APPLYING NEW APPROACHES IN SETTING UP LEGAL ENTITIES

Experience at St Bernards and Amandushill

THELMA TRENCH

Leap
legal entity
assessment project

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1 Introduction

Many of the legal entities set up to hold and manage land under land reform programmes in South Africa are performing poorly. Researchers and practitioners have done intensive work on the reasons for this and its implications[1]. For years practitioners implementing land reform inside and outside government have asked for guidance on changes that they can make in their practice in order to improve the situation. However, it is only through shifts in the *way we understand* the problem that shifts in the *way we deal* with it are becoming possible.

This paper describes co-operative work between the Diocese of Marianhill Land Reform Programme and the Legal Entity Assessment Project in using new approaches to set up legal entities for residents of two communities living on church land. It explains some important shifts from conventional thinking and practice in legal entity establishment, some of the immediate outcomes, and some questions for future legal entity establishment and the way that this fits into the land reform project cycle.

2 Background to fieldwork: St Bernards and Amandushill

Before 1998, residents of church land at St Bernards and Amandushill opened negotiations with the Diocese of Marianhill with the object of taking transfer of the land that they occupy and use. The Diocese of Marianhill Land Reform Programme (DOM LRP) provided facilitation support in negotiations. Late in 2002, the process reached the point where residents needed to create legal entities to take transfer of land. DOM LRP was concerned that the resulting arrangements should work for residents after transfer, as well as meet technical and legal requirements. The Legal Entity Assessment Project (LEAP) has developed a theoretical framework to understand performance in communal property institutions (CPIs) and practical tools for fieldwork[2]. DOM LRP and LEAP therefore agreed to co-operate on legal entity establishment at St Bernards and Amandushill.

The processes at St Bernards and Amandushill were unusual in that they were funded, managed and facilitated by DOM and LEAP, rather than by officials of the State or consultants contracted by them. This meant there was an unusual degree of freedom in the approach that could be explored and in the resources available to do this, without which the pilot would not have been possible.

St Bernards and Amandushill are very different in terms of their size, the number of households living on them and the complexity of their land uses. The DOM LRP has mapped about 120 households living on about 540 hectares of land at St Bernards. Residents build houses and have fields within the boundaries of their sites, and some run small businesses like tuck shops. Outside the boundaries of household sites there are grazing lands, small plantations and an area of forest. There are springs and a river on the farm. Infrastructure includes a district road and tracks, two schools, limited water supply infrastructure and some shops. There is a community garden and a poultry project.

Amandushill is much smaller, with 23 households living on about 10 hectares. Residential sites and their associated fields take up most of the land, although there is a small area of steep hillside used communally for grazing small stock.

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[1] Tessa Cousins and Donna Hornby, 2002. *Leaping the fissures: bridging the gap between paper and real practice in setting up common property institutions in land reform in South Africa*. Programme for Land and Agrarian Studies Occasional Paper No.19.

Tessa Cousins and Donna Hornby, October 2002. Scoping report on communal property institutions in land reform, prepared for the Department of Land Affairs.

[2] See theory section of LEAP website, at www.leap.org.za.

Participants in workshops at St Bernards included members of the interim land committee, as well as interested residents elected in a large public meeting. Together they made up the "working group" or "group of 30". About midway through the process, the working group convened a public meeting for feedback and discussion. The working group at Amandushill included people from most households. Attendance at workshops was high at the beginning and end of the process and varied in between.

3 Applying new approaches in legal entity establishment

3.1 A new understanding of the task

Conventional thinking loads land reform legal entities with multiple purposes. This creates expectations that neither facilitators nor members and committees of new legal entities can meet.

We focused on a single main purpose in setting up legal entities at St Bernards and Amandushill, namely that of **securing tenure for the group and for residents inside the group, by focusing on land rights and their administration**. We understood legal entity establishment to be a process of formalizing arrangements for land rights administration, with links backwards to often informal historical and current practice, and links forward to future land rights administration with some standing in law. The registration of legal documents would bridge the informal systems to the formal. The new legal entities and the new documents of agreements that would emerge from this process would not exist on their own, but would become key parts of the web of institutional arrangements on and off the farms by which land rights could be secured and transacted.

Making tenure secure in practice begs the question of what we had to listen for and focus on in workshops. We used the theoretical framework developed by LEAP (see Box 1 overleaf) to design workshops and determine the content areas that we would cover, to order our thinking and writing about what we heard in the field and to assess trends in the tenure security of residents when looking at their current practice and future arrangements.

In applying the LEAP framework we recognize that tenure security doesn't exist in a vacuum. It is important to be clear whose tenure security we are talking about and tenure security for what purpose in relation to present or future land use. We did not simply assume that tenure security would be achieved by transferring title to an association of residents. We recognized that there must be arrangements to secure tenure for people inside the group, that outsiders might need to negotiate rights on the property, and that the precise type of tenure arrangements would need to emerge from resident's discussions of what the land is used for now and how it might be used in future. This suggested that a mix of tenure arrangements might best meet the interests of residents. For example, households might hold private title to residential sites, while a residents' association held title to grazing land as communal property. Municipalities or the Department of Transport might need servitudes to deliver and maintain services. There might need to be procedures by which residents with a business interest in livestock could negotiate to lease part of the grazing land with the residents' association.

3.2 We used people's practice as the base and adapted from there

The shift in approach

Much conventional legal entity establishment practice uses legal requirements like the schedule of the Communal Property Associations (CPA) Act as the starting point and sets up new legal entities from scratch as though there were no existing understanding or practice around land rights administration. The consequence is systems and definitions that are unfamiliar and unknown to people. This undermines

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Box 1
Core of LEAP framework, as applied in fieldwork at St Bernards and Amandushill

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 communal property institutions (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.

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tenure security when people in new legal entities do not understand the new systems sufficiently to make them work (*Indicators 1–3*). In all the land reform–communal property situations we have seen, people already have knowledge or practices for holding and managing land communally.

In planning fieldwork at St Bernards and Amandushill we argued that

- ■ we must expect and check for existing knowledge and practices around holding and managing land communally;

- ■ what people do now is familiar, known and used (*Indicator 1*);

- ■ if practice is not working, people will want to adapt it, even though this might bring different interests into debate;

- ■ if adaptation happens consciously and towards systems that people themselves agree will work, the resulting arrangements are more likely to be recognized and therefore to work in practice.

Experience from St Bernards

At St Bernards we started by asking people to map broad land uses, and talk about who uses, manages and makes decisions about the different land uses. From these discussions a list of issues of current concern ("hot issues") emerged. In most of these we could recognize a land rights administration component and a growing uncertainty about land rights and their administration steps and authorities. These ranged from disputes about boundaries and who has rights to the community garden, to a challenge from the neigh-bouring *inkosi* to the right of residents to take transfer of St Bernards.

In subsequent workshops at St Bernards we worked with the hot issues in developing the principles of the founding law (*umthethosisekelo* – constitution) for the future. People unpacked their current practice and their understanding of the roots of the problems, and drew on this to make conscious workable adapta-tions to practice in a series of small shifts. An example of this process is given in Box 2.

A particular practical challenge in starting where people are at and adapting, not replacing, their existing practice is that of working with the concepts of equity, democracy and accountability (*Indicator 5*). Achiev-ing these depends on a complex of social factors, many of which are outside local control. Some terms of reference for legal entity establishment require the impossible in that they ask that the facilitator ensure that these are delivered. A common response delivers equity, accountability and transparency on paper, by prescribing unworkable provisions for constitutions that members and committees can't deliver in prac-tice.

The approach that we used was to bring the concepts into discussions as questions for people to consider rather than as requirements to be met. Our objective was small shifts towards the ideal, on which real agreement was possible because they lay within local notions of what is fair and workable, and which could be captured in constitutions with a good chance that they would be implemented. Examples are given in Box 3 and Box 4 overleaf.

The gender challenges are difficult to work with practically. On the one hand, Section 9 of the CPA Act[3] requires that "the constitution of an association shall be consistent with the following general principles … equality of membership, in that there is no discrimination against any prospective or existing member of

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> **Box 2**
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> **Experience of making land rights administration inside the group conscious: Clarifying land rights and land rights administration for the community garden at St Bernards**
>
> Because G had a large piece of land from the church, he gave permission for a piece of his land to be used for a community garden. The church demarcated this piece. There is infrastructure on it now including fencing, tanks and pipes, at least some of which was paid for by contributions from members of the garden group. There was never a written agreement about what rights the users of the community garden have and for how long they could have them. G's children recently asked that the site of the community garden be given back to them, creating uncertainty about the rights of users of the community garden.
>
> Some members of the working group tackled the community garden question on their own and came back with proposals both for fixing the immediate problem and for principles and procedures to avoid it recurring in future. The proposed solution to the immediate problem was that a discussion be held with G and that he be allocated another piece of land. The principles that land can't be taken away from the users without consulting them, and that G must be compensated are both implicit in this solution. To avoid the problem in future, agreements of this sort must be written down and state the extent of the land and a timeframe for the project. Such procedures would also cover instances like allocation of communal land for a community hall.
>
> These principles are reflected in the constitution, which also puts in place clear decision-making authorities and procedures for allocation of both communal land and portions of residential sites, and the requirement for periodic review of projects by a community meeting (*Indicators 1-3*).

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[3] Communal Property Associations Act, No 28 of 1996, as amended by Land Affairs General Amendment Act, No 61 of 1998.

Box 3

Experience of working with constitutional ideals: The right to information at Amandushill

A section of clause 3.1 of the Amandushill constitution was an add-on, i.e. something that had not been formally discussed in workshops but which was proposed by the LEAP core team as an additional procedural right for individuals:

> All adult residents have the right to… inspect the records of the association.

The clause has clear implications for power relations and privacy. In two successive meetings, influential men queried this proposal. One wanted only the members of the committee to have this right: "I would prefer to bring the papers to a meeting with an explanation" and "People will come and ask to see records at all hours of the night." Another man was concerned about others reading sensitive letters. In the second meeting there was a long silence. The facilitators offered an amendment "after arranging a convenient time with the secretary of the land committee". Then another man suggested shyly that the clause "stay like it is", which had broad support.

Box 4

Experience of working with constitutional ideals: Who has the right to a residential site at St Bernards?

Space for residential sites is currently very limited at St Bernards. Unless there is a decision to change the use of the grazing land, there will be intense competition for re-allocation of sites which have been allocated, demarcated and then abandoned (*amanxiwa*).

Some working group members wanted only "the son of a home" to be eligible for allocation of *amanxiwa*. Others suggested "those who have grown up here, men or women". A difficulty was that "a woman who marries and changes her surname in the way of the Zulu could not continue to stay here, but the children could stay". The fear was that letting daughters have the same rights as sons "would draw in other men".

Another issue was that sites are unequal in size, because those who were allocated sites earlier in the history of St Bernards have larger sites than those who arrived later, and some households have sites "too small to plough". The working group said that it would be completely unworkable to consider an attempt to equalize the size of sites, but found some subtle practical principles to adjust the situation without going this route.

Men and women in the working group, including those who live on small sites, felt the following provisions in the constitution to be fair and sensible:

8   **Allocation of household sites**

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.

When challenged by other practitioners on the lack of gender equity, we argued that the working group had made a shift towards less discrimination (*Indicator 5*) by allowing women to apply for allocation of residential sites to their households, but were concerned to balance the negative impacts of reversing a deep-rooted practice. There might be difficulty in deciding who can claim rights to land, and what surname children take and therefore in what place they belong.

the community … on one or more of the following grounds … gender … fair access to the property of the association, in that the association shall manage property owned, controlled or held by it for the benefit of members in a participatory and non-discriminatory manner." The Schedule of the Act requires that both the property and the membership of the group be defined as far as possible. On the other hand, the St Bernards constitution does not allocate residential sites to individual men and women, but to households. Also married men traditionally take on the responsibility of getting a site for the household on the land to which they have tribal connections. However married women traditionally live with their in-laws, and become part of households outside both the property and the group, so that a CPA and the property it owns do not form a closed system with respect to opportunities for household access to land.

3.3 We looked at land rights both for the group as a whole and for people inside the group

The shift in approach

Many facilitators and beneficiaries of land reform hold the view that tenure insecurity is addressed when the group as a whole "gets title".

In communal property systems, however, the rights holder configurations are generally much more complex than in the case of private property. Depending on the land use, people inside the group may hold and exercise rights by virtue of being residents or members of the group (e.g. the procedural right to attend and speak at community meetings), members of a household (e.g. the substantive right to build on a residential site) or members of interest groups (e.g. the right to use a plot in a community garden).

Experience at St Bernards

The benefit of paying attention to land rights inside the group was much greater clarity about who actually holds what rights to household sites and communal property (*Indicator 1*), and how to make this formal (*Indicators 2 and 3*). Box 5 gives an example (overleaf).

3.4 We paid attention to administration of land rights inside the group

The shift in approach

Land rights administration is the concrete expression of tenure, the place where tenure security becomes operational. Good land rights administration both secures land rights and enables them to change in a way that protects weaker interests. While tenure is very abstract, it is possible to hold conversations about land rights administration in the field and to make implement-able rules about it. In doing this, we had to use new understandings of what land rights administration is in communal property institutions.

Land rights administration institutions such as the Deeds Office registers and title deeds have been built to support private property (*Indicator 6*). They do give technical tenure security to groups considered as a whole, for example by maintaining evidence of the outside boundaries of the properties that they own. However, conventional practice misses the point that land rights administration exists inside communal property systems also. Its function is to maintain order in the day-to-day processes by which people inside groups secure, defend and transfer their rights and includes principles and criteria for deciding difficult cases and the right authorities and procedures to use. Box 5 gives examples (overleaf). Where such land rights administration systems for communal property are ineffective or discriminatory, tenure security declines, especially for vulnerable people, whatever the title deed says[4]. Working with this shift was key in work at St Bernards and Amandushill.

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[4] Donna Hornby, *pers.comm*.

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Box 5
Who makes what decisions about residential sites at St Bernards?

At St Bernards, people told us that they were clear who owns the residential site. LEAP unpacks such "ownership-type" rights inside communal property systems by asking "Who makes decisions about allocation, alienation and major change of land use for each particular land use?". When we asked "who makes the final decisions relating to residential sites, such as a decision to leave the site and sell the structures to someone else?", the first response was that these sorts of decisions are taken "by the household head". On probing what had actually happened in cases where decisions like this were made in the past, it emerged that all adults in the household were in fact consulted about such decisions.

The constitution was drafted with the following provisions:

> 4.3 The adult members of a household must agree on household decision-making processes and on a household representative to act on their behalf.

> 4.4 Subject to household decisions, members of the household may:
>> 4.4.1 build houses,
>> 4.4.2 plough fields,
>> 4.4.3 open and run businesses which do not pose a threat to the health or well-being of residents,
>> 4.4.4 have portions of the household site pointed out for their particular use,
>> 4.4.5 permit relatives to live on the household site,
>> 4.4.6 enter into written agreements with residents outside the household to use part of their household site according to agreed boundaries for an agreed period …

> 4.5 The adult members of the household may decide:
>> 4.5.1 on major changes to the existing uses of the household site …
>> 4.5.3 that the household will leave the site.

Therefore after registration of the constitution, vulnerable adult members of households will have the formal right to be part of major decisions resulting in alienation or change in land use of the household site. This clarity also made it possible to formulate land rights administration steps that are more likely to work to secure these rights, for example, the clauses that deal with disputes and recourse and the provision that

> 4.2 The community meeting may not make decisions on major changes in land use inside the boundaries of occupied household sites or transfer the household site or a portion of the household site to another party without the consent of the household.

Because we were talking very concretely about rights to residential sites and how they became real, it became clear what ownership-type rights the association has over residential sites. Unlike holders of title-deeds, an ownership-type right that members of a household do not have at St Bernards is the right to sell the household site to anyone they like. The constitution limits allocation of empty residential sites and the purchase of structures on household sites to residents, i.e. the association agreement determines who comes to live here.

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Experience at St Bernards and Amandushill

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. Land allocation and recording were managed by a rudimentary but adequate land rights administration system in which authority (the priest and the farm committee) and procedures were clear, known and used (*Indicators 1, 2 and 3*). During negotiations around donation of land, however, residents entered a transition period in which land rights administration was not discussed purposefully and in detail, partly because it was invisible to the outsiders working with them. The land committee and residents took on increasing responsibility for managing land without formal rules to guide them. Processes of change around land rights continued, despite the fact that residents had not agreed on the mechanisms needed to maintain clarity about rights. People left, people applied for sites, 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 plantations and forests.

The legal entity establishment process started while damage was still limited. It focused on land rights administration, built on existing areas of clarity and understanding of how things should work and required that residents develop binding rules and principles. It forced the working group to become clear on who can be a resident and what are their procedural rights, who are rights holders and what substantive rights do they hold, and the mechanisms that maintain this clarity when carrying out transactions in land rights.

Developing these rules took time. Facilitators had to deal with a strong impatience to get past the legal entity milestone and "get title", especially at Amandushill, which had fewer land rights administration problems than St Bernards.

3.5 Tenure issues for service delivery

The shift in approach

Much conventional practice around legal entity establishment focuses on registration as the end point. Planning for the development of infrastructure or business partnerships are handled as separate and subsequent steps, often paying little or no attention to the land rights transactions that come into play with changes in land use, and that need discussion. The Communal Property Institutions Review has done an assessment of a Communal Property Association[5] in which planning resulted in the establishment of a joint venture for sugarcane of which many residents were ignorant. One household had to move to make way for this joint venture and members were still unhappy about this decision months later without being clear about whom they could complain to. It shows what can happen where planning and agreements with outsiders are not built on a good foundation of principles to guide decisions in situations where the relative rights of the household, the rights of the association and the rights of the outsider involved are in competition.

Secure tenure always has a purpose in terms of present or planned future land use, i.e. in thinking about secure tenure we had to keep answering the question, "Tenure security for what?". Legal entity establishment had to think ahead to improve tenure security in a way that would enable, rather than block, improvement in livelihoods and delivery of services and infrastructure (*Indicator 7*).

Choices about how much St Bernards and Amandushill residents and how much outsiders would take responsibility for delivering and maintaining infrastructure and services would affect how residents ended up holding land. If residents decided that they wanted to decide where services go and were prepared to maintain services, one kind of formal legal entity might be appropriate. If residents decided that maintaining infrastructure and services should be the responsibility of the regional council, then another kind of arrangement might be appropriate. These choices would have different implications for who would most usefully end up making ownership-type decisions over pieces of land used for different purposes.

Therefore, for service delivery outsiders might have to negotiate new agreements about rights to land with the members of households "owning" residential sites or with an association. The document/s which would record agreements on land rights administration would need to provide principles and steps by which outsiders could do this (*Indicators 2 and 7*). Box 6: *Experience of working with the link between tenure requirements, legal forms and the provision of services at St Bernards and Amandushill* shows how these questions played out at St Bernards and Amandushill.

3.6 We discussed legal forms at the end of the process

The shift in approach

Much conventional practice presents workshop participants with the impossible task of deciding on a legal entity before they have had an opportunity to consider properly the questions underlying this choice. We argued that present and future land use, land rights and land rights administration shape the choice of a

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[5] KZN Provincial Team of the Communal Property Institutions Review, May 2002. *Assessment of the Msikazi CPA.*

legal entity and therefore must be discussed before deciding on the legal forms that enable this. Box 6 shares experience at St Bernards and Amandushill.

Box 6
Experience of working with the link between tenure requirements, legal forms and the provision of services at St Bernards and Amandushill

Residents at both St Bernards and Amandushill wanted a high level of household decision-making over residential sites, with a high level of group decision-making into "who comes to live here". Early in negotiations with the Diocese they rejected the idea of a township. However, their purposes in taking transfer of land would not be met if the agreed tenure arrangements blocked delivery of services and infrastructure or forced them to set up maintenance agreements that they could not sustain.

The choice of legal forms lay between a communal property association (CPA), a community land trust, and less formal township establishment with private title, none of which completely matched residents' requirements.

◆ Township establishment carries high financial costs and the probability of title lapsing.

◆ In community land trusts, the nature of power relations, members' land rights and availability of recourse is currently under question.

◆ There were also questions about a communal property association[6] as the legal form to hold the St Bernards or Amandushill properties. These would technically remain private land. Delivering and maintaining services on private land sets up a clash between national financial regulations and how municipalities understand their legal responsibilities to deliver services, so that policy and criteria for delivering and maintaining services in CPAs varies from municipality to municipality. Some municipalities refuse to spend public money on private land; others disregard the national regulations because they have come under pressure to fulfil their legal responsibilities. In the municipality into which St Bernards and Amandushill fall, the main concern was payment for services. Sorting out these questions needs much further research.

The final decision was to form a communal property association, in which the constitution became the instrument to meet residents' tenure requirements and at the same time provide tenure options to enable future delivery and maintenance of services.

◆ **Meeting residents tenure requirements:** According to the St Bernards constitution, the community meeting may not make decisions on major changes in land use inside the boundaries of occupied household sites or transfer the household site to anyone else without the consent of the household. Households therefore have an ownership-type right. Concerns about evidence are met by provision to record the extent of a household site. Only residents are eligible for allocation of residential sites, i.e. the association agreement limits who can come to live here.

◆ **Options for delivery of services:** Broad provisions set out procedures by which outsiders can acquire rights on land at St Bernards and Amandushill for purposes benefiting residents, for example if they need to create servitudes. This opens one option for delivery and maintenance of services. The dissolution clause would allow another option: future residents can establish a less formal township if they have the will and the finances to do this. Other clauses allow residents to raise levies.

However, the muddiness around service delivery and maintenance in CPAs by municipalities left us uncertain whether the choice of a CPA would limit or open up residents' options for services and infrastructure and what the fit would be between CPA structures and the municipality in terms of collecting levies.

Arrangements between the Diocese of Marianhill and the Department of Education about the school at Amandushill are an example of a completely different kind of arrangement to handle these questions. The Diocese agreed to a ninety-nine-year lease, on the basis of which the Department of Education agreed to build and staff the school. The piece of land on which the school stands will be surveyed and remain in the hands of the Diocese, so that it can fulfil its agreement with the Department of Education. Residents' use of the school will not change.

Because our focus had been what works for people rather than legal requirements, we anticipated a struggle to achieve compliance. To our delighted surprise, some of legal requirements became opportunities to raise questions that deepened people's clarity and understanding, and filling in the compliance form for CPA establishment was easy. It is possible to interpret the CPA Act in a way that is friendly to people and to tenure security.

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[6] An association set up in terms of the Communal Property Associations Act, No 28 of 1996, as amended by Land Affairs General Amendment Act, No 61 of 1998.

3.7 We prepared plain language constitutions using people's own concepts

The shift in approach

A characteristic of poorly performing legal entities is the gap between law and practice (*Indicator 6*). Members of new legal entities often cannot understand or implement their constitutions. One of the reasons for this is that much conventional legal entity establishment practice uses legal requirements rather than people's practice as the starting point and constitutions are written in legalese in English (*Indicators 1–4*). The consequences are that constitution provisions are unfamiliar or un–implement–able or irrelevant to the people who need them. We prepared plain language constitutions building on people's own practices and concepts[7].

Experience at St Bernards and Amandushill

In the early design processes we identified what felt important content areas to cover in workshops and capture in documents. We reviewed our findings about midway through the workshop process, to identify gaps that remained to be covered. Finally we drafted the constitutions in plain language, submitted them to lawyers and the LEAP core team for comment, and took them back into workshops for discussion.

One of the dilemmas was the degree to which we put in "add–ons", things that participants had not covered in workshops but that needed to be in to finish sentences, resolve contradictions, protect the vulnerable more or comply with legislation. We used more add–ons for Amandushill than for St Bernards, where the anxiety to get to the point of transfer was seriously disrupting workshops. We used add–ons always with caution and an eye to people's purpose, and then checked the results with the working group and in a final community meeting.

When the constitution was read at Amandushill one of the women commented that "This is our constitution – we recognize all of it". At St Bernards, where people had little hesitation in challenge and debate, the constitution went through formal adoption without a single amendment, followed by a plan to hold elections exactly as written. The facilitators had never experienced such familiarity and ease with constitution provisions before.

4   Prospects for the future

The legal entity establishment reports for St Bernards and Amandushill[8] both end with the section "Moving towards tenure security in the future", which notes areas of uncertainty or risk for monitoring. At St Bernards these include:

- how residents use the constitution in practice and become familiar with it (*Indicators 1–3*);

- the capacity of land committees to take on a large number of tasks with no extra material resources and little state support to do this;

- the risk of competing authorities for land rights administration — in both cases the neighbouring *inkosi* has made a claim to the land (*Indicator 3*),

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[7] The text of the St Bernards constitution is available in the "Writing constitutions" section of the LEAP website at www.leap.org.za

[8] Legal Entity Assessment Project and Diocese of Marianhill Land Reform Programme, 2003: *Communal Property Association for St Bernards: Legal Entity Establishment Report* and *Amandushill Communal Property Association: Legal Entity Establishment Report*. The St Bernards report is available in the Fieldwork section of the LEAP website at www.leap.org.za.

- the possibility that allocation of *amanxiwa* would not be done in line with the constitution (*Indicators 1 and 2*),

- the continued development of the land rights administration systems which includes a boundaries clarification process to provide the basis for adjudication of rights, the development of demarcation procedures and a system for recording rights (*Indicator 2*);

- how recourse and enforcement of rules and dispute resolution play out in practice (*Indicator 4*);

- how delivery of services and infrastructure play out in practice and what challenges this presents to the arrangements in the constitution (*Indicator 7*).

Land rights administration systems for private property are effective precisely because the owner is linked into a web of institutional support, which provides evidence of rights that can't be tampered with, provided by the survey profession and the Deeds Office, a system for administering transfers provided in conveyancing, and a system of recourse provided by law relating to property and the courts. Conventional practice sees communal property systems as closed, and "on their own". In fact, effective land rights administration systems in communal property institutions need linkages beyond the boundaries of the property and of the group which give them recognition and support (*Indicator 6*).

In reflecting on the areas of future risk and uncertainty for St Bernards and Amandushill, we were struck at how much was possible within the small frame of the legal entity establishment process, how much more easily this could have been done had land reform for these projects started with clarity about land rights and their administration as an objective, and the amount of work remaining to be done in the future. Residents on St Bernards and Amandushill are luckier than most land reform beneficiaries in that the church provides extra facilitation support, and they are able to make links with other non–government organizations piloting land rights administration in communal property systems. We nevertheless have a sense of people moving into an institutional "black hole" as far as support from the state for communal property institutions is concerned (*Indicator 6*). As things stand, much of the burden of securing their own tenure must fall on the people of St Bernards and Amandushill themselves.

LEAP takes a very practical view of this situation. There are aspects of tenure security in communal property systems that can only be dealt with by changes in policy and legislation, like the details of how state support for land administration in communal property systems might work and who will implement it. These will involve ideological battles and will take time. At the same time the tenure security of land reform beneficiaries who have chosen to go the route of holding land communally cannot wait until improvements in their tenure security are central to land policy, legislation and programming. Practitioners inside and outside government therefore have to work within the "steel box" of the land reform project cycle as it is now.

What does the experience at St Bernards and Amandushill have to say about this?

- First, that something can be achieved even where one starts at this late stage in the land reform project cycle. This engages the human resource of the land reform beneficiaries themselves. Leaving tenure security issues until this late stage has implications for facilitation costs (Appendix 1).

- Second, the prospects for success are probably greater if one can introduce discussion of elements such as group identity, land rights and land rights administration from the time the project is conceived, and work with this iteratively to deepen understanding throughout the project cycle. At exit, well-embedded understanding and principles as well as the product documents provide the foundation for delivery of services and infrastructure and the development of land. LEAP will shortly publish proposals for how officials might do this within the existing financial, time and programming constraints of the project cycle[9].

  Starting such discussions early would have made a difference at Amandushill, where residents were desperate to "get title", where legal entity establishment was more rushed than the facilitators would have liked, and where people's energy was dissipated in resisting "more workshops!" One of the alternative arrangements that we considered for both St Bernards and Amandushill was that title remains in the hands of the church with very different formal arrangements in terms of residents'

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[9] Lisa del Grande, 2003: *Delivering land for tenure reform: proposed practical guidelines.*

power to decide what happens on the land. However, the notion of "getting title" was so deeply embedded that we dared not even raise the question.

■ Third, there are areas in which change to policy and legislation would make a difference. One of these is the choice of legal forms available, none of which quite fitted the requirements of St Bernards and Amandushill residents (Box 6: *Experience of working with the link between legal forms, tenure requirements and the provision of services at St Bernards and Amandushill*). LEAP will explore this in a further phase. Another is the availability and nature of state support in specific areas such as dispute resolution and recourse.

5   Conclusions

Tested field designs for setting up institutional arrangements to improve tenure security within the framework of the legal entity establishment process now exist for improvement. The immediate technical and legal requirements were met without difficulty, suggesting that practitioners could apply the shifts in approach elsewhere. In doing work with people on the ground there is room to move within the "steel box" of the land reform project cycle towards greater clarity about land rights and their administration, rather than away, and to make small do-able shifts in the tenure security situation of vulnerable people. The working group at St Bernards was excited by their new clarity and by the fact that the authority of the future land committee of the Ekuthuleni Communal Property Association will, at least in theory, be supported in formal law. For these residents the situation has improved. There are a number of areas of uncertainty about the future implementation of their constitution in a vacuum of state support for land rights administration in communal property situations. Broader questions remain which can only be resolved by wider shared exploration and changes in policy, legislation and institutional support, and not by low level officials and facilitators.

Acknowledgements

Appendix 1

The facilitation costs and timeframes of new approaches

Legal entity establishment processes at St Bernards and Amandushill built on fieldwork methodologies that LEAP had used previously in review and capacity building in established legal entities. We were familiar with methodologies for design and analysis where the main task was assessment of tenure security, and demands to plan new tenure arrangements were limited. However, the legal entity establishment pilots at St Bernards and Amandushill introduced new challenges: facilitation of comprehensive institutional planning in workshops, and developing formats for and drafting constitutions and legal entity establishment reports. The legal entity establishment reports outline what we actually did[10]. Much of this time we spent "feeling our way" through the new challenges.

Calculating time needed

In calculating the time needed to apply these approaches in legal entity establishment in other cases we have made the following assumptions:

- Those applying these approaches have a good level of understanding of theory and approach, and would draw on the design experience at St Bernards and Amandushill. Tested field designs described in legal entity establishment reports and better constitutions are available on the LEAP website[11]; LEAP is willing to facilitate learning processes linked to real field situations, provided co-operating organizations are prepared to negotiate cost-sharing.

- Project "killer factors" such as fundamental conflicts about who are members are worked through in earlier steps in the project cycle.

- Workshops are partly open-ended to enable participants and facilitators to identify current land administration issues and describe current practice, and partly firmly structured, to hold focused discussion on these issues to develop principles and rules to be captured in the constitution.

- Facilitators are clear what lies inside and outside the scope of the legal entity establishment process. Identifying authorities, principles and rules to deal with land administration questions lies inside the process while implementing this (for example, carrying out a boundaries clarification process) must happen in parallel or later processes.

- Workshop participants are willing to do some homework under the facilitators' guidance, especially on questions where the issues are clear but outcomes are contested.

- The facilitators are able to make good assessments of how far they can take institutional planning with this group, and of what needs detailed discussion and what can be rushed.

- The facilitators are working within the existing legislative and policy framework and are not attempting to do basic research or policy or legislative reform.

We consider some of the costs to be non-negotiable. Good workshop recording is necessary to help with workshop-to-workshop planning and drafting the constitution. The preparation of legal entity establishment reports remains a good practice requirement to maintain continuity, even though it is not currently a legal requirement.

Projects which are "smaller" in terms of number of households or total area may take as much time as larger projects. Projects with fewer households may have fewer competing interest groups, but LEAP has encountered intractable conflict around land rights in a project of 8 families. Projects with a few simple

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[10] Legal Entity Assessment Project and Diocese of Marianhill Land Reform Programme, 2003: *Communal Property Association for St Bernards: Legal Entity Establishment Report* and *Amandushill Communal Property Association: Legal Entity Establishment Report.* The St Bernards report is available in the Fieldwork section of the LEAP website at www.leap.org.za.

Table 2 of these reports show time actually spent in workshops, but do not show time actually spent writing records, and drafting the constitutions and the legal entity establishment reports.

[11] The LEAP website can be found at www.leap.org.za.

land uses probably need fewer areas of rule–making for communal land administration, but there may be intense competition for what is available, or difficult equity issues to work through, so that the rules take longer to develop. Workshop speed also depends greatly on the experience and literacy of the group.

The table below gives estimates of time needed for different tasks. In drawing it up we held a picture of St Bernards in our minds: 120 households and 540 ha of land, with multiple land uses, and a working group with useful positive and negative experience of land administration, who were willing to spend time work–ing out land administration details by doing homework. The table assumes a field team of two: one facilitator and one recorder. Depending on the task, the "individual" may be a project manager, a member of the field team, or a lawyer. Transport and accommodation costs are assumed to be site–specific and would need to be added on.

Estimated time needed for developing institutional arrangements for tenure security for a project of the scope and complexity of St Bernards

TASK	INDIVIDUAL OR FIELD TEAM	APPROXIMATE TIME NEEDED *PER PERSON* (days)	TOTAL TIME NEEDED (person-days)		NOTES
			Low	High	
Review what is known already. Read earlier reports, telephone or face-to-face interviews.	Individual	1 – 2	1	2	
Contact possible future stakeholders (e.g. municipality, NGOs). Telephone or face-to-face interviews.	Individual	0.5 – 1	0.5	1	At start, during or after workshops; may be low levels of contact throughout.
Broad workshop design.	Field team	0.25 – 1	0.5	2	
Set-up workshop. Meet people. Get first sense of tenure security issues and land administration experience. Explain task and process, and limits of these. Negotiate working group and dates.	Individual	0.5 – 1	0.5	1	
First workshop with working group. Start with overview of current land use and practice, identify hot tenure security issues.	Field team	1	2	2	
Review, analysis, re-planning and detailed design for further workshops.	Field team	0.5 – 2	1	4	Depends on complexity. May have to review and re-plan more than once.
Further workshops with working group. Current practice, adaptations , development of principles and rules. 3 – 5 workshops.	Field team	3 – 5	6	10	
Draft and translate constitution.	Individual	2 – 3	2	3	May reduce time by studying documents describing wording of common patterns of land administration practice. NEVER cut and paste.
Discuss constitution. 1 – 2 workshops.	Individual	1 – 2	1	2	Depends on complexity and number of add-ons that need discussion .
Finish the paperwork. Draft legal entity establishment report, finalize constitution, complete legal requirements.	Individual	1 – 2	1	2	
Community meeting review and/or adoption meeting.	Individual	1 – 2	1	2	
Workshop records, development of materials for sharing.	Individual	1 – 2	1	2	
TOTAL TIME NEEDED (person-days)			17.5	33	

The process has not yet been turned into simple routines and needs a reasonably high level of conceptual and facilitation skill. This will affect the rates at which person-days translate into actual costs.

Proper integration of tenure security questions into the project cycle from its earliest stages would spread facilitation of institutional planning for improved land rights administration throughout the cycle and reduce the time needed for legal entity establishment, and therefore the costs. LEAP is making proposals for such integration which have not yet been tested in government practice. In constructing the tables above we therefore assume that most of the work remains within the frame of legal entity establishment, as was true at St Bernards and Amandushill.

Timeframes

Assuming that people need time to think, consult and do homework means that the field team comes and goes, i.e. does not attempt to do all the fieldwork in one week, although some meetings might usefully be run on successive days.

Set-up time for the St Bernards and Amandushill pilots took about 4 months. Fieldwork for both projects started in January and was completed in July 2003, with most workshops taking place over weekends.