

AFRA News

Newsletter of the Association for Rural Advancement

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The changing face of rural

TENURE

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Disclaimer

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**Cover pictures from a tenure meeting
in Gongolo, KwaZulu-Natal, 2002**

Mission Statement

Vision

AFRA is an independent land rights NGO that aims to redress past injustices, to secure tenure for all, and to improve the quality of life and livelihoods of the rural poor. AFRA works for a peaceful, secure, productive and prosperous society through the equitable redistribution of land, resources and opportunities. AFRA is committed to a non-racial society in which there is gender equality and participatory democracy.

Target Group

AFRA works with black rural people in KwaZulu-Natal whose land and development rights have been undermined, whose tenure is insecure and who do not have sufficient access to land and resources to fulfil their developmental aspirations or basic needs.

Method

AFRA will work towards this vision by

- Empowering communities to engage with land reform processes to meet their needs;
- Promoting and protecting the interests of women and the poorest within the groups we work with; and
- Networking with other organisations to lobby for a just and effective land reform programme for the benefit of our target group within an integrated rural development framework.

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The fated history of tenure reform

DONNA HORNBY

CIVIL society expected the release of a draft bill on tenure reform for public comment in November last year when the Department of Land Affairs organised a tenure conference in Durban. This did not happen despite the allocation of an entire day of the four-day conference to discussing communal tenure. The discussion was instead based on the head of tenure's verbal presentation of the principles of the draft bill. The failure to release an official document led to an urgent call to the department from land NGOs, academic institutions and amakhosi to consult the public. These consultations appear to have begun. However, they are internal to the DLA at this stage and land NGOs are complaining that, despite the openness that marked the conference, they are once again out in the cold.

These recent events in the fated history of tenure reform follow the minister's instruction in 1999 to shelve two years of work in the department on the Land Rights Bill and start again. Her emphasis then, which appears again in the formulation of the unofficial Communal Land Rights Bill, was to transfer land to tribes – or traditional communities as they are now called. NGOs point out that this strategy would deprive individuals of protection of their own land rights and force them to sub-

mit to undemocratic governance structures. An equally strong call from officials is for the individualisation of communal tenure, or an extension of the western property model to what is left of fragile, sometimes corrupt, customary institutions and practices. The justification for these arguments appears to be a concern about the unaccountable power of chiefs combined with a demand for the state to redistribute its institutional resources for securing tenure to people previously deprived of these. There is not much awareness of the failed attempts to destroy communal tenure in other parts of Africa or of the financial and social costs of individualisation.

A number of projects try to work within these extremes of tribal ownership and individualisation, arguing that communal tenure is as important as a secure land-holding model that values land as a livelihood rather than simply an economic asset. But even so, tenure arrangements must be clarified and supported if a stable base for livelihoods is to be secured. One such community project in the Eastern Cape has assisted people to apply tenure practically in a land administration system with great success. This project illustrates the state's under-investment in communal tenure and what a proper investment might entail.

But even without state sup-

port, communal tenure persists in providing millions of poor, rural people with land for housing and agriculture. It is also a form that many rural people prefer because it is familiar, accessible and inexpensive as the Ekuthuleni community in KwaZulu-Natal shows. This doesn't mean that the community want no support from the state. Rather, they want something that is based on "our way of doing things" but which gives real security while allowing for adaptations.

Communal tenure also has applications beyond land that lead into the complexities of managing rights over natural resources. The community-based natural resource management approach recognises that tenure is fundamental to natural resource conservation but that this raises questions about resource tenure and collective action that are not easy to translate into implementable policy.

These case studies and projects all throw light on ways of thinking and working between the extremes of individualisation and transfer to tribes. Many more are not mentioned here. But the lessons and work in progress provide rich pickings for the DLA to draw on in its difficult task of drafting tenure reform legislation.

We urge them not to neglect the ready contributions of civil society.

Land rights or neo-tribalism?

The National Land Committee (NLC) set up a small technical committee in the Western Cape to analyse an unofficial draft of the Communal Land Rights Bill in preparation for the DLA's tenure conference in Durban in November last year. The committee, consisting of representatives from the Surplus People's Project (an NLC affiliate), the Programme for Land and Agrarian Studies (PLAAS) at the University of the Western Cape and the Legal Resources Centre (LRC), had the following to say:

The context

IT is nearly eight years since our transition to democracy, and meaningful land tenure reform in communal areas in the former "homelands", home to a third of the population, has yet to begin. Despite constitutional obligations to enact legislation to provide secure tenure, government has thus far passed only an interim law (the Interim Protection of Informal Land Rights Act 31 of 1996, or IPILRA), which provides protection against dispossession, but does not clarify the legal status of land rights in these areas.

Tenure reform is desperately needed, especially in the former homelands. Land administration is in a state of chaos and there is widespread confusion over who may make decisions on land matters. Forced overcrowding under apartheid led to overlapping and conflicting rights in many areas, and instability and violence have resulted. Informal privatisation by powerful elites is taking place; the land rights of women are commonly undermined.

All of these factors inhibit investment and undermine

both development and sustainable management of natural resources.

One of Minister Didiza's first decisions on assuming office in June 1999 was to halt work on an near-complete Land Rights Bill for communal areas. Since then the Minister has repeatedly promised that draft legislation was imminent but a draft Bill is yet to be produced.

In the run-up to the National Tenure Conference, a draft document entitled the "Communal Land Rights Bill" (CLRB) was circulated, and while the status of the document remains unclear, it appears deeply flawed and alarming in a number of respects.

2. Points of departure

A set of basic principles that should guide tenure reform was outlined in the 1997 White Paper on Land Policy, and was widely endorsed at the time:

1. Tenure reform must move towards rights and away from permits
2. Tenure reform must build a unitary non-racial system of land rights for all South Africans

3. Tenure reform must allow people to choose the tenure system which is appropriate to their circumstances
4. All tenure systems must be consistent with the Constitution's commitment to basic human rights and equality (including gender equality)
5. A rights-based approach means that tenure reform must accommodate the de facto rights which exist on the ground
6. Overlapping and contested rights arising from forced removals under apartheid must be accommodated on additional land.

In a democratic dispensation, functions of ownership (e.g. sale and lease of land) must be distinguished from those of governance (administration and management of land). In the colonial and apartheid eras, these functions were often deliberately blurred, especially in the tribal areas where the state was both the legal owner and, through Tribal Authorities, the administrator of land.

As a result, the views and interests of rural inhabitants were often disregarded, despite the fact that most had underlying historical land rights to

land through many years of uncontested occupation.

In cases where the rights to be confirmed exist on a group basis, land rights should vest in the people who are holders of the land rights and not in institutions such as tribal or local authorities. Members of particular groups thus become “co-owners” of land, with the freedom to choose how they want their land to be administered and managed on a day-to-day basis. This would make institutions and structures more representative and accountable to the rights holders. This raises questions about the role of the institution of traditional leadership in future tenure reform. Traditional leadership, based on ascribed and hereditary rule, is fundamentally incompatible with the democratic freedoms upon which the South African Constitution is based.

The fundamental issue is whether rural residents should continue to be subjects, when their counterparts in urban areas enjoy the full rights of citizens. Ensuring that rural residents enjoy the right to choose their representatives is thus a key challenge.

When Minister Didiza stopped work on the draft Land Rights Bill in 1999 she announced her intention to transfer the title of state land in communal areas to “tribes” or “African traditional commu-

nities”¹. This echoed National Party policy in the dying days of apartheid, when deals were brokered directly between the chiefs, the Lebowa cabinet and the previous government, without ordinary people being consulted in any way.²

We must ask: Is the transfer of state land to “tribes” still the thrust of tenure reform for the Department of Land Affairs? Will it recreate the neo-feudalism of the past? Or will it create a democratic and rights-based system in the communal areas of South Africa that is consistent with the principles outlined in the 1997 White Paper?

The draft Communal Land Rights Bill – issues of concern

1 The basis for land rights is a problematic definition of “community”

One of the principles of tenure reform is that de facto rights of current occupiers must be recognised and accommodated. It is vital that the basis of these rights be clearly defined. One way to do so is to make them derive from verifiable realities and practices such as length of occupation, and established patterns of occupation and use. The draft CLRB does not take this route. It defines rights holders in terms of their membership of “a community”. This is highly problematic, for two reasons.

Firstly, community is defined in the draft bill in terms of “shared rules”, derived from “customary or common law”, but this is not the basis on which many rural people came to occupy the land they currently live on. Under apartheid hundreds of thousands of people were forcibly removed from farms and “black spots” and dumped in areas under the jurisdiction of chiefs recognised by government. The de facto rights of these people do not derive from “shared rules”, but from the fact of their established occupation and land use, and from acceptance of these by their neighbours.

Secondly, the nested character of most systems of communal land rights, within a hierarchy of neighbourhoods, sub-villages, villages, wards, chiefdoms (and sometimes “tribes” or even “nations”), makes definition of “community” intrinsically difficult. Where precisely will the boundaries of the “community” lie? One answer is to recognise that these boundaries are flexible and fluid, depending on the resources used and the decisions to be taken.

This is not the route taken by the draft CLRB.

The danger in assuming that there exist easily identifiable “communities” with “shared rules” is that this works to shore up the power of

¹ Ministry of Agriculture and Lands, June 2000, *Status report on land reform*, Draft 4.

² Claassens A. 2001. *It is not easy to challenge a chief*.

Transfer of title to tribes – lessons from Rakgwadi. PLAAS, University of the Western Cape.

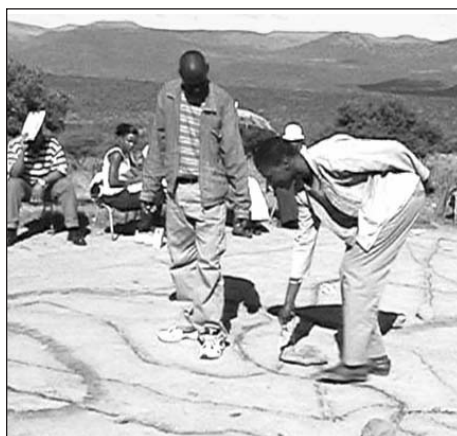
traditional leaders, who may or may not enjoy the support of people under their jurisdiction. Under these provisions a chief could easily say: “either you define yourself as my subject, or you have no land rights here, because your rights derive from membership of the community as I interpret customary law (i.e. as I define it)”.

In addition, the draft CLRB provides no clear mechanisms for decisions to be made by groups who not see themselves, or are not seen by others, as part of “the community”, but whose de facto rights will be affected by “community” decisions. Neither does it provide for mechanisms for them to challenge “community” decisions that they disagree with. Requirements that affected rights holders be “consulted” are entirely inadequate, given the long history of manipulation of “tribal resolutions” and “community” decision-making.

The net effect of these flaws in the manner in which rights are defined in the CLRB is that many current de facto rights holders will not gain secure land rights – on the contrary, they may see them undermined. This completely contradicts a fundamental principle of South African tenure reform (see section 2 above).

2 Rights holders structures

As set out in the 1997 White Paper and discussed above, there is a clear distinction between ownership (or land rights) and governance. The



policy thrust to date has been to suggest strongly that rights will vest in land users, not in institutions.

A key question then becomes: how will democratic and accountable structures be created to represent communal rights holders in decisions and transactions regarding their rights?

The draft CLRB prescribes a number of duties for these bodies, called rights holders structures, e.g. promoting compliance with the law and the Constitution, safeguarding the interests of the “community”, informing members of their rights, maintaining land registers, and helping resolve disputes. They also have far reaching powers, e.g. to allocate land, formulate rules, and manage land use.

Clearly, the legitimacy of these bodies and the degree to which they truly represent rights holders is a critical issue. Yet the draft bill sets out no procedures to assess whether or not this is the case. No criteria or procedures are set out to indicate how rights holders structures should be chosen or created, and no cri-

teria are set for their recognition by government. There are also no provisions to ensure that a majority of those whose rights are affected must endorse decisions by these structures.

Although there are no clear rules or procedures relating to the creation of a rights holders structure, the definition of this body in the draft bill states, not that it may include the institution of traditional leadership, but that it does do so.

This suggests that the intention of the drafters may be to enable traditional leaders to exercise extensive powers through these ill-defined bodies.

The draft CLRB states that a primary object of the law is to provide for fundamental human rights, including “the democratic right of persons to choose the appropriate land tenure system, communal rules and community based administrative structures governing their land”. This is empty rhetoric when the bill provides no concrete mechanisms to ensure that rights holders structures are representative and accountable. Instead, undefined “communities” will make the rules governing rights holders structures, which will have extensive powers.

3 Transfer of title

As set out in the 1997 White Paper, the current status of the occupants of state-owned communal land as second class rights holders,

via permits, is completely unacceptable. A central thrust of tenure reform must be either a considerable strengthening of these rights, or the transfer of ownership to the current occupants.

The draft CRLB allows for the transfer of land held by the state to any community or juristic person representing a community whose tenure is legally insecure.

The application must be done through the authorised rights holders structure.

However, these are perhaps the most troubling provisions of the CRLB:

- The bill does not require that people living on the land at issue be consulted prior to transfer, or that a majority of those affected endorse or support the request for transfer. There are no mechanisms or protections to ensure that transfers cannot take place if the majority of those affected are not aware of, or oppose them.
- The bill does not enable people to stop the transfers if they can show that the proposed transfers would have negative effects on their existing rights or interests
- The bill does not enable people living on part of the land to be transferred to dispute their identity as part of the “community” that requested the transfer, and to ensure that the land that they legitimately occupy and use is excluded from the unit of land to be transferred.
- The bill does not provide mechanisms to ensure that transfers do not pre-empt the rights of

people with counter-claims to the land, or for the representation of counter-claimants within the process

The lack of adequate protection of de facto existing rights may indicate that the government intends to follow the path charted by the National Party in the dying days of apartheid, and negotiate land transfers directly with chiefs, thus excluding ordinary people on the land. Transfer of land dramatically affects the status of underlying rights on the land in question, and if carried out in an undemocratic manner could lead to a massive wave of post-apartheid disposessions.

4 Registration and titling of land rights

There is a demand for registration of their land rights from some de facto rights holders in communal areas, and clearly tenure reform must provide for this option. Experience elsewhere in the world suggests that registration should be demand-driven registration rather than compulsory.

The draft CLRB does make provision for the registration of land rights, but does so in a highly confusing manner. This means, amongst other things, that registration could undermine the security of tenure of many people, such as those with established occupation who do not apply for registration, or who are refused permission to do so by other “community” members.

In addition, the relationship

between registration of rights and transfer of title are confusing and contradictory.

The draft bill provides that:

- “Communities” must, through their rights holders structures, compile and maintain a “community register of land rights”. No further detail or clarity on this register is provided.
- “Communities” may request the opening of a “communal land register”, and, if approved, a process to survey the land and indicate on a general plan each community member’s rights in land is initiated. The registrar of deeds then registers the land in the name of the community via a commonhold title document.

Individual members with land rights may then apply for registration in their name, after receiving the consent of other members of the community, on a prescribed individual or family title document. The distinction between the two registers referred to, and the relationship between them, is completely unclear. The status of land rights if they are not registered is also not clear.

If a transfer of state land to the “community” is applied for, and agreed to by the Minister, then this too results in the issuing of a “deed of commonhold title”. Is this different to the “commonhold title document” referred to in the chapter on registration? If not, then registration amounts to transfer. If it is, then the relationship between them is unclear.

As in relation to the definition of land rights in terms of “community rules” (see above), these provisions may well allow groups such as tribal elites who wield power in rural “communities” to manipulate the registration process to their own advantage. The outcome may once again be that the land rights of many people are undermined rather than strengthened.

5 Monitoring and support of land rights

For tenure reform to become a reality on the ground, rights holders need information on their rights and access to a wide range of support systems at local, district, provincial and national level. They will require ready access to government officials or non-governmental agencies, to assist them to choose a structure to administer their rights, to resolve disputes, and to assist in setting up systems of record keeping.

Monitoring of decision-making by dedicated officials is vital, to ensure that rights are respected and that rights holders structures do enjoy the support of a majority of rights holders. If there is one key lesson to be learned from the experience of tenure security legislation for farm dwellers and labour tenants, it is that rights on paper are meaningless without dedicated capacity for monitoring and support.

The draft CLRB makes completely inadequate provision for this. No dedicated government support structures are created,

and instead the bill allows for an official employed by the department to be appointed, apparently on an ad hoc basis, to investigate certain matters and convene meetings. Provision is also made for a Land Rights commissioner to be appointed by the Minister, to investigate claims, transfers, land administration and so on. Again, this is initiated apparently on an ad hoc basis as determined by the Minister.

Temporary and ad hoc arrangements such as these are completely inadequate given the scale and scope of the tenure reform needs and the many problems and disputes that are likely to arise.

Conclusion

The draft Communal Land Rights Bill is a poorly thought-through measure that, at best, leaves many questions unanswered. More worrying is the fact that it would undermine many established occupation rights, currently protected only by interim legislation (IPILRA), which will fall away if this bill became law.

At worst, the bill opens the way to the transfer of state land to “communities” controlled by powerful and unaccountable traditional leaders, who will justify their control by reference to custom and tradition as the source of “community rules”. This will have dire consequences for thousands of rural people, who would become subject to the authoritarian rule of a small elite, controlling privately-owned land.

At the end of the conference a number of interest groups discussed the issues raised. The NGO interest group had the following to say:

1 This group is unhappy with the manner in which the discussion of the so-called draft bill has been handled by DLA.

- The status of the document was, and remains, unclear
- The exact purposes of the conference was continually blurred - are we here to discuss an actual draft document or to contribute our ideas to the formation of such a bill?
- The bill has still not been circulated to delegates.

2. We call for a proper consultation process that will lead to the publication of a draft Communal Land Rights Bill within a reasonable timeframe. This process should include:

- Release of an official discussion document that sets out clearly the thinking of government on this matter, particularly the underlying principles and implementation mechanisms it is proposing. This should happen within two months of this conference.
- A thorough-going process of public consultation around the discussion document at national, provincial and local level, which includes participation by land users themselves. This should be carried out over a period of four months, terminating six months from the end of this Conference.
- Publication of a draft bill within nine months of the end of this conference.

3. Key principles regarding reform of communal tenure that we wish to reaffirm.

- Rights to land vest in people, not in institutions.
- Functions of land ownership must be clearly separated from those of administration
- Rights holders must be free to choose the type of tenure and the system of administration that they want; any institution engaged in land administration remains accountable to the rights holders.

Securing tenure of groups and individuals

Summary of a paper presented at the DLA tenure conference in November 2001 by Henk Smith and Kobus Pienaar

The terms

FOR our purposes “forms of tenure” refers to: (1) ownership; (2) different types of leases and servitudes (which are often derived from ownership); and (3) permits. New forms of ownership include “sectional title”, “initial ownership” created by the DFA, aboriginal title (yet to be recognised under South African common law) and as proposed, commonhold.

Private ownership can be distinguished from state or public ownership. Communal tenure may occur on private land and public land. Private owners include individual natural persons and legal persons where the legal entity is registered as the private owner (such as companies, trusts, CPAs). The kind of legal person or entity that holds property in ownership, leasehold or under a permit does not determine the tenure form. A person can hold the land as owner, leaseholder or permit-holder.

Tenure and Management

The management functions in group land holding institutions relate to regulation of land use, first level (often vol-

What the Constitution says

Section 25 (5) and (6) of the Constitution requires the state to take reasonable legislative and other measures to:

- enable citizens to gain access to land on an equitable basis
- provide either secure tenure of land to people and communities whose tenure is legally insecure as a result of past racially discriminatory laws or practices or comparable redress.

untary) dispute resolution, allocation of individual use and occupation rights to new members and re-allocation of terminated rights of original individual rights holders.

The management functions must be distinguished from the ownership functions. Ownership functions include group decision-making processes relating to ownership transactions and the alienation of the group assets such as the sale or lease of community land, macro land use and zoning decisions.

Forms of tenure are often associated with the kinds of persons or institutions that are responsible for the management of the land in question. But the owner of the land is not always responsible for the management of the land. For example: land can be privately owned by a CPA but managed by a service entity under a municipality. Similarly a commonage committee elected by users can manage public land owned by a local authority. The township part of CPA owned land can be set aside for administration and management by a municipality, or for residential sites to be off in ownership to households and for services to be managed by the municipality.

Tenure and Governance

The government retains its governance and administration responsibilities over all public and private land. Environmental laws, soil and water protection laws and planning and development authorisations impact on the ownership and management rights of all private landowners.

The state also takes on responsibilities of participating

in the ownership and management of private land and private property. In sectional title schemes the state's deeds office registers both group rights to common areas and the property rights of individuals. A communal property association can be monitored and restructured by the state if it does not comply with its own constitution and the act.

The CPA Act is an example of legislation that gives a private property entity the kinds of responsibilities usually associated with an "organ of state". Decisions of CPAs can be tested and challenged for reasonableness, fairness, non-discrimination and promotion of socio-economic rights, in the same way that the Integrated Development Plans of municipalities can be evaluated.

Tenure and Development

The obligations of the state to promote social and economic rights apply to all urban and rural dwellers whether they live on private or public land. The integrated development plans of municipalities must address the needs of the most disadvantaged and vulnerable. The promotion of rights to basic services and shelter must happen on public and private land.

Tenure forms and security of tenure

The Constitution promises "security" of tenure and the term is generally used to describe the quality of the rights of the tenure holder (the

individual or household or community) in relation to the outside world. It refers to both the objective and subjective experience of the land rights holder and the attitude of others with regard to his or her tenure rights. The tenure relations between the holder and those holding under him or her (family relations, household relations or employment relationships) of especially women, children, the aged and tenants are also emphasised. Thus "security" or robustness of a tenure form can be measured in terms of:

- Protection of the rights of the holder against eviction and interference by others.
- "Transactability" and transferability (by for example inheritance, lease or sale).
- Creditworthiness and whether it is accepted as security and surety for credit by banks.
- Certainty and durability, the length of time of the right.
- Assurance and respect for the status of the rights holder (as individual or collective) through registration or societal guarantee.

Security of tenure does not only depend on the form of tenure. The tenure form offers different qualities in different circumstances.

For example, the transactability and "creditworthiness" of a piece of property may be undermined if it is owned jointly by a large partnership of co-owners and the procedure to get agreement of all the co-owners may be too

cumbersome to be worth the exercise. A highly sought after permit-based right or concession may be far more transactable and acceptable as security for credit than certain land held in ownership. A public record and registration in a respected registry of the group and individual rights often adds value to "security" in the eyes of the beholder.

Security is relevant to the group and the individuals and members of the group. For instance, trusts and CPAs do not provide for the automatic vesting of property rights in individual members.

The CPA Act guarantees members only the right of protection against discrimination and unfair treatment and the right to participate in decision making and elections of representatives. Individual rights relating to exclusive occupation and use only vest once such rights are allocated. It depends on the trust deeds or constitutions of CPAs whether and when an individual's rights of use, occupation and access are awarded.

The CPA Act is not prescriptive about the form of tenure and the nature of the rights available to members. Members must decide the nature of the occupation, use and access rights which, typically, are of the permit or leasehold kind. The CPA act was designed for greenfields land reform and the act does not give automatic recognition to the rights of current users and occupiers.

It is a shortcoming in our law that the rights of individuals under a group land holding entity do not have statutory protection. The IPILRA rights protect the individual against arbitrary dispossession and afford the individual the right to participate in decision making. But the rights of occupation and use are not secure and protected in that they remain undefined.

The challenge to new tenure laws is to create by statute strong individual rights that vest in the users and occupiers as of right. Commonhold title or nominal state ownership will

then be shaped by the nature of the individual rights, rather than the current legal situation applicable to CPAs and trusts where the constitution of the land holding institution determines the nature and status of the individual rights of users and occupiers.

If the tenure rights of individuals are not defined with certainty, the security of tenure for the group and the ownership functions of the group holding entity are also affected. If a CPA fails to allocate individual use and occupation rights, it affects the ability of the CPA, through

decisions of the majority of members, to make ownership decisions. It cannot lease land to outsiders or make macro zoning decisions if the members feel insecure about their own rights.

In the land reform context, adaptability of the tenure form to accommodate the changing economic and social environment must be weighed up against the tenure security and certainty requirements. But the two requirements are compatible if the constitution allows for the adaptation of the nature and content of individual rights subject to a pre-

WHAT LAND TENURE POLICY SAYS

The 1997 White Paper on land policy stated that: "Land tenure reform may entail new systems of land holding, land rights and forms of ownership ..."

The guiding principles in the White Paper are:

- Tenure reform must move towards rights and away from permits.
- Tenure reform must build a unitary non-racial system of land rights for all South Africans.
- Tenure reform must allow people to choose the tenure system that is appropriate to their circumstances.
- All tenure systems must be consistent with the Constitution's commitment to basic human rights and equality.
- In order to deliver security of tenure a rights based approach has been adopted.

Overcrowding and the legacy of forced overlapping of rights means there is a risk that tenure reform and upgrading could result in dispossession and heightened insecurity for the most vulnerable.

To avoid this, all tenure reform processes must recognise and accommodate the de facto vested rights that exist on the ground, which includes legal rights as well as interests that have come to exist without formal legal recognition.

New tenure systems and laws should be brought in line with reality as it exists on the ground and in practice.

Previous legal reforms that have attempted to impose new

systems on top of an existing situation have failed or been irrelevant. The recognition of de facto systems of vested rights in land as a starting point for solutions is fundamental to tenure reform. Adjudicatory principles are being developed to measure current interests in land, and commensurate entitlements to tenure rights, either on currently occupied land, or elsewhere.

The most basic form of vested rights in land is established occupation. This must not be jeopardised unless viable and acceptable alternatives are available.

Another important form of established vested rights is long term historical ownership of the land which exists in practice but which is not recognised in law."

determined process and compensation where appropriate. The security and legal certainty of a tenure form also depend on the support provided for it, including:

- Registration of rights, including the demarcation or surveying of exclusive use land pockets
- Dispute resolution mechanisms, especially for overlapping rights, and resources for redress
- Respect afforded by the state and financial institutions

Land reform beneficiaries must be allowed to choose their tenure form. People's development cannot be strait-jacketed into tenure forms prescribed from above. The starting point for making a choice about tenure and management form should be the function or use of the land.

Land is used for different purposes or combinations of purposes, for example: residential, services and amenities, irrigation, arable lots, grazing, nomadic or seasonal grazing, tourism. Each land use may best be served by different management actions. For example, in the case of individualised residential land use, the initial allocation and registration exercises are the most important management and administration functions. Seasonal grazing land use may require ongoing management interventions.

Once the management requirements have been decided upon, the appropriate insti-

TENURE LAWS

New tenure legislation includes:

Extension of Security of Tenure Act, Land Reform (Labour Tenants) Act 62 of 1997, Communal Property Associations Act 28 of 1996, Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998), Transformation of Certain Rural Areas Act 94 of 1998 (TRAN-CRA) Interim Protection of Land Rights Act 31 of 1996 (IPILRA), Development Facilitation Act 67 of 1995 (DFA) and the Housing Rental Act.

Subsequent legislation such as the Municipal Systems Act of 2000 emphasises the need to integrate land use, spatial planning, local institutional development and local self-governance initiatives with economic development. Integration with local development initiatives could feature as a sixth guiding principle for tenure reform.

tution(s) for management and administration, taking into account the support needed by such management institutions, can be considered.

Evaluation of tenure forms available for land reform

From the above it is clear that land reform now requires a tenure form, supported by

management and administration systems, that provides secure tenure to both the group and individual members, and enables individuals' use and occupation rights to exist and be enforced. This is particularly necessary where use and occupation cannot be planned and allocated anew because the land is already occupied and used.

Assessing DLA's new tenure proposals

The draft Communal Land Rights Bill that was presented at the conference explicitly states that it aims "to confirm and formalise the legal status of land tenure rights held by historically disadvantaged communities and individual members of such communities".

The bill's definition of a land tenure right includes the formal or informal rights held by an individual if it is "recognised or acknowledged by any legislation, to own, occupy or use specified communal land".

Section 5 states that people who occupy or use land by virtue of being a member and who have a right under IPILRA are the true owners of the land. The use and occupation rights of individuals dealt with by the bill are therefore limited to PTOs and IPILRA rights. There are two problems with the ambit of the individual rights dealt with by the bill.

The first is that it only deals with rights recognised by statutes and the second is that

once IPILRA is repealed, it will only deal with the apartheid permit based rights under the Black Administration Act, the 1936 Land Act and the homeland land laws.

How then does the bill “confirm and formalise” the legal status of individuals’ use and occupation rights?

- A community register of land tenure rights must be compiled and maintained by the “community” and its right holders structure (section 7(1));
- Community rules made by the “community” may define the content and exercise of land tenure rights and the rules are enforceable if recorded in writing (section 9);
- A land tenure right may only be registered once the registrar of deeds has opened a communal land register on application of the minister and the community and once the community has provided a lay out plan indicating each member’s rights in land and the minister has prepared a surveyed general plan (sections 17 and 18);
- The use and occupation rights of an individual can be registered in his or her name if the majority of other rights holders agree to it at a community meeting (section 21);
- A description of the nature of each holder’s rights is required when a community applies for the transfer of state land to get commonhold title (section 23);
- A community right holders structure must allocate use

and occupation of the community’s land (section 29(g)). It appears that the exclusive use rights of an individual or household are transactable if transactions are allowed under community rules.

Our conclusion is that the individual’s use and occupation rights can only be confirmed and formalised through the community right holders structure (including the traditional authority). They do not exist and cannot be enforced independently. They depend on whether and how the “community” defines them. They remain lesser “personal” or contractual rights not amounting to ownership as reflected in a registered deed recording the rights of ownership, use, occupation or access, until they are defined by the “community”.

The bill has the same shortcomings as many CPAs and community land trusts in that the security of individuals’ use and occupation rights depends entirely on the operation of the community right holders structure.

This problem is exacerbated in tenure reform cases because the bill does not define the “community” which will comprise or authorise the rights holders’ structure.

The confirmation and formalisation of the rights of communities are similarly bound to community initiated processes. A traditional community (not further defined) or a community which has authorised a right holders structure

becomes a juristic person on promulgation of the act. A “registered commonhold title document “ is issued once the requirements for a communal land register and surveyed general plan have been complied with. (ch V). Registration of “commonhold title” can also occur through a parallel process where application is made by the community for the transfer of state owned land (ch VI). The chapter VI route replaces the requirements that the registrar of deeds open a communal land register and the surveyor general prepare a surveyed general plan with an investigation by the director-general on, inter alia, whether the community is likely to observe the equality and fairness principles of the act.

The question is whether the confirmation process leads to the qualities that will give “commonhold title” respectability, certainty and secure tenure to community interests.

The chapter V route involving the offices of the registrar and the surveyor general is the more “respectable” one and may give the certainty required for third parties to transact with a community.

The fast-track chapter VI route confers commonhold ownership, but a chapter VI title may not fulfil the security of tenure requirements.

- *A full version of the paper can be obtained from Henk@lrc.org.za or Kobus@lrc.org.za, or from the Legal Resources Centre offices in Cape Town.*

Sustainable development

WEBSTER WHANDE

IDO not claim that reforming tenurial rights will alone lead to the success of community-based natural resource management (CBNRM) programmes. However, it is important to recognise and acknowledge that clear tenure rights have the potential to create conditions for the success of CBNRM in that secure tenure creates the necessary incentives for sustainable development.

The further development of CBNRM in the Southern African region will to some extent depend on the decentralisation and devolution of resource ownership and management and other factors like the role of the state, NGOs, donor organisations and private sector and the capacity of community-based organisations. In this article, I will only analyse natural resource tenure and not these other equally important factors.

The 1970s heralded new thinking regarding the management of natural resources, highlighting a shift from protectionist positions over natural resources that emphasised the creation of protected areas and prevented the use of resources within these areas. The protectionist approach, supported by legal and policy frameworks, excluded rural people from utilising natural resources that either occurred

within protected areas or, in the case of wild animals, could move freely in rural areas and thus venture in and out of such protected zones.

The change in approach towards opening possibilities for extending access gave private landowners limited use rights over natural resources occurring on their land. These changes, occurring under the colonial and apartheid regimes, were not meant to benefit the majority of people living in the rural areas. Nevertheless, the positive outcomes of these changes on private lands set the scene for innovative policy shifts in communal areas after the independence of most countries in the Southern African region.

This new approach to managing natural resources, now commonly referred to as community based natural resources management (CBNRM), is an on-going evolutionary process. Its origins lie with the realisation by conservation officials that goals set for the conservation of nature would not be met unless the people who live face-to-face with these resources are included in the equation.

The people in this situation included, for example, those who bear the costs of living adjacent to wildlife areas and who have a long history of managing such resources. To enable rural communities to

participate in resource management, changes to the legal and policy frameworks had to be made. Beyond conservation, CBNRM was slowly recognised as a desirable rural development strategy whose objectives were gradually transformed to include social and economic upliftment and democratisation.

Limited use rights were conferred to rural communities resulting in benefits being derived on a collective basis and shared. Changes in the way rural communities' accessed and used natural resources were implemented, in the first instance by extending some use rights (as on private land) to regional or local government bodies. This allowed these bodies to begin to manage resources such as wildlife for the benefit of rural communities and thus to work towards both conservation and development.

A fundamental problem that is now confronting poor rural communities in the region is the lack of secure ownership or title over the resources they depend on for their livelihoods. Control over land and the resources occurring on such land, and the ways in which land and resources are held or not held, individually or collectively, are crucial to the way such resources are utilised and managed.

Tenurial rights have to date

through secure tenure

been conferred on local government institutions, with sanctioned and supervised use rights given to rural communities. The lack of further decentralisation and its impacts on community-based organisations can best be summarised by M. Murphree's statement in 1995 that:

"Tenurial rights will make the difference between rural democratic representation and the persistence of perpetual adolescence for rural peoples in national structures of governance."

Four basic forms of tenure exist and are found in most Southern African countries. These are:

- **state property** – the vesting of land and resources in the state;
- **common property** – defined groups of individuals exercise authority over a defined area of land and the resultant resources;
- **private or freehold property** – a legally recognised individual owns the land and resources; and,
- **open access** – which is often confused with common property or state land and resources.

Resource rights on both state property and in common property regimes are both key issues for rural communities and the success of CBNRM programmes. Despite the reali-

sation that secure tenure or title over resources is crucial for the success of conservation and rural development, appropriate tenure arrangements have been difficult to establish.

Arrangements where tenure is insecure or lacks clarity can often lead to situations that are in effect open access regimes with negative consequences for the resources. Such examples include situations where governments are legally recognised as owners of the resources whilst communities are the users and everyday managers.

Tenure arrangements should recognise the role that communities play in natural resource management. The premise for the above-mentioned argument has been that with secure and clear tenure rights, communities would be able to exclude outsiders from using their resources and institute local rules that can be monitored without investing a lot of human and financial resources.

Under the different tenure arrangements, there are a range of relationships between different interacting institutions, which in turn determine the rights of access to resources. The situation, as described above by Murphree, has very much been one of "perpetual adolescence" for sub-district communal institutions, as real authority and

management responsibility is located at district or national level.

This has been in contradiction to the vital roles and responsibilities communities play in natural resource management at the operational level. Natural resource tenure should take cognisance of these responsibilities and place authority at the appropriate level of governance.

Conclusion

While securing tenure rights, whether through decentralisation of both ownership and authority, or through shared responsibilities with the state, is crucial for the success of CBNRM in Southern Africa, other factors are important as well.

Any attempts at further decentralisation of authority will be met with new challenges, including the already well documented conflicts between traditional leadership and new institutions, the question of the capacity of these institutions and their relations with other stakeholders involved in CBNRM.

- *Webster Whande is the co-ordinator of the Community Based Natural Resource Management network based at PLAAS, University of Western Cape. He can be contacted at wwhande@uwc.ac.za*

Land use, tenure and administration to improve livelihoods

DYLAN RAWLINS
Border Rural Committee

THE people of Gasela in the Eastern Cape had hoped the new government would assist them to improve their lives after a history of displacement, exploitation and victimisation. But, frustrated with government's slow delivery pace, they approached the local National Land Committee affiliate, Border Rural Committee (BRC), for help and discovered that neither the redistribution nor the restitution programmes applied to them although the tenure reform provided protection under the Interim Protection of Informal Land Rights Act (IPILRA). Frustration led to action and together BRC and the community devised a three-pronged approach to delivering improved livelihoods and secure tenure for the community.

The basis for the three-pronged approach

The objective of the three-pronged approach is to deliver

secure tenure and improve the livelihoods of every community member through the integration of what BRC considers to be the three main aspects of rural development:

- land use
- land tenure, and
- land administration

The three-pronged approach requires the simultaneous planning and implementation of different land use and land tenure options within a customised land administration framework. The land administration aspect of this approach is effectively the 'glue' that binds tenure to land use.

The basis for this approach is that the type of land use should be matched to the form of land tenure and vice versa. Exclusive forms of tenure should be used for exclusive use rights such as garden plots or cropping whereas communal tenure is more suited towards a communal land use such as grazing. This match makes the design of a land administration system easier given BRC's conceptual under-

standing of land administration as the operational component of land tenure. This means that each form of tenure is administered differently but not necessarily by a different structure. Therefore, individual and communal tenure are administered separately according to their own set of rules with each rule being derived from the functions of land administration described below.

The practicalities of this approach are better understood through the process undertaken at Gasela. The following section describes the four phases of the project and their integration into the three-pronged approach.

Phase one: Project planning

The first aspect to project planning was to conduct a land capability and land needs assessment.

The land capability assessment determines the production potential of the physical environment and a land needs assessment determines what

the community requires from use of the land.

The land capability assessment involved a soil survey, which was used to describe the soil depth, clay content, permeability, water holding capacity and soil form. Using this information together with a slope classification, BRC was able to determine the land capability classes of each field on the farm. This classification showed that most of the farm was arable but would require moderate conservation measures such as contouring. The main problem identified was a high water table.

The land needs assessment showed that the community was primarily interested in small-scale agriculture favouring maize and bean production. Some community members ($\pm 5\%$) showed an interest in livestock farming but this was limited to those who already owned livestock.

Drawing from the capability and needs assessments, BRC then assessed what the most suitable use of the land would be given the limited financial and labour resources of the community, their specific skill levels and their access to markets. This involved predicting the yields and gross margins of different cropping options on the farm.

The options included maize, cabbages, groundnuts and soybeans. Using yield prediction equations and the current prices of inputs and produce, BRC calculated that cabbage and potato production would provide the highest returns per

household. The community accepted these recommendations and agreed that the land that was not suitable for cropping would be used for grazing.

Since the selected land use options were small-scale agriculture and livestock production there would be two forms of tenure to match the land use. The land used for small-scale agriculture would be household based and would therefore be held by the household. The grazing lands remain communal. The selection of these two forms of tenure had a number of consequences for land administration since each form of tenure had to be administered differently according to its own set of "rules".

The "rules" refer to each of the seven functions of land administration, namely:

- Adjudication
- Land allocation
- Boundary demarcation and delimitation
- Land registration (recording)
- Land use regulation
- Land valuation
- Land taxation

The community with the assistance of BRC established rules for each form of tenure. These rules related to how land would be allocated, demarcated, recorded, regulated etc. For example, arable allotments were allocated at a community meeting facilitated by the community leadership, boundaries were demarcated with all neighbours to that boundary present, a sketch plan was drawn indicating the approxi-

mate location of boundaries and the name of the household to whom the plot was allocated. (The full details of this process are too complex to describe here but can be obtained in the full report on Gasela available from BRC).

In the case of the grazing land it was agreed that rules of 'open access' would continue with the only land use regulation being that those who owned cattle would be required to maintain the fences between the grazing land and the arable allotments.

Phase two: Implementation

An administrative structure was set up to deal with the farm issues separately from the residential issues which are administered by the Gasela SANCO office.

This farm administrative structure was responsible for ensuring that all the agreed upon rules pertaining to each function were being adhered to correctly. This includes the maintenance of the land record system.

This administrative structure co-ordinated the production aspects of the land as well as the tenure issues that arose such as the subdivision and reallocation of plots.

BRC played a support and monitoring role. For the first production period the project progressed smoothly and the community, along with BRC, used the opportunity to 'fine-tune' the established land administration rules.

Phase three: Expansion

Following the successful first production period, the community and BRC decided to expand the project to include more land and to introduce more role players in the hope that this might lead to the project gaining more attention from the Department of Land Affairs. More arable land was cleared and ploughed effectively doubling the extent of arable land available for cultivation.

A separate committee was formed to administer the newly cleared land, which BRC has been working closely with to ensure that land administration is conducted fairly and openly. In addition to expanding the land, the project has been opened to the Amatola District Council, the Department's of Agriculture and Land Affairs and the Stutterheim Transitional Rural Council.

With these role players now on board both the production and land ownership issues are being boosted. The Department of Agriculture has committed itself to providing assistance to the community through extension and training. This has taken the form of demonstration plots that are located amongst the household's plots.

The Department of Land Affairs is beginning to realise the potential of the community and has started a process towards transferring the land to the community.



Phase four: The future of Gasela

The future outlook for Gasela is good. The initial objective of improving the livelihoods of each member of the community through productive land use options is well on its way to being fulfilled.

However, more importantly, the foundation for future sustainability of the community has been established through the introduction and implementation of a solid tenure and land administration component. The tenure arrangements are relatively flexible but firmly resolved within the 'rules' and functions of the different land administration systems. This creates possibilities for the future where the community is capable of administering their own land if group ownership of the farm becomes a reality. In this sense, a Communal Property Association or a Trust could take over the role of the administering institution should the farm be transferred as a whole to a legal entity.

However, if the farm is subdivided and individual portions are transferred to households then the established land administration and tenure arrangements will provide the basis for determining which household should take ownership of what land. This would be facilitated by existing records of demarcations and allocations and could be conducted according to the agreed adjudication rules.

The lesson from Gasela

Land reform has not delivered according to the expectations of rural people. Land transfers seem to have become more of an exception than the commonplace they should be. As a result, those affected by apartheid remain landless and poor. The Gasela project has shown that by placing the spotlight on the direct needs of individuals, a greater success in rural development can be achieved rather than focusing on land ownership alone.

However, the greatest lesson to be learnt from the Gasela experience is that for a project such as this to succeed in the long term there has to be a firm integration of the land use, land tenure and land administration aspects of the project.

Each is reliant on the other to define the path and options that should be considered at every step of the way.

- For more information, Dylan Rawlins can be contacted on dylan@brc21.co.za

Community Workshop report

Members of the Ekuthuleni community resolved at a workshop in December last year not to survey and register individual land holdings but to develop a new way of recording members' rights in communal property.

*What follows is a summary of the workshop report written by **Ndabezinhle Ziqubu**.*

THE workshop, held at the Ntembeni Tribal Authority hall in Melmoth, was to assist the community to unpack land-holding options that would reduce tenure insecurity and increase access to credit.

AFRA and the Ekuthuleni Land Committee initiated the project, known as Piloting Local Administration of Records, in 1999 after the community had applied to the Department of Land Affairs for a tenure upgrade. The minister designated the state owned land for settlement last year and approved transfer to a Communal Property Association (CPA). Some community members, however, felt that transfer of land to a CPA would not solve their tenure problems.

Background to the workshop

Many people expressed the need for title deeds or individual records of their land holdings for the following reasons:

- To secure the tenure of individual households against the state as the current owner and against neighbours and other community members.

EXPECTATIONS

The following outcomes were expected from the workshop:

- to have discussed and developed a tangible approach to credit;
- to clarify whether proposed amendments to the Constitution have been implemented;
- to discuss the current status of transferring land to the community;
- to clarify when basic infrastructure like water and electricity will be supplied to those who still lack it; and,
- to resolve disputes around boundaries

- Access to credit for people who are involved in commercial agriculture and want to upgrade their agricultural ventures.

Due to the high cost and inaccessibility of title deeds this was not an option for the community. AFRA thus launched an investigation into how affordable records of land rights based on the community's current land administra-

tion systems might be provided to households.

An adjudication process was undertaken in the community to clarify boundaries, identify disputes about boundaries and who legitimate rights holders are and discuss the process for resolving them.

A surveyor was subcontracted to develop land holding options, which were presented to a subsequent meeting of the Project Advisory Committee. This committee, which is composed of relevant stakeholders from community, government and NGOs, failed to reach agreement on an appropriate legal option for the Ekuthuleni community. It was therefore decided to present the options to community members at a workshop for them to decide.

Land transfer and implementation update

A DLA official reported that the Land Affairs minister had signed the designation memorandum as well as the gazette notice and that the stateland disposal committee had agreed to transfer the land.

The process of transfer was under way, but it was unclear how long this would take.

The official also reported that implementation had been delayed due to conflict between the Mnthonjaneni Municipality and the Uthungulu Regional Council about which had responsibility. It had since

been decided that the Mnthonjaneni Municipality will assume responsibility for implementing the project and a meeting will be scheduled between DLA, the municipality and the commu-

nity structure to finalise the issues.

The AFRA facilitators presented four land holding options to the community as described below:

LAND HOLDING OPTIONS

The four options below were disussed and their respective disadvantages listed (see boxes) before a final choice was made

- Transfer of land to a Communal Property Association (CPA)
- CPA transfers land to individuals
- State transfers land to individuals directly
- New internally managed system is developed under a CPA ("Informal option")

INFORMAL OPTION

This option builds on the current practices people use to access land and attempts to formalise them in order to facilitate recognition of these types of land rights by different institutions, including the law.

Implications

- The community would have to decide on how accurate demarcation and its associated costs must be;
- This option would provide secure tenure more than it would provide credit access.

TRANSFER OF LAND TO A CPA

This is the route the project is currently following.

Implications

- The CPA will be the signatory to individuals' credit access.
- Default of an individual will put the whole community at risk.
- Inheritance must be regulated by the CPA constitution.
- The CPA constitution must be amended. If it is not, issues including membership, inheritance, subdivisions and sales will cause problems.

Disadvantages

- Under the CPA household members are not regarded as CPA members and therefore have got no rights;
- It is not clear how CPA membership is passed on from one member to another within the household;
- Ownership of land vests with the CPA and individuals cannot develop their properties as they wish;
- Individuals cannot use land as collateral because they do not have title deeds for their portions of land, they have to do this through the CPA; and,
- If an individual fails to pay back the loan that problem affects the whole community.

CPA TRANSFERS

LAND TO INDIVIDUALS

After the CPA has taken transfer of land it would then subdivide it and transfer it to individuals.

Implications

- Membership has to be redefined because as it is now it is restricted to current members and those who can buy membership rights;
- The designation memorandum has to be amended to cover those community members who do not appear on the beneficiary list;
- The community has to decide whether communal property still exists or not;
- The CPA has to get authorisation from the Minister in terms of the Subdivision of Agricultural Land Act, Act 70 of 1970, to subdivide and transfer land to individuals; and,
- Community/individuals incur all costs associated with the application and the subdivision and transfer costs.

Disadvantages

- Subdivision and transfer costs are very high and will be a responsibility of the CPA or individuals;
- There will be no assistance from government financially to cater for these costs as the CPA will be the owner of land; and,
- There will be delays as the designation memorandum will have to be amended and the CPA will have to apply for consent from the Minister to transfer land to individuals.

STATE TRANSFERS LAND TO INDIVIDUALS

This involves suspending the current application and reapplying for a state survey to transfer individual holdings directly to their de facto owners.

Implications

- The land will not be transferred to a CPA, meaning the current process will have to be stopped to give effect to the transfer;
- The designation memorandum needs to be amended, causing a delay of two to eight months;
- Disputes in terms of boundaries and rights holders have to be resolved before land can be surveyed;
- The community has to use legally acceptable pegs when demarcating;
- The costs will be reduced if the community undertakes demarcation itself;
- Surveying will consume a lot of time considering the topography of the area;
- Each portion of land will have to be valued;
- Costs associated with subdividing, sales and inheritance will be incurred by individuals;
- The CPA will either be dissolved or administer the commonage; and,
- Costs per property will differ depending on the land size.

Disadvantages

- Future subdivisions and transfers costs are very high and will be the responsibility of the community or individuals after the initial transfers;
- There will be delays as the designation memorandum will have to be amended to cater for people who do not form part of the beneficiary list but are members of the community; and,
- Demarcating and subdividing land will consume a lot of time as surveyors will have to negotiate with each household around access to servitudes.

THE COMMUNITY'S CHOICE

After extended group discussions the community members unanimously decided that the Informal option would best suit them. This would involve internal recording and administering of land transfers.

They gave the following reasons for their choice:

- The CPA is going to transfer portions of land to individual households and issue ownership records for those portions;
- This option is going to formalise the practices that people are already using and are familiar with;
- Ownership records will not cost as much as title deeds to develop and issue to individuals;
- Subdivision and transfer costs from the CPA to individual households in this option will be low;
- Subdividing and transferring land to descendants will not cost individuals a lot;
- In the informal option there will be no delays like in the formal option, e.g., the amendment of a designation memorandum;
- The respect and dignity of the traditional authorities will be maintained and they will always have a role to play in the administration of land; and,
- The community will take the responsibility of demarcating and pegging as the people who are most knowledgeable about where the boundaries are.

Next steps

Agreements were reached on when and how demarcation would be undertaken as well as the resolution of existing and future disputes. In terms of demarcation, it was agreed that the induna, the committee members, the household head who is identifying where the boundary goes, and ibandla consisting of, among other people, direct neighbours of the person identifying where the boundary goes should all be part of the process.

The same group would need to be present at the resolution of disputes. While everyone agreed these processes should begin soon, it was less clear how long they take and therefore when they would be completed. It was agreed that the workshop resolutions must be taken to a community meeting, where final decisions will be made on time frames and processes.

AFRA undertook to write up a workshop report and to distribute it to the Project Advisory Committee members as well as the community.

This report will form the basis for AFRA's discussions with the PAC at a meeting to be convened early this year, after which we should have the most important provincial government department's approval for the workshop resolutions.

- A full version of the workshop report is available from **AFRA**.

Designing rural housing for the people

*When thousands of poor people occupied Bredell last year, the government promptly evicted them. In the aftermath of the shack demolition, the Department of Land Affairs committed itself to speeding up land reform delivery. Some critics, however, argued that the problem is not the pace of delivery but the type of land reform that is being delivered. Extremely poor people need access to cheap land that increases their livelihood options and not necessarily land for commercial agriculture or serviced urban houses, which are often beyond their means. One experiment in KwaZulu-Natal is attempting to bridge precisely this gap. **Donna Hornby** reports.*

“THE 300 m² plots with tiny houses could become a social disaster in the towns,” says Dave Simpson, a surveyor in Ladysmith who, together with developer Jeff Richmond, have led the way in designing rural housing schemes that overcome a number of constraints. “The houses and plots are tiny because there’s no government money for more than that. But they’re in sterile environments – there’s no work, no opportunities for people living in them.” Simpson notes though that it is very easy to criticise government but much harder to come up with concrete answers. And this is precisely the challenge he and Richmond took on early in 1997.

They thought a reasonable alternative to the urban box houses would be a patch of about an acre of land in a rural area near a town and owned in freehold together with access to communal agri-

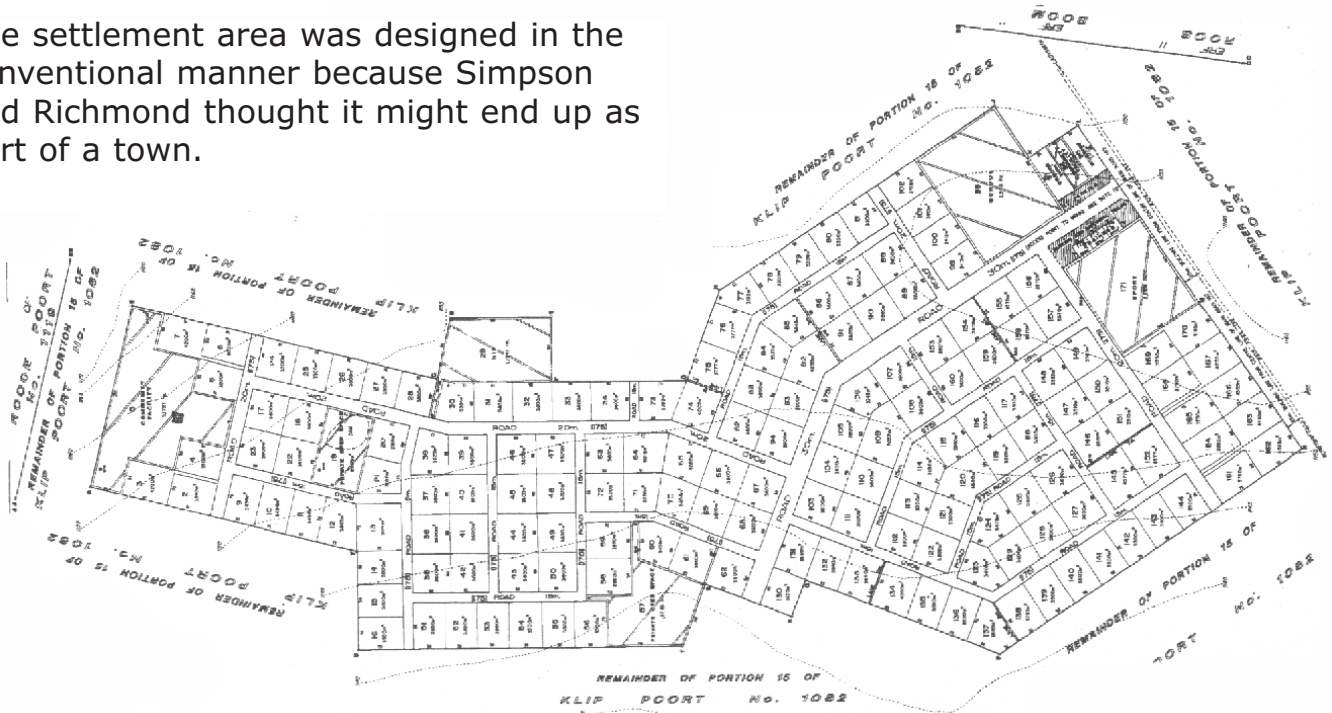
cultural land. This would create the conditions for a better quality of life in a rural setting away from urban squalor. The rural setting would enable a bit of agricultural production but the scheme would be close enough to a town to make potential employment possible. “We’re not under any illusions,” says Simpson. “This would offer agriculture as a supplementary activity but it wouldn’t financially support a family on its own. We’re just trying to provide people with a better quality of life in a traditional rural setting which is close to town, and it is intended for poorer communities.”

There were trade-offs to be made. Housing policy tends to focus on medium and low cost housing with fairly sophisticated services that are the responsibility of the municipalities to provide and maintain. Simpson’s and Richmond’s first plan, to cut up a farm and put in a road, would have cre-

ated difficulties for the municipality to provide services, water and access. They therefore decided to opt for a plan with a settlement and communal land mix, which would have fallen under the old rural municipality, the regional council. The regional council, however, was concerned about who would provide and maintain services if the project fell apart. The compromise worked out was to develop the property with very basic and unsophisticated services that would not be difficult and expensive to maintain. At about the same time, regional councils were instructed that it was their duty to provide services to rural communities and, with the compromise around levels of services, it agreed that if the landowners’ association collapsed it would provide and maintain services. These were to be boreholes with hand pumps, VIP toilets and wide road reserves to create space to avoid holes with only the

PHASE 1

The settlement area was designed in the conventional manner because Simpson and Richmond thought it might end up as part of a town.



major road being gravelled while on the others the grass would not even be removed.

With the broad framework in place, Simpson and Richmond found a farm in Roosboom near Ladysmith adjacent to land on which there is a restitution claim. The project was divided into three phases. In phase one, 161 beneficiaries each got residential land of 3 600 m², in phase two 190 beneficiaries each got residential land of 3 300 m² and in phase three, 199 beneficiaries are each to get 2 100 m² of residential land. The beneficiaries own the residential land in individual freehold and become compulsory members of the landowners' association, which owns the rest of the land in communal ownership. A constitution creates the basis for management and use of the communal land.

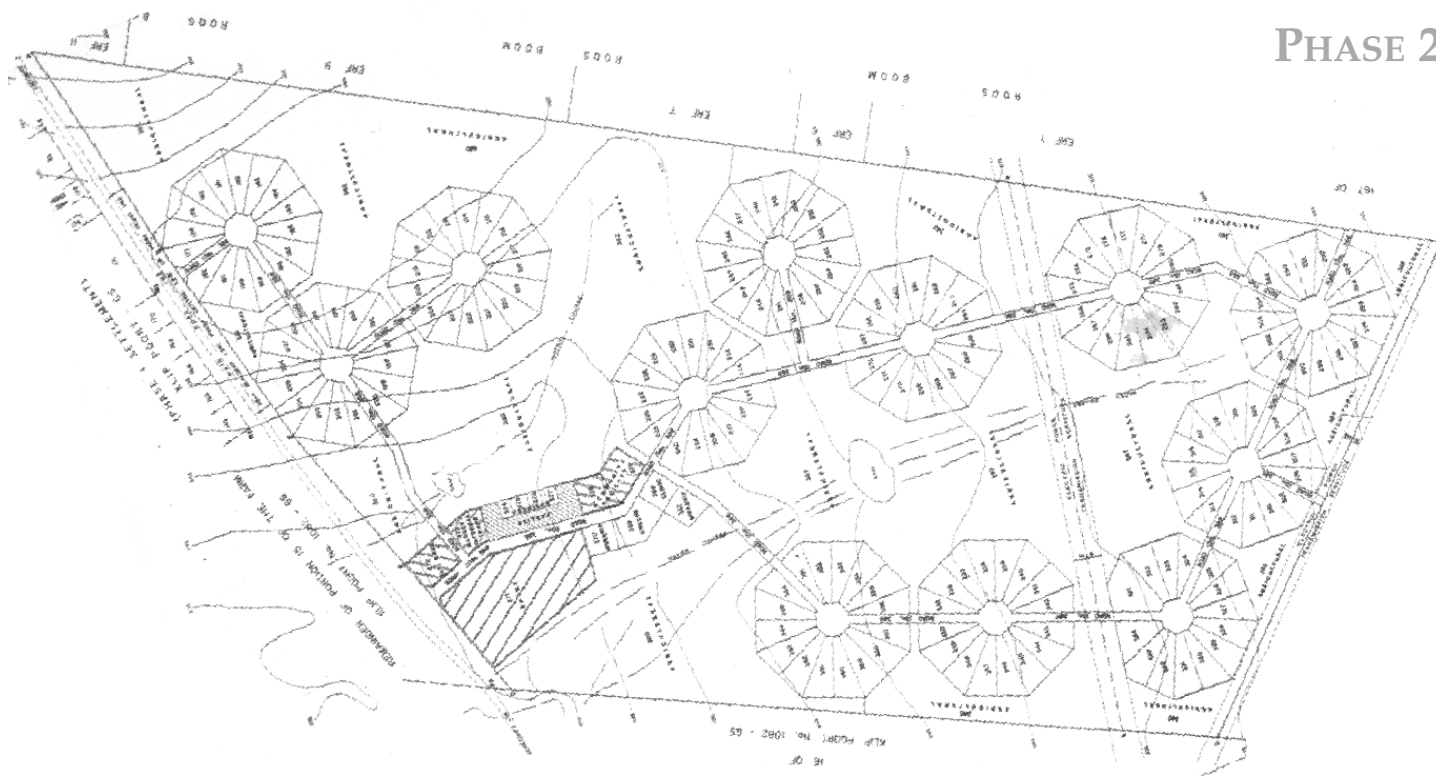
Phase one

The settlement area was designed in the conventional manner because Simpson and Richmond thought it might later end up as part of a town. The residential plots could be subdivided six times and still have road access. Boreholes were drilled in eleven places scattered around the settlement and land was allocated for communal and public facilities such as a business and trade, school, creche, church, sport, community hall and a dip. Word about the project got out and "before we knew it" there were 500 people on the list. Clearly, "there was a huge demand". People began to move on at the end of 1997 and used the remainder of the housing grants to buy building materials. Once they had settled, Simpson and Richmond asked for an evaluation so that they could improve the next

phase. The two key issues were that the settlement felt like a "lokishi" (township), especially in terms of people's access to the communal areas. The houses and residential sites were far from fields with the result that, like betterment schemes, arable production was relatively low. The second issue was access to water sources. All projects hit the problem of water, says Simpson, because the planning has to be fairly developed before expensive drilling can begin. But this means plans need to be adjusted because water location is a little unpredictable. The result is that some residents had to walk around a block to fetch water – not the shortest route.

Phase two

The residents' evaluation in phase one prompted Simpson and Richmond to redesign in



The wagon wheel design of Phase 2 dealt with some of the limitations of Phase 1. Water access was to be addressed with boreholes in the centre of the wagon wheels.

phase two. They came up with the wagon wheel design, with the intention of locating boreholes in the centre of each wheel. The design also reduced road frontage and thus saved some costs and gave residents direct access to the communal land in addition to the advantages of phase one. A different set of problems emerged, however. Firstly, although there was a 90% success rate in hitting water in the centre of the wheels, water for the remaining 10% was located outside of the wheels with the same problems of distance for fetching water. Secondly, the road linkages between wheels were expensive, which was an unnecessary cost given how few people own cars. Although road access is necessary for furniture and building material

delivery and coffin transport, it needs to be limited because it sucks up money that can be used for other purposes. A third problem was that although people had access to communal land, agricultural production was still limited because fencing to keep out livestock was scarce.

Phase three

In the third phase, the design incorporated a single ring road onto which were joined blocks of residential plots with "access courts". These courts were relatively large open spaces enclosed by a single line of residential plots and could therefore be used to access every plot. They were also big enough to ensure that water sources could be located

in each of them to ensure that all residents would be able to take the shortest possible distance to reach water. Because the residential plots ringed the access courts, they would also be relatively easy to keep free of livestock, creating potential arable fields that would be easy to access and monitor and that would be close to water for irrigation. Again, these innovations built on the advantages of phase one, such as land allocated for public and community facilities. The application for this phase has been approved by the provincial planning authorities and now awaits the go ahead from the Department of Housing.

- For more information, Dave Simpson can be contacted at (036) 637 7773 and Jeff Richmond at (036) 637 2284.

PHASE 3

In the third phase, the design incorporated a single ring road onto which were joined blocks of residential plots with "access courts".



... into the muddle of legal entities

Leaping

***LEAP** has been managed and guided by a Steering Committee that has always included representatives of government, academia and NGOs.*

*The implementation team has also remained in large measure constant. **LEAP** has never had full-time staff, but rather a team that works on part-time contracts for specific tasks.*

*One key to the interesting outcomes of **LEAP** is that those involved in it are deeply concerned about and fascinated by the complexity of the challenges in this field.*

*Everyone works on related issues in an on-going way and the **LEAP** work is constantly fed and feeding other work we all do.*

*Moreover there is a useful diversity of perspectives and **LEAP** has always sought to work closely with a wide range of needs and interests.*

IN 1996 the Communal Property Associations Act was passed to enable groups of people to form juristic persons that could hold, own and manage land on behalf of land reform beneficiaries. In a short space of time there was a growing cry that these legal entities were failing.

***Tessa Cousins** describes the history, findings and work of the Legal Entity Assessment Project (LEAP) that emerged in KwaZulu-Natal from these concerns.*

IN 1998, the KZN provincial office of the Department of Land Affairs (KZN PDLA) requested a proposal be developed to carry out a needs assessment and capacity building programme for land reform community institutions in the Uthukela region. This arose out of discussions

between a DLA official, some AFRA staff and a number of land reform practitioners who had worked with land reform legal entities and who were concerned about their viability. Funding was not available to implement that programme but the concern behind it was widely held and AFRA subse-

quently provided seed funding for a project that became the LEAP in 1999. The project was developed as a collaborative effort, with the KZN PDLA, AFRA and Midnet entering into an agreement to support an assessment of what the reality on the ground was, in order to inform the design of effective interventions.

Everyone involved knew that this was crucial and complex territory. None of us, however, expected the first phase of LEAP (which ran from 1999-July 2000) to hop into a phase two (Nov 1999 - October 2001) and then into its current phase three (June 2001 - July 2003). At the end of the first phase, in which we undertook fieldwork to assess a number of legal entities, we found that we needed to clarify our thinking if we were to make sense of what we were finding. That clarification was the prime focus of the second phase and now, in the third phase, we are going on to test and further develop our thinking and the implications of this for policy and practice.

In the first phase the team undertook seven community assessments. In seeking to analyse the outcomes we concluded that the problems they were facing, and that we were having in assessing them, came from factors that needed to be recognised and acknowledged as a starting point.

- There is no model for institution-building combined with over-loaded and unrealistic expectations of the community institutions. This leads to inappropriate government procedures and poor implementation practice in the establishment of legal entities. One expression of this is legal entity establishment as a “milestone” in the land reform project cycle and thus something to be reached and hurriedly moved beyond. Another is the striking lack of support to these newly created bodies and DLA dedicating hopelessly inadequate capacity to such tasks.
- There is little effort given to creating linkages between community and local structures and institutions. This isolates community institutions, leaving them with little support and recourse when conflicts or tensions develop internally or between themselves and other structures such as traditional authorities or municipalities.
- There are no indicators in the sector that can be used to evaluate community institutions, which has led to widespread but fuzzy and unhelpful assertions that “they don’t work”.
- Many of the legal entity constitutions (be they Trusts or Communal Property Associations (CPAs)) are poor legal documents because purposes are unclear. They are also often meaningless to community members because the procedures described are unfamiliar, the language frequently foreign and full of legalese and they are at times simply not available to the community.

We were clearly in no position to develop interventions at that stage. Instead we focused on clarifying our thinking and working with others who have been grappling with these issues. From this work LEAP

has developed some useful starting points that are now more widely used in the sector.

- It is more helpful to think of common property institutions (CPIS) for land holding and managing (that have a set of issues to tackle) than to focus on the form of the entity (a Trust, a CPA, a Section 21 Company), which is secondary.
- The search for meaningful indicators led us to suggest that tenure security should be the primary purpose of land reform CPIS. The purposes of equity, democracy and accountability should operate to secure tenure rights, rather than be models of an ideal society. Tenure security is both the universal need of the group and is the foundation for natural resource management and development.

We found “tenure security” to be a dense concept, which we’ve worked to unpack and describe so that it becomes useful for practice. There are implications from what LEAP is saying for policy and for practitioners who intervene or seek to assist communities with CPIS. For example, we suggest it is necessary to work with a thorough understanding of tenure processes and institutions that already exist or previously existed and to build from this base than to expect that we can come in and create new ones in a vacuum.

The work of LEAP in this, its third and final phase, is to refine what we have started – the developing of a sound set of concepts that will give us meaningful indicators that enables us to create a model for institution building for

CPIS. We will be testing our ideas in fairly intensive fieldwork over the coming year. We want to develop materials for practitioners that help them work more effectively and we are seeking to contribute to policy and procedures in the land reform arena. LEAP is working closely with the Tenure Directorate of the DLA as it plans a “CPA Review”, which is aimed at understanding the problems of CPAs and developing interventions to address them and to prevent them.

While LEAP’s fieldwork is carried out in KwaZulu-Natal we engage with practitioners from across the country, as we are keen to learn with and from others. We have written four papers to present at conferences and these explain the project, its progress and thinking in more detail than is possible here. We also have working documents on some of the issues we have tackled, such as the language and the layout of constitutions. All LEAP material is available for anyone who is interested. We are also keen to engage with anyone who is working on similar or related issues. Our documents are currently being organised into a more accessible electronic form, after which it will be easier to communicate and make available the range of documented work we produce.

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