

CONSULTATION WITH COUNCIL OF GOVERNORS (COG)

[ANNEXURES 5]

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COUNCIL OF GOVERNORS

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Ref: COG/2/13/Vol.16

28th May, 2020

Ms. Faridah Karoney
Cabinet Secretary
Ministry of Lands and Physical Planning
NAIROBI

Dear Ms. Karoney,

REQUEST FOR A COURTESY CALL TO DISCUSS THE PROPOSED LANDS TRANSACTIONS (ELECTRONIC) REGULATIONS, 2020

We refer to the above subject matter.

The Council of Governors has reviewed the Draft Land Transactions (Electronic) Regulations, 2020 and note that they offer enormous benefits in the digitization of land records as a measure of improving service delivery in land management. However, there are fundamental issues in the draft regulations that clawback on the spirit of devolution contrary to the Constitution of Kenya, 2010.

Accordingly, the Council would like to request for a meeting between yourself and the Governors in the Legal and Human Rights Committee and Urban Development Planning and Lands Committee during the second week of June at a date and time of your convenience to deliberate on these issues in a bid to develop a shared view point.

We look forward to receiving your confirmation on this meeting.

Thank you for your continued support to the Council.

Yours sincerely,

H.E Hon. FCPA Wycliffe Ambetsa Oparanya, EGH, CG.
Chairman, Council of Governors

THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 23 JUN 2020	DAY: TUESDAY
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CLERK-AT THE-TABLE:	

CC: Excellency Governors Urban Development, Planning and Lands Committee
Excellency Governors Legal and Human Rights Committee



COUNCIL OF GOVERNORS

LEGISLATIVE MEMORANDUM ON THE DRAFT LAND REGULATIONS

FROM

THE COUNCIL OF GOVERNORS

INTRODUCTION

The Ministry of Lands and Physical Planning, the National Land Commission and County Governments have the mandate to administer the various land law statutes including the Land Registration Act, 2012, the Land Act, 2012, the Survey Act, Cap 299, the Community Land Act, 2016, the Physical Planning and Land Use Act, 2019 and the Land Adjudication Act, Cap 284.

The Land Registration Act 2012 and the Land Act 2012 require the Cabinet Secretary Ministry of Lands and Physical Planning (MoLPP) and the National Land Commission to develop and implement a National Land Information System and to maintain a land register.

It is against this backdrop that the legal requirement and the broader e-government strategy of modernization of government through improving access to government services that the MoLPP and the NLC are collaborating to digitize land records as a measure of improving service delivery in land management. The proposed Regulations are still in the process of being developed and so far drafts intended to guide public participation and stakeholder involvement have been published and shared with stakeholders.

Under the proposed Regulations, the land registration and administration processes as set out in the Land Act, Land Registration Act, the Survey Act, the Physical and Land Use Planning Act and the Stamp Duty Act are not envisaged to change save from the digitization of the processes.

So far the following drafts have been developed and are being subjected to public participation:

1. Survey (Electronic Cadastre Transactions) Regulations, 2020;
2. Stamp Duty (Valuation) Regulations, 2020;
3. Stamp Duty (Amendment) Regulations, 2020;
4. Survey (Amendment) Regulations, 2020;
5. Physical and Land Use Planning (Electronic Development Control And Enforcement System) Regulations, 2020;
6. Land (Amendment) Regulations, 2020;
7. The Land (Extension and Renewal of Leases) (Amendment) Rules, 2020;
8. Land Registration (Electronic Transactions) Regulations, 2020; and
9. The Land (Allocation of Public Land) (Amendment) Regulations 2020.

Major Issues that need consensus between the two levels of Government

1. While devolution entails a rejection of centralization and recognizes diversity, the essence of National Land Information System (NLIS) is integration of systems that has a centralized view of things. This position creates contradictions that must be addressed and which the current draft regulations do not address. Since devolution is entrenched in the supreme law (CoK 2010), NLIS must be developed, adopted and implemented in a manner that is consistent with the constitution.
2. The proposed draft regulations grant development approval rights for projects of strategic national importance as well as intercounty projects to the cabinet secretary in charge of lands. This is in violation of the Constitution of Kenya 2010, Physical and Land Use Planning Act 2019 and the County Government Act. More fundamentally, development fees are a major revenue stream (Own Source Revenues) for the County Governments and therefore need to be safeguarded.

The Council therefore recommends that the following issues be reviewed for purposes of improving the Draft Land Regulations:

ISSUES AND RECOMMENDATIONS

1. **DRAFT PHYSICAL AND LAND USE PLANNING (ELECTRONIC DEVELOPMENT CONTROL AND ENFORCEMENT SYSTEM) REGULATIONS, 2020**

No	Regulation	Proposed amendments	Rationale/Justification
1	Regulation 3 “(1) There shall be established an electronic development control and enforcement System being a module within the National Land Information System for the purpose of handling applications for development permission.”	(2) There shall be established an electronic development control and enforcement system managed and controlled by the County Governments based on National Standards for the purpose of handling applications for development permission at the County level.	<ul style="list-style-type: none"> • National Government to create an interface with the County Systems. • This will safeguard the institutional and functional Integrity of the County Governments as is envisaged by the Constitution of Kenya

2	<p>Regulation 4</p> <p>“(1) The Director-General shall maintain in the system, an electronic database for the –</p> <p>(i) approved physical and land use plans in accordance to provisions of the First and Second Schedules of the Act;</p> <p>(ii) development control instruments including handbooks, codes, zoning ordinances, policy statements, guidelines, circulars and manuals; and</p> <p>(iii) registers of documents submitted by applicants for development permission as provided in Schedule 1.</p> <p>(2) The database shall be displayed and retrieved in such a manner that enables–</p>	<p>“(1) The County Directors of Physical and Land Use Planning shall maintain in the system, an electronic database for the –</p> <p>(i) approved physical and land use plans in accordance to provisions of the First and Second Schedules of the Act;</p> <p>(ii) development control instruments including handbooks, codes, zoning ordinances, policy statements, guidelines, circulars and manuals; and</p> <p>(iii) registers of documents submitted by applicants for development permission as provided in Schedule 1.”</p>	<ul style="list-style-type: none"> • This responsibility to be vested with the respective County Directors of Physical and Land Use Planning to safeguard the institutional and functional Integrity of the County Governments as envisaged by the Constitution of Kenya
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3	<p>Regulation 5</p> <p>“(1) For purposes of submission of development proposals listed under section 1 of the Third Schedule of the Act, the Director-General shall—</p> <p>(i) establish online links with relevant authorities for ease of information cross-referencing;</p> <p>(ii) enable module for property searches, cadastre outlay and property survey attributes for retrieval of such information for submission of development applications; and</p> <p>(iii) Process development applications within the prescribed projects of national importance in accordance with</p>	<p>“(1) For purposes of submission of development proposals listed under section 1 of the Third Schedule of the Act, the County Executive Members in charge of physical and land use planning shall—</p> <p>(i) establish online links with relevant authorities for ease of information cross-referencing;</p> <p>(ii) enable module for property searches, cadastre outlay and property survey attributes for retrieval of such information for submission of development applications; and</p> <p>(iii) Process development applications within the prescribed projects of national importance in accordance with section 69 of the Act.</p>	<p>Processing of development applications and grant of development permissions are vested with the County Governments pursuant to section 57 of the Physical and Land Use Planning Act (“PLUPA”) which reads in part as follows:</p> <p>“(1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.”</p> <p>Further Section 69 of the PLUPA refers to consideration of the Cabinet secretary of a development permission (meaning a permission that has already been granted by the County Government.)</p>
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	<p>section 69 of the Act.</p> <p>(2) There shall be a County Government system operators who shall be –</p>		
	<p>(i) the County Director of Physical and Land Use Planning in accordance with section 20(h) the Act;</p>		
	<p>(ii) such authorised planning officers in designated planning units in accordance with section 20(g) of the Act;</p>		
	<p>(iii) such authorised technical officers in the relevant authorities or agencies in accordance to section 60(1) of the Act; and</p>		
	<p>(iv) such authorised finance officers in designated finance units in accordance with section 120 of the</p>		

	<p>County Government Act and section 157, 159 and 171 of the Public Finance Management Act.”</p>		
4	<p>Regulation 12 “(1) The Cabinet Secretary in consultation with the National Land Commission shall appoint an Electronic Appeals Standing Committee to hear appeals against the termination of user’s account.”</p>	<p>The County Physical and Land Use Planning Liaison Committee shall hear appeals against the termination of user’s account within fourteen (14) days of the decision by the county executive committee member.</p>	<p>The appeals mechanism is clearly highlighted under Part IV of the PLUPA 2019 which provides in part as follows: “(3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed. (4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.”</p>

5	<p>Regulation 15</p> <p>“(1) The system shall generate an automated confirmation of receipt of the application bearing the date and time of submission and hyperlink of the documents attached;</p> <p>(2) The application shall be received and downloaded by the authorised planning officer and subject to prescribed fees in accordance to the regulations issued from time to time by–</p>	<p>(2) The application shall be received and downloaded by the authorised county planning officer and subject to prescribed fees in accordance to the regulations issued from time to time by–</p> <p>(i) the County legislation for proposed projects that fall in the classification of strategic national importance or inter-county;</p>	<p>All developments including projects for strategic national importance or inter-county shall be subject to fees and charges as prescribed by county legislation</p>
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6	<p>Regulation 17</p> <p>“(1) Subject to the provisions of Section 60 of the Act, the authorised planning officer shall transmit an electronic copy of the application to the authorised technical officer of the relevant authorities and agencies to review and comment.</p> <p>(2) The fully circulated application shall be received by the –</p> <p>(i) Director-General for the prescribed projects of national importance for onward approval by the Cabinet Secretary;”</p>	<p>(2) The fully circulated application shall be received by the –</p> <p>(i) county director of physical and land use planning for the prescribed projects of national importance for onward approval by the County Executive Committee Member of physical and land use planning;”</p>	<p>Section 57 of PLUPA provides as follows</p> <p>“(1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.”</p>
7	<p>Regulation 19</p> <p>“(1) The Cabinet Secretary shall approve or decline applications for prescribed projects of strategic national importance in accordance with Section 69(4) of the Act;”</p>	<p>(1) The County Executive Member in charge of physical and land use planning shall approve or decline applications for prescribed projects of strategic national importance in accordance with Section 69 and 33 of the Act</p>	<p>Processing of development applications and grant of development permissions of vested with the County Governments under section 57 of PLUPA.</p> <p>Section 69 on refers to consideration of the Cabinet secretary of a development permission (meaning a permission that</p>

			<p>has already been granted by the County Government.)</p> <p>Further Section 69 refers to section 33 of the PLUPA which provides that, “The County Executive Committee members of all counties participating in the Inter-County physical and land use development plan shall separately submit the plans to the respective County Assemblies for approval and thereafter submit the same to the Director-General of Physical and Land Use Planning for coordination and certification.”</p>
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General Comments

- Regulations envisaged in section 90 of PLUPA have not been completed and ideally should give effect to the electronic regulations since they describe the processes.
- While devolution entails a rejection of centralization and recognition of diversity, the essence of National Land Information System (NLIS) is integration of systems that has a centralized view of things. This creates contradictions that must be addressed which the current draft regulations do not address. Since devolution is entrenched in the supreme law (CoK 2010), NLIS must be developed, adopted and implemented in a manner that is consistent with the constitution.
- The proposed draft regulations grant development approval rights for projects of strategic national importance as well as intercounty projects to the cabinet secretary in charge of lands. This is in violation of the Constitution of Kenya 2010, Physical and Land Use Planning Act 2019 and the County Government Act. More fundamentally, **development fees** are a major revenue stream (Own Source Revenues) for the County Governments and therefore need to be safeguarded.

2. DRAFT LAND REGISTRATION (ELECTRONIC TRANSACTIONS) REGULATIONS, 2020

No	Regulation	Proposed amendments	Rationale/ Justification
1	<p>Regulation 6</p> <p>“Cadastral maps shall for purposes of registration under these Regulations, be maintained in electronic form.”</p>	<p>Cadastral maps shall for purposes of registration under these Regulations, be maintained by the County Governments in electronic form</p>	<p>Cadastral maps are generally regarded as an essential part of the land management infrastructure in most Countries. cadastral surveying and cadastral mapping are a function of county and as such the cadastral maps should be maintained at county level</p>
2	<p>The Cabinet Secretary in consultation with the National Land Commission shall appoint an Electronic Appeals Standing Committee to hear appeals against the termination of user’s account.</p>	<p>Add the Cabinet Secretary in consultation with CoG and National Land Commission</p>	<p>As per Article 189 of the Constitution, collaboration between the two levels of Government is prudent in safeguarding the interests of Kenyans.</p>
3	<p>2)The membership of the Electronic Appeals Standing Committee shall comprise of:(a)Three representatives from the Ministry; (b)One representative from National Land Commission (c) One representative from Council of Governors;</p>	<p>Add 2 members from the council of Governors and retain 2 from private sector</p>	<p>The 'Mwongozo, The Code of Governance "The board shall have a minimum of seven members and a maximum of nine members," Since the Council of Governors represents 47 County Governments, at least three representatives from the Counties should be part of the Electronic appeal standing committee</p>

	(d) Four representatives from the private sector provided that one of them shall be an Information Technology Specialist well versed with system forensic audit and cybercrime		
4	New Insertion	There should be a County Electronic Appeals Standing Committee established at County level – the Land management system should be administered at different Counties.	The Electronic Appeals Standing Committee should be established at county level where an aggrieved party then can first appeal to the County committee before escalating to the courts. Otherwise, most aggrieved parties will quickly head to court and cause all manner of hiccups to the counties.

3. DRAFT LAND (EXTENSION AND RENEWAL OF LEASES) (AMENDMENT) RULES, 2020

No	Regulation	Proposed amendments	Rationale/ Justification
1	Regulation 4: “(3) Where the County Executive Committee Member approves an application under paragraph (2), the County Executive Member shall inform the National Land Commission to –	3) Where the County Executive Committee Member approves an application under paragraph (2), the County Executive Committee Member shall inform the National Land Commission to –	Amend “Cabinet Secretary” and include “National Land Commission” in consultation with the “County Government” as the listed functions are the prerogative of the National Land Commission and the County Government as opposed to the National Government.

	<p>shall inform the Cabinet Secretary to-</p> <p>(a) require the lessee to have the land revalued in order to determine the land rent and other requisite fees, payable;</p> <p>(b) require the lessee to have the land re-surveyed and georeferenced, where applicable;</p> <p>(c) prepare a lease for the extended period, stating the terms and conditions of the extension; and</p> <p>(d) have the lease executed;</p> <p>(e) forward the executed lease to the Registrar for the registration and the noting of the extended term in the register.</p>	<p>(a) require the lessee to have the land revalued in order to determine the land rent and other requisite fees, payable;</p> <p>(b) require the lessee to have the land re-surveyed and georeferenced, where applicable;</p>	<p>This is pursuant to Article 62 (3) of the Constitution of Kenya which reads as follows:</p> <p>“Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under--</p> <p>(a) clause (1) (a), (c), (d) or (e); and</p> <p>(b) clause (1) (b), other than land held, used or occupied by a national State organ.”</p> <p>Further, the above position was buttressed in the Supreme Court Advisory Opinion Reference No. 2 of 2014</p>
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4. DRAFT SURVEY (ELECTRONIC CADASTRE TRANSACTIONS) REGULATIONS AND SURVEY (AMENDMENT) REGULATIONS

No	Regulation	Proposed amendments	Rationale/ Justification
1	All regulations	Amendment of these draft regulations to be stalled until amendment of the Survey Act Cap 299 of 1961 is done.	The current Survey Act Cap 299 of 1961 has not been amended since the inception of the Constitution 2010 to incorporate County Governments. The Council therefore proposes amendment of the principal Act before amendment of the Regulations.

5. DRAFT LAND (ALLOCATION OF PUBLIC LAND) AMENDMENT REGULATIONS

No	Regulation	Proposed amendments	Rationale/Justification
1	Regulation 34A “A letter of allotment issued under the provisions of this Act and these regulations may be done in electronic form.”	“A letter of allotment after provision of approved plans shall be issued under the provisions of this Act and these regulations may be done in electronic form.”	The base maps and cadaster plans should be based on approved plans after which allotment is done.
2	Regulation 36: “36 (1) The cabinet secretary shall prepare and execute leases emanating from allocation of public land.	(1) The National Land Commission shall prepare and execute leases emanating from allocation of public land. (3) In order to facilitate the preparation of leases on public	Amend “Cabinet Secretary” and include “National Land Commission” in consultation with the “County Government” as the listed functions are the prerogative of the National Land Commission and the County

<p>(3) In order to facilitate the preparation of leases on public land, the cabinet secretary shall request for three copies of sealed cadastral plan and cadastral map in Form LA 12 set out in the Schedule from the office or authority responsible for surveys.</p> <p>(5) Upon receipt of the sealed cadastral plan and cadastral map, a lease document in Form LA 13 set out in the Schedule and shall be executed by an officer designated by the Cabinet Secretary by notice in the Gazette.”</p>	<p>land, the National Land Commission shall request for three copies of sealed cadastral plan and cadastral map in Form LA 12 set out in the Schedule from the office or authority responsible for surveys</p>	<p>Government as opposed to the National Government.</p> <p>This is pursuant to Article 62 (3) of the Constitution of Kenya which reads as follows:</p> <p>“Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under--</p> <p>(a) clause (1) (a), (c), (d) or (e); and</p> <p>(b) clause (1) (b), other than land held, used or occupied by a national State organ.”</p> <p>Further, the above position was buttressed in the Supreme Court Advisory Opinion Reference No. 2 of 2014 which in part provided as follows:</p> <p>“The NLC is required to obtain ‘consent’ from the National or County Governments in the discharge of its functions as stipulated in section 5 (2) (a) of the NLC Act.</p> <p>That provision was to be read in conjunction with Article 259(11) which required that any function or power that was to be exercised on the advice</p>
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				or recommendation or with the approval or consent of or in consultation with another ought only to be exercised after such fact."
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REPUBLIC OF KENYA

MINISTRY OF LANDS AND PHYSICAL PLANNING
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Ref. No. MOLPP/ADM/CSO/1/351

June 3, 2020

Hon. Wycliffe Ambetsa Oparanya, EGH
Chairman, Council of Governors
Westlands, Delta House
2nd Floor, Waiyaki Way
P O Box 40401-00100
NAIROBI

Dear

RE: DELIBERATION ON PROPOSED LAND TRANSACTIONS (ELECTRONIC) REGULATIONS 2020

Reference is made to the above-named subject and your letter dated May 28, 2020.

We take note of your recognition of our efforts to develop various sets of draft regulations to support electronic land transactions, registration and conveyancing.

We also acknowledge your interest in participating in the review of the said draft regulations.

In light of the foregoing, we invite Governors in the Legal and Human Rights Committee and Urban Development Planning and Lands Committee to a meeting at Ardhi House, 12th Floor, Wing A, on **June 9, 2020 at 10.00 a.m.**

Thank you for your continued support and cooperation.

Yours

Sincerely

Farida Karony, EGH
CABINET SECRETARY



REPUBLIC OF KENYA

MINISTRY OF LANDS AND PHYSICAL PLANNING

CABINET SECRETARY'S RESPONSE TO ISSUES RAISED BY THE COUNCIL OF GOVERNORS ON PROPOSED ELECTRONIC LAND TRANSACTIONS REGULATIONS, 2020

1. PHYSICAL AND LAND USE (ELECTRONIC DEVELOPMENT CONTROL AND ENFORCEMENT) REGULATIONS, 2020

No	Regulation	Proposed amendments	Rationale/Justification	Response
1.	Regulation 3 “(1) There shall be established an electronic development control and enforcement System being a module within the National Land Information System for the purpose of handling applications for development permission.”	(2) There shall be established an electronic development control and enforcement system managed and controlled by the County Governments based on National Standards for the purpose of handling applications for development permission at the County level.	<ul style="list-style-type: none"> National Government to create an interface with the County Systems. This will safeguard the institutional and functional Integrity of the County Governments as is envisaged by the Constitution of Kenya 	<ul style="list-style-type: none"> The system is to be established in accordance with the provisions of Section 6(h) of the Land Act, that requires the CS in collaboration with the NLC to establish the System. The drafting has taken care of the interlinkage of processes between the county and the national government. It is as a unitary system with separate workflow paths.

No	Regulation	Proposed amendments	Rationale/Justification	Response
2.	<p>Regulation 4</p> <p>“(1) The Director-General shall maintain in the system, an electronic database for the –</p> <p>(i) approved physical and land use plans in accordance to provisions of the First and Second Schedules of the Act;</p> <p>(ii) development control instruments including handbooks, codes, zoning ordinances, policy statements, guidelines, circulars and manuals; and</p> <p>(iii) Registers of documents submitted by applicants for development permission as provided in Schedule 1.</p> <p>(2) The database shall be displayed and retrieved in such a manner that enables–</p>	<p>“(1) The County Directors of Physical and Land Use Planning shall maintain in the system, an electronic database for the –</p> <p>(i) approved physical and land use plans in accordance to provisions of the First and Second Schedules of the Act;</p> <p>(ii) development control instruments including handbooks, codes, zoning ordinances, policy statements, guidelines, circulars and manuals; and</p> <p>(iii) registers of documents submitted by applicants for development permission as provided in Schedule 1.”</p>	<p>• This responsibility to be vested with the respective County Directors of Physical and Land Use Planning to safeguard the institutional and functional Integrity of the County Governments as is envisaged by the Constitution of Kenya</p>	<ul style="list-style-type: none"> • The system administration as envisaged is the role of the CS, the authority that establishes the system. The operational/ technical office of physical and land use planning is the Director General who has the role of formulating policies and guidelines on physical and land use planning coordinating planning by the counties • The coordinating role of the DG is based on Article 191, specifically 191 (3) (b) (c) on the need to provide uniformity across the nation by provision of norms and standards and promotion of equal opportunity or equal access to the government services • However, PLUPA 13 does not provide for the role of DG in system establishment. The section should be amended to allow the DG to :- <ul style="list-style-type: none"> i. establish a land information system for guiding and coordinating physical and

No	Regulation	Proposed amendments	Rationale/Justification	Response
				<p>land use planning across the country;</p> <p>ii. coordinate the processing of inter-county development applications;</p> <p>iii. communicate the decisions of the national government on development applications of strategic national importance</p> <ul style="list-style-type: none"> The regulation may be amended to read the Director General shall design and oversee and support the county sub-systems...” <p>In turn, the County Director of physical and land use planning shall operate and maintain the system in accordance with the standards and specifications set by the Director General</p>

No	Regulation	Proposed amendments	Rationale/Justification	Response
3.	<p>Regulation 5</p> <p>“(1) For purposes of submission of development proposals listed under section 1 of the Third Schedule of the Act, the Director-General shall—</p> <p>(i) establish online links with relevant authorities for ease of information cross-referencing;</p> <p>(ii) enable module integration for property searches, cadastral outlay and property survey attributes for retrieval of such information for submission of development applications; and</p> <p>(iii) Process development applications within the prescribed projects of national importance in accordance with Section 69 of the Act.</p>	<p>“(1) For purposes of submission of development proposals listed under section 1 of the Act, the County Executive Members in charge of physical and land use planning shall –</p> <p>(i) establish online links with relevant authorities for ease of information cross-referencing;</p> <p>(ii) enable module integration for property searches, cadastral outlay and property survey attributes for retrieval of such information for submission of development applications; and</p> <p>(iii) Process development applications within the prescribed projects of national importance in accordance with section 69 of the Act.</p>	<p>Processing of development applications and grant of development permissions are vested with the County Governments pursuant to section 57 of the Physical and Land Use Planning Act (“PLUPA”) which reads in part as follows:</p> <p>“(1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.”</p> <p>Further Section 69 of the PLUPA refers to consideration of the Cabinet secretary of a development permission (meaning a permission that has already been granted by the County Government.)</p>	<ul style="list-style-type: none"> • This is a matter that should be carefully interpreted in view of the roles of the two planning authorities on development permission. Section 69 (4) needs to be clearly interpreted. In terms of approval of development permission, the CECM Member is confined to county matters only. The matters being handled at this level [in (i) and (ii)] are national. Article 186 (3) provides that a function or power not assigned by the Constitution or national legislation to a county is a function or power of the national government • Where deemed necessary, the CS may through a notice in the gazette make alternate regulations applicable to development of permission for projects of inter-county or strategic national importance and such regulations will take precedence over this regulation

No	Regulation	Proposed amendments	Rationale/Justification	Response
	<p>(2) There shall be a County Government system operators who shall be –</p> <p>(i) the County Director of Physical and Land Use Planning in accordance with section 20(h) the Act;</p> <p>(ii) such authorised planning officers in designated planning units in accordance with section 20(g) of the Act;</p> <p>(iii) such authorised technical officers in the relevant authorities or agencies in accordance to section 60(1) of the Act; and</p> <p>(iv) such authorised finance officers in designated finance units in accordance with section 120 of the County Government Act and section 157, 159 and 171 of the Public Finance</p>			

No	Regulation	Proposed amendments	Rationale/Justification	Response
	Management Act.”			
4.	Regulation 12 “(1) The Cabinet Secretary in consultation with the National Land Commission shall appoint an Electronic Appeals Standing Committee to hear appeals against the termination of user’s account.”	The County Physical and Land Use Planning Liaison Committee shall hear appeals against the termination of user’s account within fourteen (14) days of the decision by the county executive committee member.	The appeals mechanism is clearly highlighted under Part IV of the PLUPA 2019 which provides in part as follows: “(3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed. (4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.”	The two appeal processes (under the draft electronic regulations and under PLUPA) are not interchangeable. The liaison committee is a framework for hearing disputes arising from physical planning activities and decisions while the appeal process under the draft regulations is about system use and administration

No	Regulation	Proposed amendments	Rationale/Justification	Response
5.	<p>Regulation 15 “(1) The system shall generate an automated confirmation of receipt of the application bearing the date and time of submission and hyperlink of the documents attached; (2) The application shall be received and downloaded by the authorised planning officer and subject to prescribed fees in accordance to the regulations issued from time to time by– (i) the Cabinet Secretary for proposed projects that fall in the classification of strategic national importance or inter-county; (ii) the County Executive Committee Member for proposed developments that fall outside those specified</p>	<p>(2) The application shall be received and downloaded by the authorised county planning officer and subject to prescribed fees in accordance to the regulations issued from time to time by– (i) the County legislation for proposed projects that fall in the classification of strategic national importance or inter-county;</p>	<p>All developments including projects for strategic national importance or inter-county shall be subject to fees and charges as prescribed by county legislation</p>	<p>Further to clarification made on issue 3 above, it is strongly recommended for CoG to push for both</p> <ol style="list-style-type: none"> 1. “shared services Agreement” [CGA118] and invoke CGA 114 to ensure local ownership and 2. Tariffs and pricing of DC services to ensure all concerned authorities benefit.

No	Regulation	Proposed amendments	Rationale/Justification	Response
	in paragraph (i)			
3.	Regulation 17 “(1) Subject to the provisions of Section 60 of the Act, the authorised planning officer shall transmit an electronic copy of the application to the authorised technical officer of the relevant authorities and agencies to review and comment. (2)The fully circulated application shall be received by the – (i) Director-General for the prescribed projects of national importance for onward approval by the Cabinet Secretary;”	(2) The fully circulated application shall be received by the – (i) county director of physical and land use planning for the prescribed projects of national importance for onward approval by the County Executive Committee Member of physical and land use planning; ”	Section 57 of PLUPA provides as follows “(1) A person shall not carry out development within a county without a development permission granted by the respective county executive committee member.”	This part needs to be relooked in line with the roles of the planning authorities with regard to strategic and inter-county projects as provided for in Section 69 of PLUPA
4.	Regulation 19 “(1) The Cabinet Secretary shall approve or decline applications for	(1) The County Executive Member in charge of physical and land use planning shall approve or decline applications for	Processing of development applications and grant of development permissions of vested with the County	Again this needs to be clarified

No	Regulation	Proposed amendments	Rationale/Justification	Response
	prescribed projects of strategic national importance in accordance with Section 69(4) of the Act;”	prescribed projects of strategic national importance in accordance with Section 69 and 33 of the Act	Governments under section 57 of PLUPA. Section 69 on refers to consideration of the Cabinet secretary of a development permission (meaning a permission that	

• While devolution entails a rejection of centralization and recognition of diversity, the essence of National Land Information System (NLIS) is integration of systems that has a centralized view of things. This creates contradictions that must be addressed which the current draft regulations do not address. Since devolution is entrenched in the supreme law (CoK 2010), NLIS must be developed, adopted and implemented in a manner that is consistent with the constitution.

Response: clarified by response to issue no. 2 on the matrix

• The proposed draft regulations grant development approval rights for projects of strategic national importance as well as intercounty projects to the Cabinet Secretary in charge of Lands. This is in violation of the Constitution of Kenya 2010, Physical and Land Use Planning Act 2019 and the County Government Act. More fundamentally, **development fees** are a major revenue stream (Own Source Revenues) for the County Governments and therefore need to be safeguarded.

Response: This has partly been clarified by response to issue no.1. **and partly by response to issue no. 3**

General Comments by Mr. Augustine Masinde (Director of Physical Planning)

- I. Regulations envisaged in section 90 of PLUPA (provides the procedure for drafting regulations) have not been completed and ideally should give effect to the electronic regulations since they describe the processes.
- II. Draft Regulations in (I) were submitted to the Attorney General’s Office for professional drafting.
- III. The Draft PLUPA Regulations were outputs of robust consultative processes that culminated in the joint forum in Naivasha last year.
- IV. The Draft Regulations were developed by a team of technical officers drawn from the National Government, the National Land Commission and County Government.
- V. The County Government was represented by twelve (12) experts comprising seven (7) technical officers, two (2) CECs and three (3) attorneys. The names of these experts were submitted by CoG.
- VI. Covid-19 pandemic has slowed down the process.
- VII. Once the professionally drafted regulations are returned, the Ministry will share the document with the Council of Governors and other stakeholders.
- VIII. Workshops for discussion and value addition will be conducted.

3. DRAFT LAND (EXTENSION AND RENEWAL OF LEASES) (AMENDMENT) RULES, 2020

The National Land Commission raised similar issues on the proposed rules. A team of experts drawn from the Ministry and NLC was constituted to look into the issues and report back to us. The Council of Governors may identify a few experts to join the already existing committee so that a joint report may be presented us at a date jointly decided upon by us.

4. DRAFT SURVEY (ELECTRONIC CADASTRE TRANSACTIONS) REGULATIONS, 2020 and DRAFT SURVEY (AMENDMENT REGULATIONS), 2020

Introduction

In the memorandum, the Council of Governors proposes that the above-named regulations be stalled until the amendment of the Survey Act (Cap. 299) is done. The Council of Governors may not have taken time to look at the draft regulations, since no other comments were offered.

Some comments

- I. The Survey Act (Cap. 299) focusses on quality control by the Director of Surveys to support the guarantee of title to land by the National Government. The quality control involves: -
 - (a) Persons who may carry out surveys land for purposes relating to registration of transactions in or of title to land
 - (b) Standards to be met in execution of the said surveys in (a)

It is unlikely that the amendment of the Survey Act, as mentioned by COG, will remove the need for quality control, regardless of introduction of new actors (if any)

- II. The cadastre function, in both physical and electronic formats, underpins and supports all land transactions in Kenya, which make reference to the proprietary unit of land. Functions such as Land Registration, Land Valuation, Land Administration, Physical and Land Use Planning can only be effectively executed with requisite input from the cadastre.
- III. Identification of proprietary units for purposes of land rent, land rates, land allocation, administration and identification of community land and public land requires input from the Cadastre. For Counties to carry out functions related to revenue generation from their land resource, effectively, input from the cadastre is essential.
- IV. Any action to stall the Draft Survey (Electronic Cadastre Transactions) Regulations, 2020, and the Draft Survey (Amendment) regulations, 2020, will impede/ disable efforts in the development of the other modules within the National Land Information System (NLIS) - that action has the effect of stalling the NLIS. It will also adversely affect all land related functions within the 47 Counties and the National Land Commission.
- V. Part 2 of the Fourth Schedule of the Constitution, in section 8 (County Planning and Development), identifies Survey and Mapping (8) (b) and Boundaries and Fencing (8(c)) as functions within County Planning and Development. It can therefore be inferred that **only** the functions that serve the purposes of County Planning and development are

devolved. Section 21 of Part 1 of the same Schedule gives National Government power to provide ‘general principles of land planning and coordination of planning by counties.’ The CoG’s reading of Section 8 (b) of the Fourth Schedule is a generality that even betrays the spirit and letter of Section 21 Part 1 of the same Schedule. This reading presupposes that survey and mapping for the purposes of property registration or land transactions in general are functions of the County Governments because survey and mapping are not expressly spelt out as functions of the National Government. **Article 186 (3) gives further clarification on this matter. It provides that a function or power not assigned by the Constitution or national legislation to a county is a function or power of the national government**

- VI. It is unclear why the COG has proposed the drastic action regarding these regulations, noting that Survey Act (Cap. 299) was not among the legislations whose timelines were set by Fifth Schedule of the Constitution. The COG should engage the Cabinet Secretary with a view of addressing this matter in a different manner.
- VII. It is noted that once the NLIS and the different modules within it are operational, “the central view of things” will disappear as the system will have a global reach geographically and additional functionalities and linkages will take place in the course of time incrementally

ADDITIONAL COMMENTS ON DRAFT LAND REGISTRATION (ELECTRONIC TRANSACTIONS) REGULATIONS, 2020

- VIII. The COG is proposing a change in regulation 6 of the Draft Land Registration (Electronic Transactions) Regulations, 2020 to allow for County Governments to maintain the cadastral map. Section 15 of the Land Registration Act states that preparation and maintenance of the cadastral map is the function of the Office or Authority responsible for survey of land (Director of Surveys). Apart from this requiring an amendment to the principal Act, this should be assessed in the light of the comments in (V) and (VI)

5. DRAFT LAND (ALLOCATION OF PUBLIC LAND) AMENDMENT REGULATIONS, 2020

The National Land Commission raised similar issues on the proposed rules. A team of experts drawn from the Ministry and NLC was constituted to look into the issues and report back to us. The Council of Governors may identify a few experts to join the already existing committee so that a joint report may be presented to us at a date jointly decided upon by us.

MINUTES OF THE CABINET SECRETARY'S MEETING OF THE COUNCIL OF GOVERNOR'S LEGAL AND HUMAN RIGHTS AND URBAN DEVELOPMENT, PLANNING AND LANDS COMMITTEE ON DRAFT ELECTRONIC LAND TRANSACTION REGULATIONS HELD VIRTUALLY ON THURSDAY JUNE 11, 2020 AT 10:00 A.M.

PRESENT

S.N.	Name	Position
1.	Ms. Farida Karoney	Lands CS/ Chair
2.	Hon. Lee Kinyanjui	Chair, Urban Development, Planning and Lands Committee
3.	Hon. Prof. Kivutha Kibwana	Member, Legal and Human Rights Committee
4.	Hon. Jackson Mandago	Member, Urban Development, Planning and Lands Committee
5.	Ms. Esther Ogega	Land Secretary
6.	Mr. David Nyandoro	Head of Registration, MOLPP
7.	Mr. P. K. Mwangi	Director, Land Adjudication and Settlement, MOLPP
8.	Mr. Edward Kosgei	Director Land Administration, MOLPP
9.	Mr. Cyrus Mbogo	Head of CPU, MOLPP
10.	Ms. Polly Gitimu	Director, Surveys
11.	Eric Nyadimo	Chair, Taskforce
12.	Dr. Victor Ouno	MOLPP – Taking Minutes
13.	Ms. Mildred Ambani	Taskforce Member
14.	Mr. David Gatimu	Taskforce Member
15.	Ms. Carolyn Menin	MOLPP/ Taskforce Member
16.	Ms. Truphosa Achar	MOLPP/ Taskforce Member
17.	Ms. Sereu Moinket	Taskforce Member
18.	Ms. Clarah Ketyenya	MOLPP/ Taskforce Joint Secretary
19.	Mr. Jasper Mwenda	Taskforce Member
20.	Mr. Tom Abuta	MOLPP/ Taskforce Member
21.	Ms. Esther Omulele	LSK/ Taskforce Member
22.	Mr. Eugene Lawi	COG/ Taskforce Member
23.	Ms. Catherine Ochanda	LSK/ Member
24.	Ms. Eva Sawe	COG
25.	Mr. Julius Kahindi	MOLPP/ Taskforce Member
26.	Mr. Evans Kipruto	COG

MIN.01/06/2020

Adoption of Agenda

The agenda of the day was highlighted as follows:

1. Preamble
2. Formal Presentation of COG Memorandum
3. Comments by CS
4. Comments by Taskforce Chair
5. Reactions
6. Way Forward
7. Closing Remarks
8. Adjournment

MIN.02/06/2020	Preamble
	<ul style="list-style-type: none"> • The Chair called the meeting to order at 10:15am. • Opening prayers were said by Ms. Truphosa Achar • The Chair welcomed the Council of Governors to the meeting and thanked them for showing interest in the review of the Draft Regulations. • Ministry officials were introduced. <p>The Cabinet Secretary's Introductory Remarks</p> <ul style="list-style-type: none"> • The President directed the Ministry to develop a National Land Information Management System (NLIMS), 'a single source of truth.' • Before this directive, there were two land information systems (one managed by Ministry and another by the National Land Commission). • This system encompasses all land-related services and will accommodate the needs of all stakeholders. • A taskforce was constituted to develop regulations but Parliament annulled the regulations that the Ministry proposed. • The annulment of the statutory instruments gave the Ministry an opportunity to develop comprehensive regulations. • The Ministry constituted a new taskforce in March 2018 to review the recommendations made by Parliament. • The Regulations were meant to effect to Business Laws (Amendment) Act, 2019 that came into force on March 18, 2020. • She had gone through the memorandum submitted by the Council of Governors • The issues raised in the memorandum would be addressed in the review. • The Chair requested Hon. Lee Kinyanjui to introduce his team.
MIN.03/06/2020	COG Memorandum on Draft Electronic Regulations
	<ul style="list-style-type: none"> • The Chair of Urban Development, Planning and Lands Committee, Hon. Lee Kinyanjui, made the presentation. • He noted that land is a critical component of socio-economic development. • He urged the Ministry to take precautionary measures to guard against cyber-crimes and other security issues. • He observed that land issues were the major sources of conflicts in many parts of the country. • He hoped that the successful implementation of the system would put an end to the land issues that had impeded development programmes in the country. <p>Survey Regulations</p>

Amendment of these draft regulations to be stalled until amendment of the Survey Act Cap 299 of 1961 is done. The current Survey Act Cap 299 of 1961 has not been amended since the inception of the Constitution 2010 to incorporate County Governments. The Council therefore proposes amendment of the principal Act before amendment of the Regulations.

Land Administration Regulation

DRAFT LAND (EXTENSION AND RENEWAL OF LEASES) (AMENDMENT) RULES, 2020

Regulation 4

Amend “Cabinet Secretary” and include “National Land Commission” in consultation with the “County Government” as the listed functions are the prerogative of the National Land Commission and the County Government as opposed to the National Government. This is pursuant to Article 62 (3) of the Constitution of Kenya which reads as follows: “Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under-- (a) clause (1) (a), (c), (d) or (e); and (b) clause (1) (b), other than land held, used or occupied by a national State organ.” Further, the above position was buttressed in the Supreme Court Advisory Opinion Reference No. 2 of 2014

DRAFT LAND (ALLOCATION OF PUBLIC LAND) AMENDMENT REGULATIONS

- The base maps and cadaster plans should be based on approved plans after which allotment is done.
- Amend “Cabinet Secretary” and include “National Land Commission” in consultation with the “County Government” as the listed functions are the prerogative of the National Land Commission and the County Government as opposed to the National Government. This is pursuant to Article 62 (3) of the Constitution of Kenya which reads as follows: “Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under-- (a) clause (1) (a), (c), (d) or (e); and (b) clause (1) (b), other than land held, used or occupied by a national State organ.” Further, the above position was buttressed in the Supreme Court Advisory Opinion Reference No. 2 of 2014 which in part provided as follows: “The NLC is required to obtain ‘consent’ from the National or County Governments in the discharge of its functions as stipulated in section 5 (2) (a) of the NLC Act. That provision was to be read in conjunction with Article 259(11) which required that any function or power that was to be exercised on the advice Page 16 of 16 or recommendation or with the approval or consent of or in consultation with another ought only to be exercised after such fact.”

	<p>Registration Regulations</p> <p>Comments on Regulation 6</p> <ul style="list-style-type: none"> • Amend the clause to state: - “Cadastral maps shall for purposes of registration under these Regulations, be maintained by the County Governments in electronic form” • Land survey and mapping is a county function as per Schedule four of the Constitution. <p>Issues Raised on Regulation 13: Electronic Appeals Committee</p> <ul style="list-style-type: none"> • The Cabinet Secretary should also consult with the Council of Governors • Add two more members to represent counties <p>New Insertion There should be a County Electronic Appeals Standing Committee established at County level – the Land management system should be administered at different Counties.</p> <p>Physical Planning Regulations</p> <ul style="list-style-type: none"> • Regulations envisaged in section 90 of PLUPA have not been completed and ideally should give effect to the electronic regulations since they describe the processes. • While devolution entails a rejection of centralization and recognition of diversity, the essence of National Land Information System (NLIS) is integration of systems that has a centralized view of things. This creates contradictions that must be addressed which the current draft regulations do not address. Since devolution is entrenched in the supreme law (CoK 2010), NLIS must be developed, adopted and implemented in a manner that is consistent with the constitution. • The proposed draft regulations grant development approval rights for projects of strategic national importance as well as inter-county projects to the Cabinet Secretary in charge of Lands. This is in violation of the Constitution of Kenya 2010, Physical and Land Use Planning Act 2019 and the County Government Act. More fundamentally, development fees are a major revenue stream (Own Source Revenues) for the County Governments and therefore need to be safeguarded.
MIN.04/06/2020	Cabinet Secretary’s Comments
	<p>The Cabinet Secretary made the following comments:</p> <ul style="list-style-type: none"> • The issues raised by the Council of Governors to be addressed by the Taskforce. • The President will launch the system in July, 2020 and it was not going to be possible to review the Survey Act before then.

	<ul style="list-style-type: none"> • Pending the regulations would make it difficult for the Ministry to meet the deadlines set by the President. • The Survey could be reviewed immediately after the development of the regulations. • The Ministry acknowledged that there was need for an overhaul of the said Act. • For purposes of accomplishing the President's directive, the Survey regulations could still be implemented on a transitory basis. <p>The Cabinet Secretary requested the Council of Governors to allow the Ministry to develop the Survey regulations.</p>
Min. 05/06/2020	Taskforce Chair's Comments
	<p>The Chair of Taskforce introduced members of the Taskforce who were present and asked them to make brief comments. He then made the following comments:</p> <ul style="list-style-type: none"> • The taskforce had received the legislative memorandum from the Council of Governors. • The taskforce would address the concerns raised by the Council of Governors.
Min. 06/06/2020	Reactions
	<ul style="list-style-type: none"> • The success of digitisation programme is likely to be one of the President's greatest legacies. • The Council of Governors is supportive of digitisation programme. • The Ministry is likely to face hurdles in its implementation and should be ready to deal with the challenges • Governors in the Lands Committee would like to the review of the Survey to part of their legacies. • The National Government should not deprive County Government of revenue streams. • There was need for capacity building in County Government. • The Ministry had made a significant initiative.
Min. 07/06/2020	Way Forward
	<ul style="list-style-type: none"> • Recommendations to be incorporated in the Regulations • The revised drafts to be submitted to the Council of Governors on Monday, June 15, 2020. • A technical team, comprising Ministry and Council of Governors experts, to be put in place to work jointly on the proposals. • The review of the Survey Act to begin in July, 2020 and to be carried out jointly by both the Ministry and CoG
MIN.08/12/2020	Adjournment
	<p>The Chair asked Mr. Eric Nyadimo to pass a vote of thanks. Ms. Truphosa Achar was then requested to say closing prayers. There being no any other business, the Chair adjourned the meeting at 11.50 a.m.</p>

Approval:

Chairman Sign..... Date.....

Secretary Sign..... Date.....