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To: Law Enforcement Department
For attention: **Deputy Chief Leon Wentzel**

Per e-mail: lawenforcement@capetown.gov.za

Re: **Comments on the Streets, Public Places and the Prevention of Noise Nuisances Amendment By-law, 2020**

From: **Advocate N L Badenhorst**
Legal Counsel, *Freedom of Religion South Africa (FOR SA)*
Per e-mail: legal@forsa.org.za

Date: Friday, 15 May 2020 (Deadline: Sunday, 17 May 2020)

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Dear Deputy Chief Leon Wentzel,

1. We refer to the call for written submissions by the City of Cape Town (the "*City*"), on the **Streets, Public Places and the Prevention of Noise Nuisances Amendment By-law, 2020** (the "*By-law*").
2. We would appreciate the opportunity to make verbal submissions with regards to the By-law, if and when such opportunity presents itself.

ABOUT FOR SA, AND OUR INTEREST IN THE BY-LAW:

3. *Freedom of Religion SA NPC (2014/099286/08)* ("*FOR SA*") is a non-profit organisation, working to protect and promote the constitutional right to religious freedom in South Africa.

4. FOR SA currently has an endorsement base of religious leaders representing 6 million+ people in South Africa. Its constituency spans across various denominations, churches and faith groups in South Africa.
5. As such, and because the constitutional right to freedom of religion, belief and opinion (s 15) is directly affected by any law that would impact the rights to privacy and property (as explained below below), our constituency has a direct interest in this matter.
6. **We are concerned that the By-law, particularly the wide unfettered powers it grants to authorised officials, will potentially violate constitutional rights, including particularly the rights to Privacy (section 14) and Property (section 25). As a further result, the By-law will potentially also violate Freedom of Religion, Belief and Opinion (section 15 of the Constitution) in that it will affect persons present on the property of religious organisations, as well as said persons' and religious organisations' property.**

COMMENTS RELATING TO THE SUBSTANCE OF THE BY-LAW:

7. The By-law is over-broad in the sweeping powers and functions it gives to authorised officials and as such, is an impermissible limitation on various fundamental rights found in the Constitution's Bill of Rights, including the right to privacy (section 14) and the right to property (section 25). It, therefore, inadvertently has an effect on the exercise of the right to freedom of religion, belief and opinion (section 15) and that of religious communities (section 31) to practise their religion as religious organisations' property and people will also fall subject to this By-law.
8. These over-broad infringements make the By-law unconstitutional as it does not stand up under the scrutiny of section 36 of the Constitution which, in effect, requires that any infringement of a fundamental right be as narrowly tailored as possible and with no other means of achieving its purpose.
9. By-law Article 1 – Inspections:
 - 9.1. The By-law allows an authorised official to enter and inspect any premises, and to question any person who currently is, or recently had been, on the premises.
 - 9.2. The By-law provides this power to an authorised official without it even being necessary that there is reasonable cause for believing that the By-law is being broken. It allows an official

this power should the official merely wish to ascertain whether the By-law is being complied with, or where there has been a mere allegation that the By-law is being contravened.

9.3. As a result of this article's wide drafting, **fundamental rights are curtailed** in that religious communities' right to privacy and property are unreasonably and disproportionately infringed.

10. By-law Article 4 - Powers and functions of authorised officials:

10.1. This section is very widely drafted and as a result grants authorised officials vast powers, without a warrant and without having to have any reasonable grounds for believing that the By-law was being contravened.

10.2. **As a result of the article, fundamental rights are curtailed** as officials can exercise their powers merely to ascertain if there is an offence taking place or to make sure that the By-law is being complied with, including amongst others:

10.2.1. Article 4(2): The power to "*stop, enter and search any vessel, vehicle, premises or person*";

10.2.2. Article 4(5)(c) and (d): The power to *remove* property or require a person to *deliver* it;

10.2.3. Article 4(5)(e): To take *photographs* or *recordings* of a person; and

10.2.4. Article 4(5)(g): To *direct* a person to appear in front of him

10.3. The above are all unacceptable infringements of the fundamental rights set out in paragraph 7 above.

11. By-law Article 5 Impounding of Items, goods, equipment, vessels or vehicles:

11.1. This article provides for the impounding of, and even sale of, property by the City without a warrant.

11.2. Whilst a provision for seizure and impoundment without a warrant would be acceptable if the property was being used in the commission of an offence in the official's presence, the same is not true for property that the official merely on reasonable grounds believes to have been used in the commission of an offence.

11.3. To then allow for the sale of such property, is to add insult to injury.

11.4. We pause to mention that many churches are involved in charitable work such as feeding schemes, and as a result of such will be in possession of perishable goods which the By-law allows the City to remove without a warrant, and also to sell.

12. Should the above provisions in the By-law be allowed to remain as wide as they currently are, we submit that it is very possible that the provisions of the By-law could be challenged for being over-broad and for that reason, unconstitutional and invalid.

FOR SA's RECOMMENDATIONS:

13. We recommend that the presumably unintended, but nonetheless unconstitutional, consequences of the By-law in its current form, be avoided or eliminated by:

13.1. Requiring authorised officials to have reasonable grounds for believing that the By-law is being infringed before being allowed to inspect premises and/or question people who had been on the premises (Article 1).

13.2. Narrowly tailoring the powers of authorised officials, so that they are required to have a warrant and/or reasonable grounds for believing that the By-law is being contravened before being permitted to take the actions set out in the section, being *inter alia*, to stop, enter, search a person or premises; to remove property; and to take photographs and recordings of persons.

13.3. Narrowly tailoring the provisions relating to the removal of property and its impoundment and sale, by requiring a warrant.

CONCLUSION:

14. It is our view that the insertion of the aforesaid clauses will give effect to the By-law's objective, while allowing it to pass constitutional scrutiny due to the limitations to the fundamental rights concerned being proportionate, reasonable, justifiable and as narrowly tailored as possible.

Kind regards,

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THE END.