success and impact of inclusionary housing cannot be understated. There are huge risks to placing this responsibility on private for profit actors, rather than bodies concerned with public good or the fair implementation of an inclusionary housing policy. For instance, in the Spanish implementation of a version of inclusionary housing, the experience in Basque highlights the risk of putting the responsibility of managing and stewarding affordable units (including selecting beneficiaries) in the hands of private actors. In this context the affordable units were “...supposed to be assigned on the basis of waiting lists and other criteria, while in reality people connected to politicians or the private developers of [the affordable units] are often the primary beneficiaries.”<sup>70</sup>
75. To avoid repeating mistakes already made elsewhere, we recommend that **the Province looks to international best practice to understand both the risks of placing private developers as profit driven actors in this role, as well as the management and stewardship solutions that have been established elsewhere.** We are particularly interested in the potential that Community Land Trusts have to retain inclusionary housing units in perpetuity.
76. Even if it is not realistic to establish separate management and stewardship bodies upfront, the Policy Framework must at least deal with the need to investigate and develop these solutions over time. This is an area that could form part of the suggested Policy Framework implementation plan or support resource / research to municipalities.

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<sup>68</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 36.

<sup>69</sup> Draft Western Cape Inclusionary Housing Policy Framework, p. 36.

<sup>70</sup> Calavita & Mallach, “Inclusionary Housing: an International Perspective” (2010), Pg. 260.

## G. CONCLUSION

77. In conclusion, Ndifuna Ukwazi is in support of seeing spatially just inclusionary housing implemented in the Western Cape and therefore welcomes the Province's draft Policy Framework. In this submission we have outlined various concerns and recommendations in order to strengthen the Policy Framework and ensure that it creates inclusionary housing that is truly affordable based on people's incomes and the impact of COVID-19, stays affordable in perpetuity, is well-located, and provides greater access to land and housing to those who need it the most.
78. In summary, Ndifuna Ukwazi's broad recommendations are as follows:
- 78.1. The Policy Framework should be amended to reflect a racially targeted approach which prioritises Black families for the affordable units generated out of inclusionary housing policies.
  - 78.2. The Province should lower the upper affordability threshold of R22,000 and take a stronger position on the need for income brackets to further break down this broad category. There should be a proportional spread of households across the income bands (based on the number of people falling into the various brackets in a specific context) to ensure that municipal policies provide truly affordable housing.
  - 78.3. The Policy Framework must take full cognisance of both the impact of rates, levies and taxes on ensuring truly affordable housing particularly as well as the impact of the COVID-19 pandemic and the resultant economic downturn on what is affordable.
  - 78.4. The Policy Framework must be clear that municipal policies must ensure that inclusionary housing units are affordable in perpetuity.

- 78.5. The Policy Framework should provide clearer recommendations and guidelines to municipalities on the details of when which form of contributions should be made (on-site, off site and fees in lieu) to ensure municipal policies that create well-located affordable housing.
- 78.6. The Province must provide interim guidelines for municipalities to implement in lieu of policy, or while policy is being developed.
- 78.7. The Policy Framework must outline recommended time frames based on international experience for the drafting of municipal policies, to ensure timely policy drafting and support the ability of civil society to hold municipalities accountable through the drafting process.
- 78.8. If the Province continues with a land value capture framing, the Policy Framework must provide the clear legal mandate for this mechanism to avoid legal challenges.
- 78.9. An implementation plan for the Policy Framework is included to ensure follow through action, at least from the Province.
- 78.10. The Policy Framework should outline the additional resources and support that the Province can develop or resource, in order to assist municipalities implementing well-crafted and spatially just inclusionary housing policies.
- 78.11. The Province should investigate international best practice in terms of management and stewardship of inclusionary housing units in order to understand both the risks of placing private developers as profit driven actors in this role, as well as the management and stewardship solutions that have been established elsewhere.

Yours faithfully,

**Ndifuna Ukwazi**

**(Per: Jonty Cogger, Attorney and Robyn Park-Ross, Researcher)**