Submission on the City of Johannesburg’s Draft By-Laws on Problem Properties

Socio-Economic Rights Institute (SERI)

December 2013

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1. **Introduction**

"Attacks on the basic rights of the people are invariably couched in innocent language."

- President Nelson Mandela

In November 2013, the City of Johannesburg published its *Draft By-Laws on Problem Properties* ("the by-laws"). These by-laws detail the City’s proposed approach to so-called ‘bad buildings’ and are aimed at the “identification, control and management of dilapidated and problem properties in the City of Johannesburg and to provide for matters incidental thereto”.

The Socio-Economic Rights Institute of South Africa (SERI) has read and considered the by-laws and attended the public hearing held in Johannesburg on 23 November 2013, where the City’s Department of Citizen Relationship and Urban Management (CRUM) presented on the by-laws. SERI makes this submission to the City in accordance with the invitation for interested parties to submit written comments on the by-laws.

2. **About SERI**

SERI is a registered non-profit organisation and public interest law clinic that provides professional and dedicated socio-economic rights assistance to individuals, communities and social movements. SERI conducts applied legal research, conducts public interest litigation, facilitates civil society mobilisation and coordination, and conducts popular education and training. SERI’s core work relates to the advancement and protection of access to socio-economic rights in marginalised and poor communities. SERI’s main focus areas are protecting and fulfilling the right of access to housing, defending and promoting access to basic services, and protecting political space for peaceful organisation, expression, participation and articulation.

SERI is involved in a number of eviction cases in the inner city of Johannesburg, and has an express interest in any legislation or policy implemented by the City that impacts on the security of tenure and right to adequate housing of poor and low-income residents.

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1. N Mandela *Speech at the Inauguration of the Constitutional Court* (14 February 1995).
3. City of Johannesburg *Draft By-Laws 3*.
4. SERI is registered as a Section 21 Not-For-Profit Company in terms of the South African Companies Act. SERI also has Non-Profit-Organization status (NPO registration number: 077-530-NPO). The SERI law clinic is registered as a public interest law centre.
5. For more on SERI visit our website: [https://www.seri-sa.org](https://www.seri-sa.org).

The by-laws, while extremely broad in their scope, appear to be first and foremost concerned with addressing “the current challenges faced within the Inner City”, as well elsewhere in the city. At the outset, it is important to note that, while there is a need to develop solutions to the problems facing inner city buildings, there is an even more important requirement to address the dire housing needs that face the urban poor, which is why people occupy ‘bad buildings’ in the first place. As this submission will illustrate, the by-laws fail to present an adequate and constitutionally appropriate response to the challenges faced by the City.

A major concern is that the by-laws fail to recognise that, in reality, “problem properties” as defined in the by-laws meet at least some, albeit inadequate, housing needs of those who reside in them. The City has acknowledged this in numerous plans, court papers and meetings; however its approach to dilapidated buildings has largely been to focus on rectifying the property itself, rather than consider those living in the buildings and their housing needs.

In the past the City has attempted to engage proactively with the problem of bad buildings through the development of plans and programmes e.g. Bad/Better Buildings Programme, Bad Buildings Strategy, and the Inner City Property Scheme. These interventions have all largely focused on building stock rather than the people who live in the buildings and their housing needs. The by-laws highlight the City’s preferred strategy to deal with so-called bad buildings: aggressive regulation that grants public officials broad powers to strictly enforce formal building standards, and likely contribute to the eviction of unlawful occupiers. This action, however, does not address the underlying causes of structural poverty and the lack of affordable formal accommodation for the urban poor. The by-laws are focused on the symptom rather than the cause, and are likely to exacerbate the very concerns they seek to address.

3.1 Fails to take into consideration the Abahlali decision

Furthermore, the by-laws fail to have sufficient regard of the Abahlali judgment of the Constitutional Court. This means that they are unlikely to survive constitutional scrutiny.

In Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal (Abahlali),7 the Constitutional Court was asked to consider the constitutionality of the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007 (“KZN Slums Act”). Section 16 of the Act authorised the MEC for Housing in KwaZulu-Natal to issue a notice directing that eviction proceedings be instituted by municipalities and landowners against all informal settlements listed in the notice within a period determined by him. The applicants argued that section 16, read together with various other provisions of the Act, constituted a regressive measure which retarded access to adequate housing, contrary

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6 City of Johannesburg Draft By-Laws 3.
7 Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others 2010 (2) BCLR 99 (CC).
to section 26(2) of the Constitution. In theory, it allowed the MEC to set a deadline for the eviction of every single unlawful occupier in the province in one notice.

The applicants brought their challenge of section 16 before the MEC had purported to act in its terms. This was because they dared not wait until a notice requiring their eviction had already been issued. They argued that section 16 was facially incompatible with section 26 of the Constitution. In addition, however, they tendered into evidence a report on widespread unlawful evictions carried out by the eThekwini Municipality. They argued that section 16 of the Act would merely encourage more state officials to take the law into their own hands. They also argued, on the basis of the report, that section 16 was incapable of orderly implementation.

The Court agreed that section 16 was unconstitutional. It held that section 26 of the Constitution, the Prevention of Illegal Evictions, and Unlawful Occupation of Land, Act 19 of 1998 (“the PIE Act”), and the cases decided under these provisions, had constructed a “dignified framework for the eviction of unlawful occupiers” and that section 16 was, on its face, incapable of an interpretation consistent with the framework. In reaching this conclusion, the Court suggested that eviction must normally be a measure of last resort, after all reasonable alternatives have been explored through engagement. The Court affirmed this principle by stating that evictions would only be allowed after meaningful engagement had occurred. The Court found that if engagement took place after a decision to evict has already been taken, the engagement would not be genuine. Proper engagement, the Court found, would also include a comprehensive assessment of the needs of the affected community or group of occupiers.

Accordingly, after Abahlali, evictions are considered a measure of last resort. Poor people should also be able to propose alternatives to their eviction if these exist and should be meaningfully engaged before a decision to evict has been taken. The Court further took note of the fact that legislation similar to the KZN Slums Act was being considered in other provinces and expressed the hope that its judgment would provide guidance to provinces considering such legislation. It criticised the lack of clarity in the legislation and underscored the need for future legislation in other provinces to be more carefully crafted.

The Abahlali decision does not simply disapprove of the specific measures set out in section 16 of the KZN Slums Act, it establishes at least four important principles against which future

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8 Section 26(2) of the Constitution states that: “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right of access to adequate housing].”


10 Abahlali para 122.

11 Abahlali paras 113-115.


13 Abahlali para 114.

14 Abahlali para 126.
legislation potentially related to the right of access to housing must be evaluated. These principles are as follows:

- Evictions should not be encouraged. They should be a last resort after all alternatives have been explored through engagement.
- Evictions can only take place after meaningful engagement has occurred between the state, property owner, and the occupiers.
- Legislation aimed at addressing housing, evictions, tenure security or that may affect these issues should be clear and unambiguous.
- Security of tenure is a vital component of the right to adequate housing and legislative measures that interfere with tenure security would not readily be entertained.

The principles are also subject to the now well-established constitutional precept that evictions where they do occur, should not lead to homelessness.15

In our submission, the by-laws do not have adequate regard to the above principles. We give our reasons for saying so below.

### 3.2 By-laws will encourage evictions and homelessness

Many of the “problem properties” the by-laws refer to are inhabited by poor and low-income households or individuals, and the by-laws may encourage illegal evictions or the institution of inappropriate eviction proceedings. The by-laws substantially threaten tenure security of those living in so-called bad buildings, as well as, potentially, those living in informal settlements.

In particular, section 8 of the by-laws will likely encourage evictions. Section 8(1) states that an “authorised official” may declare a building a “problem property” by serving a written notice of such a decision on the responsible person.16 This provision further states that an authorised official may direct the responsible person to rectify non-compliance with the provisions of the by-laws by a specified date, which may not be “less than 10 (ten) days”.17 If this rectification does not take place within the allotted time period, section 8(3) read with section 8(4), compels “any person occupying, operating or working from” a problem property to vacate the property.18 These provisions also provide that an authorised official could order a responsible person to remove any persons occupying or using a problem property19 and

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15 See Port Elizabeth v Various Occupiers 2005 (1) SA 217 (CC); The Occupiers, Shulana Court, 11 Hendon Road, Yeoville v Mark Lewis Steele 2010 (9) BCLR 911 (SCA); Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA).
16 Section 8(2) also provides for an authorised official to declare a building a “problem property” without notification to anyone and take steps to rectify non-compliance with the by-laws where she considers it pertinent to “immediately” take steps “to protect the safety and health of persons or property”.
17 Section 8(1), read with section 7(2)(c), of the Draft By-Laws. It is presumed that section 7(2), (3), (4) and (5) were incorrectly numbered as section 7(u), (v), (w) and (x). In this submission, we refer to these subsections as we presume they should have been numbered.
18 See specifically section 8(3)(b) of the Draft By-Laws.
19 Section 8(3)(a) of the Draft By-Laws provides that an authorised official may order such removal if she deems it “necessary for the safety of any person”.

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prohibit the occupation or use of problem properties by any person.20 Read as a whole, these provisions prohibit the occupation of any property declared a “problem property”.

Evidently, this provision aims to induce the “responsible person” to ensure that the property in question adheres to the requirements of the by-laws or removes anyone occupying such property if they are unwilling to do so. Effectively, the by-laws thus compel the “responsible person” to institute eviction proceedings, or illegally evict occupiers. This is clearly constitutionally inappropriate and fails to have sufficient regard for the right of access to adequate housing and the PIE Act. The offence and penalties for non-compliance of a notice issued in terms of the by-laws are extremely high – R300 000 or imprisonment for a period of three years or less, or both.21

Although the provisions do present an alternative of complying with the by-laws, “unlawful occupation” itself is listed as an element that would entitle an authorised official to declare a building a problem property.22 It also seems unlikely that many “responsible persons” will be willing to expend resources to ensure that problem properties comply with the by-laws. Moreover, it is important to note that the broad definition of “responsible person” could effectively include any person occupying the property.23 Many who fall within the definition of “responsible person” are therefore unlikely to have the necessary powers or resources to bring the property in line with the by-laws. As a result, these persons are likely to be forced to vacate the property or be evicted through lawful or unlawful means, potentially rendering them homeless.

The by-laws are likely to promote evictions and homelessness as the scheme of the by-laws disproportionately emphasises the need for compliance and the removal and vacation of occupiers who reside in problem properties. In doing so, the by-laws indicate insufficient consideration for the housing needs served by these properties and the lacuna that will be created once occupiers are to be removed from these properties. The by-laws do not indicate any pro-active measures that are to be developed to address the demand for low-cost housing in the city. There is also no explicit reference to the provision of alternative accommodation to those that will be rendered homeless due to removals or vacations in terms of the by-laws, despite the fact that the Constitutional Court has affirmed that the City has a responsibility to provide such accommodation.24

Further, the by-laws allow a designated official to direct the Johannesburg Metropolitan Police Department (JMPD) to remove any “structure that part of an instance of illegal invasion of property of which the construction is complete but not yet occupied”.25 The by-laws do not say what an “unoccupied” structure is, or how a police officer is supposed to tell that a structure is unoccupied. Nor do they define “illegal land invasion”. This leaves the by-

20 Section 8(4) of the Draft By-Laws provides that “[n]o person shall occupy, use or permit the occupation or use of any problem property…unless he or she has been granted permission by the local authority in writing…”
21 Section 11 of the Draft By-Laws.
22 Section 7(1)(o) of the Draft By-Laws.
23 See section 2(1)(c) of the Draft By-Laws.
24 See City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC); Occupiers of Skurweplaas v PPC Aggregate Quarries 2012 (4) BCLR 382 (CC); Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread 2012 (2) SA 337 (CC).
25 Section 7(5) (incorrectly numbered as section 7(x)) of the Draft By-Laws.
laws open to abuse, as police officers are likely to evict first and ask questions later. The Constitutional Court in *Motswagae* has held that the confiscation and destruction of property without a court order is contrary to the rule of law.

3.3. **Failure to provide for meaningful engagement**

The by-laws do not make provision for “meaningful engagement”, which is an essential constituent element of the right of access to adequate housing enshrined in section 26 of the Constitution. This principle was clearly developed in *Olivia Road*. These by-laws provide formalistic and inadequate measures of engagement especially in instances where the insistence of rectifying issues could lead to an eviction of lawful or unlawful occupiers of buildings.

3.4. **Vague provisions, overbroad powers and unfettered discretion**

One of the chief principles of the rule of law is that the exercise of public power must be authorised by clear and unambiguous enabling legislation or delegated legislation. Vague and uncertain legislative provisions are highly undesirable in delegated legislation. The possibility also exists that vague provisions could lead to authorities exceeding the constraints of the powers granted to them or misconstruing the limits of their powers.

Numerous provisions in the by-laws are open-ended, vague or ambiguous. This renders the majority of the by-laws subject to potential abuse. The by-laws are replete with examples of vague and obscure provisions. The definition of “building” is particularly problematic and susceptible to wide-ranging abuse as the definition includes “any vacant or unoccupied erf of whatever nature and size”. The ambiguity inherent in this definition could bring any plot of vacant land and even well-established informal settlements within the purview of the by-laws. This vague definition is at odds with the natural meaning of the word “building”. It also means that the by-laws could well threaten the tenure security of informal settlement residents, rendering them at risk of possible eviction. This provision is undoubtedly capable of significant abuse.

Another major concern is that many of the provisions of the by-laws are overly-broad in their formulation. This has the effect that a number of provisions endow wide *de facto* discretionary powers onto public officials. These provisions effectively allow public officials to ‘play God’ by empowering them to make decisions based on their own subjective

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26 *Motswagae and Others v Rustenburg Local Municipality and Another* 2013 (2) SA 613 (CC).
27 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).
29 Hoexter *Administrative Law* 326 and 332.
30 Hoexter *Administrative Law* 332.
31 Hoexter *Administrative Law* 258-259.
32 See, for example, sections 2(3), 2(4), 2(7), 7(1)(g), 7(1)(p), 7(1)(s) and 7(1)(t) of the *Draft By-Laws*.
33 Section 2(3)(d) of the *Draft By-Laws*.
34 See, specifically, section 7(4) (which has incorrectly been numbered section 7(w)) and section 7(5) (which has incorrectly been numbered section 7(x)) of the *Draft By-Laws*. 
considerations, rather than on clear objective directives; which in turn creates an environment that may be subject to substantial abuse. This is exacerbated by the fact that these powers are exercised without the restraint of clear guidelines. Authorised officials in terms of the by-laws would therefore be granted virtually unfettered discretion in some instances, and highly obscure directives in others. Per illustration one could refer to section 7(1)(g) of the by-laws which provides that a building may be declared a problem property for purposes of the by-laws if the authorised official considers the building "unhealthy, unsanitary, unsightly or objectionable". This and other similar provisions allow an authorised official to exercise powers in terms of wholly subjective considerations.

The ambiguity of many of the provisions of the by-laws also brings into question the legality of the by-laws.  

It is also unclear how the by-laws will work together with the existing legal framework, particularly the provisions of the PIE Act. Although there are vague caveats that state that some provisions of the by-laws are "subject to any applicable legislation", the by-laws are almost entirely silent on how they are intended to interact with existing legislation. There is thus no clear indication how this will occur in practice. As a result, the by-laws pose a risk of being used in an attempt to circumvent the legal protections developed in relation to the right to housing and eviction law.

At the very least, the by-laws need to be expressly subject to PIE Act (although it is doubtful that the by-laws could be reconciled with the PIE Act). It is also unlikely that the by-laws would be able to be read in line with the PIE Act and the right or access to adequate housing.

4. Conclusion

The proposed by-laws will have the effect – seemingly desired by the City – to remove poor and low-income households from inner city buildings without providing alternative accommodation or taking proactive steps to tackle the acute shortage of accommodation that leads people to occupy “problem properties” in the first place. People who occupy bad buildings are the same people who clean, guard and trade outside other, ‘better’ buildings. These people are integral to the inner city economy; however the City’s approach to them is largely a punitive and criminalising one.

The by-laws would allow an official to direct the JMPD to remove “unoccupied” structures that are part of “an illegal land invasion”. The by-laws do not say what an “unoccupied” structure is, or how a police officer is supposed to tell that a structure is unoccupied. Nor do

35 See Hoexter Administrative Law 325-326, who states that vague and uncertain provisions may be unlawful or unconstitutional. Hoexter states that vague and uncertain legislative provisions may be in conflict with section 6(2)(i) of the Promotion of Administrative Justice Act 3 of 2000 or section 1(d) of the Constitution of the Republic of South Africa, 1996. She also argues that ambiguity may affect the reasonableness of a legislative provision (Hoexter Administrative Law 332-333).

36 See section 8(2) of the Draft By-Laws.

37 In the Abahlali judgment, Yacoob J tried to make out a similar argument in relation to the KZN Slums Act. This argument was, however, rejected by the rest of the Constitutional Court judges. Abahlali paras 115 and 118.

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they define “illegal land invasion”. This leaves the by-laws open to abuse, as police officers are likely to evict first and ask questions later. The Constitutional Court in *Motswagae* has held that the confiscation and destruction of property without a court order is contrary to the rule of law. The by-laws are unlikely to survive constitutional scrutiny on this test.

The proposed by-laws, in effect, permit an official of the City to evict someone by notice. That is unconstitutional. Unlawfully occupied buildings are already regulated by section 26(3) of the Constitution and the PIE Act. Both of these provisions allow eviction only with a court order, after considering all the relevant circumstances. It is unlikely that the by-laws will survive constitutional scrutiny, because they do not even specify that evictions must be carried out in terms of the PIE Act.

Meaningful engagement before an eviction occurs is an imperative and, where an eviction would lead to homelessness the state is generally obliged to provide alternative accommodation before an eviction can be carried out. The by-laws contradict the decisions handed down by the Constitutional Court in *Olivia Road, Abahlali and Blue Moonlight* in this regard.

In conclusion, it is unlikely that the proposed by-laws would survive constitutional scrutiny. It is therefore advised that the by-laws be reconsidered in their entirety.