



Incrementally Securing Tenure

An Approach for Informal Settlement
Upgrading in South Africa

ACKNOWLEDGEMENTS

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The contributions of photographs from Gemey Abrahams, Margot Rubin and Afesis-Corplan are gratefully acknowledged. Some of the photographs were taken by Kevin James and others were sourced from the Urban LandMark archives. The final text was edited by Janet Wilhelm.

Design and layout by Pure Media.

April 2010

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ABBREVIATIONS

DFA	Development Facilitation Act
DPUM	Development Planning and Urban Management (City of Johannesburg)
GIS	Geographic Information System
GPS	Global positioning system
LFTEA	Less Formal Township Establishment Act
LOS	Level of services
SHS	Sustainable human settlements
TPS	Town Planning Scheme

COMMON TERMS

Regularisation and tenure security approaches: Two approaches to tenure often contrasted in the tenure security literature. Regularisation is an approach that relies on legal recognition and emphasises individual ownership. As the name implies, tenure security approaches emphasise the importance of tenure security, and see ownership as one form of tenure. The tenure security approaches rely on both administrative and legal mechanisms to provide protection against evictions.

Incremental Tenure Approach: This is an incremental model being advocated by Urban LandMark in this publication that combines elements of the regularisation and tenure security approaches. It begins by securing tenure through administrative mechanisms for the whole settlement and then in a stepwise way sets in place the requirements for ownership, including legal recognition.

Administrative recognition: uses instruments that may arise from policies or administrative practices to give more tenure security. Examples of administrative mechanisms for tenure security are occupation certificates, shack numbering linked to registers, giving informal settlement residents an address, agreeing on a block layout or introducing basic services.

Legal recognition: uses a legal procedure in terms of a recognised law to grant legal status to an area. Examples of legal mechanisms for tenure security are the City of Johannesburg's amendment scheme procedure, 'early' forms of township establishment through the Development Facilitation Act, Chapter 1 of the Less Formal Township Establishment Act and rezoning an area in terms of a town planning scheme.

Amendment Scheme procedure: The City of Johannesburg's approach to regularising informal settlements which designates transitional residential settlement areas in terms of an amendment to the town planning scheme.



INTRODUCTION

Informal urban land markets are operating in the parts of our cities in which poorer people live. Although they function well in the short term and provide access to land, their effectiveness is limited, including locking poor people into marginal locations. Urban LandMark advocates opening up more officially recognised channels of land supply as a primary means for improving the pro-poor functioning of urban land markets. Increased tenure security in informal settlements is the first step towards official recognition. Once greater tenure security is in place, opportunities increase for access to the economy, infrastructure services, social facilities and micro-finance.

This document summarises Urban LandMark's approach to incrementally securing tenure in informal settlements. This approach emphasises practical mechanisms that allow land rights to be upgraded over time. It has been developed from a range of activities, including input from research papers, a considerable number of interviews, and the testing of different processes with municipalities.

This incremental tenure approach is based on a detailed technical proposal and is informed by technical assistance provided by Urban LandMark to the City of Johannesburg. This report is part of a collection of other publications concerned with recognising informal settlements and promoting tenure security in South Africa. The additional reports are:

- A detailed report on the Incremental Tenure Approach, which includes the technical proposal;
- A report called *Local Land Offices* which explores the local management of various land-related governance functions in the Incremental Tenure Approach;
- Two sets of Power point slides on the Incremental Tenure Approach and on the City of Johannesburg's regularisation approach to recognising and upgrading settlements.

These are all available on the Urban LandMark website: www.urbanlandmark.org.za.



BACKGROUND

In the last decade tenure security has become a major issue in the international development arena. Indicative of its importance is that in 1999, the United Nations Centre for Human Settlements decided to focus its activities on two areas: a global campaign on security of tenure and a global campaign on governance (Durand-Lasserre & Royston 2002). In other contemporary debates, tenure security is cited as a fundamental component for addressing Millennium Development Goal 7 (Lewis, 2008). While wide-ranging, the debate about tenure has been contentious, particularly since the publishing of Hernando de Soto's seminal book – *The mystery of capital: why capitalism triumphs in the West and fails everywhere else* (2000). Since then there have been hot, ideological and sometimes empirically informed debates about the value that ownership adds in the developing world.

In South Africa, debates about tenure and informality have not been particularly high profile. In part this has been because since 1994, the government has implemented a bold and, in quantitative terms at least, largely successful housing delivery programme which has incorporated individual ownership as an integral part of the package.

However, given the magnitude of informal settlements and the looming deadline for achieving the Millennium Development Goals, a more flexible and amenable approach is emerging. In South Africa, the policy framework exists for interim approaches to tenure, and more broadly, for incremental *in situ* upgrading of informal settlements, in Part 3 of the National Housing Code. However, experience with upgrading informal settlements *in situ* remains fairly limited. The time lag between earmarking a settlement for upgrading and the actual implementing of projects (anything between six months and 25 years) is also being recognised. It is this reality that has led some cities to begin to explore newer approaches. This is the context into which the approach summarised in this document has been integrated.

THE TENURE DEBATE AND THE INCREMENTAL TENURE APPROACH

Responses to tenure vary widely according to, among other factors, different government orientations, local contexts, types and prevalence of informal settlements, local politics and pressures from civil society organisations. This reality notwithstanding, it is possible to identify two main approaches (Lewis 2008; Garau, Sclar and Carolina 2005; Durand-Lasserve & Royston 2002). The first emphasises legal tenure regularisation based on individual ownership rights. This approach is often complex to implement and takes a long time. The second approach emphasises tenure security rather than ownership and stresses that such security in informal settlements derives from many factors and circumstances. The second approach argues that it is possible to achieve substantial – and often sufficient – tenure security through other mechanisms, which can include administrative recognition or local community witnessing processes.

Implicit in the first view is the idea first popularised by Turner (1968) that ownership contributes to consolidating informal settlements and to integrating them into official systems of servicing, financing and regulation. De Soto (2000) takes this line of argument a lot further and elevates the importance of tenure to that of a key

determinant of development. Claims about the value of security of tenure are generally more circumspect but widely held. Among the arguments made in favour of ownership are:

- It makes land investment more secure because it provides legal protection of tenure;
- It provides a basis against which the poor can raise loan finance;
- It promotes the official inclusion of previously unrecognised informal settlements;
- It triggers the provision of municipal services;
- It establishes effective cadastral systems for tax collection and is as a consequence central to establishing sustainable models of service delivery;
- It integrates informal housing into the financial land markets and helps equalise land prices with informal, socially dominated (Urban LandMark, 2007) land markets because standardised and reliable land records allow for more regulated purchase, sale and mortgaging of land (unit costs of land are often exorbitantly high in informal settlements) (Lewis, 2008);
- It provides substantial protection against summary eviction.





Critics (e.g. Varley 2002, De Souza, 1999 and Durand-Lasserve, 2006) question whether legal regularisation is a necessary foundation for urban development. They point out that in many instances 'uncritical' pursuit of ownership can actually increase tenure insecurity rather than promote security of tenure. Moreover, ownership often brings additional costs (e.g. taxation, service charges) which make it difficult for people to remain on the land. Ownership can also lead to gentrification and downward raiding insofar as land previously occupied by poor people now becomes more attractive to those with means. Downward raiding also further reduces the stock of land available to the very poor. Garau *et al* (2005) also point to the pressure that titling programmes can place on governments that do not have the capacity to sustain systems properly. Varley (2002) also suggests that land tenure legalisation can be, and often is, used as a mechanism of exclusion insofar as it asserts the desirability of property ownership and the protection of property rights. In addition, Varley (2002) suggests that land tenure legalisation often does not recognise multiple claims for property rights by the urban poor and the varying strategies through which the poor achieve access to resources.

The tenure security approach, on the other hand, does not require the provision of ownership. Instead it relies on simple administrative and legal mechanisms to

provide protection against evictions. Many of these mechanisms constitute implicit recognition of informal settlements (e.g. provision of services, service bills, voter rolls, registers, site plans, street and shack numbering, and the issuance of identity cards). While the tenure security approach has many variants, it tends to place greater emphasis on mechanisms that secure blanket, settlement rights in the first instance, rather than individual rights.

The tenure security approach also emphasises an incremental approach to tenure in terms of which initial tenure is simple and affordable but may be upgraded later (Garau *et al*, 2005; Cousins *et al*, 2005). Such approaches give communities the opportunity to consolidate their settlements and to clarify conflicts via internal processes which may have substantial legitimacy. Moreover, incremental processes allow government to develop the technical capacity over time to properly institutionalise new approaches. In the same vein, incremental approaches allow for the sorting out of many social dynamics and claims to land ahead of settlement upgrading. Such a process is not only sensitive to the needs of poor people, but also helps ensure that things go smoothly when upgrading takes place. Incremental processes also assist in making many social processes and transactions more transparent, thereby making the land market work better for the most vulnerable.



Urban LandMark's Incremental Tenure Approach attempts to avoid the polarisation between the two approaches that the literature sometimes implies. Most adherents of the tenure security approach are not against ownership in principle. What they are against is the insensitive shoe-horning of a uni-dimensional titling approach on all situations, which is common in South Africa. There is acknowledgement that legal approaches generally do provide a superior level of tenure security in many (but not all) situations, and that greater rather than less legal protection is desirable as long as it does not undermine the tenure security of more vulnerable members of informal settlements.

In response to this, the Incremental Tenure Approach incorporates elements of both views to ensure an incremental, administratively, legally and socially defensible, developmental way to improve the circumstances of residents in informal settlements.

It has legal dimensions but also places an emphasis on understanding and building off established processes within communities. The Incremental Tenure Approach, however, also acknowledges that in some instances social relations in communities may have

to be confronted (for example, where more vulnerable people in a settlement are exploited by powerful, organised groups).

The Incremental Tenure Approach is essentially an incremental model. It begins by securing tenure through administrative mechanisms for the settlement as a whole. Then, in a stepwise way, it sets in place the requirements for ownership, where this is possible and desired.

Although this may not be a mainstream approach at present, the reality is that the delivery of ownership will remain a national objective for some time. Thus the Incremental Tenure Approach is designed in a way that connects to the ultimate delivery of individual ownership, but provides for increasing levels of security during the period before this goal is achieved.

The Incremental Tenure Approach also highlights the importance of, and makes provision for, alternate forms of legal tenure such as short-term leases, rental and servitudes of use. It argues that in certain circumstances, such as in very poor locations or unusually good locations, these alternative forms of tenure may be the instruments of choice – even in the long term.

OVERVIEW OF THE INCREMENTAL TENURE APPROACH

This approach targets the period between informal settlement of an area and the delivery of ownership (through the housing subsidy), as illustrated in Figure 1. In this figure, tenure security is represented on a continuum (Cousins

et al, 2005) with security of tenure progressively increasing. The Incremental Tenure Approach combines a number of administrative recognition mechanisms with legal recognition tools in order to secure tenure (see Table 1).

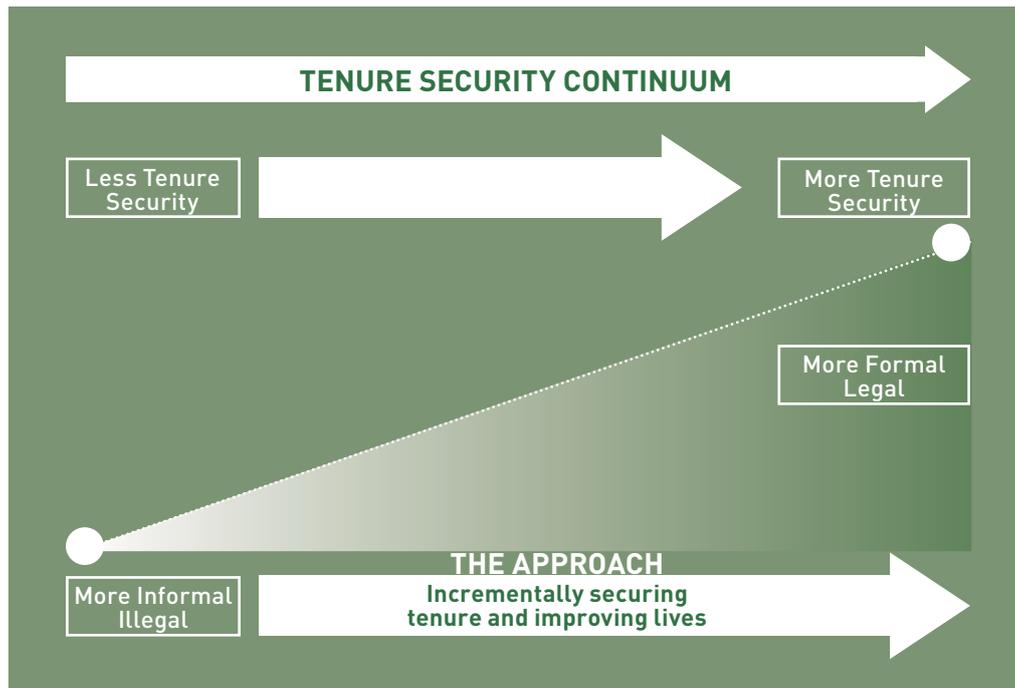


Figure 1 – The tenure security continuum



<p>ADMINISTRATIVE RECOGNITION This uses instruments that may arise from policies or administrative practices to give residents tenure security. They may not have a firm legal basis but rather derive security through commitment by authorities in the form of council resolutions or administrative systems.</p>	<p>LEGAL RECOGNITION This uses a legal procedure in terms of some recognised law to grant legal status to an area. It usually results in declaring the area in terms of this law (a settlement area, an area zoned for informal housing) which then permits certain other actions to take place legally.</p>
<p>EXAMPLES OF ADMINISTRATIVE RECOGNITION MECHANISMS:</p> <ul style="list-style-type: none"> • Issuing an occupation certificate in recognition of residents permission to remain in the settlement. • Undertaking shack enumeration and linking it to a list or record. • Agreeing on a block layout with a community and introducing basic services. 	<p>EXAMPLES OF LEGAL RECOGNITION MECHANISMS:</p> <ul style="list-style-type: none"> • City of Johannesburg’s Amendment Scheme where designated areas are declared as ‘Transitional Residential Settlement Areas’ through the ordinance¹. Certain legal conditions become applicable, e.g. land use conditions, basic layout plans, occupation certificates and registers. • ‘Early’ forms of township establishment, through for example Chapter 1 of the Less Formal Establishment Act or a simple Chapter 5 Development Facilitation Act (DFA) application, also afford legal recognition to a settlement.

Table 1 – Mechanisms for recognising tenure

There are advantages and disadvantages to either form of recognition. For this reason, the Incremental Tenure Approach uses a combination of both of them. Ideally, administrative recognition may be the first stage of tenure and settlement upgrading, which could lead to legal recognition to make the settlement more secure and allow for more individual forms of tenure. Even under the umbrella of broad settlement legal recognition, administrative mechanisms can be used. This approach therefore allows for flexibility and finding the mix that best suits a particular community and the municipality. It does not advocate one form of recognition over another but rather provides avenues for each, individually and in combination, and explains the relationships between them.

Figure 2 shows how different legal pathways can lead to legal recognition and where these fit in, in relation to administrative mechanisms within an overall upgrading process.

An important aspect of the overall approach is building on the notion of incremental improvements. By taking a step-by-step, incremental approach a community can move positively towards ownership if required. Incremental approaches imply gradual improvements in a range of components in any settlement. Table 2 illustrates how each component could be improved incrementally when using this approach.

¹ There are four former town planning and township establishment ordinances in South Africa, ranging from the former Orange Free State and Natal Ordinances dating back to the late 1940s and the more recent 1985 Cape Province and 1986 Transvaal Ordinances.

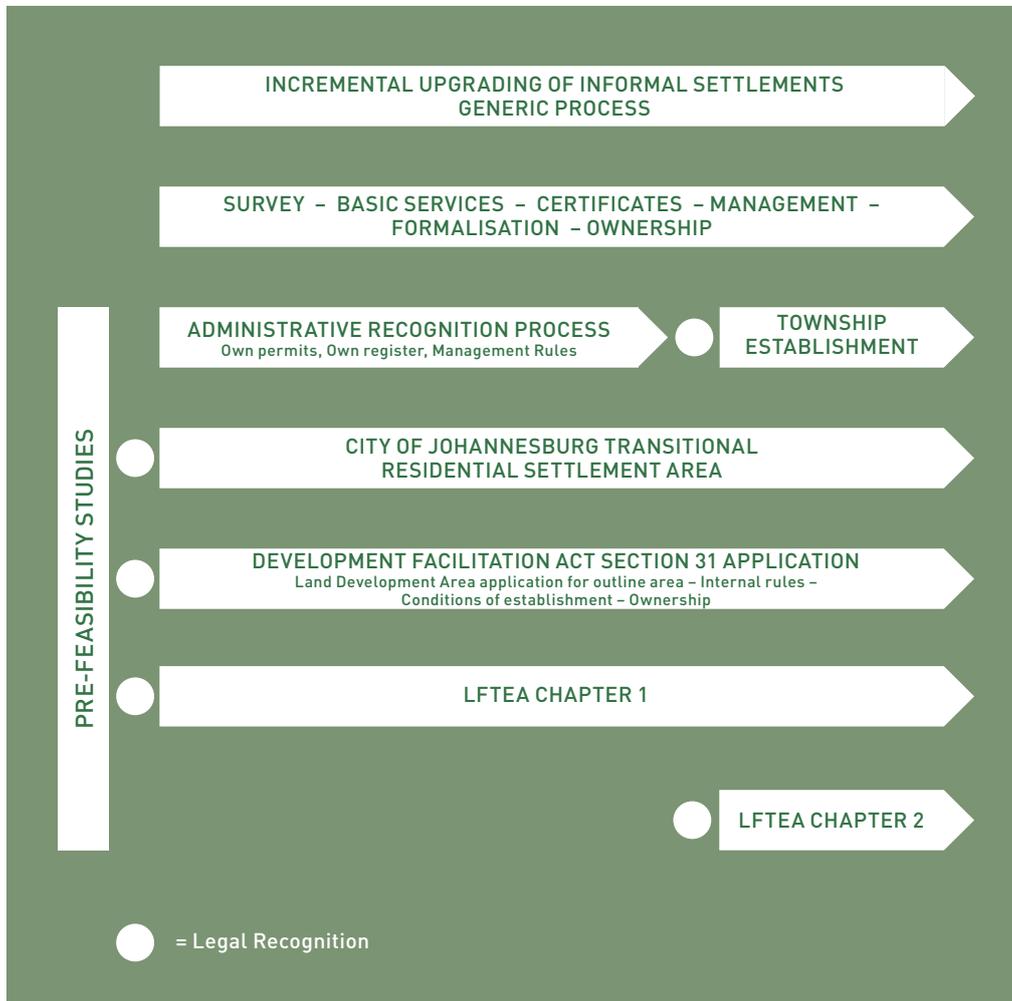


Figure 2 – Administrative and legal recognition

The Approach sets out how each of these incremental aspects can be achieved in a progressive way to improve and upgrade informal settlements. It comprises four steps, but these are used mostly for ease of explanation rather than being rigidly sequential.

In broad outline the steps are:

Step 1 involves making a decision about the long-term future of the settlement. It also involves a review and possible enhancement of current **administrative recognition** interventions (emergency services, health and safety, basic land use control, registers), or introducing them if there have been none to date. Furthermore, a review of community management and recognition/processes needs to be undertaken in this step.

Tenure mechanism	Administrative recognition	Legal recognition	Township establishment
Plot identification	Basic site plan – no individual plot boundaries, perhaps neighbourhood blocks, main roads. Based on aerial photographs and community verification	Detailed layout plan: individual plot boundaries, all roads, sites for facilities and plots identified	Approved layout plan with pegged sites which informs the General Plan that gets approved
Recording of occupants	List (database) of occupants, linked to a shack number with or without a single GPS point reference	Full register of all occupants, dependants, linked to a property description, tenant relationships, next of kin	A township register as per the Deeds Registry Act
Tenure evidence	Letter of occupation certificate/card acknowledging occupation	Simple lease with municipality/ province Simple servitude of use A municipal bill could serve as a contract	Title deed Lease Long lease
Land use management	Basic health and safety rules Can be indicated on letter of occupation	Through the Amendment Scheme (see table 3 in step 3), rezoning or DFA, rules or conditions for managing land use in the settlement.	Town Planning Scheme zoning and title deed conditions
Services provision	Basic services – communal level of services (LOS 1)	Planned, upgraded services, individual connections (LOS 2 - 3)	Highest level of services as per township establishment conditions

Table 2 – Incremental improvements



The philosophy of the Incremental Tenure Approach is to acknowledge and work from the historical trajectory and social relations in the settlement. This step may continue for a long period and will also apply to settlements that may need to be relocated some time in the future. It may also be the chosen form of intervention by the community and/or the municipality until such time that a housing subsidy is allocated to the settlement. In settlements that will remain and will be upgraded *in situ*, it is the first step along an incremental path to ownership.

Step 2 involves the blanket **legal recognition** of the settlement. The reason this step is necessary is because municipalities often cannot conduct more developmental (as opposed to control-orientated) regulation of the settlement or improve levels of service without contravening their own laws. The area has to be acknowledged in legal terms (initiating township establishment through the DFA or Less Formal Township Establishment Act (LFTEA), rezoning the area or using a Town Planning Scheme instrument) and hence changes the status of the informal settlement from that of illegal to legal. It is a preferred route for those settlements that will remain *in situ* to be upgraded.

For example, the City of Johannesburg has declared a number of informal settlements as Transitional Residential Settlement Areas in terms of an Amendment Scheme procedure, providing blanket recognition to these settlements. Legal recognition allows for incremental improvements in tenure security, infrastructure services, land use planning and regulation and integration into municipal administrative systems.

Step 3 involves the ongoing **developmental regulation** and improvement of the settlement. In terms of tenure, it involves increasing tenure rights to (include, for example, trading and inheritance), the provision of more formal tenure options (such as leases) and providing ways to give residents physical addresses. It is a phase when land use management, building control and housing improvements can be managed in the settlement. Services can also be upgraded during this phase because they are legal and municipalities can invest in and budget for services.

Step 4 involves **township establishment**, if not already begun, for the settlement and the award of individual ownership to beneficiaries on the opening of township registers.

These four steps need to be preceded by some important governance and institutional decision-making processes within the municipality. Institutionally, the municipality needs to:

- Obtain high level Council support for interventions in informal settlements;
- Develop an overall Informal Settlements Programme for all the types of settlements in the municipality, as city wide programmes have the potential to make transparent to communities when they are likely to receive the benefit of state investment (see the preparatory step on page 17 for further motivation for a programmatic approach);
- Obtain agreement for the programme, including the principles, vision and goals and generalised programme approach, by the Council and all key heads of department;
- Find a clear institutional home (department/unit) for the programme and obtain participation commitment from officials, possibly in the form of

an inter-departmental committee. This home can be the office of the municipal manager, the Planning Directorate or the Housing Department, but it must have clout to bring all departments together and direct their actions within the overall programme.

Given the flexibility of this approach, certain settlements may be suited only for administrative recognition – they may need to be relocated or the community may not want township establishment at this stage. Other settlements may stay in the phase of administrative recognition for the whole period until a housing subsidy is allocated and township establishment can proceed; others will proceed along the incremental path to township establishment. This may also apply only to parts of settlements. The options are illustrated in Figure 3. Tenure is represented on a continuum from less to more security as the progression from step 1 to step 4 takes place.

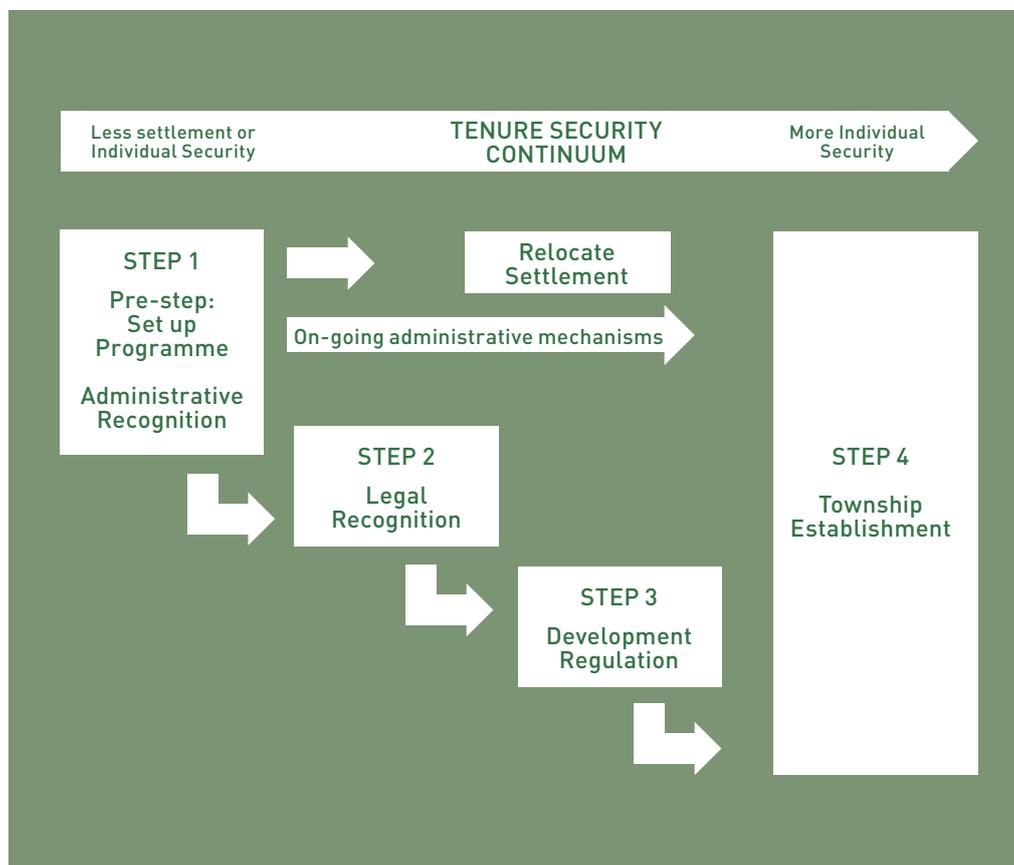


Figure 3 – Schematic representation of the Incremental Tenure Approach

THE INCREMENTAL TENURE APPROACH – STEP BY STEP

PREPARATORY STEP: PROGRAMME AND INSTITUTIONAL ASPECTS

Informal settlements are a reality for thousands of residents in many municipalities. Although the housing subsidy programme has been successful in delivering houses to low-income households, it has not been able to meet the full demand and nor will all residents of informal settlements qualify for subsidies. Some families have been living in informal settlements their whole lives. Protests by the poor demanding improved service delivery are increasing, placing pressure on municipalities to find solutions for informal settlements. The Incremental Tenure Approach advocates a way in which municipalities can begin to make improvements in informal settlements during the period between settlement formation and housing subsidy allocation. The approach is prefaced by the need for a municipality, if it has many informal settlements, to take a holistic, programme approach to deal with interventions in informal settlements. This involves developing an overarching programme in

which each settlement type can be identified for selected interventions to improve lives in that settlement. The vision, principles, goals and objectives of the programme need to be clear and widely agreed.

The development of an informal settlement programme by a municipality will require approval from the Council of the municipality. It is recommended that the programme have a political and administrative 'champion' so that there will be strong accountability for all officials involved in the programme.

This approach is not fundamentally a housing approach, but rather an incremental settlement improvement programme. As such it need not be located in the housing department of the municipality. As many of the interventions relate to urban management, planning and provision of services and facilities, it might be best placed in a planning/urban management department or an independent unit that can co-ordinate all the sector departments.

Principles underlying the City of Johannesburg's Informal Settlement Programme

This programme is premised on a number of principles, these are:

- The formalisation interventions must be consistent with the City's spatial development policies and principles relating to strategic densification, mixed housing typologies, uses and income groups as well as location, especially along public transportation routes;
- The formalisation process must ensure that these settlements develop as sustainable human settlements (SHS) as per municipal standards for the provision of social infrastructure;
- Public engagement as well as community education shall be integral parts of the Programme;
- The Programme is to be administered in a transparent and efficient way with sound records, information and management to ensure that the goals of recognition and regularisation are effectively achieved;
- Relocation and disruption of community networks shall be kept at a minimum, where it is unavoidable, this will be done through extensive public engagement;
- All stages of the Programme should include extensive public engagement;
- The focus should as far as possible be on integrating these informal settlements with any formal settlements in close proximity. This can be done through land acquisition, sharing of community facilities, etc.

Source: 'Formalisation of Informal Settlements Programme', Maycom Report, submitted by Department of Development Planning and Urban Management - Office of the Executive Director on 17 April 2008, p3.



How the City of Johannesburg set up its Informal Settlements Programme

High level support has been gained from the mayor and key Members of the Municipal Council (MMCs). The Development Planning and Urban Management (DPUM) Department initiated a joint Steering Committee that included the municipal departments of Housing, Infrastructure Services, Stakeholder Management, and Environment and the Gauteng Department of Housing. All informal settlements, including those that are being upgraded by the Housing Department as well as the Gauteng Department of Housing, fall under the municipal-wide programme. Categories of settlements have been defined and strategies and lines of responsibility developed for each type of settlement. The DPUM is responsible for those settlements that are to be upgraded *in situ* through a regularisation approach. This department has developed a mechanism, through the various town planning schemes in the City, to regularise (including legal recognition) those settlements.

Hence, the programme is overarching, is managed by a Steering Committee, is approved by the Council that demands regular reporting and the planners in the Planning Department are driving an innovative regularisation component of the programme.

Step 1: Administrative Recognition

In Step 1 a decision is made by a municipality or provincial government to make a decisive intervention which will lead to the settlement:

- Being relocated: either in the near future or in the medium term;
- Remaining and being upgraded.

This intervention signals that there will be no forced evictions, resulting in a stronger sense of tenure security even though it is not legally secured. Even for those settlements that will remain for some years before relocation, this step should apply.

The key activities at this stage of the intervention are aimed at gathering information on the settlement and the residents, to be used to categorise the informal settlement and determine the next intervention steps. It could include investigations into:

- Physical conditions (topography, wetlands and other environmental considerations, geology);
- Planning aspects (land zoning, land use, surrounding uses, conformity with spatial development framework);
- Land legal aspects (deeds office search, title deeds, land ownership, servitudes, other legal constraints);

- Infrastructure (available services, bulk connections, capacity required, road infrastructure and public transportation);
- Social relations (information on the residents, origins, economic status, employment, tenant relations, prior commitments and/or engagements with authorities);
- Tenure and property transactions status (perceptions of ownership/security, how informal transactions are done, what is transacted, impact of previous interventions, etc). As this investigation is more intensive and requires wide community consultation, it may be undertaken over a period in which community relationships are built and could extend into the next step. However, if a full study is undertaken, it should embrace the following aspects:
 - community leadership structures;
 - social movements active in the settlement;
 - community conflicts or lines of cleavage;
 - previous history of engagement with the state and its outcomes (outdated registers, shack numbering, councillor promises, commitments to housing programmes);
 - community processes and practices relating to tenure – how shacks





are accessed and transacted, is there a community register, what evidence do residents use as proof of residence/occupation, what processes are followed to obtain the form of evidence, how are disputes settled in the community;

- the nature of the relationships in terms of tenure: are there informal landlords, what are the prevailing relationships between landlords and tenants, relationships between occupants on any one plot – additional rooms rental;
- understanding informal land uses in relation to economic activities and survival strategies employed: what activities are downright illegal, noxious, will not conform even if land use management is put in place;

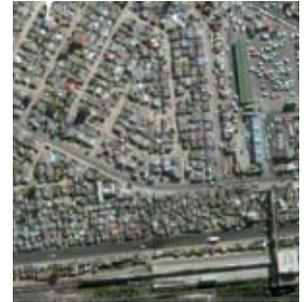
The information gathered should be used to develop a Tenure Plan for the settlement.

The outcome of this investigation step is a series of status quo reports which will inform the decision about whether the settlement stays or goes and what category it can fall into. The category will determine the level of intervention and the selection of components of the Incremental Tenure Approach that are likely to be most applicable.

Once categorised and prioritised, the municipality should prepare business plans for those settlements with which it will initiate Informal Settlement Upgrading Programmes. The business plan would assimilate the factual status quo information, the strategies and an implementation programme for the proposed interventions. It should be done in consultation with the community and be approved by the Steering Committee and the Council.

Example of categories used by the City of Johannesburg

- Upgrading projects
- Relocation projects
- Regularisation projects
- Programme-linked settlements
- Settlements not linked to programmes or projects
- Completed settlements

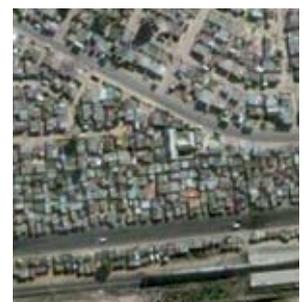


In Step 1, the interventions will be administrative and are most likely to comprise the following:

- Naming of the settlement and getting it onto the municipal GIS or land information system (i.e. cadastral definition of the property);
- Preparing a base map or site plan, based on an aerial photograph. This is a depiction of what is there and no planning is necessary at this stage. This is a spatial record of what exists and forms the base for future planning and management of the area;
- Registering structures and households – this should be done with communities and the purpose and method should be agreed with the community. The Incremental Tenure Approach sees registration as being developmental rather than control-oriented. It can provide information that can be used to positively improve the area and lend transparency and support to informal land markets operating in the area, rather than to simply control numbers and create insiders and outsiders;
- Acknowledging occupation of households in the settlement through linking the registration process mentioned previously to a list or record of occupants. The register of occupants should in turn, be linked to the municipal

land information or other administration systems. A developmental approach would link the data of the structures and households to the spatial base plan;

- In some instances, a municipality may choose to issue an occupation permit to residents. This should be seen as an administrative mechanism that increases tenure security by recognising occupation. It should not substitute for a position on a housing subsidy waiting list or be communicated as a promise of a formal house. At this stage, the underlying land is either owned by the municipality or there is a land agreement between the municipality and the private land owner. It is therefore not possible to undertake legal recognition at this stage. However, recognising occupation and setting out the roles and responsibilities of each party is a developmental step in the incremental process of tenure upgrading;
- The provision of emergency services is a Constitutional obligation and the municipality should provide water standpipes and basic sanitation. The Incremental Tenure Approach also advocates a basic refuse removal service and possibly some grading of roadways/paths with rudimentary storm water channelling. These will improve health and safety in the settlement.





Why have a record or register?

The purpose of a developmental register should include at least the following:

- To identify house occupants: including the head of household or recognised 'owner', his or her spouse or next of kin who s/he would bequeath the structure to, the dependants and the lodgers or renters of rooms or subsidiary shacks connected to the main structure. Names of the entire household should be recorded in order to protect the rights of more vulnerable members. Bar-coded identification documents can be used to obtain this identification information;
- To define the location of the structure spatially: to give the structure and/or plot a reference number;
- To record the ownership of shack structures. The shack ownership register may or may not correspond with the residents register;
- To gather developmental information about the household for planning purposes: this could include income, access to services, employment, length of residence, the way the shack was acquired, how occupants understand their relationship to the shack (are there tenants, renting from family, purchaser, landlord);
- To record the form of tenure that has been given to occupants (e.g. administrative, rental, lease, servitude of use);
- To record and administer changes in occupancy.

Step 2: Legal recognition

For settlements that will not be relocated and are able to be upgraded *in situ*, the Incremental Tenure Approach recommends proceeding to Step 2 - Legal recognition.

Legal recognition is important for many reasons, including:

- It allows municipalities to begin to undertake developmental (as opposed to control-orientated) regulation of the settlement. Without such recognition the local authority would be contravening many of its own legal provisions (such as town planning schemes and By-laws).
- It immediately makes the settlement legal, taking it out of its illegal status so that residents and their activities are no longer criminalised;
- It allows government to invest in the settlement legally – services can be upgraded from the level of emergency services, providing greater security and health and safety for residents;
- If legal recognition allows for, or requires a set of, management rules it immediately brings the settlement into a regulatory framework where land use and tenure can be effectively managed;
- It increases tenure security (becomes legally defensible) as administrative recognition is undertaken outside of a legal framework;
- It can set the settlement on a trajectory towards township establishment, which

can then be fast-tracked as many of the steps would have been undertaken during the process of legal recognition;

- It allows residents to invest in their properties without fear of repercussions such as forced removals, changes in political leadership and other insecurities that might result if it was only under an administrative regime.

Based on the information obtained in Step 1, and the decision that the settlement will not be relocated, the municipality or provincial government will proceed to make an application using the most suitable legal route for legal recognition of the settlement. Legal recognition, under existing mechanisms, can be implemented through:

- An Amendment Scheme provision allows the settlement to be listed as an informal settlement area, provides a definition of such an area and sets out conditions for management. The provision is incorporated into a town planning scheme applicable in the informal settlement. This is the regularisation route taken by the City of Johannesburg;
- Obtaining approval for a land development area in terms of Section 31 of the DFA for the outer boundary area and setting out all the conditions for managing the internal rules of the settlement and how to get to ownership. This is an uncommon process and is untested, but is possible;



- Rezoning the settlement as an informal settlement area in terms of a town planning scheme. Some ordinances and town planning schemes make provision for such a zone. Normal rezoning procedures would need to be followed;
- Obtaining approval for an area for less formal settlement in terms of Chapter 1 of the Less Formal Township Establishment Act;
- Declaration of the area in terms of a municipal by-law. This is also uncommon and untested, but it is proposed that a municipality could develop by-laws for regulating informal settlements.

The proposed legal routes have different advantages and disadvantages. The four tables that follow are summary assessments of legal recognition mechanisms.

	Advantages	Disadvantages
Designation of Transitional Residential Settlement Areas in terms of an Amendment Scheme	Gives legal recognition upfront – area designated	Only applicable in certain settlements, not an overarching approach
	It is a quick and easy process for a municipality to undertake	Does not necessarily involve community consultation in the designation process
	It provides a set of management rules – legally enforceable	Seen as interim and settlements will need to go to township establishment in term of the Ordinance/ LFTEA or DFA to achieve ownership
	It makes provision for certificates and a local register - these would be administrative tools and use administrative procedures rather than registers and procedures in terms of the Deeds Registry Act.	Perceived as a 'lesser' option – political palatability
	It applies to land with any zoning	Tenure is not legally defensible
	Do not require an Environmental Impact Assessment, not township establishment	Need to be in a town planning scheme area or get incorporated into one
	Allow service levels greater than basic	More a planning instrument and needs municipal department of housing buy-in

Table 3 – Regularisation using Amendment Scheme procedure

	Advantages	Disadvantages
Application for a Land Development Area in terms of Section 31 of the Development Facilitation Act (DFA)	Gives legal recognition upfront and a strong legal framework for the entire developmental process. The settlement becomes an approved Land Development Area.	There is a perception that it undermines local, municipal decision-making – can address this.
	It can apply in former homeland areas.	DFA not applicable in certain provinces – Western Cape, Northern Cape and Free State.
	It does not lock an area into an ownership tenure solution but can accommodate options, but also does not prevent ownership either for whole area or part.	
	Any community or municipal desired management aspects can be crafted into the rules. This includes land use management, tenure types and administration. Hence it marries the administrative aspects with a legal framework.	Will need active management of the conditions and conditions of establishment.
	The Act allows for fast-tracking and setting aside some legal provisions in other laws that could frustrate development, exemptions and condonations.	The first few applications could be legally complex but then a format will be developed.
	Tackles the entire developmental process in one, upfront application. Do not need to do as separate township establishment process later.	

Table 4 – The Development Facilitation Act

Application for a Less Formal Settlement Area in terms of Chapter 1 of the Less Formal Township Establishment Act (LFTEA)	Advantages	Disadvantages
	Gives legal recognition upfront – area designated and a legal framework established.	Not as robust or flexible as the DFA.
	Nationally applicable.	Reliant on MEC (member of executive council) decision-making.
	Chapter 1 can accommodate the entire developmental process – allows for exemptions and setting aside other legislation to fast track development.	Will need active management of the conditions and conditions of establishment.
	Chapter 1 need not register ownership; also simplified registration procedures – certificate of ownership.	Unfamiliar: The first few applications could be legally complex but then a format will be developed.

Table 5 – The Less Formal Township Establishment Act – Chapter 1

Rezoning in terms of a Town Planning Scheme (TPS)	Advantages	Disadvantages
	Locally controlled mechanism, (but may require provincial approval in some municipalities).	Need to have such a zone in the TPS already and many may not have this.
	Provides legal framework for early recognition.	May still need to do township establishment when conferring ownership.
	Introduces strong land use management and regulation.	Will need capacity to manage and enforce land use.

Table 6 – Town Planning Scheme/Rezoning approach

On legal declaration, the settlement as a whole has additional tenure security and a legal framework is established to begin a range of government interventions and investments. These activities comprise Step 3.



Step 3: Development regulation

After declaration or legal recognition of a settlement, a number of government actions are legitimised and must be legally compliant. These will assist in the delivery of more individualised tenure, higher levels of services (infrastructure and social), as well as with land use and tenure management.

Given that the informal settlement may already have the benefit of a number of administrative interventions, it is important that these Step 3 activities build on the existing systems and do not result in new, duplicating and confusing systems being introduced. See Table 2 on page 14 that outlines the incremental improvements from simple towards more detailed mechanisms.

Specific governmental activities during Step 3 include:

- Preparing a basic layout plan (only if no plan has been done before) or a more detailed layout plan, in consultation with the community;
- Identifying individual (or block) boundaries with residents (part of the layout plan exercise);
- Providing infrastructure services to a higher level than basic services. With cadastral definition of the settlement,

it is possible to supply electricity points to the boundaries and develop a reticulation system internally with the community.

- Community consultation on forms of tenure (based on the Tenure Plan) and its management. This can include leases, servitudes of use or permits;
- Introducing land administration systems – recording and updating claims and rights through registers of some description and the inclusion of this information into administrative systems of the municipality, if not already done in Step 1;
- Creating addresses for residents. With structures registered, a layout plan in place and a record or register established, it is possible to provide addresses. These should be indicated on the layout plan and the address could be indicated on the leases or permits or it could be substantiated through the issuing of a services bill or account from the municipality;
- Introducing land use management. This would be in the form of a 'mini' town planning scheme in which the agreed responsibilities of both the municipality and residents about the use of their plots, land uses in the whole settlement, contraventions and procedures for changing uses and erecting structures (building controls), are defined.

Land use management in a legally recognised informal settlement – City of Johannesburg Amendment Scheme provision for Transitional Residential Settlement Areas

One of the key reasons that the City of Johannesburg cites for developing its regularisation mechanism is to give residents in informal settlements dignity by making them part of the City and secondly, to improve health and safety. Its Amendment Scheme determines land use management in the following way:

‘After the **layout plan** is accepted (has been approved by the local authority), the **occupier** of a residential structure may apply in writing to the local authority to permit a new alternative land use on the site. The identified occupier of the structure as per approved register must submit such application in writing to the local authority. The application must be accompanied by written confirmation from all registered occupants of all adjacent structures or stands that they have been notified and indicate their support or no support for such application.

The local authority may decline or approve such application subject to conditions. The local authority shall keep a register recording the decisions of such applications. If such application is granted, the layout plan shall be endorsed accordingly to reflect the land use change.’

Source: Clause 9, Annexure 9999, Schedule 3: City of Johannesburg Amendment Scheme.

Forms of tenure and examples of tenure evidence

The forms of tenure that are appropriate at this stage will be influenced by the legal route taken for recognition. The Amendment Scheme and rezoning approaches are interim measures and the municipality or province may not want to provide anything more than temporary occupation rights, until township establishment proceeds. Also, if an administrative form of tenure was given in Step 1, there may be reluctance to deviate from this and introduce a new form. The DFA and LFTEA have specific tenure forms (albeit not commonly used), such as initial ownership or ownership certificates (Certificate AAA). In all instances contracts of some description, tailored to deal with tenure security, may be used.

Forms of tenure in Step 3

- A (short-term) lease;
- A servitude of use (used like a common law ‘contract’ between the municipality and the identified plot holder that need not be registered);
- A longer-term unregistered lease;
- A certificate of occupancy (AAA certificate) in terms of LFTEA;
- Initial registration certificate (in terms of the DFA);
- Continuing with the municipal/provincially issued occupancy permit but updating it to include additional ‘rights’ such as succession/bequeathing, sub-letting;
- A municipal services account.

Content of land rights

The contents of the rights will be influenced by the nature of the form of tenure. A (short-term) lease arrangement for example would by its nature not allow the occupier to sell the land or occupation right. The same would apply if rental is the form of tenure. However, many specific rights/responsibilities can be written into the appropriate contract documentation. It is crucial that any rights accorded can be officially administered and protected.

Examples of contents of rights in Step 3

- To occupy land owned by the municipality or province;
- To build a temporary structure on the land for own use;
- To use the land that is occupied, including productive uses such as home based enterprises;
- To let or sub-let the land or part of it/or to let or sub-let the structure or part of it;
- To have occupation protected;
- To bequeath the structure and occupation rights to it to a successor on death;
- Access to basic or higher levels of services;
- Access to social services;
- To sell the variety of rights referred to above, subject to conditions.

For example the right to sell a structure should only be entertained if it is possible to record and keep track of changes of transfers.

Local land office

As part of the management of the settlement during this step, it may be prudent for the municipality to set up a presence in the informal settlement, if this has not already been done in Step 1 or Step 2. This can take the form of a local land office. This may be permanent, temporary or a mobile facility. (See *Local Land Office* report in this collection of studies at www.urbanlandmark.org.za). The local land office could play many important functions relating to settlement and tenure management, including:

Tenure functions

- To develop an understanding of the power relations underpinning the tenure arrangements in place in particular informal settlements (inputs to the Tenure Plan);
- To be the location for the spatial maps and registers;
- To be a meeting place for the community and the municipality;
- To develop, in participation with the community, a system for recording and updating a local record of occupation, rights and transactions;
- To actively manage changes to the record;
- To ensure that certain data components of the local register are fed into central city-wide data recording processes;
- To actively update and manage the feeding of information on changes into the central data system;
- To oversee the debates around tenure as

upgrading proceeds;

- To continue to serve as a link between local processes and centralised data systems, even after ownership has been delivered;
- To play a role in community witnessing of tenure and resolving tenure disputes.

Land use management functions

With land use management, the relationship between centralised and local processes would be similar in form and content to the approach to managing a local register. In short, there will be an interactive relationship between centralised planning and land use management processes and local decision-making processes.

Local land offices together with the local community would make land use decisions within the parameters of a mandate agreed centrally. They would play a role in resolving community land use disputes.

Moving from Step 3

In step 3 residents have some form of tenure evidence, there are rules in place for tenure and land use changes, and there are infrastructure and social service commitments. A settlement may remain in this Step 3 status, or it may proceed to township establishment (Step 4). In addition, it is possible that only parts (blocks) of the settlement may proceed along the path to township establishment where it (or parts) becomes registered and residents are able to obtain ownership.

The City of Johannesburg would call settlements in Step 3 'regularised' in terms of its regularisation programme. To become established townships, they would proceed to Step 4.

Step 4: Township establishment

If residents choose ownership then a township register will need to be opened at the Deeds Office to enable title deed registration. If a housing subsidy is allocated for upgrading the settlement, then this will be a requirement.

There are a number of legal options for arriving at this status, depending on the Step 2 status of the settlement. These are outlined in Table 7.

Many related legal requirements need to be complied with before a township can be approved (e.g. environmental conditions) and these can be time consuming. For example, it can take two years to get an Ordinance application approved. It is therefore important that the settlement continues to be managed.

Step 2: Status	Requirements to get to Step 4	Step 4: Legal Options
Amendment Scheme (Transitional Residential Settlement Area)	Need to do township establishment	Ordinance LFTEA Chapter 2 DFA application
Rezoned Special Residential Area/Informal Settlement Area in terms of TPS	Need to do township establishment	Ordinance LFTEA Chapter 2 DFA application
By-law	Need to do township establishment	Ordinance LFTEA Chapter 2 DFA application
Land Development Area (DFA)	Do not need another application but need to satisfy all approved conditions of establishment so that township register can be opened	DFA compliance with Conditions of Establishment, especially Deeds Registry Act and Survey Act legal requirements
Less Formal Settlement Areas in terms of LFTEA Chapter 1	Chapter 1: Will need to comply with Land Survey and Deeds Registry Acts to open township registers.	Conversion of settlement to a township Can proceed to do a Chapter 2 application

Table 7 – Legal options for township establishment

CONCLUSION

Municipalities are under pressure to meet the needs of informal settlement residents. Many factors indicate that a more flexible approach to informal settlements would be advisable. These include the need to address the scale of demand, financial resource constraints, the needs of subsidy non-qualifiers who are resident in informal settlements and the root causes of social protest.

The Incremental Tenure Approach looks at how municipalities can make improvements in informal settlements during the period between settlement formation and housing subsidy allocation. It emphasises practical mechanisms that allow land rights to be upgraded over time in an incremental manner, combining a number of administrative recognition mechanisms with legal recognition tools in order to secure tenure. With greater tenure security, residents of informal settlements will have more opportunities to enjoy the benefits of land access. These include increased levels of service, the possibilities of access to micro-finance and economic opportunity. However, it will be important that government sustains its commitment to communities who are on the incremental path.

Adoption of the Incremental Tenure Approach will open up possibilities for the provision of infrastructure services and social facilities in informal settlements, in advance of the housing subsidy. The Incremental Tenure Approach has the potential to alleviate the pressure on municipalities and to deal with the needs of informal settlement residents in the interim.





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