Communal Land Tenure Policy

(CLTP)

Land Reform Policy Workshop

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ACRONYMS

CRDP  Comprehensive Rural Development Plan
CLTP  Communal Land Tenure Policy
COS   Council of Stakeholders
CPA   Communal Property Association
DRDLR Department of Rural Development and Land Reform
EBF   Emerging Black Farmers
HOA   Home Owners’ Association
LMC   Land Management Commission
NDP   National Development Plan
TLGFA Traditional Leaders Governance Framework Act
MTSF  Medium Term Strategic Framework
DAFF  Department of Agriculture, Fisheries and Forestry
RADP  Recapitalization And Development Programme
RIDFF Rural Investment and Development Finance Facility,
SDF   Spatial Development Framework
SDF   State Domestic Facility
RDF   Rural Development Framework
NARYSEC National Rural Youth Service Corps
SPLUMA Spatial Planning and Land Use Management Act
A. CONTEXT AND BACKGROUND

1. The Legacy of the 1913 Natives Land Act

The root of the land question today arises out of the pervasive process of land alienation that dispossessed the majority of South Africans of their land over the past few centuries. 2013 is the centenary of the 1913 Natives Land Act, which was the first of a number of discriminatory laws that reinforced the massive dispossession of land from black South Africans. The formulation of this policy forms part of Government’s undertaking to review all land reform policies as enunciated in the 2011 Green Paper on Land Reform, with a view to address issues relating to historical exclusion, equitable access to land, and participation in the optimal utilisation of land; as well as to address challenges relating to food access at both household and national levels to bring about household food security and national food self-sufficiency.

The Natives Land Act (No. 27 of 1913) became a spring of major challenges related to land reform in the former homelands. Directly related to this piece of legislation are a series of historical exploitations and land dispossession that were later entrenched with the advent of apartheid’s homeland system. Subsequent to the promulgation and execution of the 1913 Act, various pieces of racially discriminatory legislation empowered the state to both appoint and remove traditional leaders at will, to determine their jurisdictions and related territorial boundaries, and to forcibly relocate entire communities in the name of “betterment planning”. Such gross distortions to the traditional and customary systems in communal areas, initiated by colonialist and apartheid regimes, have posed enormous socio-economic challenges in today’s communal areas including overpopulation, underdevelopment, land scarcity, tenure insecurity, environmental degradation and an absence of democratic and harmonised systems of governance. The destruction of the social and economic fabric of the lives of millions of households in the former homelands is part of the democratic South Africa’s unpleasant legacy from the past that must be overcome. This Communal Land Tenure Policy (CLTP)\(^1\) seeks to address the above issues, which affect one third of South African citizens who currently reside in the country’s communal areas.

2. The Advent of the Bantustan System

The present day challenges facing people living in the communal areas are largely a product of 20\(^{th}\) century racially discriminatory legislation that confined 16 million people into less than 15 per cent of South Africa’s least arable land surface (as demarcated for African occupation by the 1913 Natives Land Act and 1936 Native Trust and Land Act).\(^2\) The African population was divided into supposedly ethnic nations each with its own homeland and prospect of independence supposedly in keeping with

\(^{1}\) Hereafter referred to as CLTP or Policy

The majority of South Africans living within the former homelands are victims of massive forced removals and ‘betterment schemes’ resulting from these laws and subsequent repressive legislation (including the Group Areas Acts of 1950 and 1957, the Natives Resettlement Act of 1954, the Native Trust and Land Amendment Act of 1954, and the Bantu Laws Amendment Acts of 1952) promulgated by the National Party under its model of Separate Development.

The height of this discriminatory legislation was the Promotion of Bantu Self-government Act of 1959. This Act established the boundaries of ten supposedly distinct ethnic nations, called “Bantustans” or “homelands”, created by the apartheid regime to ensure a sufficient source of cheap labour for the white-dominated economy. The 1959 Act was followed by the Bantu Homelands Citizens Act, 1970 (Act No. 26 of 1970), which provided for the removal of South African citizenship from Africans and enforced citizenship of a homeland. The discriminatory legislation named above resulted in the forced removals of more than 3.5 million people from their homes and ancestral lands.

With ten times the population densities of white settlements during apartheid rule, numbers of Africans living in the former reserves exploded from 4.5 million to 11 million between 1960 and 1980. The continued and intense increase in population placed extreme pressure on already resource-depleted lands, making it virtually impossible for homeland residents to sustain subsistence agriculture and livelihoods. The unceasing overcrowding also exacerbated pressure on public services and infrastructure, and capture of resources by elites within the ten homelands further deprived the majority of residents of opportunities to meet their basic needs. Along with other forms of forced removals, betterment planning, implemented in over 70 per cent of the homelands by the 1970s, interrupted customary forms of land allocation and management which, because these provided flexibility in land use, were much more conducive for agricultural production and environmental conservation.

While the tradition of tribal and communal tenure systems were largely retained within the reserve areas, the nature and form of these institutions were diverse and complex. In some parts of the country there was a continuum of communal tenure where rights to occupy and use land were allocated by family, clan and tribal institutions. In some cases these systems were democratic and required accountability in order for leadership to have legitimacy. Here, traditional leadership served as the forefront of the struggle against the erosion of African rights historically and during the second half of the twentieth century.

However, in other cases, as noted above, some traditional or tribal institutions were corrupted by the appointment of chiefs and headmen who were prepared to collaborate with the colonial and later apartheid administrations. In areas such as the Eastern Cape, where betterment schemes were introduced in the 1950s, such headmen assumed powers to allocate newly created allotments and camps where

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3 Department of Communications, 2013, About SA History, available online: www.gov.za
previously such tenure and composite user rights were allocated by communal tradition. In many areas, traditional rights to residential plots were replaced by Permission to Occupy (PTOs) allocated by Chiefs and headmen.

It followed that ownership of more than 87 per cent of the land in the country lay with whites, secured by deeds registration with detailed servitudes and restrictions, and detailed cadastral descriptions. The remaining 13 per cent consisted largely of land in the nominally independent homelands and other areas under diverse traditional communal tenure systems with only the outer boundaries of the areas surveyed. As such, the land rights of communal area residents are uncertain due to the mosaic of landholding patterns and land tenure systems governed by different laws and authorities that exist in the former reserves.

The homeland system was used in large part to legitimise the failure to provide basic economic and social services to Africans. With a few exceptions, the homeland administrations had virtually no resource base of their own, and the central state provided them with very limited subsidies. Separate Development policies before 1994 meant that public infrastructural investments and resource transfers to the homelands were limited mainly for the maintenance of law and order and the reproduction of cheap labour. Thus, apartheid spatial patterns of industrial and infrastructural development reinforced the restriction and internal disarticulation of agricultural and rural development as well as stunted utilisation of land for minerals and natural resources exploitation in the former reserves.

The reserves system has had far-reaching political and social implications. The apartheid state aimed to rule indirectly through handpicked leaders. In the process, it sponsored socio-political systems that were profoundly corrupt as well as highly oppressive, particularly to women and youth. At the same time, the homeland states were defined in ethnic terms in an effort to divide and rule exploited Africans. As a result of the apartheid regime’s policy of Separate Development, the communal areas are in a state of extreme overpopulation, environmental degradation and underdevelopment. They carry the country’s highest rates of unemployment, lowest qualities and availability of public services, high incidents of transmittable diseases and crime rates, inadequate food supplies, lack of economic opportunities and overall destitution.

Furthermore, the official land tenure system in the former reserves is presently ineffective and mired in a number of development challenges. Most occupants do not have clear legally enforced rights to land and so they have largely been ignored with regard to decision-making processes concerning the land. The imperative therefore exists for such rights to enjoy formal protection, and support, so that occupants have legally recognised claims to land and resources, which can be used more effectively to realise national development objectives.

3. The Constitution

The context of all rural development and land reform policies is the 1996 Constitution of post-apartheid South Africa. Amongst the most pertinent sections of the Constitution are the following:
• Section 25 (4) talks to national interest and states that “For purposes of this (a) the public interest includes the nation’s commitment to land reform and to reforms to bring about equitable access to all South Africa’s natural resources”.

• Section 25 (5) enjoins, “The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis”.

• Section 25 (6) upholds that “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 comparable redress”.

• Section 25 (8) provides that the state takes “legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from this section is in accordance with the provision of section 36 (1)”.

• Section 36 addresses the limitations of rights:

  (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

    a. the nature of the right;
    b. the importance of the purpose of the limitation;
    c. the nature and extent of the limitation;
    d. the relation between the limitation and its purpose; and
    e. less destructive means to achieve the purpose.

  (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Originally, the 1927 Native Administration Act and the 1952 Bantu Laws Amendment Act made provisions that empowered the State President to appoint chiefs and headman, as well as to define their distinct jurisdictions and charge chiefs with the responsibility of the first tier of local government. The 1996 Constitution and subsequent policy frameworks overturned this legislation by introducing wall-to-wall local government, establishing a democratic system of governance that requires all three spheres of Government to carry out powers and functions “which are governmental in nature”, while traditional leadership institutions are expected to execute functions that are “customary in nature”. This conceptualisation of the role for traditional leadership is clearly outlined in Chapter 12 of the Constitution, which both recognises such institutions subject to the Constitution, while also stipulating that “national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.”
The constitutional clauses presented above clearly demonstrate Government’s positive obligation to address tenure insecurity in the former homelands. In addition, the state is mandated to address the severe underdevelopment and poverty characterising these areas as the Bill of Rights provides for rights to adequate housing, health care, sufficient food and water, social security (including social assistance), and to education. Furthermore, Chapter 12 of the Constitution lays the legislative framework for establishing a role in community development for traditional leadership institutions. However, as stated in Chapter 12, traditional authorities must operate within the confines of the Constitution, embracing principles of democracy and equality. This role is further elaborated on by the White Paper on Traditional Leadership and Governance as discussed in the next section.

4. The White Paper on Traditional Leadership and Governance

The White Paper on Traditional Leadership and Governance provides some policy guidelines that should be the point of departure for understanding the institution of traditional leadership in South Africa not as an institution of government, but rather as responsible for answering to communities’ needs; and the basis for drafting land tenure reform policies in the communal areas. It also provides clarity on relations to authority and responsibility of the state versus traditional councils. Indicated by the White Paper as well as the Constitution, the functions of traditional councils at a higher level are to: support municipalities in facilitating community involvement in development planning; communicate community needs to municipalities and other spheres of government; recommend appropriate interventions to government to bring about development and service delivery; promote indigenous knowledge systems for sustainable development; and participate in the development of policy and legislation at local level. As will be demonstrated, providing clarity around such functions of traditional leadership bodies and local government is a core aim of the communal tenure policy upon which many other envisioned outcomes are dependent.

5. The National Development Plan and the Medium Term Strategic Framework

Land reform within the context of the National Development Plan (2012) (NDP) is accorded the daunting task of ensuring that economic growth and integration is facilitated as an intended outcome of land and agrarian reform. Poverty alleviation and job creation are therefore key hallmarks that will measure the success of land reform. The NDP’s land reform proposals are aligned with the Medium Term Strategic Framework (2014-19) in terms of:

- Sustainable land reform (agrarian transformation);
- Improved food security; and
- Smallholder farmer development and support (technical, financial, infrastructure) for agrarian transformation.
In attaining its objectives of ending rural marginalisation, the NDP proposes a differentiated rural development strategy comprised of the following:\(^6\):

- Agricultural development based on successful land reform, employment creation and strong environmental safeguards. To achieve this, irrigated agriculture and dry land production should be expanded, beginning with smallholder farmers where possible.
- Quality basic services, particularly education, health care and public transport well-functioning and supported communities will enable people to develop the capabilities to seek economic opportunities.
- In areas with greater economic potential, industries such as agro-processing, tourism, fisheries (in coastal areas) and small enterprise development should be developed.

Chapter 6 of the NDP, which focuses on developing an integrated and inclusive rural economy, suggests that improved land use in the former homelands could enhance livelihoods for a significant number of people as well as contribute to further development in these areas. This is envisioned to occur through securing tenure for communal area farmers (especially women) by providing clearly defined property rights and working closely with traditional leaders to realise such; as well as furnishing support for commercial agriculture production for both successful farmers as well as on underutilised land. The NDP has singled out the land tenure system in communal areas as being inadequate for the security of credit and investment and, hence it considers this form of tenure a major obstacle to land development and agriculture within the former homelands. It thus considers addressing tenure insecurity, in collaboration with traditional leadership, in these regions crucial for achieving “integrated rural areas where residents will be economically active, have food security and access to basic services, health care and quality education”.\(^7\)

6. The Agrarian Transformation System

The Comprehensive Rural Development Plan (CRDP), conceptualized and approved in 2009, serves as the overarching policy trajectory and strategy for the DRDLR. Based on a pro-active participatory community-based planning approach to rural development, the envisaged outcome of the process is the creation of “vibrant, equitable and sustainable rural communities” and food security for all. This is underpinned by the following:

- Effective spatial integration, land use planning and regulatory systems which promote optimal land utilisation and production as well as effective land administration;
- Successful land reform (including secure tenure) that promotes agricultural development, increased production and food security;
- Infrastructure development to support access to quality services and economic opportunities;
- Enterprise development to stimulate the rural economy and create jobs;


- Agro industries sustained by rural markets and credit facilities;
- Human development through increasing and diversifying the rural skills base;
- Good governance and democratisation with emphasis placed on accountability and shared benefits in the transformation of rural societies; and,
- Human wellbeing and sustainable environment – taking cognizance of the rural conditions and the interaction between people’s wellbeing and the places in which they live for sustainability.

The strategy of the CRDP is three-pronged and includes Agrarian Transformation, which denotes “a rapid and fundamental change in the relations of land, livestock, cropping and community”; an integrated and strategically planned rural development programme; and an enhanced land reform programme. The ultimate goal is social cohesion and inclusive development of the rural landscape and economies. Agrarian transformation refers to the ‘rapid and fundamental change in the relations (systems and patterns of ownership and control) of land, livestock, cropping and community.’ The Agrarian Transformation System (see Figure 1 below) has four components including: addressing basic needs and required social infrastructure for communities, developing more equitable and improved land tenure systems, and provision of necessary economic infrastructure and inputs for successful agricultural production and livestock enterprises.
All of the components of the strategy link directly with the phases of the CRDP outlined to achieve the above intended outcomes:

- **Phase 1 - Meeting Basic Human Needs**: deals with building the person, the household and the community. The focus is primarily on dealing with basic human needs and providing the required social infrastructure for improved access to services, including access to clean water,
energy, decent housing, proper sanitation, education, etc. This phase will contribute significantly to food security, dignity and an improved quality of life for each rural household.

- **Phase 2 - Enterprise Development:** regarded as the entrepreneurial development stage which deals with the establishment of enterprises, including all sizes and forms of business initiatives, cultural ware and artifact, cooperatives and arts and crafts initiatives. Linked to the above, communities will be encouraged to participate in livestock and cropping value chain development.

- **Phase 3 - Light agro industries maintained by rural markets and credit facilities:** focuses on the development of different sizes and forms of rural industries, anchored by rural enterprises, investment, markets and credit facilities.

Effective implementation of these phases requires the mobilisation and organization of rural people into functional groups to effectively take charge of their own development, especially in identifying the most pressing needs of the community and perceived optimal ways to address these. Here an employment creation model has been developed in which selected community members participate in an expanded public works programme that requires employees to share half of all wages with their respective households. In all infrastructure interventions, coordination between government and private sector is crucial to ensure that maximum benefits accrue to rural communities.

Numerous core objectives of the CRDP including self-reliance of rural communities, local economic development, increased agricultural production, sustainable use of natural resources, inclusive rural participation in developed value chains and improved rural livelihoods are premised on the realization of democratic and equitable land administration systems and security of tenure for rural residents, including those residing in communal areas. The CLTP is closely aligned with the above objectives and guided by the CRDP and the Agrarian Transformation System components described above.
B. COMMUNAL LAND TENURE POLICY

1. Objectives

Communal Tenure refers to the systems that most rural African communities operate to express an order, ownership, possession and access to regulate use and transfer of land. While land was most often under the rule of chieftainship, anthropologists have pointed to the socially embedded inclusive character of tenure regimes in which access to land as opposed to control over, was emphasized. Communal property denotes a collectivist relationship between people and their shared land; usually rights to family garden plots and fields were decided at the household level and communal resources such as grazing land, water and trees were regulated by the chief in council.

This Communal Land Tenure Policy seeks to reform communal tenure to ensure security of land rights and production relations for people residing in South Africa’s communal areas. To achieve this, the central proposal of this policy establishes institutionalised use rights, particularly for households, and other users, which shall be administered either by traditional councils in areas that observe customary law, or communal property institutions outside these.

Thus crucial to realising its primary objective, this policy intends to engender transformation of formal authority relations, specifically, the role of traditional authorities and other land governance bodies in relation to that of households and the state. Through this transformation, which requires clarity around the respective roles and responsibilities of these parties, citizens shall be empowered to play an active role in land-related decisions, and also space will be created active public participation in community development.

The CTLP is that of Communal Tenure with Institutionalized Land Rights. The envisaged objectives of the CLTP seek to advance the overarching goals of the CRDP, which include (amongst others) effective land administration, spatial integration and land use planning; enhanced tenure security that enables agricultural development, increased production and food security; human, infrastructure and enterprise development that results in rural economic growth; and good governance and democratization. In advancing these central aims of the CRDP, the policy shall help realise the NDP’s goal of creating an integrated and inclusive rural economy.

Also closely aligned with the 2011 Green Paper’s stated objective of securing rights to land for all South Africans (and particularly those living in rural areas) through the envisioned four-tier system of land tenure, the Communal Land Tenure Policy aims to:

1.1 Strengthen the security of tenure of Communal Area households under traditional leaders, CPAs or Trusts, secure the rights and interests of more vulnerable citizens and enable household members to bequeath land to their children.

1.2 Clearly define authority and responsibility within the context of transforming the rural economy. In this regard, the following proposals are made:
(i) The Republic of South Africa, being founded on values that include human dignity and the supremacy of its Constitution, as one sovereign state, whose local sphere of government, the wall-to-wall municipality system, has been conferred with the power to exercise constitutionally prescribed legislative and executive authority, which must be exercised complimentarily with the roles that traditional councils must execute in specific spaces called communal areas.

(ii) In the context of communities observing systems of customary law, traditional authorities have the responsibility to deal with matters of custom, including those related to: customary land holding, facilitating input to policies, communication of community service needs, and practicing authority in matters of culture, social welfare and morality.

1.3 Place ultimate authority in communal area land in the state and, in the context of wall-to-wall local government, in the municipality, with traditional leadership institutions holding the responsibility of local administration over state land in their respective areas. This seeks to strengthen complementarity between the household sector, traditional sector, public sector and social sector through clarified roles and responsibilities regarding land-related matters in communal areas.

1.4 Ensure gender parity and the inclusion of youth and other vulnerable groups in enacting this policy, in both the CLTP’s targeting process as well as in the establishment of governance structures. Here all communal area residents shall be mobilised at the household level to actively participate in the rural economy.

1.5 Institute tenure reform within a developmental approach built upon a land redistribution programme to complement land access and development, particularly in the traditional communal areas in order to decongest these areas and to create wider scope for land tenure reforms.

1.6 Establish institutional arrangements that seek to enhance, clarify and promote effective local administrative structures. This will involve clarifying roles between traditional councils, municipal councils, communal property associations, Trusts and other voluntary community institutions as well as household representatives. The policy seeks to create conditions that meet the basic prescripts and intentions of the Constitution and accordingly improve the customary or communal governance system. Furthermore, the policy seeks to promote complementarity rather than conflict amongst community sectors and entities. In instances where the different role players in communal areas are unable to reach an agreement, the proposed Land Management Commission (LMC) will arbitrate over land rights disputes.
1.7 Enact protective mechanisms to ensure communal residents do not lose land by whatever household or community economic venture they may enter.

1.8 Provide investor certainty, regarding who is responsible, where authority lies where and how decisions are made, in the interest of the community:

(i) Land will be protected against poor investment decisions.
(ii) The community will ideally benefit from a minimum of 51 per cent shares to the investment. This will be ensured by top up investments from the RIDFF.
(iii) For purposes of equitable management, employment income and share equity distinction will be made between those working for salaries, those working for wages and the overall share equity distribution to all the households when dividends are declared.

1.9 Provide recognition that the agency for change to agrarian relations rests with communities whereby, the household is:

(i) The unit of production;
(ii) The embodiment of the human agency by which all else is valorized (brought to bear as community development value);
(iii) A basis to fundamentally change relations to land, livestock and cropping; and
(iv) Informed by democratic and accountable decision-making based upon a substantive (household) rather than a numeric (individuals) decision quorum.

1.10 Promote both rights and responsibilities across all within communal areas, in the interest of rural economy transformation and growth. This will involve:

(i) Equitable access to benefits accrued to the communal area, its endowments and investments, and
(ii) Creating the basis for honoring payment of rates and taxes to municipalities.

1.11 Make provision for communal residents to actively participate in the process of spatially reconfiguring their areas, through state led spatial planning and land use determinations. This reconfiguration is intended primarily to: effectively plan the decongestion of communal areas and to protect natural resources; alleviate land hunger and land inequality by increasing land access and ownership for communal area residents through redistribution and managed restitution; and promote sustainable land use, and resolve the territorial segregation and dysfunctionality of most of the traditional communal areas as defined by their current boundaries.
1.12 Provide Social Solutions to Social Problems through informed, structured and facilitated deliberations as a principled practice to resolve the myriad of challenges facing communal areas and to mediate varying interests.

2. Envisioned Outcomes

The envisioned outcomes of the CLTP shall advance key outcomes envisaged by the Rural Development Framework (RDF), which include (amongst others) decongestion of communal spaces, gender equity in land governance structures and tenure rights, active public participation in community development (especially concerning youth), vibrant rural economies, decline in rural unemployment, household food and nutrition security, increased literacy and skills base of communal area residents, and an overall increase in the per capita income and well-being of the poorest 40 per cent of rural South Africans. In achieving these milestones, the RDF outlines a ‘Development Support System’ that consists of:

- A reformed communal tenure system which addresses unresolved tenure issues in the former homelands;
- A democratised rural administration system that promotes complementarity rather than destructive competition between all relevant stakeholders in communal areas as well as deals with gender disparities;
- A rural development agency to fund and oversee development projects;
- A Rural Investment and Development Financing Facility to play the role of investor, financier, funder, manager, advisor, and partner to government and social partners in rural development projects;
- The National Rural Youth Service Corps (NARYSEC) to engage rural youth in community development work; and
- The Animal and Veld Management Programme that provides necessary support for soil rehabilitation as well as re-greening and decongestion of rural spaces; and
- A variety of programmes to revitalize rural towns and villages.

Thus, closely aligned with the aims of these interventions, the envisioned outcomes of the CLTP aimed at addressing the land-related issues facing the communal areas include (amongst others):

2.1 Strengthened land rights for all communal area households and residents, especially those more vulnerable to tenure insecurity including women, youth and the poorest members of society;

2.2 Clear, effective and democratic land governance in which the state (in this instance local government) holds authority over land rights and land use while Communal Property Associations elected executives, trustees and traditional councils take responsibility for fair and equitable management of land and land-based resources;

2.3 Active promotion of informed and facilitated social solutions to social problems and the provision of enabling legislation and other institutions to affirm and codify these consensual solutions as well as the release of requisite resources to advance such;
2.4 Decongestion of traditional communal areas through application of a new developmental approach built upon a complementary land redistribution and restitution programmes that expand the scope of tenure reforms and that broaden access to land beyond the confines of the 13 per cent area;

2.4 Positioning and tapping into resources of the National Infrastructure Build Programme and its various Strategic Integration Projects to enhance infrastructure and economic development;

2.5 Investments into the + 1 300 000 hectares of fallow state agricultural land and a number of irrigation schemes and non-agricultural economic opportunities (tourism potential; mining potential and forestry potential etc) to ground the agrarian transformation strategy towards the development of these rural areas;

2.6 An institutional reconfiguration of local land administration institutions that advances overall social cohesion and ensures democratic land allocation procedures which promote equitable access to land and its use across gender and class;

2.7 Sustainable mechanisms to prevent the loss of land by communal area inhabitants through foreclosures, reckless investment, speculation and other means of dispossession with the state, ultimately, reserving the “right of first refusal”; and

2.8 Economic transformation engendered through the provision of equitable land rights and fulfillment of associated service functions, duties, the exercise and acknowledgement of authority, and responsibilities by all communal Area stakeholders.

3. The “Wagon Wheel” Model for Communal Tenure

In order to realise the intended outcomes, the CLTP bases its reforms on the 2011 Green Paper’s suggested land tenure system, which can also be illustrated through the “Wagon wheel” concept. This model of communal tenure is developed around traditional forms of African tenure systems that were in place prior to their co-option and distortion by colonial and apartheid governments. The model is illustrated below in two versions: Figure 2(a) applying to conventional traditional communal areas that observe customary laws and Figure 2(b) designed for non-traditional communal areas. In the former instance, land was most often under the rule of a chieftainship, yet the socially embedded inclusive character of such tenure regimes and access to land (as opposed to control over) was inclusive and based on accepted membership to a group. This varied depending on the individual’s status within the social unit. Usually rights to family garden plots and fields were decided at the household level, while communal resources such as grazing lands, water and trees, were regulated communally.

Unlike the areas that are today considered “communal” (the former land constrained homelands), land was plentiful and overcrowding was not a problem, and mixed tenure regimes existed depending on geographic location and clan identity. Land ownership was defined in terms of user rights and not

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exclusive ownership rights, while the traditional authority was vested with entrusted ownership over the community’s land, and the concomitant responsibility of land distribution.

In terms of customary land allocation, the traditional leader generally distributed land parcels to headmen who, in turn, distributed the land to households. The household head had the responsibility of distributing the land among household dependents. In principle, all members of the community could claim rights to land. A traditional leader or his headmen allocated land to an individual on a semi-permanent rights basis (the only real limitation is that the land could not be sold) for agricultural and residential purposes, while land for grazing and hunting remained a communal resource. This model of customary tenure is aptly illustrated in the “Wagon wheel” concept as demonstrated in the figures found below and on the next page.

Figure 2 (a)

![Diagram of communal tenure model]

Figure 2 (b)

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In order to reconstitute the deteriorated accountability of traditional community structures to the communities and households they service as found in original forms of African tenure, the “Wagon Wheel model” for communal tenure reform, emphasizes that, these institutions are responsible for land administration as outer boundary title holders.

The innermost circle located in the middle of the Wagon Wheel suggests a partnership between the municipality and the traditional authority. The traditional authority administers the land and has the responsibility to ensure compliance is met based on the household’s decisions, while the municipality provides for sector plans, integrated development and spatial plans. These are accompanied by by-laws that determine land use as well as norms and standards. Both support and co-govern public private partnerships in communal areas based upon decisions made through substantive quorums by the community. In the context of institutionalisation as determined by the Constitution and wall-to-wall municipalities, local municipalities (and by extension democratically elected governments) have executive authority over assigned responsibility areas. With respect to the 51 per cent share equity from corporate investment, the proceeds of this investment will be equitably shared in the interest of business growth and the development of the community and households. This will be incentivized and co-managed through an Investment Development Trust and/or Rural Investment and Development Finance Facility or another appropriate investment model or instrument, supporting such areas.

The second circle in the Wagon Wheel represents the household level, which is the basic unit of production and implies clear allocation of land to each household. In addition, the household as the basic unit of production holds specific roles and responsibilities constitute another focal point of targeted intervention in the CLTP. For their part, households are responsible for playing active roles in ensuring
effective land governance as well as paying taxes and rates to local municipalities for service provision and complying with by-laws. This responsibility is further incentivized by recognition of its authority; the affirmed and formalized rights to the household lands and the commons as well as substantive decisions on the use of natural resources endowments to the benefit of all.

Finally, the outside circle indicates the commons, consisting of communally owned areas designated, well-planned and efficiently managed for economic development and infrastructure investment. The traditional authority (and CPA Executives, where applicable) are vested, throughout this area, with the responsibility of administering the land and related resources on behalf of the households. Routine meetings to determine use, account for progress and substantively decide on the way forward will take place at least three times per year and annual reports to Parliament will be required on how governance is improving and equitable development being advanced.

Section 5 of this policy document details proposals on how the varying land uses will be institutionalized.

4. Correlation between Clear Roles and Responsibilities with Rural Economy Transformation

The “wagon wheel model” system offers much potential not only for strengthening land rights and advancing aims of democratic and equitable land allocation, but also promotes complementarity between land administration bodies, Government and citizens. In addition, this system completes the circle of land rights, authority and responsibility on the one end, production discipline, household food security and a basis for investment on the other and collectively, the overall rural economic transformation these engender. Such rural economic transformation entails both the significant redistribution of land, the securing of land rights, as well as the restructuring of communal area economic space and socio-political relations in order to establish a conducive environment for ‘accumulation from below’ through multiple forms of production systems, activities and throughput. This requires communal area residents to not only enjoy sufficient access to land (and the use of such property as collateral for bank loans), but also access to various infrastructure (for irrigation, transport, communications etc.), equipment (agricultural inputs and tools), markets, and support services (extension training, business management etc). The institutional reforms associated with traditional authorities and Communal Property Executives on the one side and local municipalities, national land reform and rural development agencies, on the other are key in this regard.

The diagram below seeks to further illustrate the correlation between the authority of the state and the administrative responsibility of the governance structures (Traditional Councils, CPA’s and Trusts holding land in trust of the community). At the base of these two are the “voters”/ communities and households to which investment and development is targeted. The households have rights and responsibilities and duties (enshrined in the Constitution) and require services and development opportunities. Through active and responsible citizenry the state becomes more informed about the needs of communities and made more capable in its communications planning, service delivery and its realization of outcomes envisaged by the NDP. At the second level (see green box), traditional
authorities, CPAs and Trusts are tasked with the administrative responsibilities associated with communal area land. Third, at the topmost level, the ultimate authority over land in communal areas rests with the state as mandated by the Constitution and relevant legislation. These respective roles and responsibilities, and authority, are elaborated upon in section 6.

**Figure 3**

5. Institutionalized Use Rights

Strengthen the security of tenure of communal areas through institutionalized use rights by households to enable:

- Household members to have clear rights in land allotted and use of the commons as well as to bequeath land to their off-spring and to use their land as collateral for commercial transactions;
- Households to play an active role on how land is distributed, used and allotted to investors;
- Restrictions on foreign land and concentrated land ownership;
- Democratic decisions on redistributing and use of land divested from state; trust land, as well as land acquired by the state from private holders of large tracts of land adjacent to communal areas; and
- Institutionalization of various systems and rights and imposition of lower band regulations for Agricultural Land Holdings in communal areas for purposes of economic viability and environment sustainability.
Redefine and reconstitute the communal areas: this includes the surveying and registering of all lands situated in communal areas in accordance with traditional land tenure principles in the case of traditional communal areas. Recognition of household land and land use rights rather than freehold title shall be the objective.

6. Roles and Responsibilities: State, Governance Structures (e.g. Traditional Authorities, CPAs) and Households

At the core of issues pertaining to communal land tenure remains the matter of authority, responsibility and constraints to their realisation. First, as stipulated in the Constitution and subsequent policy frameworks, the ultimate authority over land rights and land use in communal areas is vested in the State, in which wall-to-wall municipalities hold executive authority over their assigned respective areas. The Spatial Planning and Land Use Management Act No 16 of 2013 (SPLUMA), which aims to enable municipalities to execute their role in development within a uniform, effective and integrated regulatory framework and in a manner that promotes the principles of equity, co-operative governance and sustainable use of the land, will prescribe how land in communal areas is utilised and managed.

Furthermore, the administrative responsibilities associated with communal area land rests with traditional leadership councils in areas that observe customary law, or CPAs or Trusts outside of these areas. As outlined in the White Paper on Traditional Leadership and Governance, such responsibilities include (amongst others) assisting local government in motivating community involvement in development planning, informing municipalities of community needs and suggesting suitable development interventions, and incorporating indigenous knowledge into development initiatives. Here, the distinction between authority (which belongs to Government) and responsibility is crucial as many of the constraints discussed in section 2 can partially be attributed to lack of clarity on roles, responsibility and jurisdictional scope that underpins the various structures. Thus, it is emphasised here that traditional authorities (CPAs, Trusts) are structures tasked with the aforementioned duties, as mandated by the Constitution.

The third group of stakeholders, represented in the blue box in Figure 3, consists of households, who are conceptualized as the basic units of production as consumers of goods and services, ratepayers and voters. As discussed previously, households are responsible for active citizenry in which they must not only pay taxes and rates to local governments as well as comply with by-laws, but also hold land administration bodies accountable, thus safeguarding their right to effective and democratic land governance. In addition, households must engage in sustainable land use practices. In order to fulfill such responsibilities, households require certainty in terms of tenure. Secure tenure must be perpetuated by law so that it can be used as collateral to access credit and willed to future generations. If a household desires to transfer land rights, they will be entitled to compensation for land-related investments rather than the land itself, which serves to upgrade use rights as well as protects the land.

As shown in Figure 3, complimentary relationships should exist between local governments and communities in which the former provides efficient services (i.e. water, housing etc.) while the latter pays rates for such. This collaboration is crucial if municipalities are to perform their tasks effectively.
Thus, in order for rural transformation to occur in communal areas, we need a capable state supported by an active citizenry as South Africa’s democracy is not only representative but participatory in nature. Active citizenry and social activism is necessary for democracy and development to flourish.

This approach further advances the National Development Plan assessment on the need to forge an active citizenry to strengthen development, democracy and accountability. The state cannot merely act on behalf of the people – it has to act with the people, working together with other institutions to provide opportunities for the advancement of all communities.  

Citizens have the right to expect government to deliver certain basic services, and to hold leaders accountable for their actions. They also have responsibilities to other citizens, including mutual respect, tolerance and abiding by the laws of the land. Leaders throughout society have to balance the power they hold with responsibility, including listening to and tolerating different and diverse views, promoting social cohesion and working together to resolve problems. Making the plan work will require a complex interplay of actors and actions, and progress in any one area is almost always dependent on progress in another. Given the aforementioned, and as stated previously, the fundamental principle underlying the Communal Tenure Policy is that of complementarity rather than destructive competition between the household sector, traditional sector, public sector and social sector.

Table 1 on the following page seeks to further illustrate the roles and responsibilities of all stakeholders including the municipality (State Authority), Traditional Authority (or governing structure in the form of a CPA or trust) and the community/household.

---

<table>
<thead>
<tr>
<th>STAKEHOLDER</th>
<th>FUNCTION</th>
<th>AUTHORITY</th>
<th>RESPONSIBILITY</th>
<th>CONSTRAINTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>MUNICIPALITY</td>
<td>• Spatial planning and land use management.</td>
<td>• Establish Service Standards and By-Laws and Enforce them.</td>
<td>• Provide quality and reliable services.</td>
<td>• Poor Rural revenue base.</td>
</tr>
<tr>
<td></td>
<td>• Provision of basic services and essential infrastructure.</td>
<td></td>
<td>• Conduct genuine participation rather than compliant consultations.</td>
<td>• Reliance on equitable share.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Collaboration.</td>
<td>• Poor skills and human resources.</td>
</tr>
<tr>
<td>TRADITIONAL</td>
<td>• Local land administration and governance.</td>
<td>• In the area of custom and tradition.</td>
<td>• Community involvement in decision-making.</td>
<td>• Weakened rural municipalities.</td>
</tr>
<tr>
<td>COUNCIL</td>
<td>• Facilitate community involvement.</td>
<td>• Participatory Land Administration.</td>
<td>• Partaking in municipal processes.</td>
<td>• Historic norm of performing local service functions.</td>
</tr>
<tr>
<td></td>
<td>• Communicate community needs.</td>
<td>• Community and household conflict management.</td>
<td>• Facilitating access to services from government.</td>
<td>• Inherited leadership rather than elected and risk of paternalism towards</td>
</tr>
<tr>
<td></td>
<td>• Recommend appropriate interventions.</td>
<td>• Indigenous knowledge.</td>
<td>• Upholding By–laws.</td>
<td>subjects.</td>
</tr>
<tr>
<td></td>
<td>• Promote sustainable development.</td>
<td></td>
<td>• Participatory land administration.</td>
<td>• Associated challenge with accountability action.</td>
</tr>
<tr>
<td></td>
<td>• Participate in development programmes of government.</td>
<td></td>
<td>• Promoting good governance.</td>
<td>• Subtle competition with municipalities.</td>
</tr>
<tr>
<td></td>
<td>• Participate in policy and by-law development at local level.</td>
<td></td>
<td>• Promoting collaboration and mutual respect with local government.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Manage community affairs according to custom and tradition.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Support to disaster management.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Perform tasks assigned by government in terms of the TLGFA.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>COMMUNITY</td>
<td>• Participate in local affairs and municipal structures as active citizens.</td>
<td>As rightful owners of land they are decision makers on land rights, allocation, use and disposal.</td>
<td>• Pay rates and taxes.</td>
<td>• Poor access and quality of services.</td>
</tr>
<tr>
<td></td>
<td>• Champion development and rural economy transformation.</td>
<td></td>
<td>• Use scarce resources sparingly (e.g. water and electricity).</td>
<td>• Actual or perceptions of poor conduct of office bearers that discourage responsible behavior.</td>
</tr>
<tr>
<td></td>
<td>• Use allocated resources productively.</td>
<td></td>
<td>• Protect public goods.</td>
<td>• Fractures in moral societal fiber.</td>
</tr>
<tr>
<td></td>
<td>• Promote customary norms and rites in the family.</td>
<td></td>
<td>• Comply with By-laws.</td>
<td>• Weakened custom and cultural role of the traditional authority.</td>
</tr>
<tr>
<td></td>
<td>• Manage succession.</td>
<td></td>
<td>• Obey the law.</td>
<td>• Knowledge exposure and educational challenges.</td>
</tr>
<tr>
<td></td>
<td>• Support efforts at sustaining local peace and security.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
In addition, the communal land administration system should be rationalized in order to strengthen all user rights. Areas of conflict over land rights will thus be addressed with the LMC positioned to adjudicate landed disputes.

7. Strengthening Communal Area land administration system

To effectively implement the CLTP and to address the specific land administration deficiencies identified earlier, the state shall undertake various interventions to strengthen the land administration systems in communal areas, and in particular to reform the customary land tenure administration system as well as land administration under CPA’s and Trusts. The goal is to bring about the effective, democratic and participatory management of communal land rights and promote the CLTP within the framework of an integrated national land reform programme.

Specific interventions outlined earlier include: clarifying, recognizing and strengthening stakeholder roles and responsibilities in Communal Area land use and administration; designing clearly spelt out and codified roles, responsibilities, rules and procedures that govern the management of communal land within the context of customary law and practice as well as principles of good governance; supporting the creation of local land information systems, records and cadastre in communal areas to correlate with ‘informal’ records practices and systems; strengthening stakeholder participation in land administration processes; and facilitating the alignment and effective coordination of various structures at the different levels of government to enhance support to land tenure administration, land use planning as well as regulation and investment in the land in Communal areas.

8. The Rural Investment and Development Financing Facility (RIDFF)

The state shall adopt measures to promote significant productive and social investments into the communal areas, through a more effectively coordinated and planned programme of public and private investments based on a clearly articulated rural development strategy and specific plans for each communal area within a regional framework. Principles and objectives of the Spatial Planning and land Use Management Policies as well as opportunities from the National Infrastructure Plan and other economic, social and human development programmes of government will guide and inject development investments.

One component of the intervention shall be establishment of the Rural Investment and Development Financing Facility (RIDFF), which will cover rural areas, especially, but not limited to: the 23 priority districts; communal areas; land reform areas; commercial farms where farm workers and farm dwellers live; river valley catalytic areas; rural towns, growth centres and development corridors; and, Strategic Integrated Project areas. The RIDFF will work with groups that include public sector entities and departments from all spheres of government; business organizations, most especially value chains across all industries and sectors of the rural economy; labour unions; and community and civil society organisations. The RIDFF shall be an investor, financier, funder, manager, advisor, and partner to, especially, government and social partners that are contemplated in, among others, the 12 Outcomes of
the current Administration’s New Growth Path, the NDP, the Presidential Infrastructure and Coordination Commission and the CRDP. The strategic objectives of the RIDFF are *inter alia*:

- human and social capital development;
- development of competitive and sustainable value chain businesses and industries in all sectors of the rural economy;
- household food and nutrition security;
- development of social and economic infrastructure and services; and,
- increase in the per capita income and well-being of the bottom 40% of the rural population.

Establishment of the RIDFF shall be accompanied by substantial increases in state funding for social and economic infrastructures and investment projects in communal areas. Here communities shall enjoy a minimum of 51 per cent share equity from corporate investment. In addition to equitable share of resources, the benefits that accrue from investments and rural economic transformation will also take the shape of providing clarity around and ensuring the fulfillment of certain responsibilities of stakeholders involved (including the payments of rates and taxes to municipalities).

The DRDLR shall mobilise policy analyses to advocate for relevant reforms of key national economic and social policies in support of improved land utilisation in communal areas. The new interventionist and developmental approach of the South African state needs to harness redistributive land reform as a key measure for restructuring the national model of accumulation and social reproduction, including redirecting economic incentives and state investments towards new agricultural and rural development initiatives, should prioritise public investments within and direct capital towards the communal areas to enhance food security, access to agricultural markets, agro-processing value chains, as well as to promote productivity in various non-agricultural economic activities (e.g. broad-based tourism, local community forestry, green economy opportunities, mining etc).

Additionally, the state shall design policies to encourage the banking and credit institutions to embrace the country’s multi-form tenure system, and to adapt their credit supply practices to enable the holders of customary land user rights to gain access to credit, while preventing land alienation. This will include protection of the community rights to land and incentives for investments. The specific mechanisms to be used for lending those with households and/or individuals with user rights under customary land tenures and the criteria that may apply for individuals or households to qualify for credit require further scrutiny.

### C. RATIONALE FOR THE POLICY

Given the historical context of dispossession, marginalisation and distortion of traditional forms of governance, it is no surprise that today’s communal areas are home to some of the nation’s poorest and underdeveloped communities. Constraints facing these communities relate to land degradation, high population densities, unemployment, poverty, lack of infrastructure and poor provision of services, marginalization from mainstream economic development, insecure land rights and incoherent and
undemocratic governance systems. These constraints form the core challenges that the CLTP aims to address, especially the lack of clarity surrounding governance (especially in land) of communal areas and subsequent tenure insecurity experienced by communal area residents. There is therefore pressing need to provide clarification around the roles and responsibilities of the State, traditional authority institutions and other land governance bodies (i.e. CPAs) and households regarding governance issues in the former homelands. As such, these challenges to be addressed by the policy are summarised below.

1. Insecurity of tenure

Residents of communal areas suffer insecure land rights due to a variety of issues. First the conflicting conceptual understandings and legal interpretations of interchangeably used concepts concerning land ownership and land rights are applied differently among various communities across South Africa, causing confusion surrounding land rights. Second, land rights held under various conflicting local land administration institutions including Trusts, Communal Property Associations (CPAs) and traditional leadership structures are often weak due to undemocratic land governance and lack of clarity and disputes surrounding such rights. Third, patriarchal traditional land governance systems often render women’s and youth’s land rights especially vulnerable. Other issues affecting pervasive tenure insecurity in the former homelands are related to the historical legacy of betterment schemes, increased trends in foreign investment and land ownership in the communal areas that are causing more inequalities and land disputes.

Considering the above, the policy intends to both secure land rights for those living in communal areas as well as engender the transformation of land governance institutions to embrace the principles of democracy and equity.

2. Lack of clarity in land allocation procedures and other land administration matters

It is reported that the procedures for land allocation in traditional communal tenure areas are generally not clearly articulated, let alone transparent to the public and those seeking land. There is a general absence of uniform criteria for qualification to apply for land and land allocation procedures. Exacerbating this is the overlapping and conflicting nature of various land administration institutions (traditional authorities, CPAs, Trusts, local government) that operate within the communal areas under weak institutional capacities and are often unaccountable to communities. In addition, major land information deficits exist and many community members are excluded from the formulation, implementation and communication of the land reform policies.

3. Contention surrounding Land Custom and Power

This matter is directly related to the apartheid regime’s manipulation and distortion of traditional rule in which the state intentionally used traditional leadership bodies to control homeland residents. Such practices often involved corrupt mechanisms of land allocation and taxation administered by traditional leaders, resulting in the erosion of mechanisms that kept traditional authorities responsive and
accountable to their communities. As many communities experienced the imposition of traditional rule by unfamiliar leaders and councils, upon them, in many instances exploitation by such institutions became common, resulting in the legitimacy of the chieftainship being greatly tarnished by colonial and apartheid policies. Thus, there is much tension concerning the role of traditional leadership institutions in land administration.

The CLTP seeks to provide policy clarity concerning the relationship of authority and responsibility towards land such that the state has authority, while the traditional leadership has the responsibility to execute decisions in its land administrative function as defined by the state. Closely related to this is the need to clarify what is commonly understood regarding the distinction between formal customary law and living customary law with the latter occurring at the community level, and the former at the higher level. At the higher level the tendency is emphasis on the traditional leadership and council’s role without simultaneously taking into cognizance the role of the households and the community. Thus, it is crucial that the reference to traditional outer boundary land in the “wagon wheel” concept (see section 3) is in effect land being held communally and should not be misconstrued as a direct relation between traditional leadership councils and the communities towards land. The traditional leadership and councils hold the land in trust, on behalf of households and communities, but decisions are framed and made through communities substantively represented by households in decision framing, making and accountability forums.

4. Amalgamation of communities under traditional leadership jurisdictions

Certain instances exist in which communities that had purchased land of their own accord were “banded” together with other communities under the jurisdiction of traditional authorities in the post-1948 period, which witnessed greater powers being designated to the chieftaincy (with the Bantu Authorities Act of 1951 paving the way for this). This meant that chiefs and headmen were charged with responsibility for the first tier of local government and empowered to continue allocating land. Thus the question remains of how to deal with such communities who were forced to submit to promulgated rule though not part of original communities, especially considering that many traditional leadership bodies established under the 1951 Act (and thus unelected by their constituents) were the basis for the Traditional Leadership and Governance Framework Act and still subject to status determination.

Here, the CLTP offers “Social Solutions to Social Problems” (see section 3), which will be a key facet of this policy to deliberate solutions that confront Communal Tenure such as the issue noted above.

5. Weaknesses of Communal Property Associations

Communal property associations are established legal entities that allow groups to acquire own and manage land under the Communal Property Associations Act 28 of 1996. Although the Act requires CPAs to operate under principles of democracy, inclusion, non-discrimination, equality, transparency and accountability, in practice CPAs have experienced numerous problems including accusation of corruption and fraud, lack of accountability and misrepresentation of communities’ desires.
Furthermore, CPAs are not provided with adequate state support, CPA constitutions have been poorly drafted without being understood by organizational members, and land rights held under CPAs are often contested by traditional authorities. In order to prevent further conflict arising from the many limitations of CPAs, the CLTP proposes that registration of new CPAs on traditional communal tenure areas be carefully considered and principally discouraged and existing CPAs be resolved through methods of social solutions to social problems and principles of complementarity. In addition it is proposed that CPAs be provided with institutional support (as well as enforcement of regulations) to ensure democratic land administration.

6. Overlapping land adjudication institutions

The general issue regarding the management of land and related disputes is the extent to which the existing adjudication institutions are accessible to the poor and whether they are capable of addressing the range of disputes that emerge in the communal land tenure areas, as well as in the land tenure regimes created by land redistribution and restitution. There is evidence that people in informal settlements have limited channels to represent their land grievances and are unfairly overpowered in the formal courts, which adjudicate the issues that arise within the private property regime.

7. Weaknesses in land use planning and regulation and rural development

There are a variety of land use regulatory weaknesses that also undermine the effective utilization of Communal Area lands. These include: the ineffective and often complete absence of spatial planning and land use zoning in the former homelands; undue bureaucratic red tape and delays for development of communal lands due to the requirement of prior ministerial approvals; the unregulated (uncontrolled) conversion of agricultural land towards non-agricultural land uses such as mining which arises due to absence of clear legal mandates and institutional capacity to enforce the existing land use conversion regulations; and overlapping and competing authorities responsible for land use planning and regulation which creates confusion regarding roles and responsibilities of each institution.

8. Competing and Overlapping Land Claims

Largely as a result of historical processes of dispossession and associated distortion of traditional tenure and land governance systems, certain restitution awards consisting of communal area land have involved land occupied by other victims of dispossession, further exacerbating overlapping land rights and tensions over land in these areas. While such groups were excluded from the restitution claims process, traditional authorities found themselves in a position to apply for land claims as they represented groups and community claims which the restitution program favored. This has sometimes occurred without awareness, consultation or consent of community members and resulted in displacement of certain groups from communal areas. Thus one imperative of this policy is to resolve competing and overlapping land claims where they arise within communal areas, which will require rights adjudication by the Land Management Commission and in certain instances rights adjustments towards formalization of user rights shall be warranted.
9. Decongesting Customary Communal areas

Overpopulation is a major challenge facing communal areas with human population densities often reaching up to more than 300 people/km sq. This contributes to a range of related problems including land scarcity, environmental degradation and food insecurity. In addition, the overburdening of land and resources resulting from this overcrowding has translated into overwhelming pressure on already inadequate infrastructure and public service delivery in the former homelands.

In order to address these issues, the CLTP proposes to decongest communal areas. This shall entail taking measures to institute tenure reform within a developmental approach built upon a land redistribution programme to complement land access and development to address overcrowding. Instituting redistribution measures for rural economic development and overall agrarian transformation of these communal areas are key elements that underpin the developmental paradigm of the communal tenure policy. One measure that will be adopted to decongest communal areas is the adoption of effective spatial and land use planning in order to identify points of congestion, determine best land use and plan infrastructure and services. To this end, Spatial Planning and Land Use policies and approaches of the state will take precedence.

Other specific interventions include the following activities: determine land requirements for agrarian transformation and sustainable peri-urban and rural settlements, including by expanding the territory and areas of communal lands; review and alter progressively communal area boundaries to rationalize and reconfigure these areas; and create new communal areas for the excluded communities who demand such and expansion of existing areas found to be land-short through acquiring some adjacent land.

D. LEGISLATIVE REFORMS

1. Implementing the Institutionalization of Communal Land Rights by means of Registration

South African property law regulates the “rights of people in or over certain objects or things”. It is concerned, in other words, with a person’s ability to undertake, accordingly, certain actions with certain kinds of objects.

Central to conferring indisputable real rights, is their registration in the Deeds Registry. This can be achieved by means of township establishment in respect of communal land areas. A township is defined, in terms of section 1 of the Upgrading of Land Tenure Rights Act, Act No. 112 of 1991, as “any piece of land which is subdivided into smaller units in such a manner that the units are accessible by means of streets or thoroughfares, whether the units have been surveyed or are informally demarcated; or any settlement, whether surveyed as such or established in any informal manner”.

Therefore a general plan will have to be approved by the Surveyor General and an application be made for the opening of a township register to the Registrar of Deeds. The costs of these actions would,
naturally, be borne by the State or Department. The township establishment will accommodate the principles contained in the “Wagon Wheel” Concept discussed above. The township register will have to be opened in terms of the Less Formal Township Establishment Act, Act No. 113 of 1991 over communal land, and the institutionalised use rights or land rights could be allocated to the various erven in the township. The residential erven could, as far as is practical, match the current households and be transferred to their respective owners in freehold or a notarial deed of _usu_, subject to conditions only to persons approved by the community.

These erven could then be mortgaged and be disposed of by a will to the descendants of such owners, subject to communities’ conditions of “rights of first refusal”. The crop fields could also be subject of individual ownership or that the ownership thereof could vest in the community and current users be granted perpetual use right by means of registration of use servitudes in favour of current user. On the demise of current users the community may grant or register use rights in favour of descendants of current users or any other person approved by the community. Where crop fields are owned by the community, the community would then be required to obtain separate title for the crop fields, so as to facilitate the registration of user rights. Grazing fields would remain in the ownership of the community and there would be no need to obtain separate title, as the township title constitutes valid title for any erven not disposed by the community.

The community, if it chooses, could create a home owners association (HOA) to which every registered owner of an erven would become a member. This HOA would then be empowered to levy certain contribution from members for purposes of general maintenance of streets and other shared spaces. The community could also raise funds by letting out some of the erven, not in private ownership, to the business community. The erven used for Government purposes such as schools, clinics, police stations, etc. would have to be transferred to Government as they form part of the State Domestic Facilities (SDF). Consequently, the streets or thoroughfares as well as public places will vest in the local authority.

Amongst options examined, the township establishment option is a preferred option as it requires minimal or no legislative amendment for its implementation. Secondly, it would accommodate the governance structures, i.e. the state/municipal council, traditional council and members of community more say in the administration of their household. Lastly, it would give household owners more development prospects, such as more freedom in building structure or extending existing ones.
2. Communal Property Associations

The matter of Communal Property Associations in communal areas will be managed:

- Through social solutions for social problems, guided by principles of complementarity in the case of those established existing in communal areas.
- A careful consideration for approval, yet discouragement of new ones will apply as a principle.

3. Enabling Legislation

An enabling CLTP legislative framework that acknowledges the resultant social solutions and affirms the principles, objectives and instruments in each of the customary communal tenure areas, shall be created. The Constitution and inclusive development objectives shall provide over-arching guidance.
ANNEXURE A: GLOSSARY OF MEANINGS

Communal Tenure: a context specific group-based system of landholding based on local arrangements in which landed property cannot be alienated through sale or as a consequence of some indebtedness. It is based on particular norms and values and provides a base for the accumulation of social capital, which creates conditions for social stability during times of change and economic instability. In most communal systems, membership of a village community provides the framework for rights of access to commonage and collection of natural resources, even if the person is not in permanent residence. In addition, residential, arable and grazing use rights within communal systems are attached to individual households.

Traditional communal tenure: a culturally specific type of communal tenure system.

Traditional Leadership: As construed in the White Paper on Traditional Leadership, 2003, a institution of custom that generally carries out customary functions and may complement the role of government in rural areas, rendering unnecessary the contestation of authority between the institution of traditional leadership and the state. The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution, in the Republic of South Africa.

Traditional Council: A council established in terms of the Traditional Leadership and Governance Framework Act, 41 of 2003, “by a recognized traditional community”, constituted of 40% democratically elected members of the traditional community and, “at least a third of the members of the council must be women.”

Traditional Community: As defined in the Traditional Leadership and Governance Framework Act, 41 of 2003 as “any community which is subject to a system of traditional leadership in terms of that community’s customs, observing a system of customary law.”

Spatial Development Framework (SDF) is the same as the term referred to in Chapter 4 of the Spatial Planning and Land Use Management Bill 14B 2012.

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ANNEXURE B: LAND TENURE IN PRE-COLONIAL SOCIAL CONTEXTS

[EXTRACT FROM PETER DELIUS AFFIDAVIT, 2006]

Land was a vital resource for communities whose economies depended on mixed farming - crop production and stock keeping - supplemented by gathering and hunting. In African communities, rights to land came from membership of a localised kinship/residential group that in turn was part of a political unit - usually a chiefdom. When a chiefdom settled in a new unpopulated area, the Chief, along with his councilors, would point out particular areas of land to subordinate leaders who would in turn delineate areas for ward heads who in turn would convene processes for distributing areas of land to household heads on which to build and cultivate. Normally only married men were eligible for residential land.

When households needed additional land they would approach local leaders or headmen. Where there was no land available locally the local leader would in turn approach the chief or royal council to identify suitable vacant land within the wider polity. Once land had been granted it was usually passed on to the next generation within the same household. As a result, in settled societies most individuals received land not directly from the chief but through inheritance and allocation through households and within localised groups formed around a core of kin. New chieftainships were also as likely to be established over pre-existing populations as over vacant land and oral traditions suggest that a common practice was to recognise the existing rights of such groups and even to acknowledge their prior relationship to the land in key rituals within chiefdoms.  

Grazing land, which formed the bulk of the areas of most chiefdoms, was not as tightly controlled or clearly allocated as farming land. Grazing land was open to all who had livestock and there was no limitation on the amount of animals that a household could put out to pasture. Chiefs and lower level political leaders did however play a significant role in establishing the boundaries between grazing and arable land.

While these principles applied across a wide range of societies there is also evidence which suggests even greater independence of chiefly control in some areas. Amongst the Pondo, for example, “land to cultivate was not allotted (ukulawula), but each women was free to cultivate where she chose within her own chiefs district, provided she did not encroach on any area already cultivated.” Oral evidence on practices in pre-colonial Zululand also suggests that in some instances new land could be occupied and cultivated without the express consent of the King or even local political leaders.

Furthermore, the historical evidence suggests that once land was allocated to households it was very unusual for it to be reclaimed by a chief or local leader. Land was normally only taken away from households in the case of individuals being found guilty of witchcraft or as punishment for revolt against the chief. Rights of ownership of homestead sites were equally strong. Amongst the Tswana,

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13 See for example Delius, Land, pp14-17
14 Hunter, Reaction, p113
“ahomestead once built remains the exclusive property of the family occupying it; and is handed down from one generation to another. No outsider can lay claim to the site as long as it is being used.”15

A chief who denied his subjects additional land or attempted to take away lands already allocated ran the risk that he would quickly lose support and followers. It is thus clear that while chiefs played a significant part in administering land, there were very real limits on their powers. It is also clear that formulations that suggest chiefs were owners or even trustees of land were shaped by a rendering of political authority as rights of property and by the imposition of European models on substantively different African realities. In particular, the role played by chiefs in the process of allotting unoccupied land has often been mistaken for ownership.

This is not to suggest that pre-colonial tenure rights can be equated to common law ownership. It seems clear that however strong tenure rights may have been in the pre-colonial era, they were not identical to the absolute ownership of the common law because they were context specific and subject to overlapping rights. Thus Schapera points out, “the right to arable land [is] not one of absolute private ownership. Other people can graze their cattle on the stalks remaining in the field once the crops have been reaped, or hunt over it.”16

As in the case of chiefly power over land it is plain that part of what bedevils this debate are the difficulties of cross-cultural translation. It is nonetheless clear that household rights to arable and residential land were strong in pre-colonial systems of land tenure. But it must also be acknowledged that these rights existed in the wider context of the changing dynamics of power within chiefdoms.

15 Schapera, Handbook, p199
16 Schapera, Handbook, 205