

Communal Property Association for St Bernards Legal Entity Establishment Report

Legal Entity Assessment Project and Diocese of Marianhill Land Reform Programme

1. Background

In 1998, the residents of St Bernards and its sister project Amandushill¹, opened serious negotiations with the Diocese of Marianhill to take transfer of the church owned properties on which they live. A land committee was elected in 1998 to carry out liaison and negotiations relating to land transfer on behalf of the residents of St Bernards. After a land claim on the property was withdrawn in August 2002, the residents needed to create a legal entity to take transfer of land from the Diocese. Staff of the Diocese of Marianhill Land Reform Programme (Diocese LRP) and the Legal Entity Assessment Project (LEAP)² decided to collaborate on legal entity establishment at St Bernards and Amandushill, understanding this to be a key part of an on-going process of formalizing “practical and acceptable institutional arrangements for tenure security, including external support and linkages and documents, which will be used and followed by the residents of St Bernard’s and Amandushill and which will be appropriate for the land uses that residents want to pursue...”

Key documents emerging from the collaboration would be

- A founding document, probably a constitution, in Zulu and English;
- A legal entity establishment report

The purpose of this legal entity establishment report is to provide information on the approaches and processes used for legal entity establishment at St Bernards, in order to

- Assist Department of Land Affairs to make an assessment of the constitution of the CPA at St Bernards for approval and registration purposes.
- Assist those involved in work at St Bernards after transfer to integrate legal entity establishment appropriately with the processes which follow.

2. Approach and methods

2.1 Theoretical framework

The approach and methods used in legal entity establishment were shaped by the theoretical framework for assessment of tenure security in communal property institutions agreed jointly by LEAP and DLA as part of the Communal Property Institutions Review.

We understood that the **main purpose of legal entity establishment was to improve the tenure security of St Bernards residents** as a group, as

¹ See Amandushill Legal Entity Establishment Report

² See <http://www.leap.co.za>

members of households, as members of interest groups and as individuals, in a way that would enable further development of infrastructure and services and of the agricultural potential of the property.

We understood legal entity establishment to be a key part of a process of formalizing institutional arrangements for tenure security. We understood these institutional arrangements to have a **history**, in which residents had experience of rights, and of the land administration processes and authorities by which these rights were realized and maintained, for example, land allocation by the priests and Parish Council, later by the farm committee and most recently by the land committee.

We understood that the **future** of these institutional arrangements would be shaped by land uses, local understandings of rights, and land administration practices that were **currently familiar, known and used**, as well as by a vision of future land uses.

Construction of institutional arrangements for tenure security for the future would therefore involve processes in which people **consciously named and if necessary, adapted, their existing understanding and practice around rights land administration, drawing on their** experience of working with structures like the development and land committees. For legal entity establishment, we would capture the most important agreements in the constitution. We would avoid simply replacing existing practice in a way that did not connect to what people know and do.

In order to apply this thinking in workshops, we used participatory methods. The indicators determined the design of the overall process and workshops, the content areas we covered, and what we listened for as important. The content detail or issues we worked with in discussions and the speed and extent of what we covered were determined as far as possible by workshop participants.

In practice holding this balance involved some hard choices. LEAP was still learning how to make complex tenure theory work for facilitation and the exercises didn't always work. After 5 years of waiting "for title", residents were impatient to get their constitution as a last milestone. The working group often wanted to solve the immediate problem while legal entity establishment needed formulation of principles and rules. Some of the requirements for compliance with the CPA Act added to the amount of work we felt we had to cover.

Table 1: Theoretical framework for assessment of tenure security

Indicators of improving tenure security	
Indicator 1	People's rights are becoming clearer; people know better what their rights are and they are more able to defend these rights.
Indicator 2	Land administration processes such as application, recording, adjudication, transfer, land use regulation and distribution of benefits are becoming clearer, better known and more used.
Indicator 3	Authority in these processes is becoming clearer, better known and more used.

Indicator 4	There are more and increasingly accessible places to go to for recourse in terms of these processes, and these are becoming better known and more used.
Indicator 5	Land administration processes are becoming less unfairly discriminatory against any person or group.
Indicator 6	Bridges are being built that span the gaps between actual practice and legal requirements.
Indicator 7	Benefits and services are becoming as available to people living under cpis as they are to people living under other tenure systems.

Indicators applied to

- * Group as a whole
- * People inside the group – households, interest groups, and individuals
- * Outsiders needing rights on the property e.g. municipalities delivering services

Land administration processes (see indicator 2)

Application, defined as a formal request to get or give land, change land use or get help to resolve a land dispute.

Recording, defined as creating evidence about the extent of a right (demarcation), the owner of the right (registration) and the nature of the right as a basis for adjudication.

Adjudication, defined as resolving doubts about the rights held, which can involve dispute resolution.

Transfer, defined as the moment rights in land move from one holder to another. The previous holder's rights are extinguished and the new holder's rights are created.

Land use regulation, defined as the rules/practices about how members/individuals can use different portions of land and the mechanisms for enforcing this.

Distribution of benefits, which relates to the rules and systems for distributing movable common property such as profits.

2.3 Drafting the constitution

The field team drafted a **constitution** to lay down the main principles of the founding agreements in terms of which St Bernards residents hold and manage land together. We began a draft of **community rules**, which people can add to and change as their land administration systems develop.

We applied LEAP criteria of effective constitutions, to help link the **understanding** that people developed in field processes **to the document that would become their formal law**:

- The gap between what the document says and actual practice is small.
- The document reflects people's agreements.
- The document is suitable and appropriate to people's situation.
- The document is clear.
- The document is available to members.

In making decisions on the form of the constitutions we applied some guidelines for producing clear documents:

- Length: The document is as short as possible.
- Arrangement: Connected ideas are grouped together. Important ideas appear before less important ones. Subject headings are organized in a way that helps understanding.

- Flow: There isn't cross-referencing to other clauses in the same document or to legislation unavailable to the reader. Definitions appear in the context in which they are used, not in a separate clause for definitions.
- Economy: There is no unnecessary repetition or irrelevant detail.
- Consistency: The document does not include internal contradictions and is not ambiguous. The same term is used for the same idea throughout. The document is not ambiguous.
- Plain language: The document is written in plain language, not legalese.

Workshops were not structured around the headings in a constitution, but around hot issues and content areas. In workshops people's agreements were often expressed colloquially and in relation to specific cases, and were sometimes adjusted as people thought more deeply into implications. Constitutions on the other hand are written in formal clear language, express general principles, and must not contain internal contradictions, i.e. have to "balance". Circulating the early draft among members of the outside support group resulted in a number of valuable suggestions for additions, some of them for material not explicitly covered in workshops. Reading out the words and explaining the implications, and allowing enough time for people to comment therefore remained a very important check.

3. The detail of workshop and workshop support processes

Participants in the workshops were elected in a community meeting to develop agreements about principles and rules, making up a working group.

The workshops were rigorously planned, reflected on, planned again and recorded in detail. Workshop and workshop support processes are summarized in Table 2. Unshaded rows indicate fieldwork with residents, shaded rows indicate work outside St Bernards.

Table 2: Workshops and workshop support processes

What and when	Objectives	Outcomes and emerging issues
Sep – Dec 2002	Set-up	Formal contract between LEAP and DOM LRP, review of written material held by Diocese, preliminary planning meeting
9 Jan 2003 Meeting of field team with land committees of St Bernards and Amandushill	Introductions LEAP. Explain task of “building a body to take title” Understand current land Committee roles and issues Set up community meetings	All the purposes were achieved. <ul style="list-style-type: none"> The land committees explained their role as liaison and negotiating with outsiders around land, but their description of some recent activities revealed that they have a land allocation role. Want ownership to get development of infrastructure and services. Questions about the role of induna in community and about tribal levies. Questions about settlement of people on <i>amanxiwa</i>³; Sugarcane quota negotiations presented as issuing sugarcane “title”.
10 Jan 2003 Broad design meeting	Prepare an outline design for workshops	List of content <u>areas</u> to cover in workshops. <ul style="list-style-type: none"> Decision-making about land administration on different land uses, made by whom and by what procedures Rights to different land uses and procedural rights Membership and how this relates to rights holders and to group identity Tenure forms establishment and maintenance and institutional arrangements Common property structures – functioning, procedures, etc, and the constitution Institutional linkages in terms of land admin, esp around recourse and resource access. Handle the first three towards the beginning and the last three towards the end of the process.
19 Jan 2003 Community meeting	Introduction team and task Set up working group to work out details of institutional arrangements to hold and manage land.	Explained task: to build a structure that can hold land and that is accepted in law, by first looking at what is there now and building on this for the future. Inkosi made a public claim to the St Bernards land, and threatened to withdraw current dispute resolution support, which is important in maintenance of social order. He clearly named the dangers of competing authorities around land administration. Clear that most residents do not support his claim. Working group of 30 people elected – included the existing land committee and a number of other residents.
30 Jan 2003 Working group meeting 1	Working group names land uses, and discusses who uses and manages these in order to build a broad picture of existing rights and decision-making authorities and procedure around these. Working group names hot issues emerging from this discussion and sorts them into clusters. Field team names content areas to cover in workshops.	Mapping land uses led easily into the discussion of some aspects of rights, authorities and procedures. These in turn led easily into naming some burning issues which had a strong land administration component, such as <ul style="list-style-type: none"> Unauthorized expansion of the boundaries of residential sites, Settlement of people unknown to the community Irregular allocations of <i>amanxiwa</i>, Uncontrolled use of plantations on the property Questions about the role of induna. Other concerns were development and maintenance of infrastructure and services, such as water, agricultural equipment, public buildings, use of graveyards and dips. Sorting issues into clusters didn’t work well and field team did this later.
8-9 Feb 2003	Field team starts	Discussed the following hot issues and more hot issues which

³ *Inxiwa plural amanxiwa*: A site which has been allocated and from the occupiers have left.

What and when	Objectives	Outcomes and emerging issues
Working group meetings 2 and 3	discussion of each cluster of "hot issues" in order to develop a way forward on the immediate problem, and in the process of discussing it, develop an understanding of the underlying paradigm, principles, and rules for the future.	<p>emerged from them:</p> <ul style="list-style-type: none"> • boundaries of residential sites; • <i>amanxiwa</i>, • sale of solid structures when people leave; • settlement of people unknown to the community; • controlled use of the plantations; • ownership and positioning of the graveyard; • uncertainty about rights to the community garden • ownership of the Zamane poultry project. <p>Also did some work on definition of residents.</p> <p>Started to develop some principles which clarified group, household, and interest group substantive rights, as well as some procedures for land administration.</p> <p>Field team set some homework.</p>
23 Feb 2003 Reportback to big community meeting	Working group to take some proposed rules and difficulties back to the community for discussion and resolution.	<p>Run by the land committee with help from the working group. Diocese LRP staff observed the meeting.</p> <p>Some rules were accepted, some rules were discussed and amended.</p>
15 March 2003 Working group meeting 4	<p>Take report backs on big community meeting and homework.</p> <p>Further work on hot issues as in workshops 2 and 3.</p>	<p>Shared report backs on homework.</p> <p>Further discussed</p> <ul style="list-style-type: none"> • some issues around <i>amanxiwa</i>, • community ownership of the Zamane poultry project • the rights of those guarding sites and relatives "who come to live with me" • enforcement of rules. • eligibility criteria for allocation of household sites, a key substantive right <p>Field team set some homework.</p>
31 March 2003 Review meeting	Workshop discussions had begun to range too widely through land administration. It became important to name matters <u>essential</u> for legal entity establishment, so that these could become the focus of design for the next two workshops.	<p>Written review of information to date.</p> <p>Decision to focus last two workshops on</p> <ul style="list-style-type: none"> • getting clearer on substantive and procedural rights of residents by examining who makes final decisions at points of change in rights: <u>allocation, alienation and rezoning</u> for different land uses, as well as procedures to handle these and recourse when "I don't like this decision", role of tribal authorities • expressions ownership for each land use • gender as "Does this work well for everyone?" especially around sales and deaths • working with institutional arrangements in a way that doesn't fix people in a particular position – i.e. that gives them flexibility as tenure arrangements need to change; • unpacking further some of the basic definitions – e.g. resident, community ownership
12 April and 10 May 2003 Working group meetings 5 and 6	More tightly focused discussions on matters essential for legal entity establishment, also less focus on problem-solving and movement towards principles and rules.	<p>Explained way forward – legal entity establishment, transfer and work after transfer.</p> <p>Defined terms that people use: community, resident, head of household, dependent and daughters eligible for allocation of household sites.</p> <p>Took reports on homework..</p> <p>Exercise to get clearer on substantive and procedural rights for one land use - residential sites - and asked working group to</p>

What and when	Objectives	Outcomes and emerging issues
		<p>continue with the other land uses such as grazing and <i>amanxiwa</i> for homework at the end of workshop 5.</p> <p>Picked up on this homework in workshop 6.</p> <p>Discussion on the role of the tribal authorities, and developed proposals for the structure of the future land committee and how it will work.</p>
<p>May 2003</p> <p>LEAP drafted, reviewed and translated first draft of the constitution.</p> <p>LRC staff developed summary of possible legal forms</p>	<p>Start to develop wording for the constitution in both English and Zulu, and identify gaps, especially those likely to be required for compliance with the CPA Act.</p> <p>Develop information for presentation to the working group on a choice of legal forms.</p>	<p>By the time that constitution drafting started, it was clear that a communal property association would best fit what the working group were saying about the institutional arrangements that they wanted to hold and manage land. The first draft of the constitution was prepared on this basis.</p> <p>The workshop process enabled us to put in place most of the basic provisions of the constitution: the foundations of definitions of resident, rights and rights holders on which all the other clauses are built, as well as much of the section on land administration procedures. Nevertheless the review resulted in fairly extensive proposals for changes and additions to take back to the working group – the development of the detail.</p>
<p>1 and 7 June 2003</p> <p>Working group meetings 7 and 8</p>	<p>Discuss draft constitution and fill gaps in draft constitution.</p> <p>Present and discuss information on legal forms</p>	<p>The constitution was read out and some of the implications were explained using posters. There was a level of recognition of the provisions new in the experience of the field team.</p> <p>Much of the gap filling and checking was minor, but the following resulted in important changes to the draft:</p> <ul style="list-style-type: none"> • The earlier understanding of decision-making by the household head was faulty. Major decisions about the household are actually made by discussion amongst the adults in the household – some households even consult children about matters that affect them. • In filling the gaps in naming authorities for dispute resolution and enforcement of punishments for rule-breaking, the land committee suddenly became very unsure of their authority to carry out these tasks. The working group examined the current practice in which the induna is powerful and useful in terms of keeping social order, and proposed an advisory and support role for him in the land committee. • Developed procedures for community meetings and the land committee, and procedures for elections. <p>The field team did not offer a choice of legal forms. We took instead the approach that everything that people had said pointed to the appropriateness of a communal property association as the legal form, but we made the comparison with community land trusts and less formal township establishment to highlight some of the implications of this choice. The approach worked well and led to discussion of the distant possibility of township establishment “perhaps by our children” and then into formulation of the dissolution clause in a way that made sense to people.</p>
<p>June - July 2003</p> <p>LEAP redrafting of the constitution and polishing form and language, final translation</p>	<p>Complete draft of the constitution in clear language in both English and Zulu</p>	<p>Complete draft of constitution for further discussion.</p>

What and when	Objectives	Outcomes and emerging issues
by DOM LRP		
8 July 2003 Field team and one member of working group check institutional arrangements with municipal manager at Richmond	To check what institutional arrangements about holding land and raising finance the municipality might require for delivery and maintenance of infrastructure and services. To check how the present choice of St Bernards residents for a CPA would limit or open up options for infrastructure and service delivery and maintenance for the future.	The municipal manager had no personal experience of delivery of infrastructure and services to CPAs so could not comment on these aspects. The field team proposed to put him in touch with staff from other municipalities which do have such experience. A major issue for the new CPA will be the requirements of the Property Rates Bill if it becomes law, and the payment of levies that will be required for any service delivery.
14 July 2003 Field team meets DLA planner	To do an informal check on compliance with DLA requirements for the content of a constitution and for registration.	This was the point at which bridging the gap between people's practice and the law had the potential to become most difficult. In fact we agreed to only one minor change before taking the constitution to a community meeting.

4. Critical incidents in tenure security at St Bernards

In the report on the St Bernards Rights enquiry in 2000, Rauri Alcock noted that:

... numerous families have come onto the farm at various times since it has been in the hands of the church. Most notably those that have been here longer than 10 years were given rights to move on by the Father or the priest, and this was linked to their religious affiliation and their continuation of paying of taxes. Those that moved on 6 or 7 years ago seem to have been moved here as a spillover of the violence in the rural and peri-urban areas and were either allocated plots by the Bishop, Priests or a community committee (the workings of this committee still seem murky.) More recently, those that have been here 2 or less years got their permission for being on the farm from individuals within the community, the church not questioning this process, has given it by default credibility.

The land committee was elected in 1998 as negotiations between the Diocese, DLA and residents around transfer of the St Bernards properties gathered momentum. Members of the land committee first described their role to the field team as liaison, but in fact they have had a role in land allocation and negotiation of infrastructure and services, growing out of their roots in former committees.

When legal entity establishment workshops started, it became clear that tenure security for the group as a whole, and for some interest groups and individuals was declining at St Bernards.

- ❑ Inkosi Moyeni Mkhize of the neighbouring Vumukwenza Tribal Authority put in a restitution claim to the St Bernards properties, which brought under threat the procedural right of the group as a whole to decide their land arrangements, a wish held by the majority of residents. Inkosi Mkhize voluntarily withdrew this claim in August 2002, but has continued to make public claims to St Bernards land (Indicator 3 – competing authorities).
- ❑ The rights of the communal garden group to use and build infrastructure in the communal garden was challenged by the children of the man who originally allocated it to them, while they struggled without written evidence of the allocation or the conditions under which they held it.
- ❑ The head of one household allocated a neighbouring *inxwiwa* to her daughter's boyfriend. Residents complained bitterly, but no one took action, and the man now has ESTA rights.
- ❑ Some families left St Bernards during political violence in the 1980's and early 1990's and established homes elsewhere. Their sites became *amanxiwa*. In 1998, a well-attended community meeting made a rule that no more outsiders would be admitted to St Bernards. This rule provided a basis on which the group as a whole could assert its rights to *amanxiwa* to meet the needs of residents desperate for sites. The land committee acted on the instruction of a subsequent poorly attended community meeting and allocated one of the *amanxiwa* to an outsider to grow sugarcane. The neighbours didn't accept this and resented threats made to their children. The previous owner of the site also applied to come back, and the land committee seem to consider his claim valid, presumably because previous occupation is a powerful basis for claims in traditional land administration practice. The land committee now has to sort out three layers of overlapping rights, all of which can be asserted from different bases, and are understandably puzzled as to what to do.
- ❑ The Zamane poultry group raised money for a community project which subsequently became the business of a handful of people, and ceased to be accountable to the community meeting.
- ❑ A few households pushed their boundaries out into communal land, and some included inside their boundaries plantations of gum trees which were considered a communal resource providing building poles.
- ❑ In the uncertainty about the rules for using plantations and forest, wood was cut, trucked out of St Bernards and sold for a lot of money.
- ❑ The priest used to keep a register of names of household heads but this is no longer maintained.

On the positive side, the land committee was working from the strong base of “residents know who has what”, and wide, though not universal, understanding and respect for tacit rules. Community meetings probably helped by making formal resolutions in some critical areas of change in land rights, such as the decision not to admit outsiders, and when this rule was broken the land committee was vigorously challenged (*Indicator 1*).

The legal entity establishment process came in at the point where tenure security at St Bernards was starting to decline, but where the damage was still limited. The working group were excited by their new clarity and by the fact that the authority of the future land committee of their CPA will at least

in theory be supported in formal law. For these residents the situation has improved.

5. The constitution as an instrument for greater tenure security

Some critical institutional arrangements for tenure security are captured in the constitution, especially as it relates to those aspects of tenure security determined by the people of St Bernards themselves. Table 3 makes an assessment of the constitution in terms of its provisions for tenure security, using the theoretical framework.

Table 3: Assessment of the constitution

Numbers under “Comment” refer to clauses in the attached draft of the constitution

Ind no	Indicator	Comment or explanation
1	People’s rights are becoming clearer	The constitution avoids the common error of blurring the concepts of beneficiaries of grants, member of the group, and rights holder, and gives attention both to substantive rights (e.g. 4.1, 4.4) and procedural rights (e.g. 3.1 and 3.2). It pays attention not only to the rights of the group, i.e. the Association, as a rights holder, but balances group rights with those of individual residents, interest groups and outsiders by using conditions, criteria and procedures e.g. 4.1, 5.1.1, 5.2, 8.2
		Members acquire land rights by virtue of residence and land is being donated, so that beneficiaries of state grants are not mentioned in the constitution.
		The members of the group are individual residents 2, which tightly reflects the local notion of who are the “units” of the group.
		Depending on the <u>land use</u> , holders of substantive rights may be <ul style="list-style-type: none"> • individual residents because they are members of households e.g. 2 with 4.4, 5.3 and 5.4 • households e.g. 4.1 • interest groups like those who work the community garden e.g. 11, • the group as a whole, i.e. the Association e.g. 1.1.1 • outsiders e.g. 5.1.1.
		Holders of procedural rights may be individual residents as members of the Association e.g. 3.1, 3.2, 13.1 residents as members of household e.g. 4.3
	...people know better what their rights are...	Depends on processes supporting the use of the document
	...and they are more able to defend these rights.	Defence of rights is complex. It lies in the provision for legal establishment of the CPA rules, written evidence, and provision for recourse, as well as in social conditions in which people defending their rights are not subject to intimidation, which is largely outside the scope of the constitution. See Indicators 2 and 4 below.
2	Land Administration processes are becoming clearer...	The land and property administration clauses deal with a complex of procedures for application e.g. 8.2 and 10.1 and provide some criteria for adjudication e.g. 8.2, although the number of

		applications for sites may be high and the community meeting may need to develop more criteria. Definition of rights provides the basis for adjudication e.g. 4.1 and there are dispute resolution mechanisms 16. There is provision for recording e.g. 13, transfer e.g. 5.1, 9, 9.2, 10 and 11, land use regulation 15, and distribution of benefits 11.2 and 14.
	...better known and more used.	Depends on processes supporting the use of the document
3	Authority in these processes is becoming clearer, better known and more used.	Much of the constitution deals with who makes what decisions, and this is as close to familiar practice as possible. Both the land committee 7 and the induna 7.9 are familiar authorities carrying out familiar tasks, and people are familiar with them working together. The <u>formal</u> alliance of these authorities e.g. 7.9 is new and untested, and subject to political pressure.
4	There are more and increasingly accessible places to go to for recourse in terms of these processes, and these are becoming better known and more used.	The constitution offers only two options 17, the land committee which is accessible, but may be seen as not necessarily impartial because it is made up of residents, and the Director-General of Land Affairs, who is very distant, and who relies to some extent on capacity in district offices. It is likely that some residents use the neighbouring tribal authority structures as recourse, but the working group was emphatic that the inkosi should not become involved in land matters on St Bernards, so this option was not considered for the constitution.
5	Land administration processes are becoming less unfairly discriminatory against any person or group	<p>The constitution looks at land administration processes for both substantive and procedural rights. Protecting individuals inside households is very difficult. Household decision-making processes e.g. 4.3 and 4.5, and some provision for recourse e.g. 17.1 create space for women and youth to assert and defend rights, while continuing to make personal decisions about what is safe for them to do. Cl 8.2 may look sexist, but it does take into account the traditional provision for married women to get access to land elsewhere and the complex consequences of changing the surname of the rights holding household. For St Bernards this clause is a move towards less discrimination.</p> <p>Cl 7.2 requires that the land committee include women and young persons, which reflects an agreement made by the working group. Both older women and younger men provided considerable challenge in the working group itself.</p>
6	Bridges are being built that span the gaps between actual practice and legal requirements.	<p>Comprehensive formal written rules that are legally binding are new at St Bernards. The notion that the authority of the community meeting and the land committee could in theory be supported in law was a revelation to the working group. In practice DLA probably has limited capacity to offer the real support for CPAs envisaged in the CPA Act, but the association and residents should test this both with DLA and the courts if necessary.</p> <p>Keystones of the bridge in the constitution are</p> <ul style="list-style-type: none"> • the extent to which the constitution is rooted in practice, sometimes adapted practice where existing practice doesn't work for people; • the rigorous attention to clear plain language drafting; • translation into Zulu which is the language of registration. <p>The requirements for compliance with the schedule of the CPA Act required some adaptation of practice e.g. the definition of a quorum for a community meeting 6.5. Problems with poorly attended community meetings suggested that some definition was necessary, but the local understanding of a "proper" community</p>

		meeting is one where a large number of residents attend, say 100, rather than being rigorously defined in terms of household representation.
7	Benefits and services are becoming as available to people living under cpis as they are to people living under other tenure systems.	Delivery of infrastructure and maintenance of services to CPAs by municipalities is vague and discretionary because they are technically private land. Cl 5.1.1 should allow the registration of servitudes although at a practical level it is not clear whether residents would be able to afford to pay for survey and transfer. Cl 14.1.2 makes a technical provision for levies and a community meeting would be able to decide on affordability. The dissolution clause would allow residents to go the route of less formal township establishment, but this would be a last resort – it is currently neither what they want, nor what they can afford to pay for.

6. Moving towards tenure security in the future

The provisions in the constitution need to become practice before they be judged effective or not in securing tenure. The Diocese LRP is committed to support for residents after transfer. Much of this support has been envisaged in agricultural programmes, which could usefully be combined with support for land administration. The new land committee and the Diocese LRP can note the following areas of uncertainty or risk for monitoring or intervention.

6.1 The broad body of residents needs to use the constitution in practice to become familiar with it

For the working group, rights, procedures and authorities are much clearer. The work of deepening this understanding among the broader body of residents (*Indicators 1, 2 and 3*) began with the constitution adoption meeting, but needs to be broadened by formal conscious use of the constitution by the land committee itself and by outsiders working with residents, such as the Diocese LRP staff, planners and the municipality. Especially important are the previously neglected questions: who has rights here – the group? inside the group? beyond the group? what are they? and what are the land administration procedures to establish or change them?

A decision still needs to be made on how to make the final draft of the constitution and the community rules widely accessible to 123 households, and how to keep them up to date with amendments.

6.2 The danger of competing authorities for land administration (*Indicator 3*)

Pressure from the inkosi of the neighbouring tribal authority to gain authority over the land of St Bernards will probably be stepped up after transfer – this has been the pattern in other situations where churches have transferred land to the people who live on it. The legal situation as set out in the constitution is that he has **no rights over the land or property of St Bernards**, a situation that reflects the wish of the majority of residents of St Bernards. Some residents who openly oppose the idea that the inkosi has anything to do with the land nevertheless respond to his requests for levies of labour or money as a token of **respect for his traditional authority**, and this will probably continue. A challenge for the land committee will be to maintain some fine distinctions amongst the broader group of residents:

between the role of the tribal authorities in sorting out things like family disputes, and a role in land administration on the St Bernards properties.

6.3 The boundaries clarification process

The constitution requires a process of **clarifying boundaries** which needs to be supported by demarcation with pegs and written evidence of who has what (*Indicators 1 and 2*). This will provide a basis for future processes in which land use rights are negotiated or transferred. The working group has a good grasp of the problem and of what needs to happen, and should be the starting point for developing the process. They recognize that it will be a very sensitive process and they have asked for outside help. Confusion may increase quickly with time after transfer as opportunists “take the uncertainty gap” and boundary clarification should have a high priority.

A spinoff of the boundaries clarification process will be that those involved will have to work out procedures for demarcation – who does it and how – which might usefully include witnessing by neighbours, and these can be written up as community rules or amendments to the constitution.

6.4 Amanxiwa

A question related to boundary clarification is whether the community meeting should declare a moratorium on allocations until the boundaries clarification process is complete (*Indicators 1 and 2*). There is heavy pressure to allocate the *amanxiwa* and rumours that some powerful people are trying to go ahead with allocation before transfer. If they are allocated in a hurry a key resource of the group will be gone before they even have an opportunity to decide what to do with it.

6.5 Records

The responsibility for the task of **setting up and maintaining records** of rights, rights-holders and changes in rights (*Indicator 2 – recording*) has been given to the land committee because there is not yet state support for records of rights in communal property situations analogous to the support given to private property. Some level of local record keeping is better than none and the trick will be to give value to the task, help the broad body of residents to understand its importance, start small with essentials and grow as capacity grows. The land committee keeps minutes, which could handle aspects like resolutions in community meetings. The Diocese holds historical records that could be copied for the land committee. The constitution is an important record. Experimental methodologies for boundary clarification and recording processes in communal property situations are being developed by pilot projects such as the AFRA PILAR project at Ekuthuleni and the work of Border Rural Committee at Gasela.

Ideally Cl 13.1.2 should require that the names of everyone in households be recorded, but the working group were realistic in noting that they “would need a computer” to do this. The clause will not need to be changed if the land committee can achieve this.

6.6 Dispute resolution and enforcement of rules

The working group struggled to formulate realistic procedures in which the land committee would exercise authority in handling disputes and enforcement of community rules. It was during the discussion of these issues that Cl 7.9 of the constitution was developed, in order to draw on the skill and widely accepted authority of the induna. A danger is that the induna will be unable to resolve conflicting political interests. The working group have requested training in dispute resolution.

6.7 Recourse (Indicator 4)

A weakness in the institutional arrangements for St Bernards is recourse. It will be useful to monitor the recourse that people are actually using and to explore the possibilities for embedding this practice in an amended constitution.

6.8 Land rights for vulnerable groups

Cll 4.3, 4.5, 8.2.1, 15.3 and 17 of the constitution are attempts to create space for vulnerable people such as women and youth to assert, justify and realize their rights, while deciding for themselves how much they can safely do. It remains an important area to monitor.

6.9 Maintenance and delivery of services (Indicator 7)

The impetus for land transfer at St Bernards originally came from the need for infrastructure and services. Because the practice around delivery of infrastructure and maintenance of services to CPAs varies greatly, it will be important to monitor how it develops at St Bernards.

6.10 Capacity of the land committee

A concern is the wide variety of tasks that the land committee faces. Cl 7.8 of the constitution provides for flexible possibilities for structuring a spread of work while maintaining continuity of decision-making and information.