



# Land Reform Policy Committee

Department of Land Affairs

Departement van Grondsake

Kgoro ya tsa Naga

UMnyango wezoMhlaba

## **MUNICIPAL COMMONAGE: POLICY AND PROCEDURES**

(Submitted by Directorate: Redistribution Policy and Procedures)

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### **1 BACKGROUND**

The term municipal commonage is traditionally given to land, owned by a municipality or local authority, that was usually acquired through state grants or from the church. It differs from other municipally owned land in that residents have acquired grazing rights on the land, or the land was granted expressly to benefit needy local inhabitants. Municipal commonage is not the same as communally owned land held in trust by the state and usually occupied and administered by tribal authorities.

Municipal commonage provides opportunities for land reform, primarily because it is public land which does not need to be acquired, there is an existing institution which can manage the land, needy residents live next-door and have certain rights to this land. A reallocation of commonage to poor residents who wish to supplement their incomes, could help address local economic development and provide an inexpensive land reform option. However, there are a number of constraints, primarily related to the fact that not all local authorities are willing to assist poor residents to obtain access to the commonage.

Regrettably, many rural towns remain mini-citadels of apartheid with all public and private assets, including the commonage, in the hands of the white population. Its use for charitable purposes has been usurped. A practise has developed whereby the land is auctioned and leased to the highest bidder at market rates for private use. Leases are often for periods in excess of 3 years. This practice clearly excludes poor residents. Historically, the commonage had a public character. Current use is often in violation of the purpose for which the land was originally granted.

In other cases, municipalities are not prepared to consider making commonage available to people who they view as relative newcomers who will cause them administrative and management difficulties. Municipalities have become dependent on the revenue generated by leasing the commonage to the highest bidder.

Consequently, many are now reluctant to make the land available to poor people.

Although this is understandable, it is often the case that another portion of the commonage is being

leased at a nominal fee to an exclusive club or utilised for a golf course. Ways need to be found to encourage municipalities to reorientate their policies to benefit the majority of their residents.

The precise legal position of each commonage will depend on the specific conditions under which the land was granted, or the conditions contained within the title deed of the land. In general, Municipalities may not alienate the land without the consent of the Premier and must make it available for the use and benefit of inhabitants of the land. In most provinces these powers are exercised by officials under the MEC responsible for Local Government.

Municipalities throughout the country are empowered to set aside land under its control for the pasturage of stock and for the purposes of establishing garden allotments. They may make by-laws to regulate and control the use and protection of such lands and the kinds of stock which may be pastured, restrict the number of stock per householder, restrict or prohibit the use of certain of the council's land for pasturage and prescribe appropriate charges. These measures are contained in a number of Municipal/Local Authority Ordinances. However, despite the fact that municipalities have legislative competence over land allocation and management, many councils are not aware of these powers or of how to exercise them.

Problems are being experienced regarding the commonage in some of the former homelands/self-governing territories. DLA is particularly concerned to ensure that informal rights of people to graze and access the commonage for a number of purposes are protected. The Municipalities, on the other hand, are under severe pressure to provide housing to people using part of the commonage for this purpose. There is also a problem of land invasion.

## **2. RECOMMENDATIONS**

It is recommended that the following guidelines for Municipal Commonage be adopted.

**2.1 The Department of Land Affairs acknowledges that municipal commonage is land which historically has a public character and should be retained for this purpose. Thus DLA commits itself to ensuring that existing commonage land needed by local poor residents for agricultural purposes on a leasehold basis, to supplement their household income, is made available for such purpose. It will do this by:**

2.1.1 encouraging and on request assisting Municipalities to develop the conditions which will enable poor residents to access existing commonage, currently used for other purposes. This will include DLA considering whether such land cannot be requisitioned for its original purposes and DLA considering buying out existing leases under certain conditions. The DLA will also actively discourage the selling of commonage, except where this is clearly required for town development and urbanisation which enjoys the wide support of local residents, and will not support the buying of commonage by residents who wish to access the R16 000 for this purpose;

2.1.2 encouraging and on request assisting provincial government to develop appropriate provincial policy, legislative frameworks and administrative systems for municipal commonage;

2.1.3 providing funds to enable resource poor municipalities to acquire land to create or extend a commonage for the purpose of establishing agricultural or other productive lease schemes which involve use of the commonages' natural resources for use by poor and disadvantaged residents;

### **2.2 Encouraging/assisting Municipalities to develop conditions which enable poor residents to access existing commonage**

2.2.1 In many small rural towns poor residents want to access grazing land and small arable/garden areas in order to supplement their income and to enhance household food security. Some Municipalities are not willing to make this commonage available which results in residents knocking on Land Affairs' door in an attempt to access land. DLA commits itself to working with and encouraging such Municipalities to reconsider their position and make the commonage land available and on leasehold basis, for poor residents to supplement their household incomes.

2.2.2 Sometimes this unwillingness is due to lack of information. In such cases DLA will act as a catalyst providing information and examples from other areas which will enable the Municipality to act. This will include assisting Municipalities to determine how to regulate the relationship (using by-laws and/or by private agreement) between the user group, themselves and the legal authority. Examples of

management plans between users and a local authority are available.

2.2.3 In other cases there is an unwillingness on the part of the Municipality to take the demands of residents seriously. In such cases DLA will consider various ways of placing pressure on the Municipality to act.

2.2.4 In cases where commonages are not being used for the public purposes set out in the title deeds to the land, despite a demand from poor residents, DLA will investigate the possibility of requisitioning the land for its original purpose. In some instances there is an existing lease on the land which makes it impossible for the Municipality to give poor residents access. The DLA will consider buying out such leases under the following conditions:

-  the lease was signed prior to local government elections;
  
-  there is a desperate and urgent need for access to the commonage which cannot wait until the lease expires;
  
-  the lessee is willing to be paid equitable compensation for the cancellation of the lease;
  
-  the Municipality concerned has no financial resources to enable it to do this itself; and
  
-  the cost of buying out the lease is not exorbitant.

2.2.5 The DLA will actively oppose the selling of municipal commonage as this is contrary to its public character. The DLA will not make the Settlement/ Land Acquisition Grant of R16 000 available to residents for the purpose of buying commonage land.

### **2.3 Encouraging and on request assisting provincial government to develop appropriate provincial policy, legislative frameworks and administrative systems for municipal commonage**

2.3.1 Legislative competence for municipal commonage rests with Provincial and Municipal authorities, some of whom are already engaged in initiatives to support poor residents in gaining access to this land.

The DLA commits itself to offering assistance for the development of appropriate provincial policy, legislative frameworks and administrative systems for the maintenance and use of municipal commonages for land reform purposes. The key law governing municipal commonage is often a

provincial ordinance. The legislative competence to make regulations and through this set the policy framework as well as the approval to alienate lie with the Premier. If a province seeks assistance to do this then DLA commits itself to assist.

**2.4 Providing funds to enable resource poor municipalities to acquire land to create or extend a commonage for the purpose of establishing agricultural or other productive lease schemes which involve use of the commonages' natural resources for use by poor and disadvantaged residents - the Grant for the Acquisition of Municipal Commonage. This section includes both policy and procedures.**

#### **2.4.1 Objective**

The objective of the Grant for Acquisition of Municipal Commonage is to enable primary tier municipalities to acquire land to create or extend a commonage for the purpose of establishing agricultural or other productive lease schemes which involve use of the commonages natural resources for use by poor and disadvantaged residents. The Grant will not cover development of the land acquired.

#### **2.4.2 Eligibility**

Applicants will be primary municipalities. Decisions on beneficiary selection will be left to the municipality as this will change over time, but the immediate beneficiaries should at least be:

- a) citizens or permanent residents of the RSA;
- b) earn less than R1 500 per month as a household in 1997 or equivalent in later years;
- c) recognised by the Municipality as being poor residents in need.

#### **2.4.3 Disbursement and Access to the Grant**

The grant will be disbursed via the same system as for redistribution projects. As decentralisation takes place disbursement will be done by a provincially-based committee convened by the DLA provincial office, in consultation with the relevant provincial department responsible for administering the Municipal/Local Authority Ordinance governing the commonage. This will be the same committee as that established in terms of Act 126 regulations for redistribution projects. Such applications from municipalities will be subject to the following conditions being met:

- a) the applicant provides an undertaking to lease the land thus acquired to its poor residents;
- b) a plan is provided by the municipality showing how the land will be used, developed and managed;
- c) users have participated in the process and have indicated a willingness to contribute payments within their means;
- d) the application is accompanied by a full disclosure of the municipality's books and information on its existing land and leasing arrangements;
- e) a contribution is forthcoming from the municipality for the purchase and/or development of the land to be acquired;
- f) the applicant demonstrates a commitment to reorientate its budget to meet the demands of its poor residents, especially in relation to leasing its land; and
- g) the value of the land to be acquired is based on the same criteria re market value as for other redistribution projects.

#### **2.4.4 Notarial Deed of Perpetual Servitude to be endorsed against the title deed**

To ensure that the land acquired with the Grant is used for the intended purposes, a Notarial Deed will be endorsed against the title deed which encumbers the land for the future. This will

be done by way of an Notarial Deed in Perpetual Servitude in terms of section 65 (1) of the Deeds Registry Act (Act 47 of 1937). Legal services is still investigating whether the Notarial deed should be unilateral or bilateral. If a unilateral Notarial Deed is used then it must be signed by the Municipality, while if it is bilateral then it must be signed by the Municipality and the DLA. Registration of the Title Deed and the Notarial Deed must occur simultaneously. An example of a Notarial Deed is presently being drawn up by legal services. Such a Notarial Deed will contain the following:

- a) The land is granted to the .....Municipality as commonage to be used for the benefit of the residents of the .....Municipality, with the poor residents who want to engage in productive activity on this land receiving preference. Poor residents are defined as those that earn less than R1 500 a month in 1997 or equivalent in later years, who do not have the financial resources to acquire land elsewhere for agricultural or other productive lease schemes which involve the use of the natural resources on the commonage and who are recognised by the Municipality as being people in need.
- b) The land should be administered by the .....Municipality in terms of Provincial/Municipal Ordinance ..... of ..... (ie whatever is the appropriate legislation)
- c) The land may not be alienated or encumbered without the permission of the Premier of the Province.
- d) A representative management body shall be established consisting of the Municipality, the users and any other relevant authority (eg Dept of Agriculture), if possible. This body will establish conditions and allocation procedures for users which shall ensure that the poor residents shall have access to the land on a basis which is fair and non-discriminatory and which ensures accountability of the management body to its members. The management body shall ensure that effective land use management systems and arrangements are established, implemented and enforced in co-operation with the relevant authorities.

#### **2.4.5 Level of Grant**

The committee referred to under 7.4.3 will also determine the level of the Grant using the following criteria:

- a) the total amount of money available for acquiring Municipal Commonage within the financial year;
- b) the expected demand for such grants;
- c) the principle of fairness and equity;
- d) the level of need of residents - the most critical needs will receive priority;
- e) the number of residents who will benefit - the principle being to maximise the benefit while maintaining sustainable land use;
- f) the numbers of women who will benefit directly;
- g) the viability of the land use plan and the administrative institutions in place to manage this.

#### **2.4.6 Legal mechanisms for accessing the Grant**

Act 126 does not allow for such a Grant as section 2 only empowers the Minister to designate land for Asettlement of persons@. In this case the land is clearly not going to be settled and thus land cannot be acquired in terms of this Act. Act 126 is presently being amended to deal with this and other problems. There are currently two legal mechanisms in terms of which the Minister can release the Grant:

- a) The first is where the Grant can be authorised in terms of the Exchequer Act, Act 66 of 1975. This will be the case for most commonage schemes and applies where the Minister does not have specific statutory authority to acquire land. This is done according to section 39

of the Act which is called Treasury Instructions. Treasury approval is required. This approval is obtained in terms of Chapter F - Immovable State Property. Because the commonage land is purchased by the State as Immovable State Property (F1.1 - Acquisition of Immovable State Property) approval is obtained in terms of F1.1.3, which states the following:

Despite the fact that funds have been appropriated for the purchase of immovable property, no immovable property may be purchased without prior approval of the Treasury.

b) As the land needs to be registered in the name of the Municipality the land now acquired by the state must be alienated, which once again acquires Treasury approval - F1.3 - Alienation of Immovable State Property. This approval is then obtained according to F1.3.1, which states the following:

**All cases of alienation of immovable State property without cost or at a payment lower than the market value thereof must be submitted to the Treasury for approval.**

c) This whole procedure entails a double endorsement - the State acquires the land from the private seller and simultaneously transfers by endorsement that land into the name of the Municipality. The endorsement between the State and the private seller can be done by the State Attorney according to section 16 of the Deeds Registry Act, Act 47 of 1937. This would be not as costly as when a lawyer is used.

d) The second legal method for accessing the Grant is in cases where the Minister has authority in terms of a specific statute to acquire land. For example, in the former coloured reserves a statutory provision vests municipal land in the State namely the Rural Areas Act, Act 9 of 1987. This is former apartheid legislation applicable to the former coloured reserves. In this case the Minister is the Trustee of such land. Section 50 of the Act states the following:

**Purchase and sale of immovable property by board of management:**

**A board of management may with the approval of the Minister and on such conditions as he may deem expedient, purchase immovable property and let, hypothecate and alienate immovable property belonging to the board, except where alienation is prohibited in terms of the conditions on which it has been acquired by the board.**

e) As the Minister has authority to acquire the land in terms of the Rural Areas Act, Treasury approval can be obtained according to Treasury Instructions, Chapter F - Acquisition of Immovable State property - section F1.1.3.

f) On the advice of the Director: Strategic Management and Support, the Directorate: Redistribution Policy and Systems will attempt to obtain a blanket approval from State Expenditure for both of the above options to exempt DLA from getting State Expenditure approval with every grant application.

#### **2.4.7 Procedures for acquiring land according to the Project Cycle phases**

As acquiring commonage land falls under the Redistribution Programme, the phases of the project cycle for implementation should be followed where possible. Only four phases are applicable: Project Identification, Feasibility (Project Business Plan); Approvals and Transfer; and Development & Support. No detailed design is necessary.

##### ***a) Phase One - Project Identification Report***

Where the PDLA is approached either by a Municipality or residents who want to acquire land under this scheme the process will begin. It may well happen that PDLA is approached by a group who wishes to access the R15 000 or the restitution programme when in fact this is the scheme that will best suit their need. It is the PDLA's responsibility to explain the land reform

programme, to make the appropriate match and explain the details of the Grant for the Acquisition of Municipal Commonage.

It is recommended that no provision be made for the allocation of a planning grant for the following reasons. The planning required is not as complex as that required for the other redistribution projects - it does not involve the establishment of legal entities, it is clear which laws govern the land and no settlement is involved. It is important that the Municipality and other Departments, particularly the Department of Agriculture, take responsibility for the project from the start. They have the resources to undertake the planning required. In projects to date valuations have been undertaken by the Land Bank and the Department of Agriculture. If however, the price is disputed then DLA may need to provide funds for valuation. It is suggested that a maximum amount of R5 000 be allocated for such purposes from the redistribution capital budget if required. Approval to approve this must lie with the PDLA.

The Municipality should then submit a short Project Identification Report. The approval of this report will result in the Municipality proceeding with phase two. Experience to date has shown that it is extremely important that poor residents who wish to access such commonage need assistance to organise themselves and engage in the project business plan process. They should be assisted to appointed a facilitator using the Community Facilitation Fund.

#### ***b) Phase Two - Project Business Plan***

The Municipality should prepare a Project Business Plan to be submitted to the SPC (once delegation is in place, the relevant provincially based committee). The Project Business Plan for redistribution will be adapted for this purpose. As no settlement is involved, it is clear which institution will hold the land and under which provincial laws it will be governed, the focus of the plan will be on the land use and management plan.

#### ***c) Phase Three - Approvals and Transfer***

The following approvals are required before transfer can take place:

- ' the Notarial Deed must be agreed to by DLA and the Municipality and signed;
- ' the relevant committee must approve the Grant;
- ' the DG and Minister must sign a memorandum approving the release of the Grant; and
- ' State Expenditure must give approval.

State Expenditure approval is obtained either under Treasury Instruction F1.1.3 or if the land in question is acquired under the Exchequer Act then approval is required in terms of F 1.1.1 and F1.3.1. The Notarial Deed and Title Deed will be registered simultaneously. Where approval is in terms of the Exchequer Act then the State Attorney will do the transfer. This involves a section 16 Endorsement (section 16 of the Deeds Registry Act, Act 47 of 1936).

#### ***d) Phase Four - Development and Support***

The responsibility for this phase lies clearly with the Municipality, the users of the commonage and other involved Departments such as the Department of Agriculture.

### **2.5 Interim**

It is recommended that in the interim, until there is further policy clarity, where DLA is delegating ministerial power to provincial governments or local authorities over land which includes commonage land that was in the former homelands/self-governing territories, the following conditions should be attached:

2.5.1 Where a portion of the properties, formerly known as Municipal Commonages, is to be utilised for housing/township development or for any other development, the said MEC or a Local Authority or any other competent authority, the said authority must, in consultation with the Department of Land Affairs, satisfy themselves beforehand that such development will not result in the dispossession of people's rights (formal or informal) granted on or over such commonage land. In the event that people's rights are affected, it is a prerequisite that other arrangements satisfactory to those people have been made in accordance with the provisions and/or conditions in this document.

7.5.2 Where a portion of the Municipal Commonage is to be utilised for housing/township development or for any other development, subject to the condition above, the said MEC or a Local Authority or any other competent authority, the said authorities may not alienate, dispose or sell the Remainder of such a Municipal Commonage property but must retain and utilise the said Remainder for public use, that is to ensure that such land is released to the needy local poor residents for agricultural purposes on a leasehold basis.

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**Land Reform Policy 12/1997: MUNICIPAL COMMONAGE: POLICY AND PROCEDURES**

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