

PETITION TO THE NATIONAL ASSEMBLY UNDER ARTICLE 37 AND 119 OF THE CONSTITUTION 2010, AND 12TH PARLIAMENT STANDING ORDER 219 ON THE PHYSICAL PLANNING BILL 2017

To:

Michael R. Sialai, EBS,
Clerk of the National Assembly,
Office of the Clerk, Main Parliament Building,
P. O. Box 41842 – 00100,
Nairobi.

Cc: Chairperson,
Departmental Committee on Lands,
National Assembly
P. O. Box 41842 – 00100,
Nairobi.

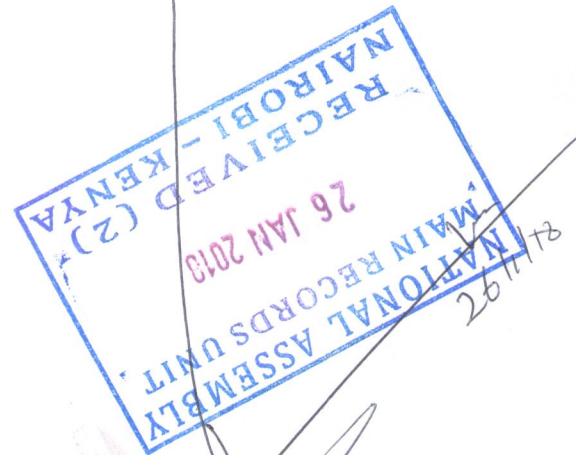
Hon. Justin Muturi
Speaker of the National Assembly,
P. O. Box 41842 – 00100,
Nairobi.

J. M. Nyegenye, CBS
Clerk of the Senate,
Office of the Clerk, Main Parliament Building,
P. O. Box 41842 – 00100,
Nairobi.

Chairperson,
Committee on Lands, Environment and Natural Resources,
Senate,
P. O. Box 41842 – 00100,
Nairobi.

Ms. Jackeline Mogeni,
Chief Executive Officer,
Council of Governors,
Delta Corner, 2nd Floor, Chiromo Road, Off Waiyaki Way,
P. O. Box 40401,
Nairobi

19th January 2018



PETITION TO THE NATIONAL ASSEMBLY UNDER ARTICLE 37 AND 119 OF THE CONSTITUTION 2010, AND 12TH PARLIAMENT STANDING ORDER 219 ON THE PHYSICAL PLANNING BILL 2017

We, the undersigned,

Are citizens of Kenya representing Nairobi residents in general, and in the interest of the public, lodge this petition to the National Assembly concerning the *Physical Planning Bill 2017*.

WE humbly draw the attention of the House to the following:

THAT

1. The *Constitution 2010 Article 1* reposes all sovereign authority in the People of Kenya;
2. The *Constitution 2010 Article 10 (1)* states that the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them enacts, applies or interprets any law. The national values and principles of governance include participation of the people (*Article 10 (2)*);
3. The *Constitution 2010 Article 119* provides that every person has a right to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation, and Parliament shall make provision for the procedure for the exercise of this right.
4. The *Constitution 2010 Article 118* states that Parliament shall conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and facilitate public participation and involvement in the legislative and other business of Parliament and its committees.
5. The *Constitution 2010 Article 95* states that the National Assembly represents the people of the constituencies, special interests, deliberates on and resolves issues of concern to the people.

THAT

6. The Clerk of the National Assembly, *Mr. Michael R. Sialai* published a notice in the *Daily Nation* newspaper on 5th January 2018 calling for submission of memorandum in the matter of consideration by the National Assembly of the *Physical Planning Bill 2017* pursuant to *Constitution Article 118 (1)(b)*.
7. The notice states that the *Physical Planning Bill 2017* has undergone First Reading and is currently committed to the Departmental Committee on Lands for consideration.
8. The *Physical Planning Bill 2017* seeks to repeal and replace the *Physical Planning Act, No. 6 of 1996* and intends to provide for the planning, use, regulation and development of land in Kenya.

THAT

9. The *National Land Policy 2009* notes that some of the main challenges facing physical planning sector include general disregard for land use planning regulations. Multiple land law

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regimes have created gaps, conflicts and contradictions in the application of the laws and these have implications on land use planning and development. Lack of stakeholder participation in planning process, poor governance leading to wastage, political patronage and corruption have eroded public confidence, lack of clear policy on implementation and weak institutional structures, inadequate technical and professional staff, problems caused by rapid urbanization, exclusion of women in land decision making processes.¹

10. The *Physical Planning Bill 2017* does not respond effectively to the challenges of development planning, does not adequately align itself to the *Constitution*, nor does it adequately incorporate key provisions provided in the *National Land Policy 2009*.
11. Some broad observed gaps in the *Physical Planning Bill 2017* are as follows;

- i. **Lack of Intergrated Planning**

Effective development planning brings together economic, fiscal, social and physical planning aspects. The *National Land Policy* and *National Spatial Plan* recognise that some of the shortcomings of the local physical development planning has been the lack of integration and inadequate capacity towards physical planning.

There is therefore need for an integrated approach in the preparation and implementation of Local Physical Development Plans. To this extent physical Planning Bill 2017 should be integrated with land use management to meet the threshold of reform envisaged under the Constitution 2010 and the National Land Policy 2009.

- ii. **Public Participation provisions do not meet constitutional threshold**

‘Development control is the power of the State to regulate property rights in urban and rural land, and is derived from the State’s responsibility to ensure that the use of land promotes the public interest.’² Development control is to conform to the principles of effective land use including ensuring effective public participation in the exercise of development control and the establishment of participatory and accountable mechanisms for development planning, management and enforcement.

Development planning in Kenya has suffered from absence of broad based consultation and the lack of an effective coordinating framework for preparation and implementation of the planning proposals and regulations. *For instance, the National and County Directors of physical planning should be responsible for ensuring the engagement between county government and the citizenry, other stakeholders and interest groups. The county director should be responsible for ensuring and coordinating the participation of communities and locations in physical planning and development at the local level and assisting communities and locations to develop the administrative capacity*

¹ Ministry of Lands and Physical Planning, National Land Policy 2009

² National Land Policy clause 48.

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for the effective exercise of the functions and powers and participation in physical planning and development at the local level.

iii. **Civic Education is a functional prerequisite that is missing from the Bill**

Civic education is a functional prerequisite for effective participation. *The Cabinet Secretary should be required to ensure counties provide civic education for the empowerment and enlightenment of citizens and government and continual and systemic engagement of citizens and government through sustained civic education of citizens. The bill should ensure adequate time and civic education be provided prior to the planning process.*

iv. **Transparency provisions are inadequate**

The Bill should *provide for the provision of an inventory of all public land* without which development planning is severely hampered.

v. **Land planning for special interest groups has been entirely ignored (the Bill lacks equity and inclusivity)**

The Bill does not recognize planning for informal sector activities. According to the *National Land Policy 2009*, informal sector activities are a key feature in many parts of Kenya both in planned and unplanned areas, and forms a crucial part of the economy as a source of livelihood. Informal sector activities have not been accommodated in the planning of urban and rural areas. Informal sector activities have arisen spontaneously as a result of rural-urban migration without corresponding availability of formal employment opportunities and other income generating activities.

The National Land Policy states that the government shall facilitate the provision of land and land use planning to enable the development of informal commercial activities in a more ordered and sustainable manner. It shall also put in place mechanisms to allow for informal activities in planned areas; and designate areas for carrying out informal activities; and Institute mechanisms to manage rural-urban migration such as decentralizing development to rural areas and minor urban areas.³

Other special interests not fully addressed in the Bill include effective protection of women's rights to land and related resources, land rights of vulnerable groups including unskilled and low-skilled workers, unemployed youth, persons with disabilities, persons living with HIV and AIDS. Poor and vulnerable people lack voice, power and representation in society, which limits their opportunities to access, use and own land and land based resources.⁴

Effective development planning should therefore ensure it recognizes and provides for the participation of vulnerable groups and provides mechanisms

³ National Land Policy 112.

⁴ National Land Policy 171.

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for the redistribution of land and resettlement, and protection from unjust and illegal expropriation. These should be captured in the interpretation of the Bill, objects, principles, norms and standards. These groups should also have representation in the National Physical Planning Consultative Forum.

vi. **The Bill is not functionally aligned to the Constitution with respect to Intergovernmental Relations.**

The framework for development planning and control is to be expected to provide an effective coordinating mechanism for the preparation, implementation of plans and development control **and to ensure the devolution of land administration and management.**⁵ Whereas the *Constitution* provides county planning as a concurrent function and assigns national government the function of, ‘general principles of land planning and the co-ordination of planning by the counties’ this is to be implemented in accordance with Article 6(2) which states that,

‘The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

Further, **Article 189(1)** state that the Government at either level shall:

(a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;

(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and

(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.

(2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.

The Bill offends the principles of distinctness by assigning the Cabinet Secretary an implementation role in several instances and thereby re-centralising planning contrary to the *Constitution*. Whereas there is to be coordination between both levels of government, and counties are to conform to national development priorities the bill seeks to impose the National Development Plan upon counties, which might force counties to ignore their local priorities.

For instance, at present the national government’s strong focus on roads infrastructure, large scale development projects which incorporate imported technology is inimical to the development of small shareholding agriculture and informal business which is a priority for many counties. Small

⁵ National Land Policy 1999

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shareholding agriculture thrives well using low, but effective technology which can be made available locally and thus spurs the creation of jobs and does not place a borrowing burden of government.

Planning compliance by county governments should be provided through the strict enforcement of norms and standards, coupled with a robust intergovernmental framework for dialogue and negotiation on priorities and strategies. The present consultative forum does not satisfy the requirements for an intergovernmental forum, has no linkages with the existing intergovernmental forums provided in the *Intergovernmental Relations Act 2012*, and instead takes us back to the era of centralised planning which has roundly failed in Kenya, and which the *Constitution 2010* and *National Land Policy 2009* seeks to redress. This also applies to the proposed regional planning framework. Further, the bill should provide for representation of residents' associations and other professional representation as well as public participation in the regional planning and implementation process.

vii. **Capacity building**

The Bill should expressly require the cabinet secretary to ensure adequate human, technical and financial capacity to national and county institutions to support effective development planning and control in accordance with Article 189 of the Constitution of Kenya.

THAT



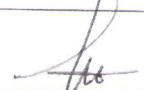


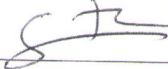


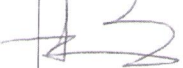

1. To the best of our knowledge, the issues in respect of which this petition is made are not pending before any court of law, or constitutional or legal body.

THEREFORE, your humble petitioners Pray that the National Assembly:

- a. Deals with this Petition immediately in view of the urgency of the matter and the seriousness of the issues presented herein;
- b. Organise a consultative process to discuss the issues raised in this petition for inclusion in the *Physical Planning Bill 2017* before its enactment

AND your Petitioners will ever Pray

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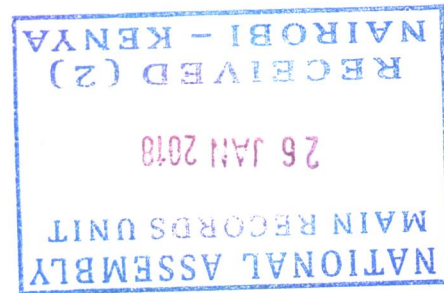
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To:
Michael R. Sialai, EBS,
Clerk of the National Assembly,
Office of the Clerk, Main Parliament Building,
P. O. Box 41842 – 00100,
Nairobi.

22nd January 2018

Dear Sir,



Re: Request to make Oral Submissions on the Physical Planning Bill 2017


The Institute for Social Accountability (TISA) is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya, to uplift livelihoods of, especially, the poor and marginalized. TISA has established itself as a leading player in the decentralized governance field and has engaged with relevant state and non-state actors in the quest to promote effective local governance in Kenya.

In furtherance to *Article 118 (1)(a) and (b) of the Constitution 2010* on public access and participation in the legislative and other business of Parliament and its committees, TISA requests you facilitate a consultative processes to discuss the issues raised in the petition attached herein for inclusion in the *Physical Planning Bill 2017* before its enactment. This is because the bill touches on serious and grave issues concerning the integrity of County powers and functions in respect to planning and because of this; the bill has generated a lot of interest from among TISA's stakeholders including resident associations and civil society organizations.

Therefore, a comprehensive consultative process ensures that all stakeholders are able to articulate their impression of the bill to the relevant committee.

We look forward to your positive response

Sincerely,



Wanjiru Gikonyo
National Coordinator

CC:
Chairperson,
Departmental Committee on Lands,
National Assembly,
P. O. Box 41842 – 00100,
Nairobi.