HDA
HOUSING DEVELOPMENT AGENCY
An Agency of the Department of Human Settlements



# Rethinking communal land administration: Unlocking human settlements development in communal land areas

2015-2016

# Unlocking human settlements development in communal land areas


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# Contents

# Abbreviations

| | |
|---|---|
| **COGTA** | Department for Cooperative Governance and Traditional Affairs (national or provincial) |
| **CLaRA** | Communal Land Rights Act No. 11 of 2004 |
| **CLB** | Communal Land Bill (under discussion, not available for public comment) |
| **CPA** | Communal Property Associations (Communal Property Associations Act No. 28 of 1996) |
| **DEA** | Department of Environmental Affairs |
| **DHS** | Department of Human Settlements (national or provincial) |
| **DMR** | Department of Mineral Resources |
| **DRDLR** | Department of Rural Development and Land Reform |
| **DWA** | Department of Water Affairs |
| **EC** | Eastern Cape |
| **FAO** | Food and Agriculture Organisation (United Nations) |
| **FLOSSOLA** | Solutions for Open Land Administration |
| **GLTN** | Global Land Tools Network |
| **GPS** | Global Positioning System |
| **GTAC** | Government Technical Advisory Centre (within National Treasury) |
| **HDA** | Housing Development Agency |
| **IPILRA** | Interim Protection of Informal Land Rights Act No. 31 of 1996 |
| **ITB** | Ingonyama Trust Board |
| **KZN** | KwaZulu-Natal |
| **LaPSIS** | Land and Property Spatial Information System |
| **MPRDA** | Mineral and Petroleum Resources Development Act No. 28 of 2002 |
| **MPT** | Municipal Planning Tribunal |
| **MTSF** | Medium Term Strategic Framework 2015–2019 |
| **NEMA** | National Environmental Management Act No. 107 of 1998 |
| **OUR** | Occupation and Use Rights |
| **PTO** | Permission to Occupy |
| **R188** | Bantu Areas Land Regulations, Proclamation No. R188 of 1969 |
| **SADC** | Southern African Development Community |
| **SDF** | Spatial Development Framework |
| **SPLUMA** | Spatial Planning and Land Use Management Act No. 16 of 2013 |
| **TAB** | Traditional Affairs Bill of 2013 |
| **TCB** | Traditional Courts Bill |
| **TKLB** | Traditional and Khoi-San Leadership Bill 2015 |
| **TLGFA** | Traditional Leadership and Governance Framework Act No. 41 of 2003 |
| **ULTRA** | Upgrading of Land Rights Act No. 112 of 1991 |
| **UN** | United Nations |

# 1. Introductory section

The following abstract informed four regional workshops on "Land Administration, Searching for Alternative Approaches" held in Ghana, Malawi, South Africa and Tanzania on 12–15 May 2008 that were convened by the Southern African Development Community (SADC) Land Reform Support Facility. It encapsulates the growing sense of urgency and frustration with the rural land administration problems, which are the legacy of the colonial period but continue well into the democratic era:

> While it took several centuries for Western countries to develop their current land administration systems, it took only a few decades to introduce them in Africa. However, the ability of Western forms of land administration to interpret the "African reality" has been very limited. These systems are often associated with costly and complex procedures, and based on a narrow conception of land rights, centered on individual land ownership. As a result, these remain inaccessible for most Africans, with an estimated 90 percent of the population without formally recognised land property rights.
>
> In Africa, the 'privilege' of having access to formal land rights is for the few and always the wealthiest. For the others, land rights have no legal existence, are not formally secured and, thus, remain contestable. In rural areas, land rights are generally informally defined and managed under customary forms of land administration. While customary systems have for a long time been efficient in making land available to those who needed it and providing land tenure security, they have been increasingly challenged by the evolution of societies and today, they are showing their limits. In urban areas, where the share of the population living in informal settlements keeps growing, land rights do not only lack formal recognition but they are contested in many cases.
>
> In this context, the need is evident for rethinking land administration systems in order to make them more accessible. However, while the limits of both the customary and statutory systems are today recognised, no evident alternative solutions have yet been found, and the need for innovation is often mentioned. Fortunately, notable progress has been made over the last decades.

## 1.1 Key points and underlying themes

This report summarises the substantial challenges that continue to plague efforts to reform South Africa's land administration system in order to ensure that all citizens have access to legally secure land tenure rights. The alternatives proposed are based on both practical experience and theoretical insights. However, to bring about the necessary institutional changes, will require at least two paradigm shifts in how officials and practitioners think about land administration and the political will to effect the changes:

- Firstly, tenures should not have to be part of the formal system in order to be recognised, as is the current practice. The social significance of existing land rights, and how these are held and transmitted, needs to be recognised, even if they are not yet legally recognised and registered. These existing rights, which are often written off as "informal tenures" are "social tenures" that exist without legal and

administrative backing. The conventional wisdom of upgrading all land tenure to full registered title, whether done incrementally on existing land or on greenfields developments, has failed to bring about effective reform for various reasons. Therefore, an alternative institutional framework is needed that can accommodate social tenures in their diversity and in their own right. Social tenures are defined and explained in more detail in Section 3.2.

- Secondly, land administration should not be the concern of the Department of Rural Development and Land Reform (DRDLR) alone. Although land affairs is a national function under the jurisdiction of the DRDLR, land administration, which involves multiple sectors at the local level, is not solely the responsibility of DRDLR. Land and land-related functions cut across all spheres and most functions of government. Several departments are involved in land-use planning, land development, environmental concerns and revenue/taxation on and from land.

"Social tenures" can apply to both rural and urban areas. This report covers rural areas which are referred to as "communal land areas" in the document. The required legal and institutional backing for such social tenures can be provided within the current legislative framework, through the drafting of regulations in terms of existing Acts, accompanied by effective delegations and institutional arrangements. The report suggests that the current void in public land administration that is plaguing these areas can be addressed in the short term.

Although urban concerns are not specifically covered in this report, the same logic should be applied to peri-urban areas on the edges of communal land and to urban areas. Administrative recognition of "informal tenure" other than through registered title can resolve the problems associated with widespread, ongoing insecurity, "illegality" labels, informal transactions and the backlog in the issuing of registered titles.

The absence of formal, public land administration in rural and former African homeland areas (the "bantustans" of the apartheid era) is indicative of a wider crisis of rural governance and the relative incapacity of the municipalities. Establishing effective land administration is central to addressing these challenges of municipal and rural governance. The contestation between elected municipal governance and traditional leadership is partly a consequence of the institutional weaknesses referred to above. The solution lies within the present constitutional architecture that allows for effective public land administration to be nationally constituted but locally administered, and for the extension of other related legislation to the affected areas. Two good examples of such overarching legislation are the Spatial Planning and Land Use Management Act (No. 16 of 2013), or SPLUMA, and the Municipal Property Rates Act (No. 6 of 2004).

Since 1994, democracy promises full citizenship for all South Africans. Central to the notion of citizenship is a sense of place that is recognised and has formalised rights. The provision of government-subsidised housing has begun to address the need for shelter and housing. However, where housing programmes have been implemented in areas without a public land administration system in place, rights to the land cannot be recorded. Indeed, it may even be unlawful, and financially and ethically irresponsible for the state to continue building and subsidising housing programmes on land where no coherent public land administration system is in place.

Individuals are required to have a fixed place of residence for many documents issued by state departments and many private companies (including cell phone companies and retail stores).[1] Yet the failure of other state departments to provide a formal national land administration system discriminates against the residents of former bantustan rural areas, as they must seek letters from headmen and chiefs to confirm their place of residence. This reinforces the rule of unelected office bearers and confirms these residents as subjects of said office bearers rather than full and free citizens in a democratic state.[2]

## 1.2 Background and introduction to research

The Housing Development Agency (HDA) is developing a Coherent and Inclusive Approach to Land Policy Framework for Human Settlements, as called for in Outcome 8 of the Medium Term Expenditure Framework 2014–2019. This research report provides background information to help inform the policy's development. Therefore, the report's purpose is:

- To convey basic factual information about land administration in communal areas in order to introduce the HDA and the national Department of Human Settlements (DHS) to the current situation.
- To provide a situational analysis to help explain how South Africa has reached the current land administration situation.
- To propose a suggested way forward, including clear recommendations for action.

The title of this report changed from "Rural Land and Communal Land" to "Communal Land" because it specifically addresses communal land issues and does not consider private commercial farming land or land tenure issues related to farm dwellers.

The research methodology for this study included research on land legislation and policy frameworks; a comprehensive literature review to inform both the understanding of the problem and the conceptual development of the analysis and recommendations; and oral or electronic interviews with HDA officials, state officials, practitioners from non-governmental organisations and advocacy institutions.

The research process involved consulting with the HDA on both the preliminary and the revised draft reports that were submitted prior to the submission of the final report; and ongoing sharing, discussion and debate of the report's contents by the authors.

The outline of the report is as follows:

- Past and present: a history of land administration in communal areas and a summary of past and present legislation relating to communal land.
- Challenges and opportunities: the various challenges and opportunities associated with land administration and land development in communal areas.
- Options for addressing challenges: the various options proposed for addressing the challenges.



[1] The latest such requirement was reported on 2 November 2015: "The Department of Transport has confirmed that vehicle owners will not be able to renew their car licences or drivers' licences if they are unable to furnish proof of residence." http://www.bdlive.co.za/

[2] For an insightful discussion of the citizenship expectations of people who maintain a rural place in a former bantustan, see Bank, L. 2015. City slums, rural homesteads: migrant culture, displaced urbanism and the citizenship of the serviced house, Journal of Southern African Studies.

- Recommendations: ways to reinstate land administration in communal areas.

Separate annexures have also been prepared where much more information can be found on the following topics:

**Annexure 1:** Terminology and definitions

**Annexure 2:** Legacies, current legislation and policies

**Annexure 3:** Issues of jurisdiction on state trust land in the Eastern Cape Province

**Annexure 4:** Perspectives on land rights and inheritance

**Annexure 5:** Locally administered land records system

**Annexure 6**: International and local experience with land administration

**Annexure 7:** Interim Procedures Governing Land Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of the Land, as amended

**Annexure 8:** Eastern Cape Planning Commission Diagnostic Study on Land Administration (extracts)

Annexure 9: List of interviewees

**Annexure 10:** Reading list [3]

## 1.3 Concepts

In order to understand many of the issues and recommendations outlined in this report, a shared understanding is needed of the terms used.

### 1.3.1 Communal land versus state trust land

The term "communal land" is used because the South African public is familiar with this label. However, the term glosses over the reality of diverse and mixed land tenure regimes on land owned by the state as trustee. A more accurate label of the formal status of such land is "state trust land", which also differentiates this trusteeship from land held under private trusts.

Therefore, "communal land" refers to land that the state owns and holds in trust for the residents, many of whom have been settled on that land for many generations. Communal land is thus not communal in the sense that the land is owned or occupied in common. Households living on this land have, through their customary land tenure practices, strong rights to occupy and use much of this land on an individual family basis. These rights are equivalent to individual rights.

Families hold rights to these residential and arable land parcels under the management of representatives of the family (the "custodians", "keepers" acting on behalf of the household or extended family). Families may access grazing lands in common, but such access is usually determined by local conventions

[3] These annexures can be found at www.thehda.co.za/information/research

established over years, if not generations. Similarly, local conventions usually determine the rights of families to harvest and use common resources for building, fuel, medicinal, spiritual and other purposes.

Access to land and rights to the use of land and its products are a result of (i) membership of a community, (ii) as a member of a family or extended family (household), and (iii) one's position within that household and contribution to the well-being of that family.

There is some community oversight of land access and control of the land, which makes the rights described in this report different from individual title rights recognised by the Deeds Registry. Holders of individual rights have mathematically calculated, subtractable shares in property, whereas communal property rights are flexible and overlapping, and cannot be calculated on a one-to-one basis between the land and the rights-holder. However, some of the collective controls and sanctions over land use can be compared to conventional land use controls, such as zoning and land use schemes, as well as (to some extent) to collective control over rights to land within townhouse and sectional title arrangements.

The blanket misnomer "communal land" also implies that all land holdings in former bantustans operate under a uniform land tenure and land administration regime. While social attitudes and practices with regard to land have much in common across South Africa (and indeed Southern Africa), the local situation will depend on the historical determinants. For example, when the land was first reserved for black occupation; whether it was mission land or crown land; whether it was acquired by conquest or some other manner; whether it was initially acquired in full registered ownership, or held under quitrent title,[4] or held in trust by a mission or government official, or recognised by means of individual certificates of occupation (PTOs), and so on. Ownership and occupation patterns were also fundamentally affected by the different rights of tenants or "squatters" on African-owned land or on commonages, and by the different processes of transmitting land inter-generationally. These differentials indicate the complexity of settlement and tenure patterns across the country.

### 1.3.2 Tiers of governance structures

Communal areas invariably bear some relationship to traditional governance, although these relationships vary according to the histories outlined above, and in some cases, traditional authority boundaries clash with other administrative boundaries.

Table 1 summarises the various scales (or tiers) and organisational structures of traditional and administrative authorities. Not all people who live in these areas identify or affiliate with the traditional structures, other than as administrative bodies. Many rural people reject the notion that they should automatically fall under these legacies of apartheid planning that fix people administratively to ethnically defined boundaries and structures. Therefore, a widespread call is for an "opt-in" rather than a compulsory system of traditional governance.



[4] See page 22.

## **Table 1:** Tiers of governance structures

| Scale | Structure | Comments |
|---|---|---|
| Province: *iphondo* – isiXhosa; isifundazwe – isiZulu | House of traditional leaders | |
| Kingdom: *isizwe* – isiXhosa and isiZulu, but contentious because it also translates as "nation" | King: *ikumkani* – *isiXhosa*; *isilo* – isiZulu, assisted by councillors; *amaphakathi* – isiXhosa | Three kingdoms in Eastern Cape (EC); all in the Transkei; one in KwaZulu-Natal (KZN); none in Limpopo |
| Regional Authority/Council: combined a number of Tribal Authorities/Territorial Councils of the same tribe; coincided with magisterial districts in KZN | Regional Authority/Council | Eight in EC; all in the Transkei; 23 in KZN; 12 in former Lebowa; six in former Gazankulu; and five in former Venda |
| Traditional Authority/Council: generally, always Territorial Council – Venda | Chief: *inkosi* – isiXhosa and *isiZulu*; *magoshi* – sePedi; *tihosi* – Xitsonga; *mahosi* – Tshivenda Traditional council: inqila – isiXhosa; *isigungu* – isiZulu | 286 in EC; 281 in KZN, 140 in former Lebowa; 39 in former Gazankulu; and 28 in former Venda. Four or five traditional council areas per local municipality in KZN. The boundaries of these areas were surveyed for the Communal Land Rights Act (CLaRA), if not before, creating or reviving many boundary disputes |
| Administrative area. This level only exits in the EC | Headman: historically and generally known as *isibonda*, but now as *inkosana* | These areas were surveyed in the EC for CLaRA. Administrative areas are about the size of a few municipal wards, but boundaries do not coincide |
| Traditional ward: village, *ilali* –isiXhosa; *igodi* – isiZulu | Sub headman: *ibhodi* or *unozithetyana* in EC, headman: *induna*, now *inkosana*, assisted by *ibandla* in KZN; *mantona*, *borakgoro* – siPedi; *tindhuna*, *xamuganga* – Xitsonga; *vhamusanda* – Tshivenda | A village or traditional ward contains a number of homesteads, as many as 100 or more. |
| Homestead: *umzi* – isiXhosa; *umuzi* – isiZulu | Family guardian | |

In 1994, after the reintegration of the bantustans into a united South Africa, the country had a total of 387 magisterial districts. These magisterial districts were the administrative units for most (but not all) state functions and departments.[5] In 1999–2000, the Municipal Demarcation Board rationalised the number of local municipalities down to 234. Table 2 compares magisterial districts and municipalities for three provinces.

## **Table 2:** Magisterial districts compared to municipalities

| Province | Magisterial districts | Total no. of municipalities |
|---|---|---|
| Eastern Cape | 78 | 39 |
| KwaZulu-Natal | 52 | 51 |
| Limpopo | 34 | 25 |

[5] For example, the deeds registries work according to older "Registration Divisions", which probably originally corresponded to earlier magisterial boundaries.

Land administration under the Permission to Occupy (PTO) system in the bantustans was centred on the administrative centres or the magistracies; in other words at a lower level than the current local municipalities. There are more magisterial districts than municipalities, despite the stated intention of the Minister of Justice and Constitutional Development to rationalise the magisterial districts so that they correspond with local municipal boundaries.[6] Any future land administration systems should preferably locate their local institutions, offices and staff in these same centres, so that users of the system can easily access them.

### 1.3.3 The concept of land administration

Land administration covers a range of cross-cutting issues. Decisions in one area of land administration usually affect the other areas, which is why it is important to design a coherent system that considers the following:

- **Land tenure:** How is land held and with what rights? Who can be on the land and on what terms?
- **Land tenure and transmission:** How are land rights transferred? How does land devolve from one generation to the next, and/or how is land transferred from one land occupation and use rights-holder to another?
- **Land tenure and custodianship:** Which state/civil institutions are the custodians of land records and registers, and how do they define the rights that they safeguard?
- **Land tenure and adjudication:** How are existing claims to land rights verified and checked? Who decides which rights to accept? Adjudication in this context refers to the processes by which existing rights to a particular parcel/piece of land are authoritatively determined, i.e., it does not mean creating new rights. In a conventional cadastral system, it refers to the painstaking checks performed by registered land surveyors and legal conveyancers to determine the precise spatial and textual characteristics of ownership to prevent overlaying boundaries and rights. A new set of adjudication principles are required for social tenures in communal land areas where rights may overlap and boundaries may be fluid.
- **Land planning:** What activities are envisaged to take place on the land in future? Who decides on these activities?
- **Land use management:** How is land use changed? What activities can be undertaken on the land? Who decides this?
- **Land taxes and fees:** How are land taxes and fees determined and collected in relation to land and services from occupants and users? What are land taxes and fees used for?
- **Enforcement:** How are above functions enforced and by whom?



[6] Minister to Chairperson of the Board of Sheriffs of South Africa, 2014/01/14.

## 1.3.4 Registered and recorded land rights

With specific reference to the state custodianship mentioned above, both "registered" and "recorded" land rights should be recognised and protected within South Africa's institutional and legal framework:

- "Registered" land rights refer to the rights to land that are recorded and registered in the deeds registries and offices of the Surveyor Generals, according to the national cadastre and the existing national property legislation.
- "Recorded" land rights refer to rights proposed in this report. These rights must be recorded in a locally administered land administration system, which is not yet covered in national legislation. This systematic recording of these rights would be referred to as a "land records system" to distinguish it from the land registration system. Such locally recorded and administered rights have been used historically, with the most pervasive example being PTO certificates.

The "recorded" land rights approach should be recognised in national law, and the two systems synchronised so that they become part of a broader, flexible land administration system.

Land tenure rights should not all be systematically "upgraded" to registered rights. This does not mean outlawing the voluntary sporadic upgrading on demand by individuals or institutions, especially public institutions. It refers to social tenures that do not fit in with the paradigm of individual registered rights, such as freehold, and for which freehold tenure is regarded as inappropriate. This approach is a paradigm shift that allows for the recognition of local and socially accepted understandings of land and land tenure, and creates a single cohesive and inclusive public platform for the administration of these rights. Table 3 compares the existing land registration system against the proposed land records system.

**Table 3:** Comparison of land registration and land records systems

| Aspect | Land registration system | Land records system |
|---|---|---|
| Enabling legislation | Land Survey Act (No. 8 of 1997) | Amendments |
| Deeds Registries Act (No. 47 of 1937) | Amendments of and regulations to the Interim Protection of Informal Land Rights Act (No. 31 of 1996) or IPILRA | DRDLR |
| Responsibility for enabling legislation | DRDLR | DRDLR |
| Responsibility for administering the system | National DRDLR through the national Deeds Registry and Surveyor General systems with offices in provinces | Short term: DRDLR/Department of Cooperative Governance and Traditional Affairs (COGTA) |
| Long term: municipalities | Registered land surveyors | Local |
| Spatial location and/or boundaries | Surveyed erven, detailing boundaries | Some geo-spatial referencing, such as a point or points, areas, outlines or natural boundaries |

| Aspect | Land registration system | Land record system |
|---|---|---|
| Responsibility for establishing and maintaining spatial location and/or boundaries | Registered land surveyors using technologically advanced measuring tools for centimetre accuracy | Local land |
| Town and regional planners, engineers | Erven kept by | Plots, points |
| Other specialists may be called upon for specific boundary problems | Local officials using digital geospatial public tools, such as GPS and Google Earth | List of names recorded in |
| Social units of people around which the system is based | Individuals, nuclear families and corporate bodies | Extended families, individuals, or organised or identifiable groups of individuals |
| Adjudication of rights to authorise ownership and transfers | Registered land surveyors and conveyancers | Local land records officers. This requires new guidelines, preferably legislation, for adjudication of social tenures |
| Custodianship of spatial records | Erven kept by provincial Surveyor General's office | Plots, points or areas kept at local municipal level |
| Custodianship of the identities of land rights-holders | List of names recorded in deeds registries kept at the Deeds Office, as part of a national database | List of names recorded in a land records system kept at the level of the local municipality, as part of a national database |
| Evidence of registration or record | Title deeds stored in the deeds office; copies to owners | Occupation and Use Rights (OUR) certificate stored in a local system; copies to rights-holders |
| Procedures for dealing with disputes over social and spatial boundaries and associated rights | Professional conveyancers, The Courts | **Local structures as appropriate; then escalated to COGTA/DRDLR. Investigate establishing an Office of a Land Ombudsman. Approach courts as a last resort"** |

## 1.4 The context

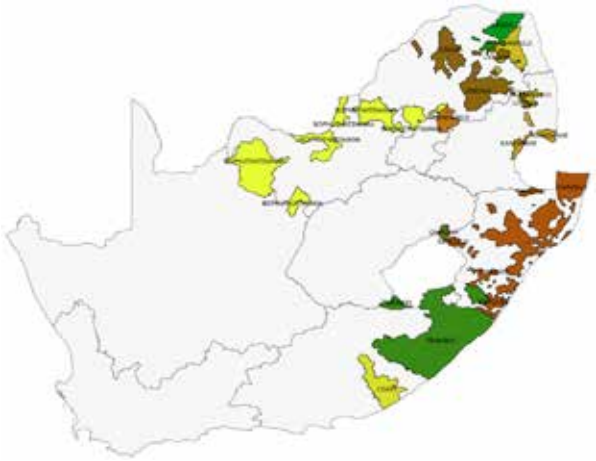
Up to 17 million South Africans (Table 4), about a third of the total population of 50.7 million people (as at 2016), regard home as a place in a rural part of a former bantustan (see Map 1) where the public administration of land tenure rights has been allowed to collapse since 1994. The poorest district municipalities in South Africa are those that include communal areas – the 10% of local municipalities with the highest levels of poverty are all situated in the Eastern Cape, KwaZulu-Natal or Limpopo Province, and all are in former bantustan areas. In the Eastern Cape, they are all situated in the former Transkei bantustan.

**Table 4:** South Africans occupying land/dwellings outside the formal property system (2011)

| Location | Number of people | % of SA population |
|---|---|---|
| Communal areas | 17 million | 32.8% |
| Farm workers and dwellers | 2 million | 3.9% |
| Informal settlements | 3.3 million | 6.3% |
| Backyard shacks | 1.9 million | 3.8% |
| Inner city buildings | 200 000 | 0.38% |
| RDP houses – no titles | 5 million | 9.6% |
| RDP houses – titles inaccurate/ outdated | 1.5 million | 3.0% |
| **Total** | **30.72 million** | **59.7%** |

*Source: Prof. Ben Cousins, presentation to REDI workshop on spatial inequality, UCT, 18 August 2015*

**Map 1:** Areas referred to as bantustans prior to 1994



*Source: www.customcontested.co.za*

# 2. The past, present and future

## 2.1 The past: previous policy and legislation

The following summary provides a highly truncated view of the historical development of communal land administration in South Africa. One of the many legacies of colonialism, segregation and apartheid is the stark patterns of inequality that have not been broken under a democratic Constitution. These legacies link directly back to core processes and institutions of the past, such as the reserved areas under colonialism that became "the bantustans" under apartheid.

Prior to 1994, the main legislation that dealt with land administration in communal areas was the Bantu Areas Land Regulations, Proclamation No. R188 of 1969 (R188), which confirmed earlier practices that had emerged in the wake of colonial rule. Among other things, the R188 provided for the administration of PTO certificates. Although a variety of homeland legislation guided the PTO system, all of these land administration systems were variants of Proclamation R188 legislation. They were generally founded on the notion of land being held in trust for black people, with the Trustee initially being the State President and later the homeland governments themselves. [7]

The general framework established an administrative basis for weaker land rights for rural, black South Africans in the bantustans. The enabling legislation for this proclamation has been repealed, and so Proclamation R188 cannot be amended (nor should it be). However, its removal has created a large legal gap that needs to be filled by legislation based on democratic land tenure and land administration principles, which will meet the real needs of the long-term inhabitants of rural areas in the former bantustans.

The older laws that preceded proclamation R188, and upon which it was built, carried administrative norms and rights that had evolved over more than a century. Many of the associated practices have become deeply ingrained. Today, many rural people still hark back to some of the practices enshrined in Proclamation R188, especially in places where the formal, public administration of the land tenure and rights system has completely broken down, which is an unfortunate reality in most former bantustans. Many of these practices have formed the basis of local decision-making and processes for up to 100 years. For example, in the former Ciskei and Transkei, the local systems developed alongside the Administrative Areas, which were sub-units of the magisterial districts. Local decision-making, involving magistrates/native commissioners, headmen and other officials of the Native Affairs Department, took root at this level as a viable form of localised land administration and rural governance.

## 2.2 The present: existing policy and legislation

When considering reforms of communal land administration, all role-players and stakeholders need to take into account the following policies and legislation.



[7] A McIntosh, D Atkinson, R Kingwill of McIntosh Xaba & Associates and Jan Barnard, Land Administration in the Ex-Homelands: Past, Recent and Current Situation, DLA Project Reference: 98/RSA/TRCG/007, page 7/114 of digital version in MSWord.

### 2.2.1 The Constitution

Section 25(6):

> a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

Section 25(9): Parliament must enact the legislation referred to in subsection (6).

### 2.2.2 The Medium Term Strategic Framework (2014–2019)

Outcome 7 of the Medium Term Strategic Framework (MTSF) deals with comprehensive rural development and land reform, and identifies the need to "[f]ast track the development of tenure security policies and legislation in communal areas to address tenure insecurity".

### 2.2.3 Interim Protection of Informal Land Rights Act (No. 31 of 1996)

The Interim Protection of Informal Land Rights Act (IPILRA) was intended to be an interim legislation until Parliament could enact comprehensive land tenure legislation and is extended annually by government proclamation. The Act continues to provide legal protection for a variety of users and occupants on state trust land (i.e. in the "communal areas"), which falls mainly within the former bantustan areas. It provides protection to people who use, occupy or access this land in terms of:

- customary laws and practices;
- beneficial occupation; or
- land vested in the South African Development Trust, or so-called self-governing bantustan government, or any other kind of trust established by statute.

The Act defines beneficial occupation as "the occupation of land by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner", and an informal right as "the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office".

In effect, the Act grants holders of these rights very strong legal protection in theory (but not always observed in practice). The rights can only be expunged by formal processes of expropriation, as stated in Section 2 (1):
[s]ubject to ... the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

### 2.2.4 Spatial Planning and Land Use Management Act (No. 16 of 2013)

The Spatial Planning and Land Use Management Act (SPLUMA) is new legislation that governs spatial planning, which is mainly associated with the development of Spatial Development Frameworks (SDFs), land use schemes and land use management. The objectives of this Act are to:

(a) provide for a uniform, effective and comprehensive system of spatial planning and land use management for the Republic;

(b) ensure that the system of spatial planning and land use management promotes social and economic inclusion; […]

(c) redress the imbalances of the past and to ensure that there is equity in the application of spatial development planning and land use management systems.

In direct contrast with the objectives of the Act, land is defined as "any erf, agricultural holding or farm portion, and includes any improvements or building on the land and any real right in land". This definition may exclude all communal land.

SPLUMA defines the scope of South Africa's land planning system. It aims to address fragmented, unsustainable spatial development patterns, create a single, integrated legal system dealing with land planning and specify the role of each sphere of government in this planning.

Before SPLUMA, most municipal planning decisions were taken under provincial planning law. With SPLUMA, most municipal planning will take place in terms of municipal by-laws. National and provincial government must assist municipalities to develop their by-laws (e.g. through model laws), while provinces may pass additional planning laws to further regulate municipal and provincial land planning. Each municipality will have a single and inclusive land use scheme, and establish a municipal planning tribunal and appeal structures to determine, decide on or adjudicate land development applications. All three spheres of government must prepare SDFs based on norms and standards guided by development principles. These must be synchronised, since no sphere of government may trump another with regard to municipal planning.

Since 1 July 2015, SPLUMA is applicable in communal areas, but regulations and by-laws still need to be developed. SPLUMA makes it possible to introduce land use schemes incrementally into these areas, and also to make use of alternative approved procedures when changing land use in communal areas – at the moment communal areas have no clear land use categories or purposes. According to SPLUMA, traditional leaders have to be involved in land use decisions, but the municipality (through the municipal planning tribunal) makes the final decision. Exactly how traditional leaders are to be involved in land use decisions is left to other legislation and provinces and municipalities to determine.

The regulations and the by-laws relating to SPLUMA are likely to go through a number of iterations before they are fine-tuned to fit the communal tenure context. This is likely to take years. SPLUMA faces the challenges of being inappropriate to the communal context and of requiring much adjustment to align with environmental, mining, forestry and other relevant legislation.

### 2.2.5 National Environmental Management Act (No. 107 of 1998)

The objective of the National Environmental Management Act (NEMA) is to provide for cooperative environmental governance by establishing principles, institutions and procedures for coordinating environmental functions exercised by organs of state. It also covers the administration and enforcement of other environmental management laws. If a project is of such a scale and type that it triggers a need for environmental authorisations, then applicants must get approval from the Department of Environmental Affairs (DEA) for the development. In such cases, it does not matter where in South Africa such projects are located.

### 2.2.6 Traditional Leadership and Governance Framework Act (No. 41 of 2003)

Section 211 of Chapter 12 of the Constitution provides explicitly for the recognition of traditional leadership but, as with all branches of the law, recognises that customary law must be subject to repeal and amendment. Section 212, the only other section in this (the shortest) chapter in the Constitution, states that national legislation may provide for the role of traditional leaders at local level and the elaboration of customary law and institutions.

In effect, the Traditional Leadership and Governance Framework Act (TLGFA) recreates the Tribal Authorities of the apartheid era as Traditional Councils, with the added requirement that at least 30% of the members of any traditional council must be women. The TLGFA recognises headmen and headwomen as traditional leaders. Previously, they were regarded as paid or unpaid servants of the state.

It is argued that provisions of the Act, which enable administrative actions by traditional leaders, may be contrary to the Constitution that provides for only three spheres of government: national, provincial and municipal. However, this Act may be repealed by the Traditional and Khoi-San Leadership Bill – see below.

## 2.3 The future: draft policy and legislation

### 2.3.1 Draft Communal Land Tenure Policy

In the late 1990s, a Land Rights Bill was developed but never enacted because of a change of ministry and new policy. Part of the justification for dropping the bill was that it would have been too expensive to implement. The Communal Land Rights Act (No. 11 of 2004), or CLaRA, was enacted but subsequently struck down by a judgement of the Constitutional Court in 2010. Although struck down on procedural grounds, the case was the result of serious contestation by various lobby groups over the principles contained in the Act, including the transfer of registered ownership of communal land to Traditional Councils.
The draft Communal Land Tenure Policy of 2013, also popularly known as the "Wagon Wheel", is the latest official attempt to address the gap in policy in communal areas. It also seeks to transfer the land within the outer boundaries of tribal land in the former bantustans to Traditional Councils. DRDLR is in

the process of drafting a new Communal Land Bill (CLB), which is not yet in the public domain.

Sectors of civil society are vociferous in their condemnation of the policy and the anticipated bill on the grounds that both will compel people to derive their land rights from authorities that are fixed to the old bantustan boundaries, making them subjects of territorialised, re-tribalised boundaries that constrain their rights as citizens of the country. Therefore, this new legislation is likely to be challenged all the way up to the Constitutional Court, based at least in part on the argument that the CLB elevates the institution and structures of Traditional Councils to a fourth sphere of government, contrary to the Constitution which provides for only three spheres of government. This was one of the most substantive arguments raised against CLaRA. If such a Constitutional Court challenge does occur, it is probable that another ten years may pass without any effective new national land tenure legislation. This will result in an ever-increasing administrative and governance vacuum.

### 2.3.2 Draft Traditional Affairs Bill[8] and Traditional and Khoi-San Leadership Bill

The draft Traditional Affairs Bill (TAB) was gazetted by the Minister of Cooperative Governance and Traditional Affairs on 20 September 2013. It has been replaced by the almost identical Traditional and Khoi-San Leadership Bill (TKLB) which was introduced on 23 October 2015 to the parliamentary standing committee as a Section 76 bill. The TKLB is criticised for providing traditional leaders with powers and autonomy that are far greater than those under the TLGFA. Section 24 of the bill provides for traditional leaders to enter into partnerships and agreements with various state and non-state institutions without having to consult with land rights-holders or communities, which is likely to be out of line with IPILRA.

Although South Africa already has laws on traditional leadership, COGTA has said that this new law is needed in order to combine the various traditional leadership laws into a single law, to solve problems that exist in the current laws, and to provide recognition to Khoi-San communities, leaders and councils, a recognition that has been absent until now.

### 2.3.3 Draft Traditional Courts Bill[9]

The stated aim of the draft Traditional Courts Bill (TCB) is to advance South Africans' access to justice, by recognising the traditional justice system in a way that upholds the values in customary law and the Constitution. It was developed to replace the segregation-era provisions of Sections 12 and 20 of the Black Administration Act (No. 38 of 1927) that empowered chiefs and headmen to determine civil disputes and try certain offences in traditional courts.

When first introduced in Parliament in 2008, the TCB met with much opposition, which continued after its reintroduction in late 2011. The legislation was criticised for giving traditional leaders too much power, as it allows a chief to punish someone in a number of ways, including with compulsory or forced labour.[10] It also did not provide for any accountability or oversight body to review court decisions, and community members could not opt out of the jurisdiction of a traditional court. The bill was withdrawn in 2014 but is likely to be reintroduced in 2015, according to the Minister of Justice. [11]



[8] Centre for Legal Studies, Rural Women's Action Research Programme, Notes on the 2013 Draft Traditional Affairs Bill, February 2015.
[9] http://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/

### 2.3.4 Opposition to the TAB, TKLB and TCB

There has been ongoing mobilisation against the TAB and TCB, and the linkages between these two, and the anticipated CLB. The TKLB has also already attracted significant opposition. Together, these bills are seen as attempts to shore up undemocratic and archaic forms of governance, which have very uneven levels of legitimacy across South Africa. Agreement with this analysis aside, the ruling party's attempt to enact such legislation introduces a huge amount of governance instability (and thus unpredictability) in rural, former bantustan areas. While the outcome of the legislative process and possible legal challenges (if the legislation is enacted) cannot be anticipated, such uncertainty may be counterbalanced by administrative steps, such as developing a more "neutral" land administration framework that is removed from these contests and yet satisfies the demands of the existing social tenures.

[10] https://www.enca.com/south-africa/traditional-courts-bill-kicked-out-parliament
[11] http://www.bdlive.co.za/national/law/2015/03/24/masutha-to-return-traditional-courts-bill-to-parliament

# 3. Challenges and opportunities

## 3.1 Challenges

Establishing administrative stability in the current "quicksand" of land administration in communal areas is bound to face significant (yet surmountable) administrative, conceptual and locational challenges. Section 5 outlines recommendations on how to deal with each of these challenges.

### 3.1.1 Administrative challenges

#### Cross-cutting land mandates

Land crosses all spheres and many functional areas of governance, and directly affects the delivery of human settlements and municipal government. Many different government departments deal with land in one way or another, as users of land administration system. They include the DRDLR, DHS, COGTA, DEA, Department of Mineral Resources (DMR), Department of Water Affairs (DWA), as well as the Department of Agriculture, Forestry and Fisheries, Department of Public Service and Administration and National Treasury. As a result, it is often unclear which sphere or department is responsible for which aspect(s) of land. For example, land use management is an exclusive municipal competency, whereas land reform is an exclusive national function. Agriculture, environmental and forestry legislation are often not seen as a form of land use management legislation, whereas, in essence, they are.

Land administration includes land tenure (which includes adjudication, transfer and succession issues), spatial planning, land use management, land taxation and enforcement. These functions of land administration are each managed by different role-players and are not well coordinated (if at all) in communal areas.

#### Administrative void and dearth of required skills

No single government department is taking leadership in fixing land administration in communal areas. No legislation regulates how to keep records of who is on the land and what they can do on this land. Historically, magistrates' offices were responsible for issuing and administering PTO Certificates, assisted by officials from the local agriculture department. However, since 1996, these officials have been withdrawn from these functions, as the PTO legislation has not been assigned or delegated to departments or officials. This loss of institutional memory and capacity was accompanied by ideological contestation around the appropriateness of PTO rights, with high expectations that new-era rights would remove the need for administering PTOs. The result of the legal vacuum was that departments stopped issuing PTOs at different points in time in different places, leading to an administrative void that municipalities and local communities have had to grapple with. Many of the steps taken to fill this void are unlawful, such as municipalities issuing what are called PTOs.

Staff within government who have performed these functions in the past have been scattered and absorbed into various departments or have retired. The loss of experienced public servants who may have passed on their expertise to a new generation of land administrators is one of the considerable costs of re-establishing rural land administration capacity. This loss, however, should not impede starting afresh and training a new generation of local land officers who may be free of the baggage of the past

arrangements, some of which still stir up older resentments about "inferior" rights.

As should be clear from the above review of legislation, the government justifies these legal gaps on the ground that the DRDLR is in the process of developing new communal land tenure legislation. But the delays in successfully introducing new legislation because of ongoing contestation, raises serious doubts whether this legislative route will provide respite from the malaise in land administration in the near future. It is certain that the prospective CLB will be challenged if enacted, leading to a further delay of five to ten years and a corresponding deepening administrative void.

## Traditional versus democratic boundary overlaps

In the Eastern Cape, the boundaries for local traditional communities and the boundaries for local municipalities and wards do not align – this appears to be less of a problem in KZN and Limpopo. These administrative-spatial disconnections increase the possibility of contestation. For example, in some areas local leadership, whether civic or traditional, has to work with more than one ward councillor, while ward councillors have to work with a number of local/traditional leadership structures. If the ward boundary splits the long-established area, two people from the same local/traditional community, depending on where they live in that community, may have to work with different ward councillors. This often creates confusion and tensions.

## Boundary disputes within/between communities

Boundary overlaps also occurs at the household, village and community scale, leading to contestation. This can be over boundaries that are recorded in oral history or on maps and plans. Different paradigms are at work here: the Land Survey Act and the deeds registry system of mutually exclusive and non-overlapping land rights, versus customary practice and perception where land rights are likely to overlap depending on a range of social and environmental factors. The techniques of land surveyors cannot resolve such issues. Since the nature of customary rights militates against being fixed within definite boundaries, the likelihood of ongoing conflict in some areas where boundaries are contested should be accepted as an inherent feature of the order. For this reason, it is proposed to strengthen conflict-resolving institutions, for example, in the form of a national Office of the Land Ombudsman.

## Governance tensions

In many communal land areas, tensions exist between traditional leadership structures and municipal structures. In some instances, traditional leaders feel that they do not have to be subjugated to the municipality when making land administration-related decisions. In other instances, councillors do not engage with traditional leaders or vice versa. Nevertheless, in some places traditional leaders and municipal councillors work together very well.

The tensions between municipalities and traditional leadership structures often play out within communities, with communities having to decide which structures will represent their needs. Although part of the problem is the lack of a cooperative governance framework, the political aspect cannot be avoided. Complex issues of legitimacy affect the traditional leadership institution in general. In the midst of all the power dynamics, traditional leadership is facing intractable questions of legitimacy.[12] One legitimacy question relates to traditional leaders' genealogies, and the difficult dynamics around

democratic governance versus traditional succession. A second one relates to how individual traditional leaders conduct themselves in the eyes of their constituencies. The third and more complex one relates to "tribes" that were moved because of wars, disasters and natural population movements, and often resulted in lack of congruence between the traditional leader, spatial jurisdiction and tribal affiliation. Unfortunately, government's current policy proposal evades the legitimacy question by providing rural communities with no choice. While traditional leadership has its legitimacy battles, elected councillors face different questions of legitimacy, which relate to their lack of proximity to communities.

### 3.1.2 Conceptual challenges

#### Second-class title

Some see individual title deeds as the ultimate form of tenure and permit-based tenure systems associated with communal land as a second-class form of tenure. They argue that without individual title deeds, as part of the formal deeds registry system, people will not be able to access bonded loans through banks and thereby use their landed assets to lift themselves out of poverty. This is a myth because:

- Title in and by itself does not get anyone credit. To obtain credit requires a regular form of income. Moreover, banks generally do not want to lend capital in areas where they are unlikely to be able to (or even want to) reclaim their loans through foreclosures.
- Research has shown that title in itself does not have any noticeable effect on the intensity of land use or smallholder agricultural productivity, nor does it appear to be a determinant of selling and buying land, which happens regardless of title.

There is often a popular demand for title or itayitile, given the majority of the population's experience of arbitrary administrative action in relation to land rights. But when unpacked, this demand is usually a demand for some public record or acknowledgment of a land right, not a demand for the registered title itself. When confronted with the transaction costs of registered title, municipal rates, and other related costs, people generally shy away from registered title if they have the choice.

#### Succession and inheritance issues

Communal tenure arrangements do not fit neatly into the western concept of land tenure where rights of ownership are defined in terms of a specific owner and a defined portion of land (called a land parcel), and where the owner has the rights of alienation (sell or transfer the property to another party) or testation (disposal of property by testament or will). The one-to-one property relationship of western-style ownership thus has repercussions for the heritability of rights. Heirs can be named in wills or in the case of intestate succession, particular heirs are identified in succession law.
In communal areas, the social unit holding the rights to the land is not always a neatly bounded group of people, and the land is not always a neatly bounded parcel of land that can be mathematically and accurately defined through survey. If owners cannot be identified precisely, then specific heirs cannot be identified. Family ownership generally implies that particular categories of kin have rights of access without having to name people individually. Rights are usually conceived over time and successive generations, and are seen to apply to the dead, the living and the yet-to-be-born.

These contrasting notions of ownership and rights result in contrasting notions of inheritance. This



[12] http://www.dispatchlive.co.za/opinion/proposed-communal-land-policy-could-replay-1913/Daily Dispatch, 8 July 2015, Opinion article by S. Manona.

is an added reason why registering owners in the deeds registry in its current form is inappropriate, as many people do not want to register a particular individual who may then use these powers to sell the property, or leave it to someone in a will. For this reason, registration tends to be avoided, and the deeds office registers lose their currency very rapidly. This is a phenomenon that has dogged the administration of freehold (and quitrent) titles ever since they were first issued to Africans in the nineteenth century.

When laws of succession are mooted for reform in order to counteract discrimination against women's rights of inheritance, it is important to consider the very different context when property is held in the family group rather than allowing any single person, whether male or female, to inherit. The alternative practice, which is already widespread, is to recognise particular individuals as "custodians", "family representatives" or "keepers" who protect family property.

Therefore, the land records system should recognise family property; the rights of access by recognised family members, male and female, over time and across generations; and the principle of custodianship rather than rights that allow for alienation. This approach implies some kind of accepted definition of who the "recognised family members" are and how the agreed definition is decided.

## Differing contexts

Communal areas are not all the same. Traditional leaders are well-respected in some areas but do not have the full support of the community in other areas – and certain areas may not even have any traditional leaders. A one-size-fits-all solution does not work in contexts where local dynamics differ from location to location, and so any land administration system will need to take these differing contexts into account.

## Differing solutions

People have different perspectives on how land tenure and land administration should happen in communal areas. Some want to transfer all land to either democratic land holding entities or to traditional leadership structures; others want to privatise all communal land; and others want to introduce systems of public recording that maintain social tenures but introduce increased definition and powers of the rights-holders. These differing perspectives lead to conflicts over what legislative and administrative interventions should be implemented by the various spheres of government.

This challenge of differing solutions underpins the lack of progress in addressing seriously the protection of the land rights of people living in communal areas in the new democratic South Africa. These tensions often play themselves out in fierce court battles, such as the contestation of CLaRA.

### 3.1.3 Location-specific challenges

## Expansion of settlements into communal areas

Many communal areas are found in locations where the demand for new land for residential purposes is high, e.g. on the edge of urban centres. With no clear land administration procedures that deal with tenure security and land use management, this rapid urbanisation creates tensions over who is responsible for controlling such development and who owns the land in question.

## Approvals for large-scale development projects

For developers who want to implement large-scale development projects (e.g. agricultural irrigation projects, new schools, clinics, shopping centres, hotels and backpacker establishments), no clear procedures exist for obtaining formal tenure security to the land or the necessary land use approvals. Although formal "procedures" associated with IPILRA set out clearly what processes should be followed to facilitate development applications, these were never formalised into legal regulations, only have the status of departmental instructions and have fallen into disuse.[13]

## Benefits from mining

Mining in communal areas ranges from small mining operations, such as sand mining for construction and borrow pits, through to large-scale and commercial mining operations. The lack of clearly defined land rights has led to sharp and growing tensions in rural communities over who should benefit from the income from mining in communal areas. Tensions around this issue have arisen in North West, KZN and the Eastern Cape.

## Rural housing subsidies

The "rural housing on communal land" subsidy was introduced to avoid the need for a registered title when issuing subsidies. However, the policy has veered to the extreme, and there is no administrative or spatial referencing of the allocated subsidy. The land records approach advocated in this report would formally and officially connect a subsidy, a house, a family and a geographic reference. Precise implications will need to be determined, such as the implications of whose name will be recorded on the national housing subsidy database when housing subsidies are allocated to "families" as opposed to married or co-habiting individuals.

## Leases on land falling under the administration of the Ingonyama Trust Board

The Ingonyama Trust Board (ITB) has stated that it is issuing or intends to issue residential leases to households living on land under its jurisdiction. It argues that this provides households and leaseholders with more secure tenure. However, for households living in these areas, leasehold tenure is a weaker form of tenure than the tenure rights that they already have and that are protected by the IPILRA. Furthermore, such leases are contrary to the provision of Section 25(6) of the Constitution, which requires enhanced tenure security. In practice, the ITB seems to have issued leases for business purposes rather than residential sites, except where banks have wanted evidence of land tenure for the purposes of granting personal loans. However, like in the case of mineral leases, questions arise over who benefits from such rental income.



[13] Interim Procedures Governing Land Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of the Land, as amended

## Land claims in communal areas

Further complicating the already murky jurisdiction and contestation over land areas are the unresolved land restitution claims in and around rapidly urbanising former bantustan towns, such as Mthatha in the Eastern Cape. Where land claims are made (or even rumoured to have been made), the claim and the actual authority over claimed land are conflated. In other words, claimants often assume that land they have claimed is de facto their land. This unstable situation is made worse by the reality that most (if not all) local municipalities concerned lack robust and proficient political and administrative capacity to manage complex dynamics around land (and specifically municipal commonage). The result is often paralysis in local municipalities about how to take charge of or manage land. [14]

## Private value capture

If communal land is privatised, those that obtain private registration and title deeds are able to sell and dispose of the land and benefit from the increased property value. No clear policy or entrenched mechanisms are in place to enable the original landowners to retain land value increases that occur when the previously communal land is converted to private land with the associated zoning. This is critical in areas with significant development potential, e.g. mineral rights and commercial possibilities, including tourist development.

One way to avoid this is to lease the land in question back to the underlying right-holders, with clear benefit flows (including rental income). This was envisaged by the Interim Procedures Governing Land Development Decisions (see footnote 13 on page 20). Precedents exist both in contemporary South Africa and in the developed world, of successful first nation land claims to prime real estate.

Furthermore, some legislation still contains unused or underused provisions that enable municipalities to claim on transfer up to 50% of the increase in land value that results from changes in land use zoning. The Cape Provincial Ordinance (No. 33 of 1934) still applies in the proclaimed urban areas of the Transkei. Sections 35ter and 50 provide for some value capture resulting from changes in zoning. Section 35ter of Ordinance 33/1934 is incorporated into the revised and updated Land Use Planning Ordinance (No. 15 of 1985), which applied in the Cape Province but not the then "independent" Ciskei and Transkei. However, it is not clear if these sections have ever been applied, and if not, why not.

## Quitrent

In most districts of the former Ciskei and in nine districts of the former Transkei, the colonial authorities introduced a form of title known as quitrent title in the nineteenth century. As with PTOs, quitrent applied to both residential and arable allotments, but quitrent land is also surveyed and registered in the deeds registry system. These were individual titles with more restrictive conditions than freehold, for which the state had dominion over the land. Over time quitrent titles have evolved to exist alongside the "lesser" rights of the members of naturally expanding family groups, who could not succeed to the original family plots, as well as large numbers of informal occupiers who were ordinarily considered to be squatters. In some cases, many families in the latter categories subsequently received PTO rights which were issued over earlier quitrent land rights. There have also been cases of bitter contestations in some areas over the common property.

[14] These insights are derived from a report on a workshop in early February 2015 of concerned specialists working in the Eastern Cape Province on the issue of land administration and funded indirectly by Government Technical Advisory Centre (GTAC) of the National Treasury, with recommendations specific to the Eastern Cape. It was prepared in response to a request for a document to brief a national Minister and contains material prepared by a number of participants.

Quitrent was upgraded to freehold in terms of the Upgrading of Land Rights Act (ULTRA) (No. 112 of 1991).[15] In addition to the contestation because of overlapping land rights, there are the ongoing problems with the records in the deeds registries that reflect ancestral owners rather than current owners and occupiers. This is partly because of the lack of a cheap and accessible procedure to update titles. A further challenge with quitrent titles is clarity on procedures for subdivision and registration of servitudes.

## Coastal and protected areas

At the heart of the High Court Dwesa Cwebe case[16] is the conflict between customary rights to marine resources and the conservationist approach imposed by the Marine Protected Areas. This case highlights that customary rights cannot be ignored in the scheme of land use and environmental management. While the case may be limited to customary rights of access to marine living resources, the judgement is likely to have far wider implications for other resources, such as forestry and sand.

Coastal and riverine forests, which are prevalent in some of the coastal communal areas, are disappearing at an alarming rate despite statutory protection. Forests are typically cleared for slash and burn agriculture, firewood and roadways, while resources such as bark, are harvested at unsustainable rates. Indigenous forests and plantations are governed in terms of the National Forestry Act (No. 84 of 1998) without parallel provincial legislation, NEMA and (more recently) SPLUMA. Only national legislation covers forestry, despite it being a concurrent competency of national and provincial government. Many of these forest areas on communal land are being plundered because of a lack of state capacity to enforce the multiple pieces of legislation. The lack of a balance between recognising customary rights and adhering to conservation legislation is resulting in many of the laws not being implemented.

Finding a balance between customary rights and the prevailing overarching legislation is also extremely difficult in the case of sand mining in coastal areas. Sand mining is subject to mineral, environmental and land use planning regulations, but none take precedence over the other.[17] Thus, three national authorities claim to regulate sand mining from an environmental perspective: the DMR, the DEA, and the DWA, which use the Mineral and Petroleum Resources Development Act (No. 28 of 2002) (MPRDA), NEMA and the National Water Act (No. 36 of 1998), respectively, to regulate sand mining. A fourth authority sits in the provincial sphere of government: the provincial department responsible for environmental affairs in each of the nine provinces.[18] It is naïve to think that the various responsible departments are all going to monitor, control and enforce the range of other legislation.

## State land lease and disposal policy

In its trusteeship role over communal land, the state has fiduciary responsibilities in respect of the communal land, but confusion over the state's powers becomes glaring in relation to decisions pertaining to leasing and disposal of communal land.

The national policy document "State Land Lease and Disposal Policy" applies to all immovable assets for which the DRDLR has legal title, but officials tend to erroneously include communal land in this broad category of land "owned by the state". Of particular importance is that communal land is a particular form of state land, in that it is nominally held by the state or in a custodianship, trusteeship capacity. The policy seeks to reverse the legacy of the 1913 Natives Land Act, by addressing issues relating to



[15] ULTRA upgraded quitrent as defined in R188 and therefore did not apply in the Transkei where quitrent was established under much earlier legislation, which still applies, at least in theory if not in practice.
[16] *Malibongwe David Gongqoshe and other vs. the Minister of Agriculture Forestry and Fisheries.*
[17] Green SC. 2012. The Regulation of Sand Mining in South Africa; A thesis submitted to the University of Cape Town in fulfilment of the requirements for the degree of MPhil, Faculty of Law, UCT.
[18] ibid.

"historical exclusion, equitable access to land, and participation in the optimal utilisation of land; as well as to address challenges relating to access to food at both household and national levels to bring about household food security and national food self-sufficiency". Communal land does not fall into this category of land available for use to achieve this objective.

In cases where state land (excluding communal land) is to be transacted or disposed of, in favour of an entity (which could include a company, person, beneficiary, CPA, or sphere of government such as a municipality), the general rule of thumb is that a Section 28(1) certificate should be issued in line with Schedule 6 of the Constitution. The competent authority to sign the Section 28(1) certificate is the Director-General of the DRDLR. The Section 28(1) certificate serves as a due diligence formality to confirm that the land is vested in that particular sphere of government and is endorsed by the Registrar. For the certificate to be issued, sufficient motivation is needed with all checks and balances sent to the relevant section of the national DRDLR. Only on the basis of the certificate can the Surveyor General endorse title, after which the property can be transacted.

A distinction is drawn between other categories of state land and land that is held in trust for tribes or other identifiable communities or persons: "When dealing with such land the relevant Minister acts in the capacity as trustee and therefore no item 28(1) certificate should be called for". For all the reasons outlined above, this policy is not designed for the purpose of regulating leases on communal land.

## 3.2 Opportunities

Government and others have a window of opportunity, as no-one wants the present land administrative void for communal areas to continue, and most role-players want to find solutions to this crisis.

### Introduction of SPLUMA

The implementation of SPLUMA provides the potential to explore new ways of addressing land use management in communal and other areas. As land use management functions are extended into these areas, re-establishing land administration functions will be possible and pragmatic.

### Living customary law

The courts are already using the concept of "living customary law", which presents a unique opportunity to build a land administration system embedded within and built on existing practices or customs, including social tenures. At the same time, it would be an example of how such law can be adapted to the Constitution's principle of equality. However, because of the dynamic nature of society, the official customary law that exists in the textbooks and in the Act[19] is generally a poor reflection, if not a distortion of the true customary law. The official rules of customary law are sometimes contrasted with "living customary law" (or true customary law), which recognises and acknowledges that rules are adapted to fit in with the changes that continually take place.

[19] 1927 Native Administration Act
[20] Bhe & others, Case CCT 49/03, paragraphs 86, 87

## Growing recognition of the core problem

An increasing sense of urgency is present among a range of role-players of the need to address the land administration void in communal areas, which is seen as being at the heart of stalled development in the former bantustan regions. The ineffectiveness of rural land administration has had extremely negative effects on attempts to develop viable rural settlements in the former bantustan rural areas. Effective local land administration is what underpins many of the day-to-day activities of local government (managing land use, building control, rates and services collection, etc.).

In the longer term, local government must expand its revenue base, and an obvious source of revenue is rural land which was once administered under R188 and its variants. Just as SPLUMA applies across the board to all areas (including those previously excluded from land use schemes and land use zoning), the Municipal Property Rates Act (No. 6 of 2004) will eventually be extended to all areas. Exemptions to this Act are unlikely to be sustained in the long run. For instance, COGTA in KZN is urging local municipalities to levy municipal rates on all business sites and on residential sites with improvements valued at over R500 000.

## Growing global interest in land records systems and improved technology

Research by the World Bank in Africa showed conclusively that productive use of land is not linked to title. There is a growing recognition that alternative tenure approaches, based on more localised land records systems, are more appropriate than registering informal land rights as formal titles.[21] Programmes whereby all land in communal areas is converted to private ownership, through the introduction of a land registration system with registered erven and title deeds, were found to be largely ineffective in promoting asset formation in South America. The World Bank has been exploring solutions to this global issue of land administration in rural and other off-register areas. The "fit-for-purpose approach" to land administration has emerged as a game changer and includes the following key elements: [22]

- flexibility, in spatial data approaches
- inclusivity, in terms of coverage of various tenures
- participatory, to ensure community support
- affordability, for the government
- reliability, in the sense providing authoritative information
- attainability, of the system within a set timeframe
- upgradeability, regarding improvement over time

International support for alternative land administration systems is growing exponentially, since the problems experienced in South Africa are replicated in most regions of the world that were once colonised. In Africa, UN-Habitat is another key role-player involved in developing new land administration systems based on the recognition of social tenure.

The UN Food and Agriculture Organisation (FAO) has also developed the "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGTs)". These guides recommend that



[21] Hernando de Soto, the Peruvian economist, published The Mystery of Capital (2000), a landmark study into the relationship between property rights and poverty
[22] GLTN and others: available at http://metaspatial.net/downloads/Standard-Open-Source-Software-for-the-Social-Tenure-Domain-Model-Tool_paper.pdf accessed 3 November 2015.

states should ensure that publicly held rights are recorded, together with tenure rights of indigenous peoples and the rights of the private sector, in a single or at least linked, land records system. The VGGTs commit states to the following principles: recognise and respect all legitimate tenure rights and the people who hold them; safeguard legitimate tenure rights against threats; promote and facilitate the enjoyment of legitimate tenure rights; provide access to justice when tenure rights are infringed upon; and prevent tenure disputes, violent conflicts and opportunities for corruption.[23] The VGGTs go beyond states to non-state actors (including business enterprises), committing them to a responsibility to respect human rights and legitimate tenure rights.

Technology offers opportunities for establishing simple and affordable open source land management systems, such as:

- The Social Tenure Domain Model, a multiparty initiative involving UN-Habitat, the World Bank, the Global Land Tools Network (GLTN), the Federation of Surveyors, and the Faculty of Geo-information Science and Earth Observation at the University of Twente (Netherlands)
- Talking Titler from the University of Calgary
- LaPSIS, the Land and Property Spatial Information System from the HDA
- FLOSSOLA (Solutions for Open Land Administration) supported by the UN FAO
- Google Earth

## Increasing understanding of how to intervene in a complex environment

Internationally, the understanding is growing on how to deal with development in complex environments.[24] Rather than trying to pre-plan for every eventuality, all affected and interested parties can work together to develop a broad framework within which they are able to try out local solutions that draw on (but do not blindly replicate) best practice from elsewhere. By adopting such an iterative approach of intervention and learning from experience, it should be possible to identify interventions that are more likely to lead to better outcomes.

[23] UN FAO. 2012. Voluntary Guidelines on the Governance of Tenure. Rome, Italy: UN FAO.
[24] See http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8287.pdf accessed 28 October 2015.

# 4. Options for addressing challenges

Before attempting to recommend how to deal with the challenges and build on the opportunities listed above, this section broadly summarises the options considered in this report: transfer communal land to traditional councils, collective property institutions or individuals; build on existing tenure-related practices found in communal areas; or do nothing.

## 4.1 Transfer

An option frequently put forward by reformers is a wholesale "transfer" of the land from state trusteeship to another landholding or owning entity in registered title. Several transfer models exist, some of which have been tried and others only suggested. For example, the current government policies favour transfer to traditional council structures. A second model, which South Africa created mainly for land returned under the land restitution programme, is collective title in the form of collective property institutions. The Communal Property Associations Act (No. 28 of 1996) controls this type of transfer. A third model, already discussed in this report, is transfer to individuals in title.

### 4.1.1 Traditional council ownership

**Transfer communal land to traditional leadership structures.**

| Advantages | Disadvantages |
|---|---|
| The Traditional Council (TC) could maintain and administer social tenure arrangements at considerably lower cost than if the state were to appoint local land tenure officers and set up infrastructure to record rights.. | The state divests itself of its constitutional responsibilities over the land tenure and to provide public services to ordinary South Africans. Local government will not be bound to provide planning services and service delivery. |
| The TC could behave as a trustee and recognise the rights-holders' existing IPILRA rights. | Once land is transferred to TCs, the state will have little traction to interfere in possible governance abuses that TCs may engage in. |
| The TC could mobilise revenues raised from business ventures to develop infrastructure and public services, such as roads, schools, clinics and internet access. | People's ability to exercise their democratic rights will be constrained because their rights will be territorially bound to potentially unaccountable structures that exist outside of the current three-tier system of governance. |

| Advantages | Disadvantages |
|---|---|
| The TC could provide conflict resolution services at considerably lower costs than if the state were to set up a national ombudsman or some other institution to mediate conflict. | There are no guarantees that the TC will behave as a trustee and not a proprietor, given that title confers "ownership". Existing examples suggest that TCs do not always act in the interests of the rights-holders but tend to use their ownership as a vehicle for individual accumulation. The TC could raise rents through leasing, tribute etc. Examples of these practices happening exist, such as the ITB in KZN issuing leases (page 21) or in the platinum belt, where revenues from extractive industries accrue to the TCs instead of to community members who have the rights. This could also happen with other forms of revenue, such as from tourism, commercial forestry, etc. However, since the IPILRA recognises that existing rights are stronger than leases, endless litigation is likely to ensue. |

### 4.1.2 Collective privatisation

Transfer communal land to Communal Property Institutions, such as Communal Property Associations (CPAs), private trusts, housing (property owning) cooperatives, etc.[25]

| Advantages | Disadvantages |
|---|---|
| The CPA protects the rights of the rights-holders from dispossession. | Almost all CPAs have run into difficulties of various kinds. |
| The CPA behaves as a trustee on behalf of the rights-holders, and administers and manages the property. | The state divests itself of responsibility for service delivery, maintaining that these properties are private. There are numerous examples of this happening. |
| CPA committee members are accessible to the ordinary members, since they are rights-holders themselves. | The constitutions of CPAs are often written in a way that most ordinary members cannot understand. |
| The CPA undertakes land administration, which then lowers the costs of land administration for the state. | CPA committees can act in an unaccountable manner towards rights-holders. |
| The CPA mobilises revenues in the interest of rural development (as above for TCs). Since the CPA is on the spot, it has a good idea of the best opportunities for development. | CPA procedures for democratic governance (elections, transparency, gender equity, etc.) are often not observed. |

[25] Some of these models have been tried to a limited extent in urban contexts with limited success so far. For example, experience with housing cooperatives in the Amalinda suburb of East London shows that households do not fully understand the complex legal relationships established in housing (property-owning) cooperatives (See http://www.afesis.org.za/images/lessons_learned.pdf accessed 31 October 2015). Housing (development) cooperatives may, however, have more promise in that households come together to arrange for building of houses, where the houses are then owned individually.

| Advantages | Disadvantages |
|---|---|
| The CPA acts as an intermediary between the state and the CPA members. | CPA committees behave in a similar way to TCs and use the property for private accumulation, instead of re-investing revenues from business ventures back into the development of the property. |
| | The CPA Act does not set out the scope and nature of the individual rights of families or individuals within the CPA, and thus CPA members make very unequal demands on the property. |

### 4.1.3 Individual privatisation

**Subdivide the communal land into erven and then transfer the erven to individuals or companies.**

| Advantages | Disadvantages |
|---|---|
| Some individual rights-holders feel that individual tenure in title will be secure from potential and actual abuses by either TCs or CPAs and will help them to escape the current indecision that plagues land administration. | Titling programmes (see 3.1.2) are ineffective in promoting security and productive use. |
| Some individual rights-holders want title in order to use their properties to raise credit. | Titling gives proprietary powers to individuals, which is contrary to the notion of securing land as social security and holding it in the family. |
| | Titling can lead to family feuds and conflicts (e.g. family members registered on the title deeds using title to sell the property without the approval of the rest of the family members). |
| | Titling divests the state of its responsibilities for the welfare of the poorer and indigent members of the society, particularly in the delivery of subsidised services. |

## 4.2 Build on existing practice

In this approach, social tenures are officially and legally recognised. "Social tenures" is an umbrella term that describes off-register tenure rights protected by the IPILRA in both communal land areas and various urban contexts. They are also known as "informal rights" but have been replaced by the term social tenures. A body of practitioners and researchers[26] have begun to record the range of practices



[26] For example the land tenure research network known as Leap http://www.lrc.org.za/focus-areas/applied-research
[27] See for example http://www.lrc.org.za/focus-areas/applied-research accessed 4 November 2015

and concepts associated with social tenures and to develop instruments to secure the legitimacy of such systems. [27]

Instead of seeing communal land rights as interim rights waiting to be incorporated into the title registration system, existing rights are recognised in their own right. Strictly speaking, the IPILRA already recognises existing "informal" rights as forms of property rights: Section 2(1) of the Act states that rights can only be removed by means of "expropriation", which implies that these rights are already strong rights, close to real rights:

> Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

The problem is the lack of an administrative back-up to uphold these rights, which means that the rights may be protected but cannot be enforced because of a lack of state capacity. Therefore, the idea is to start a process of "mainstreaming" these processes that are already underway.

Recognising social tenures instead of only title deeds involves a broader understanding of rights – how they might be administered, recorded and registered – than the current system of deeds registration allows. Some of the practices and instruments that have emerged include legislating anti-eviction protection, democratising local land administration, promoting gender equity when allocating land rights, promulgating special land use zones, recognising occupation rights and using locally accepted evidence to record rights. The next step would be to implement broader institutional interventions, so that these rights can be officially recognised at a more systematic level and thus be effectively enforced. Without further institutional development, these protected rights remain extremely vulnerable in spite of legal protection.

To make these rights enforceable requires systems of adjudication and conflict resolution, a legislative framework that provides a system for recording the rights and storing/safeguarding the records, and a new brand of land officers trained at accredited educational institutions. These provisions – conflict-resolution, adjudication, recording, storing and education/training are integral elements of the deeds registry system, and so the idea is to mirror these in an equivalent, but different set of institutional arrangements.

Ideally, several pilot projects should be used to develop the guidelines for these five components in order to test the principles before incorporating them into the proposed institutional framework. This will entail answering questions such as the following:

- What evidence is accepted locally for recognising rights, and how can these forms of evidence be built into an adjudication system?
- What are the main categories of conflict, and how can institutions be set up to deal with these conflicts?
- How can this evidence be recorded, given the flexible spatial and social boundaries of communal tenure?

- How can the state store and safeguard these records, so that all the users of a land administration system (for example, local municipalities) can draw on them for a variety of purposes?
- How can curriculums for land officers be designed that will enable them to implement locally deduced evidence?

| Advantages | Disadvantages |
|---|---|
| Social tenures are familiar to people living in communal areas and build on local living customary law. | Lack of understanding of the concept of social tenures among large segments of the state apparatus and professionals dealing with land-related matters, including town planners, conveyancers and land surveyors. |
| The IPILRA provides a starting point around which to build a land administration system for social tenures. | Officials and local land officers need a particular understanding of social tenures and how they operate on a day-to-day basis. Officials and local land officers would therefore need to be retrained. |
| Establishing and operating a land records system for social tenure rights is much cheaper than attempting to record these rights in the existing Surveyor General and deeds registration systems. | The inherent flexibility of social tenures means they cannot be implemented in an overly technocratic fashion. This would require a mindshift in current bureaucratic thinking |
| A land records system is more sustainable for recording social tenure rights than the deeds registry system, which has been shown to unravel fast when applied to social tenures that do not fit the legal requirements. | The government personnel who knew how to operate PTO and similar systems have retired or been moved to new positions. It will therefore take time to build the required personnel capacity to implement a social tenures system. |
| Social tenures can be implemented without having to resort to written evidence, as it can draw on peoples' local knowledge about who has what rights to which portions of land. | The land records system would need budget allocations for staff and implementation. However, as there is no officially recognised land administration system in communal areas at the moment, the resourcing of such a system is needed anyway. |
| As the pressure for establishing and maintaining a land occupation and use records system in communal areas intensifies, the relevant authorities can incrementally introduce the administration of social tenures. | Gender discrimination, as well as the abuse of power by chiefs, traditional councils, and community leaders, can be a problem if not specifically addressed. |

| Advantages | Disadvantages |
|---|---|
| Pursuing social forms of tenure does not close off future opportunities for specific communities to follow one of the other transfer options, such as transferring land ownership to individuals or small businesses. | The absence of legitimate channels of mediation and adjudication of land claims can make the resolution of conflicts (over who has the right to allocate plots, who within family lineages has the right to claim rights to land or housing etc.) very difficult. |

Government and other role-players could consider and construct a social tenure record that closely resembles the PTO (certificate) system of the past, where for example, Occupation and Use Right (OUR)[28] certificates are issued to families and not individuals for a portion of land as defined around a geo-referenced point with boundaries determined by local living customary law. Rights to this homestead land parcel come with associated rights to use the common and communal lands of the "village" for grazing, collecting wood, and so on, as determined by local custom, as well as possibly rights to a corresponding allotment parcel of land for agricultural purposes.

Local circumstances would determine the process through which the certificates could be issued. It would involve a role for traditional leadership structures, where these legitimately exist, to confirm who has the right to this geo-referenced point and its associated boundaries. Ideally, in the long term, local offices linked to the local municipal office would administer these certificates, and the records would form part of a nationally coordinated land records system.

Local leadership structures could also play a role in approving or "permitting" any land use change applications (e.g. converting land from grazing to residential homestead), so long as all those involved understand that such "permitting" is just one of numerous approvals needed before the communal land use change could take effect. Such local approvals should follow broadly similar but locally unique procedures that involve obtaining community and neighbourhood consent. The procedure would include community consent, consent by the neighbours, authorisation by relevant government departments and spheres, and endorsement by local leadership structures. Approvals may be needed from the Department of Agriculture (for converting agricultural land to land for residential use), the Department of Environment (for environmental authorisation), and the local municipality (for land use). Failure to secure any one of these approvals would prevent the land use change proceeding. In such cases, all parties concerned would need to follow appropriate dispute-resolutions mechanisms to find agreement on a way forward.

Taken from a forthcoming book[29] on the problems with land tenure reform in South Africa, the following passages describe the key characteristics of tenure systems:

> Tenure systems derived from 'customary' norms and values are prime examples of social tenures, and are not restricted to rural areas but also found in urban areas, including informal settlements. Common features across the country are that land rights are derived from accepted membership of a socially defined grouping (or 'community') that moderates the way in which rights are claimed and recognised and disputes are resolved. These processes take place primarily at the local level (i.e. in families, neighbourhoods and wards) rather than in centralised arenas of decision-making such as the offices of a city government,

[28] OUR terminology is new terminology proposed in this report. Consideration was given to referring to PTO certificates, but it was felt that the term PTO comes with its own historical baggage and that it is better to use new terminology.
[29] Book edited by Ben Cousins, Donna Hornby, Rosalie Kingwill and Lauren Royston

the chieftaincy or a traditional council. In rural areas the social and physical boundaries of tenure systems are often highly flexible to accommodate the overlapping or 'layered' levels of social and political organisation […] The local details of these arrangements vary considerably across the country […]

Some of the organising principles that define this broad category of social tenure are as follows:

**There is strong local oversight of processes of claiming, recognising and transferring rights, and of dispute resolution.** Oversight takes place through localised structures of authority regarded as responsible for managing or administering land rights and associated duties. These structures of authority are often a mix of customary, neo-customary and colonial/apartheid-era institutions, combined with features derived from recent constitutional and statutory reforms.

There is local, socially legitimate recognition of which people hold rights and duties in relation to land and dwellings; how the institutional arrangements are structured (e.g. through elections or other means of legitimation, including by reference to notions of 'customary law'); and how rights are accessed and disposed. Land rights and duties and the processes through which they are defined are thus embedded in social and political relationships rather than occurring through simply naming people or deciding on numbers, as occurs in official bureaucratic systems. […]

**Processes are as important or more important than rules,** and rooted in ongoing engagements between actors rather than in strict and well-defined rules and procedures, as long-noted for systems of customary law […] It is a mistake to think of such processes as disorganised and chaotic, notions that often accompany the descriptor "informal". On the contrary, in both rural and urban off-register contexts these tenure processes are often organised with reference to norms that can be clearly described. Nevertheless, their internal flexibility and capacity for accommodation of diverse social features are distinctive.

**Social tenures involve flexible approaches to social and spatial recognition,** i.e. in relation to which people are seen as legitimate rights holders and how the relevant unit of land or dwelling is defined. As many scholars have pointed out […] flexibility should not be confused with the absence of underlying principles. There are consistently applied norms that appear as clearly discernible regulatory patterns, and flexibility is not equivalent to 'open access', where power determines benefits. The inherent flexibility of social tenures is a key reason why they cannot be captured in a conventional cadastre comprising registered title deeds and mathematically defined surveys. Layered and nested property relationships militate against the one-to-one property relationships that characterise the cadastral system, both with respect to 'human-land' and 'human-human' relationships.

## 4.3 Do nothing

In this option, the authorities provide no guidance on how land administration issues can be addressed in communal areas. Instead the present confusion and potential chaos continues. This may not be a totally negative option for many stable rural areas, where there is no urgent need for major externally driven development. However if the existing situation is allowed to continue, with no guidance on how to deal with land administration in communal areas, then powerful local role-players, including traditional leadership structures, opportunistic local land entrepreneurs, etc., will fill in the administrative void.

# 5. Recommendations

## 5.1 Broad recommendation

The starting point to dealing with land administration in communal areas is to understand the nature of existing "social tenures" or "off-register rights". The task is to strengthen these social tenures and bring them into a coherent institutional and administrative framework, which will require establishing a locally administered land records system to complement the existing land registration system, and creating legal parity with registered rights.

This approach leaves options open as to how particular communities would like to deal with tenure in their localities in the future. In certain instances, some communities and households are likely to gravitate towards more individual tenure arrangements, whereas elsewhere locally specific social forms of tenure will continue to predominate.

The administrative act of providing a public record and acknowledging rural land tenure rights will provide security of tenure for most people and households. It will facilitate the emergence of rental markets, of land rights and respective land parcels, for arable and residential land in particular. It will also facilitate the extension of land use planning (as required by SPLUMA) and the collection of local rates and service charges (as per the MPRA) into communal land areas. Providing security of tenure will promote a sense of equality and full citizenship for all rural residents and practically give them a geo-spatial reference (an address) that can be used for many administrative requirements, including obtaining birth certificates and driving licences, as well as registering to vote.

## 5.2 Recommended intervention per challenge

Table 5 summarises the recommendations for addressing each challenge highlighted in Section 3.1, with suggested timeframes.

**Table 5: Recommendations to address each challenge**

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| 1. Confusion over who is responsible for land administration, as land crosses all spheres and many functional areas of governance, directly affecting the delivery of human settlements and municipal government. | HDA and/or DHS to establish a technical committee with relevant national departments to begin a process of streamlining the institutional and legislative environment and the range of procedures relating to land and land development.<br><br>Directly interested national departments must be involved, including Treasury, COGTA and DRDLR, in order to institutionalise these collaborative arrangements within the present constitutional architecture. These arrangements also need to be aligned with those of other spheres and departments, such as environment, water, forestry, agriculture and minerals, etc. | 12 months, for detailed proposals about assignments and delegation of legislative authority, and ongoing. |
| 2. No effective national legislation underpinning land tenure for communal areas. | DRDLR/COGTA to introduce a nationally constituted but locally administered land administration system that is based on a clear programme to revitalise land administration in communal areas. The plan should start with a programme to save and record existing and valid PTO records, while a new land records system is piloted and rolled out. | Within 12 months. |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| | This will require amendments to IPILRA and/or the provision of regulations that outline the procedures for a locally administered land records system for communal areas (and other areas such as informal settlements). This system must be coordinated and compatible with the national land registration system (the Surveyor General offices and the deeds registries) and with municipal SDF processes and land use schemes.<br><br>Land administration, including records of land rights, should remain a national competency as per the current constitutional architecture. | Six months for any draft amendment bills and for draft regulations to be published. |
| 3. A shortage and inappropriate allocation of staff and resources for land administration. | The DRDLR and COGTA to lead the design of a new land administration system and provide staff. Where possible, staff with a historical understanding of previous PTO systems should be retained. A national programme for training and capacity building of staff must be put in place.<br><br>The DRDLR, in collaboration with the COGTA, the DHS and other government departments, needs to start discussions with academic institutions to explore how South Africa can develop the human capacities to implement a locally administered land records system. | Put in place a human resource development plan within 12 months. |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| 4. No institutional systems in place to administer communal land, as previous administration systems have been dismantled or allowed to collapse. | The DRDLR and COGTA to establish provincial land administration offices that set up and support land administration offices at local municipal level, including magisterial district level (where similar functions were previously performed), and oversee and manage the locally administered land records system. This will include the following: | Within the short to medium term, starting with pilot projects, including any with public investment, such as housing projects, and growing the programme over time. |
| | • Day-to-day administration: capture of records and recording of transfers of land rights and new land rights on a national data system. | |
| | • Staffing by delegated officials from the national or provincial spheres. Staff and functions with appropriate delegations could be transferred to municipalities later. | |
| | • Provincial land support offices to assist local land offices to deal with challenging cases and disputes. | |
| | • National land monitoring and evaluation function to reflect on, draw lessons from and share experiences to improve the locally administered land records system. | |
| | • National land administration and records support office to ensure that the local land records offices operate within the national framework and in line with policy and legislation. | |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| | • National and provincial programmes to build the capacity of provincial and local offices and municipalities to manage the locally administered land records system. | |
| 5. Uncertainty over how to deal with land use management and spatial planning in communal areas. SPLUMA does not go into detail on this matter and leaves it up to provinces and municipalities to deal with. | The fact that SPLUMA provides framework legislation and does not go into detail about land use management in communal areas presents an opportunity to align the land tenure administration and the land use planning and management systems.<br><br>Specific national, provincial and local laws should be developed to fill gaps in SPLUMA and related regulations, and local government should develop by-laws to deal with land use management in communal areas. These laws should include appropriate land use or purpose categories for communal areas, which have flexible rules governing the type of activities and improvements that land occupants can undertake. Categories should be kept broad, and could include the following: | The Green Paper process on Spatial Planning and Land Use Management was underway in the Eastern Cape in 2015; recommendations from this report need to be incorporated into this and other provincial planning and land use management legislative processes. |
| | • Rural settlement zones (for villages with definable settlement edges) within which the law allows the full range of uses they currently contain as primary rights, or get agreement from residents/ leadership on what land uses they want allowed. | |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| | • Rural settlement zones (for villages with definable settlement edges) within which the law allows the full range of uses they currently contain as primary rights, or get agreement from residents/ leadership on what land uses they want allowed.<br>• Agricultural settlement zones for low density, smallholder agricultural settlements, such as the Mbizana coastal areas in the Eastern Cape that were never affected by betterment.<br>• Agricultural zones (for arable and grazing areas).<br>• Conservation zones (for river/ wetland/forest or coastal areas) that community members and structures recognise and agree to. Rules must be put in place governing permissible resource harvesting. | |
| | • Cultural/sacred/heritage/resort, etc. zones.<br>For many communal areas, agree on rules/principles that can be applied on an activity-to-activity basis in pre-determined zones, so as to achieve sustainable development/resource use practices. | |
| | • Link with and use local SDF planning processes to identify special areas that can accommodate flexible approaches to land use management, as well as conservation, agricultural and other areas that can help inform decision-makers when making land use change decisions. | |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| 6. Most municipalities do not have the capacity to implement SPLUMA on a wall-to-wall basis, including communal areas. | The various government departments, including DRDLR, COGTA and DHS, among others, need to collaborate in order to develop and implement a programme to build the capacity of municipalities to implement SPLUMA and the proposed local land records system. | Immediate and ongoing. |
| 7. No or very weak legislation governing land administration within communal areas, and no clear procedures for enforcing compliance with this legislation. | Include procedures and penalties for phased-in enforcement of IPILRA and SPLUMA laws and regulations related to spatial planning, land use management and land tenure administration. | Simultaneously with land use management and land administration, area by area. |
| 8. Land taxation for local revenue has broken down in communal areas. | Link the locally administered land records system to the municipal rates and services system. Historically, land transaction fees for issuing and transfer of PTOs accrued to local revenue accounts. | Simultaneously with the extension of the MPRA. |
| 9. Environmental and resource management legislation (e.g. converting good agricultural land to settlements) not coordinated within a broader land administration system because of the lack of land tenure and land use administration in communal areas. | Align the land tenure and land use administration system with environmental legislation, spatial, planning and land use management. This is how it worked in the past, with the department of agriculture advising on which land was suitable for arable or residential purposes. | Ongoing. |
| 10. Boundaries of local Administrative Areas do not align with municipal ward boundaries, at least not in the Eastern Cape. | The Municipal Demarcation Board must be urged to realign municipal ward boundaries with administrative area boundaries. The process must be consultative because the match cannot always be fully congruent. | Once local land administration offices are ready to assist with the process. |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| 11. Tensions in many areas between traditional institutions and elected structures over governance and administration of land use, land tenure and land development in communal areas. | Use the SPLUMA roll-out process as a basis for the DRDLR and provincial planning counterparts to clarify the roles of traditional and elected leadership as well as the administrative responsibilities of municipalities. Roles and functions must be based on local practices and read with the Constitution, so that they promote democracy and accountability. | Simultaneous with SPLUMA roll-out. |
| | Draw on the concept of living customary law to help find appropriate roles for traditional structures and municipalities, where customary law is able to adapt to changing circumstances. Also use the opportunity to draw on IPILRA principles as a mechanism to develop local rules. | |
| Conceptual | | |
| 12. Communal land tenure systems are often viewed as a second-class form of tenure compared with the high standards set by the formal property titling system. | Recognise the continuum of tenure forms and that some provide more secure tenure than others. Establish a legislative framework that allows for the movement (conversion or transfer) from one form of tenure to another in any direction, but under strict conditions to prevent dispossession, land speculation and value capture. | Immediate, to promote the records system within state departments and among other stakeholders; in the medium term, develop legislation that can underpin the records system. |
| 13. Transmission of land from one generation to the next, especially when it comes to land rights for women, e.g. succession law. | Explore the full implications of promoting family and household property rights (including family title) for how these rights are held, managed and transmitted inter-generationally. | Include within the process of developing legislation for introducing a land records system. In the medium term, also explore the implications of family title within the conventional land registration system. |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| 14. A groundswell of opposition to recent attempts to develop communal land tenure legislation, leading to uncertainty over how to deal with land administration in communal areas. | Use administrative steps, including the development of a land administration framework that is public, neutral and removed from these contests, but that satisfies the demands of the existing social tenures. | Immediate, to promote the record system within state departments and among other stakeholders; in the medium term, develop legislation that can underpin this record system. |
| 15. A multitude of differing local contexts and differing views on possible solutions to how to deal with land administration in communal areas. This often leads to confusion and paralysis in finding solutions to land administration challenges. | Conduct additional research into developing a policy that accommodates locally appropriate solutions within a wider framework. Normative principles, applied properly, are a possible way out of this.<br><br>Undertake pilot projects to test various solutions. Learn from these and share the lessons with others to continue improving legislation and practice. | Conduct research in the short term; conduct pilot projects in the short to medium term. |
| Location specific | | |
| 16. A lack of any formal control of land development in areas with an influx of new residents, such as in communal areas next to growing urban centres. | Differentiate and prioritise the requirements of the land administration system based on the intensity of land tenure and use changes occurring in the area: For example:<br>(1) stable areas which require less rigorous land administration systems: | Incorporate these differentiations into the promotion and development of a locally administered system in the short and medium term. |
| | Land tenure: names recorded within an administered area or against geo-referenced points | |
| | Land use: use broad mixed-land use purposes (zones) | |
| | (2) dynamic areas which require more rigorous land administration systems: | |
| | Land tenure: names recorded against plots | |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| | Land use: more specific land use purposes recorded against plots | |
| | Areas that are immediate targets for development should also be prioritised. | |
| 17. Public and private developers unable to secure land tenure on communal land. Uncertainty over how to deal with business and enterprise development in communal areas in such a way that benefits both the local community and business interests. | Consider the immediate development of the IPILRA regulations to provide for a local land records system, and align these with other legislation that affects land use, such as NEMA, the MPRDA and SPLUMA.<br><br>Investigate options for accommodating business developments on communal land, with special attention given to the ownership and decision-making structures and systems; and how to share and distribute income, profits and other benefits from such businesses. | In the short term, as part of the process of developing a land records system. |
| 18. Conflict over who should benefit from the proceeds of mining in communal areas in situations where mineral resources are found. | Engagement with the DMR on clear policy development within the framework of current legislation, "South Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof" (preamble to MPRDA). | Commence immediately. |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| 19. Uncertainty over which procedures to use for recording and administrating public infrastructure projects and community facilities (clinics, schools, police stations, post offices, etc.) in communal areas. | Make use of way-leave agreements, as an interim mechanism to record the position of infrastructure investments and to obtain the necessary approvals for such interventions. Way-leave agreements should be recorded and be publicly available from the land information system.<br><br>Expropriation of rights in land is permissible in terms of the IPILRA and when desirable for public infrastructure. This is currently being done in Sterkspruit in the Eastern Cape.<br><br>Allow Occupation and Use Rights (OUR) certificates that form part of a locally administered lands record system to be used as evidence of tenure security, as an alternative to the more complex and expensive requirement of land surveys and registration. | In the short term, pilot the use of way-leave agreements and expropriation.<br>In the medium term, after developing legislation for a locally administered land records system, use this system for rural development projects. |
| 20. Uncertainty over the implications of a locally administered land records system for those who are eligible for housing subsidy approvals. | Review the "Rural Housing: communal land" chapter of the Housing Code, taking into account the implications of a locally administered land records system for those who are eligible for housing subsidies. Use OUR certificates as evidence of tenure.<br><br>The implications of "family" title in relation to qualifications for housing subsidies will need to be investigated and guidelines developed and tested. | Undertake the review in the short term, incorporating the findings in the medium term into any review process for the Housing Code. |
| 21. It may be unlawful for the state to continue building housing without any public land administration system in place to enable accounting for public expenditure. | Introduce locally administered land records systems in all new state-funded "rural housing" projects or any housing project undertaken on communal land. | Immediate and ongoing. |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| 22. Some subsidised rural housing projects are criticised for being built in areas where housing is not a community priority and where there are limited socio-economic opportunities for the people living there. | Ensure that municipalities only approve new rural housing subsidised (or any other housing subsidised projects) in communal areas if such projects form part of the municipalities' SDFs, housing sector plans and IDPs.<br><br>Develop guidelines for municipalities to assist them in the production of these plans, which determine where rural housing and settlement projects should be located.<br><br>Introduce proactive land identification and assembly programmes in communal areas, as part of a broader land assembly strategy of municipalities that is linked to their SDFs and IDPs. This will enable municipalities to get ahead of the demand for land and ensure development occurs in appropriate locations.<br><br>Allow for settlement approaches on this land that are more incremental, such as the Managed Land Settlement approach that Afesis-corplan and others have motivated. [30] | Immediate and on-going. |
| 23. Land claims in communal areas often lead to confusion and uncertainty around development in communal areas. | This requires the Chief Land Claims Commissioner to engage with each claim to arrive at case-by-case solutions in order to build a set of precedents. | On an ongoing basis, but highlight the need to disallow restitution claims from hampering land records processes. |



[30] See http://www.incrementalsettlement.org.za/ accessed 6 November 2015.

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| 24. When communal land is privatised, private landowners are able to capture the full value of any land value increase due to rezoning, etc., with limited benefits accruing to the original communal landowners. | Conduct additional research into how increases in the land value could benefit land rights-holders and the general public and/or fiscus. There is precedent in existing legislation, such as the Cape Provincial Ordinance (No. 33 of 1934), which is still applicable in the towns in the Transkei. | Conduct research in the short to medium term and, in the medium to long term, feed the findings into broader planning and land finance legislation. |
| 25. The Ingonyama Trust Board has issued or is considering issuing residential leases to households living on ITB land, which can be argued is a weaker form of tenure then that found under the IPILRA. | The Ingonyama Trust Board must be engaged and be part of a process of formulating a uniform national framework for land administration. There appears to be a backlash against the Board for extracting and consuming rental incomes. | Start as soon as possible. |
| 26. In many areas where quitrent applies, PTOs have been issued over quitrent title. The records of quitrent title have not been kept up to date. | Given the complexity of the problems with quitrent, a set of specific recommendations would need to be formulated with respect to districts/localities where quitrent rights exist in communal land areas. The recommendations would be in addition to, but not necessarily different from, the recommendations in this report. This is an outstanding issue which is largely specific to the Eastern Cape. | Once basic land records systems are established in an area, develop skills and capacity to investigate and resolve such conflicts. |
| 27. Very weak enforcement of the complex array of legislation governing development and resource use in coastal and forestry areas. | The only sustainable control method for forestry and coastal areas is if communities are supported to help manage and control these areas themselves. Local environmental management must be encouraged within national frameworks and linked to the extension of SPLUMA. | With the roll-out of SPLUMA. |

| Challenge | Recommended intervention | Timeframes |
|---|---|---|
| Administrative | | |
| 28. Government sometimes erroneously uses the state land release policy in communal lands. | Raise awareness within government that communal land is state trust land and therefore is not subject to the procedures outlined in the state land release policy but to those in the IPILRA and the Interim Procedures. | **Immediate and on-going.** |

## 5.3 Addressing land administration in communal areas in phased manner

All the recommendations outlined in the previous section cannot be implemented at once, but will need to be introduced in a phased-in manner.

### 5.3.1 Phase 1: Immediate – up to one year

- Bring stakeholders affected by the challenges in communal areas together to share information on these challenges and open up space for them to agree on a way forward. This conversation should focus on short-, medium- and long-term national goals for land administration on communal land. They should also be translated into provincial goals.
- Address the core challenge of the administrative void, by agreeing to the implementation of a locally administered land records system and urgently obtaining a political agreement within government.
- Conduct an appraisal of the location and the state of land records in each municipal area. Once the appraisal is available, develop a strategy and a plan to rescue existing land records in various ways, including safe storage and/or digitisation of data.
- Undertake research on how to augment and align the IPILRA with other land use legislation. The process of augmenting IPILRA should be two-pronged: (i) focus on the main legislation (IPILRA) drawing on the UN FAO's Voluntary Guidelines on Responsible Governance of Tenure[31] which South Africa has endorsed; (ii) develop a set of regulations using the Interim Procedures Governing Land Development Decisions as a basis.
- Identify the full spectrum of old order legislation and undertake in-depth research to identify which elements need to be repealed and which need to be carried forward into new legislation.
- Undertake preliminary research and planning for a range of pilots in different provinces, and put in place mechanisms for coordinating pilots between different provinces.
- Hold national and provincial workshops and conferences involving government, rural



31 see http://www.fao.org/nr/tenure/voluntary-guidelines/en/ accessed 28 October 2015

communities, traditional leaders, civil society, academics and development practitioners to reflect on and learn from past local and international experiences with locally administered land records systems.

### 5.3.2 Phase 2: Short term – 1– 2 years

- Adopt amendments and a set of regulations for the IPILRA that introduce a locally administered land records system.
- Undertake a series of geographically limited land administration pilot projects that highlight the linkages between the IPILRA, SPLUMA, NEMA and the MPRDA in dealing with simpler or standard cases, difficult or special cases, stable situations and fast-changing situations.
- Develop a capacity-building and training programme for land administration personnel through partnerships with institutions of higher learning.
- Draw lessons from these pilots and share and replicate best practices.

### 5.3.3 Phase 3: Medium term – 2–5 years

- Initiate the process of consolidating lessons from the pilots and step up the incremental roll-out of the pilots.
- Step up the training of new land administration personnel.
- Based on the pilot projects, roll out further phases of the locally administered land records system.
- Work on further laws and legislation as required, such as a more comprehensive Communal Tenure Act that can be additionally tailored to forms of social tenures.
- Develop adjudicatory capacity from pilots (what evidence are people using to define their rights within and across families) and extrapolate principles from these, and develop a set of adjudicatory principles (ideally to inform an adjudication law) to guide both land rights-holders and land administration officers in weighing up rights.

### 5.3.4 Phase 4: Long term – greater than five years

- Universally implement the locally administered land records system.
- Continue to implement the laws and regulations as outlined in the IPILRA and SPLUMA, decentralising to municipalities many of the functions associated with the locally administered land records system
- Implement any new social tenure or other acts as developed by new legislation.

# 6 Conclusion

This report proposes that key decision-makers and informers involved in communal land administration undergo a mindshift in thinking. This shift should be from focusing exclusively on transferring communal land to traditional leaders (mainly), Common Property Institutions (to a lesser extent) and private individuals, to recognising and accommodating existing forms of social tenure. This can be achieved by introducing a nationally constituted and locally administered land records system that sits alongside and complements the existing land registration system (that involves the Surveyor General's office and the deeds registration system).

Land administration is a cross-cutting issue that involves land tenure, land transfer and succession, land custodianship, land adjudication, spatial planning, land use management, land taxation and fees, and land enforcement. Consequently, finding a way forward for land administration in communal areas cannot be left to one department. The DRDLR, DHS, COGTA, DEA and National Treasury, among others, all need to come together and present their respective perspectives and suggestions on how they could contribute to addressing the land administration challenges found in communal areas. An agreed way forward needs to emerge from this collaborative engagement, including commitment from all parties involved to work together to establish and incrementally roll out a locally administered land records system.

The chaotic and unregulated land administration system in communal areas cannot be allowed to continue. The introduction of a nationally constituted and locally administered land records system (preferably administered at the magisterial district level) will go a long way to satisfying government's constitutional mandate to secure the tenure rights of those living in communal areas. When this happens, residents in communal areas will finally be able to call themselves full and free citizens of South Africa.

# 7 Annexures

Separate annexure documents deal with the following issues:

- **Annexure 1:** Terminology and definitions
- **Annexure 2:** Legacies, current legislation and policies
- **Annexure 3:** Issues of jurisdiction on state trust land in the Eastern Cape Province
- **Annexure 4:** Perspectives on land rights and inheritance
- **Annexure 5:** Locally administered land records system
- **Annexure 6:** International and local experience with land administration
- **Annexure 7:** Interim Procedures Governing Land Development Decisions which require the consent of the Minister of Land Affairs as Nominal Owner of the Land, as amended
- **Annexure 8:** Eastern Cape Planning Commission Diagnostic Study on Land Administration (extracts)
- **Annexure 9:** List of interviewees
- **Annexure 10:** Reading list

These annexures can be found at www.thehda.co.za/information

# Notes

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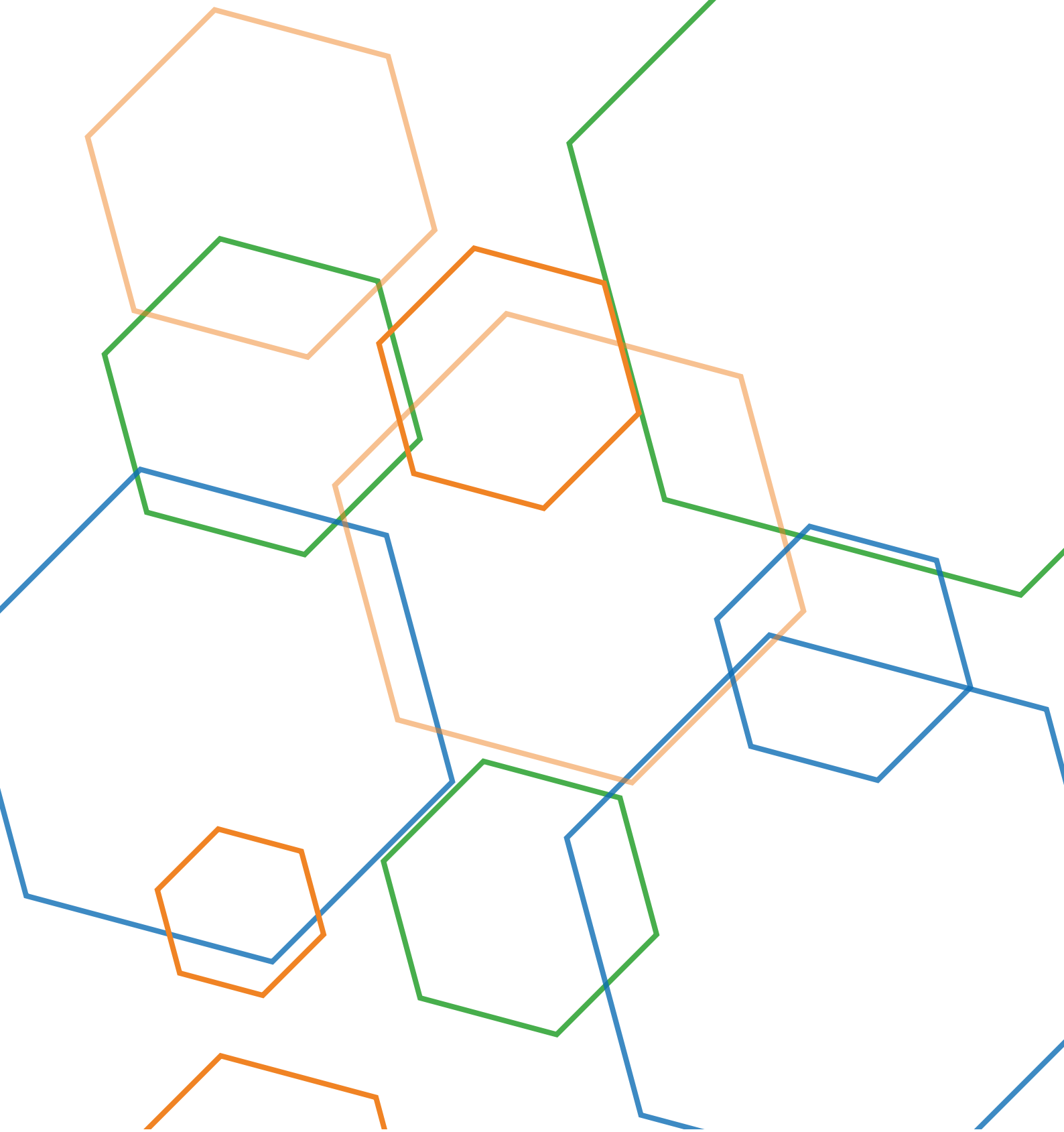

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