

ON COMMON GROUND

INTERNATIONAL PERSPECTIVES ON
THE COMMUNITY LAND TRUST



John Emmeus Davis, Line Algoed,
María E. Hernández-Torrales

EDITORS

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Community Land Trusts in Informal Settlements

Adapting Features of Puerto Rico's
Caño Martín Peña CLT to Address Land Insecurity
in the Favelas of Rio de Janeiro, Brazil



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This chapter is the result of a collaborative research project between a nongovernmental organization based in Rio de Janeiro, Catalytic Communities, and Latin America's first community land trust — one of the world's only CLTs in an informal settlement—the Fideicomiso de la Tierra del Caño Martín Peña in San Juan, Puerto Rico. The aim of the research project was to study the potential of CLT instruments and strategies developed by the communities along the Martín Peña channel as a way to tackle insecure tenure in Rio's favela communities.¹

Based on this research, we present recommendations on essential lessons when considering the creation of a community land trust in informal settlements, such as those that exist in Puerto Rico, Brazil, and most countries in the Global South. For the purpose of this essay, we have defined “informal settlements” as those where settlers have self-built homes in communal areas, on land to which they lack legal ownership, and on which they continue to live.² Many of these settlements have existed for several generations. Over time, therefore, they may become *consolidated*, whereby the building stock, access to some services, community ties, and a way of life have become firmly established, even as the residents' tenure has remained precarious; that is, their legal right to occupy the land beneath their homes has remained “informal.” Regularization becomes a primary objective in these cases, the process to legally secure the occupancy and use of the lands underlying an informal settlement.

In this chapter, we identify a set of conditions that we have concluded must be in place in an informal settlement before considering the creation of a CLT as a primary land tenure and regularization strategy. We also present an analysis of legal strategies that we deem necessary to implement CLTs, specifically in the favelas (the informal settlements) of Rio de Janeiro. Our hope is that this chapter can serve other communities, organizers, and professionals who are interested in understanding the process of establishing a community land trust in an informal settlement.

There are very special elements to take into account in the creation of CLTs in the Global South, specifically in the context of informal settlements. The challenges of establishing a CLT in an informal settlement are quite different from those that are faced by CLTs in North American, British, and European cities. In those cities, new homes are usually being developed by a CLT at great financial cost, either through construction or rehabilitation, and then marketed to prospective homebuyers or renters who choose whether they want to come and live in this newly created housing. Before moving in, they can weigh whether living on land that is owned by a CLT and whether purchasing homes with limits on equity at resale will be acceptable to them. In informal settlements, by contrast, residents may in effect already own their homes, which were built by themselves or by previous generations. They often feel a sense of ownership of the underlying land, even when lacking legal documentation of their right to that land. Residents may be reluctant to share control over the land with a new organizational entity under a form of tenure that is foreign to them.

The type of organization we will discuss and propose here is designed, in part, to address such reluctance. A CLT in Brazil, therefore, like the one in Puerto Rico, would have to be organized and directed by community residents themselves in order to be successful.

In informal settlements across Latin America, especially in Brazil, there is an urgency to finding new strategies for securing land tenure. About half of Brazil's territory is estimated to lack full property rights (Ministério das Cidades, 2019). The legal precariousness of land tenure in the favelas has allowed arbitrary evictions by governments, like the many evictions that preceded two international sports events in Rio: the 2014 World Cup and the 2016 Olympic Games. The precariousness of tenure has also served as an excuse for governments to neglect the development of local infrastructure and the provision of adequate public services. Security of tenure and the regularization of land rights in the favelas thus become essential for realization of the right to secure, fully serviced neighborhoods and the right to the city (Soares Gonçalves, 2009).

Land regularization programs that have emphasized individual titling, where deeds to lands that were once occupied informally are conveyed to individual occupants, have often increased the risk of involuntary displacements, a result of market pressures that intensify in the wake of the legalization of land tenure. Even where forced evictions are not being implemented or where governments have invested public resources in on-site

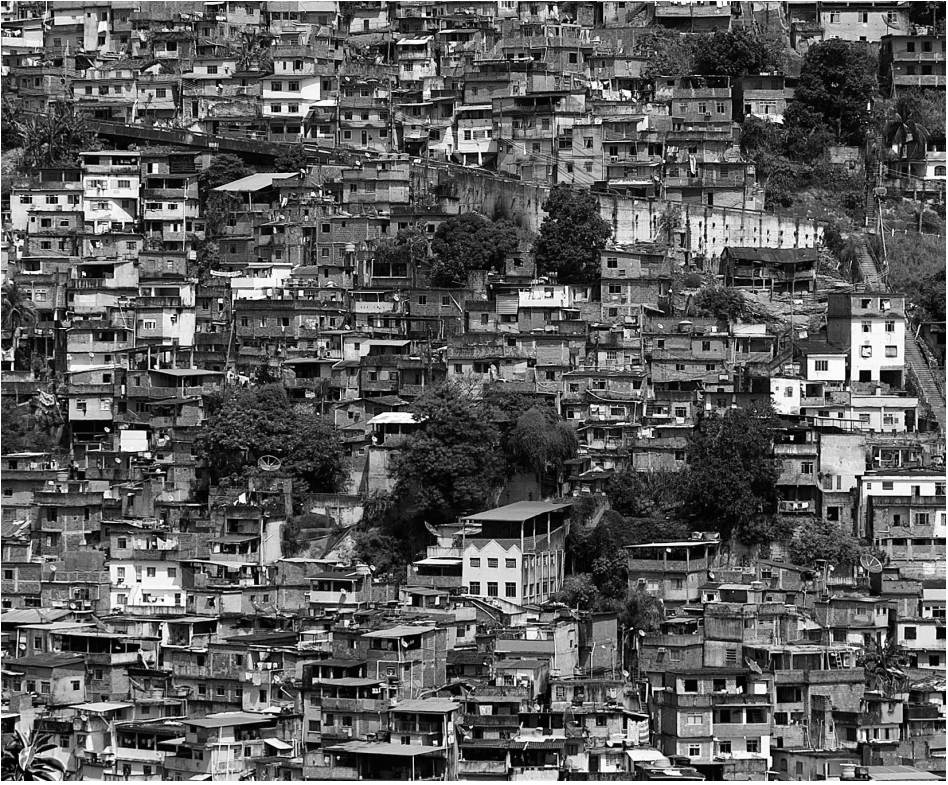


Fig. 12.1. Fogueiteiro favela, Central Rio de Janeiro. CATALYTIC COMMUNITIES

rehabilitation and upgrading programs, centrally located favelas face gentrification. In Rio, during the pre-Olympic period, gentrification, locally called *remoção branca*, or “white eviction,” was widely reported in the local and international press, and debated during community events.

It is thus time to expand the conversation around land tenure beyond the legal aspects of land titling, and move away from the emphasis on individual ownership as the strategy for land regularization in informal settlements. Individual ownership has not protected informal communities from involuntary displacement and gentrification. The strategy to regularize land tenure must not be framed solely on “legalizing” how each individual relates to the parcel of land they occupy. Rather, it should be chosen by the residents themselves as part of a participatory process that helps them to move towards their vision for the future of their community. Land titling should not be an end in itself, but rather an instrument to achieve both collective and individual objectives. Such a process implies that there are options beyond individual titles, and that such options should be evaluated by the residents in accordance with their own priorities. A participatory approach of planning – action – reflection becomes the key to addressing land tenure.

This chapter starts with an overview of the situation in Rio de Janeiro’s favelas today, where land insecurity has led to threats of eviction and gentrification. We describe past

and present policies of land regularization in Brazil, arguing that these policies have not been able to put an end to involuntary displacements, which is why looking at mechanisms and policies that favor community ownership of land is a matter of great urgency. We then focus on the Fideicomiso de la Tierra del Caño Martín Peña, describing how residents of the Caño communities came to the conclusion that a community land trust was the best strategy to protect lands they and their families have inhabited for almost a century.

Finally, drawing upon lessons and insights we have gained from peer-to-peer exchanges between community leaders and staff of the Caño CLT in Puerto Rico and community leaders and technical supporters in Brazil, we present the legal implications for the establishment of a CLT in Rio de Janeiro's favelas. We then provide an analysis of conditions that must be present to make organizing a CLT both possible and feasible and we offer recommendations for community leaders, organizers, and supportive professionals to consider when taking the first steps toward creation of a CLT in an informal settlement.

I. RIO'S FAVELAS: INSECURE HOMES ON INSECURE LAND

Rio de Janeiro today has over 1000 favela communities, ranging in size from a handful to over 200,000 residents. Over 24% of the city's population lives in favelas, which constitute the city's primary affordable housing stock. The first community to be called a "favela" is today known as Morro da Providência (Providence Hill). The community's founders were formerly enslaved Africans who were recruited to fight in the bloody war of Canudos in Brazil's arid Northeast. They had been promised land in Rio de Janeiro, the nation's capital at the time, as payment for their military service. When they arrived in Rio in late 1897, however, no land was made available, so they settled on a hillside between the city center and the port. They named the hill "Morro da Favela" (Favela Hill) after the robust, spiny and resilient *favela* bush that dotted the hillsides of Canudos. Eventually, all of Rio's informal settlements — including ones settled long before, such as the community of Horto (settled in the early 1800s, still standing and fighting eviction today) — became known as favelas.

There are a number of facts essential to understanding why, over 122 years after the first favela was settled, the potential for Favela CLTs is currently galvanizing local organizers. First is the *scale* of the challenge. Rio's 1000 favelas today house over 1.4 million people, the vast majority of whom have no legal title for the land they occupy.

Second is the role of *race*. Rio was the largest slave port in world history and received five times the number of enslaved Africans as the entire USA. Slavery also lasted in Brazil 60% longer. Free men, who had previously been enslaved, had served in the bloody Canudos battle on behalf of their adopted nation. Denied their promised compensation, they squatted on land, starting a favela next to Rio's Port. Across the city, hundreds of thousands of other descendants of enslaved people and rural migrants joined them over



Fig. 12.2. Morro da Providência today, Rio's first favela. CATALYTIC COMMUNITIES

the following generations. As a result, today's racial maps of Rio show that black and mixed-race Brazilians tend to live in favelas, particularly in distant ones, while white Brazilians live mostly in upscale and centrally located regions.

Third is the historical *longevity* of these informal settlements. Rio's favelas, on average, are not the precarious "shanties" or exodus-desiring "slums" they are depicted as being in the mainstream media. Rather, they are well-established communities with a long history and a strong local cultural production and community investment.³

Finally, it is necessary to understand the intentional *neglect* inflicted on these communities. After 120 years, favela neighborhoods continue to be underserved, over-policed, and insecure in their tenure. Rio is not a city that is only now beginning to urbanize. This happened decades ago, providing ample time for quality upgrades which never materialized.

Favelas Today: Products of a Cycle of Legitimized Neglect

One might argue that, at the outset, the founding of an informal settlement constitutes a failure of government, especially the failure to produce affordable, livable housing and a supportive neighborhood environment. Once consolidated, however, the real failure is to deny communities recognition, preservation, and improvement on their historic investment. When residents value their community and identify their *permanence* in the territory as a primary goal, however — not to mention when they have established a solid stock of self-built housing and other community amenities — this is a clear sign of

a consolidated community or one that is on the path to consolidation. At this point, public policy should focus on identifying such communities and working with residents to detect needs and provide the services they lack, along with preserving community-built assets. In self-built communities, only residents are capable of accurately identifying their assets and needs and how best to preserve them and to address them. Thus, the need for community control over development becomes increasingly critical and just.

This realization has been recent. It came over the past decade, after Rio de Janeiro was selected the host city for the 2014 World Cup and the 2016 Olympics. Prior to 2008, the city had experienced economic stagnation for thirty years, and it was often assumed that underinvestment was due to a lack of public funds. During the Olympic build-up, however, the government spent over US\$20 billion on infrastructure and other public improvements in Rio. Promises that were made to the favelas fizzled — including the Morar Carioca program which was supposed to upgrade all favelas by 2020 (Osborne, 2013). Instead, 77,000 favela residents lost their homes to forced evictions (Children Win, 2016).

In a handful of other favelas, the government gave out land titles and invested in policing to bring down crime rates. It also invested in formalizing public services (water, electricity) and community businesses. Community moto-taxi stands and other informally operated businesses now had to be registered, with associated fees and taxes paid up. That was also the case of access to critical utilities. Not coincidentally, this happened in favelas located in the city's touristy South Zone where land values are highest, and where eviction is the most politically difficult. These communities consequently experienced the beginning processes of gentrification, with the cost of living increasing, property values



Fig. 12.3. Vidigal favela, Rio's most notably gentrifying favela. FELIPE PAIVA

skyrocketing, renters leaving, hotels and bar chains opening up, and some homeowners selling, unaware that the value of their homes was monetarily (and emotionally) much greater than what they ended up accepting (Timerman, 2013).

It was at this point, and with the added support of community and international media (which replaced previous dependence on local media monopolies), that the government's policy of neglect and exploitation became explicit. A public official, unaware of the implications of his own comments, noted in 2013 that, "Favelas in the South Zone were fine when they provided cheap labor nearby. Not anymore." Residents of favelas are meant to serve, in other words, not to be served, or so it seems. When they are no longer useful, they need to move. When their land becomes valuable, they need to move. Such is the logic that permeates public policy and social relations across Rio's territory.

Favela organizers today are much more aware that what they are now experiencing and have always known is a vicious cycle of legitimized neglect. This has been the default policy of municipal and state governments toward favelas over generations. Lack of investment in the triad of services most-needed by communities (health, education, and sanitation) produces lack of opportunity and marginalization by the wider society, which in turn propels some residents toward criminal activity. This also makes favelas easy targets for criminal activity. When neighborhoods become known for crime, officials further justify their repressive actions, neglect, and evictions. And the cycle continues.

Despite this cycle, however, residents have built many resilient and culturally vibrant communities with immense potential. In Rio, favelas are also generally well-located across the urban fabric, most having been founded due to nearby employment and services. It is this patrimony they seek to defend and to build upon when residents insist that they want to remain in their neighborhoods. And this is why a tension surfaced during the pre-Olympic period: at the same time as communities facing eviction were being denied the titles they desired, communities facing gentrification spoke against individual titling. How could this be? Because titles, long thought to be a panacea, clearly didn't offer the type of protection that communities desired (Williamson, 2015).

Looking at land tenure alternatives is thus particularly urgent in the context of Rio de Janeiro. Instead of adopting mechanisms that offer the "right to speculate," favela organizers are searching for mechanisms that ensure the right to stay, along with greater access to public services, recognition of self-built community assets, and community control.

The Failure of Regularization Policies in Solving the Problem of Land Insecurity in Brazil's Favelas

More than fifty percent of Brazil's national territory is occupied in an informal or irregular way; that is, without formal title to the land. This started during Portuguese colonialism in the 16th Century. The change of this situation was only pursued in the 19th Century with enactment in 1850 of the Law of Lands.⁴ Despite this legislative change, the scenario of uncontrolled land occupation continued, aggravated by a strong urbanization process that began in the 20th Century. Decades passed following passage of the Law of Lands,

with no progress being made toward regularizing tenure in informal settlements. Nor were any new legislative or practical measures undertaken to solve the problem.

This scenario of neglect finally began to change in the urban context with the enactment of the Federal Constitution of 1988. It included a chapter dedicated to urban policy, the result of pressure applied by various social and technical movements in a struggle for urban reforms. This chapter of the Constitution would later be regulated by Federal Law 10.257 (2001), known as the City Statute, which introduced an important set of instruments for land regularization, providing a general guideline for national urban policy.

Despite growing attention to the problem of land insecurity in the form of legislation, land regularization as a public policy with wide-ranging pretensions was only instituted as a result of Law 11.977 (2009). This Law provided a basis for regularization of tenure that was focused on guaranteeing rights to the inhabitants of informal settlements and increasing the accountability of developers and real estate agents who contributed to the situation of land informality. The Law created a framework for land regularization, including provisions for the legal title and land registry for the lands occupied by residents of

Where land is most valuable, individual titling strengthens speculative investment.

informal settlements. The Law also provided for territorial improvements and increased construction safety, and included measures aimed at improving social and economic conditions for residents of the country's favelas.

Law 11.977 (2009) had little impact, however, because of its short duration. Its chapter on land regularization was revoked by Law 13.465 (2017), enacted after President Dilma Roussef was ousted from power. The new legislation altered the previous land regularization model, reducing it to a focus solely on the registration aspect; that is, the granting of title deeds to residents living in informal settlements. This Law emphasized individual titling through full private ownership, prioritizing registry regulation to the detriment of other dimensions of land regularization, especially those related to infrastructure improvements in the favelas and social assistance to residents, which had been essential components of the previous legislative framework, Law No. 11.977 (2009).

The most direct threat to the security of tenure came from the option given to the Brazilian legislature under this new law to distribute property titles to residents of informal settlements. In areas of the city where land is most valuable, individual titling strengthens speculative investment in real estate and increases the cost of living for the poorest residents. The increase in the cost of living is due to the introduction of (often exorbitant) fees for basic services such as water and electricity, the collection of property taxes, the forced formalization of local businesses, and the growth in new local businesses targeting a higher-income clientele. Meanwhile, the introduction of speculative development stimulates property sales by residents, which typically take place at values below the formal market rate, but above the values practiced in the informal market where properties were previously traded.

Nevertheless, like every policy intervention before it, this latest piece of legislation for land regularization has been marked by disputes and contradictions. Because it will fuel speculation, this new law directly threatens the security of tenure. It also denies the guarantee of low-income residents' right to services. On the other hand, this legal framework also makes it possible to mold a CLT, should full land rights be yielded to communities who want to create one. Careful monitoring of the implementation of this law is thus in order to ensure the security of the possession of the poorest.

II. ADAPTING INSTRUMENTS AND STRATEGIES OF THE CAÑO MARTÍN PEÑA CLT FOR POSSIBLE APPLICATION IN RIO'S FAVELAS

After ten years of work supporting hundreds of favela community organizers and then helping their communities to fight both government-sponsored evictions and market-led gentrification — one due to the absence of land titles and the other to their presence — Catalytic Communities (CatComm), a Rio de Janeiro-based nonprofit organization, began studying the potential of CLTs for Rio de Janeiro's favelas. In the early 2010s, the organization engaged with a number of academic and business partners who were familiar with the CLT model in the United States, theorizing and imagining its possible application to favelas. CLTs seemed to offer a solution that would support the residents of consolidated favelas in achieving their primary land security objective: *permanence*, the ability to stay put in neighborhoods where they are financially and emotionally invested, places where they feel a sense of belonging.



Fig. 12.4. Asa Branca favela street life. CATALYTIC COMMUNITIES

CLTs seemed to CatComm like they might be a good fit for formalizing Rio's favelas because a CLT is organized and operated along the same lines as a favela: homes are built, bought, inherited, and sold on a parallel, affordable housing market, while the underlying land is seen as a common good. Meanwhile, residents work collectively to build and to maintain their community and to fight for improvements. Favelas are often on land that is publicly owned. These informal settlements are regarded as providing for the "social function" of land, as required by Brazil's Constitution. CLTs can guarantee the security of land tenure of vulnerable populations, while also retaining the non-monetary values that residents have often built in their communities. This is done through a flexible arrangement that is easily adapted to different local realities. But it is also an emancipatory arrangement, since all planning and management of the territory arises from the residents, who are now in a position to officially define development within their own territory.

Despite suspecting that CLTs might have potential for formalizing Rio's favelas, however, Catalytic Communities did not feel capable of introducing something so unfamiliar and theoretical into the public debate. The mental leap required to take a North American model in which CLTs are built from scratch, and applying it to decades-old informal settlements in Brazil, building demand (and power) in the favelas for adopting this model, seemed an impossibility.

It was in this context that CatComm learned of the Caño Martín Peña CLT in Puerto Rico. Not only did seven San Juan communities successfully make this mental leap, they also *realized* a vision of what informal settlements could achieve when building upon the

The CLT could function as an instrument of emancipation and empowerment.

basics of the North American CLT model and creating a CLT to fit their own circumstances. The Caño CLT had successfully demonstrated that establishing CLTs in Rio's favelas might be an effective strategy to halt forced evictions,

while also addressing the challenges that typically come with individual land titles. These challenges include: higher costs of living, real estate speculation, and gentrification; individualistic thinking and the atomization of community; and a change in local culture due to the growth of *lógica mercadológica* (market-oriented logic), circumventing the traditional collective and demonetized exchanges on which favelas have historically been based. Community organizers in Rio's favelas typically spend so many years seeking individual titles as the primary solution to land insecurity that they rarely think about the brand-new set of challenges that await residents once those titles are issued. It is then too late to tackle these new challenges, since the mechanisms that might support resistance have by then been blunted through the introduction of the individualized logic of conventional titling.

The CLT, by contrast, seemed to offer a solution to *both* the first challenge (land security) *and* these secondary challenges. The CLT was not simply an arrangement for owning and managing land. As the Caño CLT had shown, it could also function as an instrument

of emancipation and empowerment. The Caño CLT had demonstrated a growth in *unity* among seven neighborhoods as they participated in the community planning process that led to the establishment of their CLT, resulting in an incredibly rare level of *power* in their relationships with public authorities.

Caño Martín Peña CLT: Latin America's First CLT

For approximately 80 years, nearly 25,000 residents of the communities along the Caño Martín Peña (Martín Peña Channel) were invisible to government officials, at both the local and state levels. These communities, located in the heart of San Juan, Puerto Rico's capital city, were the result of rural migration during the economic crisis of the 1920s through the 1950s. Impoverished peasants moved with their families to the San Juan area looking for jobs and better living conditions. Most self-built their own housing. A number of families occupied dry land, but many built their homes on the wetlands along the Martín Peña Channel using cardboard, tin, and wood. A great number of them built their houses literally on the water. Over time the families and the municipal government filled the wetlands with all kinds of debris, creating dry land to sustain their makeshift homes. The city continued to grow, and soon the Caño communities found themselves in the heart of San Juan, next to its financial district. A place that no government administration wanted to look at or to care for became strategically located on valuable land that presented manifold development opportunities for the city and the country.

Government disinvestment and neglect, along with poor watershed management, led to a clogged channel. This was coupled with lack of adequate infrastructure, exposing residents of the Caño communities to an unhealthy environment. In 2002, however, after decades of studies and a lack of concrete action, the government announced its intention to dredge and to restore the Martín Peña Channel, reconnecting the lagoons, canals, wetlands, and beaches that are part of the San Juan Bay Estuary.

Having faced evictions and displacement in the past, residents of the Caño's communities inserted themselves into the planning process of what became the Caño Martín Peña Special Planning District in order to protect the permanence of their communities. They created the ENLACE Caño Martín Peña Project to spearhead the effort, completed with a strong community organizing and participation component.

Their participation turned an engineering project (unaware of its negative externalities) into a comprehensive development project (taking action to prevent such externalities) and led to the creation of public policy and institutions to make it feasible. Not only would the channel be cleaned and dredged, but improvements in stormwater and sewerage infrastructure were also planned in order to avoid further contamination, along with needed upgrades to the potable water and power infrastructure. It was recognized, too, that interventions would be needed to improve the quality of public spaces and inadequate housing, along with a sensible relocation strategy and socio-economic development initiatives.

The Comprehensive Development and Land Use Plan for the Caño Martín Peña Special Planning District (Development Plan), created with the active and informed participation of the residents, made it clear that for its implementation to be possible the community had to have control of the land. Of the approximately 188 hectares (466 acres) that comprise the Planning District, 78 hectares (194 acres), were scattered throughout and were owned by five different governmental entities. Although there were some vacant lots and public buildings, most of this acreage was occupied by residents lacking any kind of land title. The planned eco-restoration of the channel and rehabilitation of the District's infrastructure would have made these residents vulnerable to involuntary displacement and gentrification. That is why the Caño's communities held a long and thorough deliberation process to assess what kind of land ownership strategy might be available that would ensure the permanence of their communities (Algoed, Hernández-Torrales, Rodríguez Del Valle, 2018).

Within the Caño Martín Peña Special Planning District there had previously been different strategies and experiences regarding land ownership. At the beginning of this informal settlement, the peasants who occupied government-owned and publicly owned land without legal title became owners of the improvements on the land, but the land continued to be public or under the government's ownership.⁵ During the 1960s and early 1970s, some of the Caño communities, with the government's assistance, formed land cooperatives that allowed many residents to acquire the land they occupied and to develop basic infrastructure for their communities. On July 1, 1975, the Puerto Rico Legislature enacted a law that made it possible for low-income families or individuals without land title, like residents of the communities along the Caño, to be able to acquire the title to public land at a very low cost, mostly for just one dollar (US\$1.00). This measure was used by politicians as a clientelist strategy, however, to gain electoral votes and not all community residents benefited from the law.

By the year 2002, there were homeowners in the Caño communities who had individual title to their land, but almost fifty percent of the Caño's residents were still living on land over which they had neither ownership nor control. Residents realized that, because of the strategic location of their neighborhoods, restoring the Caño would further encourage the sale of plots of land with titles to speculators at higher prices than their market value, but significantly below their market potential, and continue to fragment the communities. Those who sold their plots would not be able to find alternative housing within the city for the money they had received for their land.

As part of the participatory planning, action, and reflection process that led to the eventual adoption of the Development Plan, residents evaluated various options to address insecurity of tenure against a set of priorities that included: avoiding displacement and gentrification as an unintended consequence of restoring the Caño; getting access to credit; and ensuring their heirs could inherit the right to occupy and use the

land, supported by a valid title. Residents considered those forms of land ownership they already were familiar with, such as individual land titles and land cooperatives, and also explored ways of owning and managing land that were new to Puerto Rico, including the community land trust.

After thorough consideration, they found the CLT to be an instrument that is flexible enough to fulfill their needs and more. Three basic characteristics distinguished the CLT from other forms of ownership, namely community-led development on commu-

The Caño's residents designed a CLT that would enable them to achieve security of tenure.

nity-owned land for the provision of affordable housing for low-income families. Within that general framework, the CLT could be adapted and applied in any way a community might prefer. In the Caño's case, the res-

idents concluded that a CLT would allow them to have collective control over the land and would ensure implementation of the Development Plan, including providing housing for families in need of relocation. The Caño's residents designed a CLT that would enable them to achieve security of tenure and to regularize their relationship with the land beneath their houses. Through the *Fideicomiso de la Tierra del Caño Martín Peña*, their right to use the land would be validated through a legal document (a deed) that recognized their right to use the surface of the land; that right would be inheritable under Puerto Rico's laws; the improvements (the house) would be registered at the Puerto Rico Registry of Real Estate Property, together with the surface rights deed; residents would be able to develop new housing; and they would have access to mortgage credit, among other important benefits they had not previously enjoyed.⁶

The Legal Framework of the Caño Martín Peña CLT

The CLT is a variable tool, allowing wide possibilities of adaptation according to the conditions of the legal system of each country. Puerto Rico was a Spanish colony until it was invaded by the United States in 1898. This caused a change of jurisdiction in legal terms. In the areas of private law (e.g., persons, property ownership and its modifications, different ways of acquiring ownership, obligations and contracts), Puerto Rico still applies fundamentals of the Spanish Civil Code, as do most Latin American countries. However, in areas such as corporate law, administrative law, and constitutional law, Puerto Rico uses the Anglo-Saxon common law as a primary reference.

Securing community control of the Caño's publicly owned land was critical for the implementation of the Development Plan and to provide housing for those residents who needed to be relocated to provide the physical space for the infrastructure projects. The costs of all the work planned for the dredging of the channel and rehabilitation of the Caño communities was initially estimated at \$700 million, but Puerto Rico soon started to suffer from a severe economic and fiscal crisis that has now extended for more than

fifteen years. Hence, in order to ensure the implementation of the Development Plan and to alleviate costs, it was essential not only that all public land within the Special Planning District would be put under the control of the organized communities, but that the cost to the communities of acquiring the land would be negligible. Otherwise, the cost of completing the Caño infrastructure projects would be rendered unbearable.

These considerations led the organized communities of the Caño to decide not to create the Caño CLT as a nonprofit corporation under the Puerto Rico General Corporations Law. Instead, the Caño communities decided to draft a bill that would create their CLT as a trusteeship, along with all the other instruments needed for implementation of the Development Plan. Among the other purposes of this innovative strategy, enactment of this special law by the government of Puerto Rico would enable the free transfer of public land to the Caño CLT.

Law 489-2004, as amended, gave life to the *Proyecto ENLACE del Caño Martín Peña* as an independent project. It also created the tools needed for its implementation. The legislation created a government corporation, the ENLACE Project Corporation (ENLACE). This new corporation was charged with responsibility for coordinating the dredging of the Martín Peña Channel. It would also be responsible for coordinating the rehabilitation and new construction of infrastructure (stormwater and sanitary sewers, potable water systems), the relocation of power lines, streets, and public spaces, and the relocation of families and housing. These interventions were deemed crucial not only for the ecological restoration of the channel, but also to reduce the risk of flooding with polluted water that recurrently affected the communities. The ENLACE Corporation was charged with creating the conditions for the economic and social development of the Caño communities as well.⁷

The Fideicomiso de la Tierra del Caño Martín Peña (Caño Martín Peña CLT) was also created by means of Law 489-2004 as a private legal entity, separate from ENLACE or from any other governmental agency or instrumentality, and was invested with the legal authority to fulfill its responsibilities. All the public land within the Special District was transferred by this Law to ENLACE, which then transferred the land to the CLT by means of public deeds.

The Caño Martín Peña CLT is governed by regulations and by a board of trustees designed by the residents as a result of a two-year participatory planning process. The composition of this board differs somewhat from the three-part model used by most CLTs in the United States. Residents of the Caño communities decided that they would retain a majority of the seats on the governing board, while still providing for representation by the government and by other parties who are not residents of the Caño. The CLT's eleven-member board of trustees is constituted as follows: four are individuals residing on CLT land, elected by their peers; two are community residents, delegated by G-8, a coalition of community-based organizations representing all of the Caño's

neighborhoods; two are experts, selected by the board, according to the organization's needs; two are representatives of governmental agencies;⁸ and one is a representative of the municipality of San Juan.

A Proposed Legal Framework for Brazilian CLTs

The Caño Martín Peña CLT provided the comparative starting point for Catalytic Communities' own research into how a CLT might be established in Brazil. As CLT practitioners around the world have discovered, the model and instruments developed in one country must be modified to conform to laws and politics in another country. That is true in the Brazilian case as well.

The trusteeship (*fideicomiso*) used by the Caño Martín Peña CLT, for example, which was established through an act of the legislature in Puerto Rico, cannot be used for the purpose of establishing a CLT in Brazil, unless a specific law were to be adopted. Any attempt to enact such a law would run into political and bureaucratic difficulties. Even so, CatComm and organizers in favela communities may eventually pursue the presentation of a CLT bill as a political strategy to foster debate on the issue. They would propose a model that is able not only to guarantee security of tenure, but also to integrate the community and to increase its capacity for self-management and political negotiation.

But, for now, an arrangement was sought using instruments already existing in the Brazilian legal system which are capable of providing the basis for the present-day implementation of a Brazilian model of the community land trust, tailored to local specifications and needs. A legal framework was developed and proposed by CatComm that unites several instruments for the construction of a community land trust that could be specifically applied to addressing the problem of land insecurity in the favelas of Rio de Janeiro. This legal framework for a Brazilian CLT has three components, which may be assembled sequentially in different stages or pursued on parallel tracks. They are as follows:

- Acquisition of land and regularization of title by community residents;
- Constitution of the legal entity to receive the land and to be responsible for the continuing ownership and management of the land; and
- Separation of ownership of buildings from the ownership of land, transferring surface rights back to community members who manage the legal entity that owns the land.

Land acquisition and regularization. The legal reality in Rio's informal settlements, as well as in favelas throughout Brazil, is of people occupying land for which they have neither ownership nor control. Sometimes this land has not even been registered. Considering that the community land trust relies on gaining possession of land, where the ownership of lands and buildings will then be separated, the regularization and registration of title

and the transfer of ownership are indispensable for the implementation of a CLT. There are many instruments for the regularization and conveyance of land in Brazil. The most significant in terms of dealing with land insecurity in informal settlements are adverse possession, concession of use, donation, purchase and sale, and land legitimization.

- *Adverse possession (usucapião)* is used for the acquisition of titles of property by populations residing on privately owned land. The basic argument is that the registered owners have failed to fulfill the social function of the property for a certain period of time, stipulated by law, during which the residents occupied the property and, as a result of continuous occupation over many years, they now have a legal claim to that land.
- *Concession of use* is an instrument that usually applies to publicly owned land, where it is not possible to apply adverse possession. This is an administrative contract that grants the use of a property for a certain period of time. Generally, in order to provide the instrument with more security, concessions have a 99-year term that can be extended for an equal period.
- *Donation* is an instrument through which public or private owners donate, free of charge, the land inhabited by low-income residents to said residents.
- *Purchase and sale* demands a financial contribution from the residents.
- *Land legitimization* is a new instrument provided by Law 13.465 (2017), which was intended to become the main land regularization instrument in Brazil. Applicable in public or private areas, it seeks to ensure private property for residents of informal occupations, be they low-income or otherwise.

Constitution of a legal entity. With the use of one of these instruments, once title is regularized and the ownership of land is poised to be conveyed to a community land trust, there must be a legal entity in place to constitute the CLT, receiving title and becoming responsible for the ownership and management of the land for years to come. This legal entity may take various forms (e.g. association, condominium, etc.) in accordance with the Brazilian legal system. A case-by-case analysis will be required to decide the best format in a specific situation. CatComm's analysis has recommended that each CLT be established as a nonprofit legal entity with a dual objective of holding and managing land on behalf of a particular favela and preserving its affordability for low-income residents.

Separating land ownership and building ownership. Once these other stages have been achieved, the ownership of any buildings already existing on the land when it was acquired by the CLT, and, typically, the ownership of future buildings constructed on the land, must be separated from ownership of the underlying land. (The legal entity that

owns the land — i.e., the CLT — must, in turn, be collectively controlled by residents who live on the land.) When it comes to the separation of ownership, there are several instruments available in the Brazilian legal system. The most appropriate of them, as concluded by CatComm’s analysis, will be the surface rights deed, similar to what is being used by the Caño CLT in Puerto Rico.

With the separation of ownership, the three components of the legal constitution of a Brazilian CLT would be put in place. The crafting of each component will then depend upon the objectives and needs of the communities that are building the model. What is presented here is only a basic legal framework, which offers several options suitable to serve the diverse needs that will present themselves in practice.

Coming to the end of this legal sequence, the CLT will be able to exert its full potential in the territory it has chosen to serve. Especially based on a collective management model designed by the community according to its own needs and specificities, the CLT will be able to recognize local realities and to strengthen community assets as it seeks territorial improvements.

This methodology releases any CLT implementation from the need to wait or to depend on the approval of enabling legislation, which could take years considering the unstable Brazilian political scene. That said, the fight for specific CLT enabling legislation should be pursued in parallel to the application of existing instruments described above, since legislative support could significantly facilitate, support, and boost efforts to establish favela CLTs.⁹

The CLT is seen by a growing number of favela leaders, NGOs, legal experts, practitioners, academics, and public servants in the urban planning and land titling fields in Rio, as a *ferramenta de costura*, a “seaming tool” that integrates and addresses diverse conclusions reached separately over the years by residents and supporters working on supportively addressing the problem of informality. CLTs provide a foundation for:

- securing the social function of land;
- realizing the need for land regularization;
- respecting the typology and self-management already inherent in favelas;
- promoting and preserving the affordability of housing;
- respecting people’s sense of belonging and deeper concern for permanence (rather than seeing homes as a “speculative investment”);
- recognizing the importance of community-controlled, participatory planning processes;
- guaranteeing a re-ordering of the community, so that services can be provided, consistent with a “do no harm” approach; and

- engaging technical expertise in support of community planning, rather than through top-down models.

III. GUIDELINES WHEN CONSIDERING A CLT AS A POSSIBLE STRATEGY FOR REGULARIZING LAND TENURE AND PROTECTING HOMES IN INFORMAL SETTLEMENTS

The collaborative research project that was conducted by CatComm and the Caño Martín Peña CLT involved peer-to-peer exchanges between community leaders and staff of the Caño Martín Peña CLT and interested favela communities and professionals during five days in Rio de Janeiro in August 2018. From that collaboration, we tentatively offer guidelines and recommendations for other communities that might be interested in implementing a similar strategy in their own territory.

It should be noted that every community is different and, therefore, every CLT will also be different. There is no universal recipe as to how to create one. Community residents design the bylaws, policies, priorities, and internal procedures, which will define the CLT and will be different for every new CLT in accordance with the community's particularities, circumstances, and needs. It is worth repeating, as well, that a CLT that is designed to address the challenges of regularizing land tenure in informal settlements will be organized and operated differently from a CLT freshly created to provide new housing in neighborhoods where ownership of the land is already formal(ized). Our recommendations are aimed, in fact, at neighborhoods like Brazil's favelas where people have



Fig. 12.5. Delegation from the Caño Martín Peña visiting the Barrinha favela, August 2018.

occupied land for years which they neither own nor control. In such settlements, activists who are interested in creating a CLT must consider two questions: What are the *conditions* that must be present to make a CLT feasible in an informal settlement; and what is the *process* that organizers must follow to make a CLT a reality?

Conditions: Where Might It Be Feasible to Establish a CLT in an Informal Settlement?

Community leaders and activists, public officials or others interested in developing CLTs should take into account that CLTs may not work in every community. For a CLT to be considered in the first place, as a possible strategy for addressing the need for regularization and upgrading in Rio de Janeiro's favelas — and, for that matter, in the informal settlements of many other countries — the following conditions need to be present:

- Consolidated communities are located on lands where residents perceive a threat — or experience the reality — of gentrification, forced eviction, or other human-induced involuntary displacement;
- A large percentage of families lack legal titles and want to address the problem of insecure land tenure;
- There is a possible path to acquiring title(s) to the land;
- Residents feel a strong sense of belonging and a desire to remain in their community; and
- There is a solid process of community organization in place, supported by organizations that are ready to accompany the community and that are able to provide technical assistance.

The experience of Puerto Rico and discussions to date in Brazil reveal that there are additional conditions that may be essential to the process of establishing a CLT in informal settlements. Amongst them are:

1. An organized community and mature leadership that fosters horizontal participation, new leadership and decision-making among all sectors, and that is willing to assume new responsibilities and to make a commitment that will last the life of the community.
2. Supportive organizations and technical allies that are prepared to: (a) accompany the community in strengthening an organizing process and, if necessary, to facilitate and to provoke difficult conversations that will ensure that the participatory planning, action, and continuous reflection process needed to choose and implement a CLT will be controlled by the community and have widespread participation; (b) engage

in dialogues with residents to help inform their decision-making process, where the technical allies are willing to both listen and to learn from the residents and to share their knowledge; and (c) help to strengthen and to complement the community and economic resources that are required to fulfill the community's development plan.

3. Community planning that comes first. CLTs that are designed to regularize land tenure must emerge and develop from existing resident desires and demands. Residents must come together to evaluate their options and make an active choice to adopt a CLT, and that CLT must provide a path to addressing their very real needs. Residents must also reach a broad understanding that some form of collective or community ownership of the land will best serve their needs and will allow them to accomplish their development objectives, both social and economic.
4. Communities that have a strong sense of belonging. The Caño's leaders made it clear that residents with this strong sense of belonging are those that are the most supportive of their own CLT, and that the pride in one's community and a strong sense of history can be strengthened and stimulated in the process of creating a CLT.
5. A legal entity that is controlled by the community, which can receive land rights as a means of collective or community ownership, along with the mechanisms to make the transfer a reality.

These five conditions are key to a successful CLT, but not all of them need to be present at the first moment of considering whether or not to form a CLT. In fact, several get put in place during the process of mobilization and reflection leading up to the decision to move forward in establishing this instrument. What should be emphasized and observed in every case of creating and applying a CLT in an informal settlement is community initiative and broad participation, both in the design of the CLT and in the definition of the goals to be achieved.

Process: How Might Residents Get Started in Establishing a CLT in an Informal Settlement?

As a result of the peer-to-peer exchanges between community leaders and staff of the Caño Martín Peña CLT and interested favela communities and professionals, a number of recommendations were made on essential steps to be taken when considering the formation of a new CLT in an informal settlement.

Start a process of community planning-action-reflection. Before anything else, residents have to decide whether a CLT is the right mechanism for land regularization in their community. A thorough process of planning with active and continuous resident participation is crucial to make informed decisions about the type of land tenure that will best serve their needs and, if it is decided that a CLT is the right mechanism, how the CLT

will be established and governed and how the land will be managed as a collective asset to realize the community's vision. A *CLT is not an end in itself, but rather an instrument to achieve the goals of the community.*

In the Caño, residents engaged in a participatory planning–action–reflection process, where through concrete actions they could obtain short-term wins to keep the community engaged, and continuously reflect on their actions so as to learn from them and inform their planning process. Such a process can be started by residents, community leaders, community-based organizations, government agencies or NGOs. In every case, however, supportive technical allies must recognize their role as being one of helping to create the conditions that will enable residents to strengthen their organizations, to take control of the process, and to participate effectively.

Further recommendations for this participatory process include:

- Start small. Think from less to more. Sports or cultural events can help as a mobilizing method.
- Get residents involved who are influential in the community and who are trusted by a wide range of residents.
- Organize events where residents can think of their ideal community and define what they want their neighborhood to become.
- Develop and use popular education techniques such as street theater, comic books, videos, and others, and engage youth in their design and as communicators.
- Remember that it always seems impossible until it is done.

Create CLT structures, policies, and procedures. If it is decided that the CLT is the right mechanism to meet the needs of the community, residents need to decide how the CLT will function. The bylaws, policies, and activities of every CLT will be somewhat different. Residents must formulate what the shape and function of their CLT should be, which may change over time when conditions or contexts change. The organizational structures and operational priorities of other CLTs can be consulted as inspiration. (See, for example, the rules and regulations of the Caño CLT in “Reglamento General para el Funcionamiento del Fideicomiso de la Tierra del Caño Martín Peña,” 2008.)

Technical assistance from professionals. NGOs, universities, or government will be necessary to support residents in achieving their goals. Professionals — social workers, urban planners, architects, engineers, lawyers — should support the process, not lead it. They are not the ones to provide answers to questions, as the knowledge lies within the community. Rather, they can help to expand possibilities. Social workers and community organizers that accompany the community can help facilitate discussions, find alternative ways to engage residents, promote critical thinking, and ensure that participation

is productive and inclusive. Planners can help the community to keep a comprehensive perspective throughout the process. Engage experts after residents have defined what they need and what they want. If experts come too early or without proper orientation to promote a balanced dialogue, they may downplay the community, co-opt the process, or impose their own standards on communities.

Define the legal possibilities. After the community has defined what it wants, lawyers can get involved to guide the community through which legal instruments already exist that make the transformations legally possible. If certain legal instruments do not yet exist, they can be created to meet the needs of the community, or elements can be borrowed from other legal instruments. Also here, residents themselves must design these new legal instruments, with the help of lawyers (not the other way around). If elements are taken from existing legal instruments, it is essential to focus on the final goal and to make adjustments in the process in order to ensure the community's goal is reached. If members of a community have decided they want to hold their land collectively, for example, but their only legal option is to pass through individual titles first (as is currently the case in Brazil for publicly-owned lands), it will be necessary for residents to have reached a decisive conclusion to combine their titles under a CLT well prior to receiving those titles, and execute that decision immediately. Otherwise, speculation can curtail the process. Ideally, in this case, the CLT organization should be established in advance and be ready to receive those titles as soon as they are issued.

Strategize. The process to establish and to maintain a CLT requires continuous organizing and strategizing on how to choose partners and on how to communicate and to engage with third parties in order to achieve such objectives as securing the land, dealing with conflicts, and attracting resources, among others. Taking the time to stop and to reflect on the challenges and opportunities within and beyond the community is key to developing a successful path forward.



Community land trusts are always unique. The Caño CLT borrowed some elements from other CLTs, but residents and their allies also created many new elements completely from scratch in order to address the needs of their community and to find ways to make their CLT function properly within their own context. CLTs in Brazil will undoubtedly take on a whole new shape, and will differ from community to community, depending on the goals of residents and the circumstances of each community.

It is essential to remember, however, that there should never be discussions about the community—including discussions about forming a CLT—without the community

being present. As organizers in informal settlements, from Johannesburg to Rio, often say: “Nothing for us, without us.”

At the time this essay is being written, a working group comprised of 154 community leaders and technical allies has formed in Rio de Janeiro and is supporting the development of pilot CLTs in two communities that meet the conditions described above: the Trapicheiros and Esperança communities. This working group is also developing enabling legislative proposals and outreach materials to share the CLT model with other communities. Trapicheiros and Esperança have each embarked on the process of establishing their own CLT and are currently holding regular community social events and workshops, engaging residents in a participatory planning process towards forming a CLT.

The working group formed after the August 2018 visit by a delegation of five Caño Martín Peña CLT organizers, who came to Rio to share their story. This city-wide, multi-partner working group includes leaders from over twenty communities, land rights agents from the state, planners and lawyers from Rio’s universities, public defenders, NGOs and others. Some of them traveled to Puerto Rico in May 2019 to participate in a peer-to-peer exchange hosted by the Caño Martín Peña communities. Community leaders and their support organizations from Argentina, Bangladesh, Barbuda, Belize, Bolivia, Brazil, Chile, Ecuador, Jamaica, Lebanon, Mexico, Peru, South Africa, and the United States came to San Juan learn more about the Caño CLT.

Seeds are being sown for new CLTs across the world. To be continued!

Notes

1. The study was financed by the Latin America program of the Lincoln Institute of Land Policy.
2. We are focusing here on the informal occupancy of land as an *urban* phenomenon. Throughout the world, however, there are also millions of acres of *rural* land that are occupied and used for housing, farming, grazing, and woodcutting by people who have no formal title to these lands.
3. In recent years, twelve favelas have opened museums documenting their histories. The social museology movement is growing.
4. The land law of 1850 established purchase-and-sale as a form of land acquisition in Brazil, breaking with the previous model that had recognized effective occupation of a territory as a criterion of acquisition. In addition, it provided for a system of land registration aimed at the formal regularization of the national territory, which was not applied in practice, however.

5. Original inhabitants built their homes themselves. Over time, as people moved on, houses were sold using informal documents or private contracts that clearly established that the buyer was only acquiring the house, not the land. Almost all of those documents stated that the land was public land. None of the documents were registered, however, which precluded buyers from accessing mortgage credit.
6. From a procedural perspective, the Caño Martín Peña opted for a surface rights deed, instead of a ground lease, for regularizing use of the land and for securing and registering a family's ownership of the house. A ground lease agreement may be used for other owners, however, like businesses or organizations established on the CLT's land.
7. This government corporation was set up with a sunset provision. It is scheduled to go out of business after twenty-five years.
8. One of these should be a board member of the ENLACE Project Corporation.
9. In effect, there are two possible legal ways to enable the formation of a CLT in informal settlements: (1) the approval of a specific law, detailing a CLT's application and creating legal instruments to put the CLT into effect; or (2) the use of instruments already existing in the legal system, combining several of them for the CLT's formation and operation.

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