ENVIRONMENTAL LAW ASSOCIATION

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The City of Cape Town

Area Economic Development (AED)

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RE: Comments by the Environmental Law Association of South Africa (ELA): City of Cape Town: Informal Trading By-law

Below, we make our submissions on the proposed City of Cape Town: Informal Trading By-law**.**

DEFINITIONS

1. The definition of "nuisance" in section 2.17 of the City of the Cape Town: Informal Trading By-law ("the By-Law") is vague and unnecessarily broad and includes ambiguous terms such "comfort", "peace", and "convenience", which can be used to give a written warning to an affected person or be used as the basis of a criminal offence as per sections 12.3.1 and 19. This definition criminalises virtually all conduct of informal trade and is at the whim of the officers in question and the complaining members of the public. This constitutes an overly broad and vague scope for the crime of nuisance and would have an impact on the rights to dignity and to earn a living of informal traders. The vague nature of the definition renders it inconsistent with the rule of law and the right to administrative justice. This definition of "nuisance" must be narrowed, and it must have clear parameters for the "noise" aspect, taking into consideration that "especially in contemporary conditions, some **discomfort** or **inconvenience** or annoyance emanating from the use of neighbouring property must needs be endured" – *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) (30 October 2006) para 22.

TRADING PLANS

2. Section 5.5 of the By-law states that the City of Cape Town (the City) must consider and decide upon a request for adopting a trading plan within a "reasonable period". Our view is that a maximum period must be explicitly prescribed, particularly to safeguard the interests of affected persons who usually belong to the historically

disadvantaged group so that they can properly vindicate their rights. Any unspecified period would frustrate the rights in the Bill of Rights, such as the right to dignity, right to equality, the right to earn a living, the right to a clean environment and the right to just administrative action. An indefinite period to make this decision is also prone to abuse and may undermine the principles of accountability and openness as required by section 195 of the Constitution of the Republic of South Africa, 1996 ("Constitution").

3. Section 5.2.2 is incongruous with the provisions of section 3.1 and 3.2 and should be revised. In this regard, section 5.2.2 requires the designation of "trading bays" and "trading markets". However, while neither of these terms is defined, they are suggestive of defined locations where informal traders may trade, which is at odds with, *inter alia*, "roving trading", "trading at special events" and "mobile trading" as provided for in sections 3.1 and 3.2.

4. Section 5 should also specifically require that the development of a trading plan must take into account and be consistent with the City of Cape Town's Integrated Development Plan and Spatial Development Framework, and any other relevant spatial planning or environmental policy applicable to the area.

5. A trading plan should also make provision for mobile and roving traders.

6. The publication of the trading plan in section 6.3 must specifically require that the notice must be published in the languages that are spoken in the area in question, which are Xhosa and Afrikaans. This is the only way that the affected parties from the historically disadvantaged group can have meaningful consultation in line with their constitutional rights to freedom of expression and culture. It is common cause that these rights are indivisible, and the ability of these communities to engage in public participation requires that they must be able to understand the content of these trading plans. The same considerations must apply to the choice of radio stations in the areas in question as per section 6.4 and the "presentation" contemplated in section 6.7.1 of the By-Law and the publication of the notice notifying the public of the adoption of the draft trading plan. By the same token, the adoption of a trading plan must be done with a specified maximum period of time instead of the "reasonable period" requirement in section 6.9.

7. Section 6.3.2 should make provision for oral representations by interested and affected parties. The latter representations should be able to be made in person by (prospective) informal traders at the City's designated office, and such representations are separate and distinct from the comments and objections made at a public meeting and referred to in section 6.7.

8. Section 7.1.2 must specify that the "Administrative justice rights" are those stipulated in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the Constitution.

9. The By-law must specify the **criteria** that must be taken into account by the City in the approval of a trading plan which must be consistent with the rights in the Bill of Rights and relevant legislation, applicable spatial and environmental policies, the specific consideration of historically disadvantaged individuals and, in particular, the requirement to ensure social upliftment in pursuit of the "sustainable development" mandate contained in section 24 of the Constitution (*Fuel Retailers Association of*

Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC) (7 June 2007) para 117), as well as the mandates to pursue **environmental justice** in terms of the National Environmental Management Act 107 of 1998 and **spatial equality** in terms of the Spatial and Land Use Planning Management Act 16 of 2013 (SPLUMA).

PERMITS

10. The requirement for an "additional fee or tariff" to acquire a trading permit under section 8.2.3 is unduly burdensome on informal trades who are disproportionately people from historically disadvantaged groups. This is concerning in that this decision falls solely to the City of Cape Town with no criteria, and purports to confer an unfettered discretion, is open to abuse, and contravenes the values of openness, transparency and accountability as required by the founding values of the Constitution and section 195 of the Constitution.

11. The requirement that the appeal for a waiver for the "fee[s]" in section 8.3 must be in writing, violates the right to culture of historically disadvantaged individuals, which is based on oral tradition and who are likely to be disproportionately affected by this by-law. Our submission is that administrative justice demands that affected parties must be allowed to make oral submissions to the City of Cape Town, and there must be specified criteria that can guide the affected parties as to how to appeal these fees not only in writing, **but also** through recorded messages. Section 8.6.6 should also make provision for oral representations as well as written representations. The courts have recognised that oral submissions ought to be accepted in such circumstances, including the apex court in *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC), which held at para 53 that "[i]n applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written". Thus, the By-Law must not propagate an approach that alienates a major proportion of its constituency and must prevent the hegemony of one culture over another.

12. The requirement that an applicant must be a South African citizen in section 8.4.3 is not in line with our law as it excludes the holders of permanent residence permit and other holders of visas outside of work permits (See *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC)). This exclusion is arbitrary, irrational and unconstitutional. This section must specify all the persons that are entitled to apply for a permit in line with the Constitution and our jurisprudence.

13. The "reasonable prior notice" requirements in sections 8.6.5 and 8.7 must be specified in order for the right to procedural fairness in section 3(1) of PAJA to be given effect. The "reasonable prior notice" requirement is also not in line with section 7*(b)* of SPLUMA, which requires the "principle of efficiency", whereby decision-making procedures are designed to minimise negative financial and social, economic impacts. The "reasonable prior notice" requirement also falls foul of section 7*(c)* of SPLUMA, which requires adherence to the "principle of good administration" and which demands

that policies, legislation and procedures must be clearly set in order to inform and empower members of the public. The reference to "reasonable" time periods scattered across the By-Law violates the principles of efficient and good administration. This requirement should be carried through to all relevant sections of the By-law to ensure that all informal traders are able to meaningfully participate in informal trading decisions that affect them.

14. Section 9.1.1 should not only provide for "death", but other circumstances, including medical boarding, permanent incapacitation, physical or mental health, which render the permit holder unable to continue trading under the permit.

15. Section 11.2 should be amended to include "any environmentally sensitive area as designated in any spatial or environmental plan or policy developed by the City, or in terms of any other law by any other branch of government responsible for the environment or water resources."

16. Section 12 must be amended to include that "no informal trader shall, in the course of informal trading, breach the statutory duty of care to prevent degradation and/or pollution of the environment from occurring, continuing, or recurring." [Section 28, National Environmental Management Act 107 of 1998].

GUIDELINES AND POLICIES

17. Under section 15, the policies and guidelines for informal trading places must only be published or amended if they have been subjected to prior public consultation in line with section 195(1)(e) of the Constitution, which requires that the public must be encouraged to participate in policy-making. Furthermore, consultation is required by section 33 of the Constitution read with section 4 of PAJA.

ENFORCEMENT

18. In section 18.3, the power of the City of Cape Town to withhold goods by up to 30 days when not "satisfied" must be clarified. It must first be clarified on what grounds the City of Cape Town may deem itself "unsatisfied". Secondly, the 30 day period is excessive given that it has severe implications for the dignity, livelihood and subsistence of the affected person and must be reduced to a maximum of 7 days.

19. Section 18.1 refers to using a written warning as the starting point. This measure is too drastic and should be preceded by an oral warning in light of the devastating consequences a person may suffer should they lose the goods with which they need to trade.

20. The proceeds of impounded goods not claimed within 3 months must not be forfeited to the City of Cape Town without qualification in section 18.7 but must rather be employed to address the issue relating to the administration of the By-law. It has been held by the Constitutional Court that forfeiture of goods cannot occur without prior notice and a hearing of affected persons. Procedures must be put in place to ensure that forfeiture only occurs following a fair administrative process.

OFFENCES

21. The offences created in section 19 carry an excessive fine and impose an excessive period of imprisonment. The principle behind a fine is that it is supposed to be payable by the affected party. It is irrational to have an R5000.00 fine or 3-month imprisonment. The nature of this penalty ensures that convicted persons will almost always get imprisoned because it is inconceivable that the affected person would somehow have R5000 when they trade informally to sell low-cost goods such as bubble gum and sweets. The fine also contravenes section 7*(b)* of SPLUMA, which requires the principle of efficiency, whereby decision-making procedures are designed to **minimise negative financial and social, economic impacts.**

    Significantly, the courts have made it clear that "[w]here the court decides to impose a fine, the intention being to keep a person out of prison, the court should not stultify itself by imposing a fine which it has no reason to suppose the accused can pay"- *R v Nhlapo* 1954 (4) SA 56 (T) at 58G-H. The result is that if a fine is imposed in order to keep the offender out of prison, the fine should be **within the offender's means**. This principle was first established in *R v Frans* 1924 TPD 419, where Feetham J decided: **"[w]here a fine is imposed as an alternative to imprisonment it should, I think, bear some relation to the probable resources and earnings of the person on whom it is imposed"**. See also *S v Dandiso* 1995 (2) SACR 573 (W) at 576g; S v Sibeko 1995 (1) SACR 186 (W) at 189a; *S v Sithole* 1979 (2) SA 67 (A) at 69G. Otherwise, the i**nevitable punishment will be imprisonment, which is almost invariably imposed as an alternative to the fine**.

    Furthermore, the By-Law should allow for a "means test" of the offender to ensure the just assessment and determination of the extent of the fine, which, as stated above, must be an amount determined according to the means of the accused within the bounds of ensuring deterrence. It is unacceptable that an indigent offender should be more severely punished than other offenders in that she will be serving imprisonment simply because she cannot pay the fine - *S v Seoela* 1996 (2) SACR 616 (O) at 622c-d. In short, the penalty of a fine here is inappropriate since the offenders cannot afford it - *S v Sekoboane* 1997 (2) SACR 32 (T) at 40e-f the court found that, if the accused is not a candidate for a fine because of a lack of financial ability, a fine should not be imposed, not even as a suspended sentence; See also *S v Koopman* 1998 (1) SACR 621 (C).

ENVIRONMENTAL INJUSTICE AND SPATIAL APARTHEID

22. The issue of trading in beaches must be clarified. The By-Law vaguely states that if one is "permitted to conduct beach trading" at section 12.8. However, beaches are not listed as areas where informal trading is "prohibited" or "restricted" in sections 11 and 12 of the By-Law. Notwithstanding that the terms "prohibit" and "restrict" must be defined in the By-Law, it is our view that the informal traders **must be allowed to conduct beach trade as a matter of principle** to address matters of spatial injustice and environmental injustice as the historically disadvantaged individuals suffer from a legacy of being blocked access to beaches in the more lucrative areas of Cape Town. Thus, the informal traders must be allowed to conduct beach trading in accordance with the By-Law. This By-law represents a perfect opportunity for the City of Cape

Town to commence its duty to address its constitutional obligations to sustainable development, environmental justice and spatial justice in response to the spectre of Cape Town's prevailing spatial apartheid. The principle of spatial justice is a statutorily guaranteed right under section 7 of the SPLUMA. In particular, section 7*(a)* of the SPLUMA requires that the By-Law must give effect to the principle of "spatial justice", whereby—

(i) past spatial and other development imbalances must be redressed through improved access to and use of land;

(ii) spatial development frameworks and policies at all spheres of government must address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation;

(iii) spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons.

The "additional fee or tariff", the lack of an oral warning and a tacit embargo on trade in beaches collectively violate the principle of spatial justice. It is common cause that " "Cape Town is one of the most segregated cities in the world'" – *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* [2020] ZAWCHC 87 (31 August 2020) para 98. This By-Law represents an opportunity for the City of Cape Town to address issues of sustainable development, in particular, social upliftment and equity - both intergenerational and intragenerational (*Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* para 51), environmental justice and spatial justice, which are superordinate constitutional mandates for the City of Cape Town.

Regards

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