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Director Neville Michaels
Metro Police
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Dear Director Michaels,

Re: By-Law Relating to Streets, Public Places and the Prevention of Nuisances, 2006

The Freedom of Expression Institute has carefully studied the City of Cape Town's proposed "By-Law relating to streets, public places and the prevention of nuisances". We were pleased when, after having passed the By-Law, the Council decided not to promulgate it but to subject it to a process of public comment.

Our focus in this submission is mainly on Section 11 of the proposed By-Law, which deals with "Processions".

The FXI has just completed a nationwide survey of the implementation of the Regulation of Gatherings Act (Act No. 205 of 1993) and has done extensive work on the Act itself. Our finding has been that most local authorities have been acting illegally and unconstitutionally in the manner in which they have implemented the Act. We attach an extract from our report on the Western Cape marked "A" hereto.

Since the FXI was founded in 2004, we have become the leading activist NGO on the right to protest and have built up a substantial body of expertise on the law and application of the right to gather. Amongst the various policy statements, press releases and legal opinions on our website (www.fxi.org.za), we attach an extract from a legal opinion we recently obtained on the spirit, purpose and proper application of the RGA, marked "B" hereto.

We have also represented (or assisted with court representations) organisations around the country that have been the victims of unlawful application of the RGA. We have won every single court case we dealt with or assisted with on the Act. COSATU has echoed our call for a top-level investigation by government into abuses by local authorities of the RGA and the constitutional right to assemble. We are meeting with the Minister of Safety and Security, Charles Nqakula, and security officials in different provinces to discuss these abuses and how local authorities need to comply strictly with the RGA.

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Your proposed By-Law is illegal and unconstitutional and we vehemently oppose the promulgation thereof for the following reasons.

1. No municipal by-law can limit the constitutional right to assemble. Such limitation can only be made in terms of a law of *general application*, pursuant to section 36 of the Bill of Rights (BR), which reads as follows:

“36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a. the nature of the right;*
- b. the importance of the purpose of the limitation;*
- c. the nature and extent of the limitation;*
- d. the relation between the limitation and its purpose; and*
- e. less restrictive means to achieve the purpose.*

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

A By-Law is necessarily of limited application; in this case, limited to the City of Cape Town.

Section 17 of the Bill of Rights reads as follows:

“Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.”

1. Most of section 11 of the By-Law constitutes a manifest limitation of BR section 17, is in violation of BR section 36 and is therefore liable to be struck down as unconstitutional by a high court.

According to Point 1, all gatherings and processions in public places are, in the first instance, deemed to be proscribed. Point 2 provides the mechanism by which such activities might be legalised. This is a violation of BR section 17. This guarantee is echoed by the preamble to the RGA, which reads as follows:

“...every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so...”

The RGA stays true to the spirit of the Constitution in holding the notion of a gathering as a right, which can only be limited in exceptional circumstances pursuant to BR section 36 ‘to the extent reasonable and justifiable in an open and democratic society’. The RGA therefore deems all gatherings to be legal unless expressly prohibited (for a very limited number of reasons) by the local authority.

Section 11 (1) of the By-Law purports to subjugate the By-Law to the RGA. This qualifier will not save the By-Law, which is both unconstitutional and *ultra vires* the RGA and liable to be struck down as unlawful by a high court.

2. Section 11 (2) of the By-Law requires the submission of a written application to the City for permission to hold a gathering. This is *ultra vires* the RGA, which requires only *notification* to a local authority, not to apply for permission (see sections 2(1)(a)(i), 2(1)(b) and 3 of the RGA).
3. Section 11 (3) of the By-Law requires a certificate as a *sine qua non* for any gathering, whether or not such gathering is *in fact* "...likely to be in conflict with the interests of public peace, order or safety..." This places an unreasonable burden on organisers of gatherings to seek written ratification of a pre-existing constitutional right and puts organisers at the mercy of bureaucrats who have the power to withhold such certificate, with or without justification. There is no recourse provided for in the By-Law for those aggrieved organisers who do not receive a certificate timeously or at all.
4. The period of thirty days' written notice that should be given by organisers of a gathering is so onerous as to make a mockery of the right to gather and protest. Rarely do people plan protests that much in advance. More importantly however is the fact that the RGA requires only seven days' advance notification (section 3 (2) of the Act) and even contemplates notification of 48 hours (section 3 (2) of the Act). Indeed, the Act even contemplates that spontaneous gatherings might take place (section 9(1)(c) of the Act), without making such gatherings illegal. In contrast, your proposed By-Law, by running foul of the RGA, will make itself the promoter of illegal requirements.
5. Section 11 (2) (a) of the By-Law requires the organiser of a gathering to provide her/his occupation. This is beyond what the RGA requires and is both an unreasonable and unnecessary enquiry.
6. Section 11 (3) of the By-Law provides that only if, "*in the opinion of the City*" any action/s of the gatherers are not "*likely to be in conflict with the interests of public peace, good order and safety*" will the City issue permission for such a gathering to take place. This violates both the BR section 17 and the RGA. The Act provides only a limited number of circumstances under which a gathering might be prohibited (section 5). Such a prohibition (if the notice is given more than seven days before the proposed gathering) can only be valid if the responsible officer is provided "*credible information on oath*" that "there is a threat that a proposed gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat". The By-Law makes no mention of the need for the City to obtain such information "*on oath*" and thus makes the very subjective "*opinion of the City*" the only arbiter.
7. Sections 11 (4) and (5) of the By-Law, explaining when the City might refuse or withdraw permission for a gathering falls foul of the RGA for the same reasons as explained above.
8. Section 11 (6) of the By-Law creates an arbitrary and unjustifiable distinction between religious, wedding or funeral-related gatherings and 'other' gatherings. There is no apparent reason why the categories of gatherings in this section should be exempted from compliance with the entire section 11, while other gatherings related to, for example, protests over service delivery, must overcome the significant administrative hurdles in the section.

9. Section 11 does not reconcile with section 2 (1) (a) of the By-Law, which prohibits the intentional blocking of vehicular or pedestrian traffic. Even the RGA foresees the possibility of disruption, even serious disruption, to such traffic, which is inevitable given that gatherings (as defined in both the RGA and By-Law) necessarily take place in public places and on public roads.
10. Similarly, section 11 does not reconcile with section 2 (3) (b) of the By-Law, which prohibits the causing of a disturbance, by making noise. The RGA clearly contemplates the making of noise by protesters and does not give the right to authorities to interfere in any way with gatherings on this basis. Indeed, chanting and singing is an integral part of the proud toyi-toyi tradition of South African protester, without which protest action would be silenced, literally and figuratively.

For the above reasons, we believe that the entire Section 11 of the proposed by-law should be removed. Rules governing gatherings and processions are already adequately covered in the Regulation of Gatherings Act, which is a law of general, national application and which generally passes constitutional muster. It would be unnecessary and unlawful (as in this case) for municipalities to draft additional by-laws to regulate gatherings.

While our main focus in this submission has been the issue of gatherings, we find the By-Law in general to be antithetical to notions of freedom of expression of various sectors of Cape Town society. The tone, indeed, is draconian. While some of the objectives of the By-Law (facilitating traffic, preventing dumping of waste in public places, etc) are laudable, the inclusion of aspects that clearly discriminate against poor people will inevitably cause various sections of our society to call for the entire by-law to be scrapped. We would urge a complete redrafting of the By-Law in a manner that avoids the problematic points raised here and by others.

The proposed by-law is completely ignorant of the reality of what it means to live and survive in South Africa. The Council, with due respect, seems to be totally out of touch with the socio-economic conditions of the vast majority of South Africans and seems to address the needs of councillors more than the needs of the majority of the city's population. As one observer was quoted in a newspaper as saying: "It's not the rich and middle class who have to bathe themselves under a tap or stand by a fire." Among many Capetonians, the impression has also been created that the proposed By-Law is the first in a series of assaults against the rights of the people of Cape Town as the city prepares for the 2010 soccer world cup. That the issue of beggars and homeless people is lumped into a by-law that deals with the dumping of toxic waste says a lot about manner in which the Council views the people that make up the city.

Yours faithfully

Simon Delaney
Head: Legal Unit

Na'eem Jeenah
Head: Anti-censorship Programme