

**Square pegs for round holes?**

Some questions relating to the emerging Land Management  
Frameworks in South Africa

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## ACRONYMS

CLRB -	Communal Land Rights Bill
CPA -	Communal Property Association
CPI -	Communal Property Institution
DFA -	Development Facilitation Act
DLA -	Department of Land Affairs
DO -	Deeds Office
DPLG -	Department of Provincial and Local Government
FIG -	International Federation of Surveyors
GIS -	Geographic Information Systems
IDP -	Integrated Development Plan
LAC -	Land Administration Committee
LM -	Land Management
LUM -	Land Use Management
LUMB -	Land Use Management Bill
LUMS -	Land Use Management System
MPC -	Multi-purpose cadastre
SDF -	Spatial Development Framework
SGO -	Surveyor General's Office
PLRO -	Provincial Land Reform Office
PTO -	Permission to Occupy
TA -	Tribal or Traditional Authority
TC -	Traditional Council

## GLOSSARY

For the purposes of this paper the following terms are used in the following way, recognizing that these terms have different meanings in different contexts depending on who is using them, and for what purpose.

**Cadastral system:** is used in the conventional sense to mean a land information system that has two key components or subsystems: a spatial component, the geometric description of the land parcels linked to the textual component, the records or registers, describing the nature of interests and ownership of the land parcels (FIG 1992). The concept of a “cadastre” is, however, fluid. The International Federation of Surveyors (FIG), for example, has been involved in ongoing redefinition of the concept and its objectives to take into account contexts other than those of the Western European countries or their colonial legacies, leading to broader conceptualisation of land administration definitions, e.g. the Bogor Declaration (1996) and the Bathurst Declaration (1999). It remains, however, a heavily contested professional, intellectual and practical concept.

**Customary** (as in customary system; tenure; principles): is used in this paper in a fairly loose sense to reflect local governance practices in relation to land access, rights and use that are well understood by a local community, and which may or may not be at odds with the country's legal procedures. There is an implied quality of historical continuity, mitigated by adaptability to change over time as systems respond to new external challenges. The concept is similar to “traditional” only the latter can be misinterpreted to imply a naïve acceptance of obdurate adherence to unchanging values, which these systems do not necessarily display. The term “traditional” has also somewhat controversially become co-opted into formally recognised state structures.

**Communal** (as in communal system; tenure; land): is also used in this paper to reflect the broadest possible interpretation including areas under customary, PTO, quitrent and other hybrid systems of community tenure where land access and allocation is based on membership of a particular group or community in contrast to market-based private land transactions.

## 1. INTRODUCTION

The paper<sup>1</sup> explores the continuing institutional misfits between the dominant land management frameworks in developing countries like South Africa, and the marginalised informal systems that serve the poor in both urban and rural landscapes.

Institutions that reflect this imbalance are sometimes referred to as the “formal” and “informal” systems. In the context of the land sector, the systems under examination are those of land use and land tenure, alternatively described as “official” or “unofficial” systems or “registered” or “off-register” land rights.

Emerging land policies aim to “suck” the informal systems into the formal system. There is a need for more rigorous analysis of why these policies continue to fail.

The persistence of institutional misalignment contributes to a rationale for people in the informal systems to stay outside the formal system. The informal system provides some basic elements of social support and security to the poor and responds dynamically (if somewhat dysfunctionally) to stresses and shocks experienced by those whose livelihoods are vulnerable.

The formal system is inflexible and unable to respond dynamically in this way. Also, by increasing the visibility of the very poor during processes of formalisation, attempts to “mainstream” local institutions can actually make the poorest more vulnerable because of increased demands from the state e.g. to pay for public and private services, manage new legal entities and maintain new infrastructure. Nowhere is this truer than during the process of formalising land tenure.

It is therefore important to analyse the actual and potential impact of new institutions on local realities and practices, i.e. the household and community level. However, it is also important to analyse institutional arrangements at levels above the household and community level, namely at municipal, provincial and national levels, and to assess the nature and form of decentralisation of powers to the local level. Evolving legislation and institutions may reproduce past inequalities by institutionalising principles derived from the constitution that neither the state can deliver nor the citizens respond to in a sustainable fashion. There is also a danger that the alternative approach of designing “custom-built” institutions for the poor, e.g. lowering standards, waiving land management and taxes or appropriating local (community) institutions and practice outside of the formal system, the poor are placed in a parallel institutional universe reminiscent of the past.

In the context of settlement planning, there is sufficient anecdotal evidence to suggest that there tends to be “reversion” to informal (e.g. extra-legal) practice after settlements are formalised in both rural and urban contexts. This is merely one indicator of malfunction, but it is a powerful symbol. Experience suggests that institutional incoherence between central, middle-level and local institutions contributes significantly to this phenomenon, whilst acknowledging the impact of legacies that are rooted in deep-seated macro-economic imbalances.

What might appear as small institutional gaps at higher levels gather momentum downstream manifesting in a “two world’s” paradigm at the point of impact.

On the question of land tenure, there is little historical experience of titling for the poor in rural and urban areas in South Africa, since black people were denied the right to the dominant land rights of the white ruling classes. However, there are examples where survey and titling were carried out, particularly in the Eastern Cape, with some questionable results. The post-1992 introduction of freehold title as an option for all citizens, as well as

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<sup>1</sup> This paper has drawn heavily from a much longer sectoral report prepared by the author as a sub-contract to the Human Sciences Research Council (HSRC), which was in turn contracted by the Department of Provincial and Local Government (DPLG). The full report is entitled “The Assignment of Schedule 4 and 5 of the Constitution and other Plenary Powers and Functions to the Local Government Sphere”; also from the author’s participation in reports prepared by McIntosh, Xaba and Associates (MXA) for the Public Service Commission (2003) on “Land Administration Systems in the Eastern Cape” on request from the Premier of the province. The synthesis and conclusions, however, are those of the author

new forms of tenure, such as Communal Property Institutions, are likewise producing results that raise serious questions about how the state invests its resources in tenure security for the poor.

There is a need for deeper analysis that looks beyond tenure forms, and examines the entire conceptual and institutional framework for land management in developing countries. This reveals serious gaps between the management frameworks for the formal and informal systems. In the formal sector there are different institutional imperatives for the regulation of tenure, on the one hand, and land use, utilities, servicing, taxation and enforcement on the other. The design of land administration institutions at the upper reaches of government supports a separation of these two arms of land management, i.e. land tenure and land use regulation. In the formal sector these branches of land management are institutionally linked via the cadastral system

The current formal cadastral system, however, has continued to elude the poor in both urban and rural contexts in many parts of Africa, including South Africa with its highly developed cadastral network. In the less formal land sector, there is consequently a failure of management at point of impact. This impairs the ability of decentralised governance institutions to be effective in land reform at the local level - particularly municipalities, which are mandated to implement developmental land management policies. Indications are that institutional mis-matches are likely to persist in spite of massive state resources being pumped into new forms of land tenure.

This paper raises only some symptoms of institutional mis-alignment between the dominant land systems in South Africa, and those of the economically marginalised. The focus is on government institutions. I see this, however, as a *manifestation* of deeper political and economic imbalance and do not wish to suggest that institutional alignment is a politically detached, neutral or purely technical process. Rather, the intention is to show how technical processes can sometimes disguise highly contested political spaces.

## **2. THE EVOLVING FRAMEWORK FOR LAND MANAGEMENT IN SOUTH AFRICA**

### **2.1 Defining Land Management**

In this paper Land Management is defined as the overarching process of decision-making around land resources, including responsibility for the implementation of the decisions. From an institutional perspective it includes the formulation of land policy, the preparation of land development and land use plans, and the sub-systems for the administration of a variety of land related programmes. Land Administration defines the activities that “actualise” these policies and plans. These include the functions involved in administering tenure arrangements, resolving conflicts concerning the ownership and use of the land, regulating the development and use of the land, gathering revenue from the land (e.g. through taxation, leasing, sale, etc) and enforcement mechanisms for these.

Increasingly, these activities are supported by formal planning processes. Planning and development functions occur in a variety of contexts in support of, or for the purposes of, both land management and land administration, and these functions mostly occur at the local level.

At a general level, a land management system is concerned with land as a resource and includes the processes for making decisions about who can do what where. The decision-making realm can be centralised, decentralised, localized or a combination of all or some of these. Hence land management generates a set of land policies at different levels of government and civil society. In regions of rapid change there is seldom a land policy at the centre that holds for the country at large. Land policies – hence governance - can even be localized at community level and operate unofficially or extra-legally, e.g. in informal settlements<sup>2</sup>, or according to customary principles that may or may not be endorsed by government, e.g. in rural communal areas.

In the official or formal system in South Africa currently, decisions about land ownership are centralised, while questions about land use management are increasingly seen as provincial and local level functions with the

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<sup>2</sup> See, for example, Barry M. & Fourie C. 2002. Analysing Cadastral Systems in Uncertain Situations: a Conceptual Framework based on Soft System Theory. *International Journal of Geographical Information Science* 16(1) 23-40.

actual execution thereof taking place at municipal level. The extent of local government discretion for decision-making is still being tested. Thus, in South Africa today, the question of “who decides” takes place at different levels, with greater or lesser co-ordination of these decisions across the formal and informal systems divides. In this sense, there is no overarching Land Management System in South Africa today.

There are strong arguments, moreover, for much of land management systems planning to be decentralized, particularly in the interests of supporting development for the poor. According to LEAP’s concept of land management, **a pro-poor land management system would use, in an explicit and planned way, instruments that improve the sustainability of the tenure security and servicing levels to the poor.** For this, tenure, development and servicing systems need to be carefully aligned, and much of this alignment should ideally take place at a local level. Decisions about tenure, land use management and land development are closely bound together and should be considered holistically to ensure the goals are realised. Holistic systems planning is also important to ensure that land administration arrangements for carrying out these decisions are integrated and the various Land Administration components “speak to each other”.

Evolving methodologies<sup>3</sup> for exploring the links and the tensions between different institutional levels at the micro, meso and macro levels of society is complicated in the case of land management because of overlapping, ambiguous and unresolved roles and responsibilities of local institutions in communal contexts. This has severe repercussions for local government in South Africa, given the constitutional mandate for municipalities to facilitate planning and development in rural as well as urban contexts, including the communal areas.

Local government has the most important role to play in reversing the legacy of racialised economic geographies as a result of apartheid spatial planning, most noticeable in and around communal areas and informal settlement around towns and cities. Land tenure and the allocation of land for settlement are intrinsic to the processes of land development and are essential components of an overall municipal land management strategy. For this to be effective, there should be clarity as to how the various public and private institutions responsible for land management and land administration articulate with one another between levels as well as at local level.

## 2.2 Land Management Institutions in the Formal System

At an institutional level, land management and land administration functions have been conventionally defined in terms of hierarchical sets of relationships (see figure 1 below), with government and private sector organisations structured to service specific components of these functions.

This institutional structuring has worked relatively well in servicing the formal land sector in South Africa, attributable in large measure to the presence of a well-defined, robust<sup>4</sup> cadastre, statutorily linked to the Deeds Registry. Under such circumstances it is possible to design systems around clearly defined components, such as:

- Surveying, conveyancing and deeds registration arising from functions of ownership under the custodianship of the national sphere of government
- Regulation of land use arising from the functions of spatial planning and land use management, primary responsibility of which falls on local government. Cadastral information, generated from the first set of functions, is conventionally used as the basic unit of administration for planning, development and land use management. Increasingly, other forms of land information, e.g. infrastructural and environmental, are being integrated into, or superimposed on these information systems for planning and other purposes. Modern technology, such as Geographic Information Systems (GIS), has facilitated the development of more complex information systems, such as ‘multi-purpose’ cadastres (MPCs), while regional and global Spatial Data Infrastructure programmes are under development to promote “the technology, policies, standards and human resources necessary to acquire, process, store, distribute and improve utilisation of geospatial data”<sup>5</sup>.

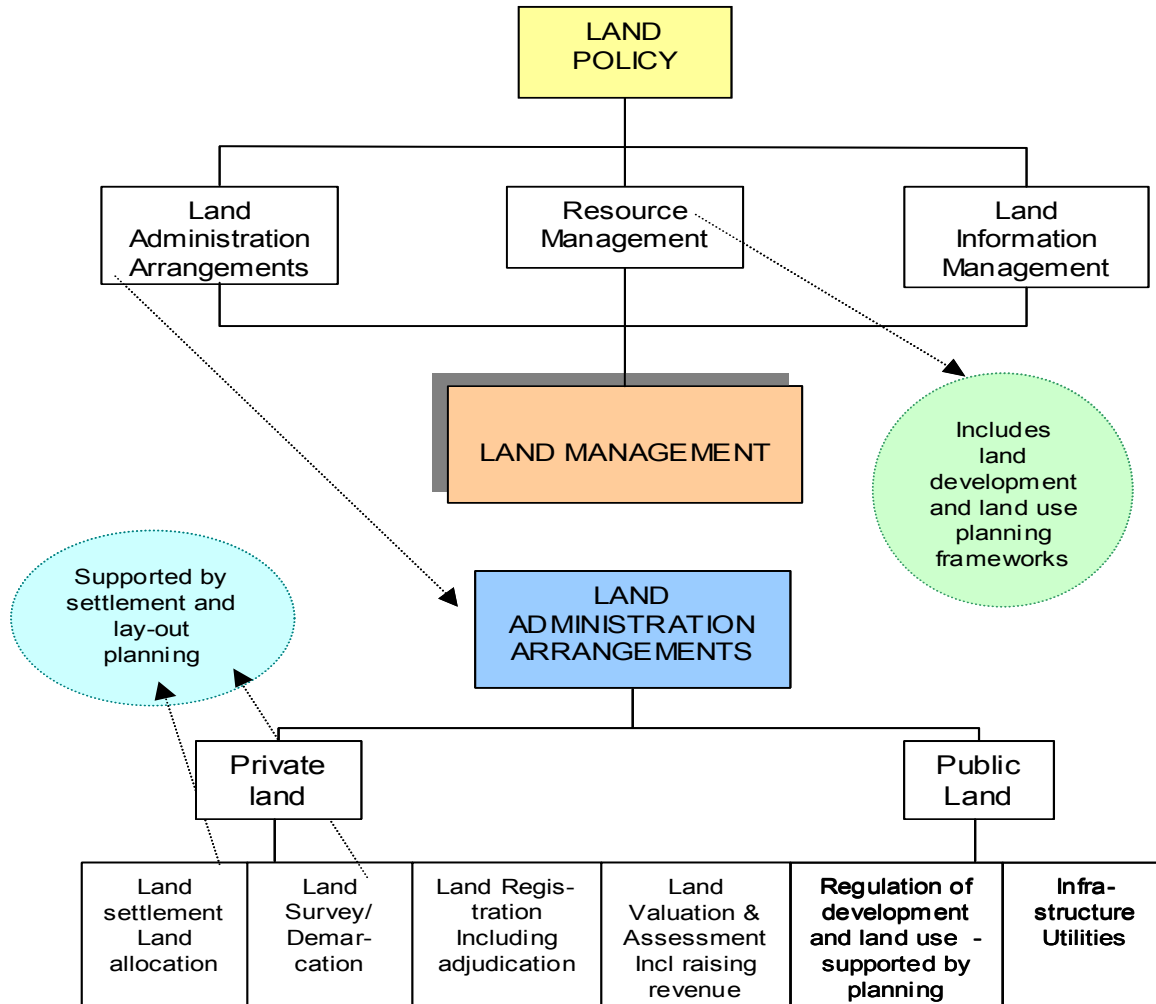
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<sup>3</sup> See for example, conceptual frameworks and methodologies for community-based development such as espoused by Khanya – Managing Rural Change cc. [www.khanya-mrc.co.za](http://www.khanya-mrc.co.za)

<sup>4</sup> The South African cadastre is based on an accurate geodetic reference network.

<sup>5</sup> Nebert DD (ed). 2004. The Spatial Data Infrastructure Cookbook. Global Spatial Data Infrastructure. [www.gsdi.org](http://www.gsdi.org)

**Figure 1. Land Management Arrangements from institutional perspective (formal system)**



Source: Adapted from Dale P & McLaughlin J (1988): 4-7

These two sets of land management functions, namely administration arising from ownership and regulation arising from spatial planning and land use management (SPLUM), are closely linked in the formal land sector. With land information at the center, these two sub-systems can be seen as the “skeleton” within the overarching land management “body”. Figure 2 below shows the twin sources of authority for these two main branches of land management in the formal system in South Africa. There are different institutional frameworks for these functions, and each currently falls under different national departments. Although separable, these the two branches are linked via the cadastral system, which acts as the “glue” between them. Hence these institutional arrangements have functioned relatively logically in supporting the land rights of the formal system.

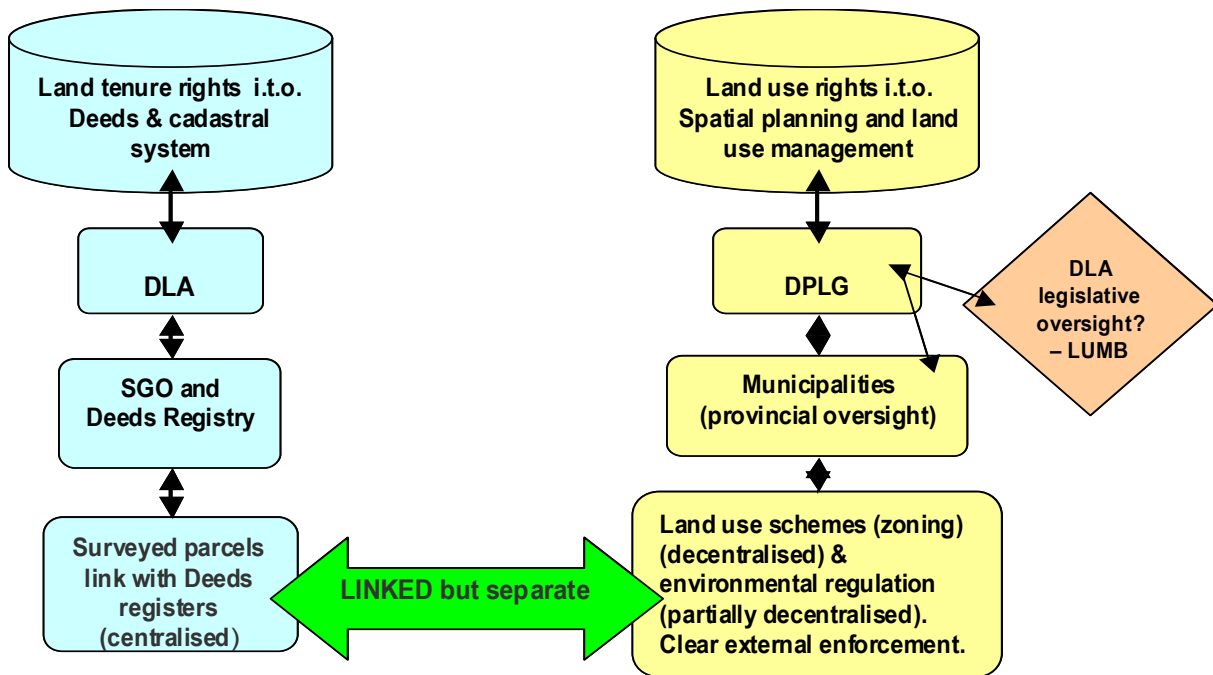
Traditionally authority for these two branches of land management vests at different levels of government: land tenure is managed and regulated via a centralised national registry, while land use management is decentralised and regulated at local level. Figure 3 shows the constitutional endorsement for this set of arrangements.

Zoning of land is the principle mechanism for managing land use in the formal system. Land Use schemes are traditionally dependent on a cadastral foundation. A “zone” is not a mere description of preferred land use, but rather it is a legal mechanism used by local authorities to attach particular permitted land uses to particular properties<sup>6</sup>. Although zoning as a concept has undergone some transformation from a rigid unresponsive tool of

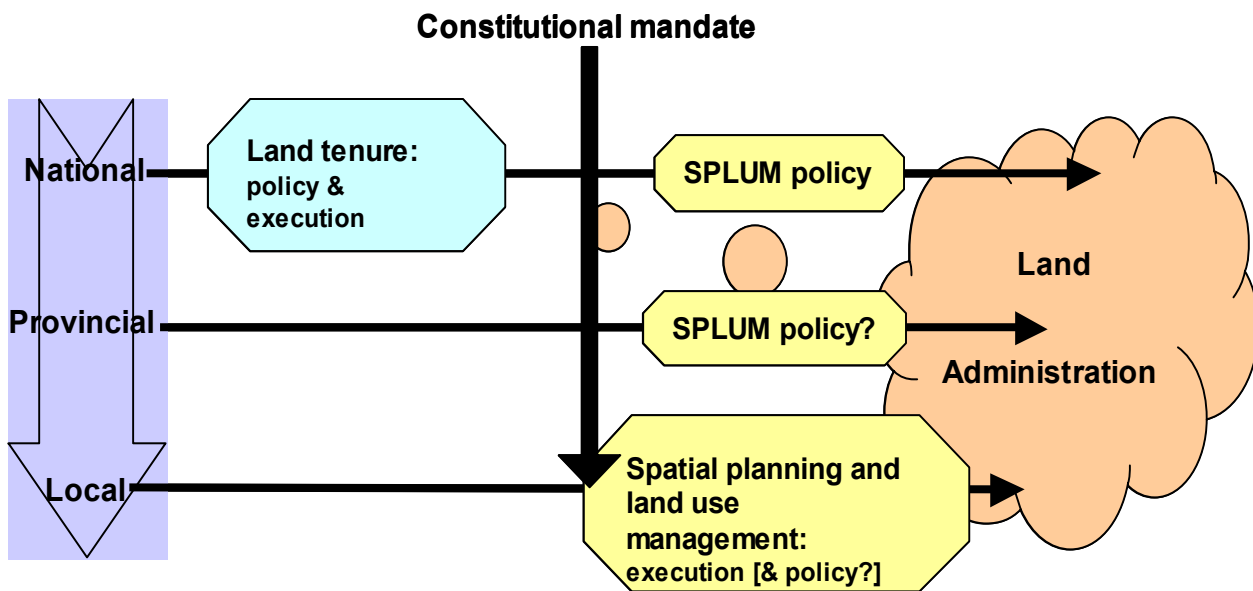
<sup>6</sup> See Public Service Commission (2003), Report by McIntosh Xaba and Associates, Land Administration Systems in the Eastern Cape.

control to one that is capable of responding to more flexible spatial patterns of land use (e.g. multi-purpose rather than single purpose land uses), the basic legal mechanism remains unchanged. Land use rights are attached to legally identifiable (surveyed and registered) parcels of land, which implies a cadastral infrastructure.

**Figure 2. The “two streams” of authority for key Land Management Functions in the formal system**



**Figure 3. Constitutional Mandates for placement of functions**



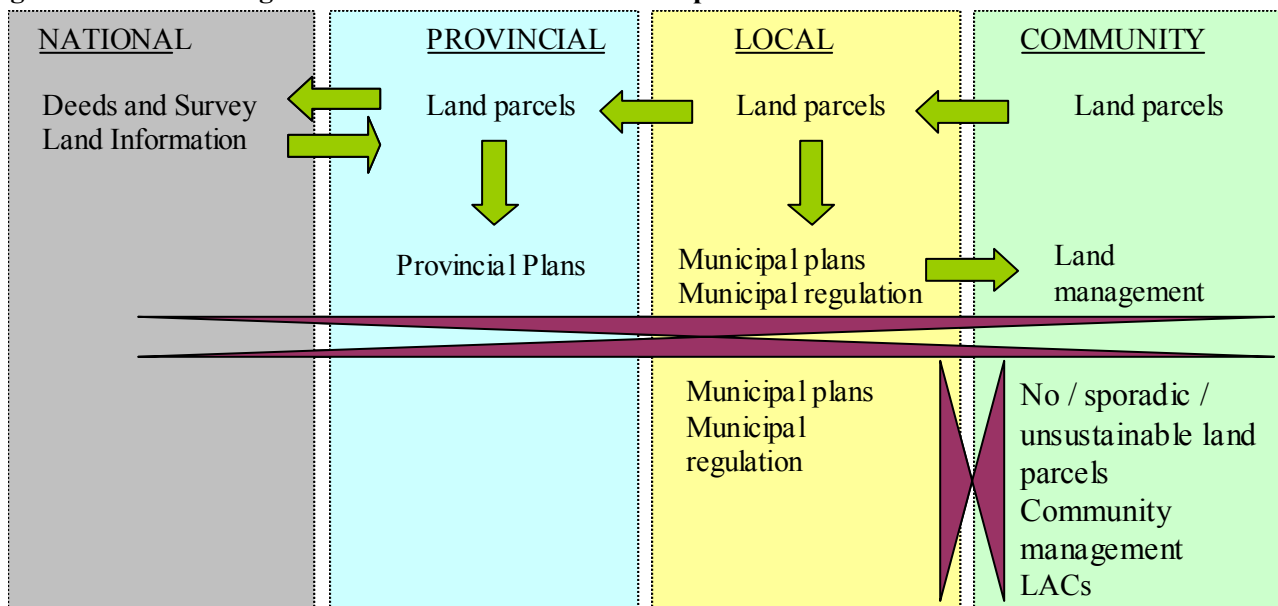


Rural commercial land was for the most part also brought within zoning schemes, with an additional legal mechanism in the form of the Subdivision of Agricultural Land Act, which prevents subdivision of agricultural land without consent. This was part of an agricultural strategy to encourage large farm units and prevent the growth of small farms regarded as “uneconomic”. The repeal of this Act is still pending.<sup>7</sup> The delay in implementing the repeal appears to speak of nervousness about jeopardising this form of regulation, but, however, the Act already competes with newer legislation that generally waives sub-division prohibitions in land reform projects, further evidence of duality.

### 2.3 Land Management in Informal Systems

In the informal system the officially prescribed institutional configurations do not match up with local practice or local realities. In contrast to this formal system of regulation, the linkages between land tenure and land use in informal or customary settlements cannot be explained by either the “hierarchical” or the “two stream” system. One of the principle reasons for this that land management in informal contexts is not founded on land parcels, and generally lacks accurate up-to-date records of land holding. Alternatively, land parcels are interspersed with informal land allocations. In spite of this anomaly, emerging land management frameworks are not developing alternative criteria or base-line land information or record keeping on which to base a land use management system. Figure 4 represents the break in institutional coherence where there is an absence of well-defined land parcels or accurate land records. The institutional coherence is only maintained in the presence of land parcels.

**Figure 4. Land Management Framework based on land parcels**



The “two stream” system of land management, parts of which are centralised and parts decentralised, does not fit more localized forms of land management in informal systems where there is an absence of defined land parcels.

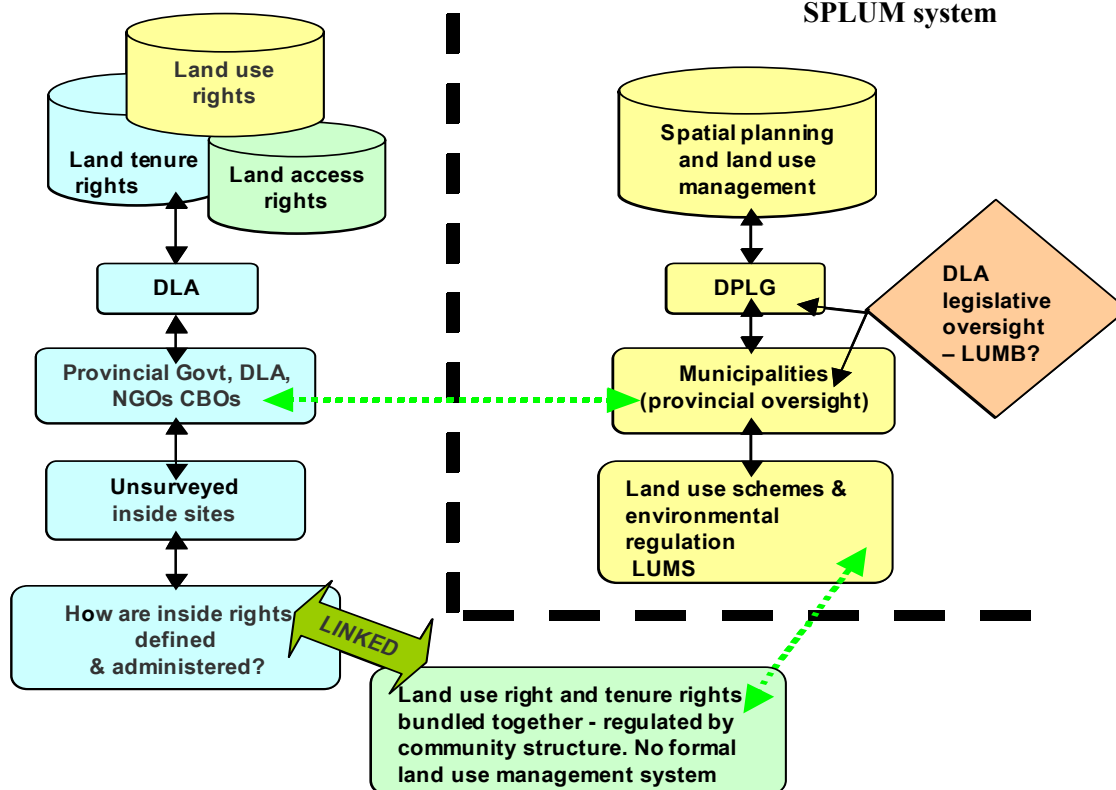
In the formal system, land parcels are the main “carriers” of land use information. Land use rights are allocated, generally by the local authority, according to the permitted use(s) in terms of the zoning scheme. These rights (and restrictions) attach to the parcel of land. A change to the permitted use is affected on application to the relevant authority and a consequent change to the land use scheme. A change of ownership does not affect the use right, and nor is a use right affected by the identity of the owner. Land use regulation therefore does not have to pass through the Deeds and Cadastral system. However, it is entirely dependent on the cadastral system in so far as land use rights are associated with registered parcels of land. Enforcement occurs as a result of the link

<sup>7</sup> The Subdivision of Agricultural Land Act, 70 of 1970, has been repealed by the Subdivision of Agricultural Land Act Repeal Act, 64 of 1998, but this has not been signed into law, and therefore the Subdivision Act remains in place.

between the owners and the properties through the registration system. Hence, the integrity of the formal system is maintained by the public land administration system, serviced in important respects by the private sector (e.g. surveyors and conveyancers) within standards set by the state.

By contrast, in most rural former homeland contexts, regulation of land use occurs through the issuing or allocation of the tenure right to a particular person. The tenure right is also a use right. Landholders are granted a right to use the land for a specific purpose, such as for a residential purpose, arable purpose, trading purpose, etc. The bundled use and tenure right attaches to the person, unlike the formal system where the use right attaches to the property. When the ownership changes (e.g. a person dies) the tenure/use right is either cancelled and re-issued to a family member (PTO system), or the use right devolves to the family through customary practice. The allocations<sup>8</sup> are made by various structures at present, from local associations, to Traditional Councils to various line functionaries, depending on the set-up. In the past, allocations were legitimated by the District Magistracies and records were held in the Magistrate’s offices (in the case of the PTO system). In the case of customary allocations, these took place according to customary principles and legitimated by the Tribal Authorities. Figure 5 shows how the land access/use/tenure rights are bundled together in customary systems, making it difficult to apply the separable management institutional framework of the “two stream” system.

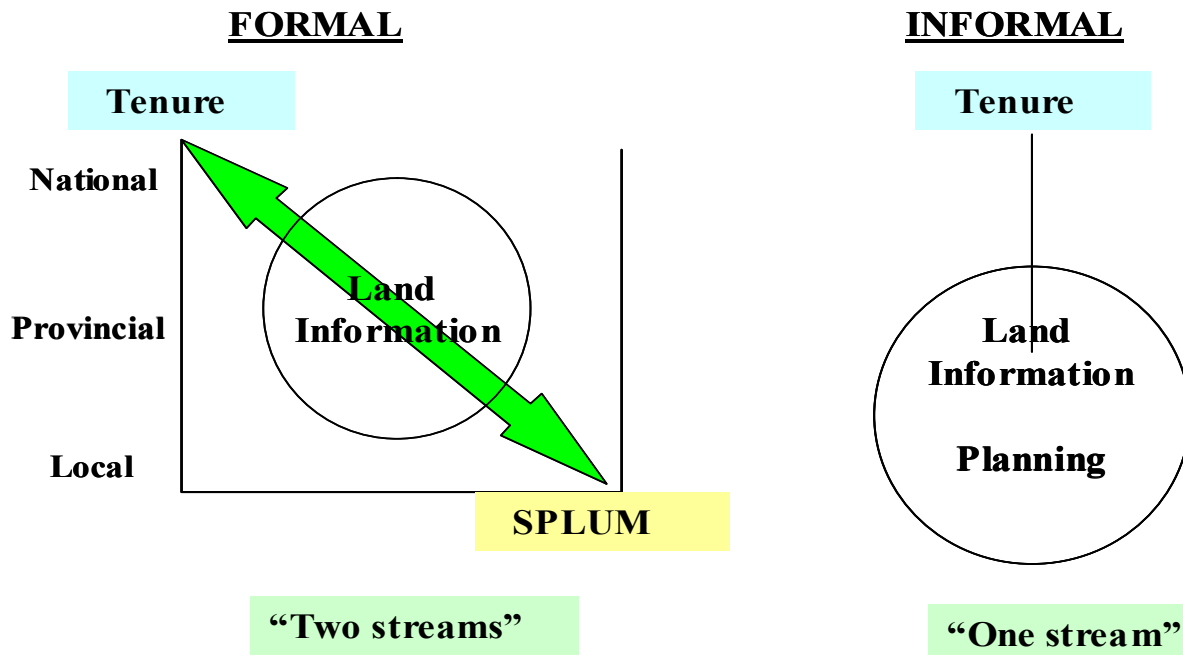
**Figure 5. Bundling of land tenure and use rights in the informal system – weak linkages into formal SPLUM system**



It seems evident therefore, that land under customary tenure regimes (or hybrids thereof) cannot be managed in the same way as registered parcels of land. This raises important questions: what is the role of local government in densely settled communal areas where formal land management systems are ill fitting? If wall-to-wall zoning is out of the question, what are the alternatives? There is very little evidence that alternative management mechanisms, capable of enforcement, are being developed. On the contrary, the regulatory framework continues to advocate “land use schemes” in spite of anomalies that arise from land use schemes in non-cadastral areas.

<sup>8</sup> This system also allowed for arbitrary dispossession and reallocation of land use rights on communal land e.g. betterment planning, new land uses such as irrigation and other agricultural schemes, new rural settlements and nature reserves, holiday resorts and hotels – without compensation for the full value of land rights so lost. On the other hand, these regulations were also closely linked to internal land use controls to regulate the scale and location of spatial development, e.g. the “cutting up” of new residential sites or village sections.

**Figure 6. Institutional arrangements for Formal and Informal Land Management compared**



Alternative community-based models, e.g. Community-based Natural Resource Management (CBNRM) emanating largely from the NGO sector are relevant here, but if power is not devolved to the local sphere, these models do not in themselves create institutional linkages, e.g. through co-operative governance or co-management entities<sup>9</sup>. There is an additional problem associated with community-based models. Land and housing development is “subsidy driven”. Community-based systems may not match criteria for state support and project-linked subsidies. When counter posed with official projects, the danger of local conflict arises. State subsidies have the power to drive local development that may not be the most suitable or sustainable.<sup>10</sup>

There has been very little research on local practices with regard to internal land use regulation in various informal systems, i.e. customary settlements, former PTO-regulated settlements and urban informal settlements. The focus to date has been on land tenure forms in the context of transfer and ownership - individual or collective - rather than on land management in informal and communal systems. However, tenure rights are not beneficial purely as a result of tenure rights having been officially acknowledged and conferred by the centre. The actual *benefits* of secure tenure are derived from *relationships* that *flow from* the recognition, awarding or transfer of tenure rights. Given that the most concrete manifestation of these relationships occurs at the local level, institutional coherence at this level is critical to how tenure performs both socially and economically.

### 3. MANIFESTATIONS OF INSTITUTIONAL DUALISM

#### 3.1 Lack of coherent Land Management framework

In South Africa the institutional dualism manifested as formal and informal systems today, has its origins in pre-colonial, colonial and apartheid institutions that have been bifurcated along various axes, between, for example, “homeland” and non-homeland systems; urban and rural land; commercial and customary use rights; freehold and communal tenure rights; individual and collective ownership; registered privately-owned land parcels and unregistered socially-occupied unparcelled land, and so on.

<sup>9</sup> Legal Resources Centre, Cape Town, is assisting with setting up co-management municipal entities (includes community members) for administering land management arrangements in Namaqualand. This precedent will not be replicable where overridden by the CLARA.

<sup>10</sup> Poor people living in informal settlements want reassurance that by adopting “alternative” approaches to the mainstream, they will not have to sacrifice subsidies, tenure and services offered by the state. This has generated serious conflicts in some social housing schemes where municipalities, for e.g. have not developed systems for managing and servicing land under collective tenure forms.

The opportunity to overcome bifurcation arose with the drawing up of all land functions to the centre – the national sphere - during the constitutional reconfiguration of state functions and departments in 1994. However, instead of designing an integrated system of land administration at national level, the Minister delegated or assigned new order and most of the old order homeland laws – sometimes only parts of these - to the provinces in terms of the Land Administration Act, No 2 of 1995. This was to ensure the continuation of key functions. Serious anomalies crept in, as the Department of Land Affairs would not sanction the administration of the tenure aspects of this old order legislation, particularly PTOs - regarded as defunct - leaving the provinces with a range of semi-functioning legislation and unclear roles. Only ownership rights (interim registration, freehold and Communal Property Associations) are endorsed, raising problems with planning and development in contexts where other land rights prevail during the transition. This confusion was passed on to the new municipalities.

Land administration is still not clearly defined at national level: there is no structure in national Land Affairs that undertakes land administration in a holistic sense. Neither is it a function identified for decentralisation: it is not identified in the Schedules to the Constitution as a function to be decentralised. Thus it tends to be associated with the national directorates responsible for the Deeds Registry, the Surveyor General's Office and various Land Information competencies. Failure to create a specific land administration function at national level, key components of which could be delegated or assigned<sup>11</sup> to the provincial and local spheres, has led to a situation where provincial and local government have inherited various fragmented pieces of legislation to implement, without a integrated “whole” against which to define their roles in relation to communal and informal areas. As a result, these spheres of government tend to ‘default’ to the ‘known’ and familiar aspects of land administration, viz. surveying and registration of land parcels, and registration of title deeds. When it comes to communal land development, this has very severe consequences for the extent to which local municipalities are able to integrate communal areas, or land under collective ownership, into provincial or local land management frameworks.

The Communal Land Rights Act (CLARA) compounds, rather than resolves, this fogginess. The CLARA sets up local administration committees at community level that do not link into the institutional systems and structures of governance for land management in the country, other than the SGO and the Deeds Registry. While not technically a “fourth sphere of government”, the proposed system of Land Administration Committees (LACs) resembles a fourth level of governance, which, however, bypasses the middle and local spheres. Powers do not devolve to the local level. It is simply a conferral of administrative responsibilities. This will further confuse the role of municipalities in land management, and their ability to design integrated systems will be compromised. There are no statutory links between the LACs and Municipalities. The LACs are answerable, ultimately, to the Minister. The CLARA therefore appears to have opted for an approach that officially recognises and supports, from a land policy perspective, a continuation of institutional dualism and centralisation of power.

For argument sake, I have singled out three related and linked problems that arise from the institutional systems and structures of governance for land management and land administration. Some of these have already been alluded to. This is by no means exhaustive, but serves to illustrate the problems of institutional incoherence.

1) One set of problems revolves around the nature and role of the cadastre in South Africa. During at least the next half century, it is unlikely that the current cadastral policy framework will be sufficient to sustain land management, tenure and development in the informal areas, and in rural contexts in particular. This does not mean that a cadastral system is doomed to redundancy. On the contrary, it suggests urgent need for cadastral reform. Evidence suggests multiple causes of failure during attempts to absorb the informal into the formal:

- Land use patterns and land use management systems or practice in communal areas differ substantially from the dominant systems for regulating land use. Land use is managed, not via the formal cadastral system, but via the allocation of use rights to the holders of the land. These use rights attach to the holders, and not to the parcel of the land. Management is based on managing “people”, i.e. membership of the group. This can

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<sup>11</sup> The alternative is full devolution of legislative functions, which requires legislation and involves full transfer of the authority role to municipalities. It is permanent and irrevocable, with municipal discretion and authority to pass by-laws.

cause conflict between groups and leaders within a fluid community. The dominant system cannot “read” these informal systems, and hence cannot absorb them into their current management frameworks.

- Prohibitive costs if these are measured in terms of sustainability and not only in terms of “raw figures”. Factoring in costs should include the complex administrative procedures, minimal capacity in government or communities to support the new institutions, sustainability over time and people’s perceptions of the social costs of conversion, including fear of loss of collective oversight. Costs should be measured against benefits.
- Time factor: tenure can only be fully secured *after* land rights enquiries are conducted. In many urban and rural contexts, the issues that arise during rights enquiries are complex and not easily resolved. Some conflicts have been fomenting for generations and may continue to elude easy resolution.
- What happens during the interim, that is prior to confirmation of surveys and tenure? What forms of land management and development will municipalities be able to implement during what appears will be a prolonged transitional period while the CLARA is phased in? Will currently recognised interim rights be sufficient to generate development and adequate management systems?
- With little vision of alternative cadastral models, how will municipalities be able to apply servicing policies, and rates and billing policies for services – or indigent policies for these – in communal and informal areas if the land management systems differ so substantially between the formal and informal areas?

2) A second set of problems relates to the centralised systems for the confirmation and administration of land tenure in South Africa. In circumstances where it is not possible to confirm, administer and maintain land rights that are outside the system of land parceling (or revert back after parceling), the centralised Deeds Registry system and local land committees are an inadequate response to the institutional requirements for land tenure in South Africa. There has been insufficient attention to the opportunities presented by decentralised land tenure administration supported by the public sector- not to be confused with voluntaristic community-based structures.

3) A third set of problems revolve around the difficulties that municipalities face in developing integrated systems for spatial planning and land use management in circumstances where substantial differences persist between land use regulation in formal and informal contexts.

The implications of the questions above are multiple and complex. The remainder of the paper will focus briefly on each of the main lines of argument raised so far. These are (1) the constraints of a highly centralised system of governance for land tenure and the lack of integration of land administration functions at national level; (2) the constraints of the current cadastral system; and (3) some limitations of current municipal land management systems for land use regulation, land development, servicing and billing in communal and informal settlements.

### **3.2 Centralisation of land tenure functions**

South Africa has a long history of centralised land tenure with regard to systems that serviced freehold land ownership. The Deeds Registry, linked to the cadastre, is regarded as one of the most rigorous systems in the world today. However, the post-1994 dispensation inherited the legacies of the colonial and apartheid state, with the homeland adjuncts. The colonial and apartheid state did not succeed in systematising a uniform system of tenure for black people living in the cities and in the bantustans, though numerous efforts were made to do so. Proclamation R188 of 1969 was one such attempt, as was R293 of 1962. However, the reality is that a wide range of semi-formalised tenure systems continued to operate in various different regions and provinces and these legacies remain today. The Eastern Cape probably displays the widest range of variance - from individual to communal forms of tenure and a mix of both - within and across the old administrative divides. These systems have certain aspects in the common, in addition to the more obvious observations as to the relative “cheapness” of administering these systems and the exclusionary and inequitable nature of the rights so conferred:

- Decentralised forms of tenure confirmation and local administration
- Absence of surveyed parcels - or surveyed parcels that were administered outside the central Deeds Registry
- Land use regulation by means of the allocation of specific tenure rights to specific people for specific uses, such as arable plots, residential sites, trading sites, etc.

In the enthusiasm to extinguish all traces of these “second class” land rights, the debates have tended to polarize around proponents of “titling” (individual or collective) and proponents of “communal” where communal has tended to be conceptualised as synonymous with non-titling or as opposed to registration of land rights. The CLARA attempts to combine “titling” with “communal”, but via the central Deeds Registry, thus retaining the highly centralised nature of land tenure confirmation. There has been remarkably little debate on a “middle way” which considers expanding the scope of the Deeds Registry both conceptually and spatially.

This alternative model, evidently one that has been rejected, could, for example, embrace a system of decentralized land registries. This is not the same as “community records”. The suggestion is for a sub-system of decentralised registries in which various forms of evidence may be admissible. The e-Cadastre project in DLA, which aims to convert the paper-based Deeds system into an electronic system is critical here, but not sufficient. What is still missing is a system for land adjudication and the development of a “hierarchy of evidence” in circumstances where land rights confirmation cannot be processed by formal conveyancing procedures and stored in the central Deeds Registry. The idea of decentralised registries that could over time integrate the formal and informal systems has had remarkably little coverage, in spite of the overwhelming emphasis on local governance as an engine for development in South Africa. Decentralised registries tend to be equated with community record keeping, which is a different concept, and one advocated by the CLARA. Community registers on their own have been found, where tried, to meet few criteria for sustainability or good governance. However, community level records remain an important concept - if tied up in a system of co-governance.

The White Paper on South African Land Policy (1997) contains a vision for “decentralisation of functions to the local government level” (s.6.7). The White Paper foresaw a delegation or assignment of land administration functions to provincial government and eventually to local government. “This would bring the situation in rural areas in line with those in urban areas where substantial land administration functions, particularly those relating to planning and development control, are already vested in local authorities”. The policy document lists several land administration functions as among those that would eventually be administered by local government, including “the allocation of user rights (in the case of communal and public land)” and “(a)ssistance with rights adjudications, registration of rights at the Deeds Office, processing requests for upgrading of land rights”.

“.....An important element of this vision of a decentralised delivery capacity is the notion of a land office staffed by land officers that would be located within local government. The land officers and their staff would be responsible for elements of the land reform programme, as well as for on-going land administration functions....”

The decentralisation vision of the White Paper, particularly land administration in relation to rural areas, has been reversed by recent policy and legal interventions. A key departure from the vision of the White Paper is that land administration in rural communal areas is to be undertaken by Traditional Council structures (TCs), or other local structures where no TCs exist, operating under centralised discretionary powers of the Minister of Land Affairs. The CLARA creates very weak links into local government. Institutional linkages in the Act rely on concepts such as “liaison” with local government, and injunctions for planning to take place via local government. However, there are no clear statutory linkages to Local Government, or plans to develop institutional capacity at that level. There is no meaningful devolution of powers to the local level.

### **3.3 Fragmentation of Land Administration**

The challenges facing all spheres of government in administering land are complex. Land administration remains a fragmented exercise in that it involves different spheres of government and separate administrative imperatives for various departments. It is further complicated by the legacy of racially separated local authorities, institutional anomalies peculiar to the homeland system and the phenomenon of traditional authorities that had their own jurisdiction in some respects regarding land administration.

Land Administration is ideally conceptualised as a composite set of functions at national level requiring integration at provincial and local government level. Land Administration functions are the competence of the

DLA but the DLA does not have a structure to accommodate this functional competence. As a result, Land Administration has become increasingly fragmented as it moves through to provincial and local government. Land Administration needs to be acknowledged as a competence; a structure at national level created to undertake the competence, and most functions of this competence should in turn be assigned, delegated or devolved to provincial and local spheres of government. Currently, land administration at provincial sphere tends to be narrowly defined as administering land for housing and registration of title. This is too narrow a definition of land administration, and it leads to inequitable distribution of land administration services to the formal land sector, leaving communal areas without land administration services.

Many land administration functions, or functions closely related to land administration are currently undertaken and best understood in relation to land supported by the Deeds and Cadastral system, that is the formal system. When these functions are applied to the informal system, and communal areas in particular, the system breaks down. Most services and land development, such as credit, utilities and spatial planning and land use management are fundamentally linked to the cadastre, or surveyed, parcelled land. Without an adequate cadastre, or where a cadastre is unravelling, the land management and administration roles and functions of all spheres of government are compromised. This may lead to a situation where people's *de facto* rights are jettisoned, with elite capture of land development and services, or systems revert to informality with minimal service delivery.

Land management and administration should be seen in the light of the role it plays as a Public Good. Inadequate land administration hampers delivery of housing and range of other services, both public and private, and this in turn reduces opportunities for local economic development.

State oversight has all but disappeared with the dissolution of the former institutional and organisational structures of land tenure in communal areas, leaving local structures, including Traditional Councils, to compete with a host of other local level actors, including municipalities, civics, NGOs and line departments. Thus tenure in these areas has assumed the characteristics of an "informal" system in many of the former homelands, since the regulatory aspects have moved to a stand-alone community level. Resolving local governance in respect of rural land administration therefore requires a multi-faceted, inter-governmental and holistic approach.

Provincial and local governments do not have adequate institutional arrangements or capacity to undertake land administration in a holistic and integrated way. Since national DLA has dealt with its competency over Land Administration by delegating or assigning laws within a narrow structural framework for land administration, this function has become invisible, obscured, fragmented and narrowed as it works its way down through provincial to district to local municipalities, ironically, in the same order of proportion to its increasing importance as it moves through these levels.

### **3.4 Constraints and opportunities of South Africa's cadastral system**

In South Africa the cadastral system does not cover large parts of the rural areas in the former homelands. On the other hand it is important to digest that, unlike other African countries, a cadastral network covers a very large percentage of South Africa. The exceptional racial skewing of land ownership patterns has created a highly developed cadastral legacy in the most parts of the country. This cannot be ignored in policy development.

That does not mean, however, that boundary demarcation is absent or unimportant in off-register systems. There are other informal or off-register internal "cadastrals" within communal areas, some more functional than others.

As the paper has indicated so far, the present land use regulatory mechanisms ride on the back of the juridical cadastral system. The implications are that such mechanisms will be ineffective in areas without a cadastre. That leads to several possible responses. (i) Introduce the dominant cadastral system into these areas; (ii) Examine current practice in communal areas where there is no formal land parceling, but where land use areas are clearly locally understood and described and which can be, or already have been, mapped in one form or another. Alternative methods for formalising an internal cadastre could be developed, including decentralised registries and use of a general boundary system. The efficacy of an administrative boundary system could be further explored as an interim measure. (iii) Survey parcels only where there is strong local pressure for conversion, designing alternative land management systems in areas lacking the criteria for immediate cadastral intervention.

The administration of PTO rights, for example, was based on a decentralised system of rights recordal maintained and updated in district land registers, with corresponding spatial representation (sketch maps or orthophotos) held in accessible paper-based form in district towns within reach of the rural populace. The system was maintained – with greater or lesser effectiveness - by the public sector. In systems where customary tenure operates, the evidence is publicly witnessed, though not recorded. Whether recorded or oral, the twin characteristics of a cadastre, namely, identity of land holder and spatial or locational representation are present, only there are additional complexities regarding (a) non-locational rights e.g. access to natural resources held in common or held by another entity; undefined rights of way, etc; (b) local registers (whether in a book or people’s heads) that are not linked to the formal registry of land falling under the cadastre – a parallel ‘registry’ outside of the cadastral system, not linked to surveyed parcels and the Deeds Registry, but linked to an administrative system of a local administration unit such as a Magisterial district or Traditional Authority.

There is, in addition, a network of administrative boundaries in the former homelands, more developed in some provinces than others. For example, old magisterial district boundaries and administrative area boundaries. For most living in the rural former homelands, the name of an administrative area (previously called a “location”) represents an “address”. The scope and limitations of administrative boundaries as a basis for development planning, as a transitional measure, requires deeper reflection.

Tenures based on customary systems are “social tenures” – the important relationships defined by the tenure arrangements are between people within a hierarchical locally understood social structure. In the formal system, by contrast, the defining relationships are between the people and the land, mediated by public institutions. However, there is evidence of increasingly permanent association between landholders and land in customary systems. This makes it possible for this system to evolve towards a cadastral-based system for the purposes of land information management and land use management. However, in areas where social relationships and the land are still more fluid – and the demand for social tenure persists - a conventional cadastral system with full transfer of ownership to individuals or entities is unlikely to succeed in the immediate future.

If one takes the “long view” of economic development and transformation in South Africa, it is plausible that the present patterns of land occupation in the communal areas will change, even if over a long period of time. It is accepted wisdom that present patterns of occupation are a distortion of the past, where land rights for black people were restricted to small pockets of territory. Those who migrated to towns and cities maintained – and still maintain - connections with rural homeland villages as a point of stability and a social identifier. It is possible that over a long period of time this “double-rootedness” will change in emphasis - if not entirely dissolve - as population pressures shift towards the urban areas to a much greater extent. It would seem foolish to invest large state resources in small-scale cadastral activity in rural areas where it makes no long-term sense.

### **3.5 Spatial Planning and Land Use Management**

Planning has long been a traditional function of local authorities (town or regional) in urban or developing contexts. Planning is closely related to land management, since it involves the allocation and reallocation of use rights. In modern contexts, spatial planning and land use management is necessitated by increased land densification where issues of health, sanitation, placement of infrastructure and utilities, servicing and protection of valuable agricultural land, natural resources or heritage sites impact on public policy and service delivery. The role of the state in land information management (particularly countries with an active land market) has progressed from concerns for raising revenue from the land (fiscal cadastres) or improving the efficiency of the market, to concerns also about regulating the spatial pattern of land development and land use, In South Africa, with its racially skewed patterns of land development, this concern particularly relevant.

There have been deliberate attempts to overcome legal bifurcation at national level with regard to spatial planning and land use management. The White Paper on Spatial Planning and Land Use Management (2001) and the Land Use Management Bill (LUMB) propose to regulate these functions within a uniform system of



decentralised powers and functions to Local Government via a framework of national norms. The policy and Bill are based on the assumption that a uniform system across the old administrative and tenure divides is possible.

Schedules 4 and 5 of the Constitution define the respective powers and functions of the provincial and municipal spheres of government. Land Use Management is not specifically listed as a function, but “planning” and “development” appear in various guises. “Municipal Planning” is a Schedule 4 Part B function (i.e. a local government function). “Regional Planning and Development” is a Schedule 4 Part A function, “Provincial Planning” a Schedule 5 Part A function and “Urban and Rural Development” a Schedule 4 part A function.<sup>12</sup>

These listings of “planning” and “development” functions in the Constitution are not very helpful in clarifying the powers and functions regarding land use management between national, provincial and municipal government. In some provinces<sup>13</sup> powers in respect of planning have been contested between the provincial and local spheres of government, and the legislative competence of provinces is being tested in relation to the national sphere. The DLA regards itself as having legislative oversight by virtue of its competency over Land Affairs, while some provinces refer to their Constitutional mandate for Provincial Planning.

The concept of planning in the Schedules of the Constitution needs to be brought in line with more recent institutional developments with regard to spatial planning and land use management, such as Integrated Development Plans (IDPs), Spatial Development Frameworks (SDFs) and Land Use Management Systems (LUMS) as provided for in the Municipal Systems Act, supported in the Land Use Management Bill. There is a need to bring clarity to the relative powers of the national, provincial and local spheres in relation to spatial planning and land use management, which are critical functions particularly of local government.

The White Paper is unambivalent about the role of local government.

Local government shall play the most direct role in spatial planning, land use management and land development. This sphere of government will be responsible for formulating the planning frameworks on which all the decisions on land development should be based. Municipalities will be responsible for the formulation and approval of their spatial development frameworks and for making decisions relating to land development and land use change, except where those decisions have impacts that extend beyond the particular municipality’s boundaries or where the impacts have national importance. Every Municipality will be required to designate a committee of councillors with a direct mandate to take decisions relating to land use and land development.

And again

The new spatial planning, land use management and land development system is based on two important points of departure. Firstly, *local government forms the most important sphere for decision making*.<sup>14</sup> Secondly, the IDP required by the Municipal Systems Act forms the key planning instrument.

Spatial planning is described as high-level governance of spatial aspects of planning, or the strategic planning of spatial aspects of development, including identification of public expenditure and where investments should be focused - not to be confused with detailed land use planning. This amounts to forward planning, conceptualised so as to promote a developmental vision, not simply the reactive form of development control of past systems.

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<sup>12</sup> Schedule 4 refers to “concurrent national and provincial” legislative competencies, while Schedule 5 refers to “exclusive provincial” legislative competencies. Parts A and B of each schedule differentiates between provincial and municipal functions, but those in Parts A that will most “effectively” be administered by Local Government must be assigned to this sphere (s.156(4)). Municipalities have executive powers over the functions listed in Parts B of each. Municipalities thus have “executive authority .. and .. the right to administer” municipal planning (s. 156 (1)). This authority allows municipalities to make by by-laws for the effective administration thereof (s. 156 (2)), but these must comply with national or provincial legislation (s. 156 (3)). S. 151(3) of the Constitution also constrains the discretionary powers of local government to govern, as their powers are “subject to national and provincial legislation”.

<sup>13</sup> Western Cape, Kwazulu-Natal and Limpopo

<sup>14</sup> Italics added

Land Use Management is linked, but is closer to the concept of what was formerly known as “development control”. However, the new approach is to both promote desirable development and not merely prohibit undesirable development in a reactive way. Land Use Management is rapidly being recognised as an essential function of municipal planning and an important component of Integrated Development Planning. The IDP must therefore contain a Land Use Management System (LUMS) which is a land use scheme recording rights and restrictions of properties. This is necessary to provide the certainty and the detail - and hence the ability to manage and enforce land use regulation - which is absent from broader scale IDPs and SDFs. This is the binding component of the IDP. The SDF is intended to provide an indicative plan, i.e. the *desired* patterns of development and land use, which will be binding on all spheres of government and the private sector.

In the rural context, land use management includes natural resource management (critically, commonage management), land rights and tenure arrangements, land capability, subdivision and consolidation of parcels and the protection of prime agricultural land. These contexts present new challenges for wall-to-wall municipalities.

On decision making with regard to land development the White Paper is clear and direct:

Municipalities will also be charged with the responsibility of taking decisions on land development applications made to them. Local government is the sphere of government at the coal face of development. This view is ... supported by the concept of developmental local government, in the White Paper on Local Government.

With regard to the rural former homeland areas, the White Paper comes out strongly in support of a uniform approach to land development management, including areas in former homelands previously not involved.

The new law on spatial planning, land use management and land development will empower municipalities to take all land development decisions, save those that have been referred to the land use tribunals.

On enforcement:

The new law will empower municipalities to enforce the provisions of their land use schemes.

The Land Use Management Bill establishes a national enabling framework to guide spatial planning, land use management and land development throughout the Republic, in terms of which all Municipalities are required to prepare a land use management system (LUMS) to regulate the use and development of land.

Every municipality must have a land use management system and that system must include at least a scheme recording the rights and restrictions applicable to erven within the municipal area. Every scheme shall consist of a map and set of regulations. The scheme is a key part of the municipality’s regulatory powers and must therefore be formalised as a bye-law...

This requirement was endorsed in the Municipal Systems Act.

Spatial planning, land use management and land development are, furthermore, inextricably linked to a range of functions of land administration. Co-ordination and integration of land administration optimally occurs at local government level. In spite of the crucial importance of land administration at decentralised levels of government, it is not listed in the Schedules; only the administration of specific municipal amenities is listed.

Notwithstanding the overarching policy and legal framework for SPLUM functions, there is continuing confusion around the purposes and role of, and responsibility for, planning and land use management in communal areas. Contributing to this confusion are (a) evolving legislation such as the CLARA, which creates a parallel system of land administration, raising questions about effective integration of SPLUM functions at local government level; (b) planning functions in post-1992 land reform legislation. New land and development laws

tend to combine provisions for “planning” with provisions for land allocation and tenure<sup>15</sup>. This is in sharp contrast to the formal system where these are kept legally distinct. (It is however, in keeping with much old-order legislation). The imperatives are partly political and partly financial – to allow for fast-tracking development and avoiding tedious, inappropriate or mal-fitting bureaucratic planning procedures as well as to ensure that land reform and/or housing subsidies include resources for professional planning. It means that the national sphere is actively involved in local-level planning contexts (in the sense of approvals, for example, state land disposal, restitution, rights enquiries). (c) LUMB brings in the requirement for wall-to-wall zoning through land use schemes. As discussed, it is not possible to zone communal land in this way. The institutional anomalies beg the question of how municipalities integrate communal areas within their Land Use Management Systems.

The Communal Land Rights Act does not resolve these fundamental questions. The CLARA proposes extending the cadastre to rural settlements via new legal entities supporting new order communal land rights or individual titles. However, it is not clear how the internal use rights – individual and family rights within these collective ownership structures – will be regulated, and how this regulation will link back to the regulatory frameworks of the municipalities. In other words, there may be a “plan” which may link to an IDP, but it is not clear how the plan will be managed after implementation, nor who would be responsible for enforcing the restrictions on land rights – or the regulation of land use – and on whom? The collective body or the individual rights holders?

There is a great need to analyse the implications of the devolution of planning functions to municipalities in so far as communal areas are concerned, and to ask what it would mean to design alternative forms of land management. Although some municipalities have attempted to include land management plans for communal areas in their IDP sectoral and spatial planning (e.g. Amatole District Municipality’s Land Reform and Settlement Plan), or LUMS (e.g. Kwazulu-Natal), these plans are unlikely to be effective if the larger institutional issues are not addressed. The effect will be to have plans on paper, but with ongoing neglect of land management, particularly use management, in communal and informal settlements. In fact, the new planning frameworks arising from the Municipal Systems Act have had markedly little impact in communal areas.

#### 4. CONCLUSION

It is contended that the implementation of a uniform or coherent land use management framework for the country will continue to be plagued by institutional uncertainties or anomalies as a result of the following:

- Inadequate provision for land administration functions within the national organisational framework of DLA. DLA has the competence to provide land administration services, but the key directorates dealing with land administration relate to the Deeds and Cadastral system of land management and do not adequately cater for the range of land administration needs in the country as a whole, in particular, off-register and collective systems of land rights. This includes land information management.
- Overlapping roles of the national and local spheres in relation to land administration. The national sphere, as “trustee” of communal land, proposes, in the CLARA, to provide Land Administration Committees with powers over land administration in communal areas; while at the same time the national sphere, with powers to regulate municipal functions, has decentralised key executive powers and functions regarding spatial planning and land use management to the provinces and particularly, Local Government.
- The apparent disappearance of rigorous engagement around land administration by government, NGOs and land practitioners. The earlier vision of a decentralised and integrating land administration system, capable of straddling a range of tenure forms and bridging the gulf between the “formal” and the “informal” land tenure systems has all but disappeared.
- The abandonment by the Department of Land Affairs of its earlier commitment to a policy of decentralisation, particularly but by no means only, in relation to land administration.

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<sup>15</sup> E.g. Less Formal Township Establishment Act, 113 of 1991 (LFTEA); Development Facilitation Act, 67 of 1995 (DFA); Provision of Land and Assistance Act, 126 of 1993; Restitution of Land Rights Act, 22 of 1994; Extension of Security of Tenure Act, 62 of 1997.

- The lack of alignment between policies and existing systems regulating spatial planning and land use management within the formal or “core” land tenure structure and those pertaining to informal, customary or off-register systems - existing and evolving. As long as land tenure remains highly centralised and spatial planning and land use management highly decentralised, with the informal systems straddling differentially between them, institutional mis-matches are likely to persist - in spite of the range of tenure options offered.
- The impact of historical and evolving land tenure legacies on the practical application of land use regulation in communal areas, e.g. who enforces what land use regulation on whom in a collective ownership situation?
- The lack of constitutional clarity regarding the *legislative* powers of the three spheres of government in relation to planning and development.
- Many ambiguities surrounding “planning” functions as set out in the Constitution. Planning and development functions are listed in different contexts in both Parts A and Parts B of the Schedules. Legal frameworks for planning differentiate between the “commercial” and “land reform” contexts.
- Ambiguities in the roles and responsibilities of the DLA and the DPLG with regard to Land Management regulation. DLA has national authority over land issues while the DPLG has authority over municipal issues. While the LUMB has been drafted by the DLA, the legislative basis for implementing the LUMB is the suite of municipal laws drafted by the DPLG, e.g. the Municipal Systems and the Municipal Structures Acts.

The extent of institutional bifurcation can also be seen in the lack of a common language and understanding between the land management support institutions, e.g. the private sector technical, planning and conveyancing professions and the CBO and NGO sector. In the past the private sector serviced the formal land sector, i.e., the system of registered land rights, underpinned by the cadastral infrastructure. CBOs, NGOs, TAs and homeland officials, on the other hand, have supported land management in contexts of informal land tenure systems. This is changing and increasingly the private sector plays a role in the latter, while CBOs and NGOs are drawn into processes of formalisation, for example, Communal Property Associations and other forms of tenure resulting from urban slum upgrading, land redistribution, land restitution and recognition of labour tenant and farmworker rights. The increasing integration of roles, coupled with the national effort to consolidate a land management framework for the country, creates the need to develop a common understanding among land practitioners, which turn calls for a common language - discourses that can be understood across the sectoral divides.

There continue, however, to be anomalies and misfits and it may not be possible to find a common language without a substantial process of debate, “learning by doing”, trial and error and re-incorporating the lessons into conceptual frameworks. Without such debate and learning, the assumption might hold that the merge of the informal into the formal systems is merely a matter of time and degree; or conversely and more seriously, that land can be left to the informal systems to manage on their own. These two assumptions are not opposing phenomena; rather they flow from one another. Informal systems are regarded as a deviation from the norm, and hence the tendency to treat such situations as “special cases” worthy of “special treatment”, such as waiving of land information standards and hence land management. In practice local consultation tends to be regarded as an adequate substitute for poor statutory links and lack of a common institutional framework for the whole country.

While consultation and participation are fundamentally important for democratisation of local institutions and “learning by doing”, it is not enough to develop plans based on consultation and participation if the plans cannot be implemented nor the rules enforced. There should be statutory provision, institutional alignment and decentralisation of powers from the centre through to local and community levels. The structuring of Traditional Councils in land administration in the CLARA does not fulfil the criteria for decentralisation of powers.

There is now a substantial body of experience and evidence that suggests there is a need for a qualitative shift in thinking and institutional adjustment. The formal institutions themselves may need considerable adaptation before the needs of the poor concerning land management may truly be taken into account in the design of the country’s core institutional frameworks.

## REFERENCES

- Barnes, GB (2002). Lessons Learnt. An Evaluation of Cadastral Initiatives in Latin America over the past two Decades. International Federation of Surveyors (FIG). FIG XXII International Congress, Washington DC, USA
- Barry M. & Fourie C. 2002. Analysing Cadastral Systems in Uncertain Situations: a Conceptual Framework based on Soft Systems Theory. *International Journal of Geographical Information Science* 16(1) 23-40.
- Dale PF & McLaughlin JD. 1988. Land Information Management. An Introduction with special reference to cadastral problems in Third World countries. Clarendon Press: Oxford.
- Fourie, C & van Gysen H. 1996. Land management and local level registries. Paper presented at 63rd Federation of International Surveyors PC Conference, Buenos Aires, Argentina, April 1996. *South African Journal of Surveying and Mapping*, 23, 6(142): 353:359.
- Human Sciences Research Council. 2004. "The Assignment of Schedule 4 and 5 of the Constitution and other Plenary Powers and Functions to the Local Government Sphere". Dept of Provincial and Local Government.
- Kingwill, R. 2004. Mbumba Development Services. Report on the Land Sector for the Human Sciences Research Council. 2004: "The Assignment of Schedule 4 and 5 of the Constitution and other Plenary Powers and Functions to the Local Government Sphere". Department of Provincial and Local Government.
- LEAP. 2003. Conceptual framework. [www.leap.org.za](http://www.leap.org.za)
- McIntosh Xaba and Associates. 2003. Land Issues Scoping Study: Communal Land Tenure Areas. Report prepared for the UK Department for International Development - South Africa.
- McIntosh, Xaba & Associates, 2003. Reports on an investigation into Land Administration Systems in the Eastern Cape Province. South Africa. Office of the Public Service Commission of South Africa, Project OPSC001/01.
- McIntosh, Xaba & Associates, 2002. Best Practices Newsletter October-December 2002. C.Fourie and B.Cousins on the theme: Examining the Communal Land Rights Bill and Learning Lessons from International Experience. Durban.
- Murray, Colin. 2001. Livelihoods research: some conceptual and methodological issues. *Background Paper 5. Chronic Poverty Research Centre*. University of Manchester
- Nebert DD (ed). January 2004. The Spatial Data Infrastructure Cookbook. v.2. Technical Working Group. *Global Spatial Data Infrastructure*
- South Africa. Department of Land Affairs. 1997. White Paper on South African Land Policy
- South Africa. Department of Land Affairs. 2001. Wise Land Use. White Paper on Spatial Planning and Land Use Management.
- South Africa. Department of Land Affairs. 2004. Legislation. Homepage on [www.gov.za](http://www.gov.za)
- Williamson I & Grant D. 2002. United Nations-FIG Bathurst Declaration on Land Administration for Sustainable Development. Development and Impact. International Federation of Surveyors (FIG). FIG XXII International Congress, Washington DC, USA.
- Williamson I. 2001. The Evolution of the Modern Cadastre. *GIM International: Cadastres in the 21<sup>st</sup> Century*.

## **Appendix 1**

### **LEAP on institutional coherence**

LEAP, as an action research project initiated to understand the functioning and malfunctioning of Communal Property Institutions (CPIs) in relation to the attainment of constitutional and land reform objectives, has generated a set of methodological tools for evaluating land tenure in communal areas more broadly. One of LEAP's key arguments (LEAP 2003:1) arising from this research is that

Law should establish a framework that enables the creation of a coherent state supported land administration system that accommodates individual and communal property systems and overlaps between the two, in order to secure the multiple range of property rights that individuals, families and groups hold.

Thus, while LEAP's work is grounded in practice and its insights are derived from experience on the ground, the project simultaneously seeks to identify institutional incongruities at all levels of decision-making and authority. This emerged as an important principle underlying tenure reform, on the grounds that tenure security requires legal, technical and institutional coherence to help overcome the inherited legal dualism in property regimes in the country. Among the multiple factors that influence tenure security, LEAP found that lack of "consistency between laws, relationships at different levels of decision-making and authority and the alignment of specific mechanisms and procedures" impact materially on the outcome of interventions at community level. Since "adaptive intervention" at the level of CPIs and the institutions that support them rather than the "replacement of tenure regimes" is considered to be the most sustainable strategy of intervention, the need for institutional coherence to bring about integration of existing regimes is considered to be vitally important. (LEAP 2003:2)

Appendix 2

Figures 7 & 8. Further configurations of Key Land Management Functions in formalising contexts

Figure 7. Linkages and disjuncture between Land Management Functions in the case of CPAs

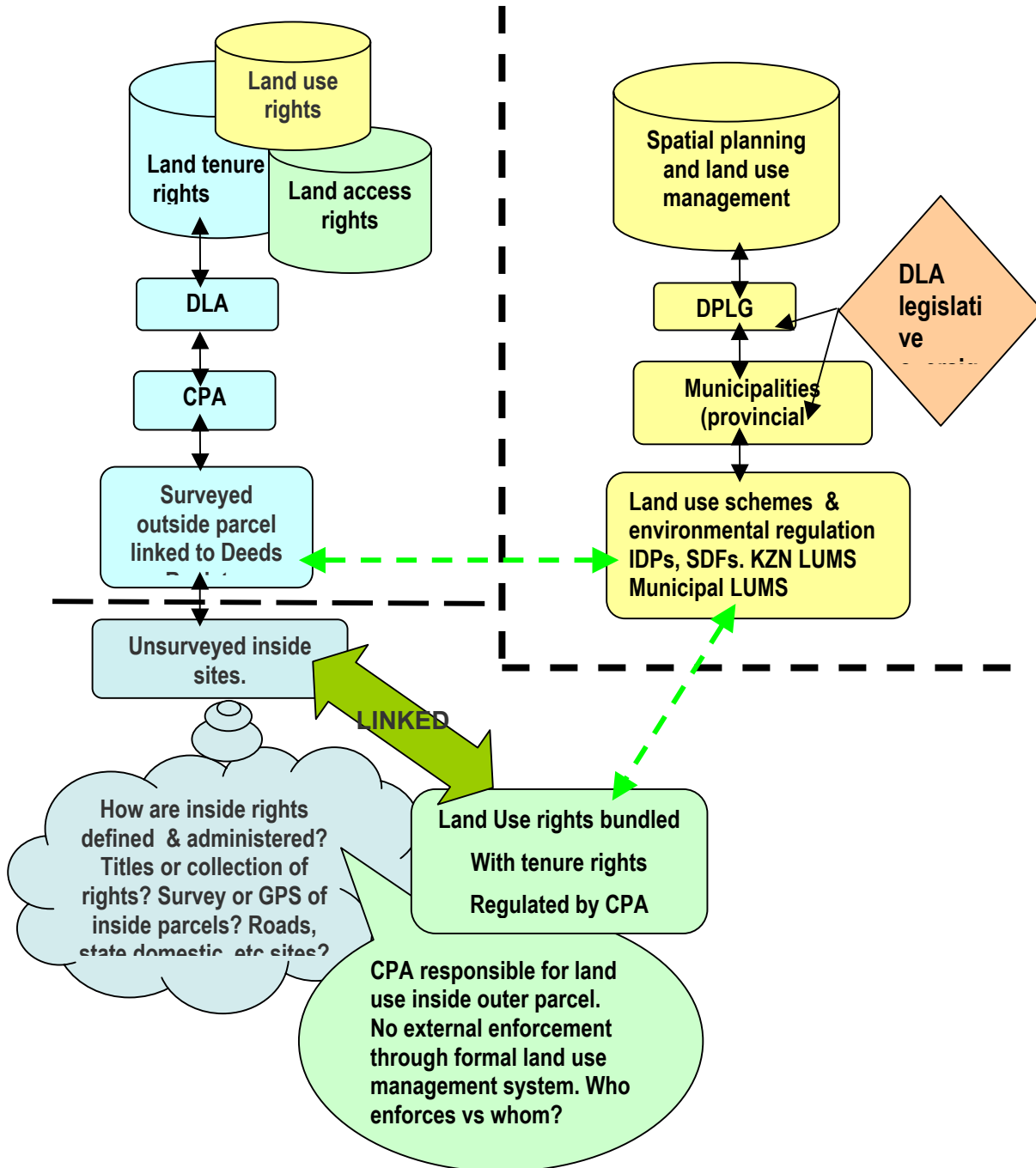


Figure 8. Establishing linkages between the formal and informal systems in Buffalo City, EC

