



## OFFICE OF THE SECRETARY/CEO

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REF: NLC/LUP/PDP/1/(16)

DATE: 28<sup>th</sup> June 2018

County Secretary,  
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### **RE: ADVISORY TO COUNTY GOVERNMENTS ON THE LEGAL BASIS FOR PREPARATION OF COUNTY SPATIAL PLANS, URBAN AREAS, MUNICIPAL AND CITY LAND USE DEVELOPMENT PLANS**

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The National Land Commission is mandated under Article 67 (2) (h) to monitor and have oversight responsibilities over land use planning throughout the country.

The Commission's attention has been drawn to various advertisements by county governments appearing in the daily newspapers giving notices to the public on the intentions to prepare, or completion of various types of plans.

It is observed that majority of these plans are either for urban areas or the county spatial plans.

The commission advises as follows:

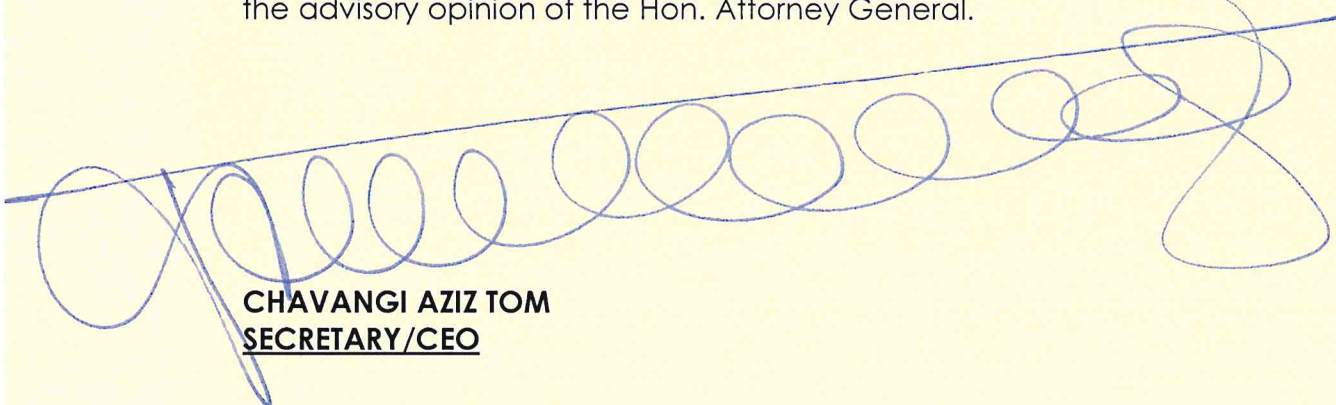
1. The appropriate framework for planning of urban areas and cities is the integrated framework as provided for in Section 36 and 39 of the Urban Areas and Cities Act, 2011.
2. The County Governments Act 2012 in Section 111 also provides for the preparation of the city and municipal land use plans, urban areas, building and zoning plans.
3. The County Governments Act 2012 in Section 110 provides for the preparation of county spatial plans.

It is the Commissions opinion and advice that the blanket citation of the Physical Planning Act Cap 286 as a reference frame and law for the preparation of these plans is not only erroneous but may raise legal issues to the county government as regards their approval and implementation.

The correct and proper reliance by the county governments may be according to the particular statute for preparation of specific types of plans as follows:

1. Urban areas, municipalities and cities within an integrated framework; cite the Urban Areas and Cities Act Cap 275.
2. City and municipal land use plans, urban areas, building and zoning plans; cite County Governments Act 2012.
3. County Spatial Plans; cite County Governments Act 2012.

For the avoidance of doubt and for further reference and details on the process and details on the process and oversighting of the plans. I have attached herewith the advisory opinion of the Hon. Attorney General.



**CHAVANGI AZIZ TOM**  
**SECRETARY/CEO**

Encl

cc **Chief Executive Officer**  
Council of Governors  
P O Box 40401-00100  
**NAIROBI.**

All Speakers  
County Assemblies



REPUBLIC OF KENYA  
OFFICE OF THE ATTORNEY-GENERAL  
&  
DEPARTMENT OF JUSTICE

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Our Ref: AG/CONF/21/72/2/VOL.II (7)  
Your Ref: NLC/LUP/PDP/1/ (2)

17<sup>th</sup> February, 2016

Chavangi Aziz Tom  
The Secretary/C.E.O,  
National Land Commission,  
Ardhi House,  
1<sup>st</sup> Ngong Avenue, Off Ngong Road,  
P.O Box 44417-00100,  
**NAIROBI**

**RE: ADVISORY TO COUNTY GOVERNMENTS ON THE LEGAL BASIS FOR  
PREPARATION OF COUNTY SPATIAL PLANS, URBAN AREAS, MUNICIPAL  
AND CITY LAND USE DEVELOPMENT PLANS**

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We refer to your letter dated 13<sup>th</sup> January, 2016 requesting our office to give appropriate advice/interpretation to guide the County Governments appropriately.

We have considered the request, perused your correspondence attached thereto including provisions of the Constitution, the County Government Act, 2012, the Physical Planning Act Cap 286 and the Urban Areas and Cities Act Cap 275 which your office highlighted in your request to our office and advise as follows :-

**BACKGROUND**

1. The County Governments through various advertisements appearing in the dailies, have been giving notices to the public on their intentions to prepare or complete the various types of plans. Majority of the plans advertised are either for urban or the county spatial plans.
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2. All of the advertisements in the dailies cite the Physical Planning Act Cap 286 and the County Government Act, 2012 as the basis for preparation of the plan.
3. The National Land Commission (herein after referred to as NLC) being an oversight body on land use planning throughout the country pursuant to Article 67 (2) (h) of the Constitution is of the view that to avoid future disputes regarding the legality of the notices the following Acts should be consulted and referenced and thus the notices be drawn in line with their relevant provisions:
  - a) *The Urban Areas and Cities Act Cap 275, Sections 36 and 39 provide for the integrated framework preparation of urban areas, municipality and cities land use plans.*
  - b) *The County Governments Act, 2012 under Section 110 provides for County spatial plans.*
  - c) *The County Governments Act, 2012 Section 111, also provides for the preparation of the city and municipal land use plans, urban areas, building and zoning plans.*

#### ISSUES FOR DETERMINATION

4. Whether the reliance by the County Governments to the Physical Planning Act Cap 286 and the County Government Act, 2012 in preparation of the above mentioned plans is illegal.
5. Whether the County Governments actions go against the spirit of devolution and functional allocation between the National Government and County Governments as set out in schedule 4 of the Constitution of Kenya.

#### LEGAL OPINION

- A. Whether the reliance by the County Governments to the Physical Planning Act Cap 286 in putting out notices in preparation of the above mentioned plans is illegal.
6. The County Governments place their reliance under section 29 (a) (c) (d) and (e) of the Physical Planning Act which empowers each Local Authority (County Government) to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area, to consider and approve all development applications and grant all development permissions, to ensure the proper execution and implementation of approved physical development plans and to formulate by-laws to regulate zoning in respect of use and density of development.

7. Section 107 (1) (a) – (d) of the County Governments Act, 2012 provides for the types and purposes of county plans to guide, harmonize and facilitate development within each county as follows:
  - a) county integrated development plan;
  - b) county sectoral plans;
  - c) county spatial plan; and
  - d) Cities and urban areas plans as provided for under the Urban Areas and Cities Act (No. 13 of 2011).
8. The county spatial plans are provided for under section 110 of the County Governments Act. Under section 110 (2) (c) (h) of the same Act the spatial plan(s), which shall be spatial development framework for the county, shall contain strategies and policies - setting out basic guidelines for a land use management system in the county taking into account any guidelines, regulations or laws as provided for under Article 67 (2) (h) of the Constitution;
9. Section 111 of the County Governments Act provides for the preparation of the city and municipal land use plans, urban areas, building and zoning plans.
10. With a blanket citation of the Physical Planning Act and the County Government Act, 2012 as the basis for preparation of the plans and with the majority of the plans either being for urban or the county spatial plans, the correct and proper reliance by the County Governments may be according to the particular statute(s) which are as follows:
  - a) *The preparation of urban areas, municipality and cities land use plans within an integrated framework pursuant to sections 36 and 39 of the Urban Areas and Cities Act Cap 275.*
  - b) *County spatial plans provided for only under section 110 of the County Governments Act, 2012.*
  - c) *The preparation of the city and municipal land use plans, urban areas, building and zoning plans provided for under section 111 of the County Governments Act.*
- B. Whether the County Governments actions go against the spirit of devolution and functional allocation between the National and County Governments as set out in schedule 4 of the Constitution.
11. Section 3 of the Physical Planning (Development Plans) Regulations [L.N. 137/1998] empowers the Director to notify the respective local authority of his decision to prepare a development plan in respect thereof. After approval by the Minister for Physical Planning, the Director under Section 5 of the Regulations thereof gives a notice to the public of the approved development plan.

12. Section 4 (2) of the Physical Planning Act Cap 286 provides for the Director of Physical Planning to be the Chief Government advisor on all matters relating to physical planning. Further Section 5 (b), (e) & (f) thereof provides for the functions of the Director to be amongst others:
  - b) To be responsible for the preparation of all regional and local physical development plans;*
  - e) To advise the Commissioner of Lands (currently NLC) and local authorities (currently County Governments) on the most appropriate use of land including land management...;and*
  - f) To require local authorities (County Governments) to ensure proper execution of physical development control and preservation orders.*
13. Sections 36 and 39 of the Urban Areas and Cities Act Cap 275 provide for the preparation of urban areas, municipality and cities land use plans to be done within an integrated framework.
14. Section 103 (a) of the County Governments Act Cap 2012 provides that as one of the objectives of county planning, a county is to ensure harmony between national, county and sub-county spatial planning requirements.
15. Section 105 (c) of the County Governments Act requires a county planning unit to be responsible for ensuring linkages between county plans and the national planning framework;
16. In integrating national and county planning, Sections 106 (1) and (2) of the County Governments Act, 2012 provides for cooperation in planning to be undertaken in the context of the law governing inter-governmental relations and that county plans shall be based on the functions of the county governments as specified in the Fourth Schedule to the Constitution and on relevant national policies.
17. Schedule 4 - Part 1 (21) of the Constitution bases the general principles of land planning and the co-ordination of planning by the counties as a function of the National Government.
18. Article 67 (2) (h) of the Constitution empowers the NLC to monitor and have oversight responsibilities over land use planning throughout the country.
19. From the above, it may be possible to construe from the issues raised by NLC that the County Governments actions in preparing county spatial plans, urban areas, municipal and city land use development plans without involving the NLC goes against the spirit of devolution and functional allocation between the National and County Governments.

## RECOMMENDATIONS

20. Under section 5 (b), (e) & (f) the functions of the Director to are amongst others:

*b) To be responsible for the preparation of all regional and local physical development plans;*

*e) To advise the Commissioner of Lands (currently NLC) and local authorities (currently County Governments) on the most appropriate use of land including land management...;and*

*f) To require local authorities (County Governments) to ensure proper execution of physical development control and preservation orders.*

21. The NLC as an oversight body has the power to monitor and have oversight responsibilities over land use planning throughout the country subject to Article 67 (2) (h) of the Constitution.

22. That it is in my considered opinion based on the aforementioned, that the County Governments upon preparation and completion of county spatial plans, urban areas, municipal and city land use development plans, should consult with the NLC for its comments, approval and/or recommendations on the plan(s) and the NLC should give reasons for its objections if any to the County Government so as to avert future disputes or illegalities.

23. That it is in my considered opinion and it may also be advisable for the NLC to engage the County Governments in workshops, forums and/or seminars to address the issues herein. County Government officials (Nairobi County Government officials) expressed concerns as to the NLC coming at the last stage as an oversight body herein instead of being engaged from the start in collaborative engagement with the County Governments.

24. The National Land Commission is a creature of the Constitution under Article 248. The principle objectives of all constitutional commissions (which NLC is a part of) are set out under Article 249 of the Constitution. NLC has the power and authority while exercising its mandate to protect the sovereignty of the people of Kenya, to promote constitutionalism and to ensure that those who work under or with them observe the national values and principles.

25. In executing this mandate the NLC has the exclusive power to oversee and monitor land use planning. The Constitution gives it the first say on all matters concerning land, policy, management, use, taxation and registration of titles.

26. The NLC has a constitutional obligation to ensure that all the state organs and state officers they deal with observe the national values and principles of the Constitution. Under Article 10 of the Constitution, one of our national values and principles is the rule of law.

27. In the High Court case of the *County Government of Meru v Ethics and Anti-Corruption Commission [2014] eKLR*; the basic facts surrounding the dispute are that, officers from the Ethics & Anti-Corruption Commission raided Meru County Headquarters without prior notice and took possession and carried away all original documents from the procurement department. The County was never informed of the intended raid in writing, whether any documents were required for purposes of carrying out investigations or whether any corrupt charges had been preferred against either the itself or any of its officers, nor was it disclosed the place or department to be searched, the documents seized or the purpose of the seizure.

In determining whether the High Court had jurisdiction to determine a dispute between two State organs at the preliminary stage, Justice Majanja stated that '*County Governments are recognized as part of the State organs that exercise the sovereign power of the people under Articles 1 (4), 6 and 176 of the Constitution*'. Under Article 10 of the Constitution therefore, County Governments are required to adhere to the rule of law.

28. Further the failure by the County Governments to make reference to the correct Act(s) may attract a litigious action for future challenge as to the legality of their actions.

29. It may be advisable for the County Governments in putting out the notices for advertisements to cite as the basis for preparation of the plans either as being for urban, municipality and cities land use plans or the county spatial plans and in line with the following Acts and provisions;

- a) The preparation of urban areas, municipality and cities land use plans within an integrated framework pursuant to sections 36 and 39 of the Urban Areas and Cities Act Cap 275.
- b) County spatial plans under section 110 of the County Governments Act, 2012.
- c) The preparation of the city and municipal land use plans, urban areas, building and zoning plans under section 111 of the County Governments Act.

The above will ensure the correct and proper reliance by the County Governments when issuing such future advertisements in line with the prevailing laws and the constitution.

Kindly be advised.

  
GITHU MUIGAI, EGH, SC  
ATTORNEY GENERAL