CENTRE FOR LAW AND SOCIETY

RURAL WOMEN'S ACTION RESEARCH PROGRAMME

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'.

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

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.

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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