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12 May 2020

The Observatory Civic Association, the Salt River Residents' Association, Sea Point for All, the Woodstock Resident's Association and the Wynberg East Civic Association hereby jointly object to the proposed amendment of the City of Cape Town's Streets, Public Places and the Prevention of Noise Nuisances By-law, 2007 ("2007 By-law").

## Introduction

The amendment of the 2007 By-law has the purpose of "add[ing] and streaml[in]ing] procedural aspects of the By-law that support and enable necessary law enforcement, including:

- effectively resolving complaints and situations relating to noise, and
- reducing risk to the City, individuals and land owners [sic] by ensuring that these processes/actions are supported by legislation."

The proposed amendments, which limit the constitutional rights to dignity, freedom of movement, privacy and property, are not justifiable in an open and democratic society based on dignity, equality and freedom.

It is, however, not just the proposed amendment of the 2007 By-law that is in breach of the Constitution, but already the 2007 By-law itself.

The 2007 By-Law conflates a number of issues in one by-law and is unreasonably broad. It covers

- parking violations,
- street obstruction offences (anything from heavy motor vehicles, goods and building materials, to digging holes and trees growing in the street),
- noise nuisance, including from private residences,
- public nuisances like fighting, gambling and using abusive language,
- waste carrying,
- dangerous acts, which lump discharging a firearm and skateboarding in the same clause,
- informal trading (despite this being dealt with in a specialised 2009 by-law)
- a range of anti-poor measures such as the prohibitions of sleeping, washing oneself or washing or drying clothes in public, begging and making a fire,
- sex work,
- the display of street numbers,

- and finally, the mere act of sitting or standing in a public place after an authorised official has told you to move along, more than reminiscent of apartheid laws.

Contravening any of the extensive by-law provisions is an offence which can lead to being fined and/or imprisoned for up to six months (longer if the offences are covered in other legislation).

The current review of the constitutionality of the 2007 By-law in court, which is a result of homeless people being fined in 2019, is overdue. The existing 2007 By-law limits Cape Town's citizens' constitutional right in an unproportional way, it is too broad and restrictive for the harm it is trying to prevent, and it is blatantly anti-poor.

Against this background, it is a worrying development that the City is hurrying to make the by-law even more stringent while insisting on an insufficient public participation process during the COVID-19 lockdown.

Instead, the 2007 By-law should be completely scrapped and redone to pass constitutional muster. In the process, separate issues should be dealt in separate, more specific by-laws including a Prevention of Noise Nuisances by-law, and informal trading should be dealt with comprehensively in another by-law.

## **Specific objections**

### **Section 22(2) Instruction to leave**

This suggested amendment limits the rights to constitutional rights to freedom of the person, which includes freedom of movement. Limiting a person's freedom of movement, as we are seeing in the current COVID-19 crisis, is considered to be a serious infringement of a person's human rights. The 2007 By-law amendment does not specify for which by-law contraventions this right can be limited. Limiting this fundamental right is only justifiable to prevent serious harm which cannot be prevented with less restrictive measures. The nature and seriousness of the by-law offences would need to proportionate to the infringement of the right and such offences which would need to be clearly spelled out and kept to a minimum. The proposed amendment in its current form is hence unconstitutional.

### **Sections 22(1) Inspections and (4)(1–3) Powers and functions of authorised officials to enter, search and seize**

The powers to enter, search and seize private property which are considered in these subsections seriously infringe the constitutional rights to dignity, privacy and property. Even in terms of the Criminal Procedure Act, officials cannot search a person's home, property or body or seize items of property without legal authorisation in the form of a warrant. The circumstances not requiring a warrant are narrow and exceptional. The offences in the 2007 By-law are not of such a serious and urgent nature that they would justify allowing for these rights limitations without the authorisation by a magistrate or judge. The proposed amendments in their current form are hence unconstitutional.

### **Section 22(4)(7) Powers and functions of authorised officials to arrest a person without a warrant**

Sections 39ff of the Criminal Procedure Act specify the requirements for the arrest of persons without a warrant by police, peace officers or private persons. Considering the importance of the basic right to freedom and security of the person and South Africa's history of unlawful detention the City by-law should not be allowed to extend the circumstances where a person can be arrested without a warrant. Research published by the Centre for Constitutional Rights shows that most people who get arrested in South Africa never get charged with the offence they allegedly committed and were arrested for. Extended powers of arrest without a warrant invariably lead to abuses which disproportionately target individuals from vulnerable sections of society. The proposed amendment in its current form is hence unconstitutional.

### **Section 22(5) Impounding of items, goods, equipment, vessels or vehicles**

The constitutional right to property includes the right not to be arbitrarily deprived of one's property. Municipal by-laws should ensure that impoundment as a means to ensure compliance is only used in exceptional circumstances and sparingly. In *Makwickana v Ethekwini Municipality*, the High Court found impoundment provisions in a by-law unconstitutional because they were overbroad and permitted impoundment for all contraventions without differentiating between serious contraventions and less serious non-compliance. These arguments are equally applicable to the proposed 2007 By-law amendment which does not enumerate the contraventions which can trigger impoundment and does not explore the possibility of less restrictive measures.

Allowing for impoundment of perishable goods opens the way for corruption as the people who have their perishable goods impounded know that this action is irreversible and that they will not get the goods back in time for use or sale so they are often desperate enough to agree to pay a bribe:

The 2007 By-law amendment spells out in (5)(9) that the City may, at any time after the impoundment, destroy impounded perishable goods if their condition renders them unfit for human consumption. Seeing how (5)(5)(c) specifies that impounded goods only have to be released within 72 hours in case if no fine is issued or no prosecutorial action follows, this is an extremely likely scenario for perishable goods, even if it turns out that the impoundment was unjustified. The clause allowing for the goods destruction makes no mention of damage payments in cases of unlawful impoundment, which amounts to expropriation without compensation.

The proposed amendments in their current form are hence unconstitutional.

### **Right to recourse against City officials and private security personnel**

Anyone without the means to take the City to court for illegally instrumentalising the impoundment of goods can be abused with impunity by City officials.

Likewise anyone being unlawfully instructed to leave, stopped, searched, having their property entered or seized or getting arrested without a warrant.

This is cause for concern on two fronts:

Firstly, many of the individuals who are likely to run foul of the 2007 By-law are economically disadvantaged and therefore have no access to legal recourse.

Secondly, there are Improvement District security officers in many suburbs across Cape Town who are the first port of call for by-law violations and who assist the City's authorised officials to police and enforce the 2007 By-law. A good example is the CCID, operating in the Cape Town CBD, which has been repeatedly in the media in the past for their heavy-handed treatment of buskers and homeless people in the inner city. CCID personnel are implicated in the sustained harassment of homeless people and illegal confiscation of their property in Cape Town last year. There are no complaints processes in place against CCID security personnel who overstep their powers while supporting City officials in enforcing by-laws. This will only become more problematic with the proposed amendments regarding enforcement of the 2007 By-law.

One of the amendment's purposes is to reduce the risk to the City, individuals and landowners by ensuring that these enforcement processes/actions are supported by legislation. But who is reducing the risk of harm to those individuals who will end up having their rights, their goods and their dignity trampled on by the enforcements?

### **Effectively resolving complaints and situations relating to noise**

The other stated purpose of the proposed amendments, to effectively resolve complaints and situations relating to noise, might well be a valid one. From anecdotal evidence, the enforcement of noise complaints does presently not have much teeth.

To achieve an efficient way to resolve such complaints and situations, a separate noise nuisance by-law should be drafted with its own enforcement stipulations proportionate to the nature and seriousness of the harm to be prevented or stopped and in line with an open and democratic society based on dignity, equality and freedom. Proposing the same enforcement mechanisms for noise nuisances as for all 2007 By-law contraventions only ends up making these amendments unconstitutional.

We therefore strongly oppose the proposed amendments to the 2007 By-law and suggest that the City redrafts its by-law in line with the recommendations set out above for further public comment.

Given the general impoverishment caused by COVID-19 crisis, the City needs to urgently concentrate on developing **positive** ways of assisting poor and homeless people rather than criminalising their destitution!

Yours sincerely

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