



23 January 2015

The Director-General
c/o Sunday Ogunronbi
Department of Rural Development and Land Reform
224 Helen Joseph Street
Room 605, Capitol Towers
Pretoria

PER e-mail: spluma@ruraldevelopment.gov.za and sunday.ogunronbi@drdlr.gov.za

Dear Sir/Madam

Comment on Draft Regulations in terms of Spatial Planning and Land Use Management Act 16 of 2013, as published in GG 38331 on 12 December 2014

The Centre for Law and Society (CLS) was established in 1994 (under the name Law, Race and Gender Research Unit) as a research and training unit in the University of Cape Town's Faculty of Law. Presently, the main project of CLS is the Rural Women's Action-Research (RWAR) Programme. The RWAR Programme is part of a wider collaborative initiative that seeks to support struggles for change by rural people, particularly women, in South Africa. An explicit concern is that of power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level. Among other things, the RWAR Programme seeks to provide targeted forms of support to those engaged in struggles that challenge patriarchal and autocratic power relations in former homeland areas.

CLS thus raised several concerns regarding the Draft Regulations in terms of the Spatial Planning and Land Use Management Act 16 of 2013, as published on 4 July 2014, in a previous submission (dated 4 September 2014). CLS speculated that certain provisions would be harmful to democracy in rural areas, particularly in the former homeland areas which largely coincide with the 'traditional areas' referred to in the Draft Regulations. It was specifically submitted that proposed regulations 96, 97 and 98 (as they then were) disregarded the nature of customary land rights, failed to incorporate mechanisms to ensure accountability and transparency to ordinary people, and provided traditional authorities with responsibilities contrary to the Constitution's understanding of traditional leadership.

While some of the concerns raised have been addressed in a subsequent version of the Draft Regulations (published 12 December 2014), others remain. For this reason, CLS makes the following submissions in respect of the new Draft Regulations, limited in scope to proposed regulation 19 that deals with 'Areas under traditional leadership'.

"Promoting justice through research and dialogue"



1. It is appropriate that the ambiguity regarding the meaning of the term 'traditional authority' has been resolved in the new Draft Regulations, which now specify that the relevant actors in proposed regulation 19 are 'traditional councils'. Yet, proposed regulation 19 continues to make certain assumptions about the role of traditional councils in traditional communities, which will be dealt with in more detail below. It should further be noted that issues relating to the legal reconstitution and recognition of traditional councils throughout the country have not yet been resolved. Many have failed to meet the composition requirements that were set in the Traditional Leadership and Governance Framework Act 41 of 2003. CLS therefore maintains that the Department should be dissuaded from providing traditional councils with substantial responsibilities in the Draft Regulations.
2. Proposed regulation 19 continues to associate traditional councils with the land allocation process. The Draft Regulations require that a traditional council provide proof of a customary land allocation to any person living in that traditional area who makes an application for land development and land use. This empowers traditional councils to define the content of customary law (by determining what qualifies as 'customary' for purposes of proof) and creates the potential for local land allocation processes to be seized by traditional councils in practice – particularly since traditional councils enjoy financial and institutional support from government. Moreover, to assume that traditional councils are the sole arbiters of custom and land rights flies in the face of the Constitutional Court's jurisprudence of living customary law. This assumption was challenged on substantive grounds in the case of *Tongoane*, which was however decided on procedural grounds. That traditional institutions have such powers intrinsically 'according to customary law' remains deeply legally disputed and makes these regulations subject to attack on Constitutional grounds. The regulations as they currently stand would undermine local customary laws and practices, which do not necessarily involve traditional councils in land allocation processes. This is questionable in terms of Chapter 12 of the Constitution, since the regulations do not deal specifically with customary law yet may result in the extinguishment of customary law and rights. Indeed, where a traditional council has concluded a service level agreement with a municipality, proposed regulation 19(2) seems to assume that no proof of land allocations will need to be obtained by the traditional council (that is performing duties on behalf of the municipality) since the traditional council will already be in control of the allocation process. This assumption was discussed in some detail in CLS's previous submission. CLS maintains that in practice it will be difficult to ensure accountability and secure the communal land rights of individuals if traditional councils are centrally (and unilaterally) responsible for decision-making in respect of land development and use. Central decision-making powers could further undermine important consultative processes that underpin local customary land relations in practice.



3. It is unclear from proposed regulation 19 how traditional councils will be held accountable for the land use management powers and duties that they are supposed to perform on behalf of municipalities (where there is a service level agreement), or for the responsibility of providing proof of customary land allocations (where there is no service level agreement). While the Draft Regulations stop short of stating that a traditional authority must first sanction any developments on land in traditional areas – a positive change from the previous version – the land development and land use application of any person living in a traditional area is still dependent on the actions of a traditional council. This is because the Draft Regulations require that the council first provides proof of a land allocation, or assume that the traditional council will be in control of the initial allocation process, in order for an applicant to submit his or her application. Effective mechanisms for holding a traditional council accountable to ordinary people and local government are therefore essential. CLS maintains that traditional councils must be held to democratic principles of accountability, responsiveness and openness when carrying out public responsibilities, and that the proposed regulations should be drafted so as to ensure this explicitly.
4. Finally, CLS reiterates that the important notice and consent requirements contained in the Interim Protection of Informal Land Rights Act of 1996 should be taken into account and implemented in the land development and land use application process put forward by the Draft Regulations. Failure to incorporate these principles into the proposed regulations makes them vulnerable to legal challenge as they do not conform with protections set out in law, that are moreover protections required by s 25(6) of the Constitution.

CLS urges that the daily challenges and experiences of ordinary people be taken into account in developing the Department's approach to land administration at the local level, and thanks are extended to the Department for this further opportunity to communicate CLS's views on the Draft Regulations.

Kindly consider this comment alongside CLS's previous submission, dated 4 September 2014 and attached hereto as an Annexure. Note further that CLS endorses the submissions made by the Legal Resources Centre on the Draft Regulations.

Sincerely,

Dr Aninka Claassens

Director of the Rural Women's Action Research Programme

Centre for Law and Society

Faculty of Law, University of Cape Town

Tel: 021 650 5640 or E-mail: Aninka.Claassens@uct.ac.za

"Promoting justice through research and dialogue"



4 September 2014

The Director-General
c/o Sunday Ogunronbi
Department of Rural Development and Land Reform
E-mail: spluma@ruraldevelopment.gov.za and sogunronbi@ruraldevelopment.gov.za

Dear Sir/Madam

Submission on Draft Regulations in terms of Spatial Planning and Land Use Management Act 16 of 2013

The Centre for Law and Society (CLS) was established in 1994 (under the name Law, Race and Gender Research Unit) as a research and training unit in the University of Cape Town's Faculty of Law. Presently, the main project of CLS is the Rural Women's Action-Research (RWAR) Programme. The RWAR Programme is part of a wider collaborative initiative that seeks to support struggles for change by rural people, particularly women, in South Africa. The Programme focuses on land rights, but includes related issues of poverty, inheritance, succession, marriage, women's standing and representation in community structures and before traditional courts, rural governance, citizenship and access to human rights in general by rural women. An explicit concern is that of power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level. The RWAR Programme seeks to understand the complexities and opportunities in the processes of contestation and change underway in rural areas and aims to provide targeted forms of support to those engaged in struggles that challenge patriarchal and autocratic power relations in former homeland areas.

In this context, CLS is concerned that the Draft Regulations in terms of the Spatial Planning and Land Use Management Act 16 of 2013 will be harmful to democracy in rural areas, particularly in the former homeland areas which coincide with the 'traditional areas' that have been demarcated through the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). We submit that rural democracy will be undermined in that the proposed regulations 96, 97 and 98 disregard the nature of customary land rights, fail to incorporate mechanisms to ensure accountability and transparency to ordinary people, and provide traditional authorities with responsibilities contrary to the Constitution's understanding of traditional leadership. The scope of our submission will be limited to these three proposed regulations.

"Promoting justice through research and dialogue"



Contrary to Constitution's recognition of traditional leadership

Proposed regulations 96, 97 and 98 not only envisage that 'traditional authorities' have responsibilities in land allocation processes as described below, they actively endeavour to replace the third sphere of government with 'traditional authorities' by stating that these authorities can perform 'the land use management powers and duties of a municipality'. In this respect, we strongly urge the Department to consider the following issues.

It is first necessary to point out that it is unclear who exactly the 'traditional authorities' are that the Draft Regulations refer to since the TLGFA recognises only traditional communities, traditional leaders and traditional councils. This ambiguity must be resolved so that it is clear who the actors are that could be empowered to exercise the far-reaching land development application responsibilities in terms of the Regulations. This is generally required as per the rule of law but would also contribute to the transparency of processes envisioned in the Draft Regulations.

If it is assumed that 'traditional authorities' refers to traditional leaders, by replacing elected local government officials with primarily unelected, and in some cases apartheid-imposed, traditional leaders, the Draft Regulations potentially contradict how Chapter 12 of the Constitution on traditional leadership has been interpreted by the Constitutional Court. In the *Certification of the Constitution of the Republic of South Africa, 1996* case the Constitutional Court made it clear that if traditional leaders were supposed to have governmental powers and functions the 1993 Interim Constitution would have specifically stated so. Instead, it was only stated that the 'institution, status and role' of traditional leaders was to be recognised, and this is still the formulation of traditional leaders' position in s 211 of the Constitution at present. Against this background, the constitutionality of substituting local government officials with traditional leaders to perform the 'land use management powers and duties' of a municipality is questionable (Reg 96). While s 212 of the Constitution states that national legislation can provide a role for traditional leadership at a local level, the *Certification* judgment informs us that this 'role' is not the same as government's powers and functions.

The constitutionality of traditional councils performing local government powers and functions is similarly doubtful, if it is assumed that 'traditional authorities' refers to these councils. Moreover, the legal recognition of these traditional councils has been plagued with uncertainty as many have failed to meet the composition requirements that were set for them in the TLGFA. In order to be recognised as traditional councils, tribal authorities inherited from apartheid had to meet certain thresholds of women and elected members by a specific deadline. In most provinces compliance with these requirements has been inadequate. Limpopo, for example, has never held elections to reconstitute its tribal authorities into traditional councils. It is submitted that these and other existing issues with traditional leadership institutions should dissuade the Department from assigning substantial responsibilities to 'traditional authorities' as the proposed regulations attempt to do.

"Promoting justice through research and dialogue"

Faculty of Law

All Africa House, University of Cape Town
Private Bag X3, Rondebosch 7701, South Africa
Tel: +27 21 650 5906 Fax: +27 21 650 3095
Email: pbl-cl@uct.ac.za

www.cls.uct.ac.za

www.customcontested.co.za

 @ClisUct



Undermines customary land rights

If by 'traditional authorities' the Draft Regulations refer to traditional councils, then proposed regulations 96, 97 and 98 confer traditional councils with greater decision-making powers over land administration, by deeming that they have responsibilities in the allocation of land and development. Underlying these responsibilities is the assumption that land administration is in the main a function of traditional councils.

This conceptual basis is similar to the one that informed the Communal Land Rights Act of 2004 (CLRA) which was struck down by the Constitutional Court in 2010, and underpins the Department's current policy framework on communal land tenure, in particular the wagon wheel model (Department of Rural Development and Land Reform, August 2014). While this model creates institutionalised use rights at the household level, in practice it will be impossible to realise the security of stronger rights when ownership of the outer boundary vests in traditional councils and can be used to undermine household rights. Like the wagon wheel model and CLRA, regulations 96, 97 and 98 rely on a misconstrued role of traditional councils in land administration that is inconsistent with existing systems in communal areas.

They also empower 'traditional authorities' to define custom through the approval of some land uses and forms of notification 'in accordance with customary law'. In so doing, the Draft Regulations assume that customary law is the preserve of traditional councils or leaders. Without explicitly requiring members to consent to the applied customary law, it allows traditional councils or leaders to unilaterally determine land use developments that are customarily permissible. This approach is at odds with customary law and existing systems of land administration in communal areas, where decision-making on land allocation and use takes place at multiple levels of social organisation. It also threatens the rights of smaller groups and limits their ability to be part of the initial decision-making process. Instead, their authority is reduced to submitting objections after the fact. It furthermore assumes that there is a uniform customary law observed by all those living in so-called traditional areas. For instance, it does not take into account groups with different customs and affiliations that were forcefully relocated under the jurisdiction of different traditional leaders during apartheid.

Unlike the centralised model of land administration reinforced by regulations 96, 97 and 98, decentralised decision-making is a feature common to land administration systems in a large number of communal areas in South Africa. Descriptions provided in affidavits that formed part of the CLRA Constitutional Court case, including accounts by anthropologists and historians, point to decision-making processes about land allocation and use at different levels of social organisation – for example, at a family, household, clan, sub-village and village level. They reveal the layered character of land administration in communal areas and point to an upward flow of authority in land allocation. This layered system of land allocation and use rights, internal to communal areas, has been characterised in some instances as nested systems of land administration. (Claassens & Cousins, *Land, Power and Custom*, UCT Press, 2008)

"Promoting justice through research and dialogue"

Faculty of Law

All Africa House, University of Cape Town
Private Bag X3, Rondebosch 7701, South Africa
Tel: +27 21 650 5906 Fax: +27 21 650 3095
Email: pbl-cls@uct.ac.za

www.cls.uct.ac.za

www.customcontested.co.za

 @ClSUct



It is a system that allows for accountability through the mediation of power by multiple levels of authority. It also mediates power by the inclusion of various social organisations, including the basic unit of an organised society, the family. The centralised model of land administration enabled by the Draft Regulations will pre-empt these levels of land allocation and use rights internal to communal areas and their authority to hold traditional councils accountable.

In addition to pointing out our concerns with the model proposed in these Draft Regulations, we remind the Department of the important consent and notice requirements contained in the Interim Protection of Informal Land Rights Act of 1996 and put forward that these should explicitly be taken into account in the land development application process put forward by the Draft Regulations.

Fails to ensure accountability and transparency

South Africa's democracy is founded on principles of accountability, responsiveness and openness that are protected in the Constitution. Where 'traditional authorities' are given responsibilities towards members of the public they must be held to these same principles, as would also be required of them under customary law. Yet, the proposed regulations in many respects fail to ensure that these principles of democracy will be upheld during the land development application process involving traditional authorities.

The proposed regulations assume that 'traditional authorities' are responsible for approving allocations of land in traditional areas and then make them unilateral decision-makers in respect of land developments (see also Reg 98(1)), but then fail to incorporate checks and balances or guidelines for how those decisions should be made – stating only that they must be 'in accordance with customary law' where there is no service level agreement (Reg 97). This could lead to abuse if traditional authorities rely on 'official' apartheid and colonial understandings of customary law – that were used to bolster autocratic power in the former homelands – instead of the 'living' version of customary law that has been recognised by the Constitutional Court. This latter understanding of customary law places emphasis on current and changing practice by people on the ground.

By making the land development application process in traditional areas contingent on a traditional authority's prior approval, the proposed regulations undermine important consultative processes (not mere notice) that in practice underpin customary land relations at a local level and thereby diminish the extent to which that traditional authority is accountable to ordinary people. Furthermore, by conflating roles that would otherwise be performed by multiple institutional actors at different levels and instead enabling centralised decision-making by a traditional authority, the proposed regulations undermine transparency in the land development application process.



Where there is a service level agreement between a traditional authority and a municipality, the proposed regulations envisage that traditional authorities will have a 'precinct plan' and 'planning and participation procedures' against which to measure their land development decisions (Reg 97). If a traditional authority indeed has these plans and procedures in place, in effect the authority's land development decisions will be made on its own terms. How and to whom could a corrupt or biased traditional authority then be held to account?

Conclusion

For these reasons we submit that the proposed regulations highlighted above will fail to ensure a democratic land development application process for ordinary people living within so-called traditional areas. The seemingly unfettered responsibilities being provided to traditional authorities could undermine land rights, democratic principles of transparency and accountability, and the institution of traditional leadership as it is recognised in Chapter 12 of the Constitution.

We furthermore recommend that the Department of Rural Development and Land Reform remain cognisant of the abuses by traditional authorities recounted by many people living in rural areas in other forums at which the Department has been present. The challenges experienced by people on a daily basis should fundamentally inform the Department's regulatory interventions in respect of the land development application process.

Our thanks are extended to the Department for this opportunity to present our views on the Draft Regulations.

Sincerely,

Dr Aninka Claassens

Director of the Rural Women's Action Research Programme
Centre for Law and Society
Faculty of Law
University of Cape Town
Tel: 021 650 5640
Aninka.Claassens@uct.ac.za