



LEGAL RESOURCES CENTRE

NPO No. 023-004

PBO No. 930003292

3<sup>rd</sup> Floor Greenmarket Place • 54 Shortmarket Street • Cape Town 8001 • South Africa • [www.lrc.org.za](http://www.lrc.org.za)

PO Box 5227 • Cape Town 8000 • South Africa • Tel: (021) 481 3000 • Fax: (021) 423 0935

28 May 2012

The Honourable Chair  
Ms Daphne Qikani MP  
Select Committee on Land and Environmental Affairs  
National Council of Provinces  
Parliament  
Parliament Street  
Cape Town  
Att: Asgar Bawa - 403 3762 / 083 709 8530 [aqikani@parliament.gov.za](mailto:aqikani@parliament.gov.za)  
[abawa@parliament.gov.za](mailto:abawa@parliament.gov.za)  
Committee Secretary: Select Committee on Land and Environmental Affairs

And to:  
The Secretary to Parliament  
Parliament  
PO Box 15  
Cape Town  
8000  
[zdingani@parliament.gov.za](mailto:zdingani@parliament.gov.za) ; [amyakayaka@parliament.gov.za](mailto:amyakayaka@parliament.gov.za)

And to:  
The Department of Rural Development & Land Reform  
Attention: Chief Director: Spatial Planning & Information  
Room 605, Capitol Towners  
224 Church Street  
Pretoria CBD  
Pretoria  
BY EMAIL: [SPLUMB@ruraldevelopment.gov.za](mailto:SPLUMB@ruraldevelopment.gov.za)  
[SOGunronbl@ruraldevelopment.gov.za](mailto:SOGunronbl@ruraldevelopment.gov.za)  
[RMakan@ruraldevelopment.gov.za](mailto:RMakan@ruraldevelopment.gov.za)

Dear Madam/Sir

**Spatial Planning and Land Use Management Bill B 14 - 2012**

- 1 We refer to the rule 186 notice issued by the department on 26 April 2012 inviting comments on the bill, yet to be published at the time, such comments to be sent to the department by 25 May 2012. We sent a comment to the department on 25 May, supplemented by the attached memorandum sent to the department today.
  
- 2 We note that your committee will be briefed by the department tomorrow and we request that this letter be placed before your committee and that we be allowed to answer any questions that you may have to our submission.
  
- 3 We propose that:
  - a) The bill be withdrawn;
  - b) The offending aspects of the DFA be repealed;
  - c) An appropriate bill be prepared with participation of relevant departments and stakeholders by a newly constituted Development and Planning Commission established by Cabinet under the DFA which will be required to ensure an informed participative legislative process;
  - d) The support of the Constitutional Court be sought for this plan of action.
  
- 4 We say this because:
  - a) the bill fails to meaningfully support the constitution and the rights of citizens and communities to land reform, tenure reform and redistribution, the right to housing and accommodation, the right to culture and the right to development and participation in decisions about development<sup>1</sup>;

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<sup>1</sup> The right of a community to decide on its own development path underpins the social and

- b) the bill does not protect communities against land use changes such as mining that involves relocation and permanently sterilises land without real community participation in such a planning decision and benefit from such development<sup>2</sup>;
- c) the bill fails to secure community participation in planning procedures on communal land and pays no attention to living local customary law decision making procedures;
- d) the bill fails to articulate with recent developments and policy statements including:
  - the Green Paper on land reform which emphasises culturally appropriate development;
  - the Guidelines for the Formulation of Spatial Development Frameworks (draft 8) Prepared for Department of Rural Development and Land Reform which emphasises extensive public participation in plans and budgets as envisaged by sections 151(1) (e), 152 and 195(e) which obliges municipalities to encourage the involvement of the public and communities in local government matters including policy-making;
  - The National Development Plan which envisions massive irrigation schemes that will transform rural landscapes and the small scale farming sector on a

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economic rights contained in our constitution and is aptly expressed in the African Charter signed and ratified by South Africa: Article 22 1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development... They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

<sup>2</sup> The requirement, under customary law and the interpretation in the Endorois decision of the right to development contained in the African Charter, of free prior informed consent would protect communities against invasive development projects unless their support and benefit is sought and achieved

scale across the boundaries of local and district municipalities;

- e) Public participation in the formulation of the bill was less than meaningful and limited to notice and comment procedures in 2011.

5 The Legal Resources Centre is a non-profit public interest law firm. Much of the work of our organisation is devoted to representing poor rural communities, and our comments on the SPLUMB are on behalf of such communities. We also act herein for the Federation for Sustainable Environment and the FSE assisted in the preparation of the sections of the memorandum dealing with sustainable development, mining impact and environmental considerations.

6 This letter introduces our attached memorandum and deals with:

- a) the legislative process in the select committee and the invitation for public comments issued by the department on 26 April 2011;
- b) the problem of submitting a Bill for public participation in terms of section 72 of the constitution when the Bill, on the face of it,
- does not address the constitutional problems raised,
  - was prepared by the department with minimal consultation with the public and civil society;
  - was prepared without any consultation whatsoever with rural communities on communal land;
- and the department is now seeking an expedited parliamentary procedure, and provincial mandates which may further compromise public participation in the

legislative process under sections 59, 72 and 118 of the constitution.

- 7 We made submissions to the department in June 2011. Our submission on the 2011 draft bill remains relevant. The attached memorandum commenting specifically on the 2012 bill, elaborates on the following areas:
- a) The failure of the Bill to incorporate sufficient development principles relevant to the **principle of sustainability**;
  - b) The failure of the Bill to ensure the constitutional principle of **administrative justice** is respected and adhered to through-out the land use change and land development process;
  - c) The failure of the Bill to recognise the historical impact **mining** has had on communities in South Africa and its continuing impact, which creates a need for the Bill to make special consideration when applications for land use change and land development are made in the context of mining;
  - d) While the Bill recognises, in its Preamble, that the informal and traditional land use development process remain poorly integrated into formal systems of spatial planning and land use management, it is then silent on the **status of customary tenure and the rights of customary communities** as provided for in the Interim Protection of Informal Land Rights Act. As such, it may only perpetuate the inequality it purports to undo.
  - e) The failure of the Bill to recognise the tension of opposing development paradigms and **community participation** in this regard as provide for in regional and international law.
- 8 As appears from our submission, the LRC represented and continues to represent citizens and communities in litigation involving customary law and its status, development on communal land and community

participation in development projects such as mining and the decision to authorise mining, . Our clients include the communities that successfully challenged the constitutionality of the Communal Land Rights Act of 2004, which act you may recall gave extensive powers to the minister to plan, zone, subdivide and title communal land.

- 9 Our opposition to those aspects of the bill that involves the participation of traditional leaders without facilitation of general community participation under customary law, is not opposition to the institution of traditional leadership, or to customary law. There is widespread acceptance of the valuable role played by customary law and the need for indigenous legal processes and their associated institutions to be recognised and supported. The statutory regulation of customary law should not deny it to develop in consonance with the Bill of Rights as envisaged in section 39(3) of the Constitution. We are concerned about the manner in which new laws, including the Traditional Leadership and Governance Framework Act of 2003, bolster unilateral chiefly power and undermine indigenous accountability mechanisms. The TLGFA is criticised for entrenching the colonial and apartheid distortions and divisions that were central to the creation of the Bantustan political system and used to justify the denial of equal citizenship to all South Africans.
  
- 10 The resolutions of the African National Congress 52nd National Conference held in Polokwane in December 2007 are relevant to the lawmaking initiatives of the governing party in Parliament. Various resolutions under the chapter heading 'Rural Development, Land Reform and Agrarian Change' are relevant to the context in which the Bill is being considered. The party resolved to:

*“Strengthen the voice of rural South Africans, empower poor*

*communities and build the momentum behind agrarian change and land reform by supporting the self-organisation of rural people; working together with progressive movements and organisations and building forums and structures through which rural people can articulate their demands and interests...*

*“Build stronger state capacity and devote greater resources to the challenges of rural development, land reform and agrarian change...*

*“Ensure that the allocation of customary land be democratised in a manner which empowers rural women and **supports the building of democratic community structures at village level**, capable of driving and coordinating local development processes. The ANC will further engage with traditional leaders, including Contralesa, to ensure that disposal of land without proper consultation with communities and local governments is discontinued.*

- 11 Both the National Development Plan of the National Planning Commission and the Green Paper on Land Reform emphasise agrarian transformation and changes in production relations. Rural local government and governance in general must also be geared to the transformation process. The Rural Women's Assembly<sup>3</sup> more recently focused on skewed power and governance relations in rural areas.<sup>4</sup> It is in this context that the role of traditional leaders, and the furtherance of this role envisioned by the Bill, must be considered.

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<sup>3</sup> MEMORANDUM to the South African Presidency, and Parliament from the Rural Women of South Africa International Rural Women's Day October 15, 2011

<sup>4</sup> “Agrarian reform, redistribution and tenure

1. Equal rights and access to land, water and natural resources for women producers
2. Ensure that traditional governance systems do not discriminate against women's land rights.

“Traditional governance and customary law

12 The year 2012 could be a watershed year. The colonial and apartheid systems have come to an end and a great effort has been made to better the lives of all South Africans, especially the poor. But the 1913 Land Act is largely still with us; the economic disparities are stuck with us; deep levels of poverty are staring at us. The development of customary law and its institutions which go hand in hand with transformation of property, land reform and rural development can be given its rightful place in 2012. The Bill in its current format, however, is a step in the wrong direction.

### **The process proposed by the department**

13 On 26 April 2012 the department issued an invitation in the government gazette calling for comment on the Bill by members of the public to be submitted by 25 May 2012. There are a number of problems with the notice:

- a) The notice pre-empts your committee and the NCOP considering the appropriate manner of public involvement under section 72;
- b) The notice pre-empts your committee and the NCOP considering a process of public awareness, education and workshops involving the affected citizens and in particular communities on communal land, before the formal public participation process is embarked upon.

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- 11. All laws and traditional structures including the traditional courts Bill, the traditional councils and the traditional leadership and governance framework must be brought into line with the constitution and operate according to its values.
  - 12. Section 28 of the Traditional Leadership and Governance Framework Act must be done away with.
  - 13. End discrimination against women within all traditional systems and end traditional harmful practices.
  - 14. Rural women from all walks be represented equally in all systems particularly the most marginalized and poor women.

- 14 The problem is exacerbated by the insistence of the department that the passage of the bill be expedited to meet the deadline of the Constitutional Court order which is set at 17 June 2012. On 22 March 2012 the department announced that “the Leader of Government Business will liaise with Parliament to explore expedited processing of this Bill through Parliament.” Our investigations have not shown a public detraction or update on the department’s position.
- 15 Your committee and the NCOP are required under section 72 to “facilitate public involvement” in its legislative processes. The constitutional requirement of public involvement in law-making has been fleshed out by the Constitutional Court. The Court has stated that the legislative process must include steps by the legislature to ensure that the public was made aware of the legislation, and could actively participate in the legislative process. The legislature must create conditions that are conducive to the effective exercise of the right to participate in the law-making process. It was pointed out that this can be realised in various ways, including through road-shows, regional workshops, radio programmes and publications aimed at educating and informing the public about ways to influence Parliament.
- 16 The manner of public involvement, depending on the matter under consideration and its potential social and other impacts, could range from
- a) notice and written comment,
  - b) public hearings in parliament, to
  - c) public hearings in areas and venues where people who are affected would have access, and may include

d) other methods of eliciting the response and input from citizens not limited to individual written and oral representations.

- 17 Given the constituency potentially affected by the Bill and in particular rural communities on communal land, we submit that your committee and the NCOP had at minimum the duty to use these methods, if not more extensive ones: one of the objectives of the Bill is purportedly to enable access to resources to people too far removed from formal institutions to realise this right. By this logic, exceptional effort would be required to ensure that these very people are enabled to engage with the Bill as others with ready access to information and institutions of democratic engagement.
- 18 Your committee and the NCOP are required to consider appropriate methods of public participation taking into account the importance of the Bill.
- 19 Your committee and the NCOP cannot embark on a limited involvement process, in the form of notice and written comment, without considering a thorough information and education process. This would be to ensure that those affected are informed so that they can participate meaningfully in the actual legislative process.
- 20 Even taking into account that various versions of the Bill was previously published in 2007 and 2011, the letter and spirit of section 72 must be followed and your committee's and the NCOP's constitutional obligations respected.
- 21 We urge you to withdraw the Bill from the legislative process and to propose the adoption of the following course:

- The offending aspects of the DFA be repealed, and the workable parts of the DFA given continued application;
- An appropriate bill be prepared with participation of relevant departments and stakeholders by a newly constituted Development and Planning Commission established by the Cabinet under the DFA which will be required to ensure an informed participative legislative process;
- The support of the Constitutional Court be sought for this plan of action.

Thank you for the opportunity to make this submission.

Yours faithfully

**[signed]**

**LEGAL RESOURCES CENTRE**

**Per: HENK SMITH, WILMIEN WICOMB and SARAH-JANE FRITH**

Copy to:

The Honourable Chair  
Mr Mzinwa Johannes Mahlangu MP  
National Council of Provinces  
Parliament  
Parliament Street  
Cape Town

E-mail address: [ljiyane@parliament.gov.za](mailto:ljiyane@parliament.gov.za)

Fax number: (021) 403-8219