

Paying attention to land rights administration in church land projects

Experience of setting up legal entities to take transfer of land at St Bernards

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1. Introduction

The purpose of this report is to share our experience in legal entity establishment at St Bernards with other practitioners involved in land reform on church land. We hope that they will recognize the situations we describe, and will find our thinking useful in their work. We describe how St Bernards residents faced a series of burning land administration issues in the transition to ownership, because land rights administration wasn't consciously important, and how the legal entity establishment process turned this around. We facilitated processes in which residents adapted what they do now to make small shifts towards greater tenure security for the group as a whole and people inside the group.

Late in 2002, years of work by the Diocese of Marianhill Land Reform Project (DoM LRP) with the people of St Bernards reached the point where residents needed to create legal entities to take transfer of land. For several years there has been widespread concern that land reform legal entities perform badly after transfer, and much debate as to the reasons for this and what should be done about it. DoM LRP was not only concerned about technical and legal processes, but also that the resulting arrangements should work in practice for residents after transfer. The Legal Entity Assessment Project (LEAP) has developed a theoretical framework to understand performance in communal property institutions (see *Box 1: Core of LEAP framework, as applied in fieldwork at St Bernards*) and practical tools for fieldwork. It made sense for DoM LRP and LEAP to co-operate on legal entity establishment at St Bernards.

About 120 families are settled at St Bernards on about 540 ha of land. Some sites are allocated for the exclusive use of particular households, who have built homes, ploughed fields, and in some cases set up small businesses on the site. There are areas of veld used communally for grazing, and plantations, used communally as a source of building poles. There is a community garden, used mostly by women in the garden group. There is some infrastructure including schools and a district dirt road.

2. The LEAP framework and the workshop approach

The task of legal entity establishment is often understood to be the creation of an entity recognized by law to which land can be transferred. It is often handled as a milestone to be passed as quickly as possible, and is often considered to be complete after registration of a constitution.

We understood our task to be to support residents in thinking through and making formal in law arrangements that would enable them to achieve the purposes of building future livelihoods and infrastructure by creating a firm foundation for future tenure security. Within the process of legal entity establishment, we remained open to the

notion of communal ownership for some land uses and more exclusive arrangements for others. We understood land rights administration to be the means by which tenure security becomes real or is undermined in practice, both for people inside the group as well as for the group as a whole. We gave attention to linkages between the structures that were being set up and internal and external existing and future structures, systems and processes. These would become key parts of the web of institutional arrangements on and off farms by which land rights could be secured and transacted. We used the indicators in Box 1 for workshop design and to make assessments of tenure security trends in current practice and future arrangements.

Box 1. Core of LEAP framework, as applied in fieldwork at St Bernards¹

Indicators of improved 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 rights 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 rights 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 rights 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.

¹ For more detail see the theory and fieldwork sections of the LEAP website at www.leap.org.za

We held to the practical principle that residents should be able to manage the arrangements for tenure security, rather than setting bureaucratic or ideological ideals. We started by looking at what was familiar to people in terms of their understanding of their rights and the steps and decision-makers they use to handle transactions in land rights. Inside this we listened for what was working and what was not working for them. In formulating principles and rules to be made formal in law through the founding document (constitution), we sought to adapt, rather than replace, current land rights administration practice. These roots in residents' practice meant that the indicators could not be used to set up ideal arrangements that would work only on paper; instead we applied them to test adapted arrangements to understand where we were moving towards greater tenure security rather than away from it in terms of the arrangements that people considered workable.

3. Hot issues at St Bernards in legal entity establishment workshops, early 2003

When serious negotiations began for transfer of land from the Diocese to residents, a land committee was elected, officially to carry out negotiations on behalf of residents in land matters and for liaison. In practice they carried out a range of other tasks. The working group for legal entity establishment workshops included members of this interim land committee, as well as interested residents elected in a large public meeting.

Asking the working group simply to map St Bernards and talk about who uses and manages the different land uses generated about 11 clusters of burning issues, all with their roots in land rights administration problems. These ranged from problems between neighbours and interest groups to threats from outside St Bernards. Discussion of these issues from a land rights administration perspective led to the drafting of a constitution that has since been approved by the Department of Land Affairs.

The following examples show the scope of these issues, and how we worked with them.

3.1 Uncertainty about the boundaries of residential sites

During 2002 and 2003, some households pushed out the boundaries of residential sites into land widely understood to be communal property. The working group was concerned at this slight but growing confusion about who owns what.

Finding a workable land rights administration solution involved:

Understanding what had worked in the past: the old farm committee had a clear responsibility for marking sites; the priest kept a register of households; a rare boundary dispute was resolved with the help of neighbours (*Indicators 1-3*).

Recognizing what was no longer working and the need for change to accommodate a changing situation: The working group noted that the problem has become more noticeable as St Bernards has become more crowded. They asked for a process to clarify the boundaries of household sites, mark them permanently, and create written evidence of who holds what (*Indicator 2*, recording and adjudication).

Agreeing on principles according to local notions of what is fair and workable: The idea that all sites should be re-demarcated to make them equal was discussed and rejected. The working group agreed on the principle of staying with what people had been allocated in legitimate processes, while recognizing that there was an unresolved problem of some sites being too small for the households settled on them.

Proposing land rights administration steps and authorities in the form of rules for the future: The working group proposed a boundaries clarification process to be run as soon as possible by the land committee with help from older people and neighbours. Pegs, not stones, should be used for marking and there should be some letter or record as evidence. Because boundary disputes can be very sensitive, the land committee asked for outside help.

The constitution made some of these proposals formal in law (*Indicator 6*). Clause 4.1, under "Rights and duties on household sites", assumes that the boundaries clarification process has happened, and protects the existing sizes of sites where these are agreed to be legitimate:

The boundaries of household sites as existing at transfer of the land to the association and the households that hold those must be confirmed in a community meeting after transfer and be placed on record as allocated land, as a pre-condition for transactions involving household sites.

The working group defined procedures for "Allocation of household sites" (*Indicator 2, application and recording*), captured in the Land Administration section of the constitution. These give attention to the problem of small residential sites and make a shift away from current practice in making some women eligible for household sites (*Indicator 5*):

- 8.1 Residents wanting to establish new household sites must first apply to their own household for a portion of that household site. If the household agrees, the site allocated by it must be demarcated and registered by the land committee as a new household site.
- 8.2 A resident who is unable to access a new household site from his or her own household must apply to the land committee. If land is available for settlement, the land committee may allocate household sites to the households of residents who are
 - 8.2.1 either married sons of residents or daughters of residents over 45 years of age with children over 18 years,
 - 8.2.2 born at St Bernards,
 - 8.2.3 Christians who have respect *oyikholwa ohloniphayo*.
- 8.3 Priority must be given to applications from households whose sites are too small to establish new household sites.

3.2 What to do about amanxiwa²?

The D household left St Bernards because of party political violence. During participatory rural appraisal workshops in 1998 as part of the land transfer

² The term amanxiwa is used at St Bernards to mean sites which have been allocated, demarcated and then abandoned.

negotiations, there was agreement that people from outside the area should not be allowed to come and build, to get sites or to use the land. Based on the mandate from a poorly attended community meeting the land committee subsequently allocated the D *inxiva* to Mr S to plant sugarcane because his site was small. The neighbours said that they were not consulted about this allocation and were concerned about the possibility of disputes arising from the theft of sugarcane by their children. They threatened Mr S.

Mr D then came to the land committee and asked for his site back. The land committee first challenged him and told him that he can't come in because there was someone already there, and then proposed that he should be allowed to return and that Mr S should be allocated a site elsewhere.

The potential for violence is obvious. The difficulty of finding solutions to the problem of what to do about *amanxiwa* was reflected in the way we returned to the problem in workshop after workshop.

Understood as a land rights administration problem, the problem seemed to sit in:

Conflicting bases on which people can assert rights (*Indicator 1*): The basis of D's claim has its roots in indigenous land rights administration practice: the household to whom the site was allocated originally always has a claim, because a surname becomes "embedded" in the land. S has an alternative basis for claiming rights, namely that he received the land by applying to a recognized authority, namely the land committee.

Disputes about how authority is constituted and delegated (*Indicator 3*): The land committee claimed to be acting on a mandate from a community meeting. Those who contested their decision claimed that the community meeting which made the original decision to exclude outsiders was properly constituted; the community meeting where this decision was reversed was not. There was discussion about how a proper community meeting should be constituted.

The land committee was trying to deal with new situations without principles or rules to guide them (*Indicator 2*).

The land committee was unclear about the moment of transfer, when ownership would move from the departing household back to the group for re-allocation. This would be the moment at which old claims would fall away.

Under "Re-allocation of vacated household sites" the constitution defined procedures to be followed when leaving a site, and the moment of transfer (*Indicator 2*):

- 9.1 If a household plans to leave the household site, the household representative must inform the land committee. If the site has neither residents nor structures remaining on it, it becomes available for immediate re-allocation.
- 9.2 If all members of a household leave a household site without informing the land committee, the household site becomes available for re-allocation two years after the last occupants left, and the members of the household will have no further claim on it.

The constitution also defined a proper community meeting, i.e. described how the highest decision-making authority would be constituted (*Indicator 3*):

- 6.5 All adult residents may attend, participate and vote at a community meeting. To make binding decisions at least one adult resident from at least 40% of households spread across major settlement areas must be present. Binding decisions are made by majority vote.

The constitution also defined criteria for who could apply for household sites, quoted in clause 8.2 above, and defined how the community meeting would authorize the land committee to act on its behalf in different situations.

3.3 Illegal settlement by abangaziwa

Mr Ml was allocated a site at St Bernards and abandoned it. Mr Mk settled there and also left. One of the women from a neighbouring site allowed her daughter's boyfriend, J, to settle there. The working group felt strongly that J's settlement is illegal. He did not come in "according to the law" and is not registered or known to people - "under *ama-Roman*, a person who was not registered was not allowed to be there". He had not followed the practice under which women who marry elsewhere go to live with the family of the husband - "he is not even married."

The J case pinpointed strengths in the current land rights administration practice, such as broad clarity about who can settle and the right procedures to follow, as well as weaknesses: the lack of formal rules about settlement and the lack of mechanisms to report and deal with rule breaking (*Indicators 1-4*).

The constitution defines the term resident, which is then used and qualified in different ways throughout the constitution to show who can apply for certain rights. Applying this definition and the provisions in clause 8.2 quoted above would have excluded J:

- 2.1 A resident is a member of a household that holds a household site according to this constitution and whose home is on the land.

The constitution included a clause on rule breaking and punishments.

3.4 Pressure from neighbouring tribal authorities

The *inkosi* of the tribal area neighbouring St Bernards made a restitution claim on the St Bernards properties that held up land transfer for a year. During negotiations he withdrew his claim. However in a big public meeting at the start of the legal entity establishment workshops he made a claim that "This is the land of *inkosi*...". Only one of the residents challenged this openly.

St Bernards has a history of party political violence. Residents are overwhelmingly in favour of ownership by residents, including some who pay tribal levies and help out with work for the *inkosi*.

Two key roles in a future land rights administration system would be dispute resolution and enforcement of rules. However, members of the interim land committee had real difficulty imagining themselves imposing punishments and

sorting out disputes. The current practice is that people go to the induna when there are disputes. He keeps order at weddings and deals with incidences of cattle theft.

In the interaction with the *inkosi* and in workshops, facilitators worked consistently from two principles: that the people of St Bernards will decide on arrangements for holding land and that the land rights administration system must work. The working group recognized that there are risks in involving the tribal authorities and risks in leaving them out. After much debate, the working group proposed that the induna have a limited ex-officio role. This recognized that he is a resident, and that he has valuable experience and influence both inside and outside St Bernards, especially in resolving disputes.

The clause in the constitution under "land committee" that deals with this matter says....

- 7.9 An induna who is also a resident must attend meetings of the land committee with particular responsibility to advise on matters relating to disputes and breaches of the constitution and the community rules, to support the land committee in resolving such matters, and to be part of task teams or sub-committees set up to handle such matters.

4. The consequences of land rights administration being unconscious

During the period of active administration by the Diocese, residents were clear about the extent of household rights to residential sites, the extent of land used communally and for public purposes, and who held these rights (*Indicator 1*). Land allocation was managed by a land rights administration system in which authority (priest and farm committee) and procedures were clear, known and used (*Indicators 2 and 3*).

Serious negotiations about transfer of land from the Diocese to residents opened spaces of opportunity and uncertainty. The property is large, there are multiple land uses; there are multiple interests in play and there is growing competition as St Bernards becomes more crowded. People left, people applied for sites (even though the policy was to admit no-one from outside), residents wanted to use building poles from the plantations, opportunists used the uncertainty of the transition period to extend their sites or to make money out of communal resources like wood and forests.

Processes of change around land rights continued, despite the fact that residents were insufficiently clear about the land rights administration procedures and authorities needed to deal with new situations.

The (interim) land committee was elected, and by default took over some familiar aspects of land rights administration because of their roots in earlier committees, but **faced new situations without defined authority, principles or rules to guide them.**

St Bernards was a *de facto* communal property institution, even though the Diocese held title to the land. However, **the need for and complexity of clear arrangements for communal property land rights administration in the transition was largely invisible as an issue to the outsiders who might have supported the land committee:** officials of the state and the ngos who worked with residents. The nature and importance of land rights administration in communal property institutions is a

developing discourse and hotly contested. But the consequence of not seeing its importance was that until the legal entity establishment workshops, even those closest to the residents didn't see the developing threats to group, household and individual rights, and work with the land committee to get adequate principles and rules in place.

5. The consequences of paying attention to land rights administration

The rudimentary but adequate land rights administration systems developed under the Diocese and the work of the Diocese Land Reform Programme meant that residents started from an orderly place, with a growing practice of questioning and democratic decision-making (*Indicators 1-3, 5*). 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. The working group debated questions openly and energetically.

The legal entity establishment process came in at the point where tenure security at St Bernards was starting to decline, but where damage was limited. The need to develop rules and principles that would be binding in law forced the working group to become clear on rights holders and the rights that they hold; who is a resident and the procedural rights of residents; principles and criteria for deciding difficult cases; and a wealth of land rights administration procedures, born out of their experience of problems in land rights administration. It was a good example of how contesting and challenging land rights can help people get clearer about what those land rights are. The working group was excited by their new clarity and by the fact that the authority of the future land committee of the Ekuthuleni CPA will at least in theory be supported in formal law. For these residents the situation has improved. However a great deal of work remains to be done.

6. Broader implications

St Bernards residents will carry the responsibility for boundary clarification, recording, dispute resolution, enforcement and recourse post transfer. The legal entity establishment processes enhanced their existing capacity to take this on, but important questions remain.

The muddles that developed at St Bernards during the period of transition of ownership from the Diocese to the residents showed us what happens when land rights administration is neglected. Burning land rights administration issues that had critical importance for the future land rights of residents had to be crammed into a short space of time, after four years of workshops and waiting.

Land rights administration needs attention not only before but also after transfer, and needs state support. Land rights administration systems for private property are well developed in South Africa. However a significant number of transfers of church land will be to groups rather individuals, for which land rights administration support from

the state is limited in law, is sometimes inaccessible in practice, and often doesn't fit what people actually do on the ground. Serious theoretical and practical work on land rights administration in communal property systems is gathering momentum in South Africa but formal functioning state institutions supporting such systems have yet to take shape.

Church land forms a significant part of land available for land reform. Features of the institutional context of such transfers are the facilitation support that different churches are securing and offering to residents both before and after transfer (like the DoM LRP), and advocacy for land policies and instruments that work for the poor. These draw on long relationships with residents, and a concern with socially responsible land transfer.

Where church land projects still have some way to go to transfer, there are significant opportunities for those supporting residents to facilitate discussions on existing practice and future land rights administration, working with people's hot issues and using the debates and resolutions to feed the processes of making arrangements formal in law during legal entity establishment. This is especially true where negotiations take a long time and there are long periods of waiting.

There are also opportunities for those facilitating church land projects to support residents with land rights administration post-transfer. Attention to land rights administration can easily become part of work on development of agricultural land and infrastructure - it involves looking at the tenure security aspects of such development. The requirements of projects will differ from place to place and will have to be negotiated with the new landowners, but possibilities include:

- linking those responsible for land rights administration to the growing number of communal land rights administration pilots and any emerging state support,
- holding in facilitation a theoretical framework which can help to surface practical threats to tenure security,
- monitoring what happens post-transfer to feed the broader communal land rights administration discourse.

Important hanging questions are "Can and should those supporting church land projects play a direct formal role in land rights administration post-transfer, for example a first point of recourse where the rights of the vulnerable are being eroded or violated?" And if yes, "What role?" The answer may lie in residents' existing practice, the objectives of programmes, and the degree to which broader advocacy is able to influence the state to support land rights administration on communal land.

7. Thanks

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