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**Owl House Foundation**

Martin Street

Nieu Bethesda

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**WRITTEN SUBMISSIONS ON THE DEVELOPMENT OF THE CRAFTERS PRECINCT AT THE OWL HOUSE  
IN NIEU BETHESDA**

**A. Introduction**

1. Lawyers for Human Rights (“LHR”) is an independent human rights organisation with a 40 year track record of human rights activism and public interest litigation in South Africa. LHR uses the law as a positive instrument for change and to deepen the democratisation of South African society. LHR operates as an independent, non-governmental human rights organisation and employs a holistic approach to social justice and human rights enforcement that includes strategic litigation, advocacy, law reform, human rights education, and community mobilisation and support.
2. LHR’s Land and Housing Programme aims to protect the constitutional property rights of all disadvantaged and vulnerable people in South Africa. The programme assists in addressing historical property and land injustices of previously disadvantaged communities in South Africa. The programme deals with a number of cases in urban areas, the current focus is on evictions both of large groups and individuals, women and housing, protecting indigents people’s property rights and protecting the rights of informal traders and waste reclaimers.
3. The LHR welcomes the opportunity to make this submission on behalf of the Bethesda crafters at the precinct.

**B. Brief Historical Background of the Bethesda Crafters**

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4. The Bethesda Crafters are an unique group of about fifteen informal traders who make their own artwork and sell them to tourists visiting the Owl House in Nieu Bethesda. They have been making and selling their crafts for several decades.
5. The presence of the crafters and their unique cement creations form an intrinsic part of the Helen Martins' legacy and heritage of Nieu Bethesda. The history of the crafters goes back to Koos Malgas who assisted Helen Martin in creating the famous Owl House and Camel Yard through a collaborative process. The close collaboration between Martins and Malgas contradicted the harsh divisions created by the Apartheid system at the time.
6. A number of the current-day crafters are related to Koos Malgas and others who worked with Ms Martins.
7. Sadly, the legacy of Apartheid remains a reality for the Crafters who live and work in dire conditions that expose them to the harsh elements. The initiative taken by the Owl House Foundation to develop the Crafters Precinct adjacent to the Owl House was an important and commendable initiative to recognise the crafters contribution to the heritage of the Owl House and Nieu Bethesda. This development will bring considerable relief to the despicable conditions under which the Crafters, some of whom are disable and advanced in age, are working in.

## **C. Development of a Crafters Precinct**

8. The Beyers Naude Municipality began an initiative to develop a crafters precinct. The plan was to allocate a specific area for the crafters to set up their stalls and trade. This initiative by the municipality is commendable and it is unfortunate that it came to a halt due stringent bureaucratic processes that do not outweigh the rights that the crafters have as contained in the Constitution. Although the whole process has now come to a halt, our position is that the initiative must continue, or rather started afresh where the correct procedures are complied with.
9. The Constitution contains a number of fundamental rights and protections associated with informal trade in the Bill of Rights, including the rights to human dignity, equality, to choose one's trade, occupation or profession, and just administrative action.
10. An important right surrounding informal trade, is the constitutional right to just administrative action, which is contained in section 33 of the Constitution. Administrative law is the form of law

that governs the exercise of public power. This is the branch of law that regulates the action of government bodies, government officials and any companies that perform public functions on behalf of the government. Section 33(1) provides that everyone has the right to administrative action which is *lawful, reasonable and procedurally fair*. This means that, when making an administrative decision, local government officials must ensure that they act lawfully, reasonably and in a manner which is procedurally fair.

11. As stated above, any action by a body must be reasonable, meaning the action must be linked to the purpose to be achieved. It is our position that it was unreasonable for the entire initiative to be set aside because of non-compliance with procedural requirements. The municipality could have remedied the situation by addressing the shortcomings. Since the initiative has already been set aside, the reasonable way forward is to continue with the plan to create a craftworkers precinct.

#### **D. Historical Redress and Spatial Justice**

12. Apartheid left a legacy of patterns of spatial injustice. Poor black people were concentrated in township areas or informal settlements. There is legislation and policy that is aimed addressing this, namely the Spatial Planning and Land use Management Act (SPLUMA) and the National Development Plan 2030. One of the aims of SPLUMA is to address the historical imbalance by allowing and improving access to areas that were designated to privileged groups. It is unfortunate that SPLUMA, in this case, was used to exclude a group of poor black people from engaging in their trade in a dignified manner.
13. During the apartheid era, informal traders were regarded as a nuisance and were treated as such. Informal traders are largely poor and unable to find employment, they resort to informal trading to merely survive. A restrictive approach takes away constitutional rights of informal traders. It puts an already vulnerable group in a worse position and it discriminatory.
14. Section 7 of the Constitution mandates the state to “respect, protect, promote and fulfil” the rights contained in the Bill of Rights. The obligation to respect places a duty on the state not to impair the existing rights of informal traders. In other words, the state must refrain from interfering directly or indirectly with the rights that informal traders have already vested. The state also has the duty to promote and fulfil the rights of informal traders. The act of creating a precinct is the state fulfilling its duties, in terms of section 7 of the Constitution.

## E. The Right to Work/Trade

15. Section 22 of the Constitution enshrines that “each citizen has the right to choose their trade, occupation or profession freely”. The freedom to trade extends to informal traders, the Constitution provides that informal trade may be regulated by the state in legislation or policy documents. The Businesses Act is the piece of legislation that regulates informal trade. The Act expressly grants municipalities the power to regulate informal trade by enacting municipal by-laws on informal trade. In this case, local government has the responsibility to ensure that informal traders have access to the spaces within the area where they can freely engage in their trade in a dignified.

## F. The Right to Dignity

16. Section 10 of the Constitution enshrines that everyone has the inherent right to dignity and the right to have their dignity respected and protected.

17. The Bethesda Crafters trade in order to survive and fend for their families. Currently, they trade in open areas and even the street. This leaves them exposed to the elements, the blasting sun during summer and the harsh cold during winter. Already their living circumstances are not good, for them to suffer further when trying to make enough to survive is deplorable. Especially when there are spaces within the town where they can trade.

18. In *Somali Association*,<sup>1</sup> the Supreme Court of Appeal accepted that some of the informal traders were in “dire financial straits”, “destitute” and “unable to buy food or support their families”. For this reason, the court found that disallowing informal trade violates the right to dignity of persons who, having no realistic possibility of employment, would be rendered destitute in the absence of the right to trade.

19. In the *SAITF*<sup>2</sup> case, the Constitutional Court in the *SAITF* stated that:

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<sup>1</sup> *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and 2015 (1) SA 151 (SCA) (Somali Association)*.

<sup>2</sup> *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others 2014 (4) SA 371 (CC) (SAITF)*.

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*“[t]he ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it [informal traders] faced ‘humiliation and degradation’. Most traders, we were told, have dependants. Many of these dependants are children...”*

20. Frustrating the crafters ability to engage in their trade in a dignified manner impedes on rights that has been afforded to them in the Constitution and the case law stated above.

## **G. The Right to Equality**

21. According to section 9 of the Constitution, everyone is equal before the law and everyone is entitled to equal protection and benefit of the law. This provision also includes a right not to be unfairly discriminated against on any ground, including race, gender, sex, ethnic or social origin or any other ground.

22. The Constitution prohibits discrimination based on any of the grounds listed and any similar grounds (even if those grounds are not listed in the Constitution). In Makwickana’s<sup>3</sup> case, the court seems to have found that “socio- economic status” is a ground upon which discrimination is implicitly prohibited and a ground connected to racial discrimination, which is a prohibited ground of discrimination. The judge recognised that informal traders are forced to participate in informal trade “because their socio-economic status or race or both are barriers to better opportunities”.

23. The failure to allow the crafters better opportunities is discrimination based on race which is also intrinsically linked to socio-economic status.

## **H. Conclusion**

24. Informal traders’ right to trade therefore goes to the very core of the South Africa’s constitutional democracy. It is with this in mind that there must be a cooperative effort to realise the rights of the crafters of Bethesda to create a precinct where they can engage in their trade.

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<sup>3</sup> Makwickana v Ethekwini Municipality 2015 (3) SA 165 (KZD)

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25. LHR commits to provide legal representation to the Crafters throughout this process, which may include conducting litigation to ensure that the decision-making process is lawful, reasonable and procedurally fair.

## I. Resources

- The Constitution of South Africa
- Spatial Planning and Land use Management Act
- PAJA
- Business Act
- National Development Plan 2030
- *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* 2014 (4) SA 371 (CC)
- *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism* and 2015 (1) SA 151 (SCA)
- *Makwickana v Ethekewini Municipality* 2015 (3) SA 165 (KZD)

For more information, please do not hesitate to contact:

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