



Legal Alert | August 10, 2022

THE PHYSICAL PLANNING REGULATIONS

Introduction

On November 26, 2021 the Cabinet Secretary for Lands and Physical Planning gazetted various regulations (the “Regulations”) under the Physical and Land Use Planning Act, 2019 (the “Act”) and they include:

- a) The Physical and Land Use Planning (Development Permission and Control) (General) Regulations, 2021;
- b) Physical and Land Use Planning (Development Control Enforcement) Regulations, 2021;
- c) Physical and Land Use Planning (Local Physical and Land Use Development Plan) Regulations, 2021; and
- d) The Physical and Land Use Planning (Liaison Committees) Regulations, 2021.

Some of the key highlights of the Regulations are discussed below.

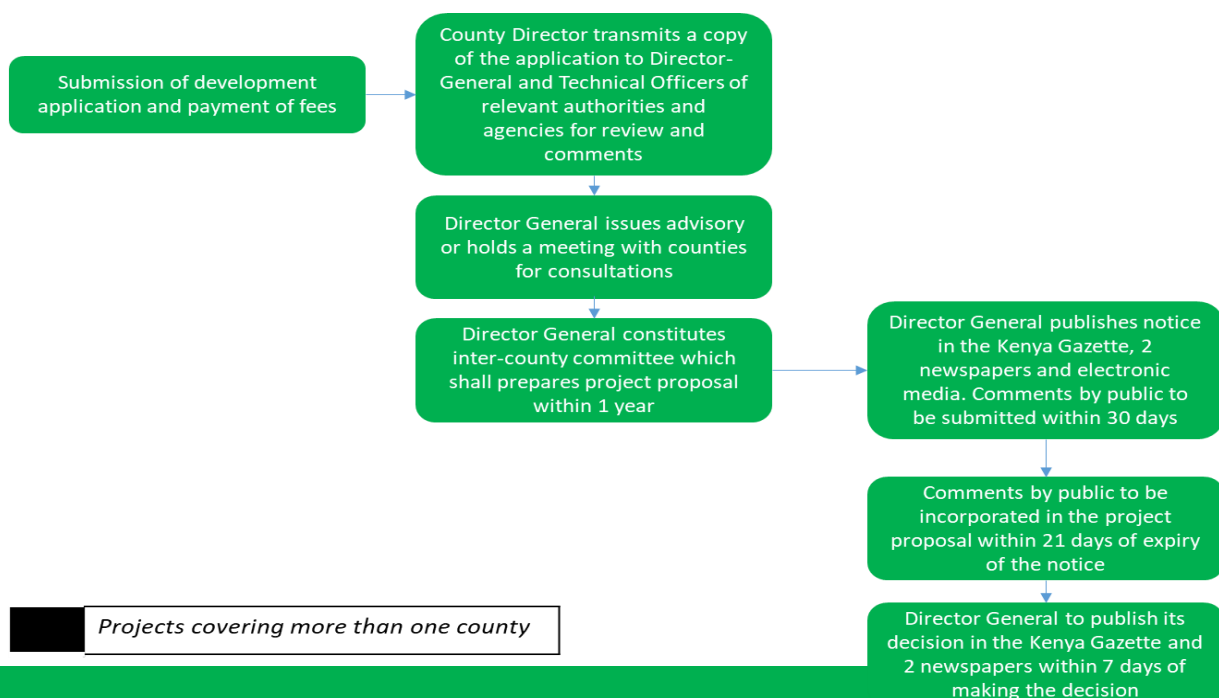
Key Highlights

Densification of Use

The Regulations provide for repurposing of land through “densification of use” which has been defined as a deliberate planning process to change and enhance the land carrying capacity in terms of population and user activities. This has been necessitated by the increase in population and consequent increase in demand for housing, utilities and services. Pursuant to this, old estates may be repurposed to high rise buildings to meet the ever increasing demand for housing especially in urban areas. By repurposing land, planning authorities may take a proactive role in meeting the objectives of development control such as promoting public health and safety. This may include the provision of playgrounds within residential estates to protect the fundamental rights and freedoms and the best interests of children as upheld in a court decision discussed in our article which can be accessed [here](#).

Processing of Development Applications

The procedure of processing development applications has also been provided for. Where the applicant does not receive a written response within 60 days of the application, the development permission is deemed to have been given in line with section 58(6) of the Act. The Regulations also set out procedures for processing applications for projects covering more than one county as illustrated below as well as for projects of national importance. This provides clarity on the process and expected timelines.





Revocation of Approvals

The Regulations allow for revocation of development permission where there is a risk of natural disaster, where the applicant contravenes the conditions of the approval or where it is necessitated by public policy, public safety, public order or land use planning. The County Executive Committee is required to issue the approval holder with a notice of revocation setting out the reasons for revocation and the approval holder may appeal to the County Physical and Land Use Planning Liaison Committee within 14 days. Previously, revocation of approved development plans was difficult, even where there were valid reasons for revocation; under the repealed Act, revocation was only available for regional physical development plans and had to first be gazetted and thereafter submitted by the Director to the Cabinet Secretary for approval.

Exempted and Permitted Developments

General works of repair and maintenance for buildings, bridges, railways, drainage works, optic fibres and harbours among others are exempted from the development permission process, which is a change from the previous regulations that required development permission for these.

The Regulations also provide for permitted developments which are developments that may be undertaken without an outright development permission. This is in line with the pillars of Vision 2030 and the Big 4 agenda to make Kenya a newly industrializing middle income country. Such developments include maintenance and repairs of roads, developments by county governments and developments for industrial purposes.

Classification of Development Applications

Permitted developments are classified into several classes and the Regulations set out the standard conditions applicable to each class of permitted development. This provides certainty as to the minimum standards a developer should expect when applying for a change of use. They mainly relate to protection of the integrity of the road network. The standards include the right of the county to prescribe paint colour for exterior surface of buildings and to satisfy itself that adequate provision for parking, loading and unloading of vehicles in the case of industrial and commercial buildings or uses has been made. In respect of classes of use, these are further broken down to specific classes ranging from Class A to Class X, with certain classes further broken down to sub-classes. The regulations provide that the purpose for this is to ensure compatibility of uses, to enhance amenity and reduce detrimental effect on neighbourhoods with the general rule that a county should not approve classes that are not compatible within the same development. A person making a development application should therefore confirm that they get approval for the appropriate classes. Once an approval is procured within a class, a user may develop any of the items contemplated within that class without having to apply for a change or extension of use.

Liaison Committees

The liaison committees are established at the national and county level. They will be chaired by advocates of the High Court nominated by the Law Society of Kenya. A person aggrieved by the decision of a county executive committee member in respect of a development permission may appeal to the County Liaison Committee within 14 days of the decision. The County Liaison Committee will then make a determination within 14 days and its decision will be recorded as judgment of the court with full force and effect. The decision of the liaison committee may be appealed to the Environment and Land Court within 14 days. The Court upheld the jurisdiction of liaison committees in *Lashad Mohamed Mubarak v County Government of Mombasa [2020] eKLR* where a judicial review application had been filed against a decision for revocation of a development permission.

Enforcement Mechanisms

Enforcement teams are established under the Regulations in line with the objectives of development control to protect public safety and health. They will be composed of county directors of physical and land use planning, physical planners, building inspectors and county enforcement officers. The enforcement teams have the power to inspect buildings or works for compliance and issue stay orders in the event of non-compliance.



Wayleaves and easements

Wayleaves and easements shall be depicted in the physical and land use development plans and survey plans and shall be registered for features including cycle paths, walkways and footbridges, water drainage, irrigation channels and pipelines, street lighting works, gas reticulation services, wildlife migratory corridors and vicinity of strategic developments such as mineral exploration sites. This addresses the situation particularly for titles issued under the repealed Registration of Titles Act where a search would reveal wayleaves and easements on title records which could not be traced.

Standardisation

The Regulations also provide for new standard forms and standard fees for various services provided by the planning authorities at the national and county levels. There are, for example, different application forms for building plans, structural civil and engineering drawings as well as for strategic national projects. There are also standard fees for processing development applications, appeals and certificates of occupation. These standard forms and fees allow for uniformity and clarity in the application processes across the country which we trust will improve the efficiency of approvals as well as the ease of getting inter-county approvals.

Electronic Submission of Applications

The Regulations have taken into account technological advances and provided for submission of development applications by email as well as electronic communication of decisions by the planning authorities through means such as text messages and emails. It is therefore expected that counties will roll out electronic platforms to enable electronic filing of development applications.

Conclusion

The Regulations are a welcome addition and reflect the principles enshrined in the Constitution of fair administrative action and access to information, for example the manner of inspection of various registers maintained pursuant to the Regulations for issues such as conflict of interests recorded during consideration of an application for development permission or an appeal. The timelines provided uphold the constitutional right to fair administrative action and provide clarity and efficiency in the application and dispute resolution processes with the deemed approval provision making it important for counties to ensure applications submitted are dealt with efficiently.

We however note that there are a number of political appointees in the committees and organs which may cause delays in appointing members leading to quorum hitches and inefficiencies.

In our view, for transparency and efficiency, the following measures may be taken into account:

- Committee procedures may be outlined in the County Governments' websites. At present, they have not been clarified and this may reduce confidence in the committees and preference for familiar avenues of dispute resolution such as the courts.
- As contemplated by the Regulations, counties may adopt e-filing procedures similar to the system used by the judiciary for efficiency.
- A staggered appointment of committee members may be adopted to manage vacancies and the members of the public notified of the appointments through the relevant authorities' websites.

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