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## **THE CITY OF CAPE TOWN DROUGHT LEVY PUBLIC PARTICIPATION SUBMISSION BY THE ORGANISATION UNDOING TAX ABUSE (“OUTA”)**

OUTA is a proudly South African non-profit civil action organisation, supported and publicly funded by people who are passionate about improving the prosperity of our nation. OUTA was established to reintroduce accountability to government and to challenge the abuse of authority with regards to the use of tax revenues.

We are making this submission as OUTA has supporters in Cape Town, our organisation has a national focus, and we believe that the imposition of Cape Town’s proposed drought charge may have national implications for methods which municipalities use for raising revenue.

### **The summary**

OUTA strongly opposes the imposition of the proposed drought levy. We urge the City of Cape Town to engage the Western Cape provincial government and, essentially, the national Department of Water and Sanitation, in finding realistic and long-term solutions.

This is not a dismissal of the dire water situation in Cape Town and the Western Cape. We believe the drought and water scarcity situation is urgent and must be addressed. We strongly support measures to save water and believe it is the obligation of every individual and institution to support water-saving projects. This is also not a blanket dismissal of the need for any of the water services projects which the City of Cape Town is proposing, but a questioning of whether this is the correct

funding method. This crisis must be addressed realistically and honestly, but a semi-clandestine and questionable “Drought Charge” is not the way to do it.

This is not a demand for the indigent to be cut off because they cannot pay or to allow those who can afford to pay to duck social responsibilities. Everyone has a right to basic water supplies. This matter needs resolving in a fair and equitable manner, which requires a more transparent discussion and holding to account of authorities.

There has been a strong undercurrent of political point-scoring around the Cape Town water issue, which we believe does not serve anyone’s interests, and we thus urge the different levels of government to work together to resolve this matter. The failure of cooperation between the City of Cape Town and the national Department of Water and Sanitation is allowing the City to resort to fiscal “self-help”, which would set a dangerous precedent in governance throughout South Africa.

Cape Town is not the only settlement in a desperate water crisis, it is just the biggest and most well-publicised. The similar crises in other South African towns should not go unresolved because they are invisible and their residents powerless. Instead, the City of Cape Town should be leading the way in negotiating for national solutions to this problem.

## **The legal framework**

We believe that ultimately, the legal responsibility for ensuring a bulk water supply for the City of Cape Town is the responsibility of the national Department of Water and Sanitation (DWS) and that the City should thus act without delay to ensure delivery by DWS. Setting up a new municipal tax or surcharge requires a clear legal process, which the City does not appear to have followed. We are also not convinced, on the basis of the available information, that this is an equitable way of paying for the necessary services.

1. The Constitution sets out (in Section 40 and 41) that national, provincial and local spheres of government are distinctive, interdependent and interrelated and that each sphere is obligated to act in co-operation with the others, including not assuming any power or function except those conferred on them in terms of the Constitution, not encroaching on another sphere of government, co-operating and co-ordinating with each other and avoiding legal proceedings against one another.
2. The Intergovernmental Relations Framework Act 13 of 2005 provides for structures and institutions to promote and facilitate intergovernmental relations and for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. The Constitution (Section 43) requires that organs of state involved in an intergovernmental disputes must make every reasonable effort to settle those disputes by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before approaching court.
3. We note that the City of Cape Town and the Western Cape province have been declared disaster areas and we understand that this was a slow process and did not generate sufficient funds for the emergency measures needed. Surely there must be further measures available to Cape Town to force the national government to provide assistance?
4. No indication was given by the City of Cape Town of endeavours to invoke the provisions of the Intergovernmental Relations Framework Act 13 of 2005 (IRFA) to force DWS to fulfil its constitutional obligations as the trustee of all water resources to combat the existing water crisis. No details are available of provincial endeavours to intervene in terms of IRFA to ensure due and proper performance by DWS relating to the water crisis in Cape Town. Surely this was a priority? Ratepayers should not have to pay – in addition to having paid national taxes – for infrastructure and services which are the responsibility of national government.
5. Section 27 of the Constitution provides that everyone has the right to have access to sufficient water. National Water Act 36 of 1998 (NWA) charges the national government with the trusteeship of water: “As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used,

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Co Reg: 2012/064213/08 NPO #: 124381NPO

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developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate". The NWA states that "the Minister is ultimately responsible to ensure that water is allocated equitably and used beneficially in the public interest" and that the "National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic". The NWA is intended to ensure national control and management of the country's water resources, which includes taking into account the needs of present and future generations, equitable access to water, efficient, sustainable and beneficial use of water in the public interest, social and economic development, providing for growing demand for water use, promoting dam safety, and managing floods and droughts.

6. Regardless of the current vocal efforts by the DWS to police water consumption in the Western Cape, we need to understand what the Province and the City has done to ensure that DWS effectively manages the drought situation by creating alternative water supply mechanisms?
7. As part of the trusteeship, the NWA requires that the Minister must ensure that a National Water Resources Strategy must be compiled and reviewed every five years. The last review of this strategy was during June 2013. This may have contributed to the current crisis.
8. The proposal to impose a drought levy as means to augment the City of Cape Town's water budget in view of lower water sales and to secure sustainable water sources, conflicts with the principles of co-operative governance as detailed in Chapter 3 of the Constitution. Serious consideration should be given to call on the DWS to account for its inability to fulfil its fiduciary duties as custodian and trustee of SA's water sources.
9. Chapter 5 of the NWA deals with pricing strategy for water; such strategies are set by the Minister in concurrence with the Minister of Finance. Section 57(5) provides that no charge made under this Act may be of such a nature as to constitute the imposition of a tax, levy or duty.

10. While the NWA deals with the sourcing of water as commodity, the Water Services Act 108 of 1997 (WSA) deals with the bulk and local distribution of water. Section 10 of the WSA deals with norms and standards for tariffs which must be set in concurrence with the Minister of Finance. Section 10(4) provides that no water services institution (including the City of Cape Town) may use a tariff which is substantially different from any prescribed norms and standards. The prescribed norms and standards do not make provision for the imposition of a drought charge.
  
11. Section 229 of the Constitution deals with the fiscal powers and functions of municipalities, which may only be exercised in accordance with national legislation if appropriate to local government. Various national legislation applies in this instance. The Municipal Property Rates Act 6 of 2004 applies in respect of property rates. The Municipal Systems Act 32 of 2000 includes a general authorisation to impose surcharges on fees, rates on property and, to the extent authorised by national legislation, other taxes, levies and duties, while stating that the amount individual users pay for services should generally be in proportion to their use of those services. The Municipal Fiscal Powers and Functions Act 12 of 2007 (MFPFA) allows for municipal surcharges and municipal taxes, but states that these may not be levied without the approval of the Minister of Finance who, in turn, must consult including with the Minister for Cooperative Governance and Traditional Affairs, with organised local government and the Financial and Fiscal Commission, and the tax then is then authorised by the Minister of Finance in regulations. The MFPFA allows surcharges, but these must also be levied in line with the Act, require gazetted Minister of Finance permission, and then must also meet the requirements of the Municipal Systems Act (Section 75A).
  
12. The City's own explanation of the drought charge ("[FAQs: Drought Charge](#)") states: "The drought charge is a taxation based on the City's Property Rates Policy." This makes it clear that the City regards it as a tax, not a surcharge. However the City does not appear to have fulfilled the requirements for a new municipal tax, as listed in the Municipal Fiscal Powers and Functions Act (see above). There are detailed permissions and requirements for levying a new municipal tax in this Act.

13. The intention to introduce a municipal surcharge or municipal tax as envisaged by the City of Cape Town is not appropriate to local government in terms of Section 229(1)(b) of the Constitution – it is a national obligation which must be fulfilled by the DWS in terms of Section 27(2)(b) of the Constitution read in conjunction with Section 2 of the NWA. In addition, the National Pricing Strategy (NWA Section 57) forbids the imposition of a tax, levy or duty on the use of water. The norms and standards as detailed in Section 10(4) of the WSA do not provide for the introduction of a drought charge where the National government fails to execute its constitutional obligation in managing droughts.
  
14. It would appear that neither the National Water Resource Strategy nor the Water Pricing Strategy catered for the situation experienced by the City of Cape Town and other affected areas. This indicates the serious neglect of constitutional obligations by the DWS, which has effectively forced the City of Cape Town into a self-help fiscal situation to ensure that water services delivery is normalised over the short to medium term.

## **The City's Rates Policy**

15. The City's "[FAQs: Drought Charge](#)" states that the drought charge is based on the City's Property Rates Policy. It also states that "The current rebates that apply on the standard property rates will also apply to this drought charge." This is a little confusing: the [Rates Policy](#) on the City's website, dated 30 May 2017, says there is a rebate of R50 per month for owners of residential property valued from R400 001 to R750 000. The proposed drought charge is less than this rebate for those property values: does this mean the City will be paying ratepayers rather than collecting from them?
  
16. The City's Rates Policy levies rates on vacant property. If the drought charge is levied in the same way as the Rates Policy, this means that owners of vacant properties will have to pay a drought levy despite not using water.
  
17. The City's "[FAQs: Drought Charge](#)" indicates that the charge will apply to residential properties valued at R400 000 and above and to commercial properties valued at R50 000 and above. It lists examples of charges for residential and commercial property owners.

However, there is no mention of how, or even whether, this charge will be applied to other property owners. What is the situation for industries? What about churches, schools and charities? Why should government property escape a drought charge? This is discriminatory.

18. The City's Rates Policy excludes nature reserves and national parks from liability for rates. Amateur sporting bodies are exempt. Do they use municipal water? Should they be excluded from any drought levy?

#### **The drought charge: insufficient information**

19. There was a lack of clear information available from the City on this matter, which is unacceptable as a basis for setting up a new tax. The City's website [link](#) provided an outline with a reference to a council decision on 5 December, a copy of a drought charge advert and the "FAQs: Drought Charge" document. There was no link to the Rates Policy. There was no collection of relevant documents from that council meeting: if there was a meeting with a decision or resolution, where is the public notice of the meeting, the agenda with the drought charge listed, the copy of the resolution, the minutes of the meeting and any written motivation or business plan for the Drought Charge? This is a wholly inadequate basis for public "consultation". It is not transparent and thus it is not a reasonable basis for the City to make a decision on such a charge. The City can also not expect its residents and other affected parties to deliver sufficient input through a public participation process without providing the information on how the City's council came to the conclusion that a drought levy is the solution to its problems.

#### **The projects**

20. We are not offering an opinion on whether the water services projects proposed by the City of Cape Town are indeed relevant and essential, as we do not have sufficient information on this. We are encouraged at the diversity of suggestions on these. However, we question whether there has been the necessary consultation with the other tiers of government on what is needed and, more crucially, on who is responsible for funding it. We also need to understand why bodies such as the Trans Caledon Tunnel Authority (TCTA), who is a state-

owned entity with the mission of financing and implementing bulk raw water infrastructure, wasn't approached by the City for relief?

## The finances

21. The City provided no indication of how much money the City expects to make from the proposed drought levy. There is no information provided on how many ratepayers are to be charged or what the estimated revenue may be. There is not even a thumbsuck estimate. How is it possible to justify imposing a tax on this basis?
  
22. On 9 January, [Cape Town mayor Patricia de Lille said](#): "Only 464 216 households out of a total of 707 814 households will be affected by the charge. Of these, only 52 510 will pay more than R150 per month. The rest will pay less than this. The majority will pay less than R47 per month." We would have liked to have seen the calculations on this. There isn't enough information to understand how much will be collected, but it appears to be a minimum of R654 million over three years, from those households<sup>1</sup>. We would like to know if that means that only households are expected to pay, or businesses too, or other property owners in Cape Town as well. We would like to know the total Cape Town expects to raise. And we would have liked this information a month earlier, when the Drought Charge was announced. We would also like to understand what the operational cost implications would be on the residents as the technologies proposed, such as desalination, are electricity intensive.
  
23. The City's "[FAQs: Drought Charge](#)" indicates that the charge is both for funding infrastructure ("to fund our projects to make additional water available") and as additional revenue for operating costs ("to maintain adequate service delivery"). The FAQs refer to groundwater projects in Atlantis, Cape Flats and Table Mountain Group aquifers, the Zandvliet water recycling plant, the Monwabisi and Strandfontein desalination plants and unspecified "operational costs" of "drought interventions". The City's brief [website page explanation](#)

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<sup>1</sup> (52 510 households x a minimum of R150pm x 12 months = R94 518 000 per year)

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(464 216 households – 52 510 households paying higher rate = 411 706 households paying at an unknown lower rate of at least R25pm x 12 months = R123 511 800 per year)

= R218 029 800 per year x 3 years = R654 089 400 over three years from households only.

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says the charge is also needed to supplement revenue from selling water: “Due to the current drought, Capetonians have restricted their water use to help save water. However, the result of that is that the City is not receiving the necessary income we need to fund our water augmentation schemes and maintain adequate service delivery. So we are introducing a drought charge.” There is no clear explanation of how much money the City wants to raise, how much money the City has lost due to lower sales of water, how much the City is saving on buying bulk water through those lower sales, exactly which infrastructure projects are to be funded and their costs, or what the running costs will be. Instead, it appears that any revenue from the drought levy will simply be added to the general revenue as a top-up.

24. We were able to find some documents relating to the City’s Adjustments Budget, dated 7 December, on the City website (although there were no links to these from the Drought Charge webpage). We assume that these were presented to the City’s meeting in December. While these documents provide lists of water services projects which will apparently be funded wholly or partly by the drought levy, there is no clarity on which projects exactly are being funded.
25. The Adjustments Budget is part of the Integrated Development Plan, and refers to financing requirements for the Water Resilience Action Plan. Is this the drought charge or something separate? The Adjustments Budget seems to indicate that financing and approvals were already arranged. How does the Drought Charge fit into this? Is it an additional charge in case the City runs short?
26. The [City states](#) that the public comment period runs to 15 January but that the drought charge will be implemented from 1 February 2018. How does this allow sufficient time? Is this already a done deal and the “public comment” just window dressing? What happened to the legal permissions and consultations required from national government? We understand that Cape Town is in crisis, but this is chaotic and shows ineptitude and lack of transparency.

27. The Adjustments Budget and various other City statements on water projects indicate that some or all of these projects have been in the planning for weeks or months. If so, why was the public consultation process left to the last minute?

## **Debt and discrimination**

28. The Municipal Systems Act (Section 75) refers to municipal tariff policies, which “may differentiate between different categories of users, debtors, service providers, services, service standards and geographical areas as long as such differentiation does not amount to unfair discrimination”. However, the Drought Charge brings a certain level of discrimination, which appears unfair: while the City says it has tried to be fair by basing this on the Rates Policy (which includes rebates for deserving categories), ultimately this Drought Charge is designed as an extra charge on those who are already paying for services, partly to compensate for the City’s failure to collect properly on outstanding debt.
29. The Adjustments Budget ([Annexure 3](#)) plans for collection rates for 2017/18 to 2019/20 for rates, electricity and refuse ranging from 93% to 98%. The collection rates for water are 82% throughout and for sanitation (also a water-based service) is 86%. There is no explanation for these lower collection rates for water and sanitation other than that these collections were “lower than anticipated” so the projected rates were “reduced to more realistic rates for the 2017/18 MTREF”. These collection rates do not refer to the reduced sale of water, but to the reduced payment for billed water usage. As water-based services in a disastrous drought, surely these need more control? Is this a way of manipulating the City’s Budget to justify the imposition of the Drought Charge?
30. Cape Town’s consumer debt for water has increased over the past year. The [Section 71 reports](#) (we used the most recent quarterly report, for the quarter ended 30 September 2017, and compared it with the same report a year earlier, for the quarter ended 30 September 2016) show this increase. In September 2016, consumers owed Cape Town R1 972.408 million in arrears owed for more than 90 days; by September 2017, this had grown to R2 354.011 million. This is a year-on-year increase of R381.603 million. We are aware that this is a national problem, not just a Cape Town problem, and this is not to suggest

that the indigent should be cut off if they cannot pay. But indigent definitions – and thus justifications for not paying – are set in terms of policy. If these levels are inadequate, they should be reassessed. Those who genuinely can't afford it should indeed not have to pay, particularly for an essential service like water. Allowing this debt to increase, on the assumption that those who don't pay "can't afford it", ultimately conceals the reality that those who don't pay include some who can indeed afford it. It also insults and discriminates against those really poor consumers who are indeed paying their bills: why should they pay, if others of more substantial means do not? We are aware there is no clear answer to this. But in a time of severe drought and financial crisis, this is an area which needs some assessment and explanation.

## Reduced revenue

31. Part of the City's justification for the Drought Charge is that revenue from water services has dropped during the drought. There are no clear figures for this. There is also no acknowledgement that, while sales and thus revenue may have dropped, the cost of buying bulk water increased to offset this to some extent.
32. The City introduced penalty tariffs for consumers who use more water than permitted under drought restrictions. The Adjustments Budget ([Annexure 3](#)) says the City started such penalty tariffs during 2016/17. The City is presumably charging those penalties as merited: where is this additional revenue reflected in the Budget? How much does this offset the loss of revenue due to reduced sales?
33. On 5 December, [Mayor De Lille said](#): "Based on consumption figures for October 2017, the Water and Sanitation Department has calculated that the projected water budget will suffer a deficit in the region of R1,7 billion for 2017/2018." On 9 January, [De Lille](#) was reported as saying that the City had lost around R1.6 billion in water revenue due to reduced demand. This was used to justify the Drought Levy. This is not presented as the extra needed to fund unplanned capital projects, but rather a loss of water revenue due to reduced sales.

34. However, those Section 71 reports do not reflect this massive drop in water revenue. Instead, they show that Cape Town's revenue from water services (the amount billed to consumers) went from R3 659.924 million for the year in 2016/17 (this is the audited outcome, higher the original expected revenue of R3 229.392 million) to an expected annual revenue of R4 123.369 million for 2017/18, calculated as at 30 September 2017. These reports show a year-on-year budgeted increase of R894 million (that's a 28% increase). The revenue for the last available quarter (July-September 2017) is 12% higher than budgeted. This does not reflect De Lille's claim of a massive revenue drop. Is this perhaps the effect of fines for excessive water use? Or did Cape Town suddenly recalculate and find a massive loss between 1 October and 5 December? If Cape Town made a mistake by budgeting incorrectly, surely, they cannot expect the local community to carry the burden thereof?

## Other funding sources

35. There is insufficient information available on other funding methods. In July last year, it was reported that the City of Cape Town [raised R4.3 billion](#) with its Green Bond for environmentally sustainable projects, which was reportedly four times more than expected. This was explicitly referred to as [funding for infrastructure](#), including water management, and responding to climate change. Isn't this funding some of those water projects? What was the extra funding used for?

36. How much disaster funding was raised through the declarations of disaster, was it sufficient and what was this spent on?

37. What other funding within the City's budget was reprioritised to address the water crisis?

38. As mentioned before, did the City approach any relevant state-owned entities, such as the TCTA, to finance and develop the water projects as they are mandated to do?

## Conclusion

39. In conclusion, we believe that there is a dangerous crisis which needs urgent attention. While the City's proposed water projects may help alleviate this crisis, the City's proposed Drought Charge does not address the realities of paying for those projects or of assigning funding responsibility to different tiers of government. Hitting the ratepayers may be the easiest solution, but we do not believe it is the legally or morally correct one. We urge the City of Cape Town to reconsider this plan urgently.
40. We trust that the City will study the concerns raised by OUTA and that comprehensive feedback will be provided to each of the points raised and that more public engagement will commence as to ensure that informed decisions are made.

Kind regards,

Julius Kleynhans  
Portfolio Manager for Water & Environment