



c/o: Mpho Raboeane, Attorney, Ndifuna Ukwazi

mpho@nu.org.za

Danielle Louw, Attorney, Ndifuna Ukwazi

danielle@nu.org.za

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To: The Deputy Chief: Leon Wentzel

Law Enforcement Department

First Floor

Omniforum Building

94 Van Riebeeck Street

Kuilsriver

By email: unlawful.occupation@capetown.gov.za

CC: Anathi Dywili

By email: anathi.dywili@capetown.gov.za

Dear Deputy Chief Wentzel,

RE: NDIFUNA UKWAZI'S COMMENT ON THE DRAFT UNLAWFUL BY-LAW

1. Ndifuna Ukwazi ("NU") is a non-profit activist organisation and law centre that combines research, organising and litigation in campaigns to advance urban land justice in Cape Town. Our primary mission is to expand and protect access to affordable housing towards building a more just and equal city.

Ndifuna Ukwazi is a not-for-profit trust (IT 540 - 2001)(NPO 094 - 737).

Board of Trustees: Shuaib Manjra (Chairperson), Ruth Hall,
Phumeza Mlungwana, Mercy Brown-Luthango, Michael Evans

18 Roeland Street
Cape Town, 8001
Tel: 021 012 5094 | www.nu.org.za

2. Over the last seven years, Ndifuna Ukwazi has been involved in legal, research and organising work around evictions, relocations, rental housing, the allocation of state-subsidised housing, the management of public land in a manner that prioritises socio-economic needs and the promotion of social, transitional and inclusionary housing. We have published several resource guides and research reports on these issues. Ndifuna Ukwazi has also been involved in a series of important court cases dealing with land occupations, evictions, the provision of alternative accommodation, and the state's constitutional and legislative obligation to combat spatial apartheid and promote spatial, economic and racial justice and equality through expanding access to land and affordable housing.
3. This comment is made pursuant to the invitation for comments as published on the City of Cape Town's website on 26 June 2021. Ndifuna Ukwazi has read and considered the draft Unlawful Occupation By-law and hereby makes this submission.

Yours faithfully,

Ndifuna Ukwazi

Per: Danielle Louw, Attorney and Mpho Raboeane, Attorney.

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NDIFUNA UKWAZI'S SUBMISSION ON THE CITY OF CAPE TOWN'S DRAFT UNLAWFUL OCCUPATION BY-LAW (2021)

I. Context

The Draft By-law is published in a context of rampant spatial inequality, a massive shortage of well-located affordable housing and amid fierce criticism of the deplorable conduct of the City's Anti-Land Invasion Unit (ALIU) and law enforcement officers during unlawful evictions.

This context is not acknowledged by the Draft By-law. While the causes of occupations are multiple and nuanced, treating occupiers as criminals fails to recognise that the vast majority of people are forced to occupy land out of need. Generations of dispossession, an inability to develop a coordinated response to rapid urbanisation, and a systemic failure on the part of government to deliver on the promise of a functioning state-subsidised housing programme have all contributed to the crisis.

Urban informality is driven by historical, racial and class exclusion - and it is this exclusion that has defined the urban policies, priorities and processes of development in Cape Town for decades. The COVID-19 pandemic has laid bare the deeply entrenched inequitable access to housing and land. Tenure insecurity has become a definitive tenet of the impact of the pandemic.

Despite the professed pre-emptive nature of the Draft By-law, it is strikingly blind to the causative circumstances that have led many in need of a home to occupy vacant land. Paradoxically, a significant contributing factor is the state's response to informality, which in turn reinforces informality. Spaces of informality are continually perceived as disquieting reminders of deeply entrenched inequality which finds reproduction through the politico-economic systems that fail the urbanised poor.¹

The City needs to proactively plan for informality which, given the socio-economic situation in our country, is only set to get worse. The blunt instrument of evictions is not a considered response which will sustainably address the reality of land occupation being driven by the continued state of tenure insecurity that people face. Specifically, households living in informal dwellings number around 270 000² across the City and roughly 60% - 65%³ of all informal dwellings are located within informal settlements, with the balance being located in backyards.

¹ Huchzermeyer, M. "Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa" (2011) at 29.

² City of Cape Town Human Settlements Strategy Council Draft, May 2021 at 17.

³ Stats SA Community Survey, 2016.

Ndifuna Ukwazi is deeply concerned that the Draft By-law reflects an approach to informality that echoes the apartheid government's displacement and forced removal of Black and Coloured people from urban centres. In addition to anti-poor measures, the Draft By-law has the potential of creating a police state through an arbitrary exercise of power by law enforcement agencies and undefined "authorised officials".

The City's Draft By-law, as with most of the City's responses to unlawful occupation, decentralises the question of access for the urban poor, but rather relegates their continued presence to targets for removal, criminalisation and erasure. Although national policy and its empowering legislation require a recognition and incorporation of informality into the city structure, the approach of addressing the causes of informality remains less favourable as opposed to the superficial focus on the symptoms advanced by this Draft By-law.

II. Legal Framework

There is a considerable array of applicable legislation and policies which relates to the issues the Draft By-law seeks to address. Some of the most important are as follows: -

The Constitution 108 of 1996

Section 25(5) is a peremptory provision requiring reasonable and equitable access to land:

The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

Sections 25 and 26 both recognise the right not to be arbitrarily deprived of property or arbitrarily evicted:

'25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'

'26(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

And the right to access to adequate housing:

'26(1) Everyone has the right to have access to adequate housing.

26(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

Section 153 of the Constitution refers to the developmental duties of Municipalities. In terms of these duties, priority should be given to the community's basic needs. Since access to housing is a basic community need, section 153 of the Constitution interacts with the unlawful occupation of land question.

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act)

The PIE Act was enacted to give effect to section 26(3) of the Constitution in prohibiting illegal evictions and providing procedures for the eviction of unlawful occupiers. This Act aims to strike a balance between a property owner's common law rights and the needs of people in unlawful occupation because they have nowhere else to go and necessitates that an eviction must be just and equitable after a consideration of a range of factors.

The White Paper on South African Land Policy 1997

The Policy set out the vision and implementation strategy of South Africa's land policy. Relating to [unlawful occupations]⁴ the policy acknowledges that '[l]andlessness and [unlawful occupations] are a stark reality in South Africa. Delays in the release of land and slow delivery of housing programmes have exacerbated the problem, as have unrealistic expectations and a lack of information, particularly with the time it takes to transfer land. This has led to urban land invasions and subsequent evictions by local and provincial authorities and ongoing legal disputes.'⁵

The policy is clear on the causative factors of unlawful occupation:

'Rapid urbanisation is creating enormous pressure on urban land. It is taking place in the absence of clear and coordinated policies and strategies to provide for speedy land delivery, management and development. In the absence of these actions, informal settlements and land invasions will continue to grow in number and complexity.'⁶

The policy is clear that evictions as a first resort are an untenable solution. It notes:

'[unlawful occupations] are increasing in the absence of suitable land being identified and assembled for affordable housing. They hamper efforts to release land in a planned manner and result in 'queue jumping' for the housing subsidy and for land.'

Government, while strongly discouraging [unlawful occupations], does not believe that the only solution lies in evictions, which are often a route towards confrontation and civil disturbance. Evictions as a solution to [unlawful occupations] are a measure of last resort and should only be considered after all other possible alternative solutions have been explored, including commitments to organised groups of landless people for the delivery of land within specific time frames. Where evictions are the course of action decided upon, this should only be after due process has been followed. **In the final analysis it is the delivery of appropriate land at a rapid pace that is the solution to land [occupations].**⁷ (emphasis added)

⁴ In this submission we shall use the term 'unlawful occupation' as opposed to 'land invasion'.

⁵ Section 3.15.2, White Paper on South African Land Policy, Department of Land Affairs (1997).

⁶ Section 3.15.1, White Paper on South African Land Policy, Department of Land Affairs (1997).

⁷ Section 4.8.1, An adequate response to land invasions

Municipal Systems Act No 32 of 2000

Section 23 directs municipalities to undertake developmental orientated planning by way of in to ensure that they : -

- '(a) Strive to achieve the objects of local government as set out in section 152 of the Constitution;
- (b) Give effect to their developmental duties as required by section 153 of the Constitution; and
- (c) Together with other organs of state, contribute to the progressive realisation of fundamental rights, as for example, housing.'

Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA)

This legislation was enacted to give effect to sections 24, 25(5), 26 and 27(1) of the Constitution. Section 21(k) of the Act mandates municipalities, in their Spatial Development Frameworks to "identify the designation of areas in the municipality where incremental upgrading approaches to development and regulation will be applicable".

Section 7(v) provides that "land development procedures must include provisions that accommodate access to secure tenure and the incremental upgrading of informal areas."

Housing Act 107 of 1997

The Housing Act gives effect to the constitutional obligations contained in section 26, and in doing so, introduced a variety of programmes as contained in the National Housing Code, 2009 which provide poor households access to adequate housing.

Section 9(a) instructs every municipality, as part of the municipality's process of integrated development planning, to take all reasonable and necessary steps within the framework of national and provincial legislation and policy, to ensure that its inhabitants have access to housing and related services on a progressive basis.

Section 9(f) directs municipalities to initiate plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction; and

Section 9(h) allows for municipalities to plan and manage land use and development.

National Housing Code, 2009

National Housing Programme: Upgrading of Informal Settlements (UISP)

Part Three of the Housing Code details the process and procedure for the in situ upgrading of informal settlements as it relates to the provision of grants to a municipality to carry out the upgrading of informal settlements within its jurisdiction in a structured manner. The key objective of this programme is to facilitate the structured in situ upgrading of informal settlements as opposed to relocation to achieve tenure security through the recognition and formalising of tenure rights of residents within informal settlements; the provision of affordable and sustainable basic municipal engineering infrastructure; and addressing social and economic exclusion through community empowerment and participative processes.

Where necessary, the programme includes relocation as a last resort and in exceptional circumstances, with relocation and resettlement of people being on a voluntary and co-operative basis.

The National Housing Code also contains the National Housing Programme for Housing Assistance in Emergency Housing Circumstances. This policy requires the City to investigate and assess the need for emergency housing in its jurisdiction and to plan proactively for those purposes.

The policy also makes provision for the City to access funding through the Western Cape Provincial Government, for persons within its jurisdiction who qualify for emergency housing. Such persons include those who are threatened with eviction. The Emergency Housing Policy requires that the provision of temporary shelter to those who qualify for emergency housing should constitute the first step towards permanent housing solutions which the City is mandated to plan and develop.

Draft Human Settlements Strategy 2021

This Strategy recognises the extent of informal housing prevalent within Cape Town. It argues that this informality is partly due to market failure, whereby the cost to produce a house in well-located areas has outstripped the ability of a household to afford it and is due to the inability of the government's national housing programmes to adequately meet the widespread housing needs of low-income households. Other social and economic dynamics affect the rise of informal settlements in the South African context, including economic opportunities that developing metropolitan areas hold.

The Strategy determines to respond to affordability and informality; interpreting informality as a form of private sector response to the deficit of affordable formal housing provision. The City has a role to play in recognising and supporting the need and desire of low-income households to build their own houses or provide housing opportunities for others. It states that the City's response to informality is detailed through:

- inclusive design of informal settlements and emergency housing;
- the provision of basic service infrastructure;
- the recognition of informal building practices;
- the opportunities for supporting informal structure compliance and tenure.

Unlawful Occupation of Land Framework 2020

The Framework requires that the City, in the short-term, establish a mechanism for *pre-emptively protecting its land from unlawful occupation*. Furthermore, the City must confirm its plans for the provision of temporary basic services; particularly to recently unlawfully occupied settlements.

In the long-term, the City must determine a framework for responding to informality by increasing the number of formal affordable housing opportunities entering the housing system as well as legally enabling informal housing development. The Framework acknowledges the resource constrained environment that the City finds itself in and as a response mandates the City to pilot a Managed Settlement Programme.

III. General Comments on the City of Cape Town's Draft Unlawful Occupation By-Law

i. Regressive measures

The measures sought to be introduced by the Draft By-law signal a return to the exclusionary conception of property which found legal expression through legislation such as the Prevention of Illegal Squatting Act⁸ (PISA). This is alarmingly apparent in the response to unlawful occupation proposed in the Draft By-law as well as the conferring of criminal sanction and prospective legalisation of dispossession it provides for. The nuanced context of occupation and circumstances of occupiers are met with the blunt instruments of criminalisation and removal - features which came to characterise the segregationist purpose and operation of apartheid legislation such as PISA.

It cannot be forgotten that this proposed legislation operates within a context of historical and continuing dispossession, inequality and perpetual landlessness for the poor and marginalised of our society. The legacy of racially discriminative policies has created a climate in which neutrality and substantive equality before the law cannot exist. Albeit prima facie non-racial, we cannot be blind to the reality that those living in informality and facing insecure tenure in occupied spaces are predominantly Black and Coloured, poor and of the working class. Thus, in such a contextual setting the reintroduction of apartheid era legislation is objectively regressive and may result in the negation of the constitutionally enshrined imperatives that are to underpin access to land, municipal governance and society in general. The approach chosen by the City in this Draft By-law views a deeply complex societal issue through the simple lens of property ownership rights which offers little protection for those living in precarity and serves to 'legislatively intensify' the weak position of Black and Coloured non-ownership rights:

'The 'normality' assumption that the owner was entitled to possession unless the occupier could raise and prove a valid defence, usually based on agreement with the owner, formed part of Roman-Dutch law and was deemed unexceptional in early South African law, and it still forms the point of departure in private law. However, it had disastrous results for non-owners under ... apartheid land law: the strong position of ownership and the (legislatively intensified) weak position of black non-ownership rights of occupation made it easier for the architects of apartheid

⁸ Act 52 of 1951.

to effect the evictions and removals required to establish the separation of land holdings along race lines.⁹

It is concerning that the provisions of the By-law mimic, if not fully resurrect, the provisions of the repealed PISA. The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*¹⁰ considered the eviction of 68 occupiers at the instance of the Port Elizabeth Municipality and in doing so, extensively set out the legislative mandate and historical impact of PISA. The Court per Sachs J noted that the operation of PISA: ¹¹

“[...] [W]as to prevent and control what was referred to as squatting on public or private land by criminalising it and providing for a simplified eviction process.¹² The power to enforce politically motivated, legislatively sanctioned and state-sponsored eviction and forced removals became a cornerstone of apartheid land law.¹³ [...] Evictions could be sought by local government and achieved by use of criminal rather than civil law.”¹⁴

In this submission we argue that the operation of the Draft By-law in its current form will result in the wholesale regression of the protections built into sections 25 and 26 of the Constitution as well as offending against national legislation and policy which seek to protect, promote and fulfil the rights in the Bill of Rights. Specifically, the Draft By-law is reminiscent of sections of PISA allowing for summary ejection, relocation or removal of trespassers, the demolition of structures and enabling the exercise of unfettered discretion with respect to the administrative powers conferred through the Act.

ii. Objects, Constitutional matrix and interpretation of the PIE Act

It is in view of this history that the restorative aims of the Constitution informed the creation of a society premised on the preservation of human dignity and the fundamental principles of equality and freedom.

The operation of the By-law brings to light the constitutional nexus between the section 25 and 26 rights of residents in the City, particularly those who will be affected by the Draft By-law. The preamble of the Draft By-law professes a cognisance of the requirement in section 26(3) of the Constitution which has

⁹Van der Walt “Exclusivity of ownership, security of tenure, and eviction orders: a model to evaluate South African land-reform legislation” 2002 *TSAR* 254 at 258, quoted with approval by Olivier JA in *Ndlovu v Ngcobo; Bekker and Another v Jikka* 2003 (1) SA 113 (SCA) at para 65; 2002 (4) All SA 384 (SCA) at para 69.

¹⁰ 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004) (“PE Municipality”).

¹¹ PE Municipality at para 10, footnotes omitted.

¹² *Ndlovu and Bekker* at para 12.

¹³ Van der Walt at 260.

¹⁴ *Id.*

been given legislative expression to by the PIE Act. The PIE Act, was enacted with the objective of overcoming the apartheid era abuses legislated by PISA and ensuring that evictions in future took place in a manner consistent with the values of the Constitution.¹⁵ The effect of PIE was to decriminalise what was referred to as squatting, recognising the inherent dignity of persons in unlawful occupation. As noted by the Court in *PE Municipality*:

“PIE not only repealed PISA but in a sense inverted it: squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the name, character, tone and context of the statute being turned around. Thus the first part of the title of the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common law remedies while reducing common law protections, was reversed so as to temper common law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgement of the necessitous quest for homes of victims of past racist policies. While awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect.”¹⁶

The PIE Act therefore creates an imperative for humane procedures premised on fairness to regulate both evictions and unlawful occupation and reverses the depersonalised process that paid no regard to the life circumstances of those with precarious tenure facing summary expulsion. The Draft By-law seeks to undo this reversal by reintroducing provisions identical to the repealed PISA.

iii. Arbitrary deprivation of property and section 25’s recognition of precarious tenure

Where the stated aim of the Draft By-law is ostensibly to protect land and buildings from unlawful occupation; and where the operation of the Draft By-law’s provisions permit the seizure of intended or existing occupiers’ property, the Draft By-law will invariably invoke section 25 of the Constitution. The Draft By-law’s current treatment of property may be antiquated and fails ‘[...] to move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the status quo to a dynamic,

¹⁵ PE Municipality at para 11.

¹⁶ Id at para 12.

typically public-law view of the constitution as an instrument for social change and transformation under the auspices of entrenched constitutional values.¹⁷

Given the Draft By-law's provisions on confiscation of materials, impoundment of property- including personal effects and seizure of same, the Draft By-law cannot survive constitutional scrutiny.

iv. Constitutional regard for the home

The sanctity of a home has special constitutional regard.¹⁸ The Constitutional Court recognises that the Constitution acknowledges the nature of a home being far more than shelter from the elements but a 'zone of personal intimacy and family security' in a context of hostility and turbulence for poor people in particular'.¹⁹

International instruments recognise the institution of the home in accordance with the right to adequate housing and protection from evictions, as enshrined in Article 25 of the Universal Declaration of Human Rights²⁰ (UDR) as well as Article 11 of the International Covenant on Economic, Social and Cultural Rights²¹ (ICESCR). Instructively, the Committee on Economic, Social and Cultural Rights does not interpret this right restrictively as 'the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity.'²² Instead, the right should be seen as 'the right to live somewhere in security, peace and dignity',²³ as one's home is inextricably linked to the inherent dignity of the human person. The human rights and the fundamental principles upon which the ICESCR is premised further require that income or access to economic resources should not be prohibitive factors to the enjoyment of this right as detailed above. The City's Draft By-law is vehemently opposed to the recognition and respect of the sanctity of a home through legislating discrimination based on socio-economic status and

¹⁷ AJ van der Walt, *The Constitutional Property Clause* Juta: Kenwyn, 1997 (Van der Walt 1997) at 11.

¹⁸ PE Municipality at para 17.

¹⁹ *Id.*

²⁰ Article 25 of the Universal Declaration of Rights provides:

"(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

²¹ Similarly, the International Covenant on Socio Economic Rights Article 11 requires states parties to recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

²² UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23 at para 7.

²³ General Comment No. 4: The Right to Adequate Housing at para 7.

the lack of access to economic resources which characterise occupiers and communities living in informality.

This is inimical to a constitutional democracy fundamentally founded on principles of dignity as pointed out by our courts:

'It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence.'²⁴

v. Evictions a measure of last resort

The provisions of the Draft By-law that obligate the City to initiate eviction proceedings in instances of unlawful occupation negate the principle of evictions being a step of last resort. The level of engagement provided for in the Draft By-law is not of the nature contemplated in national legislation and Constitutional Court jurisprudence. The Draft By-law cannot be construed as truly meaningful consultation neither does it demonstrate the propensity to engender effective interactive community participation. Instead, it creates a mandatory system of evictions that fails to take into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded in situ and whether there will be alternative accommodation as well as the nature and timing of any eviction.²⁵

The Constitutional Court has encouraged those seeking eviction to remain cognisant of the inherent dignity of the individuals they seek to evict and not to "rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances."²⁶

Proactive and honest endeavours at finding mutually acceptable solutions constitute an approach to meaningful engagement that accords with constitutional values and underlines the requirements set out in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*²⁷ namely, that the local authority meaningfully engage with occupiers both

²⁴ PE Municipality at para 18.

²⁵ Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others 2010 (2) BCLR 99 (CC) at para 114.(Abahlali)

²⁶ PE Municipality at para 41.

²⁷ 2008 (3) SA 208 (CC) (Olivia Road).

individually and collectively.²⁸This is all the more necessary where there exists a possibility of homelessness as a result of an eviction at the instance of the City.²⁹

Specifically, the Court envisioned a two-way process³⁰ in which:

‘...the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine—

- (a) what the consequences of the eviction might be;
- (b) whether the city could help in alleviating those dire consequences;
- (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
- (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and
- (e) when and how the city could or would fulfil these obligations.’³¹

While the Draft Unlawful Land Occupations Framework considers the City’s residents’ engagement as integral to all matters concerning urban development, the Draft By-law is notably devoid of such a consultative approach. Decision-making in terms of this By-law is reserved for the City and its agents, to the exclusion of the affected communities, contrary to the principles enshrined in the constitution as well as national policy instruments.

vi. Public participation

Further, given the nature and import of this Draft By-law, the limited period provided for public comment does not offer members of the public, particularly those who stand to be affected by the Draft By-law, sufficient time to engage with its content in order to participate meaningfully. We are not aware of any actions taken by the City to raise awareness in communities - particularly those living in informality - on the Draft By-law. Their omission bypasses the central tenets of consultation and people centeredness,

²⁸ Id at para 13.

²⁹ Id.

³⁰ Id at para 14.

³¹ Id.

and true community participation as envisaged in the Municipal Systems Act No. 32 of 2002. This is, once more, a demonstration of the City prioritising property over people, and not property for the benefit of people.

IV. Comment on specific sections

1. Definitions - Section 1

The Draft By-law defines an “authorised official” as an employee of the City responsible for carrying out any duty or function or exercising any power in terms of the By-law and includes employees delegated to carry out or exercise such duties. This definition provides no certainty as to the designation of the contemplated official, the department(s) within the City that are mandated with the implementation of the provisions of this By-law and under which authority (including delegation in terms of the City’s System of Delegation³²) they would be acting in carrying out such functions. As such, the current formulation of “authorised official” is vague and provides no clarity as to the level of responsibility such official would bear in terms of the By-law, whether said official is indeed authorised and the line of authority - which in turn informs the line of accountability - of any official who acts under the provisions of the By-law.

A glaring omission in the definition of key terms in the Draft By-law is a definition of “home” as this is central to an official’s decision-making process in terms of section 9(2)(b)(iii) and the City’s determination in terms of section 9(3) respectively. Therefore, the provisions that invoke the concept of a home will be vague and contrary to the basic tenet of legal certainty, and as such, the rule of law.

Another central term for the purposes of the Draft By-law is “informal settlement”. The By-law nominally differentiates between unlawful occupations and informal settlements, particularly in relation to the provision of basic services and the recognition of informal settlements. A clear distinction between *imminent* occupation and long-standing, yet unrecognised informal settlements is necessary and would afford residents of the City living in informality a level of certainty as to the applicability of the By-law to their conditions of informality³³.

Chapter 2: Managed Land Settlements

2. Identification of Land for Managed Settlements -Section 3(1)

The piloting of a Managed Land Settlement (MLS) programme is required by the City’s Draft Unlawful Occupation of Land Framework 2020 as a long term response to informality in a context of constrained

³² Version 6 as adopted on 27 May 2020, resolution C11/05/20.

³³ c/f the definition of “informality” contained in the Human Settlements Strategy Council Draft, May 2021: “[Informality] refers to housing expansion which has not followed formal compliance steps such as building plan submission, obtaining zoning permission, adhering to building guidelines etc”.

resources. The Framework recognises that “housing and permanent service access are captured within the Constitution as elementary to the basic needs of all residents of South Africans” and that the *appropriate* responses to informality entail increasing the number of formal affordable housing opportunities as well as legally enabling informal housing development.³⁴ MLS focuses on greenfield development: undeveloped land incrementally developed with basic services as a first step towards a longer-term housing and settlement upgrading process. The Draft By-law indicates that the form of MLS to be undertaken is plot-and-basic-services³⁵ whereas it is silent on other options such as site-and-service³⁶.

Where the Draft By-law provides for the allocation of sites under the MLS programme to persons evicted in terms of the By-law, no mention is made of relocation guidelines or principles to be followed by the City. Such criteria, guidelines or principles are necessary particularly in instances where considerations such as accessibility and location of the site may (adversely) affect evictees under the By-law. To this end, the City should provide more information pertaining to its piloting of the MLS programme. The UISP provides specific guidelines in this instance while maintaining that relocation should be the last resort. In instances where relocation and resettlement is unavoidable, the UISP provides the following directives:³⁷

- Where relocation is unavoidable, it should be based on the principle of minimal disruption to the affected persons and to relocate the persons to a site as close as possible to the existing settlement.
- A relocation strategy should be developed *in collaboration* with the community.
- The rules of this programme will also apply to the development of the relocation areas with the changes relevant to the particular context.

2.1 Section 3(2)

In terms of National legislation municipalities are, where possible, obliged to provide 6kl of water and 50 kWh of electricity per month free to every household.

³⁴ City of Cape Town Draft Unlawful Land Occupation Framework 2020 at 12.

³⁵ This form of managed land settlement comprises government provision of a planned plot with records kept by the municipality, and communal water and sanitation.

³⁶ This form of managed land settlement entails government providing a surveyed erf with water and sanitation per erf/ site.

³⁷ Section 3.9C, Upgrading of Informal Settlement Programme (UISP) Part 3, Volume 4 of the National Housing Code (2009) at 32.

The government, according to a set of objective formulae that embody the principles of equity, efficiency and democracy, allocates to municipalities an equitable share of nationally raised revenue.³⁸

This equitable share is aimed at allowing municipalities to sustainably provide an essential minimum package of services to all indigent households.³⁹

The Draft By-law needs to be cognisant of the above where accounts will be kept for the provision of such services. Further, it must be noted that the City's Credit Control and Debt Collection Policy makes provision for indigent relief, and that where occupiers qualify, they should be offered this assistance with respect to any accounts for occupation and services levied on them.⁴⁰

3. Determination whether to provide interim or emergency basic services to unlawful occupants - Section 4

The decision-making power granted to the City on whether occupiers are to be provided with interim or emergency services cannot be made in accordance with the Draft Unlawful Occupation of Land Framework in isolation. There are national and provincial policies and guidelines that regulate and provide direction on incremental settlement development from an in-situ or brownfield context, which includes the provision of basic services. Such policies contemplate questions of 'interim' provision of services – specifically, the UISP in Part A section 3, sets out important considerations such as determining which settlements would qualify for the provision of such services, towards the (phased) upgrading of the informal settlement. Section 3.3 introduces objectives and principles against which the identification of projects should be undertaken.⁴¹ Followed by section 3.4 which stipulates the characteristics of an informal settlement that may be used in the identification and determination of 'beneficiary' informal settlements.⁴²

At present, the Draft By-law lacks any determinative criteria for the decision made in terms of section 4(1) and is silent on which department is responsible for making this significantly consequential decision. This is concerning as the lack of an objective standard leaves the potential for unchecked discretion and subjective considerations held by officials unduly influencing the decision-making process.

³⁸ Human Settlement Development, Western Cape Government, Informal Settlements Handbook (2005) 7.6.1.1.

³⁹Id.

⁴⁰ Credit Control And Debt Collection Policy 2021/22 (Policy Number 21144D) as approved By Special Council : 26 May 2021 at chapters 3 and 4.

⁴¹ Upgrading of Informal Settlement Programme (UISP) Part 3, Volume 4 of the National Housing Code (2009) at 25.

⁴² Id at 26.

The extent to which this section applies to unlawful occupations / informal settlements remains unclear in spite of section 4(3). The City is yet to develop a comprehensive Informal Settlements Upgrading Pipeline outlined in the City’s Draft Human Settlements Strategy. In terms of the Strategy, the pipeline will “establish a convention for informal settlement upgrading, and so will distinguish between historical informal settlements, new informal settlements, settlements without any basic service access, settlements with some service access, and settlements that have received full upgrading.”⁴³

In the absence of the above Pipeline, the lack of a comprehensive, *publicly available* register (or matrix) of recognised informal settlements further renders this section incompatible with the legal principle of certainty, inherent in the rule of law. Residents are thus placed in a position where there can be no certainty as to whether the provisions in this section apply to their communities.

4. Provision of interim or emergency services to unlawful occupants - Section 5

With respect to subsection 3, we raise similar concerns as in the comment on section 3(2) above.

5. Voluntary relocation of unlawful occupants - Section 6

The decision taken by the City in terms of section 4(2)(b) is to be communicated to the affected occupiers by writing as required by section 6(1). The section presupposes any given occupier’s ability to read. This may not always be the case as some occupiers may not be able to read and write. As such, further means of communicating the contents of the notice contemplated in this subsection would be warranted. City officials must ensure that the notice is not only received by occupiers, but also effectively communicated and understood. The principles of meaningful engagement are applicable and should underpin this, and every interaction between the City and occupiers that is required under the Draft By-law.

Moreover, the requirements under subsection 2(c)-(d) offend against the stipulations in the Housing Act⁴⁴ as well as the National Housing Code⁴⁵ that affected communities must be meaningfully consulted and that relocation be a measure of last resort. The Code consistently requires municipalities to “adhere to

⁴³ City of Cape Town Human Settlements Strategy Council Draft, May 2021 at 42.

⁴⁴ Section 2(1)(b) of the Housing Act provides:

“National, provincial and local spheres of government must—

. . .

(b) consult meaningfully with individuals and communities affected by housing development”.

⁴⁵ Chapter 13 of the National Housing Code requires that municipalities have “... due regard for the principle that relocation should be limited as far as possible and only be considered as a last resort.”

the principle that community participation is the key to success and that relocation of communities should be a last resort.”⁴⁶ It also requires a municipality to pay “due regard for the principle that relocation should be limited as far as possible and only be considered as a last resort.”⁴⁷

Further, these provisions introduce the option of settlement in terms of the MLS programme given its availability in the circumstances. Yet, in the instance where such settlement is not available, the Draft By-law is silent on the procedure to be followed for occupiers who have no alternative accommodation.

As observed with previous sections, Section 6(3) does not point to a set of guidelines or a standard operating procedure which regulates the process of relocation including the minimum requirement that an occupier be adequately engaged pertaining to the process of relocation and that their rights and property be safeguarded.

Chapter 3: Unlawful Occupation

6. Identifying and monitoring land and buildings prone to unlawful occupation - Section 7

The Draft By-law’s current failure to adequately identify an ‘authorised official’ lends itself to a possible duplication of functions under this section. The duties of the City/ authorised officials contained herein are identical to the stated duties of the City’s Anti Land Invasion Unit. This duplication may impede on available City resources to the detriment of competing needs the City should be addressing.⁴⁸

We are further concerned that this may promote over policing in predominantly poor, Black and Coloured areas as evinced by recent experience. The presence of greater numbers of law enforcement agencies in these areas has not necessarily equated to greater protection for the residents – in fact, recent events have demonstrated the City’s prioritisation of property over the safety, physical integrity, and dignity of people.⁴⁹ It is our reasonable apprehension that this section, read with later sections in the Draft By-law will serve to fortify this combative approach and amplify the levels of distrust and violent confrontation.

⁴⁶ Upgrading of Informal Settlement Programme (UISP) Part 3, Volume 4 of the National Housing Code (2009) at 25.

⁴⁷ Id at 32.

⁴⁸ Research has shown that the City’s inefficient distribution of resources in responding to the unhoused in its jurisdiction has proved more costly and ineffective in the long run and has resulted in the under resourcing of more appropriate City department programmes and long term solutions. See for example Fig 8 “City Improvement District expenditure attributable to homelessness” in Hopkins, J et al, “The Cost of Homelessness Report” (2020) at 14.

⁴⁹ See for instance the “Battle of Hangberg” available at <https://www.youtube.com/watch?v=zK8CmSUwopE> as mentioned in Worth, K “The Demolition of Hope in Hangberg” in Mail and Guardian (3 July 2020) available at <https://mg.co.za/news/2020-07-03-demolition-of-hope-in-hangberg/>; Kiewit L, “High court declares the City of Cape Town’s lockdown evictions illegal” in Mail and Guardian (25 August 2020) available at <https://mg.co.za/news/2020-08-25-high-court-declares-the-city-of-cape-towns-lockdown-evictions-illegal/>; Stent J, “City of Cape Town Law Enforcement drag naked man out of his house” in Ground

7. Responding to unlawful occupation on land or building under the control of the City:

7.1. Section 9(2)(a)

The Draft By-law empowers the vaguely defined 'authorised official' to arrest without a warrant an intended occupier who fails to comply with an instruction given by them to not enter the land or, when an occupier who is already on the land, fails to dismantle their structure and leave the land taking their building materials and possessions with them.

Section 40 of the Criminal Procedure Act No. 51 of 1977 ("CPA") is applicable in cases of arrest without a warrant. This section, however, does not contemplate arrest as a power for members of a municipal police service. This power is reserved for 'peace officers' as defined in section 1 of the Act as 'any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334 (1), any person who is a peace officer under that section.

Section 334(1) reads as follows:

'(a) The Minister [of Justice] may by notice in the Gazette declare that any person who, by virtue of his office, falls within any category defined in the notice, shall, within an area specified in the notice, be a peace officer for the purpose of exercising, with reference to any provision of this Act or any offence or any class of offences likewise specified, the powers defined in the notice.

(b) The powers referred to in paragraph (a) may include any power which is not conferred upon a peace officer by this Act.'

The Draft By-law does not define who the 'authorised officials' are that would be responsible for its enforcement and therefore does not provide clarity on whether these officials are in fact empowered as peace officer or by the Minister to arrest without a warrant. It would appear that the City is attempting to circumvent the provisions of the Criminal Procedure Act and the Minister's powers to confer onto itself powers of a peace officer not properly authorised. The Draft By-law however does provide that delegated employees may be charged to carry out the duties, functions and powers in terms of the Draft By-law.

Up (1 July 2020) available at <https://www.groundup.org.za/article/city-cape-town-law-enforcement-drag-naked-man-out-his-house/> and Mketane O, "Residents go on rampage after woman allegedly pulled out her bath during eviction" in Cape Times (12 July 2021) available at <https://www.iol.co.za/capetimes/news/residents-go-on-rampage-after-woman-allegedly-pulled-out-her-bath-during-eviction-b44df33a-818e-4ed8-a15a-abfb9048ca8e>.

This further broadens the scope of people whom the Draft By-law aims to empower to arrest. We therefore submit that this provision, read with the definition of ‘authorised official’, is vague and unenforceable and should it be enacted, will not survive Constitutional scrutiny.

7.2. Section 9(2)(b)- (3)

Section 26(3) as recognised by the Draft By-law falls under the housing provision of the Constitution which guarantees everyone’s right to have access to adequate housing⁵⁰ and the positive obligation on the state to take reasonable legislative and other measures within available resources, to achieve the progressive realisation of access to adequate housing.⁵¹

Yet section 9(2)(b)(iii) shows blatant disregard for the requirement that no legislation permit arbitrary evictions.

As with the prohibition against the arbitrary deprivation of property, the Draft By-law is an affront to the basic tenets of section 26(3) and the PIE Act through the unfettered discretion given to an official to determine what may or may not constitute a home. It also permits various violations against the privacy, dignity and sanctity of one’s home solely on the basis of unlawful occupation.⁵² It also does not accord with the procedural requirements of national legislation (the PIE Act) which is applicable to any building or structure⁵³ erected on all land throughout the Republic.⁵⁴

Sections 9(2)(b)(iii) and (3) bring into question *how* City officials determine whether structures are occupied and could reasonably constitute a home. The effect of these provisions operates against the *nemo iudex in sua casa*⁵⁵ principle of natural justice and fairness. Such decisions also stand to infringe on the rights to a fair public hearing before an impartial forum (enshrined in section 34 of the Constitution) and the right to lawful, reasonable, and procedurally fair administrative action enshrined in section 33(1) of the Constitution. The City’s Anti Land Invasion Unit, a subset of its Law Enforcement Unit, has

⁵⁰ Section 26(1).

⁵¹ Section 26(2).

⁵² Draft By-law section 9(2)(b)(iii).

⁵³ Section 1 of the PIE Act defines these concepts as follows:

“ [...]”

(i) “building or structure” includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter

[...]”

Further, in *Ndlovu v Bekker* 2002 (4) All SA 384 (SCA) at paragraph 20, it was stated that the purpose of the PIE Act is to subject buildings and structures that “perform the function of a form of dwelling or shelter for humans” to the protection of PIE.

⁵⁴ Section 2 of the PIE Act.

⁵⁵ Latin for “no one should be a judge in their own cause”. It is one of the cardinal rules of natural justice that no one should act as a judge a case in which they have a personal (vested) interest.

historically made such determinations on an admittedly arbitrary basis. In *South African Human Rights Commission and Others v City of Cape Town and Others*⁵⁶ (SAHRC case) the Court found the City had “not provided a substantial response to the charge of the Applicants and Intervening Applicants that the ALIU determines which dwellings are unoccupied and singled out for demolition in an arbitrary, capricious and unfettered manner. The City has failed to point to any policy, rule, or legislation that sheds light on how it determines what is occupied and unoccupied.”⁵⁷

The Court further found the City was unable “to point [it] to any evidence which indicated any policy employed by the ALIU, let alone one that was not arbitrary.”⁵⁸

The Constitutional Court has asserted the Constitution’s ‘special regard’ for the home.⁵⁹ This constitutional regard for the home cannot be divorced from the context in which those living in informality make their abode. This is the context within which “[i]t is the poorest of the poor, the homeless, downtrodden and unemployed who seek refuge in informal settlements and erect structures to provide shelter. Whether such structures are complete, incomplete, or in the process of being built, they are capable of providing shelter from the elements especially during the winter season we are now experiencing. This, is especially so during the catastrophic times we are forced to endure while the coronavirus pandemic rages.”⁶⁰

The use of the word “must” in section 9(3) suggests that an eviction is ultimately the Draft By-law’s sole response to existing unlawful occupations. This is unconstitutional and clearly contrary to the Constitutional Court’s pronouncements in eviction matters. A law which rendered evictions mandatory even if the PIE Act could not be complied with, was found to be irrational, in conflict with the Constitution and the PIE Act and invalid by the Constitutional Court in *Abahlali*⁶¹. Section 9(3) fails to distinguish between circumstances in which evictions would be able to comply with the PIE Act or not. This provision of the Draft By-law requires only the pursuit of evictions regardless of the circumstances.

Therefore, given the Constitutional protections and above jurisprudence it is inappropriate and contemptuous of our courts for the Draft By-law to attempt to legislate and thereby legitimise what is otherwise an “arbitrary, capricious and unfettered” judgment call by a vaguely defined authorised official

⁵⁶ 2021 (2) SA 565 (WCC) (25 August 2020)(SAHRC).

⁵⁷ SAHRC at para 50.

⁵⁸ Id.

⁵⁹ PE Municipality at para 17.

⁶⁰ SAHRC at para 55.

⁶¹ *Abahlali* at paras 58 and 111.

on what constitutes a home in situations of informality. The Draft By-law cannot pass constitutional muster where its provisions mandate eviction proceedings regardless of the circumstances and the ability to comply with the PIE Act.

7.3. Impoundment – section 9(2)(b), 9(4), 11(4)(b) and Chapter 12

These provisions allow authorised officials to impound intended occupiers' building materials, personal possessions, and vehicles driven in contravention of the By-law.

Section 9(2)(b) states that an authorised official may dismantle an occupier's structure and impound their building materials and possessions if the structure is on land under the City's control, on a public thoroughfare or if it is 'not yet capable of constituting a home' on any other land.

The power to impound the property of those involved in unlawful occupation goes further than the stated aim of the Draft By-law which is to 'prevent the unlawful occupation of land and buildings' ostensibly to protect such property from unlawful occupation. As mentioned elsewhere in this submission, the Draft By-law will invariably invoke section 25 of the Constitution, namely, the right to property.

Notably, the consideration of the property clause in *First National Bank of SA Limited t/a Westbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Westbank v Minister of Finance*⁶² found the function of the property clause to in one way or another, underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa.⁶³ There the Court emphasised that under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations.⁶⁴

The Draft By-law in its current form is devoid of a constitutionally mandated instrumental perception of property, and goes further to offend, we argue, the protections against the arbitrary deprivation of property enshrined in the Constitution. Section 25(1) requires that no one be deprived of property except in terms of law of general application, and that no law may permit the arbitrary deprivation of property. The Draft By-law stands to become a law permissive of arbitrary deprivation of property particularly through the

⁶² 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (FNB).

⁶³ FNB at para 49.

⁶⁴ Id.

current construction of Chapter 6. Arbitrary deprivation, within the meaning of the Constitution is, per the Constitutional Court, contextual. Further, more instructively, the Court in *FNB* held that:

'[...] a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with “arbitrary” in relation to the deprivation of property under section 25.’

In the instance of the Draft By-law’s provisions on confiscation of materials, impoundment of property - including personal effects and seizure of same - the Draft By-law cannot survive constitutional scrutiny both on a cursory view as well as in terms of the above factors. Given a contextual reading of the impugned provisions and the purpose of the Draft By-law which is to pre-emptively prevent the unlawful occupation of land, it follows that the Draft By-law is discriminatory in its deprivation of property, that is, operating solely to dispossess the poor, those with meagre means and those whose personal effects do not meet an undefined, arbitrary and baseless standard of ‘not yet able of constituting a home.’⁶⁵ The nature and extent of the deprivation would prove devastating to persons who relied on such property as their primary source of shelter and in the case of personal effects, their only material possessions.

Furthermore, the Draft By-law is in contravention of the City’s Standard Operating Procedure on the Impoundment of Goods and Animals of 2012 (“the SOP”) which provides that a written compliance notice should first be issued before the City impounds someone’s possessions.⁶⁶ It is further in contravention of the SOP in that the draft section 12(2), (3), (5) and (6) creates a separate and onerous procedure for the release of impounded items and its subsequent forfeiture. The Draft By-law does not present reasons for why it is deviating from the procedure as contained in the SOP. In *Ntoyakhe v Minister of Safety and Security*⁶⁷ the court stated that the right of further detention of a seized article is not unlimited and does not confer upon the state the right to deprive someone of their lawful possession indefinitely.

In addition, the aims of the Draft By-law do not constitute a compelling purpose neither do they provide a sufficient reason to deprive persons of their property. The prevention of unlawful occupation and the protection of property are proactive measures that require forethought and planning by the City and private owners. This aim is confirmed in the City’s Draft Unlawful Occupation of Land Framework.⁶⁸ Such preventative measures should not result in deprivation determined capriciously on the basis of suspicion and/or personally held beliefs of an inappropriately trained, unnamed official.

⁶⁵ Draft By-law section 9(2)(b)(iii).

⁶⁶ Section 5 of the City’s SOP.

⁶⁷ 2000 (1) SA 257 (E).

⁶⁸ City of Cape Town Draft Unlawful Occupation of Land Framework.

We therefore submit that this provision will lead to the arbitrary deprivation of people's property and that consequently, it will not survive Constitutional scrutiny.

7.4. Use of force – section 9(5)

Section 9(5)(i) states that in responding to an unlawful occupation, an authorised official should exercise their powers reasonably and with due regard to every person's fundamental rights as contained in the Bill of Rights. Concerningly, section 9(5)(ii) provides that if force is required under the circumstances, that a 'justifiable and proportional' level of force should be employed. The Draft By-law however does not list the circumstances which would require the use of force, nor does it offer guidance on when the use of force would be justifiable and proportional. We believe that this offers wide discretionary powers to the undefined authorised officials which conflicts with the rule of law which restricts the arbitrary use of excessive power and mandates that laws be clear, concise and accessible.

While section 9(5)(i) mandates that authorised officials exercise their powers under section 9 in compliance with the Bill of Rights, the City's track record in effecting demolitions and evictions, especially throughout the national state of disaster, does not inspire confidence that they will in fact comply with this provision. For example, during 2020, the City's law enforcement officers, in an attempt to demolish Mr Bulelani Qolani's home, dragged Mr Qolani from his home while he was bathing, thereby severely infringing his human dignity and right to privacy.

As South Africa lacks a coordinated legislative instrument on the use of force and as such, regard is to be had to the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁶⁹ The Principles provide as follows:

'19. Governments and law enforcement agencies shall ensure that all law enforcement officials are **provided with training and are tested in accordance with appropriate proficiency standards in the use of force**. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use. (emphasis added)

⁶⁹ United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, available at: <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>

20. In the training of law enforcement officials, Governments and law enforcement agencies shall **give special attention to issues of police ethics and human rights**, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.’ (emphasis added)

Given that we are not provided with the identity of the authorised officials we cannot determine whether they have in fact undergone the necessary training and testing with appropriate proficiency standards in the use of force. This section of the Draft By-law is therefore vague and cannot survive Constitutional scrutiny.

8. Owners other than the City’s obligations in responding to unlawful occupation - Section 10

It is unclear what the measures referred to in section 10(2) are and whether they differ from the preventative measures contemplated in section 8(2) or require further action from a land owner or the City. Again, the legal uncertainty created by the references to seemingly unstated measures and vague requirements negates the primary function of the rule of law.

9. Chapter 4: Prohibited conduct, offences and penalties

Section 11(1) of the Draft By-law provides as follows:

‘Any person who contravenes or fails to comply with any provision of this By-law or disobeys any instruction or compliance order by an authorised official enforcing this By-law, shall be guilty of an offence.’

Subsection 2 then proceeds to create thirteen new offences. These offences relate to occupying land unlawfully, and ranges from the act of instigating or planning an unlawful occupation to the transport of persons, building materials and personal possessions for the purpose of an unlawful occupation

Section 11(3) then prescribes that the sanction for committing an offence in terms of section 11(2) is liability on conviction to a fine or to imprisonment of between six months and two years or both a fine and imprisonment.

As mentioned earlier in this submission, the criminalisation of occupation takes us back to the provisions of the repealed PISA which imposed criminal sanctions for unlawful occupation. We argue, however, that the By-law goes even further in that it not only criminalises unlawful occupation, but also the acts associated with unlawful occupation. Criminalising these actions does not address the causes that drive unlawful occupation but instead punishes poor and marginalised people for addressing their own housing needs. On the contrary, it will increase the load of an already over-burdened criminal-justice system leading to an increase of state expenditure. For instance, in 2018/2019, South Africa spent R23 billion on prisons and R22 billion on the court system.⁷⁰

This view is shared by members of the Human Settlements WCPP, who observed that social solutions rather than policing were needed to address unlawful occupations and expressed their concern that most of the solutions presented by the City of Cape Town involved policing.⁷¹ If the City's Draft Unlawful Occupation of Land Framework requires that the City proactively plan for informality and establish mechanisms to *pre-emptively protect* public land from unlawful occupation, the Draft By-law in its current form has gone far beyond these aims.

In a report by the United Nations Special Rapporteur on the Right to Adequate Housing, the Special Rapporteur laments the situation of the unhoused who are often met with measures which criminalise themselves and their survival strategies.⁷² Guidance in this regard has further been provided by the African Commission on Human and Peoples' Rights ("the Commission") who has called for the decriminalisation of petty offences in Africa.⁷³ The Commission specifically states that no law or by-law should target persons based on their social origin, social status, or fortune by criminalising life-sustaining

⁷⁰ Lukas Muntingh, 'Race, gender and socio-economic status in law enforcement in South Africa – are there worrying signs?' (2013) available at: <https://acjr.org.za/resource-centre/Inequality%20paper.pdf>.

⁷¹ Meeting of the Human Settlements (WCPP) on Land invasions: City of Cape Town, Western Cape, available at: <https://pmg.org.za/committee-meeting/31087/>.

⁷² L Farha Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, A/HRC/31/54 (30 December 2015) available at: <https://digitallibrary.un.org/record/831237?ln=fr>, at para 88.

⁷³ African Commission *Principles on the Decriminalisation of Petty Offences in Africa* (2017) available at: <https://acjr.org.za/resource-centre/decriminalisation-of-petty-offences-web.pdf/view>

activities.⁷⁴ Never before has a home been as imperative for the protection of one's life as it is currently in the face of the Covid-19 pandemic.

In the face of an inadequate supply of affordable housing by the state and private sector, the Draft By-law has the effect of punishing the most marginalised in our society for creating a home for themselves. We therefore consider Chapter 4 of the Draft By-law inappropriate to achieve the Draft By-law's aims and argue that it amounts to discrimination against the poor.

10. Search and seizure – Section 13

Section 13(1) of the Draft By law provides as follows:

'An authorised official may without a search warrant search any person, vehicle, or structure for the purpose of seizing any article which is, or is on reasonable grounds believed to be, concerned with the commission of an offence in terms of this By-law if –

- a) The person consents to the search;
- b) The person does not consent, the official, on reasonable grounds believes –
 - i) that a search warrant will be issued under paragraph (a) of section 21 (1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) if application is made for a warrant; and
 - ii) that the delay in obtaining a warrant would defeat the object of the search; or
- c) in terms of section 23 of the Criminal Procedure Act, 1977 (Act 51 of 1977).'

Again, we are faced with the same concern in relation to the identity of the 'authorised official' and whether they are in fact authorised to conduct search and seizures in the manner contemplated by this section.

Section 13(2)(b) is concerning in that it provides that an authorised official may designate 'any woman' to conduct a search if there are no authorised officials who are women available. This extends the powers of the unidentifiable authorised official to random, nameless persons.

Furthermore, the same concerns relating to the arbitrary deprivation of property as discussed under the section relating to impoundment above are relevant here.

⁷⁴ Ibid at p 11.

We therefore submit that section 13 in its current form will not survive Constitutional scrutiny.

11. Appeal - Section 15

The appeal mechanism against any decision made by an authorised official under the auspices of the Draft By-law is limited and will be, in some instances, moot where the immediate effect of the decision cannot be undone or compensated for. This will be the case where the impugned decision is that of dismantling a structure sanctioned by section 9 of the Draft By-law or the various provisions authorising the impoundment of occupiers' property, leaving affected occupiers dispossessed with no place to go and some instances no provision of alternative accommodation by the City.

V. Conclusion

We recognise the need to protect both public and private land, particularly land earmarked for the provision of social amenities and services. Yet the proactive protection of land need not devolve into the perpetuation of dispossession and severance from networks, access, and opportunity. The City instead needs to prioritise and plan for informality and urbanisation through the constitutionally mandated provision of equitable access to land and access to adequate housing with a housing backlog nearing 370 000⁷⁵ people in the metro.

It is therefore our view that the Draft By-law should be developed toward achieving aspirations of informal settlement upgrading and the provision of appropriate alternative housing to people living in occupations instead of the current trajectory of aggressive regulation, superficial engagement, and capricious evictions. It is imperative that the City's response to unlawful occupation address its causes, which the Draft Human Settlements Framework identifies as *inter alia* 'overwhelming density, issues of urban management, lack of available services in informal settlements, and more recently the economic impact of the COVID-19 pandemic'.⁷⁶ Criminalisation does not address these issues. Instead, resources should be directed toward the transformative principles of urban management that are consistent with our legal

⁷⁵ In January, Human Settlements MEC Tertuis Simmers revealed there were a total of 595 232 applicants on the Housing Demand Database, 369 542 being in the metro. See Thembo, T." Western Cape struggles to tackle growing housing backlog" in Cape Argus (22 March 2021) available at <https://www.iol.co.za/capeargus/news/western-cape-struggles-to-tackle-growing-housing-backlog-c08d6d7a-17e6-491f-bb73-e5745dab7456>.

⁷⁶ City of Cape Town Human Settlements Strategy Council Draft, May 2021 at 45.

and policy framework, as well as international human rights obligations. It is our submission that the Draft By-law in its current form does not adequately reflect this reality.

[ENDS]