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Submission
to the
Johannesburg City Council
on its
FINAL DRAFT INFORMAL TRADING POLICY
(February 2020)
by the
Free Market Foundation of Southern Africa
and various
SMME associations

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1. INTRODUCTION AND BACKGROUND

We thank you most sincerely for extending your deadline and your personal call to let us know. This is very much appreciated. In return we do our very best to do justice to your proposed policy and bylaw, and we offer our considerable experience and expertise accumulated over nearly 50 years on a continuous basis. Problems always arise, which might be where we are able to provide especially valuable support.

The Free Market Foundation has been at the forefront of informal sector policy for decades. We have been closely associated with small and large SMME groups throughout the country, most notably with NAFCOC and ACHIB. We have repaired this Submission in close consultation with them and various localised Johannesburg groups. We have always worked closely with various councils, including Johannesburg. We initiated the Constitutional Court case for Johannesburg street traders a few years back, and were consulted by your colleagues and consultants a year or two ago. We have attended many meetings with your council over many years.

PLEASE NOTE that this Submission addresses only a few areas of concern. We compliment you most sincerely on multiple excellent and insightful aspects of your Draft. We compliment you not only on your sound and considered analysis and proposals, but also on fine drafting.

2. BASIC CONCEPTS

2.1. **Street trading laws do not regulate trade**

We understand perfectly that this heading might seem odd. In all our years we have never heard encountered an argument for regulating street *trade*, nor have we seen a regulation that does so. There is no proposal in your Draft, for instance, to regulate prices, or means of payment or the terms of contract. That would be *trade* regulation.

I will get to what is actually envisage and suggest an adjusted conceptualisation.

What civilians and councils want regulated is everything except trading in streets and other public places. As is apparent from you Draft the real issues have little or nothing to do with “trade”.

It is critical to note that most or all of the issues of concern do not fall within the exclusive or concurrent powers of local authorities. In other words, they cannot lawfully be regulated by council bylaws.

Arguments for regulating “street trade” include the following:

2.1.1. **Illegal immigrants**

Your Draft makes it clear that you want “foreigners” treated fairly, equally and lawfully. This is excellent and enjoys the full support of most decent local and foreign people, especially the people who matter most, consumers.

However, immigration control, work permits, permanent residence and so on are not municipal competencies. If concerns arise, they must be referred to the relevant national authorities.

2.1.2. **Traffic hazards**

Traders neither cause traffic hazards nor block roads, people do. From a traffic control perspective, there is nothing special about traders. There is no need for a special bylaw.

In any event, the Constitution requires laws of “general application” equally applicable to all.

Traders are and must remain subject to precisely the same laws as everyone else.

2.1.3. **Pedestrian obstruction**

Again, there is no need for anything trader-specific. No one may obstruct pedestrian or traffic. Metro police need learn only one set of universally applicable laws. They will be rightly confused if expected to apply different laws to different people. Doing so would, in any event, be unconstitutional.

One of many examples of “formal” business, sometimes huge construction forms, create obstruction by, for instance, having piles of bricks, sand, stones and other building material on sidewalks. That should be treated in precisely the same way as a trader who obstructs a sidewalk.

2.1.4. **Health and safety**

Certain health and safety laws are within municipal jurisdiction.

Here too, there is no need for anything special, not even national regulation. Common law requires everything by anyone, regardless of how big or small to be healthy and safe. The same law must be applied to an international hotel or major chain, as to street traders.

This does raise an important question. Health laws for hotel restaurants, for instance, prescribe refrigeration stainless steel shelving and wall covering, ablution facilities and the like. The problem is not that such measures cannot be applied to street traders, but that they should not be applied to “formal” establishments. Doing so creates needless health hazards. When contaminated food is sold in the formal sector (which often happens) their defence is to plead compliance with the law. What is demanded of everyone is to sell uncontaminated food regardless of whether kept in a fridge or prepared on stainless steel counter tops.

2.1.5. **Public facilities, such as toilets and cleansing**

There is also nothing special about street traders in this context. They, like everyone else, must not commit public indecency, must practice public hygiene, and must use public facilities if available. If not, the council should work with them to find solutions, such as portable facilities.

2.1.6. **Litter**

The same applies to litter; no one may litter. This is not a trader-specific issue anyway. Close to no litter is that of street traders. A cold drink can, banana peel, bottle or crisp packet tossed by a consumer is the same regardless of where it was purchased.

Most traders keep their immediate vicinity clear for the very obvious reason that it is good for business.

They and formal shops should be equally encouraged by the council to help the cleansing department. To blame one or the other is a mistake and unfair.

2.1.7. **Crime**

Much crime is associated with street trading, mostly unfairly. Muggers might run by and drop loot with a street trader, which hides it under a blanket. But they also do so with formal shops, such as “township” stores, spazas and tuckshops – even with guards at the entrances to big supermarkets.

Everyone should be subject to identical laws against all crime. There is nothing special in this context about traders.

Most crimes are not with municipal competencies.

2.1.8. **Drugs**

2.1.9. Drug control is not a municipal competence. If it were, the same constitutional principle of equality at law must be applied.

2.1.10. **Illicit products**

Illicit products such a contraband apparel, cigarettes and appliances, are not withing municipal competence. Again, one universal law for all is mandated by our Constitution, and nothing special needs to be applied to people who happen to be trading.

2.1.11. **Illegal labour**

Labour law is also not a municipal competence. Mercifully, most informal sector labour is not regulated at the national level, and should remain so.

Your Draft highlights the importance of the sector for job creation. Nothing should be done to discourage it.

2.1.12. **Unfair competition**

One of the most curious and illegitimate arguments for restrictive regulation of informal business (of all types) is that it is supposedly “unfair” competition.

This is simply not so. Uniform laws equally applicable to all give “formal” business precisely the same right to trade “informally” in public places.

We have some of the country’s biggest business as our members and funders. When they say that street traders trade outside their shops, pay no rent or tax, are no subject to building regulations and so on, we simply point out that they are free to do the same. We had one which literally did that – set up a street trade outlet. When we last heard it was doing well.

There are many other flaws in the argument. Most street trader incomes are below the taxable limit. They cannot buy in bulk, so that their input costs are higher. They also cannot get credit.

In any event, most do their buying from the businesses that complain.

It is true that they operate from municipal land. The simple solution is to regard them as tenants renting space and charge what could be called a “rental”. That can be a simple average, or a specified area. For Rx per month they get y square meters, and so on.

Without “regulation” this will increase council revenues.

2.2. **There is no such thing as “the informal sector”.**

We obviously expect this to cause raised eyebrows. In economics, “sectors” are such homogenous areas of business as manufacturing, retailing, wholesaling, agriculture, transport, finance or services. The misleadingly named “informal sector” falls into all of these.

In fact, not only is it not a “sector”, but it is not “informal”. Most of it complies with standard definitions of “formal”

It is also not “SMMEs”, because some multimillion rand businesses are “informal”.

What then do we have in mind when we talk about the “informal sector”? The answer is far from clear. We have feelings about what we have in mind, but no coherence definitions. All attempted definitions are arbitrary and anomalous; they are riddled with so many exceptions as to be unhelpful except in some very limited contexts, such as turnover for VAT purposes.

Since the “sector is not “informal” and cannot be defined, we encourage the council to consider the matter more rationally and realistically, by tweaking the Draft into a “Public Space Management Bylaw”. In other words a bylaw that governs everything that anyone does in a public space.

It is clear from your Draft that the issue is not that people trade, but that they, like others, often create many problems of a *non-trading* nature. It is those problems that should be regulated equally for all.

2.3. **If “regulated” it is not “informal”.**

There is no such thing as an “unregulated” activity. Everything we do is regulated by multiple laws. People may generally not endanger, obstruct, defraud, assault, or offend each other.

Everything anyone sells must be safe, perform the functions intended, and be according to agreed terms.

Under apartheid, we had licensing, marketing and price control laws for everything. When they were abolished, people feared that they would be “unregulated”. One of our tasks in the FMF was to explain to people that this was not so.

“Free markets” are subject to the strictest of all regulations, namely “competition” and “consumer sovereignty”.

3. **PUBLIC SPACE MANAGEMENT BYLAW**

As stated, for the reasons given, we urge the council to consider tweaking the Draft into a Public Space Management Bylaw.

We fully appreciate all the hard work that has gone into your fine Draft. If should, of course, be reserved and built-on.

We hereby **offer to prepare a such a variation for your consideration.**

A *Public Space Management Bylaw* will provide everything expressed as the council’s objectives, and require no need for discriminatory laws. It will set a fabulous precedent for all local governments, and be fully Constitutional.

4. SPECIFIC COMMENTS OF YOUR DRAFT

Based on what we have written, specific comments might not be necessary. Even so, we make a few specific comments to illustrate how these basic principles could be applied.

4.1. Section 3

According to section 3 “Policy Vision”, Johannesburg will be “a city of opportunity where the benefits ... will be shared in a way that enables all residents to gain access to the ladder of prosperity and where the poor, vulnerable and excluded will be supported out of poverty to realize upward social mobility.”

These are wonderful words; this is bold language. This Draft has been under consideration of years. This is truly an opportunity to fulfill that promise.

To achieve that there must be no regulatory barriers to participation and upward mobility in the sector. There must be no regulatory “glass ceiling”.

Section 3 goes on to say that the policy’s vision is “*a well-managed informal trading sector*”. This might be unfortunate wording that gives the wrong impression. It contains a contradiction. A “well-managed” sector is not an “informal” sector.

Might we suggest that language more consistent with your vision is a “well-functioning” sector.

4.2. Section 4

The “Policy Mission” envisages “providing a stable and predictable regulatory and management environment”. Such an environment will be one with uniform laws for all.

4.3. Section 7.1.

“Economic Principles” is, in our view, especially excellent. This should inform the entire document.

4.4. Section 7.2

Likewise, Section 7.2. It is bold and enlightened, for which we compliment you.

4.5. Section 8

Section 8 raises crucial points of law. Commitment to compliance with the Constitutional right to freedom of trade means a lot to us because we played a role in its formulation and inclusion in the Constitution.

Not only did we play a role in the Businesses Act, but drafted much of it.

We draw attention the fact that sections cited have been misconstrued by various councils. The idea is not that councils could declare substantial areas, or entire towns, could be “prohibited” areas. This refers to very specific narrowly defines places, such as outside a police station, national monument, entrance to a building, or a freeway.

Subsection (3) goes onto ye idea of leasing municipal land to street vendors.

As stated above, most of the other laws cited are national statutes not withing municipal competence. They must be complied with, rather than supplemented with municipal bylaws.

4.6. **Section 9**

Parts of Section 9 are inconsistent with the values of the Draft. We strongly suggest that there should not be a “permit” requirement, but “registration”. The registration should be quick, easy and cheap – along the lines of the “rental” envisaged.

We trust that you share our concern that discretionary measures create irresistible temptations for corruption, discrimination and abuse.

It is critical for the Bylaw to have only objective criteria, apply equally to all, and not constitute a barrier to trading, job creation serving consumers etc.

Perhaps the sole “objective criterion” should be registration. Everything else is governed adequately by other laws of general application.

Even registration might not be required uniformly. Maybe only for designated “high value” areas. A proverbial “little old lady” selling boiled mielies under a tree, should be left in peace.

4.7. **Conditions**

Most of the conditions that follow are unduly onerous and should, we suggest, be revisited. The policy should, as stated in Sections 3 to 7 be accommodating. By the time the strict conditions and regulations appear, it seems as if the Draft has “lost the plot”.

We suggest a thorough revision of these so as to ensure consistency with the council’s central values and objectives.

We hereby volunteer a draft revision for your consideration.

5. **METRO POLICE TO BE FAIR AND REASONABLE**

Especially in the context of recent ugly scenes of police brutality against a trader – who we will represent and protect – all Metro Police should be made completely familiar with the council’s policy of openness and freedom to trade. Maybe a small briefing session should be conducted annually to ensure a positive and healthy attitude.

We would willingly undertake if required.

6. **CONCLUSION**

Finally, we pledge our traditional support and encouragement to the council and all informal business.

Leon Louw

President

23 July 2021