

DO THE MEANS DEFEAT THE ENDS?

Impact of legislation on Gauteng's enclosed neighbourhoods

Boyane Tshehla, Institute for Security Studies
boyane@iss.org.za

Gauteng has most of the country's enclosed neighbourhoods. The province is also ahead in its enactment of policy and legislation to regulate the restriction of access to public spaces for safety purposes. The goals of many residents are however likely to conflict with the legal provisions. For example, the legislation and policy provide that private security personnel at booms only monitor and observe activity. They may not search vehicles or people, or require registers to be completed, or request personal information from visitors to the area.

South Africa, like many other countries, increasingly experiences inclinations towards restriction of access, largely in the form of security villages and enclosed neighbourhoods.¹ Security villages are developed in such a way that they are fenced off from their surroundings, while enclosed neighbourhoods arise when residents gate off their neighbourhood in order to control or prohibit access by members of the public.

Enclosed neighbourhoods are the controversial type of gated community. The controversy largely hinges on the fact that the area in question is public space. The absence of national policy guidelines exacerbates the heated public debates around the issue. Gauteng province is currently the exception in the country, having enacted the Rationalisation of Local Government Affairs Act (10 of 1998). Chapter 7 of this Act deals with restriction of access to public spaces for safety and security purposes. The Act provides a broad framework within which municipalities in Gauteng can develop their own policies regarding access restriction.

It was in line with this Act that the City of Johannesburg produced a policy document on restriction of access in 2003. The policy comprehensively details the requirements for implementing such access control, as well as the procedure that needs to be followed. This article seeks to assess the appropriateness of this Act and the policy resulting from it.

The legislation goes a long way in dealing with some of the problems inherent in gated communities, such as legality, exclusiveness, human rights and inconvenience. These are discussed below. However, although the Act and the policy are progressive and sensitive to the constitution, the question is whether enclosed neighbourhoods (supposing that the legal requirements are adhered to) still serve a significant purpose. An examination of the law suggests that it would be difficult to achieve the intended goals within the legal framework.

Key aspects of the policy and legislation

Compliance with the stringent requirements set out in the applicable legislation and policy may sit

uncomfortably with the goals of those who gate off. Particularly pertinent are the procedural processes to be complied with before gating off and the requirements imposed on security personnel responsible for operating the gates and booms.

Chapter 7 of the Act, amplified by the City of Johannesburg policy, provides for two ways in which restriction of access may be effected. It distinguishes between a situation where the municipal council initiates the restriction of access (section 44) and one where such permission is granted to someone else (section 45).

Whichever route is followed, an application must be submitted that contains details regarding the applicant/s, the area, the number of people affected and payment of registration fees. These administrative requirements are less important for the present discussion as they are not particularly problematic.

The important requirement is that an application has to be supported by the majority of people in the area. The Act requires that at least two thirds of those affected by the circumstances giving rise to the application, approve the application.² The City of Johannesburg policy requires that 80% of people give their approval.

The legislation further requires that the applicants and the council should meet with the South African Police Service to determine the merits of the application, as well as terms and conditions applicable. This procedure will have to take place every two years because the restriction of access is only valid for this period.

Once the procedural requirements have been complied with, the City of Johannesburg policy requires that a declaration be signed by the security company responsible for operating the gate. In sum, the declaration constitutes an undertaking that the company will comply with the law.

The declaration reflected in the text box below captures the legal obligations applicable to those manning the booms in enclosed neighbourhoods.

Declaration to be signed by the private security company before permission will be given to restrict access

1. Personnel manning the access control point may *only monitor and observe* activity. In line with the requirements of the constitution, they may not search vehicles or people, may not require the filling in of a register or supplying personal information, nor delay traffic other than the absolute minimum required to open any gate, or boom (emphasis in original).
2. No person or vehicle may be denied access to any area, at any time. The public will have access to the area at all times.
3. All personnel manning a control point must be equipped with and wear reflective/dayglo vests or jackets for visibility.
4. Orders for the staff of a control point must be in writing and on public display at the control points.
5. 24-hour contact numbers for security company management and local SAPS must be on public display. Security company management and local SAPS must be in the possession of 24-hour contact numbers for the resident association.
6. Control point staff must be registered with the Security Officers Board, and must produce registration cards on request to any person passing through the control point.
7. In the event of suspected criminal activity, the assistance of the South African Police Service should be obtained. Only as a last resort should monitoring personnel intervene, when confronted with actual criminal activity.
8. No fee may be charged for access to the area.

Legality

The main problem here is that, in the main, the creation of enclosed neighbourhoods is illegal. The 1939 Ordinance³ and the 1987 Road Traffic Act⁴ respectively oblige local authorities to keep public roads open, and make it an offence for any person to erect barricades or blockades on a public road.

Most of the efforts to gate off communities throughout the country are illegal in terms of these two pieces of legislation.

Arguably, before the 1998 Act became operational, road closures in Gauteng (as in many other municipalities that fell under the 1939 Ordinance) were illegal. This includes even those that had been given 'permission' to effect such closures. In other words, the municipalities did not have a right to authorise any road closures for security purposes in the absence of enabling legislation. To the extent that residents adhere to the legislation and policy, the 1998 Act effectively addresses the legality issue. Gauteng now has a law that authorises local authorities to allow others to restrict access (under the conditions noted above, of course).

Exclusiveness and inconvenience

Whatever the ultimate aim of controlled access, it is achieved through excluding certain people from a specific area. Whether because of concerns about crime or something else, people put booms at their gates so that they can monitor movement in and out of the area. It is in this respect that gated communities can be illegal.

The Gauteng legislation (in line with the country's constitution) does not give anyone the right to prohibit any other person from entering a particular area nor to search such a person and/or his or her car. More interestingly, no one has a right to even ask any person for their personal details when they enter the gated area.

Given these provisions, 'restriction of access' can be interpreted as meaning physically limiting the number of access points (or roads) to an area rather than limiting or restricting access of certain people or vehicles to an area. This is the rub: there appears to be a disjunction between what the legislation and policy allow and the expectations and motives of those who gate off their communities. Suffice it to say that the Gauteng legislation and concomitant City of Johannesburg policy specifically prohibit any form of exclusion.

The legislation and policy also address the charge that gated communities can inconvenience their

residents, service providers and the broader community. The requirement that a thorough study be conducted before permission to gate off an area will be granted, means that the local authority will be in a position to assess 'inconvenience' factors such as the impact of access restriction on traffic and other necessary services (e.g. emergency services).

Constitutionality

The restriction of access to a public space necessarily infringes rights of others (e.g. freedom of movement, privacy, etc). When considering the constitutional implications therefore, the debate should be whether such an infringement is justifiable under the circumstances or not. This will probably not be known for certain until the country's courts are approached for reprieve based on the constitutionality or otherwise of gated communities and/or legislation regulating them.

That said, there are areas of tension between individual rights and restrictions associated with enclosed neighbourhoods. First, it is problematic for civilians to be granted absolute and unrestricted rights to search others on public space. Even members of the South African Police Service (SAPS) needed legislative mandate, in the form of the Criminal Procedure Act (51 of 1977) to enable them to search someone or his/her property. It thus makes sense for the City of Johannesburg to require that people who operate the boom or guard house be registered as security officers and that their employers (i.e. security companies) sign a declaration to the effect that they will adhere to the strict conditions of approval provided by the city.

Another contentious issue is the fact that the 1998 Act and the policy require that the application for access restriction be supported by two thirds, and 80% of residents respectively, in the area in respect of which the application is lodged. It is however constitutionally suspect that a majority rule could be applied in terms of individual property. Buying property is an individual decision influenced by subjectively considered preferences – a decision that at no stage involves other property owners in one's vicinity.

It is therefore untenable that individual members of the community can decide to change the nature of an individual property owner's environment and probably the nature of his or her property. For instance, if A buys a house in area Z because it is close to a range of amenities, it seems unfair that when the neighbourhood is enclosed, he or she may then be far away from such amenities.⁵

Where does this leave enclosed neighbourhoods?

The net effect of enclosed neighbourhoods before the 1998 Act was that communities could decide who to admit into their area. Guards at the entry points could ask for personal details, search vehicles or even deny people access. Despite the illegality of these practices, the fact remains that the guards manning the boom gates were able to grant or deny access to an area.

This meant that enclosed neighbourhoods operated exactly like privately owned security villages, despite the fact that the roads in these neighbourhoods are public property. Indeed, this was probably the reason why neighbourhoods were boomed off in the first place. The City of Johannesburg's policy clearly prohibits this.

So, while the policy provides that permission to restrict access may be applied for and granted, the powers of the guards at the entry points are extremely limited: they can only monitor and observe proceedings. This was clearly never the intention of many people who sought to restrict access in the first place.

It is doubtful if those who invested in booming off their suburbs would have done so had they known how limited the powers regarding access control are. A guard simply standing at a gate and monitoring movement is unlikely to have any control over activities within the community. The guards would not even have a record of who has entered the area, nor would they be able to stop any suspicious looking car that leaves the neighbourhood loaded with furniture.

Given the stringent conditions facing those in Gauteng who wish to create enclosed neighbourhoods, access restriction does not serve a

significant purpose. Those who have taken such measures would see greater returns if they invested in securing their individual property, or supporting their neighbourhood watch and local police.

The stringent conditions governing enclosed neighbourhoods are understandable considering that the legislation is the product of a 'balancing act' between the interests of those in favour, and those against, the concept of gated communities. This balancing act, however, appears to leave Home Owners' Associations in a situation where they either operate an ineffective access restriction system, or break the law. Put differently, if a security officer manning the access point cannot ask visitors for their particulars nor enquire about their business in the area (let alone stop them from entering) what purpose does the access restriction serve?

Endnotes

- 1 While gated communities are found in all provinces in South Africa the largest proportion of them (30%) are in Gauteng. See K Landman, A National Survey of Gated Communities in South Africa, CSIR, 2003.
- 2 Section 45 (1) (b).
- 3 Local Government Ordinance No. 17 of 1939.
- 4 Road Traffic Act of 1987.
- 5 As one letter by DR Maddocks in the *Star* of 25 June 1997 stated: '...these road closures put my family and other families severely at risk, as barriers are erected between us and our most critical emergency services: SA Police Services, ambulance, fire brigade, hospital, veterinary clinic, pharmacy, etc.'