

7 Institutional issues

7.1 Introduction

As is frequently acknowledged, Botswana's land administration system has been one of careful change, responding to particular needs with specific tenure innovations. Land boards constituted under the Tribal Land Act are the custodians and administrators of all tribal land. Other land institutions include the District Land Use Planning Unit, the Land Tribunal, the Department of Surveys and Mapping, the Department of Lands, the Department of Town and Regional Planning and the Attorney General's Chambers Lands Division & Deeds Registry. It would seem that the essential land sector institutions are in place but they require some considerable adjustment to cope with the demands of the evolving land market.

First, actions are required to consolidate the institutional restructuring following the separation of the Ministry of Lands, Housing and Environment¹⁴ (MLHE) from the Ministry of Local Government (MLG).

Second, actions are needed to clarify the roles and responsibilities of the agencies operating in the land sector and to reassess the institutional relationships, both internally and with local government. The uncertainties relate to the efficiency and applicability of the current land use planning system and the respective roles of the land boards, the DTRP/district councils – not uncertainties in the law.

Thirdly there is need to improve the operational efficiency of bodies (land boards and DLUPU) at district level and below that are involved in land administration and management through decentralisation and devolution of power, training and capacity building.

Once these roles and responsibilities are clarified, there still appear to be some gaps remaining in the land sector which have already been identified in this report. There is need to broaden the scope of the Land Tribunal to cover matters relating to the TCPA and the LCA and land valuation; there is need to cater for the planning and implementation of infrastructure of greater Gaborone; and to provide for community-based management of land and natural resources in rural areas.

Finally, it is necessary to make provision for the regulation of the providers of land-related services in the private sector.

7.2 Institutional restructuring

7.2.1 Background

The MLHE was formed in 1999 from the subdivision of the Ministry of Local Government, Lands and Housing. Important steps must be taken to complete the reorganisation. Despite the transfer of the land portfolio to another ministry, the Department of Local Government Service Management (under the MLG) continues to

¹⁴ The MLHE is to lose Environment when two new ministries come on stream in April, 2003.

provide personnel to the land boards in terms of the Unified Local Government Service Act. The DLGSM provides training and administrative support to Land Board staff, etc.

Management dysfunctions also arise from the placement of the Deeds Registry under the AG's Chambers.

7.2.2 Related policy issues

The land boards currently come under two ministries. They report directly to the PS MLHE for implementation of the Tribal Land Act, planning, zoning, demarcation and allocation. In matters of human resource management, training, employment and welfare land board staff are administered under the MLG's Department of Local Government Service Management. Difficulties arise in assigning management responsibility for the land boards to the MLHE and MLG and drawing a line between 'technical' and 'personnel' matters. Management in both the ministries feel that there is a lack of adequate control over the staff and a lack of direction of the work of the land boards.

At the same time, the land board personnel are 'in limbo' and are being deprived both of leadership and opportunities for professional advancement in the land sector. If the Land Boards are to be placed entirely under the MLHE, the ULGS Act will have to be amended. Unless land board staffs are to become members of the public service, separate legislation to provide for their recruitment, advancement, discipline, etc. will be needed.

7.2.3 Policy principles and choices

In keeping with the well-recognised management principle of 'unity of authority and responsibility', it is necessary to bring the land boards fully within the portfolio of the Minister of Lands and Housing without further delay. Most, if not all, of the actions needed to improve the operational efficiency of land boards and to re-align their work require a clear and direct line of authority and control from the office of the Permanent Secretary to the land board secretaries and below.

An alternative might be to further democratise the Land Boards by providing for direct election of the members by secret ballot by registered voters in their constituency, as part of the normal electoral process so that Land Boards would be accountable to the electorate as District Councils are. The relationship between the Land Boards and the Minister responsible for Lands would then be similar to the relationship between the District Councils and the Minister of Local Government.

The Deeds Registry, currently part of the AG's Chambers, should be reconstituted as a separate Department, with its own legal staff, under the MLHE, or as an independent (self-funding) statutory body reporting direct to the Minister. Scope for greater decentralised registration and lodgement of deeds (possibly electronic lodgement) will be essential in the medium term.

7.3 Roles and responsibilities for land use planning

7.3.1 Background

District Land Use Planning Units throughout the country, complain of the overlapping jurisdiction of the Tribal Land Act and the Town and Country Planning Act. For example, it is held that authority to grant change-of-use in planning areas on tribal land lies with both the DTRP/Council and with the Land Board. Officials report difficulties in ensuring that proper procedures are followed. It is held that authority for land use planning should be withdrawn from land boards.

7.3.2 Related land policy issues

In law there is no overlap in jurisdiction between the TLA and the TCPA with regard to planning. In practice, problems arise as a result of misunderstandings among officials and the public as to the relative roles and responsibilities of the district council (for planning and development control) and the land boards (for land allocation) both inside and outside designated planning areas.

Legally, the TCPA takes precedence over other Acts in those areas 'declared planning areas by Order published in the gazette' under the TCPA (section 41). Where the areas are not declared planning areas as per the provisions of the TCPA, even in the event of change of use, the TCPA does not apply.

The Tribal Land Act confers responsibility on the Land Board to allocate tribal land. Its jurisdiction in land control matters is confined to that tenure category. The Town and Country Planning Act does not provide for the allocation of land and its jurisdiction is not confined to any specific land tenure system. It is applicable to all tenure systems including tribal land.

Under the Tribal Land Act land boards are responsible for identifying and zoning land on tribal land in consultation with the District Council to facilitate land allocation for different purposes. The different purposes are: land for residential, agriculture, commercial and, in some parts of the country, CBNRM projects. This land use planning does not appear to cause difficulties where the level of economic activity is low. However, where there is a high level of economic activity or where there is great potential for a range of other land uses, disagreements are more likely to arise.

Land use planning and zoning in terms of the Town and Country Planning Act applies to 'planning areas' that have been declared by Order published in the gazette in consultation with a broad spectrum of stakeholders and has to take into consideration environmental concerns in its plans.

The ownership of tribal land is vested in the land board, and it is responsible for granting user rights to individual members of the community. These individual user rights can be converted, subject to conditions, to exclusive private rights by the individual granted the land. Once the land is privatised, the real rights cease to be vested in the Land Board. The new individual 'owner' is no longer under the jurisdiction of the Tribal Land Act and will have to seek permission for further development in terms of the Town and Country

Planning Act, but only if the land falls under a ‘planning area’ as declared in an Order under the provisions of the Town and Country Planning Act. In the absence of such Order, the standards that are set in the Country and Town Planning Act are inapplicable. The same applies to the standards and requirements of the Building Control Act, with exception to commercial buildings of more than 232 square metres. The Town and Country Planning Act does not confer ownership over any land nor does it confer rights of use or any other ownership right. It merely provides for the orderly development of land according to set minimum standards which could be of value to tribal lands.

Even if the TLA (which gives a land board certain responsibilities for land use planning) were amended, as the law now stands, customary grant holders would still need the consent of the land board, as the landowner and holder of ‘real rights’, for any change of use on land allocated in terms of a customary grant.

The Tribal Land Act does not facilitate planning as understood from the perspective of the Town and Country Planning Act. It is limited in its approach to land use issues. Where other lucrative opportunities exist for employment, especially near urban areas and as the country develops other sectors and moves from being an agriculture-based society, there is need within the law to accommodate change of use. But the capacity of the land board in planning, land use and land management appears to be wanting.

7.3.3 Policy principles and choices

A national legal framework for planning is already in place, what is needed is a policy direction that will strengthen and/or create legal linkages between the land boards responsible for land administration and DTRP and the district councils responsible for land management.

A policy decision has to be made whether or not to allow the application of appropriate land planning, land zoning, land use and land management requirements to apply to tribal land outside planning areas, as well as allowing, on the basis of planning conditions, the change of use upon fulfilment of certain conditions.

A policy decision is also needed whether or not to change the functions of the land board for the above purpose, either by requiring application of other Acts, or amending the existing functions and institutional structure.

Consideration must be given to whether a land board should be given all the powers, responsibilities and capacities necessary for land use planning and development or whether these powers should be reserved for DTRP/district councils.

7.4 Decentralisation, training and capacity building

7.4.1 Background

Almost all the policy prescriptions of this report would have an impact on the workload of land boards and the supporting District Land Use Planning Units (see following table). This raises the issue of the capacity of these institutions to change in order to meet the demands placed upon them.

Issue	Role of Land Boards
1.2 Land rights of the poor	Strengthen capacity in land allocation and management
1.3 Land rights of women	Strengthen women's participation in decision-making in matters of land allocation
1.4 Land rights of minorities	New sub-land boards to be established to accommodate RADs and other disadvantaged minorities
1.5 HIV/AIDS and land rights	Introduce measures to improve operational efficiency, including better land information
2.2 Promoting land market efficiency	Shortening the time it takes to effect transfers and allocations
2.3 Extending land markets	Review procedures to ensure that they are not prohibitively time consuming and costly
2.4 Illegal and extra-legal transactions	Revise functions, especially operations in peri-urban areas, so that land boards increasingly bear responsibility for recognising land transactions that in any event are taking place, including rentals.
2.6 Cadastral information	Co-operate in the development and management of the TLIMS
2.7 Land access by non-citizens	Apply LCA s.7 criteria to consents for transfers to non citizens under s.38 of TLA
3.2 Regularisation of peri-urban settlements	Develop a working partnership between landholders (including tribal land rights holders), district councils and land boards in planning and servicing of land ripe for urban land use activities.
4.2 Rural property rights	Land occupied by minority communities to be included in a separate sub-land board territory to be administered primarily by members of that community.
4.3 Conversion of arable	Enforcement of national norms monitored at district level by the land boards and district councils
4.4 Communal grazing	Securing communal grazing rights entails Land Boards and other institutional stakeholders giving recognition to the existence and validity of community-based land rights.
4.5 Dual grazing rights	Persons wishing to move livestock from a fenced ranch to a communal area should be required to obtain permission from the body responsible for that area's management. At present this will be the LB, but in future it might be a communal grazing committee.
4.6 Use of TGLP Ranches	LBs should be more flexible in allowing variations to the use of fenced ranches on tribal land.
4.8 Land for tourism development	LBs should work with communities to develop a better relationship with concessionaires and invest more in the monitoring function.
4.9 Management of Land & N.R.	Support and assist the development of community based institutions to manage land and natural resources
5.2 Hierarchy of land use planning	Land boards, as land lords, should (i) prepare detailed land use plans for approval by council; (ii) assist customary land rights holders to obtain planning permit and approval from council; (iii) and keep proper land records on applications, allocations and transfers.

7.4.2 Related land policy issues

Land boards: The land board system was introduced soon after Independence. At the time, the intervention was justified to Parliament as being necessary for the modernisation of rural and urban land tenure and the democratisation of land administration.

Botswana's experience with land boards in southern Africa is unique. It is to be expected that the system has its detractors. The reform entrenched a fairly uniform system of Tswana land tenure. It did not accommodate other forms deviating from the Tswana patterns of land holding and use. It was never designed to accommodate variations in land tenure practices prevailing in the different tribal territories. Nor was scope provided to vary the composition of land boards to fit the needs of the different groups.

Judging by the frequent adjustments in board membership criteria and appointment arrangements, it has proved extremely difficult to mould the land boards simultaneously to fit the diverse objectives of modernisation, democratisation and the pursuit of sometimes conflicting policies (e.g. the privatisation of the commons at the same time as upholding the egalitarian principles of customary tenure).

The current system provides for 12 members for the main boards and 10 for the subordinate boards. Two members on each main and subordinate board are representatives of the MoA and MCI. Five members on the main boards and 4 on the subordinate boards are appointed by the Minister MLHE to hold office for 3 years, but subject to reappointment. The remaining 5 members on the main boards and 4 on the subordinate boards are appointed by the Minister for a four year renewable term after being selected by a Land Board Selection Committee¹⁵ from lists of candidates compiled in the area of jurisdiction of each subordinate board and endorsed by a meeting in the *Kgotla*.

Experience has shown that the powers and duties of land boards have to be set down with great care because any gaps or ambiguities will be exploited. From the outset, one problem that has continued to severely undermine the system has been the failure to provide for the recording of all existing customary land rights. The land boards are reported to have always suffered from a bad case of 'land information myopia'.

Over the years, it has also been clear that the role, responsibilities and institutional relationships of land boards have to be adjusted to changing circumstances, particularly those arising from the emerging need to respond to the land market. A distinguished observer of Botswana's land board experiment has stated the following:

*A land board system must be capable of accommodating the natural evolution of land tenure without perhaps seeking to engineer, accelerate, or, indeed, obstruct the process. From these various experiences it must also be appreciated that the introduction of a land board system must be seen as a process, not an event. It must be seen as continuing process of land tenure reform that will require periodic adjustments and reorientation.*¹⁶

¹⁵Land board Selection Committees comprise of the District Commissioner as chairperson, Council Secretary for the District Council concerned, Land board Secretary for the area, the Chief or Sub-Chief of the area, and a member appointed by the Minister.

¹⁶ Professor Clement Ng'ong'ola, Law Department, University of Botswana.

DLUPUs: The effectiveness of a District Land Use Planning Unit¹⁷ depends on the willingness of officials to work together in support of the land board. The energy and leadership qualities of the Secretariat, under the DO(L), are crucial to its success.

Despite the efforts of the DLUPU, a land board might still go ahead with land allocation or granting change-of-use without reference to the advice given. Part of the problem may lie with the inadequacy of the guidance and the lack of competence of the planning staff.¹⁸ Part of the difficulty may relate to the land board's failure to give sufficient priority to planning considerations and to its preoccupation with so-called 'local politics'.

Although there is undoubtedly room for improvement, the DLUPU system seems to work reasonably well. Its strength lies in the wide representation of professional interests. It is noticeably less effective when one faction or interest group dominates. It is doubtful that DLUPU would enjoy the same respect and authority if it were made up entirely of members of one department (e.g. the Department of Lands).

Some members of DLUPUs have expressed scepticism about the usefulness of central government's policy-making processes (e.g. as is currently underway with the national land policy). There is a strong perception that policies are too often formulated without reference to the implementation difficulties at district-level. Lack of devolved decision-making authority, scarcity of transport, technical equipment and lack of information are causing frustration. The case of state land in rural areas is given as an example. Responsibility for management of the land is vested in the Department of Lands in Gaborone. Its remoteness results in lack of supervision, self-allocation and lawlessness. Should this land not be tribalised and transferred to the Land Board?

This disenchantment with the policy-making process is perhaps an indication of the over-centralisation of the government administration, past lack of consultation and poor follow-up of the various national policies which have been developed, often with substantial inputs from the district level, but have not lived up to expectations, frequently because of lack of support and funding from central government.

7.4.3 Policy principles and choices

As prescribed in the Draft Rural Development Strategy, a fundamental principle to guide the further development of land administration and management is that of greater devolution of powers of decision making and greater involvement of local people in the planning and implementation of the actions necessary to satisfy their needs. In the context of the land boards and DLUPU, this would require:

- Consideration of ways and means for the more democratic selection of land boards. (Land allocation decisions can rarely be de-linked 'from politics'. Hence the

¹⁷ This is an advisory and co-ordinating committee comprising the District Officer (Lands) attached to the District Administration, professional officers from central government departments (MOA, DWNP etc.), the Physical Planner attached to the District Council and the Secretary of the land board.

¹⁸ Due perhaps to high turnover, inadequate training and inexperience in the district.

importance of a democratically elected land board, which is more likely to reflect the view of the majority of citizenry in the areas concerned.)

- The reservation of half the seats on the board for women members (Section 1.3)
- Greater decentralisation of powers and responsibilities for land administration and management (including land use planning) to the district, sub district and local community level as proposed in Sections 1.4, 4.4, 4.9, 5.2 of this report.
- Amendment of the TLA to provide for greater flexibility of land administration and management of tribal land, both in urban and peri-urban areas (i.e. the current planning areas) (Section 2.4 and 3.2), and areas culturally different from mainstream Tswana culture.

Training and capacity building:

- Related to the need greatly to increase the efficiency of land boards, it will be necessary to implement a comprehensive programme of training and capacity building linked to the legal, administrative and technical developments arising from the land policy review process.
- An important part of any programme of implementation of new laws would be campaigns of public education and awareness, programmes of training and capacity building within the institutions and amongst the professions, which would have the responsibility for administering the new laws and implementing the land sector plan.
- In the field of institutional development, government would have to provide for:
 - building the capacity of the decentralised land administration and dispute resolution bodies through training and the provision of a framework of rules and guidelines to regulate discretionary authority;
 - building the capacity of the citizenry through expanding their knowledge about new laws and the opportunities provided by the laws to acquire and safeguard their right to land;
 - building the capacity of the MLHE by providing the training and information necessary to develop a coherent, cost-effective and responsive plan to implement the National Land Policy and laws in the medium and long term.
- Proposals have been made to transfer the DO(L) from the District Administration, where the officer tends to be caught up in 'other duties', to the land board. Others have recommended assigning the DO(L) to the District Council to join the Physical Planner. Both proposals have their merits as does leaving the DO(L) with the District Administration. Probably more important is that the DO(L) (and perhaps other key DLUPU members) receives the appropriate amount of training and technical support wherever s/he is located.