UN-HABITAT AND CITIES ALLIANCE JOINT WORK PROGRAMME

From Land Use Control to Managing Urban Development

Policy Recommendations

Nyandarua County, Kenya

UN-HABITAT
FOR A BETTER URBAN FUTURE

Cities Alliance
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REPUBLIC OF KENYA

COUNTY GOVERNMENT OF NYANDARUA

UN-Habitat and Cities Alliance Joint Work Programme

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Policy Recommendations

Nyandarua County, Kenya

United Nations Human Settlements Programme (UN-Habitat)

P. O. Box 30030, 00100 Nairobi GPO Kenya

Tel: 254-020-7623120 (Central Office)

www.unhabitat.org

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Principal Authors: **Yoel Seigel, David Gatimu, Mary Chege, Evelyne Otieno and Cyrus Mbisi**

Project Manager: **Marco Kamiya**

Project Technical Advisor: **Yoel Seigel**

Project Coordination: **Hazel Kuria**

Editor: **Cathryn Johnson**

Design and Layout: **Euclide Inyumbira**

Donor: **Cities Alliance**

Partner: **County Government of Nyandarua**

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Executive **Summary**

Background

The last eight years have been a truly intense regulatory era with emerging consensus about the pivotal role of counties in the planning processes. The increase in pressure for managing urban development and ensuring infrastructure provision requires wider planning considerations with the application of innovative and more expansive mechanisms for infrastructure financing. Some of these mechanisms are already in place, such as county government own source revenues, county securities, public private partnerships. Others, such as land-value capture or royalties will necessarily call for new laws, policies and regulations that will need to be developed, streamlined and operationalised to make these new financing mechanisms effective.

The analysis of Nyandarua County urbanization draws policy attention to several issues. Nyandarua County is still in the early stages of urbanisation, but market driven demand for urban land is already beginning to push up land prices and pressure the transformation of agricultural lands. Therefore, there is a critical need to strengthen land policy, land use plans and county-level legislative framework for urban development management.

In Nyandarua, land use planning and land administration and policies revolve around land rights, land fragmentation, deforestation, and the transformation of agricultural lands into growing market and urban centres.

Although the previous constitution did not provide adequate legal, administrative and technological support for urban planning in towns, with the onset of devolution governance, the new forms in which the national and county governments have structured themselves, afford new tools for navigating the process of urban transition.

While there may be some arguments regarding the scope or potentially overlapping roles at national and county government agencies in the planning process, the critical details – such as the implementation of development fees – are in favour of an integration of spatial planning with economic planning using flexible interventions. The many key innovations in the new Physical and Land Use Planning Act herald a new wave of interventions that need to be incorporated into the development planning system, especially in County Governments.

Policy Recommendations for Land Use and Urban Development Management

Land use plays a pivotal role in regulating urban development. It also plays a key place-shaping role in the built environment and the ability of planning to manage the components of the built and natural environments so that they work together properly. This is at the heart of how urban development management can achieve efficiencies, cost-effectiveness and added value.

The purpose and performance of land use planning is to 'regulate the development and use of land in the public interest'. Land management represents multiple values that should be protected by both policy and law. Because land use is so closely bound up with land transactions towards urban change, this translates into abstract management principles of sustainability and operational policies. Both principles set out the goals and direction for the present and the future management of land. As an explicit statutory duty, county governments wield the power to 'satisfactorily' reform and modernise given the realities of land use controls in emerging land markets.

The rolling out of the series of county planning and urban management policies must be

The policy recommendation is for the county to enact the appropriate local legislation that is in keeping with the legal regulations set out in the new act and the other stipulated legal foundations.

translated into action that will manage the emerging urban sprawl, enhance the vitality of towns and preserve amenity. The prospects for urban development under devolution have shown the huge potential in steering Kenya in the direction of wholesale change.

Therefore, in keeping with the IEER and LAR, there are four components of the policy recommendations for managing urban development in Nyandarua County.

1. Legal Foundations for Managing Urban Development and Using Development Fees

Although the new National Physical and Land Use Planning Act provides county governments with the authority to impose conditions for approving land use and levy development fees, each county must pass its own regulations and incorporate them into the planning and building permit granting process. **The policy recommendation is for the county to enact the appropriate local legislation that is in keeping with the legal regulations set out in the new act and the other stipulated legal foundations.**

The enactment of the Physical and Land Use Planning Act in August 2019, with its renewed emphasis on implementation, is a boon to effective local policies consistent with national policy. The definitions of both "land use planning" and "physical planning" also serve to provide clarity to planning authorities and practitioners. Land Use Planning is defined as:

"…the process of designating, regulating, evaluating, zoning and organizing the present and future use and development of land in all its geographical areas and its resources to secure the physical, economic and social efficiency, health and well-being of urban and rural communities".[1]

1 Section 2, Physical and Land Use Planning Act

Physical planning on the other hand is defined as:

"..the active process of organizing the physical infrastructure and its functions to ensure orderly and effective siting or location of land uses, which encompasses deliberate determination of spatial plans with the aim of achieving the optimum level of land utilization in a sustainable manner".[2]

These definitions are aligned to the constitutional obligations under Article 42, which entitles every person to the right to have the environment protected for the benefit of the present and future generations. Also, Article 69 defines the State's obligations with regard to the environment, including but not limited to, ensuring sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensuring the equitable sharing of the accruing benefits.

From these two definitions, it is possible to identify a number of important variables in developing land use and urban development processes that are market friendly and responsive to best practices of quality urban development. Mechanisms to implement planning objectives include zoning, subdivision regulations, building regulations, cadastral registration, land registration, etc. These mechanisms are controlled at three key government levels.

The figure below (Figure 1) illustrates the three seamless institutional arms, the processes of which revolve around one key common denominator: development compliance. Urban land use and development rights are determined through a planning and development compliance process vested in the county government. The elements of defining the geographical locality and physical form are captured through surveying and processed

2 Section 2, Physical and Land Use Planning Act

Figure 1. Planning & Development, Cadastre Registration and Development Rights Registration

Source: Salute Spatial Solutions

through cadastral techniques, leading to land registration with vested development rights.

The National Land Commission's role in the entire process is to ensure that public interests are fully met. The national government provides security guarantees of the development rights as enshrined in each jurisdictional planning and development law.

Enacted land laws are anchored in land policies and regulations that provide clear roadmaps and processes in the three broad stages that are geared to sustainable development.

In order to strengthen development management, reforms have to be made within these development governance systems to ensure full-cycle development compliance.

These are high-skill capacity areas in both personnel and enhancement of technology, entrenchment of professional values and ethics and for successful development management at the county level.

The objectives of development control as outlined in section 55 of the Physical and Land Use Planning Act include, amongst others, the promotion of public participation in physical and land use planning development decision-making and ensuring the proper execution and implementation of approved physical and development plans.

The scope of control is confined to the approved policy, such as a process of 'predict and provide' in the relationship between demand and supply. Planning decisions are made 'subject to conditions' with attendant measures for enforcement.

The Physical Planning and Land Use Act defines "development control" as

"the process of managing or regulating the carrying out of any works on land or making of any material change in the use of any land or structures and ensuring that operations on land conform to spatial development plans as well as policy guidelines, regulations and standards issued by the planning authority from time to time in order to achieve a purposeful utilization of land in the interest of the general welfare of the public."[3]

The Act further outlines the objectives of development control to include ensuring optimal land use, orderly physical and land use development and ensuring proper execution and implementation of approved physical and land use development plans. Development control is also key in ensuring the protection and conservation of the environment, ensuring orderly and planned building development, as well as the construction, operation and maintenance of such buildings. Finally, it is envisaged that development control is also key to the safeguarding of national security.

The Physical and Land Use Planning Act identifies a wide range of activities, which are subject to development control processes and procedures including:[4]

- Change of user
- Extension of users
- Extension of lease
- Sub-division schemes and amalgamation proposals
- Building plans
- Processing of easements and wayleaves
- Siting of educational institutions, base transmission stations, petrol stations, eco-lodges, camp sites, power generation plants and factories
- Advertisements, and
- Others, as the county executive committee member responsible for planning may prescribe from time to time.

The importance of development management extends to promoting investment, conservation of heritage and safeguarding planning standards in the land market by ensuring compliance with the standards set by the public sector. A critical component is the need to ensure adequate infrastructure.

For the first time, the new Physical and Land Use Planning Act, No. 2019 (PLUPA) explicitly legally mandates the authority to County Governments to institute development fees as part of the process of application for development permission. In keeping with section 63 of the PLUPA, county governments have the authority to incorporate a development fee that is to be paid (or some portion thereof) to the county government by developers (commercial or individual) as an integral part of the planning process and granting of building permits.[5]

The development fee can, however, only be imposed by the county government once it has published regulations determining the circumstances under which such levies shall be imposed, the rates payable and the circumstances under which the development fees may be waived by the county government.

3 Section 2, Physical and Land Use Planning Act

4 Section 1, Third Schedule of the Physical and Land Use Planning Act

5 Section 63(1) PLUPA provides that "*A county executive committee member may levy a development fee against an applicant for development permission*".

2. Spatial Planning and Permit Approval as Mechanisms for Managing Development

The Central Role of Spatial Planning

Spatial planning needs to become the underlying mechanism for guiding and regulating the development of land upon which urbanization grows. Pursuant to the County Government Act, under Part XI (County Planning), the key principles of planning and development facilitation require the integration of national policies and plans in all processes and concepts and further serve as a basis for engagement between county government and its citizenry, other stakeholders and interest groups.

At this level, the County Spatial Plan (CSP) provides a spatial depiction of the social and economic development programme of the county with clear statements of how the spatial plan is linked to the national, regional and other county plans. On specific contingencies, **the plan should provide strategic guidance in respect of the location and nature of development within the county, set out a capital investment framework and identify programs and projects for the development of land within the county.**

Although the county government is finalizing its Spatial Plan, it needs to deepen the understanding of urban transformation and opportunities so that steps can be taken at city, country and global level to overcome urban problems. The plan provides for the functions and principles of land use and building plans, development control and the location of various types of infrastructure. These need to be incorporated into the operational procedures and enforcement mechanisms.

In addition, the spatial plan needs to be fully integrated into the County Integrated Development Plan. This investment framework reflects the belief that private sector support and incentives would increase the effectiveness and efficiency of the public sector in economic growth. With respect to investment in land, the plan shall indicate where public and private land development and infrastructure investment should take place, identify areas where strategic intervention is required and indicate areas where priority spending is required.

In the area of development facilitation and development control, the city or municipal plan provides for basic needs such as housing, transport/mobility, employment or livelihood jobs, education, and opportunities for recreation, and basic services like water, electricity, clean air and health care. These needs are articulated under the principles of land use, zoning and building plans, development control and the location of various types of infrastructure.

Strengthening Planning Procedures as a Critical Component for Managing Urban Development

In the entire plan making process, there is a strict relationship among and between sectors in contributing to sectoral strategies that culminate in integrated plans. This means that for all intents and purposes, developers intending to undertake a project must refer to an approved plan and any associated reference document. Development proposals relating to a specific parcel of land must be made with reference to a whole spatial policy system.

This procedure for the assessment and approval of development permission applications is illustrated in Fig 3 with staged steps that lead to a formal decision. As the application process would necessarily include various county government departments (such as planning, infrastructure, water and sanitation), there has to be an efficient and transparent process that keeps up with the application requests.

Conditions are often attached to planning permission that need further details to be submitted and approved by the county government at certain stages of the development.

There are three main types of conditions to enhance the quality of the development based on relevance to both countywide planning and to the specific development proposal:

a) Pre-commencement conditions: These conditions need to be formally fulfilled prior to construction and or development starting on site;

b) Performance conditions: These conditions are normally progressive and largely capital intensive and require secondary processes to be discharged; and

c) Pre-occupation conditions: These conditions need to be formally discharged prior to the development being occupied or put into use.

These conditions can be divided into 8 different stages for approving land use plans including applications for change of use, sub-divisions, and building permits. **The implementation of these procedures requires professional, political, and organizational institutionalization.**

The policy recommendation is for the adoption and adaptation of these procedural guidelines by the County.

The Pre-Applications Phase

In the entire plan making process, there is a strict relationship among and between sectors in contributing to sectoral strategies that culminate in integrated plans. This means that for all intents and purposes, consultants intending to undertake a development proposal must make reference to an approved plan and any associated reference document. Development proposals relating to a specific parcel of land must be made with reference to a whole spatial policy system. Three elements stand out in this phase:

The Pre-Approval Phase

The operating efficiency of land development under the devolution framework should trickle down to the sub county or city/municipal level[6]. This allows a submission of applications at lowest service level, a closer match between public policies and rendering services, desires and needs at local level.

The Post approval Phase

The approved developments are official statements of government policy. Their implementation must comply with all conditions imposed. Approved developments, whatever their nature or magnitude, must have an implementation program that may include components, such as an implementation schedule and, for major development bearing, an infrastructural element (under the provisions of PLUPA Section 63) and development criteria for performance benchmarks. The coordination for monitoring and evaluation that define the measure of achievement at every milestone and a thorough final inspection before final (completion or occupation) certification.

County Services and Devolved outlets

At the county government level, two pieces of legislation – The County Government Act and the Urban Areas and Cities Act – hold the key to driving the urbanisation and

6 County Government Act 50(3); 51(3); 52(3)

Figure 3. County Planning Procedures

DEVELOPMENT CONTROL PROCESS

Planning

1. Subdivision/ Amalgamation of land
2. Change/Extension of Use of land
3. Extension/Renewal of Lease of land
4. Outdoor Advertising & Signage
5. Regularisation of Existing Developments

Engineering

1. Structural Engineering Designs & Supervision
2. Civil Engineering Designs, works & clearing

Architectural

1. New Buildings
2. Alterations and additions to existing buildings
3. Demolitions of Dwellings
4. Regularisation of Existing Developments

Phase	Process Stage	Activities	Tools/Reference Documents	Responsible	Statute	Output
PRE-APPLICATION	1 CLIENT/CONSULTANT ENGAGEMENT	1 (a) Client/Consultant Briefing 1 (b) Physical Site/Property Verification 1 (c) Broad enquiries on technical & policy, 1 (d) submission fees, procedural matters 1 (e) Compilation of Submission Bundle	1. County Spatial Plan 2. Municipal Urban Integrated Plan (Municipal Land Use Plans) (Municipal Builing & Zoning Plans) * All Applicable Reference Documents Available at 1. Sub County Offices 2. Municipal Office 3. County Website 4. NLIMS	Consultant 1) Planner 2) Architect 3) Engineer	PLUPA 58(5) 58(7&8) 59(1) 68 CGA Part IX Part X Part XI UACA 21 36	Compliant Quality submission
Pre-Approval Phase	2 INVOICING & REGISTRATION OF APPLICATION	2 (a) Receiving 2 (b) Registration 2 (c) Invoicing	a) Prescribed Application Forms b) Planners/Architects Engineers Annual Practice Cert c) Applications Booking Register d) County Finance Act (Development Levies)	Sub County Team 1. Sub County Admin 2. Sub County Planner 3. Town/Municipal Manager	PLUPA 58(1)	Revenue Efficient Workflow and Tracking
	3 SIEVING CIRCULATIO & EVALUATION	3 (a) Sieving & sorting by development magnitude 3 (b) Local vetting for Zoning Compliance 3 (c) Fastracking of simple developments 3 (d) Circulation for Detailed Sectorla Evalutaion 3 (e) Determination of Development Fees for major developments - Infrastructure planning & design	a) Spatial Plan b) Municipal Plan c) Planning Handbook d) Building Code c) County Finance Act e) WaRMa Guidelines f) Engineering Codes (g) Public Health ByLaws (i) Valuation Roll	County Technical Officers a) Planners b) Public Health Officers c) Engineers d) Revenue Officers e) Environment offocers f) Land Registrars g) Land Valuers	PLUPA 60(1) Third Schedule Sections 2-17	a) Comments b) Clearance c) Performance Conditions
	4 AGENDA COMPILATION & DETERMINATION OF DEVELOPMENT APPLICATIONS	4 (a) Agenda Itemisation 4 (b) Convening of Development Determination Commitee 4 (c) Items Deliberations & Resolutions	a) Agenda Listing Template b) Meeting Proceedings Guidelines b) Minutes of Resolution Meeting	Development Determination Committee (Line Directors/ Commenting Authorities, Professional Associations, Co-Opted Invitations)	PLUPA Part VII 90(b)(e) PLUPA 61(1) 6192)	Minutes of Proceedings & Resolutions
	5 COMMUNUCATION OF DETERMINATION & APPEALS	5 (a) Reporting to CECM 5 (b) Reporting to Municipal Managers 5 (c) Signing & Stamping drawinga & Permits 5 (d) Dispatching Applications to consultants 5 (e) Receiving & Processing Appeals	(a) Minutes of proceedings Resolutions (b) All Refrence Documents used for evaluation	County Director Of Phyiscal & Land Use Planning	CGA 95 96	Development Permits
Post-Approval Phase	6 IMPLEMENTATION PLANNING	6 (a) Consultant/Client interpretation of Approval Conditions 6 (b) Securing Secondary Permits (EIA, NCA, Hoarding etc) 6 (c) Costing of the approved development 6 (d) Sourcing of Funding 6 (e) Bidding/Tendering Process 6 (f) Conract Awarding	(a) Funding Options References (b) Fund/Investment Sourcing References	(a) Developer (b) Relevant Built environment Professionals (County & Consultants) (c) Lending Institutions (d) Contractor (e) Insurance Underwriters (f) Legal/Judicial Officers (g) Enforcement Officers		(a) Secondary Permits (b) BQs (c) Development Funds (d) Implimentation Contracts (e) Inspection Reports/Certificates
	7 PROJECT EXECUTION	7 (a) Project Phasing 7 (b) Progressive Inspections & Reports 7 (c) Amendments or/and redisign 7 (d) Enforcement Notices for non-compliance 7 (e) Prosecution for non-comliance	(a) Approved Working Drawings (b) Quality Control References (c) Safety Procedures (d) Judicial Processes Reference Documents			
	8 PROJECT COMPLETION	8 (a) Final Testing/Inspection 8 (b) Handing Over/Commissioning	All Refrence Documents used for evaluation	Relevant Built environment Professionals (County & Consultants)		Completion/ Compliance/ Occupation/ Certificate

planning agenda. The County Government Act has a dedicated section – part XI County Planning – that ensures harmony in planning requirements at both national and county levels. The Urban Areas and Cities Act provides for integrated development planning at municipal levels. Under these two legislations, county governments and urban municipal boards are empowered to put all the pieces together, using spatial planning strategies, forming components of a comprehensive urban development perspective – land use, housing, transportation, environmental issues, infrastructure issues and urban design.

While urban planning and land development is a shared responsibility between the national and county governments (and by extension, municipalities), the demarcation to structure the framework at each level is blurred. The essence of devolving planning towards counties was seen by its proponents to be more favourable towards economic growth and more market friendly, but the current status suggests that more action is still needed.

Planning at 'town level' is the strategy to ensure a sustainable accommodation of large numbers of people within limited space. The plan is the instrument for development facilitation and development control within the respective city or municipality operating within the framework of integrated development planning. The 'best value' of town planning is to integrate sectoral thematic areas to address the cross-cutting issues facing their citizens and communities.

Municipal governance plays a key role in value creation, whether through land use regulations using planning and regulatory tools, infrastructure and utilities provision, environmental improvements or creating a business environment conducive to commerce, retail and real estate development.

In the practice of development control, substance and procedure are inseparable. From political and governance systems, devolution places development control at the doorstep of county governments. The knotty questions about the extent to which the Municipal Boards can exercise development control functions will continue to rent the air as long as the safeguards of substance, procedure and conformity between the county plans and strategic management of development are not exhaustively addressed.

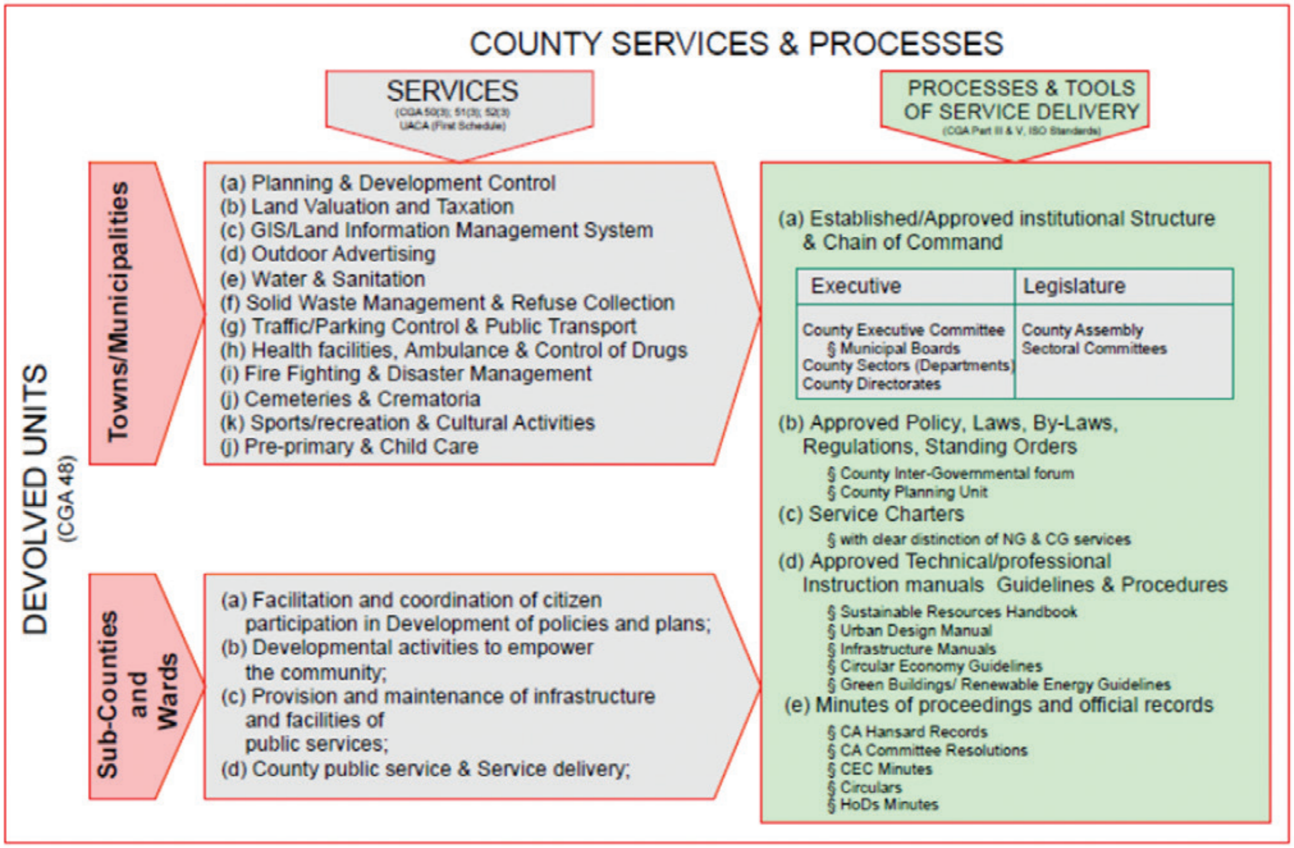
3. Infrastructure Fees as a Condition for a Development Permit (Pre-Approval Phase)

In order to meet the infrastructure requirements of the growing population and ensure proper standards, Nyandarua County needs a strong statutory and financial mechanism for infrastructure development. The increase in pressure for infrastructure development requires wider planning considerations within the application process. There is also a clear need for innovative and more expansive mechanisms for infrastructure financing.

It is being recommended to institute a "development levy/fee" to be paid to the county government by developers (commercial or individual) for the construction of sewage treatment, water purification, drainage, and organic waste treatment.

- **Expected Urban Population of about 200,000 people by 2026.**
- **Additional 6,000 urban family units.**
- **Infrastructure costs for the next 5 years = 3,000,000,000 (1,000 units/ yr X 5 X 600,000 Ksh/unit) the annual infrastructure cost is 600 million Ksh.**

Figure 2. Sub-County/Municipal Planning Responsibilities



Compared to other urbanizing Counties this is a very manageable scope. However, if unmanaged, this will quickly become a long-range burden beyond the capacity to meet the needs of the growing urban population.

Under the PLUPA, county governments have the powers to impose planning conditions and infrastructure obligations and to determine the circumstances under which a development fee is applicable to private sector developments.

Development fees are a once-off capital charge to accommodate the impact of intensified land use. The rationale for the implementation of development fees as envisaged in section 63 of the Act is based on the "benefits principle". It posits that the main beneficiaries of infrastructure within the county should make an appropriate and fair contribution to the cost of the infrastructure without unduly burdening the rest of the taxpayers within the county that are not associated with that infrastructure.

The development fee should therefore ensure that the pro rata share of actual capital costs to service a particular development are borne by the persons who would benefit from the intensified land use.

Not all development applications give rise to development fees. In appropriate situations, the developer may receive a waiver for payment of the development fees. In lieu of payment, the developer would be required to provide the necessary infrastructure for general use by the residents of the area where the property in questions is located as determined by the county government.

The introduction of a development levy will serve not only as the source of revenues needed to finance new infrastructure development. It will also restrain the dynamics of urban sprawl. The costs of extensive access roads, proper sewage treatment, water purification, and power increase as the distance from urban centres increases. In addition, the requirement and enforcement of this payment prior to granting a building permit will dampen speculation.

In reality, important as the introduction of development fees is, the first impetus in initiating reforms lies in progressive capacity enhancement through planning policy guidance notes that accommodate current development undercurrents in the devolved units. Furthermore, a careful rolling out of processes, norms, standards and procedures that provide a clear roadmap to carry out the desired policy reforms, as well as future reforms, will be crucial.

If cleared by all departments, the application is recommended for approval, otherwise, the application is returned to the project initiators/developers with clear and concise reasons for review/amending. The making of legally binding decisions requires elaborate compliance processes. The processes in this stage, therefore, use the time and expertise of different professionals at the sub-county / municipal level, whose technical decisions, including infrastructure needs, inform and bind the approving authority[7].

Infrastructure Development Fund

In order to link the levying of a development fee with infrastructure construction in specific ventures, there needs to be a management framework with the authority and capacity to undertake the engineering and financial management of infrastructure provision. (See figure 5):

- **Creating a dedicated Infrastructure Development Fund that ensures the use of development fee payments only for the specific projects designated by the fee payment.** This is to be outside the regular County Budget and is aimed at preventing the "absorption" of capital development revenues into the ongoing expenditures of the county government.

- **Structuring the Development Fund as a management body with the mandate to contract for the appropriate infrastructure construction and ensure a county infrastructure development master plan in keeping with the County Spatial Plan.** (This could be a function of the Nyandarua County Development Company)

- **The option of providing bank guarantees in lieu of full payment of development fees as a condition for a building permit.** They would ensure full payment of development fees once the infrastructure is completed.

- **This mechanism can provide Nyandarua County Governments with a secure source of funding which is a prerequisite for undertaking deficit financing of infrastructure projects.**

4. Land Rates as a Mechanism for Revenue Generation and Managing Urban Development- a two-tier zone-based policy

A Two-Tier System of Land Rates

In order to capture the increased value of properties in the growing urban areas and in order to establish differential revenue sources for the two levels of governance - county government and the newly formed municipalities- there needs to be a restructuring of the property taxes. One

7 PLUPA Section 58(5) & (60 & 61)

that is based, not only upon land values of undeveloped property, but also upon a property's "developed" functions (residential, commercial, public, industrial, non-agricultural and other).

The undeveloped land tax would serve as the source of income for the county government (which is the current under-enforced practice), and the developed land tax would serve as the source of income for the municipal boards.

This differentiation will facilitate a more equitable and feasible provision of ongoing services in the urban centres. **Although a tax and not a fee, it is being recommended in urban areas/municipalities that this additional tax burden be directly linked to improving services to the locations from which these revenues are collected.**

Land Rates Based Upon Tax Zones

In addition, by creating tax zones based upon land values, it is possible to set and update land rates much more easily, in keeping with market-based demand. This also enables the linking of increased revenues to improve services. Zone-based land tax systems are well established around the world and can be an alternative to the cumbersome practice of valuation rolls. (This, in fact, is in keeping with Part VI of the Rating Act, Cap 267, and only requires a delineation in the county finance bill).

Revenue Potential from Two Tier Land Rates

Given the lack of accurate valuation data, it is very difficult at this point to assess the potential from land rate revenues. The intention here is to give a preliminary picture of the potential of a two-tier zone-based land tax mechanism.

At approximately 390 million Ksh, the current level of Own Source Revenues (OSR) is only 6% of Nyandarua County's income. Land rates are an insignificant component of this income. **However, the potential for income from even minimal land rates could triple OSRs.**

Based on a current population of 850,000 and an average family size of 4.25, there are approximately 200,000 households in the county. Land value varies from 500,000 Ksh per acre to over 10,000,000 Ksh per acre in urban areas. Thus, for the purpose of calculating the approximate potential scope, a value of 1.5 million Ksh per acre or 350 Ksh per sqm of land is applied on rural lands. 350,000 Ksh for the value of a household plot is being used as a county wide average. The intention is only to include residential land use for this calculation.

As stated above, undeveloped land values would be set by geographic zones and would be based upon land values pro-rated at the market value per square meter. The tax levied on land would be the assessed value per sqm in that zone (using the market value of land in that area as the base) multiplied by the fixed percent (1%-3%) multiplied by the size of the land (sqm). The landowner would pay undeveloped land tax (land value multiplied by e.g. 1%) (assessed value for example at 1,500,000 KSH/acre = 3.75 KSH/sqm tax/year). Thus, the tax rate would be 3.75 KSH/sqm. Tax on a 450 sqm. plot would be 1,688/year. **This would yield 200,000 households X 80% (rural population) = 270 million Ksh.**

In Nyandarua, Urban land value varies from 3,000,000 Ksh per acre to over 10,000,000 Ksh per acre in urban areas. In Olkalao Town a 500 sqm plot sells for 1,000,000 Ksh (8 million/ acre). The undeveloped land rate/tax for the landowner would be based upon a value of 2000 Ksh/sqm. For property on a plot of 450 sqm, it would be 9,000 ksh/year or 750/month. (2000 X 1% = 20 Ksh/sqm X 450)).

The potential tax revenue from undeveloped property in urban areas, assuming an urban population of 40,000 households on an average of 450 sqm of land each, and an average value of 8,000,000 Ksh per acre, would be 360,000,000

Total yearly, undeveloped land tax revenues including rural households would be 750,000,000, (200% of current OSR).

In addition, assuming a 1:1 ratio of land use and plot size and a tax rate of 20 Ksh/sqm, municipalities could generate an additional 320,000,000 on residential developed properties and close to another 100 million Ksh from commercial business developed properties.

Total land revenue would be close to 1 billion Ksh.

(There is of course no intention to tax rural/agricultural lands)

CHAPTER 01

Recommendations for Development Control and Compliance in Nyandarua County

David Gatimu and Cyrus Mbisi

1.1. Introduction

Nyandarua County may not currently be experiencing the same level of urbanisation pressure as compared to the urban frontline counties especially in the Nairobi Metro Region. But it is steadily receiving an indirect impact by virtue of its fringe agro-based economy, which is responding to a surging demand for food supply by the urban population. There is a sense that the urban food system leads to a spatial order of peri-urban areas through the confluence of demand and supply of food. Urban food dependency is an industry, which requires human and material resources, products and services within that production area. Nyandarua is famed for its wide-ranging farm produce that feeds far-flung destination markets for home and hospitality industry consumption.

The dynamic interaction and delicate balance between rural economic systems and urban development is therefore becoming an urgent spatial concern as the findings of the Local Assessment Report (LAR) indicate. Development control becomes the key tool to regulate land assets towards livelihood strategies where food systems and settlement systems are more integrated.

1.2. Challenges

To gather insights into the main development management challenges in Nyandarua County, Engineer and Ol Kalou towns were selected for urban assessment and the following emerged as key challenges that require attention by the County Government of Nyandarua.

1.2.1. Insufficient capacity for Development Management

All projects implemented by County Governments must result from the County Integrated Development Plan (CIDP) as stipulated by law. The spatial component of CIDP is the County Spatial Plan (CSP). Nyandarua County is now on the second CIDP (2018- 2022), having retired the inaugural plan of 2013- 2017. Institutionally, towns and urban areas are currently managed by the County Government of Nyandarua, like all other areas within the county. The Governor chairs the County Executive Committee; currently consisting of 10 County Executive Committee Members. Ol Kalou Town, the County Headquarters, has recently been elevated to Municipal Status with the Municipal Charter finalised and approved by the County Assembly. The Municipal Manager, in office since April 2019, is in the process of constituting the Secretariat and filling positions for other necessary staff. The Municipality will be run by a Municipal Board as constituted under the Urban Areas and Cities Act (UACA) and supported by a Secretariat. The Board is fully constituted and has already established four committees fashioned around the mandated functions, as stipulated in the Charter. The committees are Environment, Public Health and Natural resources; Municipal Planning and Engineering; Finance Administration and Audit, and Social Services, Sports and Gender. Project implementation is the responsibility of the Municipal Board in consultation with the County Executive Committee Member (As per the existing County Government structure).

In this arrangement, the municipal manager provides the guidelines on the management of the project. The county has committed to redeploy staff to the Municipality, to ensure continuity and speedy take-off by the Board. Here, the Boards retain autonomy in project implementation, whereas the County Government is to play enabler and supervisory roles. Outside municipalities, for instance, Engineer Town, are managed by the County Executive Committee Member in charge of Lands Housing and Physical Planning constituting sections: Planning; Survey; Housing and Urban Development. The main challenge to managing Engineer Town is the inadequate institutional capacity, partly due to centralisation of relevant urban management institutions (and staff) in the County Headquarters; Ol Kalou Municipality, and Nyahururu Town, hitherto the headquarters of Nyandarua County.

In terms of planning, the County Integrated Development Plan (2018- 2022) is in place, but lacking some of its constituent components; County Spatial Plan (CSP) and urban plans. Consequently, there is no spatial framework for the development of Engineer Town and other urban areas within the county. It is noteworthy that Nyandarua County has about 200 urban centres, including Engineer Town, and almost all of them are running on obsolete spatial plans, some prepared in the 1960s.

Challenges such as limited budget, especially overreliance on the national government, low own-source revenues, poor enforcement, lack of institutional capacity, among others, are key factors impeding adequate development management in the town. Additionally, there appear to be transition issues following the enactment of Physical and Land Use Planning Act No. 13 enacted in August 2019. The new law adds to the existing Urban Areas and Cities Act No. 13 of 2011, and County Government Act No. 17 of 2012, including the applicable regulations that seek to clarify matters of development management. There is, therefore, a need for a proper transitional framework to guide urban management institutions in addressing the numerous urban challenges, by way of harmonising the existing policy and legislative framework.

1.2.2. Transport and Physical Infrastructure Backlog

The absence of key infrastructures such as water supply, storm water drainage, solid waste management in the majority of urban areas in Nyandarua County is a cause for concern not only to the town managers, but also due to the potential environmental and public health risks it poses.

There is no sewer system in Ol Kalou town, and it mostly relies on septic tanks and pit latrines. Tenders to develop the sewer system have been floated by Rift Valley Sewer and Water Company. The town is encouraging the use of bio digesters to mitigate the potential pollution and contamination from the poor drainage in the area.

Lack of storm water drains: Other than the Gilgil- Nyahururu road (C77) that has storm drains on one side of the road, the rest lack storm water drains including Ol Kalou- Nakuru road (C69) and the rest of the road network in Ol Kalou Town. This encourages poor drainage, especially during the rainy season as the water drains into nearby streams and rivers.

The poor condition and network of roads: The circumferential and ring roads are not developed in Ol Kalou town, which appears to lie in a ravine, with the railway and the main street, running from south to north, giving the town its ribbon-like character. The situation is similar in Engineer town and in other urban areas in the county. Development of these roads would discourage the sprawl of the town and encourage compactness, both of which are efficient in terms of land use and cost for infrastructure development. The condition of the roads also requires attention, since only a small proportion of the roads, mostly arterial , are all-weather roads, with most being dirt roads.

Solid waste management: The main challenge is the inadequate capacity to ensure proper solid waste management. The county, therefore, has noted that long-term sustainability of the solid waste management system also depends on the level of segregation of waste. Segregation can be done in three streams, i.e. biodegradable, recyclables and garbage/waste, with the final waste disposed of in a sanitary landfill site already identified by the county. Key projects to address this issue include buying solid waste bins and trucks for collection and transportation of waste.

Provision of infrastructure incentivises development and it is necessary to formulate a framework for benefit-sharing between the property developer and Town Management. Land near the main highway attracts higher prices, for example, Mahinga in Ol Kalou Town where land prices are Kshs. 1m per 0.05ha (subdivision schemes with no development control), whereas at Kariamu, an eighth of an acre (0.05Ha) goes for Kshs. 850, 000 with lots touching Ol Kalou and Njambini road going for Ksh. 1.7m per acre. Those near Shamata Shopping Centre in Ol Kalou Town are going for Kshs. 950, 000.

1.2.3. Social infrastructure Backlog

The following are some of the social infrastructures identified as critical in supporting the development of the county. The identified gaps are due mostly to the mismatch between development and social infrastructure provision due to organic growth of the urban areas.

Markets: Ol Kalou town has developed as a trading base due to its centrality in the county, coupled with good communication links to Nakuru, Gilgil and Nyahururu. The availability of agricultural production, mostly in the hinterland, makes it even more attractive for traders who ply their trade in far-flung counties in the western side of the country and north eastern counties of Laikipia and Samburu. There is already a designated market in the town that is more or less full and requires expansion. More markets are needed in Engineer town and all other emerging urban areas in Nyandarua County.

Other social infrastructure such as health and education facilities, especially public ones, is identified as critical to supporting the nascent urbanisation in the county. One of the reasons for this backlog is the organic growth of the towns and urban areas outside a spatial development framework.

1.2.4. Expansion of the Town Boundary

Through the delineation committee, the current town boundary for Ol Kalou Town is expanded to include rural areas almost thrice the current urban area. The boundary expansion, incorporating more rural lands into Ol Kalou town, requires more work to prevent it from resulting in urban sprawl in the rural hinterland. The town and its immediate hinterland are well known, mainly for the production of maize and potatoes. Nyandarua County is the leading producer of potatoes and maize accounting for almost 40% of the national potato output. These key values require careful consideration when faced with such competing policies as the expansion of urban areas. This is in part due to Nyandarua County's strategic location, especially proximity to Nairobi, making agriculture readily attractive to the vast majority of the people and offering the county a competitive edge over other agriculturally endowed counties in the country.

1.2.5. Inefficient Land Administration and Management

Land related services are mainly found in Nyahururu Town, approximately 40 kilometres North of Ol Kalou town. Nyahururu Town was the regional administrative centre for Nyandarua County until recently when Ol Kalou was designated as the County Headquarters. During the transition period, and before the registry and related infrastructure and services are established in Ol Kalou Town, these services will continue to be accessed from the Nyahururu town. Currently, only planning services can be accessed from Ol Kalou town, whereas the registry, valuation and survey services are in Nyahururu Town. Additionally, most services are still analogue, and investments are required to provide the necessary support towards digitisation, maintenance and operation of related databases. During the on-going formulation of the County Spatial Plan for Nyandarua County, about 99% of the land within the county government mandate is now in digital format (land in Nyandarua County is under schemes and all these schemes have been fully captured) and the amendment is dated 2017 (the year the Nyandarua County Spatial plan was formulated).

Lack of valuation Roll: for land transfers, a stamp duty of 2% is levied on the value of land and determined based on the location of the land. There needs to be a better valuation to capture the real value of land and development to the benefit of both the county and town management. Currently, the district valuer serves both the county and national governments. Land rates are charged at Kshs,. 40 regardless of the size of the agricultural land, whereas commercial land is calculated using a formula determined at the rates office. County government is now reviewing the basis for rating to rationalise the stamp duty payments.

1.2.6. Poor Land Tenure Characterised by Squatting and Encroachment

Most land in the Ol Kalou town is freehold (around JM Hospital, Vatican, Kiajei, and Mwireri suburbs). There are leases in most parts of Ol Kalou town allocated by the defunct county council, allotment letters in formerly county lands and title deeds in previously adjudicated lands that are mostly in rural areas. Additionally, there is the problem of double allocation of land. Double allocation can be considered the biggest issue regarding the land sector in Ol Kalou, and it is traced back to the defunct county councils. The allocations were also poorly documented; breeding land disputes that pose the single most serious challenge to the land sector in the town.
There is also encroachment on public lands especially along rivers and on-road reserves that require urgent attention from county government.

1.2.7. Degradation of Sensitive Ecological, Environmental and Natural Resources

Ol Kalou town is nestled between two rivers. Kirundu River to the north and River Makuyu to the south and it is home to numerous streams, making the region a major catchment for the downstream river system. Indeed, early settlers in the Ol Kalou town remember the town as a swamp and developers having to drain their sites to put up developments. This is a major consideration for any planning exercise and should inform the plans for expansion of the town's boundary, so as not to fragment the existing ecosystems. There are quarries on the western side of the town, acting as the physical boundary for the growth of the town in that direction, as well as rivers to the north and south of the town, perhaps making it difficult to expand the road network across these barriers. Engineer Town is a mostly agriculture-based town sitting at the southwestern end of the

Aberdare Mountain Range. Due to its location, the town and immediate environs form an important catchment area for downstream river systems. This is a major planning consideration alongside the protection of farmlands and should inform future spatial planning policies for the town. Overall, improved urban management through urban planning and infrastructure development is a first step in containing urban sprawl, as well as improving the environmental condition of the town and the state of other environmental resources in the immediate hinterland.

1.2.8. The Poor Performance of the Agriculture Sector

This is due to lack of participation by young people with most participants being elderly. This also impedes the adoption of new farming techniques with the older generation (majority) being invested in traditional farming methods. Secondly, lack of extension services and competition from other agriculturally endowed counties. This has hit the dairy sector particularly hard in recent times with milk prices falling to as low as Kshs. 26/litre from 40/litre. To address these issues, the following are proposed: capacity building for young people, women and community-based groups; providing incentives such as subsidised tools and equipment, seeds and fertiliser; establishing a funding scheme to enable farmers to afford farm inputs and services, and lastly; register a county service delivery schedule for easier management and payment of farmers. Already there is an on-going four-year project for the establishment of cold storage facilities in areas such as Njambini, Ol Kalou, Ol Njoro, and Kipipiri.

1.2.9. Poor Business Environment

The business environment in the county is characterised by challenges such as complicated approval processes (especially where no proper ownership documents exist), lack of street lights (limiting business hours to daylight), insecurity, poor road condition (limiting access to town, especially by walk-in customers), lack of storm water drainage in the towns, lack of planning to regulate developments, and inadequate local capacity to deliver services, especially land-related services that are currently delivered through national government officers seconded to Ol Kalou. There is, therefore, a need to strengthen development management, including urban planning and management to infuse order into the management of the town and address the factors hindering ease of doing business in Nyandarua County.

1.2.10. Revenue Collection

Currently, traders, businesses, land rates and rent payments are attended to at the central revenue offices situated in Ol Kalou town, with other towns within the county relying on manual collection by revenue offices. There is, therefore, a need to digitise revenue collection to make it easier for businesspeople to pay and also for /accounting purposes. This is well supported by mobile connectivity in Kenya and more so in urban centres like Ol Kalou where it is above 80%,with the business community with almost 100% connectivity. Service providers can, therefore, install a centralised system that exploits mobile money technology as well as phase-out manual payments. The town targets, in the first phase, using handheld gadgets for revenue collection in car parks and bus parks, as well as mobile money for fixed businesses.

1.3. The State of Development Control

From the LAR findings the spontaneous human settlement patterns in Ol Kalou, Engineer and Mairo Inya towns present a big challenge for urban growth management; the current population in these urban centres and demographic projections portray an alarming growth with an obvious lack of a stringent mechanism for proper controls and compliance appraisal discussed hereunder.

1.3.1. Technical Capacity and Determination Guidelines

The effectiveness of scrutiny and determination of development applications places greatest emphasis on the technical personnel across the development spectrum and tools at the disposal of professionals on both sides (development consultants and government officers).

Under the repealed Physical Planning Act, development control was a function delegated to local authorities, most of which lacked professional capacity save for a skeleton staffing of building inspectors and public health officers, whose work lacked serious linkages to local development plans and other development control tools. Ol Kalou's current development control systems are largely a carry-over from both (the defunct) Ol Kalou Council and for the rest of the county under the Nyandarua County Council, which had weak or non-existent technical staffing in planning and development matters, a deficiency which continues to dog the current governance. This challenge is not an isolated situation for Nyandarua County, but a major country wide challenge.

Beyond the serious technical personnel deficiency, there are few credible reference materials or tools in the current development application's evaluation mechanisms. The absence of an approved Planning Handbook, which is the key reference document for standards and norms, leaves the floodgates wide open for substandard land sub division 'approvals'; the absence of up-to-date policy and zoning guidelines paves the way for change of user for incompatible developments and the reliance (if at all) on archaic building code, public health code, fire safety or engineering standards heightens the risk of buildings collapsing and other public safety concerns.

1.3.2. The Workflow and Approval

The processing of planning permits goes through five pre-approval stages up to the permit level. There are no documented post-approval processes to ensure that the planning conditions are fulfilled. For land subdivisions, the failure to enforce the provision of basic infrastructure is the most glaring omission. This is perhaps the weakest link in the infrastructural non-performance in most of the housing estates.

The approval of development applications in the former local authority governance, pursuant to the repealed Local Government Act, was vested in the Town Planning Committees. The current trend in many counties to vest this responsibility in the unlegislated Planning Technical Committees is a legal flaw that should be urgently addressed pursuant to PLUPA Section 90(2)(e).

Without prejudice to the ongoing formulation of the Regulations, the recommendations given in section 1.7 are based on the rationale that the workflow has definitive milestones (see Figure 3) anchored to the three pieces of legislation PLUPA, CGA and UACA, operating at the lowest governance level, based on devolution principles and the provisions of CGA section 104(3) that states:

"The county government shall designate county departments, cities and urban areas, sub-counties and Wards as planning authorities of the county."

Figure 1 illustrates the legal framework connecting the workflow from the devolved planning authorities to the apex approving authority. While PLUPA vests Permitting Authority in the CECM, the milestones in the workflow should be at these designated levels where a series of instruments are applied by the various relevant authorities for quality assurance, conformity to policy and most importantly profession validation. Before reaching the CECM a higher level of validation is necessary to be done by a Technical Committees whose composition is ideally a caucus of County Heads of Directorates and Agencies and Municipal Manager(s) that assumes professional responsibility for all the compliant applications and deferring or declining with grounds. A further committee membership could be opened up to the

Table 1: Legal Framework of Workflow Development Control

	FUNCTION	LEGISLATION			INSTRUMENTS
A	Power to undertake Development Control	PLUPA	CGA	UACA	
		S.56	S.104(3)	S.20(2)	
A1	Development Control Activities	S.56(a-g)	S.103(a-j)	S.20(1)(d)	
1	Receiving Development Applications	CECM S.58(1) (application in the prescribed form) & S.59 Submission by a qualified person • County Director of Physical & Land Use Planning – S.20(j) issuance of development permission & other development control instruments			• Submission Forms • Professional credentials • Other supporting accountable documents
2	a) Submission Fees	a) Is for application evaluation PLUPA S.90(2)(a)			• Invoices for different category of applications, • Waiver Certificates
	b) Development Fees	b) Is Infrastructural Services development PLUPA S.63 • CECM to develop guidelines for both guided by the PFM Act (18 of 2012) • Municipal Board – UACA S.20(1)(n) as may be delegated by the county government, collect rates, taxes • levies, duties, fees and surcharges on fees			
3	Registers	CECM S.62 • County Director of Physical & Land Use Planning – S.20(j)			Submission Certificate – permanent reference number
4	Circulation to relevant authorities	CECM S.60(1) • County Director of Physical & Land Use Planning – S.20(j)			• Circulation Forms • Policies • Zoning ordinances • Handbooks • Codes • Manuals
5	Review & Commenting				
6	Permitting Authority	CECM S.57(1) • County Director of Physical & Land Use Planning – S.20(j)			• Agenda for validation • Notification for validation meeting • Proceedings of Validation Meeting • Minutes • CECM Approval of Validation Minutes

private sector (without voting powers on technical resolutions). The resolutions of these Development Applications Validation Committee meetings should be the basis for the CECM Approval.

1.3.3. Compliance Monitoring and Enforcement

There are major capacity challenges to track, monitor and inspect all approved building, not to mention the effort to enforce sanctions on the illegal construction strewn across the county. This is a complex phase of development control as it involves multiple players and processes. For example, for those developments that are illegal or not approved, it requires the involvement of enforcement officers (county for simple cases and Kenya Police Service for major operations) and judicial processes, which means operational spillovers beyond county jurisdiction.

1.3.4. Process Records, Technical Evaluation and Approval

The application registers and the manual workflows stated above are spearheaded by planners and architects, respectively, in separate ways. This includes separate technical meetings that are the basis for approval authority. It is hardly surprising to find an 'approved' development in Nyandarua County that fails to comply with many rudimentary development standards, or some situations where properly approved developments (e.g. in conformity with the Building Code) deviate from the approved version

1.4. Devolution and Urban Management Reforms

1.4.1. Public Service Delivery

Public service delivery under devolution governance is a statutory undertaking by the county government. One of the public service principles in Section 116(2) of the County Government Act aptly states, *"a county shall deliver services while observing the principles of equity, efficiency, accessibility, non-discrimination, transparency, accountability, sharing of data and information, and subsidiarity."*

Figure 1. Illustrates the linkages of the policy-making processes with service delivery through the decentralised structures within the context of urban services and sub-county/ward hierarchy. The key coordinating organ in this arrangement is the County Intergovernmental Forum for coordination and feedback mechanisms.

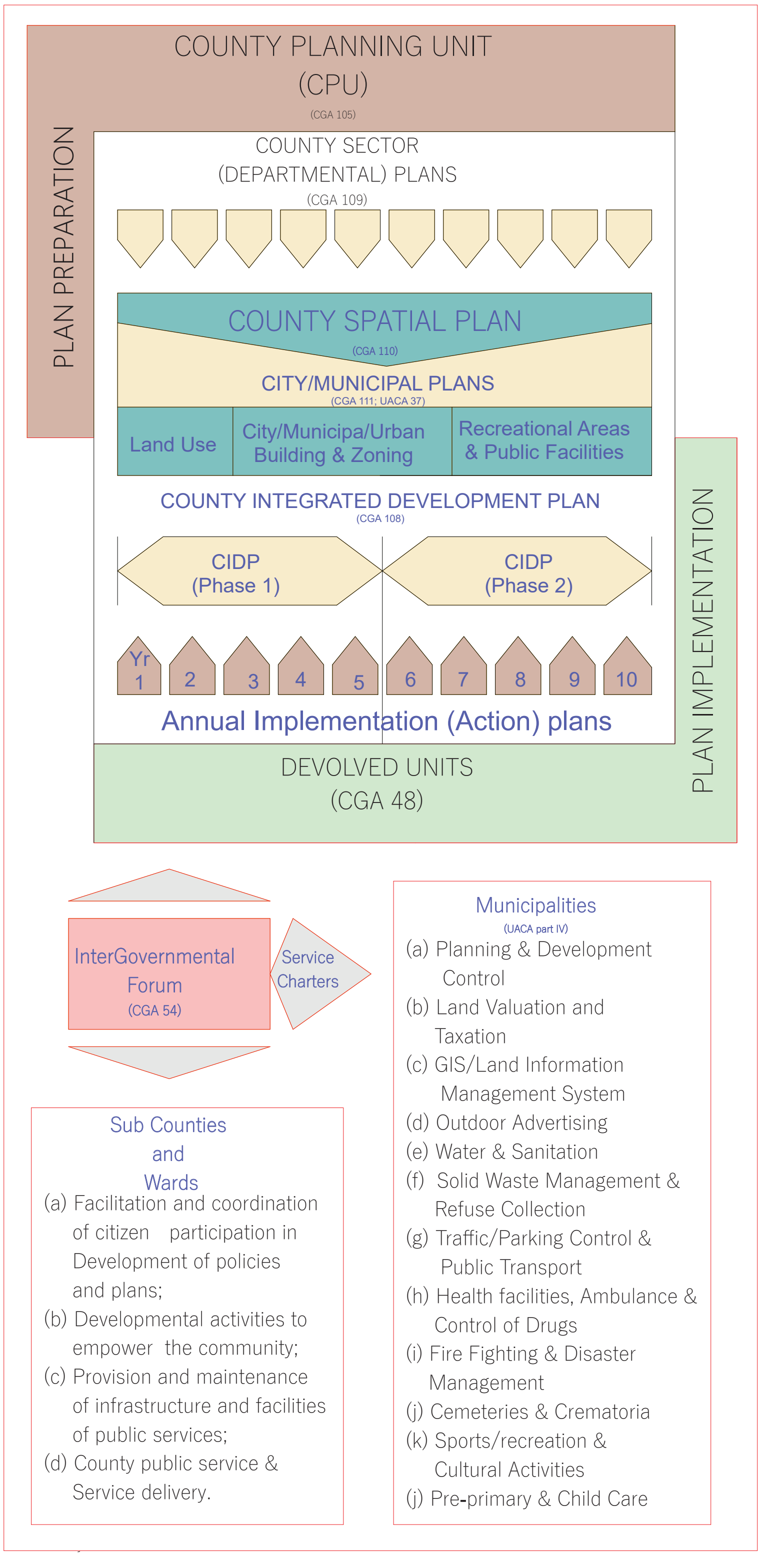
1.4.2. Urban Planning Services

Service delivery in urban areas, as part of the Integrated Program of Action, is guided by the provisions of the Urban Areas and Cities Act, Part V. One of the objectives of integrated urban development planning is to provide a basis for development control[8] as part of the range of urban services, which are provided in the First Schedule of this Act.

If the machinery of development control is to be effective in Nyandarua, reforms will be necessary to remedy the current flaws and strengthen planning controls and compliance. This can be remedied by the provisions of PLUPA section 20(g) UACA section 20(2) read in conjunction with section 13(e).

8 UACA Section 36(1)(g)

Figure 1. Planning & Service Delivery Linkages



1.5. Aligning Development Control to the County Governance Structures

The essence of devolution in the context of urbanization is anchored on building strong institutions and systems to exercise the total planning doctrine of the integration of development plans and development control.

It is therefore imperative that Nyandarua County Government aligns its governance structures as required by law and not only for the functions that are devolved to it, but also to ensure compliance with the approved plans during implementation, while monitoring that financial resources are only allocated to approved activities within such plans.

The County Government Act, the Urban Areas and Cities Act and the Physical and Land Use Planning Act all provide the framework that supports the delivery of services to the lowest devolved units.

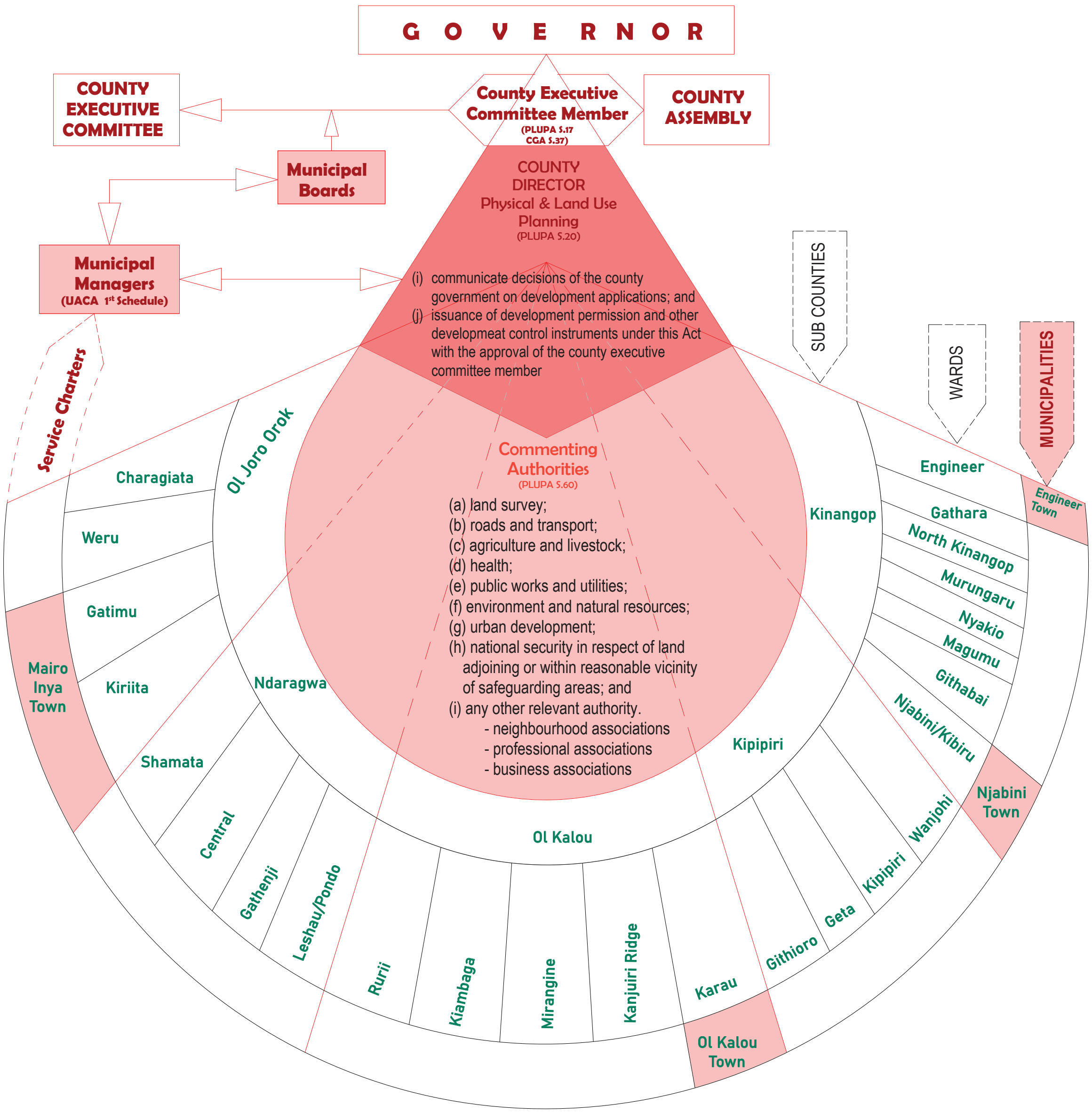
Figure 2 shows the linkage between development control authority and processes in the county structure from the apex level of the CEC member whose roles are defined in CGA section 37 and PLUPA Section 17. As a technical function, the County Director of Land Use and Physical Planning's development control mandate is defined in PLUPA Section 20(i) and (j). Being a consultative process, the circulation to relevant authorities for referral opinion or comments is provided for in PLUPA section 609(1). The role of municipal boards and other decentralized units[9] will require detailed operational structuring for coordinated intrinsic control or ordering in their respective areas of jurisdiction.

This illustration shows the number of urbanizing areas ready or poised for conferment of municipal status[10].

9 CGA Section 48(1); Section 49; UACA Section 32)

10 UACA Section 9

Figure 2: The Ideal Nyandarua Development Control structure



1.6. Development Control as Public Service

The most critical pillar of development control during this devolution transition period is the careful rolling out of processes, norms, standards and procedures that provide a clear roadmap to carry out the desired policy reforms, as well as future reforms which will be crucial. As a county public service guided by the principles in the County Government Act, the Physical Planning and Land Use Act sets out the detail that defines "development control" as

"the process of managing or regulating the carrying out of any works on land or making of any material change in the use of any land or structures and ensuring that operations on land conform to spatial development plans as well as policy guidelines, regulations and standards

issued by the planning authority from time to time in order to achieve a purposeful utilisation of land in the interest of the general welfare of the public."

The processing of development applications therefore remains a critical arena in Nyandarua County for innovation and improvement. Development control as currently legislated[11] is a county government function within their jurisdiction to:

a) prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;

b) control or prohibit the subdivision of land;

c) consider and approve all development applications and grant all development permissions;

d) ensure the proper execution and implementation of approved physical and land use development plans;

e) formulate by-laws to regulate zoning in respect of use and density of development;

f) reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical and land use development plans; and

g) consider and determine development planning applications made in respect of land adjoining or within reasonable vicinity of safeguarding areas.

1.6.1. Development Permits

Decisions relating to a specific parcel of land must be made with reference to a whole spatial system. Development permits are therefore organised around three fundamental "controls": conformity, performance and net benefit. The controls are guided by the ability to assess development applications and score through procedures and test effects of plan-quality attributes.

Giving this a lay interpretation, it means any development by a property owner must pursue the process of planning or architectural application and obtain a permit in conformity with approved planning policies, ordinances and acceptable standards. This brings us to the familiar terms of Planning Permit and Construction Permit for planning and architectural applications, respectively. In a nutshell both are Development Permits.

1.7. Charting the Nyandarua County Development Control Process – Phases and Stages

There are three structured phases in the practice of development control. These are pre-application, pre-approval and post-approval. The figure below illustrates the three types of development applications at the head and below them the activities broken down into the sequential activities. Each activity is adapted in the space of policy, regulations, norms, codes, specifications etc.

1.7.1. The Pre-Applications Phase

In the entire plan making process, there is a strict relationship among and between sectors contributing to sectoral strategies that culminate in integrated plans. This means that, for all intents and purposes, consultants intending to undertake a development proposal must make reference to an approved plan and any associated reference document. Development proposals relating to a specific

11 PLUPA Section 56

Figure 3: The Development Applications Flow Proces

DEVELOPMENT CONTROL PROCESS

Planning

1. Subdivision/ Amalgamation of land
2. Change/Extension of Use of land
3. Extension/Renewal of Lease of land
4. Outdoor Advertising & Signage
5. Regularisation of Existing Developments

Engineering

1. Structural Engineering Designs & Supervision
2. Civil Engineering Designs, works & clearing

Architectural

1. New Buildings
2. Alterations and additions to existing buildings
3. Demolitions of Dwellings
4. Regularisation of Existing Developments

Phase	Process Stage	Activities	Tools/Reference Documents	Responsible	Statute	Output
PRE-APPLICATION	1 CLIENT/CONSULTANT ENGAGEMENT	1 (a) Client/Consultant Briefing 1 (b) Physical Site/Property Verification 1 (c) Broad enquiries on technical & policy, 1 (d) submission fees, procedural matters 1 (e) Compilation of Submission Bundle	1. County Spatial Plan 2. Municipal Urban Integrated Plan (Municipal Land Use Plans) (Municipal Builing & Zoning Plans) * All Applicable Reference Documents Available at 1. Sub County Offices 2. Municipal Office 3. County Website 4. NLIMS	Consultant 1) Planner 2) Architect 3) Engineer	PLUPA 58(5) 58(7&8) 59(1) 68 CGA Part IX Part X Part XI UACA 21 36	Compliant Quality submission
Pre-Approval Phase	2 INVOICING & REGISTRATION OF APPLICATION	2 (a) Receiving 2 (b) Registration 2 (c) Invoicing	a) Prescribed Application Forms b) Planners/Architects Engineers Annual Practice Cert c) Applications Booking Register d) County Finance Act (Development Levies)	Sub County Team 1. Sub County Admin 2. Sub County Planner 3. Town/Municipal Manager	PLUPA 58(1)	Revenue Efficient Workflow and Tracking
	3 SIEVING CIRCULATIO & EVALUATION	3 (a) Sieving & sorting by development magnitude 3 (b) Local vetting for Zoning Compliance 3 (c) Fastracking of simple developments 3 (d) Circulation for Detailed Sectorla Evaluatoin 3 (e) Determination of Development Fees for major developments - Infrastructure planning & design	a) Spatial Plan b) Municipal Plan c) Planning Handbook d) Building Code c) County Finance Act e) WaRMa Guidelines f) Engineering Codes (g) Public Health ByLaws (i) Valuation Roll	County Technical Officers a) Planners b) Public Health Officers c) Engineers d) Revenue Officers e) Environment offocers f) Land Registrars g) Land Valuers	PLUPA 60(1) Third Schedule Sections 2-17	a) Comments b) Clearance c) Performance Conditions
	4 AGENDA COMPILATION & DETERMINATION OF DEVELOPMENT APPLICATIONS	4 (a) Agenda Itemisation 4 (b) Convening of Development Determination Commitee 4 (c) Items Deliberations & Resolutions	a) Agenda Listing Template b) Meeting Proceedings Guidelines b) Minutes of Resolution Meeting	Development Determination Committee (Line Directors/ Commenting Authorities, Professional Associations, Co-Opted Invitations)	PLUPA Part VII 90(b)(e)	Minutes of Proceedings & Resolutions
	5 COMMUNUCATION OF DETERMINATION & APPEALS	5 (a) Reporting to CECM 5 (b) Reporting to Municipal Managers 5 (c) Signing & Stamping drawinga & Permits 5 (d) Dispatching Applications to consultants 5 (e) Receiving & Processing Appeals	(a) Minutes of proceedings Resolutions (b) All Refrence Documents used for evaluation	County Director Of Phyiscal & Land Use Planning	PLUPA 61(1) 6192) CGA 95 96	Development Permits
Post-Approval Phase	6 IMPLEMENTATION PLANNING	6 (a) Consultant/Client interpretation of Approval Conditions 6 (b) Securing Secondary Permits (EIA, NCA, Hoarding etc) 6 (c) Costing of the approved development 6 (d) Sourcing of Funding 6 (e) Bidding/Tendering Process 6 (f) Conract Awarding	(a) Funding Options References (b) Fund/Investment Sourcing References	(a) Developer (b) Relevant Built environment Professionals (County & Consultants) (c) Lending Institutions (d) Contractor (e) Insurance Underwriters (f) Legal/Judicial Officers (g) Enforcement Officers		(a) Secondary Permits (b) BQs (c) Development Funds (d) Implimentation Contracts (e) Inspection Reports/Certificates
	7 PROJECT EXECUTION	7 (a) Project Phasing 7 (b) Progressive Inspections & Reports 7 (c) Amendments or/and redisign 7 (d) Enforcement Notices for non-compliance 7 (e) Prosecution for non-comliance	(a) Approved Working Drawings (b) Quality Control References (c) Safety Procedures (d) Judicial Processes Reference Documents			
	8 PROJECT COMPLETION	8 (a) Final Testing/Inspection 8 (b) Handing Over/Commissioning	All Refrence Documents used for evaluation	Relevant Built environment Professionals (County & Consultants)		Completion/ Compliance/ Occupation/ Certificate

parcel of land must be made with reference to a whole spatial policy system. Three elements stand out in this phase:

1.7.1.1. Stage 1: Regulatory and policy Reference/Guidance

Section 58 (5) "The development permission granted by a county executive committee member shall be subject to compliance with the provisions of any other written law"

1.7.1.2. Stage 2: Public Notification & consensus

PLUPA Section 58 (7 & 8) "A person applying for development permission shall also notify the public of the development project being proposed to be undertaken in a certain area in such a manner as the Cabinet Secretary shall prescribe"

1.7.1.3. Stage 3: Qualification and competence of Consultants

PLUPA Section 59(1) consultants….. "applying for development permission have been prepared by the relevant qualified, registered and licensed professionals" 59(2)…." shall prove that person's credentials"

1.7.2. The Pre-Approval Phase

The operating efficiency of land development under the devolution framework should trickle down to the sub county or city/ municipal level[12]. This allows a submission of applications at lowest service level, a closer match between public policies and rendering services, meeting desires and needs at local level.

12 County Government Act 50(3); 51(3); 52(3)

1.7.2.1. Stage 1: Prescribed Application Form(s)

PLUPA Section 58(1) …. "by applying for development permission from that county executive committee member in the prescribed form and after paying the prescribed fees

1.7.2.2. Stage 2: Receiving Invoicing and Registration

The receiving of acceptable applications rolls over to the registering of developments in the prescribed register[13]. The registration serves multiple purposes that include formal acknowledgement, permanent reference number, application classification (planning, architectural, development type etc.), and circulation tracking reference. The registration process also allows for other considerations such as waivers of fees to special developments (religious, charity, public service partnerships that are determined by gazetted guidelines), supplementary submissions (county planning and public works projects).

Once all registration parameters have been finalised, the invoicing[14] is done. Things to consider in determination of fees: zonal graduated charges based on urban fabric formation (urban, peri-urban and rural settlement form); waivers, supplementary applications

1.7.2.3. Stage 3(a): Sieving, Circulation and Evaluation

This stage entails bundling of submission documents, sieving/initial vetting and

13 PLUPA (62)

14 PLUPA (58)(1)

circulation for detailed evaluation[15]. The preparation of documents in an orderly manner and bundling for circulation is an activity of the coordinating department, namely Physical and Land Use Departments; under the devolution principle, this is best handled at the sub county or municipal level. In the sieving assessment for circulation, the presiding planner has the responsibility to vet and weigh the nature and magnitude of an application and decide which stations to circulate.

1.7.2.4. Stage 3(b): Material Considerations16

This stage subjects applications to stringent professional scrutiny responsibility with regard to regulatory and policy matters. The circulation must ensure all relevant agency authorities are given an opportunity to evaluate with the option to recommend (with or without conditions) or comment on appropriate amendments. In their evaluation and determination, development applications are subjected to specific standards that are defined through planning, architectural, public health, environmental and engineering requirements. These are also known as zoning regulations, ordinances or codes depending on the field of assessment. These legally define three key parameters of development: permissible uses, public/ environmental health and safety, extent of site development and site layout and design.

The most complex conditions may require further processes to achieve compliance with further performance conditions, such as Development Fees.

15 PLUPA Section 60(1)

16 PLUPA Third Schedule

1.7.2.5. Stage 3(c): Development Fees[17]

Development fees are a once-off capital charge to accommodate the impact of intensified land use based on the "benefits principle" which posits that the main beneficiaries of infrastructure within the county should make an appropriate and fair contribution to the cost of the infrastructure, without unduly burdening the rest of the tax payers within the county that are not associated with that infrastructure.

If cleared in all stations, the application is recommended for approval and if the application is returned to the consultants it will have clear and concise reasons for review/amendment. The making of legally binding decisions requires elaborate compliance processes. The processes in this stage, therefore, use the time and expertise of different professionals at the sub-county /municipal level, whose technical decisions inform and bind the approving authority[18].

The surge in pressure for infrastructure development requires wider planning considerations with the application of innovative and more expansive mechanisms for infrastructure financing.

1.7.2.6. Stage 4: Determination of Application

This stage entails the agenda preparation for recommended applications, final vetting, determination and communication.

Development applications and permits form a basis for the land information system for which statutory responsibility lies with the County Director of Physical and Land Use Planning[19]. As discussed in

17 PLUPA Section 63

18 PLUPA Section 58(5) & (60 & 61)

19 PLUPA Section 20(h-j)

all the preceding stages, coordination of the entire development applications at the sub county level is a devolved activity at the request of the County Executive Committee Member.

Similarly, the authorities and agencies that are consulted at the sub county/municipal level must have a clear communication mechanism of vertical linkage to their respective Heads of Department for final vetting, ownership/or variation of decisions made at the sub county/ municipal level.

For accountability and collective professional responsibility purposes (by voting), all the Head of Directorates (at County Level and Municipal Managers in Urban Areas) need a joint forum to approve or vary the decision made at the sub county level. Private sector membership (Business Community, Neighbourhood Associations and relevant Professional Bodies) may be incorporated as observers. This forum is yet to be formulated under the provision of PLUPA 90(2)(e).

Ideally, in strict adherence to the statutory timelines[20] provided for approval of development applications, the County Director of physical and Land Use Planning should prepare a comprehensive agenda of all the recommended applications and share it with all relevant HoDs prior to convening a joint forum for ratifying the recommendations.

Ideally, beyond the closed HoDs circuit, the forum should engage with the private sector through key land development stakeholders, such as built environment professional bodies, financial institutions with a bias towards development matters and relevant recognised business and neighbourhood associations.

20 PLUPA Section 60(2)

The Forum agenda should strictly be for those items that have been found compliant from the circulation circuit and are consolidated in a summary spreadsheet/matrix for tabling. Based on the tabled items, this is the most powerful technical forum to ratify, decline or defer applications. For the ratified applications, it advises the approving authority to invoke the Approval and provide further vertical communication to the Office of the Governor.

For the declined items, appeals mechanisms will be handled by the County Physical and Land Use Liaison committee and for the deferred items, the issues raised must be amended or clarified.

1.7.2.7. Stage 5: Communication of Determination & Receiving Appeals

Institutional communication goes beyond the ordinary public statements to detailed technical information that has a bearing on the public interest. The approval timelines provided by PLUPA are a clear attempt to tackle barriers to the planning process by making the development application much simpler and accessible and reducing backlogs.

The paper trail of development applications and the technical decisions at all evaluation stations form part of the complex communication networks inside and outside of the county records management systems. The Inter- and intra-departmental communication of the resolutions of planning applications enables the continuous monitoring of conformity between sectoral plans and the overall strategic county guidance.

External communication to individual consultants allows measures to be taken to fulfil the approval conditions or for the aggrieved applicant to appeal.

The continuous dissemination of the county resolutions creates certainty in fostering confidence and continuous support for better engagement and governance so that public, private and third sector service providers work in harmony.

1.7.2.7.1. Receiving and Processing Appeals

PLUPA Section 61(3) states that "An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed."

This is one area in dire need of streamlining by constituting liaison committees[21] and developing inquiry procedure rules. This being a judicial process, it must safeguard the principles of open, impartial and fair consideration of policy and material issues.

1.7.3. The Post approval Phase

The approved developments are official statements of government policy. Their implementation must comply with all conditions imposed. Approved developments, whatever their nature or magnitude, must have an implementation program that may include components such as an implementation schedule and for major developments an infrastructural element (under the provisions of PLUPA Section 63) and development criteria for performance benchmarks. The coordination for monitoring and evaluation defines the measurement of achievement at every milestone and a thorough final inspection is carried out before final (completion or occupation) certification.

21 PLUPA Part VI

CHAPTER 02

Development Fees as a Mechanism for Ensuring Urban Infrastructure Nyandarua County

Dr. Yoel Siegel

2.1 Background

The problem of rapid urbanization is neither unique to Kenya nor to Nyandarua County. Nonetheless, the issues of a fast growing, more densely concentrated city dwelling population, combined with the lack of adequate infrastructure, especially the treatment of water, sewage, waste and drainage, threaten the quality of life and the ability of the county as a whole to sustain itself economically, socially and environmentally.

An efficient and effective system of providing the necessary infrastructure is an essential condition for achieving the development objectives of the county governments and Vision 2030 in particular. Investors, both foreign and local, require assurances that the county government's management of public funds relating to the provision of the necessary infrastructure can be relied upon to maintain fiscal discipline and ensure that contributions towards the provision of necessary bulk infrastructure are indeed utilized in a fair, transparent and accountable manner, and only for the purpose for which they were paid.

Development fees are recognized worldwide as an effective financing instrument that ensures that those people, who benefit most directly from the availability of infrastructure, contribute their fair share to the cost of that infrastructure.

According to the World Bank, Kenya faces a significant infrastructure-financing deficit, estimated as US$2.1 Billion annually, and sustained expenditures of almost US$4 Billion per annum will be required to meet the country's infrastructure needs. With public debt standing at close to 57% of GDP, it is evident that this deficit cannot be met by public resources and the country needs to mobilize the private sector and local currency to finance infrastructure needs. The Bank further estimates that increasing infrastructure financing could improve Kenya's per capita growth rate by 3%.[22]

Kenya, like the rest of the continent, must industrialize to end poverty and to generate employment for the millions of young people who join its labour force every year. However, while investments in large scale infrastructure at the national government level has been significant over the years through various programmes funded through concessional loans and grants from international financial institutions and bilateral development partners, there have been no significant investment at the subnational level of a comparative nature.

Regarding affordable housing in particular, it is estimated that the costs associated with infrastructure delivery to service the target of 1 million homes is 25% for onsite infrastructure and 20% for offsite infrastructure computed as a percentage of the average housing unit cost.

With enormous investments needed in water and sewerage, transport, power and solid waste management within counties to support

22 Kenya: Enabling Private-Sector Participation in Infrastructure and Social Services, https://www.worldbank.org/en/about/partners/brief/kenya-enabling-private-sector-participation-in-infrastructure-and-social-services, 2018

these developments, the allocation of 30% of their revenues to development projects is evidently insufficient. In order to accelerate their investments in key infrastructure, county governments will have to radically change their focus and strategy. One of the key strategies at sub-national level that has been employed in other jurisdictions, and now legitimized through section 63 of the Physical and Land Use Planning Act, is the utilization of development fees to fund critical infrastructure associated with specific developments.

In the absence of an effective and efficient system of Development Fees, the county governments will continue to face:

(i) an increased infrastructure deficit (both new and expansion); and

(ii) an increased burden on households and businesses that do not benefit from the specific infrastructure as the County Governments increase property rates and service charges in a bid to invest in additional infrastructure services that do not benefit these rate payers.

In the LAR this problem was clearly highlighted:

Seepage of sewage into the water table, especially when combined with shallow wells for drinking water (without a purification process) results in serious health problems. This in turn creates an economic burden both in direct health costs and in lost days of work.

- The towns lack public sewer networks and rely on individual (developer/property owner) provision.
- Septic tank is the most used sewerage technology and recently there is increasing uptake of bio digester technology (few homes even make use of this form of sanitation).
- The increasing population density will render septic tanks and bio digesters inappropriate technologies, at some point.
- Exhauster trucks provide maintenance services to septic tanks, bio digesters and cess pits.

Although Nyandarua County is already part of the greater Nairobi Metro Region, the scope of the challenge facing the county is still manageable. By 2030 the population should be just over 1 million inhabitants. An increase of 200,000 people over the next 10 years would mean some 5,000 new households a year. If 20% are in urban areas, (as is the percentage today), then there will be 1,000 new urban dwellings each year (at 4 people per household). The current level of expenditure is KSH200,000 - 300,000 for septic tanks. The cost of providing the basic infrastructure is approximately KSH 600,000 per apartment (an add-on of 300,000). Projecting 1,000 new households per year times a minimal cost of 600,000 Ksh per household for infrastructure (a sceptic tank alone – though not suitable – would cost 3,000 USD) would mean a **600,000,000 KSH infrastructure deficit per year = 1.6 million Ksh/day.**

This does not include costs for Health, Education, and other critical services facilities. Nor does it include major access road development, which remains the responsibility of national and county government.

Much of this growth is currently taking place in informal settlements, which means that there is no consistent regulation nor payment of even existing fees. Nonetheless, the sanitation needs and resulting deficits are growing.

This is on top of the existing infrastructure deficit. Less than 8% of the households have adequate water and sewage treatment. Currently there are approximately 200,000 households of which 20% are urban, 40,000 households (requiring collective infrastructure solutions). Given the poor state of urban infrastructure, the costs of upgrading the existing infrastructure facilities (retrofitting and extending) would be about the same as starting new (or more expensive) infrastructure. **At a cost of 600,000 Ksh per urban household, there is a backlog of 24 Billion Ksh.** If spread over 10 years of financing this is approximately equal to the entire annual development budget of the county.

Thus, the need for Nyandarua County to manage infrastructure development is critical. However, the organizational structures, financial resources, and county legislation to take on this task need to be formulated and implemented. The challenge here is not creating new models for county infrastructure financing, but crafting the county government's institutions in a way, which will enhance their ability to utilize and adapt successful models. This requires an integrated strategy of action and organizational gearing up; a) upgrading planning capacities, b) engaging financial institutions, c) creating a dedicated development platform, d) establishing the legal anchors, and e) expanding the public mandate.

It is being recommended to institute a "development levy/fee" to be paid to the county government by developers (commercial or individual) for the construction of sewage treatment, water purification, drainage, and organic waste treatment. These payments will go either towards expansion and upgrading of central systems (when available at reasonable cost and time frame) or towards integrated neighbourhood treatment systems (examples already exist in some form in Kenya). Payment of the levy will be a precondition for receiving a building permit.

The economic feasibility of such a levy is based upon the relatively small add-on costs to construction that could easily be absorbed in the growing urban real estate market of Nyandarua County.

By using the county's statutory authority, not only to set regulatory standards, but also to charge developers the actual cost for construction of these critical infrastructure components, the county can have better control over their actual provision and either oversee their construction by the developers themselves or contract for their provision. In both cases there need to be dedicated financial and engineering management mechanisms to ensure proper implementation.

Example: Housing costs and generic infrastructure burden of costs in an urban area

The average cost of a 500-sqm plot for housing in an urban area is 1,000,000 KSH.

The cost of an 80sqm house including land and construction would be KSH 4,600,000. The additional cost of KSH 600,000 for payment of an infrastructure development levy (KSH 200,000 sewage + 400,000 other) would be about 11% of the Total cost 5,200,000 KSH. (The market value would increase much more)

These Framework Guidelines provide guiding principles and an implementation strategy, within the scope of the Physical and Land Use Planning Act, the County Governments Act, the Urban Areas and Cities Act, and the Public Finance Management Act, for ensuring that those developments that result in an increased or intensified use of land requiring significant investments in infrastructure services are able to have the requisite infrastructure in place and the main beneficiaries of such infrastructure make an appropriate and fair contribution to the cost of the infrastructure, without unduly burdening the County's ratepayers not associated with this additional infrastructure. This is to be achieved through capital contributions which the County Government will raise through Development Fees as envisaged under the Physical and Land Use Planning Act.

2.2 Infrastructure Development Strategy and Financing

Proper planning procedures and legal regulations have the potential of ensuring the revenue stream for infrastructure provision in Nyandarua County, but as with all resources, they require the right type of investment at the right time to become profitable both economically and socially.

Although this example did not present the details regarding the above private sewer project, such as engineering designs and costing, this initiative, despite its take-off challenges, signifies the 'willingness to pay' for better infrastructure, by developers and property owners. This is a critical element for institutionalization of a land-based/property-based financing mechanism for infrastructure provision in the town.

In Kajiado County, a section of developers and property developers attempted to undertake a private sewer construction to be connected to the network serving the EPZ. They raised *"kshs200,000 (US$ 2,000) for each building in order to raise ksh. 40 million (US$ 400,000). However, the project has since stalled after it was featured on media (television)"* (KII, with Resident of Kitengela Heights). The respondent indicated that negotiations between the county and the project (developers and property owners) were short of a win-win situation; hence uncertainties regarding the implementation of the project. *'EPZ has been coordinating but advised the private developers to agree with Kajiado county government on a common ground, but that is yet to come', asserted the respondent.*

To effectively address the new infrastructure needs and the mounting backlog, the county has to diversify ways of financing infrastructure; notably, to shift from conventional annual budgetary allocation to more guaranteed and long-term looking financing mechanisms, including establishing working partnerships with the private sector (developers and property owners) and local communities.

Even though there are only a few decades of experience globally, there are many examples of success. Municipal governments around the world use sophisticated mechanisms from municipal bonds to tax increment financing to promote development. As already described the new spatial planning law in Kenya contains the legally mandated preconditions for the payment of infrastructure costs. Building permits can be issued upon the condition of paying development fees (or some portion thereof).

In Kenya, the new Physical and Land Use Planning Act, No. 2019 (PLUPA) legally mandates the authority to County Governments to institute development fees as part of the process of application for development permission. In keeping with section 63 of the PLUPA, county governments have the authority to incorporate a development fee that is to be paid (or some portion thereof) to the county government by developers (commercial or individual) as in integral part of the planning process and granting of building permits.[23] The development fee can, however, only be imposed by the county government, once it has published regulations determining the circumstances under which such levies shall be imposed, the rates payable and the circumstances under which the development fees may be waived by the county government.

Based on comparative practices in other jurisdictions, it is envisaged that these development fees will go towards expansion and upgrading of central systems (when available at reasonable cost and timeframe) or towards integrated neighbourhood treatment systems, (examples already exist in some form in Kenya). Payment of the levy will be a precondition for receiving a building permit.

In order to transform this potential in

23 Section 63(1) PLUPA provides that "*A county executive committee member may levy a development fee against an applicant for development permission*".

Nyandarua into an investment program, the county government needs to adopt the planning procedure recommendations and additional policies that link spatial plans, legal instruments, finance structuring, and management framework adaptations. The County Integrated Development Plan needs to include not only long term strategic development objectives for the county, but also overall urban design (or designated target area), structuring of key infrastructure development ventures (BOT, joint venture, public project), financing structure (scope of funds, risk management, costs of financing/ return on investment, time frames), and the legal/organizational design of the specific infrastructure development venture.

The authority to impose development fees is further delineated in the Third Schedule to the Act which addresses development control. Of the eight development control processes and procedures enumerated in this Schedule, the county government will have to have due regard for the availability and adequacy of the infrastructure as far as permissions for Change of User, Extension of Users, Extension of Lease, sub-division scheme and amalgamation proposals and building plans are concerned. With particular regard to sub-division schemes and amalgamation plans, the county government will also have to consider the linkage and indication of classified roads in addition to the availability and adequacy of the infrastructure.

Finally, the adequacy of infrastructure will need to be addressed in every local physical and land use development plan in accordance with Section 5 of the Second Schedule to the Act. In particular, each such plan should include an analysis of, among other issues, Housing and Infrastructure, as well as Transportation and Communication[24].

24 Paragraph (e) Housing and Infrastructure Analysis, and Paragraph (f) Transportation and Communication Analysis under Section 5, Second Schedule.

The following key issues should therefore be covered under a Housing and infrastructure analysis:

i. Housing occupancy rates, accommodation density, housing requirements, type of residential areas and industrial locations.

ii. Education.

iii. Recreation areas and other public purpose land uses.

iv. Power lines and wayleaves.

v. Water and sewerage networks.

vi. Housing and infrastructure programmes.

In the Transportation and communication analysis, the following key issues will need to be addressed in the local physical and land use development plan:

(i) Road networks, footpaths, cycle-ways, railway lines, depots, waterways, docks, etc.

(ii) Telephone lines.

Although this new national legislation provides the county governments with the authority to levy development fees, as mentioned above, each county must pass its own regulations and incorporate it into the planning and building permit granting process.

A critical challenge, above and beyond spatial planning and legal authority for instituting development fees, is the big-time gap between the outlay of expenditures for planning and constructing infrastructure, that need to be in place in advance of residential and business projects, and the return of payment from development fees. (Fees are levied as a condition for receiving a building permit and paid in part or in full at that time). There can be a 2 to 7-year time gap especially in the case of central water and sewage facilities. Thus, the county is faced with the need for significant interim financing.

The first wave of residents will enter homes before there are sufficient funds from development fees to cover the full cost of major facilities. Therefore, there needs to be public investment in infrastructure, often over a period of 20 years, before costs can be recovered, as additional housing or business units are constructed. In part, this can be mitigated by a policy of interconnected decentralized units. This is best suited for water, energy, sewage, and organic waste treatment.

The second challenge is the relationship between the developers and the County Government. Using public financing (loans, bonds, or development budgets) is a well-accepted practice in developed nations around the world. It is predicated upon the understanding, acceptance, and de-facto payment of development fees by the private sector as an integral part of projects. The political culture of payment of these fees is strong, as are the sanctions for non-payment. By comparison, in Kenya, the collection of land-based taxes in general is very low and development fees are not even considered legitimate by many. As a result, county governments are reluctant to risk such development expenditures.

Furthermore, private sector developers are reluctant to pay the county governments development fees for infrastructure construction. They are fearful that the fees will be paid, but the funds will be "absorbed" into the regular budgets and the necessary infrastructure will not be constructed. Even assuming that the monies are utilised exclusively in targeted infrastructure, the concern is that the time frame of the developers (construction and occupancy) will not be adequately synchronized with the pace of infrastructure construction by the county government.

Overcoming the vicious cycle of public payment and non-repayment by the private sector or private sector payment and non-delivery of infrastructure services by the county government, is possible through the institutionalization of two-part organizational structure.

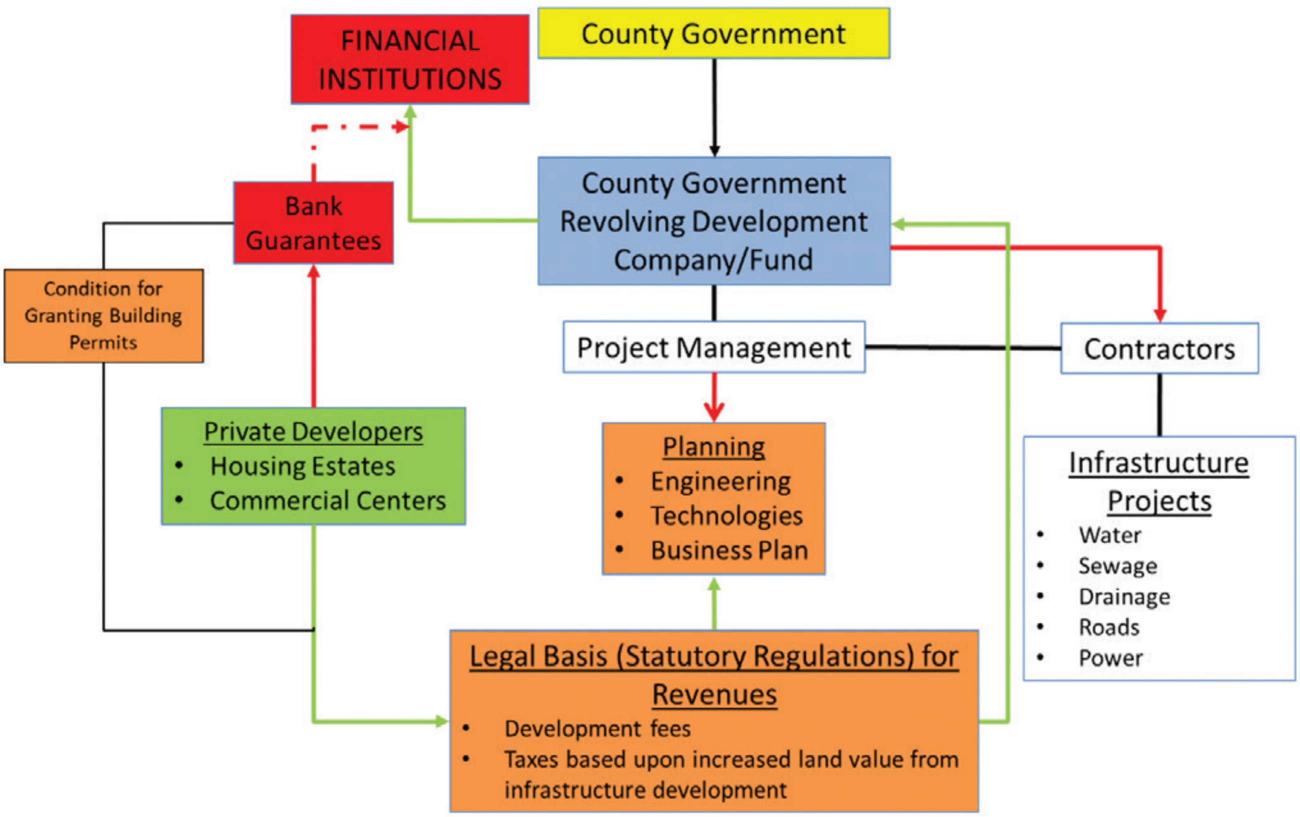
- Creating a dedicated Infrastructure Development Fund that ensures the use of development levy/fee payments only for the specific projects designated by the fee payment. This is to be outside the regular County Budget and is aimed at preventing the "absorption" of capital development revenues into the ongoing expenditures of the county government.

- The option of providing bank guarantees in lieu of full payment of development fees as a condition for a building permit. They would ensure full payment of development fees once the infrastructure is completed. This procedure can provide county governments with a secure source of funding which is a prerequisite for undertaking deficit financing of infrastructure projects.

This can provide the private sector with a mechanism to ensure that infrastructure fees are used exclusively for that purpose. With this mechanism, the county has no incentive to delay use of the funds. Although this does not completely guarantee synchronization of public and private initiatives, it creates a financing mechanism that, on the one hand, enables county government to initiate infrastructure development proactively and, on the other hand, serves to control unmanaged urban sprawl. (Permits will not be given until adequate infrastructure is in place).

The component of return on investment from development fees can be the primary source of funding for infrastructure development programs and can also serve as the basis

Infrastructure and Assets Development Financing



for an investment accreditation to financial institutions.

The financing structure being proposed here will operate as a revolving investment/development account. It will fund revenue generating development projects in two stages.

1. The first stage will be to undertake a full feasibility analysis and project structuring of infrastructure needed for housing and business – economically, organizationally, for engineering, and legally. This will enable the County to mobilize funds and create the appropriate implementation framework. It will include delineation of TORs and other components that are needed to bring the project to fruition. The investment in this stage is between 500-900,000 USD.
2. The second stage is project implementation/construction. Based upon the full feasibility analysis, the costs of putting in appropriate and sustainable infrastructures can be used to set the development levies for the different projects by location, scope and technology over time. This will serve to mobilize the investments needed and ensure repayment plus the cost of capital (interest, conditions of PPP, or other interim financing). An integral part of this stage is having the engineering and financial management mechanisms in place (legally and organizationally).

This financial strategy for county government led infrastructure development has very high feasibility especially if enforcement is rigorous. The issue of interim finance, though, is most acute at the planning stage. If a good feasibility analysis is done and development fees are levied accordingly, then the economic viability of the projects themselves should be easily assessed. The subsequent ability to finance the actual construction would be a function of the viability of the projects and the county's management capacity. The primary need then is for the county to establish a revolving fund for planning and feasibility analysis, which could recoup its costs over the course of the project.

Such a course of action, over time, would enable Nyandarua County Government to have a credit rating and track record to allow it to operate more independently. Donor/aid agency budgets could be turned into "investments" thus expanding revenue enhancing and infrastructure development projects through a growing revolving fund. The extent to which new funds would be needed is a function of the degree of risk and baseline economic viability to be set for these projects. Some, by their nature or target population, would require public non-refundable investment at the project level. The "return on investment" would be in more overall economic and/or human resource terms. However, the economic assessment would be known in advance and be transparent for decision-making.

2.3 Organizing for Implementation

In order to ensure a clear separation between development revenues and ongoing income generation, local government development corporations, which are legally constituted entities controlled and owned by the local government, frequently undertake infrastructure projects to provide the water, sewage, local roads and drainage needed by market driven housing.

The Nyandarua County Government Development Company together with a dedicated infrastructure fund, can provide the institutional framework for undertaking the detailed planning, financial structuring, and overseeing of the management of the implementation of development ventures/projects. Planning and implementation here are integrally linked. Implementation is not a onetime undertaking, but rather a development process that requires adaptation as it moves forward. Furthermore, financing is also more than a single stage event. Monies are allocated according to progress and revenues are generated over the life of the project.

The intention is not to transform the County Development Company into a bureaucratic institution, rather that it should contract a professional project management company (local or international). Such a management company would undertake the functional engineering and financial management under the auspices of the County Development Company. Likewise, the County Development Company is to be the legal entity to tender the bids and contract for the construction of projects or enter into other financial arrangements with investment institutions.

Although largely premised on the notion that necessary infrastructure is the responsibility of the government, there should be clear separation between responsibility for bulk infrastructure and responsibility for private sector infrastructure ventures, to intensify land use. The bottom line is that this is an obligation by both public and private sectors. The absence of instruments to coordinate and regulate this obligation in Kenya has had a negative (overload) effect on existing infrastructure and caused a deficit in upcoming large-scale projects.

As stated above, under the PLUPA, county governments have the power to impose planning conditions and infrastructure obligations and to determine the

Waste disposal adjacent the road

circumstances under which a development fee is applicable on private sector initiated developments. Development fees are a one-off capital charge to accommodate the impact of the new land use.

Granting Planning Permission with Conditions (PLUPA c.62(2)(a)

As explained earlier, there are often conditions attached to planning permission that need further details to be submitted and approved by the county government at certain stages of the development. There are three main types of conditions to enhance the quality of the development based on their relevance to both planning and to the specific development:

a) **Pre-commencement conditions:** These conditions need to be formally fulfilled prior to construction and or development starting on site;

b) **Performance conditions:** These conditions are normally progressive and largely capital intensive and require secondary processes to be discharged; and

c) **Pre-occupation conditions:** These conditions need to be formally discharged prior to the development being occupied or put into use.

Infrastructure Development as a Performance Condition

Planning obligations and conditions are powerful tools upon which the provision of necessary infrastructure can rest. Under the provisions of the local physical and land use plan, an analysis of infrastructural needs should be based on time specifics and local market dynamics.

The availability and adequacy of infrastructure is a prerequisite in the development control process, which is further delineated in the Third Schedule to the Physical and Land Use Development Act. Of the eight development control processes and procedures enumerated in this Schedule, the county government will have to have due regard for the availability and adequacy of the infrastructure as far as permissions for Change of User, Extension of Users, Extension of Lease, sub-division scheme and amalgamation proposals and building plans are concerned. With particular regard to sub-division schemes and amalgamation plans, the county government will also have to consider the linkage and indication of classified roads, in addition to the availability and adequacy of the infrastructure.

Finally, the adequacy of infrastructure will need to be addressed in every local physical and land use development plan in accordance with Section 5 of the Second Schedule to the Act. In particular, each such plan should include an analysis of, among other issues, Housing and Infrastructure as well as Transportation and Communication.[25]

Conditions can cover a cumulative multitude of matters, which require comprehensive guidance for their application. For the purposes of efficiency and effectiveness, a model based on sieving tiers that categorises the magnitude of the proposed development and the levels of assessment during the planning and development permitting process is essential. The table below provides a guideline on how these categories of development applications can be sieved through in a systematic manner.

However, these categories need to apply with caution: each condition attached to a planning permission must be precise and justified.

Calculation of Development Fees, Appraisal Criteria and Performance Measurement

The intention of development management is above all to promote public good; managing local development helps secure long-term benefits for sustainable communities. The charging of development fees reflects the possible private benefit implicit in the planning permitting process. The calculation formula is derived from a development parameter that reflects the overall cost in relation to

25 Paragraph (e) Housing and Infrastructure Analysis, and Paragraph (f) Transportation and Communication Analysis under Section 5, Second Schedule.

Tier 1	**All Development Applications namely:** • Change of use, extension of use, sub-divisions and amalgamations, processing of easements and wayleaves; • Extension of lease term; • Siting of education institutions, base transmission stations, petrol stations, eco lodges, camp sites, power generation plants and factories; • Construction/building permits; • High impact advertisement and signage applications; and • Low impact advertisements and signage, landscaping schemes.
Tier 2	**Development Applications that give rise to:** • development charge components contribution (Structural, civil, electrical, mechanical and ICT engineering services); • performance Conditions discharge through Interim, partial and incremental certification; • environmental and social impact; (environmental reports, traffic management reports, urban design drawing schemes); • final discharge of land development completion or building pre-occupation certification; • planning gain in lieu of infrastructural services contribution; and • being national strategic or inter-county projects.
Tier 3	**Development Applications in fulfilment of pre-commencement and performance condition(s) granted in Tier 1 and Tier 2. These include, but are not limited to;** • construction site board; • hoarding of construction sites; and • site safety and utility services.

the estimated impact of the development on external services.

The county planning appraisal and performance measurement criteria require regular reviews (5-year mid-term reviews for sectoral and spatial plans, and annual reviews for the CIDP) of the local infrastructure itself and the projected needs.

The approach serves the purpose of striking a balance between public and private interests and a fair administrative discretion in determining the development fees, standards and timelines for implementation. As indicated elsewhere in this report, it is imperative that the implementation of the development fees be guided by the benefits principle and treatment of all county residents in an equitable manner.

It is important to highlight that development permission is not granted in perpetuity and applicants are obliged to commence with the implementation of their development project within three years of obtaining such development permission. The development permission may, however, be extended by a further year subject to the applicant demonstrating good cause for such an extension.

Furthermore, developers are also liable to such fines or conditions as may be imposed by the county government where they fail to complete the building works within a period of five years.

The classification of infrastructure by sector and spatial disposition:

The physical and land use planning linkage with infrastructure can be promoted by specific county infrastructure development policy that integrates land use planning with the environment and the different types of infrastructure within and between different sectors to make a fairer and more inclusive society.

Other matters dealt with include traffic management and accessibility profiles for vehicles and pedestrians, including the minimum standards introduced for new developments under the classification listed in the table below.

Sector Classification	Spatial Disposition
Roads	Internal (within the confines of private land)
Storm water Drainage	
Street Lighting	External (trunk services serving multiple properties and land uses on public land)
Water Supply	
Sewerage Reticulation	Link (interface linking internal services to external bulk services)
Solid Waste	
Communications (Fibre Optics & BTS)	

In appropriate situations, the developer may receive a waiver for payment of the development fee. In lieu of payment, the developer would be required to construct the necessary infrastructure as determined by the county government in accordance with section 63(3) which provides that:

"*(3) Where a development fee has been waived in relation to an application for development permission, a county executive committee member may require that applicant to develop infrastructure in relation to the property in question for general use by the residents of the area where the property in question is located.*"

Thus, three tracks for implementation would need to be set in keeping with the parameters and function of each housing or business development and its location.

1. The County (or county development company in coordination with the water-sewage company) will provide the necessary infrastructure using the income from the development levy to construct neighbourhood infrastructure facilities (water, sewage, drainage, roads) or expand central systems

2. The developer will construct a neighbourhood treatment facility under county supervision/regulation and the development levy will be greatly reduced (20-30% remaining for infrastructure components that are located beyond the neighbourhood level).

3. The development levies will be the source of funding for BOT infrastructure projects that will include an operational income and management component.

This type of development levy is a fundamental mechanism of local and regional government agencies around the world. It ensures necessary sanitation treatment, healthy water, and access. It also provides a secure source of funding that enables deficit financing.

It "requires developers to go beyond installing infrastructure facilities at their own site. It obliges a developer to finance part or all of the costs of external infrastructure needed to deliver public services to the site. Thus, developers are required to build subdivision roads and help pay for major access highways to the area. They may be required to help pay for the trunk lines that deliver water and for wastewater removal and treatment systems. In some cases, investment responsibilities are assigned through formal public-private partnerships" (Peterson, G, 2008. *Unlocking Land Values to Finance Urban Infrastructure* https://openknowledge.worldbank.org/bitstream/)

2.4 Steps for Implementation:

The primary stages and division of responsibilities between the public and private sectors include:

- Conceptualization and feasibility analysis of infrastructure development: needs and potential for covering costs - macro plan for infrastructure development: scope, locations, time frames, technologies
  - Water
  - Sewage
  - Drainage
  - other amenities
- Approving the legislation for county government to have the authority to levy development fees
  - transforming the National Planning Act into delineated county level regulations
  - setting environmental and health standards for water and sewage treatment that are to be met as a precondition for building permits
  - legislation based upon environmental protection and building regulations and setting the development levy rates
- Establishing a dedicated development platform under the county government
  - County mandated organizational framework designed to integrate the public and private actors


A blocked drainage systems.

- A closed, self-contained system for financial management of the development processes and projects

- Contracting for Project Management:
  - oversight of detailed planning
  - preparation of bids/TORs
  - supervision of construction
  - establish a training and maintenance plan/mechanism

- Detailed assessment at the engineering level is necessary: what specific types of technologies are suitable for neighbourhood level integrated treatment systems that can be easily maintained, where can centralized systems be expanded, where are specific locations of development?
  - scope and locations
  - technologies
  - costs
  - financing arrangements
  - public – private strategy

- Based upon the engineering assessment, the financial component needs to be refined: what are specific costs, what should the rate of the development fee/levy be and how should it be structured? (by sqm of construction, number of housing units, or other)

- Establishing a Revolving County Development Fund with the regulations for development fee guarantees from developers and a payment schedule that

Figure 1. Different Levels of Private Sector Engagement in PPP Contracts

<table>
<tr><th>Type of cooperation</th><th>Identify Infrastructure Need</th><th>Propose Solution</th><th>Project Design</th><th>Project Financing</th><th>Construction</th><th>Operation/ Maintenance</th><th>Ownership</th></tr>
<tr><td>Bid/Build</td><td colspan="4">Public Sector</td><td>Private Sector</td><td colspan="2">Public Sector</td></tr>
<tr><td>Design/Build</td><td colspan="2">Public Sector</td><td>Private Sector</td><td>Public Sector</td><td>Private Sector</td><td colspan="2">Public Sector</td></tr>
<tr><td>Design/Build/Finance</td><td colspan="2">Public Sector</td><td colspan="3">Private Sector</td><td colspan="2">Public Sector</td></tr>
<tr><td>Design/Build/Finance/ Operate/Maintain</td><td colspan="2">Public Sector</td><td colspan="4">Private Sector</td><td>Public Sector</td></tr>
</table>

Source: Brookings analysis and expert interviews

will give the county a secure source of revenues against which it can leverage development loans/investments.

- Detailed planning and design of specific projects (infrastructure for housing or business development; county owned assets improvement)
  - detailed architectural and engineering plans
  - business plan and investment strategy
  - structuring of partnership if relevant
  - ongoing management mechanism
- Project construction
  - choice of contractors
  - site constructions of infrastructure in coordination with developers
  - financial management: cash flow, payments, collections
  - project supervision
- Collections of long-term fees and levies

The following figure gives an overview both of the primary stages and the options for public private cooperation.

In order to undertake this initiative, it is recommended to prepare a TOR for the management of this process and consider sources of interim funding or a donor-based program together with UN-Habitat.

CHAPTER 03

Legal Foundations for Development Management and Development Levies

Mary Chege LLM

3.1 Introduction

These Guidelines provide a legal framework for the principles and an implementation strategy for the imposition of development levies, with a view to ensuring that the main beneficiaries of infrastructure within the County make an appropriate and fair contribution to the cost of such infrastructure, without unduly burdening the County's ratepayers not associated with such infrastructure. The Guidelines are aligned to the Constitution of Kenya, the Physical and Land Use Planning Act, No. 13 of 2019, the County Governments Act, No. 17 of 2012 and the Public Finance Management Act, No. 18 of 2012, as amended from time to time.

These Guidelines are consistent with:

(i) Article 209 of the Constitution of Kenya, which empowers County Governments to impose property rates and any other tax that it is authorized to impose by an Act of Parliament. Art. 209(4) of the Constitution further provides that the National and County Governments may impose charges for the services they provide;

(ii) Article 183(1) of the Constitution of Kenya, which requires the county executive committee to implement, within the county, national legislation to the extent that the legislation so requires;

(iii) Section 63 of the Physical and Land Use Planning Act, No. 13 of 2019, which empowers the county executive committee member responsible for planning to levy a development fee against an application for development permission;

(iv) Section 106 of the County Governments Act, No. 17 of 2012, which requires that county plans be based on the functions of the County Governments as specified in the Fourth Schedule of the Constitution and take due cognizance of the financial viability of development programmes;

(v) Section 120(2)(b) of the County Governments Act which requires that the amount individual users pay for services should generally be in proportion to their use of that service; and

(vi) Section 104(1)(d) of the Public Finance Management Act, No. 18 of 2012 requires County Treasuries to monitor, evaluate and oversee the management of public finances and economic affairs of the county government, including mobilizing resources for funding budgetary requirements of the county government and putting in place mechanisms to raise revenue and resources.

The Guidelines provide a framework for the imposition of development levies associated with the provision of bulk infrastructure services and link infrastructure services to large scale property developments within the county.

Every new development is associated with the intensification of a specific parcel of land and the development fee is designed to ensure that the pro rata share of the actual capital cost of County infrastructure required to service a particular development is actually borne by the persons who will benefit from the intensified use of the land.

The Guidelines identity the development control applications that will give rise to a development fee, as not all land use changes will give rise to the development fee.

These Development Fee Guidelines prescribe a methodology for determining the unit costs for use in computing Development Fees based on the impact on county services and infrastructure that a particular development will have. This will ensure that property developers have a clear guideline and can estimate these levies during their planning process and incorporate these costs into their property development costs.

Finally, the Guidelines make provision for the establishment of a County Sustainable Infrastructure Development Fund into which all monies contributed as Development Fees are to be paid and ring-fenced for utilization for the sole purpose of implementation of infrastructure associated with the development levies within the County.

The Framework Guidelines are based upon a careful review of global studies and policies in various jurisdictions, including South Africa, Canada, United Kingdom and Australia that have successfully implemented effective systems of infrastructure services contributions also referred to as development charges, infrastructure services fees, engineering services contributions or development fees.

The Challenge

As county governments have sought to effectively execute their service delivery mandate of transferred functions, either through the county government departments, or the various boards established under the Urban Areas and Cities Act, No. 13 of 2011, it has become evident that in the midst of the devolution transition, the increased development in the counties, as elsewhere across the globe, is associated with a corresponding increased demand for essential bulk infrastructure including water, sewer, storm water management, roads, transport, solid waste and electricity. Other services required as the population continues to grow include social services such as healthcare facilities, schools, parks and recreation and other public amenities.

Funding to cover the cost of infrastructure is currently obtained from four main sources:

Market Waste disposal Point.

(i) National Government Transfers pursuant to Article 202(1) of the Constitution, which requires that revenue raised nationally shall be shared equitably between the National and County Governments;

(ii) Own Source Revenues pursuant to Articles 209(3) and 209(4) of the Constitution which entitles County Governments to impose property rates and entertainment taxes and such other charges for services they provide;

(iii) Loans subject to the conditions imposed in Article 212 of the Constitution regarding National Government guarantee and County Assembly approval26; and

(iv) Contributions from Development Partners under agreements signed between development partners and National Treasury (e.g. Nairobi Metropolitan Services Improvement Programme, Kenya Informal Settlements Improvement Programme, Kenya Municipal Programme, etc.).

Several counties have transitioned, or are in the process of transitioning, from primarily agricultural or rural economies to urban or metropolitan economies ripe for increased local and foreign investment. However, the lack of enforcement of development controls has resulted in urban sprawl replete with unserved and inappropriate or poorly sited developments and buildings, without adequate facilities or infrastructure to support them.

Current inadequate infrastructure and utilities have been associated with a history of poor service connections spanning several decades, poor network accessibility, inadequate capital investments and inadequate operations and maintenance funding. As a result, the productivity of firms and individuals is compromised, there is a low attraction of foreign and domestic investments and poor exploitation of the vast opportunities presented within the counties.

3.2 Framework Guidelines Context

These Framework Guidelines have been developed to provide a framework for regulation of the imposition of Development Fees to ensure the implementation of appropriate infrastructure for the provision of various services within the county relating to those functions that have been devolved to the County Government under Part 2 of the Fourth Schedule of the Constitution.

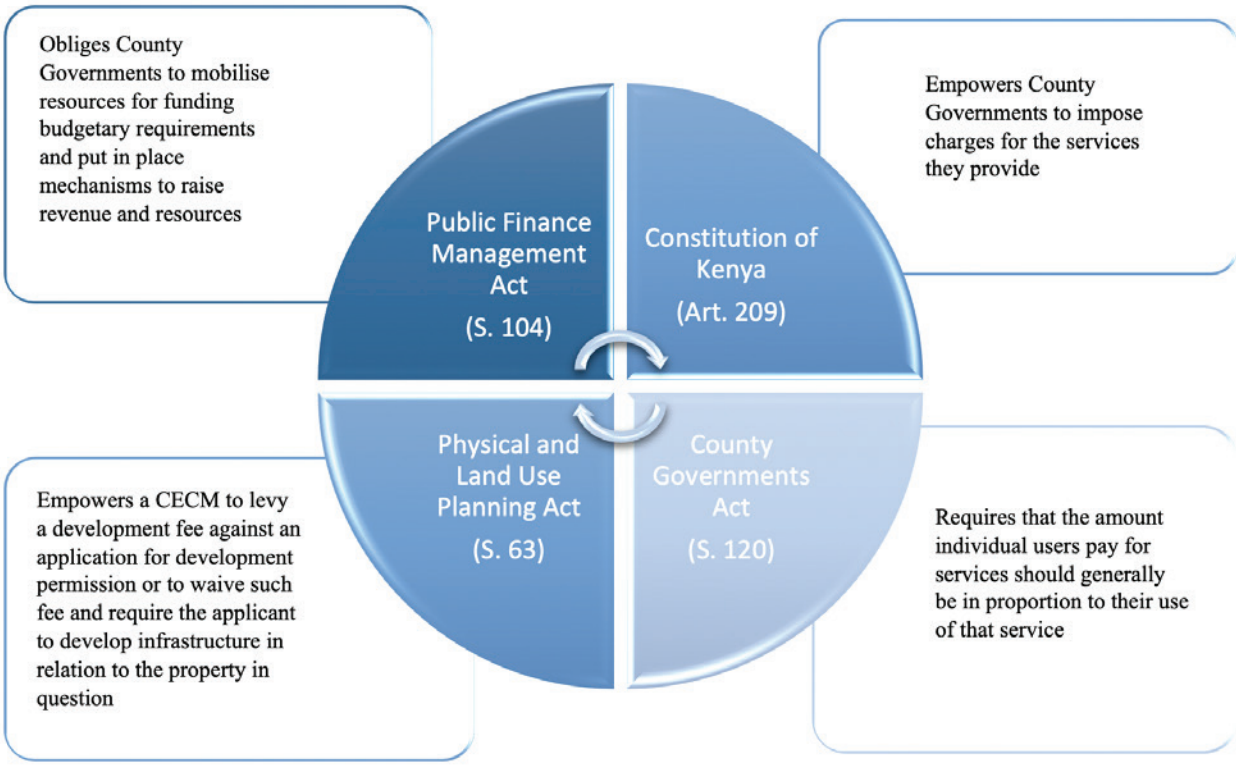
The Framework Guidelines are consistent with Section 63 of the Physical and Land Use Planning Act and Section 106 of the County Governments Act. Finally, the Framework Guidelines reflect the role, purpose and legal nature of Development Fees as instrumental in the performance of county government functions as envisaged in the Fourth Schedule of the Constitution.

3.3 Applicable Legislation

Development Fees will be an integral part of a broader legal framework for urban land development and County Government finance, both at national and county levels. Although largely premised on the notion that necessary infrastructure is the responsibility of the government, there should be clarity on the public sector mandate to provide bulk infrastructure in general, versus the private sector responsibility to contribute to bulk infrastructure resulting from the intensified use of land by the private sector. Until the recent enactment of the Physical and Land

26 Article 260 of the Constitution defines “loan” to include any form of borrowing, lending or deferred payment in respect of which money from a public fund may be used, or is required to be used, for payment or repayment.

Figure 1.0: Regulatory and Institutional Framework Governing Development Fees



Use Planning Act in 2019, the absence of instruments to coordinate and regulate the latter obligation in Kenya has had a negative (overload) effect on existing infrastructure and resulted in an infrastructural deficit in upcoming large-scale projects.

The starting point for the discussion on development levies is Article 209(3) of the Constitution of Kenya, which empowers a County Government to impose property rates, entertainment taxes and any other tax that it is authorized to impose by an Act of Parliament. Art. 209(4) of the Constitution further provides that the National and County Governments may impose charges for the services they provide.

Article 183(1) of the Constitution requires that a county executive committee member shall implement within the County, national legislation to the extent that the legislation so requires. To this end, section 63 of the Physical and Land Use Planning Act empowers the County Executive Committee Member to levy a development fee against an applicant for development permission and to publish regulations determining the circumstances under which a development fee shall be levied, the rates that shall be payable and the circumstances under which a development fee may be waived.

Part 2 of the Fourth Schedule of the Constitution outlines the functions that are devolved to the County Government including, among others:

(i) refuse removal, refuse dumps and solid waste disposal;

(ii) County transport (includes county roads, street lighting, traffic and parking, public road transport;).

(iii) electricity and gas reticulation and energy regulation;

(iv) County public works and services (storm water management systems in built-up areas, water and sanitation services); and

(v) Firefighting services and disaster management.

Article 43 of the Constitution provides that every person has the right to, among others, "…*accessible and adequate housing … and to reasonable standards of sanitation and to clean and safe water in adequate quantities*…"

The County Governments Act, 2012 outlines the manner in which County Governments may provide the services and perform the functions enumerated in the Fourth Schedule, while the Public Finance Management Act, 2012 prescribes the manner in which public finances may be planned and expended by the County Government in the performance of its functions. These functions are discharged through, among others, the provision and operation of infrastructure, including external infrastructure.

Section 113(2) of the CGA requires that each county's integrated development plan shall provide clear input, output and outcome performance indicators, including the percentage of households with access to basic services contemplated under Article 43 of the Bill of Rights of the Constitution.

The obligation to plan for future generations of the County is emphasised in Section 102 of the County Governments Act, which provides that the principles of planning and development facilitation in a county shall protect the right to self-fulfilment within the county communities and with responsibility to future generations.

Section 103 further identifies one of the objectives of County planning as being to *"…facilitate the development of a well-balanced system of settlements and ensure productive use of scarce land, water and other resources for economic, social, ecological and other functions across a county…and maintain a viable system of green and open spaces for a functioning eco-system"*.

Further, it is envisaged under Section 120 of the County Governments Act that a County Government or any agency delivering services in the County shall adopt and implement a tariff and pricing policy for the provision of public services. Such a tariff policy is required to reflect several guidelines, some of which include:

(i) The amount individual users pay for services should generally be in proportion to their use of that service.

(ii) Tariffs shall reflect the costs reasonably associated with rendering the service, including capital, operating, maintenance, administration and replacement costs, and interest charges.

(iii) Provision may be made in appropriate circumstances for a surcharge on the tariff for a service.

(iv) Provision may be made for the promotion of local economic development through special tariffs for categories of commercial and industrial users.

The County Government is also empowered to differentiate between different categories of users, debtors, service providers, services, service standards, geographical areas and others,, as long as the differentiation does not amount to unfair discrimination. Section 120(3)(d) of the County Governments Act further requires that the provision of services should be reflective of capital costs as well as costs relating to operations and maintenance, administration, replacement & interest charges associated with the provision of such services.

Section 63 of the Physical and Land Use Planning Act empowers a county executive committee member to levy a development

fee against an application for development permission and, where such fees are waived, to require an applicant for development permission to develop the necessary infrastructure in relation to the property in question for general use by the residents of the area where the property in question is located. The manner in which such fees shall be levied, together with the rates payable and circumstances for waiver, are to be stipulated in regulations published in the Kenya Gazette.

Finally, Section 104(1)(d) of the Public Finance Management Act requires County Treasuries to monitor, evaluate and oversee the management of public finances and economic affairs of the county government, including mobilizing resources for funding budgetary requirements of the county government and putting in place mechanisms to raise revenue and resources.

It is on the above basis that these Framework Guidelines have been developed to provide guidance to county governments on the implementation of development levies as envisaged under section 63 of the Physical and Land Use Planning Act.

3.4 Regulation of the County Planning Function

The planning role within county government is designed to ensure the harmonisation of the development of country communication systems, their infrastructure and related services, as well as provide the pre-conditions for integrating underdeveloped and marginalised areas to bring them to the level generally enjoyed by the rest of the county. The County Planning Unit (CPU) is therefore at the core of all planning within the county government and is responsible for:

(i) coordinating integrated development planning within the county;

(ii) ensuring integrated planning within the county;

(iii) ensuring linkages between county plans and the national planning framework;

(iv) ensuring meaningful engagement of citizens in the planning process;

(v) ensuring the collection, collation, storage and updating of data and information suitable for the planning process; and

(vi) ensuring the establishment of a GIS based database system.

County governments are required, under the County Governments Act, the Physical and Land Use Planning Act and the Urban Areas and Cities Act, to develop various planning instruments as follows:

3.4.1 County Sectoral Plans

Under this public policy making process, each county department (Sector) is mandated by law to develop a ten-year County Sectoral Plan that aligns the financial and institutional resources to agreed sector policy objectives and programmes. The set programmes provide a basis for sector budgeting and performance management. In their administrative structures, county governments have an average of 10 departments.[27]

3.4.2 County Spatial Plan (County Physical and Land Use Plan)

A County Spatial Plan (County Physical and Land Use Development Plan) is a ten (10) year plan that seeks to accommodate the needs identified in the various County Sectoral Plans within a technical and spatial framework. The spatial plan indicates the desired patterns of land use within the county and identifies areas where strategic intervention is required with clear statements of its linkages to the regional, national and the other county plans.[28] **In its spatial depiction, the plan should indicate where public and private land development and infrastructure investment should take place by taking into account any guidelines, regulations or laws as provided for under Article 67(2) (h) of the Constitution.[29]**

3.4.3 County Integrated Development Plan (CIDP)

The planning, delivery and financing of urban service delivery falls squarely within the mandate of county governments through a range of institutions, including the county departments, and urban boards and committees. The convergence of the above two sets of plans is the five-year County Integrated Development Plan (CIDP) that identifies the county institutional framework for the implementation of the counties' plans, including the County Sectoral Plans and County Spatial Plan with provisions for evaluation and monitoring. The CIDP addresses the county's internal transformation needs as informed by the strategies and programmes for any investment and development initiatives in the county, including infrastructure, physical, social, economic and institutional development.
A CIDP should inform the county's budget, based on the annual development priorities and provide a basis to prepare identified action plans for the implementation of strategies with clear input, output and outcome performance indicators.[30]

27 Article 179 of the Constitution vests the executive authority of the county in a county executive committee composed of the governor and deputy governor and a maximum of ten members with each member being responsible for a county department.

28 The Physical and Land Use Planning Act identifies and provides the framework for the development of the National and Inter-County Physical and Land Use Development Plans. Section 27 in particular requires that other plans, such as the Inter-County, County, City or Urban Area Physical and Land Use Development Plans, base their preparation on the National Physical and Land Use Development Plan prepared in accordance with Section 21 of the Act.

29 This Article vests the National Land Commission with the mandate to monitor and have oversight responsibilities over land use planning throughout the country.

30 Section 108 County Governments Act

A key component of the CIDP is a resource mobilisation and management framework which is required to include the financial resources that are available for capital project developments and operational expenditure identified in the CIDP, together with a financial strategy that includes mechanisms for increasing revenues and external funding for the county and its development priorities. While the main source of funding for the county governments is the unconditional equitable share transfer under Articles 202 and 203 of the Constitution, county governments are also mandated under Article 209 to generate own source revenues from various sources including property rates, as well as levies and user fees for services rendered.

As with the County Spatial Plan, public participation is a key component of the development of the CIDP and in particular, county governments should be guided by the principles of reasonable access to the process of formulating and implementing development proposals, projects and budgets as well as the establishment of specific standards.

3.4.4 City or Municipal Plans (Local Physical and Land Use Plans)

Towns in Kenya remain the dominant focal point of both public and private sector activities. The rise in population and the sheer numbers of urban residents give perhaps the clearest indication facing Kenya's urbanisation processes. **The County Governments Act recognises that a city or municipal plan shall be the regulatory instrument for development facilitation and development control within the respective city or municipality** and should be reviewed every five years subject to the approval of the county assemblies.

The Urban Areas and Cities Act further requires that county governments initiate an urban planning process for every settlement with a population of at least two thousand residents.[31]

The Local Physical and Land Use Plan should therefore plan for zoning, urban renewal or development, **provide guidance for the development of infrastructure, as well as provide a framework for coordinating various sectoral agencies. Most importantly, the Plan should provide a framework and guidelines on building and works development in the relevant city,** municipality, urban area or other smaller urban centres (including local centres and market centres).

3.5 Infrastructure as a Development Factor

As discussed above, the physical and land use plans which include public infrastructure investment proposals are based on a 10-year time frame. The alignment of the 10-year sectoral plans with the physical and land use plans allows for prioritisation and **scheduling of the implementation of bulk infrastructure investments, which would influence and promote private sector development initiatives and further guide the imposition of development fees to be utilised towards internal and link infrastructure.**

The operating efficiency of land development systems as an actual tool of control is the link between the infrastructural needs analysis in the physical and land use plans and the supply side development economy. Private sector investment that results in intensified land use has to compete in the marketplace by providing key infrastructure as an enhancement of both site and buildings, and the infrastructure must be completed and brought into service before occupation of the buildings under construction. An investor must therefore deploy a financing model against the prospect of financial return.

31 Section 36 Urban Areas and Cities Act, No. 13 of 2011

3.6 Principles Guiding the Development Fee Framework Guidelines

In preparing these Framework Guidelines, care was taken to reflect the principles enshrined in the various provisions of the Constitution, the Physical and Land Use Planning Act, Public Finance Management Act, the County Governments Act and the Urban Areas and Cities Act. Key among these include:

Equitable & Justifiable: Section 120(3)(a) of the County Governments Act provides that users of county services should be "…treated equitably in the application of tariffs, fees, levies or charges…". This implies that the Development Fees should be reasonable, balanced and practical so as to be equitable to all stakeholders.

The key function of an efficient system of Development Fees is to ensure that those who benefit from new infrastructure investment, or who cause off-site impacts, pay their fair share of the associated costs of such infrastructure.

This position is entrenched in the County Governments Act under Section 120(3)(b), which provides that "…*the amount individual users pay for services should generally be in proportion to their use of that service*".

On the other hand, it is important for county governments to ensure that the imposition of development levies upon new developments to finance specified infrastructure should not impose an unfair burden on such developments and adversely impact their viability. The development levies should therefore be applicable after an assessment of the additional infrastructure needs and/or necessary improvement programs, thereby ensuring that new developments are required to pay only that portion of the costs of constructing the infrastructure facilities, specifically and uniquely attributable to the new development(s).

Limited to Purpose: Development Fees paid pursuant to section 63 of the Physical and Land Use Planning Act should be of restricted use and dedicated to the exclusive purpose for which they were raised, i.e. paying for the infrastructure services, whether such payment is made directly or as a pledge against bonds, revenue certificates or other obligations of indebtedness.

The development levies a developer should make are limited to the expected impact on the infrastructure and services. Property developers in the County should not be asked to contribute to a backlog or to provide services in excess of the impact the land use change will have. The new development should therefore not subsidize existing communities, as the county governments should fund the backlog and other infrastructure from funds specified for this purpose.

Predictability: Development Fees imposed by a County Government should be a predictable, legally certain and reliable source of revenue for the County Government for providing the necessary infrastructure. In order to promote predictability and coordination, the costs associated with County infrastructure should be established before capital grants or subsidies from National Government or other funding source are applied, so that there is full transparency regarding the funding of County infrastructure.

This is further supported by Section 107(2)(g) of the Public Finance Management Act, which requires that county governments should ensure a reasonable degree of predictability with respect to the level of tax rates and tax bases. By knowing the estimated cost of the Development Fees beforehand, developers will be able to build that cost into their viability calculations before lodging an application with the County Government for approval of the proposed development.

The development levies are additional and supplemental to and are not a substitute for, any other requirements imposed on the development by the relevant county government. In no event should a property owner or developer therefore be obligated to pay more for infrastructure services than the amount calculated for that specified development.

Where the development fees are reviewed, it is important to note that Regulation 65 of the Public Finance Management (County Governments) Regulations 2015 permits county governments to review all fees, charges or rates, scales or tariffs of fees and charges that are not fixed by any law that relate to revenue accruing to the county. Information on the tariff structure is required to be disclosed in annual reporting including information on exemptions, discounts, free services and any other aspect of material influence on the county's revenue yield.

Full Cost Recovery: The primary role of an effective system of Development Fees is to ensure the timely, sustainable financing of required County infrastructure to support land development in line with County planning. Pursuant to Section 120(3)(d) of the County Governments Act, the imposition of the Development Fees related to the provision of infrastructure services within the County therefore needs to be reflective of not just the capital costs associated with rendering the service (e.g. road infrastructure or sewerage system), but also those costs relating to operating, maintenance, administration and replacement, and interest charges.

The Development Fees should therefore, at the minimum:

a. be determined on identifiable and measurable costs to avoid distortions in the economy and in patterns of spatial development;

b. not be used as a spatial planning policy instrument. Inevitably, however, removing the current, implicit subsidies for urban sprawl arising from the under-recovery of Development Fees would lead to less sprawl; and

c. where appropriate, be levied on a sectoral or geographic scale to more accurately approximate costs within a specific impact zone.

Administrative Ease and Uniformity: The determination, calculation and operation of Development Fees should be administratively simple and transparent. Citizens should therefore be able to access clear and accurate information in reasonable detail on how the development levies are computed, which developments are subject to the levies and which are exempt, the procedure for exemption for eligible developments or portions thereof, etc.

Finally, the roles, duties and responsibilities of the county government and the developer should be clear and unambiguous as should the complete process applicable for the computation, payment or exemption of the development levies. Details on the enabling legislation and all administrative forms, Development Fee calculators, County spatial plans, County Master Plans, County Infrastructure Plans per affected services and other related documents should be publicly available at the County Offices, Website and such other media as the County Government may choose to make such information and documentation publicly available, in accordance with the provisions of Part IX of the County Governments Act. Such a system will provide greater certainty to landowners, developers and investors, while improving administrative efficiencies within the County Government.

3.7 Justification for a Uniform Development Fee Framework Applicable Across Counties

One of the key factors identified by the African Development Bank, in explaining the low infrastructure provision on the African continent, is weak legal, regulatory and institutional frameworks that serve as major constraints to attracting private capital to infrastructure.[32] They have been either ineffective or non-existent and when laws are enacted, they may not be implemented or may lack the necessary framework to ensure actual implementation.

The lack of appropriate legal, regulatory and institutional frameworks not only increases project costs but also hampers the ability of the private sector to engage appropriately and effectively with the public sector agencies as each project is treated on a case by case basis – opening doors to corruption activities and uncompetitive pricing and undermining infrastructure maintenance and sustainability of any benefits that may accrue with such infrastructure. The ad hoc processes further impact the ability of the public sector to develop the necessary skill set required, not only to assess projects and their associated infrastructure service needs, but also to define these infrastructure needs in well-defined infrastructure master plans within their respective jurisdictions.

Finally, even where a sufficiently skilled workforce may exist within the public bureaucracy, poor coordination between relevant national and county government processes or within various county government departments makes the process complex and time consuming, further discouraging investors.

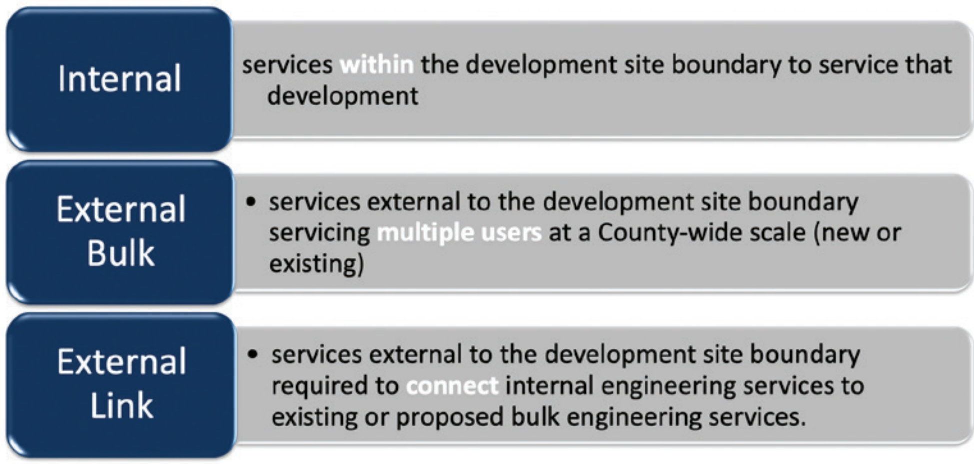
32 https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/2018AEO/African_Economic_Outlook_2018_-_EN_Chapter3.pdf, at 76

It is recommended that these Framework Guidelines form the basis for adoption by county governments across the country subject to such customisation made necessary by the circumstances peculiar to the respective counties, so as to ensure uniformity in application. In so doing, the benefits that accrue to both county governments and developers have been summarised in Table 1.0 below:

Table 1.0: Summary of Benefits of Implementing Development Fees

Benefits to County Governments	Benefits to Developers	Benefits to Citizens
Enhance the revenue streams for financing strategic county infrastructure for service delivery	Assurance of a mechanism to finance new infrastructure for proposed development and provide the basis to hold county governments accountable for timely delivery of required infrastructure	Assurance that the infrastructure required to service new development is paid for by direct beneficiaries so that existing residents do not subsidise new developments
Promotion of integrated planning and budgeting between spheres of government by ensuring each sphere bears the full cost of infrastructure provision and adequate resources allocated to service infrastructure for poor households	Developers involved in the provision of affordable housing assured of adequate allocation of funding for infrastructure to service these houses, as county funding is released from infrastructure provision for higher income developments	Increased infrastructure investment to service poor households reduces sprawl of informal settlements without adequate infrastructure
Spatial impact of development charges has potential to guide planning by discouraging urban sprawl which perpetuates unequal spatial patterns, thus reversing unsustainable low-density expansion of urban and peri-urban settlements not supported by requisite infrastructure	Developers encouraged to undertake infill development by investing in areas where infrastructure already exists	Residents assured of developments that are supported by adequate infrastructure
Provide pledgeable revenue stream to support borrowing by counties for infrastructure with development charges being pledged to repay this debt which will reduce finance charges in rates and tariffs	Provide a mechanism to compute the costs of the infrastructure associated with the development and accurately pass this on to the end users in a coherent manner	Reduction in rates and tariffs reduces the cost burden of new infrastructure on existing residents
Uniformity across county governments on the application of development levies which will eliminate unfair competition and/or treatment of developers	Ensures that developers only pay their proportionate share of the infrastructure which are directly attributable to their development	Residents in less urbanised areas assured of availability of adequate infrastructure, thus reducing mobility and strain on key urban centres and cities
Enhanced ability to provide sufficient infrastructure in a timely and efficient manner to support property developments and economic development	Availability of infrastructure unlocks further development in a specified area, thus increasing the value of the developments	Assurance that the requisite infrastructure will be available for new developments that they are moving into, thus encouraging economic investments in the area

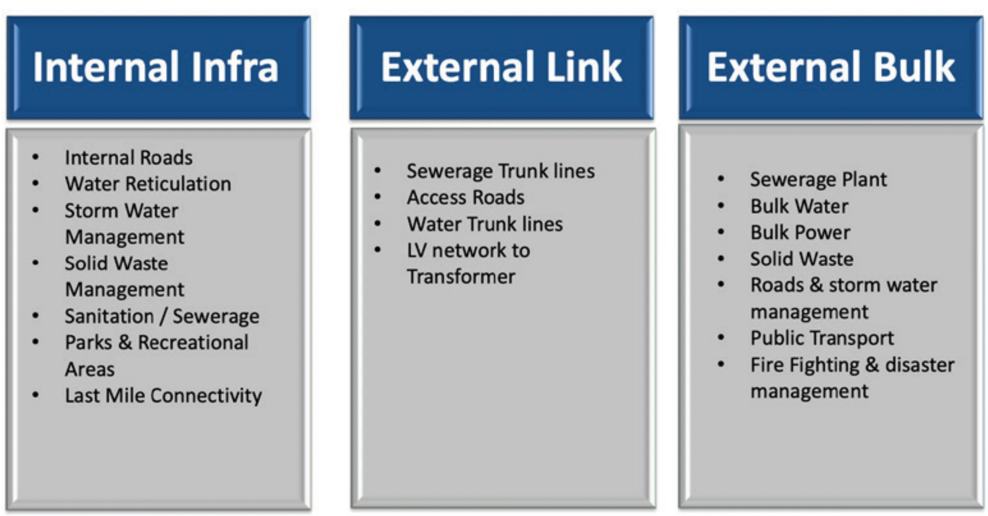
Figure 2.0: Key Categories of infrastructure Services



With the cost of infrastructure for specified property developments being directly financed through a development fee on a “user pays” principle, the county governments would be able to release resources that would otherwise have been dedicated to meeting these infrastructure needs, with these funds becoming available to be spent on other development priorities.

For example, the State Department of Housing and Urban Development estimates the costs associated with infrastructure delivery to service the 1 million target homes as 25% for onsite infrastructure and 20% for offsite infrastructure computed as a percentage of the average housing unit cost. These costs would then be funded directly by the national government, thus ensuring that the development fees do not have an adverse impact on the poor.

Figure 3.0: Key Components of Internal and External Infrastructure Services



3.8 Classification of Infrastructure Services

The physical and land use planning linkage with adequate infrastructure can be promoted by specific county infrastructure development policies that integrate land use planning with the environment, and the different types of infrastructure within different sectors to build a more inclusive society. Section 8 of the Third Schedule of the Physical and Land Use Planning Act therefore requires a county government to have due regard for the availability of various factors, including adequate infrastructure where a development involves the erection of a building. These Framework Guidelines cover the following infrastructure services within the scope of the development levies:

The Second Schedule of the Physical and Land Use Planning Act provides further guidance on the scope of housing and infrastructure analysis that needs to be undertaken within the context of a local physical and land use development plan. This includes:

(a) Housing occupancy rates, accommodation density, housing requirements, type of residential areas and industrial locations;

(b) Education;

(c) Recreation areas and other public purpose land uses;

(d) Power lines and wayleaves;

(e) Water and sewerage networks;

(f) Housing and infrastructure programmes;

(g) Transportation and communication analysis;

(h) Roads networks, footpaths, cycle ways, railway lines, depots, waterways, docks, etc.; and

(i) Telephone lines.

The particular components of what constitutes each of the three infrastructure types can therefore be further broken down as follows:

3.8.1 Internal Infrastructure Services

The Internal Infrastructure Services are those for the installation of which the developer is solely responsible. These Framework Guidelines provide a mechanism for the implementation of the internal infrastructure services by either the developer or the county government, while maintaining the responsibility for the associated costs with the developer. This therefore solidifies the county government's enforcement role in ensuring that the internal infrastructure services required under the existing planning legislation are indeed implemented.

The computation of, and transfer mechanism for, the costs associated with the Internal Infrastructure Services, which are solely the responsibility of the developer, will, however, be different from the mechanism for computing and paying for the Development Fees.

The purpose of including these costs in the scope of these Framework Guidelines is to close the loophole abused by developers through which they obtain development approvals conditional upon installation of internal infrastructure services, but subsequently fail and/or neglect to install this infrastructure.

3.8.2 External Infrastructure Services:

The External Infrastructure Services comprise Bulk and Link Infrastructure services and different rules apply to the two categories of Infrastructure Services. It is envisaged that developers within the County will be required to pay the following:

(i) a pro rata share of the cost of the Bulk Infrastructure Services to the development; and

(ii) the direct costs of any Link Engineering Services required for the specific development.

3.8.2.1 External Engineering Services – Bulk

The Bulk Infrastructure Services include:

(i) Potable water provision;

(ii) Sewerage collection and treatment;

(iii) County roads and associated infrastructure;

(iv) Storm water management;

(v) Solid waste disposal (landfills and transit stations);

(vi) Electricity distribution;[33] and

(vii)Public transportation.[34]

33 Under the Fourth Schedule of the Constitution, the reticulation of electricity is a joint function between National and County Governments and the Energy Act, No. 1 of 2019 requires county governments to participate in the distribution of electricity within their jurisdiction.

34 The provision of public transport is a devolved function under the Fourth Schedule of the Constitution. As with electricity reticulation, several county governments are undertaking preliminary studies to determine the viability and necessary structures for the provision of public transport for their residents in various parts of the County. At present, the immediate need has been identified for a rapid transit system within the urban centres of the Nairobi Metropolitan Area, comprising five counties (Nairobi, Kiambu, Machakos, Kajiado and Murang'a counties), Mombasa County and Kisumu County.

Where the County Government and the developer agree that the developer will install aspects of bulk infrastructure services, the cost of that installation can be set off against the developer's overall development fee liability. Should the set off value described here be greater than the total development fee for bulk infrastructure services for all phases of a development, the developer shall be responsible for the additional cost.

3.8.2.2 External Infrastructure - Link

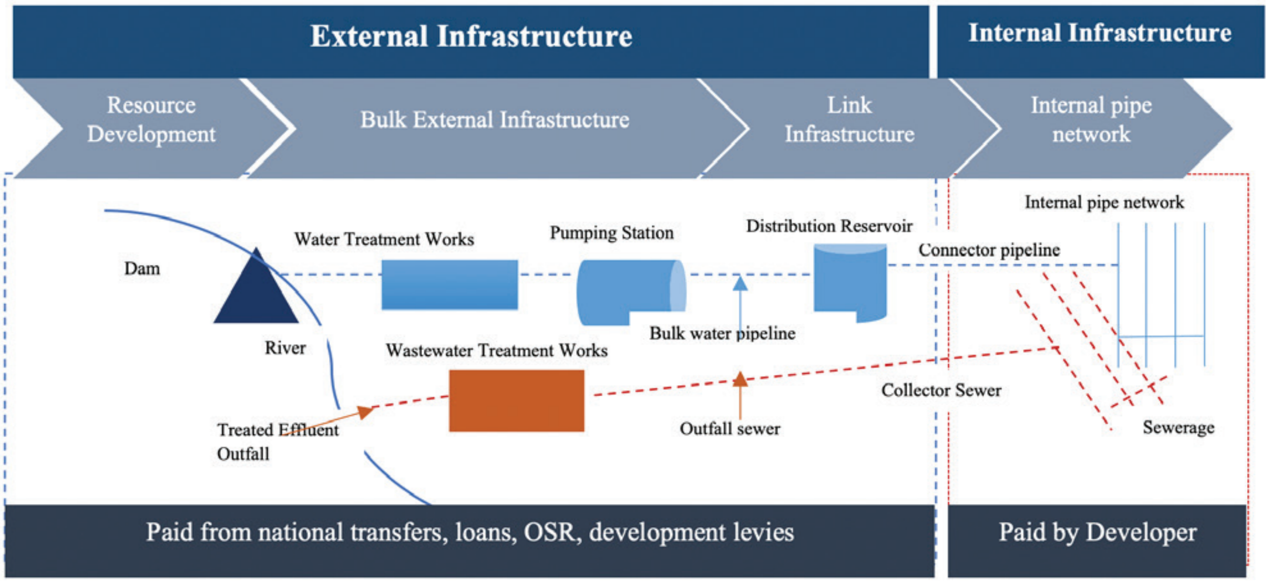
Where development takes place ahead of planned infrastructure provision, external link infrastructure services may be required to link the development's internal infrastructure to external infrastructure and to maintain functionality of the overall network.

In the case of Link Infrastructure Services, the installation shall be the direct responsibility of the developer, unless otherwise agreed in writing with the County Government. In this case, the value of the required Link Infrastructure Services must be determined by the developer and the developer will be responsible for the full cost of such Link Infrastructure Services.

Where the County Government identifies that the Link Infrastructure services installed by the developer must be of a greater capacity than that required by the specific land development, in order to maintain the functionality of the County Government's long-term plans and master planning as envisaged in the County Governments Act, then the County Government may require the developer to install such greater capacity. The cost of the additional link infrastructure services can be set off against the developer's overall Engineering Services Contribution liability.

The diagram below captures the role of the different key players and the source of financing of the three types of infrastructure services discussed in this section using the example of water and wastewater treatment works:

Figure 4.0: Development Fees Principle – Water and Wastewater Treatment Work



In an ideal situation, the actual infrastructure services required should be determined for each development and charged to the Applicant concerned. However, because this is not practically possible, use is required to be made of calculation methods derived and outlined in this Framework Guidelines and as shall be developed by the County Government pursuant to this Framework Guidelines and any ensuing Development Fees Regulations gazette pursuant to section 63 of the Physical Planning and Land Use Act.

3.9 Determining Impact of New Developments

A County Government that publishes regulations for the imposition of development fees to be imposed pursuant to section 63 of the Physical and Land Use Planning Act must ensure that the developers will only be required to cover the provision of infrastructure for which the County Government is responsible under the Fourth Schedule of the Constitution. Furthermore, any regulations must ensure that there is no duplication of costs in the manner in which development fees are calculated and must, therefore, set out the methodology for the calculation of a unit cost per infrastructure service.

The County Government shall calculate the Development Fees to approximate as closely as possible the pro rata share of the actual costs of related County infrastructure needed to service a particular development. The determination of costs is based on estimated unit costs for each service, which are calculated in the following manner:

(i) A 20-year land use model is developed for the County that includes planned generic land uses and densification. This land use model is used to develop optimum service models for roads, transport, water, sewerage, storm water, solid waste and electricity to correspond to the future land use scenario.

(ii) A service master or framework plan for each infrastructure sector that identifies future infrastructure requirements on the basis of identifiable impact zones (or sub-areas) of the County Government, provided that such plans only need exist for the impact zones in which development fees are to be levied.

(iii) A comprehensive 20-year infrastructure plan that establishes the levels and standards of service, current replacement costs of facilities, depreciation and renewal requirements for each service sector for which development fees will be calculated. For purposes of this requirement, current replacement costs include all land costs, professional fees, materials, labour, preliminary and general items. The capital cost to address infrastructure backlogs is excluded from the total cost.

(iv) The engineering standards for infrastructure installed to meet the County Government's requirements shall be as set out in any National or County guidelines for human settlement and planning and minimum standards stipulated for the civil infrastructure services in respect of such human settlements, various design manuals and engineering practice in the industry as amended from time to time.[35]

(v) The average fixed cost per unit, where fixed cost is equal to the current replacement cost of installing or constructing the existing service, provided that:

a. the unit costs shall, with the formal approval of the County Assembly as part of the medium-term budget process, be updated every three years to factor in the impact of inflation.

b. the developer shall be required to pay the unit cost rate applicable on the date at which the development fees becomes payable.

c. where the payments of the development fees are scheduled in accordance with phased approvals of a development, then the applicable unit cost payable for each phase is that applicable on the date on which the development fees become payable for that phase; and

d. in the case of a phased development, where the application is made prior to a full re-calculation of the unit costs, but the approval is granted thereafter, the last unit cost (including annual inflation) prior to the full re-calculation shall apply.

Table 4.0 below provides a summarised guideline for the standard units of measurement of the impact of a development on infrastructure services provided by the county government:

35 Examples of such manuals include the Roads Design Manual, Ministry of Transport & Communication, 1987.

Row Housing in Ol Kalau town in Nyandarua.

Table 4.0: Standard Units for Measurement of Impact on County Services

Service	Factor	Yardstick	Unit of Measure
Roads	Increased road capacity required - the 'width' component or 'capacity' component	Increase in vehicle trip generation	Vehicle trips/day
	Reduction in road life as a result of the development – the 'strength' component	Increase in heavy vehicle traffic	Heavy Load Vehicle trips /day
	Boundary roads	Street frontage	Kms required
Sanitation	Additional sewerage effluent generated	Average Annual Daily Outflow	kℓ/day
Solid Waste	Increase in landfill airspace required and transfer station capacity	Solid Waste Generation Capacity	Solid waste tonnage per day
Storm Water	Increase in the overall quantity and the peak flow rate of the runoff	Runoff coefficient	Impervious area
		Area of the development	m2
Water	Additional consumption per distribution or reservoir zone	Average Annual Daily Demand (AADD)	kℓ/day
Electricity	Increase in peak capacity requirement per substation zone	After Diversity Maximum Demand (ADMD)	kVa/day
Transport	Increased number of passengers using public transport and requiring additional facilities	Person trip generation	Person trips per day

In appropriate circumstances, the County Government may further require a developer to provide infrastructure services to a higher capacity than warranted by the development proposed, to accommodate future developments. In those circumstances, and when developers are required to fund the provision of bulk infrastructure services, suitable arrangements need to be incorporated in a Service Agreement relating to control over the costs of such external services and the refund (where appropriate) of costs in excess of those which the developer would have incurred if normal capacity standards had been applied. Such arrangements may include the application of set-off of development fees against such costs.

In all circumstances, where lawful development exists on the site to be redeveloped, development fees should be required only to the extent that the redevelopment for which approvals are required under the Physical and Land Use Planning Act, place an additional burden on the existing bulk services infrastructure.

3.10 General Treatment of Development Fees

It has been noted elsewhere in these Framework Guidelines that development fees are additional and supplemental to, and not in substitution of any other requirements imposed by the County Government on the development of land or issuance of building permits and should therefore by restricted to the development of infrastructure services that are specifically and uniquely attributable to the proposed development or building.

It is therefore imperative that the development fees are ring-fenced and protected from utilization by the County Governments for general purposes. County Governments should therefore be able to separate administrative fees associated with the application for development permission from the development fees imposed on such proposed development. The administrative fees should therefore be deposited into the County Government's general revenue fund while the development fees must be deposited into a separate fund designated for this purpose and utilized solely for the purposes for which they were charged.

Furthermore, all payments for Development Fees must be recognized as revenue by the County Government, subject to the following minimum requirements:

(i) be separately accounted for and presented in its financial statements as deferred income that is recognised on a systematic and rational basis over the useful life of the asset;

(ii) be transferred in accordance with Chapter 8 of these Framework Guidelines to the Fund;

(iii) have sufficient funds, at all times, to meet obligations in respect of development fee reimbursements and external infrastructure services as contemplated in these Guidelines;

(iv) if capital infrastructure assets installed by the developer become the property of the county government, they should be accounted for as an asset gain in accordance with the generally recognised accounting principles established under the Public Finance Management Act.

(v) In order to ensure that each distribution of development fees from the Fund shall be used solely and exclusively for the provision of infrastructure services specified in a given needs assessment, prior to the Fund Administrator authorising disbursement of any funds, said Fund Administrator should ensure that he or she is in receipt of the following:

   a. A fully executed Service Agreement between the County Government and the developer or third party receiving such funds for the implementation of the infrastructure services; and

   b. A fully executed disbursement statement for the specific development for which the funds are applicable.

3.11 Establishment of a Development Fee Fund

The Public Finance Management Act empowers the CECM responsible for finance to establish a fund in accordance with S.116 thereof. Such a Fund should, at the minimum, meet the following requirements:

(i) be initiated through a proposal by the CECM responsible for the Lands, Housing and Physical Planning to the CECM for Finance and Economic Development and shall:

   a. clearly set out the justifications for establishment of the Fund

   b. certify that the functions and the public services to be delivered through the Fund cannot be delivered through the structure of budget appropriations;

   c. provide a clear justification as to why the Fund structure is deemed appropriate for improved service delivery in the light of the legislative and policy mandate of the County Government under these Framework Guidelines;

   d. confirm in writing that the establishment of the Fund and its continued existence will not depend on annual financing from the county exchequer and that the Fund will be self-sustaining;

   e. demonstrate how the activities of the Fund will fit in the overall Medium-Term Plan and County Fiscal Strategy Paper; and

f. stipulate the life of the Fund which shall not be less than two years and not more than ten (10) years, provided that where the Fund to be established is for a period beyond the maximum period of ten years, then the approval of the County Executive Committee and County Assembly approvals shall be sought;

(ii) the administration costs of the Fund shall be a maximum of three (3%) percent of the approved budgets of the Fund; and

(iii) the County Executive Committee Member shall grant approval in writing before establishment of the Fund.

3.12 Capitalisation of the Fund

The Development Fee Fund should be capitalised by the Development Fees charged by the county government as a condition for development permission. The Fund's finances may also consist of any grants, gifts, donations, loans or other endowments granted to the Fund provided that:

(i) such other monies shall not include appropriations from the County Government annual budget or allocation from the National Government under Article 202 of the Constitution; and

(ii) such other monies shall accrue towards:

   a. subsidising the cost of implementation of external infrastructure services in designated marginalized zones within the County; and

   b. be utilized in accordance with an approved framework for implementation of the external infrastructure services in designated marginalized zones within the County.

(iii) Any surplus funds realised from an accrual of interest on the capital amounts in the Fund shall be used for the purpose of the Fund in accordance with paragraph (ii) above.

(iv) All receipts, earnings and accruals of the Fund and the balance of the Fund at the close of each Financial Year shall not be paid into the County Revenue Fund but shall be retained by the Fund for the purposes of the Fund.

3.13 Utilisation of Development Fees

All monies in the Fund may only be used for capital works, i.e.:

(i) the full and actual costs of the designated infrastructure services; and

(ii) shall not be used to reduce or eliminate existing infrastructure backlogs, for operations or maintenance costs, or as a general revenue source for the County Government.

Subject to the provisions governing phased developments, once a developer has paid in full for a specific piece of infrastructure, the County Government must include that infrastructure development project on the capital budget in the subsequent budget cycle. Where the subsequent budget cycle will delay the implementation of the development, the County Government may prepare a supplementary budget to prioritise implementation of a specific piece of infrastructure that has been fully paid for.

The Fund must be reported on annually in a manner that provides:

(i) information on any specific memorandum accounts within the Fund for each of the impact zones it has defined in its approved policy framework; and

(ii) all associated revenue receipts and expenditures against specific commitments for the delivery of infrastructure.

3.14 Administration of the Fund

The CECM responsible for Finance and Economic Development shall appoint a fund administrator pursuant to Section 116(2) of the Public Finance Management Act, 2012. The roles and responsibilities of the Fund Administrator shall be as designated in the said Act and shall include, but not be limited to:

(i) supervision and control of the administration of the Fund;

(ii) preparation of a budget and such plans for better administration of the Fund to be approved by the County Executive Committee;

(iii) causing proper books of account and other books and records in relation to the Fund to be kept, as well as to all the various activities and undertakings of the Fund;

(iv) preparation, signing and transmission to the Auditor-General in respect of each financial year and within three (3) months after the end thereof, of a statement of accounts relating to the Fund in accordance with the Public Audit Act, No. 34 of 2015 and in such details as the County Treasury may from time to time direct;

(v) furnishing such additional information as may be required for examination and audit by the Auditor-General or under any law; and

(vi) designation of the staff necessary to assist in the management of the Fund.

Agricultural land use.

3.15 Responsibility for Revenue Management

The CECM for Finance and the Fund Administrator should adhere to the principles for revenue management outlined in the Public Finance Management Act in general, and Regulation 63 of the Public Finance Management (County Governments) Regulations 2015 in particular. These include ensuring that:

(i) Adequate safeguards exist and are applied for the prompt collection and proper accounting of all development fees collected pursuant to section 63 of the Physical and Land Use Planning Act;

(ii) Adequate measures, including legal action where appropriate, are taken to obtain payment of any and all development fees due to the County Government by a developer; and

(iii) Official receipts are issued for all monies paid to the County Government as development fees.

3.16 Specific Reporting Obligations

Regulation 65 of the Public Finance Management (County Governments) Regulations 2015 allow County Governments to review all fees, charges or rates, scales or tariffs of fees and charges that are not fixed by any law, that relate to revenue accruing to the county. Information on the tariff structure is required to be disclosed in annual reporting including information on exemptions, discounts, free services and any other aspect of material influence on the county's revenue yield.

The County Government shall publish annually the following information, broken down by service and by applicable region and used for evaluation and review of the Framework Guidelines:

(i) value of Development Fees levied;

(ii) value of Development Fees received;

(iii) value of the external infrastructure provided by developers as payment in kind pursuant to section 63(3) of the Physical and Land Use Planning Act;

(iv) value of subsidies and other exemptions awarded and sources of alternative funding for the requisite infrastructure services; and

(v) expenditure for operational and Fund administration expenses.

CHAPTER
04

Revenue Management in Urban Areas –Nyandarua County

A Model for Implementation of Land Tax (Two Tier) Counties and Urban Municipalities

4.1 Introduction

Increasing revenues is certainly a priority of County Governments. Land/property-based taxes are universally the primary source of local government revenues around the world. Given that the revenues generated in Kenya by local governments are currently about the equivalent of parking fees, restructuring property taxation needs to become the primary focus for increased revenues. This is necessary in order to capture the increased value of properties in the growing urban areas and in order to establish differential revenue sources for the two levels of governance - county governments and the newly formed municipalities. The restructuring needs to be based not only upon land values of undeveloped property, but one that is also based upon a property's functions (residential, commercial, public, industrial, agricultural and others).

The challenges that face County Governments in the generation of revenues needed by municipal boards and town committees is both a question of which source of revenue is optimal and which governing body has the right to tax the residents. It also raises the question of tax duplication. The proposal here should be viewed as one example of how the division of jurisdiction can be linked to revenue generation and the provision of services in specific geographic urban centres.

The policy recommendation here suggests basing land rates upon "zone" valuation, which is both equitable and easy to update, based upon current market values of similar properties in close proximity. (An alternative that is already possible in the existing Ratings and Valuation Acts of Kenya and a well-established practice in local governments around the world).

This would be further regulated through a system of Tax Increment Financing (TIF) that would ensure that the additional revenues generated through developed property tax are reinvested into the area from which these "additional" municipal revenues are collected.

4.2. A Two-tier Zone Based Land Tax Model

The proposed mechanism is an outgrowth of the existing national Valuation/Ratings Acts and is aimed at establishing differentiated sources of revenue for the county and the municipalities. Such a system has the potential for capturing increased land value, and that is a necessity for providing county-based services and municipal based services for a growing urban population and the ongoing rural population. The proposal is to create tax valuation zones or clusters of properties with a similar value per square meter of land.

Although not well designed for this task, the existing Ratings Act and Valuation Act do provide an opportunity for more "creative" land/property tax, especially as they are necessary to ensure the provision of county services. It is therefore recommended that a programme of land tax restructuring be based upon the following principles:

- Land/property tax is to be based both upon:

  (i) the value of the land, and

  (ii) property attached to (constructed on) the plot.

- The tax assessment will be based on two tiers:

  (i) the land valuation itself, and

  (ii) separately the value (added) of the improved property constructed upon it

- The tax will be progressive – increasing rate with increasing size and economic uses

- There will be a discount rate based upon the location of the land and constructed property in relation to the proximity to CBD's/urban areas

- Payments will be monthly with a discount for full payment in advance

- The charge will be made to the owner of the property but payable by the tenants

- Each improved (constructed) property -even on the same "plot"- will be assessed and billed separately

- The categories of valuation of land and economic category of improved properties should be based on tax valuation zones. This would greatly simplify the procedure for keeping the valuation rolls up-to-date without the lengthy and expensive process of individual valuation of each property

This is based on part (a) of sec 4 of the Rating Act cap 267, zones/area rating is acceptable (see Addendum). In addition, it is easier in terms of administration, collection, updating payer's database, future valuation and harmonization of the existing discrepancies that lead to under collection.

The existing system of taxation and revenue generation places the primary burden on the lowest end of the economic scale. In the proposed zone-based system, of undeveloped land tax zones + improved property rates, taxes would be progressive, and the revenue generation burden would be more equitable. Furthermore, it has the potential to generate many times the current revenue in urban areas and create a revenue stream that could differentiate between county revenues and municipal revenues (based upon improved property taxes).

a) Undeveloped Land Property Tax

As stated above, undeveloped land values would be set by geographic zones and would be based upon land values pro-rated at the market value per square meter. The tax levied on land would be the assessed value per sqm in that zone (using the market value of land in that area as the base) multiplied by the fixed percent (1%-3%) multiplied by the size of the land (sqm). The landowner would pay undeveloped land tax (land value multiplied by e.g. 1%) (assessed value for example at 1,500,000 KSH/acre = 3.75 KSH/sqm tax/year). Thus, the tax rate would be 3.75 KSH/sqm. Tax on a 450 sqm. plot would be 1,688/year.

Table 1 Zone-based rate for undeveloped properties

Location	Zone C	Zone B	Zone A
Market value per acre	8,000,000	4,000,000	1,500,000
Undeveloped Land Value: KSH/sqm	2,000	1,000	375
Undeveloped land tax rate per sqm of land (at 1%)	20	10	3.75

In Nyandarua, Urban land value varies from 3,000,000 Ksh per acre to over 10,000,000 Ksh per acre in urban areas. In Olkalao Town a 500 sqm plot sells for 1,000,000 Ksh (8 million/acre). The undeveloped land rate/tax for the landowner would be based upon a value of 2000 Ksh/sqm. For property on a plot of 450 sqm, it would be 9,000 ksh/year or 750/month. (2000 X 1% = 20 Ksh/sqm X 450)).

b) Developed Property Tax

The tax on developed property would be based upon the value of land and its economic use. This tax rate on constructed property would be set differentially and progressively. There would also be a zoning discount as a function of the property's proximity to the CBD.

The tax levied on the constructed property would therefore be the rate per sqm (as a function of its economic use and land value) multiplied by the size of the building (occupied by that business) multiplied by the discount rate (100%, 85% 65% 50%) by geographic zone.

In this model of property taxation, the rate per sqm of constructed property would be a function of combining geographic location (such as CBD, peri-urban area, and rural area) with the economic use. It would avoid the costly process of assessing each property, but still be in keeping with the national tax regulation of Kenya.

Table 2 Example of Table of improved property and tax rates per sqm

Type of Economic Function	Tax Rate per sqm of constructed area	Size of building in sqm	Zone and discount rate: CBD 100% URBAN AREA 85% CLOSE PERIPHERY 65% RURAL AREA 50%
Kiosk, small shop, informal business	20 KSH		
Commercial business Small crafts (carpentry etc.) Mechanics	30 KSH		
Medium scale lodging and food service Grocery store	50 KSH		
Quality Lodging and restaurant,	60 KSH		
Manufacturing business Shopping Mall Supermarket	60 KSH		
Financial business Petroleum business	80 KSH		

c) Combined County and municipal zone-based property tax

The property tax on a given plot of land with a constructed building would be the cumulative rate of undeveloped land paid to the county and the developed property rate paid to the municipality.

For example, a 400 sqm supermarket in the Urban area (not CBD) on a quarter acre would pay 500 sqm X 10 KSH (zone B) = 5,000 undeveloped land property tax + 400sqm X 60KSH/sqm X 85% = 20,400 improved property tax per year. The total annual property tax = KSH 25,400.

Implementation of this combination of taxes would optimally be based upon a digital mapping of all plots of land and constructed properties.

Given the lack of accurate valuation data, it is very difficult at this point to accurately assess the potential from land rate revenues. The intention here is to give a preliminary picture of the potential of a two-tier zone-based land tax mechanism.

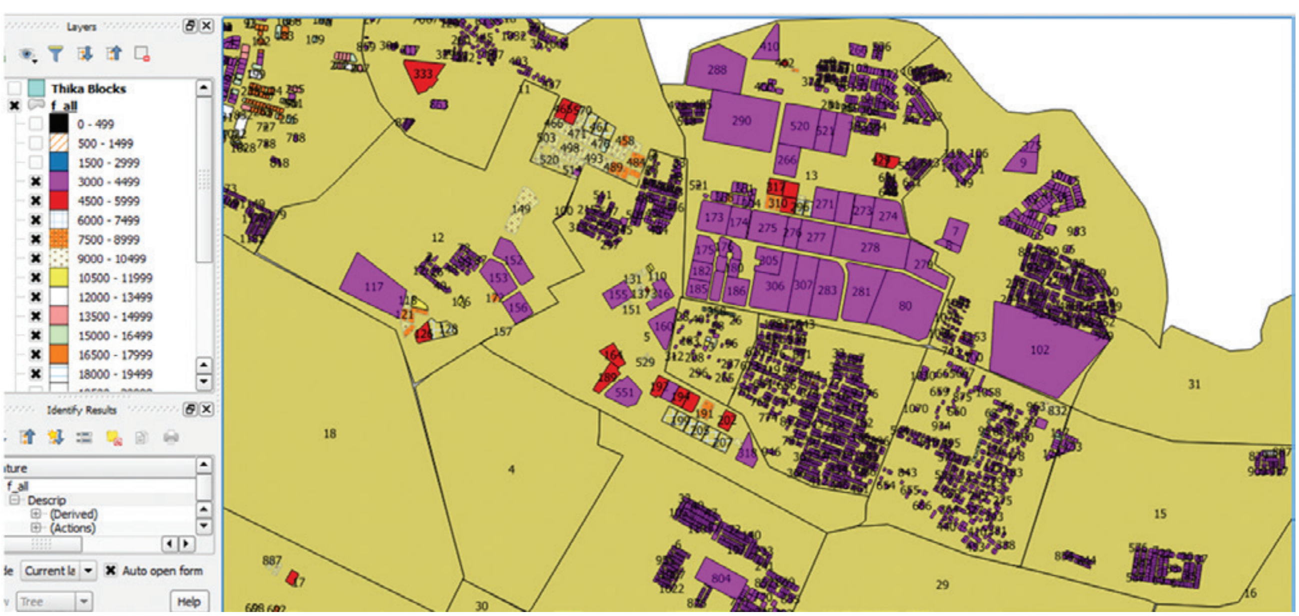
At approximately 390 million Ksh, the current level of Own Source Revenues (OSR) is only 6% of Nyandarua County's income. Land rates are an insignificant component of this income. **However, the potential for income from even minimal land rates could triple OSRs.**

Thus, for the purpose of calculating the approximate potential scope, a value of 1.5 million Ksh per acre or 350 Ksh per sqm of land. 350,000 Ksh for a household plot is being used as a county wide average. The intention is only to include residential land use for this calculation.

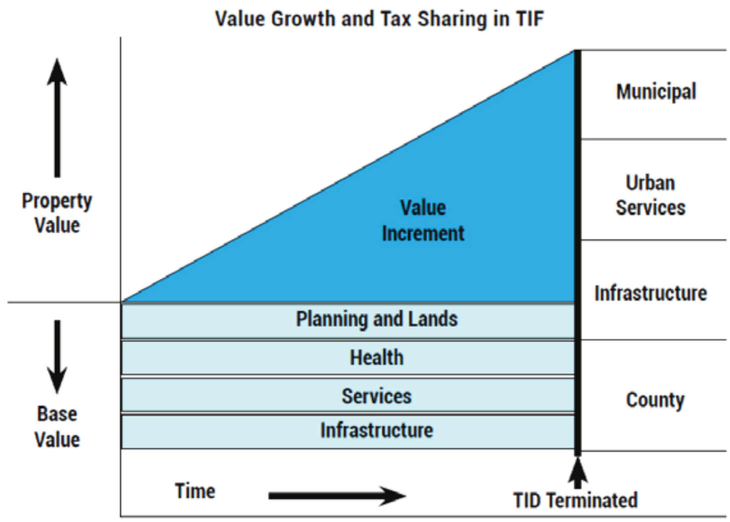
The calculation for revenue on undeveloped rural households would be 3.75 KSH/sqm X 450 sqm. plot X 200,000 households X 80% (rural population) = 270 million Ksh.

The potential tax revenue from undeveloped property in urban areas, assuming an urban population of 40,000 households on an average of 450 sqm of land and an average value of 8,000,000 Ksh per acre would be 360,000,000.

Sample map of simulation for tax valuation zones (Sample simulation of Thika)



Sharing the Tax Base



Adapted from wisconsin Department of Revenue

Johnson and Man 2001

Total yearly, undeveloped land tax revenues **would be 750,000,000, (200% of current OSR).**

In addition, assuming a 1:1 ratio of land use and plot size and a tax rate of 20 Ksh/sqm, municipalities could generate an additional 320,000,000 on residential developed properties and close to another 100 million Ksh from commercial business developed properties.

Total land revenue would be close to 1 billion Ksh.(There is of course no intention to tax rural/agricultural lands)

4.3 Linking Taxes to Improved Services – adapting the model of Tax Increment Financing (TIF)

Although, in principle, taxes (as different from fees) are not directly linked to specific services, the ability to increase significantly revenues in the County Governments in Kenya must be explicitly connected to an improvement in services. This is particularly challenging, given that the current level of services being provided is still not covered sufficiently by local revenues. Nonetheless, some portion of increased revenues coming from improved property tax needs to be channelled directly to improved services in the geographic area, or especially in urban areas from which increased revenues are generated.

Tax increment financing first developed as a tool in the 1970s. Recognizing the difficulties in spurring economic development in certain areas, state legislatures authorized this financing tool in areas deemed physically blighted and/or in need of economic development that would not otherwise be developed without this financing mechanism. Once a district is created, property tax flows towards the general fund are frozen at a base year for a designated time period. As directed efforts from the public and private sector to redevelop the district increase the property values and sales taxes, this incremental increase in tax revenue from the base level flows to a TIF designated fund to repay any initial revenue bonds and to finance any continuing projects within the district. Once the term of the TIF district expires, all tax revenues revert back to the city's general tax fund. Although it is argued that an increase in property values would not occur without the assistance of TIF, entities that rely on general funds might suffer during the term of the TIF. Depending on state law, school districts – major benefactors from property taxes – may or may not be excluded from the terms of the TIF district (Johnson and Man 2001).

This form of taxation, by itself, though a good source of revenues in a progressive manner, would undoubtedly be met with a strong public outcry. Therefore, despite the principle that taxes should not be related to the provision of a specific service (in contrast to fees, which are a function of service provision), in this case there needs to be a clear transparent connection (though not a direction function as a fee) to improved services by location and population group.

Therefore, the mechanism that can be adapted to Kenya for introducing this type of taxation is Tax Increment Financing, TIF. In various cities around the world, TIF programmes have been successful in improving services and upgrading infrastructures. Tax increment financing first developed as a tool in the 1970s (USA). Once a district is created, property tax flows towards the general fund are frozen at a base year for a designated period of time. As directed efforts from the public and private sector to redevelop the district increase the property values (or the newly instituted tax on improved properties), this incremental increase in tax revenue from the base level flows to a TIF designated fund to repay any initial revenue bonds and to finance any continuing projects within the district. This system of land/property taxation could be adapted to the County/Urban Municipalities revenue division. The county would continue to enjoy the revenues from the undeveloped land tax (which, over time, would increase as the urban centres develop) for the general budget and the municipalities could channel the revenues from the developed property tax into specific infrastructure improvements and service upgrades in the urban centres.

4.4. Steps toward Implementation

In order to implement this valuation mechanism, the following steps are necessary:

1. adoption of this mechanism by the County Executive

2. inclusion of this mechanism in the Finance Act of the County, including the ramifications for the appeals process – in the current round of county legislation

3. digital mapping of the clusters and attached properties to enable the creation of geographic tax zones – refining the zones in urban areas and sub-counties

4. organizational gearing up of the revenue collection department

5. public information campaign as part of the approval of valuation rolls

6. rolling introduction by sub county

ADDENDUM 1

GENERIC EXAMPLE OF CHANGES IN A COUNTY VALUATION AND RATING ACT

AN ACT of the County Assembly to effect the implementation of Article 209 (a) of the Constitution; valuation and rating of land and for connected purposes.

ENACTED by the County Assembly as follows ––

Purpose of the Act	The purpose of this Act is to provide for a framework for valuing and rating land in order to: (a) ensure efficiency, accountability and transparency in administration of valuation of land for rating; (b) promote economic development; (c) ensure equity and fairness in land valuation and rating system; and (d) ensure compliance with payment of rates related to land
Basis of Valuation	**PART III – VALUATION** (1) For the purposes of preparing the valuation roll or supplementary roll, the basis of valuation is the market value of the vacant land. (2) In arriving at the value under subsection (1), the Director shall have regard to–– (a) other land of a similar class, character, position or other comparative factors; (b) any restrictions imposed on the land; or (c) its use under any written law, or approval of change of use given by the county which either increases or decreases the value of the land; (d) This is so that the value of any specific land may be determined by the value of similar lands, as determined by geographic zones of valuation bands of properties with similar value for taxation purposes, as determined by the county. (3) In arriving at the value of land under this section, the valuer shall apply the suitable method of valuation as approved by the County Executive Committee. (4) Where a valuation roll includes the value of the unimproved land, the value of any improvements and the value of the land, shall in no case exceed the amount found by deducting the value of the unimproved land from the value of the land.
Forms of rating.	**PART VI – RATING** For the purposes of levying rates under this Act, the Department may adopt any of the following rates, shall be applicable under this Act–– (a) an area rate or zone rate; (b) an agricultural rental value rate; (c) a site value rate; or (d) a site value rate in combination with an improvement rate. (2) Where any one of the forms of rating under subsection (1) has been adopted in respect of any rating area, no other form of rating under this subsection shall, at the same time, be adopted in respect of that area. (3) The provisions on valuation under this Act shall apply in regard to any form of rating adopted under this Act. This is the wording of the law and cannot be changed

Alternative methods of area rating	**1.**	(1) Subject to subsection (2) the Department may adopt one or more of the following methods of rating–– (a) a flat rate upon the area of land; (b) A graduated rate upon the area of land; (c) A differential flat area or a differential graduated rate upon the area of land according to the use to which the land is put, or capable of being put, or for which it is reserved. (2) A rate levied under this section shall be referred to as an area rate.
Site value and improvement rates	**2.**	A site value rate may be levied in combination with a rate on the assessment for improvement rate as appearing in the valuation roll provided that–– (a) any site value rate shall not exceed four percent of the unimproved value of land; and (b) the estimated product of any improvement rate shall not exceed in any financial year, one quarter of the estimated aggregate product of the rate levied in such financial year.
Supplementary rate	**3.**	A supplementary rate may be levied for any financial year where it deems necessary to do so; Provided that, where a site value rate or an improvement rate is levied , no such supplementary rates which, when added to the rate or rates previously levied in the same financial year, would exceed either of the limits laid down in the provisos to subsections (1) and (2) of section 32 of this Act.

ADDENDUM 2

Pilot Project for Restructured Tax Model

DELINEATION OF STEPS

Based upon the simulation of the restructured land and property tax model, the next step is to undertake a pilot project. There are a number of steps to be taken which will extend over a 12-month period:

1. Gearing up

- Preparation of Pilot Project Budget
  - Expected income
  - Costs of collections for pilot project
  - Costs of upgraded service/infrastructure
- ITC system integration
  - Digital Mapping
  - Operational support for pilot project
  - Analysis of system effectiveness and future structure
- Collections system
  - Delineation of procedures
  - Staff requirements and training
  - Delineation of management and oversight functions

2. Community Involvement

- Preparation of explanation materials
- Community/stakeholder meetings: Manufacturers' Assoc., Business Assoc., Community Groups, Religious Leaders, Informal business representatives, others
- Interview of individuals characterizing different groups
- Analysis of community Inputs
- Creation of mechanism and procedures for ongoing community involvement
- Joint decision making and monitoring framework
- Revising rates before pilot project implementation

3. Implementation of Pilot Project

- High visibility of County upgrading initiatives
- Collections
  - Mapping of businesses by size and type of economic activity
  - Setting specific tax rates for each business
  - Billings and collections
    - ICT
    - Face to face
  - Appeals and conflict resolution procedures
  - Transparency of income generated

- Service upgrade
  - Options for improved service packages
  - Choosing priorities with the community
  - Implementation – ongoing service improvement/infrastructure improvement
  - Monitoring with the community

4. Evaluation

- What is working/not working
- What adjustments need to be made
  - Management and organizational procedures and structures
  - Adjusting tax rates for business
  - Interface with the community
  - Insights for County level implementation

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FOR A BETTER URBAN FUTURE

UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME
P.O. Box 30030, Nairobi 00100, Kenya
unhabitat-info@un.org
www.unhabitat.org

@UNHABITAT