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SUDAN RURAL LAND GOVERNANCE (SRLG) PROJECT

LAND USE LEGAL BRIEF

MARCH 2013

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ACRONYMS AND ABBREVIATIONS

CLA	County Land Authority
CPA	Comprehensive Peace Agreement
GOSS	Government of South Sudan
SRLG	South Sudan Rural Land Governance
USAID	United States Agency for International Development

EXECUTIVE SUMMARY

The Draft Land Policy recognizes that “land use planning is essential to the efficient and sustainable utilization and management of land and land based resources.” Lack of technical and institutional capacity, coordinating framework to prepare and present planning proposals and a national land use framework has resulted in uncontrolled urban expansion, land use conflicts, environmental degradation and spread of informal settlements. Protection of eco-systems and urban environments depends on sound policies and collaborative planning processes. The Draft Land Policy recommends that a Town and Country Planning Act be enacted and harmonized with existing legislation “to provide an appropriate framework for preparation and implementation of national, regional and local area land use plans and ensure the planning process is integrated, participatory and meets stakeholder needs.”

In simple terms, land-use planning is about making decisions on a “sustainable form of land use in rural areas and the initiation of the appropriate options and measures for implementation and monitoring.”¹ The land use plan itself is often a product of both environmental and technical planning processes. In some situations, socioeconomic processes that aim to negotiate the interests of different stakeholders constitute part of the land use planning process. Such social processes include, for instance, the creation of social platforms for solving land problems and settling conflicts. The end product is the development of consensus around a land use plan that is aimed at promoting equitable and efficient land use systems, and solving land-use conflicts. The process is guided by legislation that defines planning parameters to produce a statutory plan with enforceable provisions.

Such statutory plans are necessary to help guide sustainable economic development and mitigate conflict in the transitional context of South Sudan. Currently, legislation is not yet in place to guide development of statutory land use plans. This brief will discuss land use provisions in the existing legal framework, current land use practices and constraints at the local level, substantive and procedural issues to be addressed by the proposed Town and Country Planning Act, capacity building issues in land use planning and key recommendations for taking land use planning forward.

¹ GTZ (1999): Land Use Planning Methods, Strategies and Tools, Working Group on Land Use Planning, Eschborn, downloaded from www.mpl.ird.fr/crea/taller-colombia/FAO/AGLL/.../gtz-lup.pdf; 27 September 2012.

I.0 ANALYSIS

I.1 LAND USE PROVISIONS IN THE CURRENT LEGAL FRAMEWORK

Protection of the environment is one of the fundamental objectives and guiding principles underpinning the Constitution. Section 41 (3) provides that “appropriate legislative action” is required to protect the environment for the benefit of citizens and future generations. Environmental regulation should balance “ecologically sustainable development and use of natural resources” with “rational, economic and social development so as to protect genetic stability and bio-diversity.”

Although environmental protection is an important national objective, the legal framework relevant to land contains no substantive provisions to guide development of land use policies and plans. Chapter XI of the Land Act is dedicated to land use and social and environmental protection. It discusses only the responsibilities of national and state governments in regards planning. For example, Section 42 (2) provides that national government has the power to intervene in town and rural planning which is within the jurisdiction of states under Section 43 (5). States are also responsible for land zoning under Section 43 (13).

Similarly, land use and planning provisions in the Local Government Act address only the general responsibilities of state and local government. Schedules I (27) and II (5) of the Local Government Act confer local government councils with responsibility for town and rural planning and concurrent powers with the state over urban development and planning. The Act also requires in Section 88 (1) (b) that States in consultation with Local Government Councils produce Land Use Master Plans. Local Government Councils are then required to prepare policy guidelines for land use rights (Section 91 (3) (d)) and to enact by-laws to regulate land use control and protection (Section 92 (1) (a)). It is clear that the current legal framework provides local government with almost exclusive responsibility for land use planning and management but provides no legislative guidance for doing so.

The most specific language pertaining to land use plans is found in Section 61 (2) of the Land Act that references a comprehensive land use plan to delineate land into zones to facilitate investment as required by the Investment Act. Under sub-section (3), the land zoning system is to be adopted in consultation with the community concerned and comply with the existing Land Use Plan. Section 66 (1) provides that the land use planning system referred to in Section 61 is also to be delineated to include pastoral lands to be protected. The Land Act does not reference the procedures for developing this comprehensive land use plan and there is no evidence that it has been produced. In the absence of legislative guidance, it appears that land administration officials rely on legislation promulgated prior to the CPA.² Against this background, what are the current land use problems and constraints that the proposed new legislation is expected to address?

I.2 CURRENT LAND USE PRACTICES AND CONSTRAINTS AT THE LOCAL LEVEL

With the return of peace in the country, pressure for development has increased in both rural and urban contexts. As can be expected, land use problems and the shortcomings of current planning practices are more pronounced in urban areas than is the case in rural settlements. The design of urban settlements is not guided by sound planning practices, with little attention paid to service delivery and infrastructure development. For

²This includes the Demarcation and Survey Act, 1905; Sudanese Disposition of Lands Restriction Act, 1918; Land Resettlement and Registration Act, 1925; Disposal of Town Lands Scheme Act 1947, Urban Planning and Land Disposal Act of 1994

instance, even in large settlements like Juba, the design of roads is grossly inadequate, with minimal or no provision of parking space and drainage systems. There is ineffective management and control of development, resulting in an increase in un-serviced informal settlements in most urban settlements (USAID 2010³). A significant proportion of the urban population is engaged in agriculture, causing conflict between rural land uses (e.g. livestock keeping) and urban based activities. The new settlements coming up have mixed land-uses, with no clear zoning practices in place. Thus, light industrial uses, offices spaces, residential uses, hotels and shops often alternate from one type to the other. Such intermingling is not ideal for the modern day urban contexts, with incompatibility of land uses being a cause of tension and conflict amongst land users. In places like Yambio in Western Equatoria, household plots also function as burial places (SRLG Field Experiences, 2011-2013). Further, the design of plot sizes is not guided by international best practices in planning where plots are required to be rectangular in form. The continued used of square measurements produces designs that are not cost-effective, causing the cost of housing provision to be unaffordable to the poor. Regulations and codes that determine distances of buildings to plot boundaries, provision of private open space, ventilation and day lighting standards are not in place. In general, much of the growth in urban settlements is unplanned and unmanaged (USAID, 2007),⁴ giving rise to massive environmental problems.

The management of the interface between urban and rural areas is another cause of concern. With no solid planning systems in place, most towns in South Sudan, including Juba the capital city, have no planned dumping sites for solid waste management. In this regard, all forms of solid waste from the towns are simply being disposed-off 'anywhere and anyhow' in the surrounding rural neighborhoods (SRLG Field Observations, 2011-2013). Charcoal is the major source of energy for urban households and other agencies. In this regard, deforestation is taking place rapidly in rural areas that surround major towns (ibid). Also, best practice examples require that town boundaries be sufficiently extensive to include land required to accommodate foreseeable urban expansion, with formal reviews undertaken at relevant time periods to make adjustments to meet unforeseen land needs. This aspect is missing in South Sudan towns, setting the scene for conflict between rural and urban land uses as is currently the case. The gazetting of town boundaries is a requirement for land use planning and land administration to function, paving the way for legal jurisdiction to be transferred from customary law to the municipal law under the municipal or town authority.

Current planning practices in Bor and the wider context of South Sudan show little evidence of the application of planning standards. Noticeable in this regard is the planning of public utilities and other infrastructure without taking into consideration the land requirements of such facilities. For instance, schools are often located on limited physical spaces that do not allow for either expansion or the provision of basic infrastructure that supports the school. Many of the schools in Bor County and elsewhere (for example, Juba and Terekeka Counties in Central Equatoria) are without sporting grounds. Further, built up infrastructure (homesteads, schools etc.) are constructed with no observation of building lines, a clear indication of the lack of development control. The problem is even more pronounced in Juba, the capital city, than elsewhere in the country. In informal settlements, the situation is acute, with service provision either very minimal or absent (USAID 2010). A study on informal settlements in Juba revealed that these were located on marginal ground, such as near the Nile River, and were a major cause of environmental pollution (ibid). Whilst there are no accurate statistics, it is estimated that a large percentage of the urban population is now residing on land that is not formally registered or that falls outside the formally planned areas. This is leading to an increase in urban and peri-urban informal settlements with the attendant issues of lack of tenure security, poverty, increasing land disputes, and absence of basic services (ibid). For lack of planning standards, settlements in both rural and urban situations are located too close to the Nile River, causing water pollution. There are cases where pit latrines are within 10 meters from the river. In addition to exposing human settlements to possible flooding hazards, this is strong evidence that already the Nile River is being polluted in both rural

³USAID (2010): Land Tenure and Property Rights in Southern Sudan: a case study of informal settlements in Juba, Sudan Property Rights Program.

⁴ USAID (2007): Southern Sudan environmental threats and opportunities assessment; Biodiversity and Tropical Forests Assessment. Washington: International Resources Group.

and urban situations. Thus for instance, there are challenges and constraints faced by SRLG in its efforts to produce the land use plan for Bor County.

With no firm land use planning framework in place, uncontrolled settlements are for instance threatening fragile environments of the Sudd. The South Sudan Rural Land Governance (SRLG) Project's experience has shown that settlements of fishing communities in Akuak Boma and elsewhere in the Sudd of Bor County have caused multiple land use planning complexities. Planning for service provision – transport, health facilities and education etc. – is almost impossible given the kind of terrain that characterizes the Sudd. Discussions with communities revealed that it was very difficult for the sick to access health services, with many having lost their lives after failing to access medication. Children barely access education facilities, while transport service connecting to Bor Town is largely non-existent. This complicates even the provision of mobile services. Another pressing situation confronting fishing settlements is the management of wastes on such squash environments. Apparently, it seems as if all household waste is dumped into the flowing waters of the Nile. Inevitably, pollution of fresh water sources of the Nile can only intensify with increasing population. In addition to being a health hazard, commercial fishing activities can hardly take place under such situations. In the dry season, the Sudd is occasionally used for burial purposes.

Also, SRLG's experience has shown that existing planning practices are fostering the development of land use conflicts and lack the application of planning standards. Highly contentious in South Sudan is the planning and management of urban and peri-urban areas. Not only do communities contest and challenge government's eminent domain powers for urban development, but claim land administration responsibilities in towns as well. This is precisely because the law is either non-existent or ambiguous pertaining to the planning and management of towns. Even where the law exists, it is seldom enforced. For instance, evident in both rural and urban contexts is the sharing of road infrastructure by traffic and livestock. In Bor County, land use conflicts of this nature are discernible in Bor town and in Anyid and Kolnyang Payams along the Juba-Bor highway. Inside Bor town, many households still keep livestock, while households located far afield have claims on sections of the town previously used as cattle routes. The location of human settlements in Kolnyang and Anyidi payams is such that during the rain-season, cattle have to use the same Juba-Bor road when moving to and from grazing areas. This creates conflict between traffic and livestock movement, a situation that can only get worse as the road get busier. The same can be said of the Juba-Terekeka road in Central Equatoria. In fact, anecdotal data suggests that many other states experience similar problems.

In rural contexts, conflict over grazing and water rights and between agriculturalists (cropping) and pastoralists is a major cause of violence in several States of South Sudan. For instance, the Mvolo area of Western Equatoria has a long history of inter-tribal conflict between the agriculturalist Juru Belo tribe and the pastoralist Dinka Agar tribe of Rumbek and Yirol West Counties (USAID 2010)⁵. This is common across most places in the country. With no functioning legal and policy frameworks in place, the application of planning tools to mitigate such conflicts has not been pursued. Thus, the demarcation of cattle routes and the creation of buffer zones to separate cropping and pastoralist activities cannot be effective when not backed by a legal mandate.

In summary, the importance of land use planning in shaping the development policies of South Sudan cannot be over-emphasized. As already argued, missing in the country are clear legal frameworks and institutions with adequate capacities to implement land use planning interventions. It is a challenge obtaining in rural areas and urban settlements alike, facing all States of South Sudan. The absence of such land-use planning frameworks and related institutional capacities in the rural areas has fostered the development of conflicts between land uses. Easily noticeable is the tension caused by the expansion of urban areas into rural land owned by communities. As already discussed, pollution of water resources is escalating owing to the non-existence of land use planning frameworks. The grazing demands of pastoralists and arable land needs of

⁵ USAID (2010): Conflict over resources among rural communities in Southern Study: a case study of Lake Girindi, Mvolo, County, Western Equatoria State, USAID South Sudan, Juba.

sedentary farmers are in perpetual conflict across South Sudan. The fragmentation of communities along political and ethnic lines has fuelled the incidence of conflicts over the utilization of common property resources, especially water, fisheries and other forestry products. At the same time, the old laws and policies provide no sufficient framework for guiding land use planning, and hence the recommendation for new legislation. However, as already argued, some sections of the old law may remain relevant in the new South Sudan, and hence new legislation can, and should borrow from these.

I.3 NECESSARY LEGISLATION

Recently, SRLG convened a workshop under the theme: ‘Changing Paradigms for Rural/Urban Land-Use Planning.’ The workshop brought together high-ranking officials from the national and all ten states’ Ministries of Physical Infrastructure. When participants were asked what laws guide their land use planning activities state representatives indicated that they applied pre-CPA legislation to fill legislative gaps when necessary. It is not clear, however, that these laws are applicable today. Additionally, they do not appear to provide the necessary legislative guidance. For example, the Urban Planning and Land Disposal Act of 1994 is the key planning legislation inherited from the pre-CPA period. The Act does not comprehensively address all the country’s planning needs. It regulates planning only in urban areas, leaving out the critical role of regional planning in stimulating rural development. It does not provide clear guidance for the preparation of master plans and does not address the issues of subdivision and consolidation of land. Nonetheless, evidence on the ground reveals that pre-CPA policies and legislation continue to shape planning and land administration practices in the newly created South Sudan. Ad hoc application of such laws leads to inconsistent planning practices at the State and local levels that are not enforceable.

The Draft Land Policy confirms the need for a Town and Country Planning Act to guide the preparation of land use plans at the national, regional and local levels and describes the range of issues it should regulate. The Town and Country Planning Act is expected to address the fundamental issues pertaining to physical planning in rural and urban settlements. These relate to the institutional framework for planning, regional planning for rural development, types of plans, development control, subdivision and consolidation of rural and urban land, acquisition and disposal of land by the state and the administrative arrangements for handling planning and land administration disputes. In relation to the institutional framework, the law should state the institutions with planning functions and their respective responsibilities. Based on international best practices, the law must provide an appropriate balance between the development of land use plans by State governments and intervention by the national government in efforts meant to make plans comply with national government requirements.⁶ Of particular importance in South Sudan are the functions of State Ministries of Physical Infrastructure and local government institutions (county and municipal government). The law will also stipulate the types of plans to be produced (master plans, local plans, layout plans) and the process issues of developing the same. The content of the plans will be expressly stated, and so will be the management and implementation issues. Development control is an important pillar of physical planning in both rural and urban contexts. The law will stipulate, among other issues, procedural aspects of handling applications for development permits, instruments for enforcing development control and prescriptions on the use of land and buildings. Further, the law will establish the legal foundation for the development of various forms of regulations and policy instructions, covering issues pertaining to land uses, building lines, planning standards etc.

The law will also provide for the subdivision and consolidation of land in urban and rural areas. This captures the process issues of subdividing and consolidating land and quality control of property documents. The proposed Town and Country Planning Act should also reference other legislation on land administration, especially on issues concerning registration of newly created properties and boundary demarcation at various levels. It is also a requirement for the law to provide for the acquisition and disposal of land for development purposes. This section of the law restates the eminent domain powers of the state, as well as providing for the

⁶ Stein, L ;2012; A Review of International Best Practice in Planning Law, Centre for Environmental Legal Studies, New York, www.planning.nsw.gov.au/LinkClick.aspx?fileticket...tabid...20-01-2013.

payment of compensation for any land acquired for development purposes. The section on regional planning provides for the development of rural areas, outlining the institutional dimensions, process and content issues. Covered in this section will also be the establishment of regional planning bodies that will guide development planning, conflict mitigation and the use of natural resources shared by the States. In addition, the law will also stipulate the administrative arrangements for dealing with disputes in town and country planning. It is also important for law to provide for public participation in various components of planning, particularly those relating to acquisition of land and the development of various types of plans. In a country where the governance systems are still evolving, the law should explicitly state who represents the community for public participation purposes, methods of undertaking public participation and means of proving that the process has taken place. The requirement is for legislation to provide for the development of a community participation plan, producing guidelines, and requiring that the participation guidelines be followed. Against a background where there are teething boundary problems in South Sudan, it is imperative that planning legislation makes mandatory provisions for consultation with neighboring States and Counties in all matters pertaining to land use planning interventions. In line with global trends, the new planning law should also address issues on climate change adaptation in land use planning.

For practical reasons, efforts to draft the new Town and Country Planning Act might begin by identifying provisions from pre-CPA legislation and modifying them to suit Southern Sudan's new socio-economic and political context. Officials from the Ministry of Justice confirmed that it was common legal practice to use provisions of old legislation as a starting point when crafting new laws.

Next, appropriate State ministries should be mobilized. It is expected that the key Ministries of Physical Infrastructure at State level and the Ministry of Housing at national level will readily identify with and buy-in into this type of intervention. Ultimately, when consensus is reached, it is expected that the Ministry of Housing will lead the process, supported by an external agency. A team led by a professional planner will be expected to drive the process. The Scope of Work for developing the new legislation will need to include a review of old planning legislation in South Sudan and best practices at the international level. Further, an analysis of the existing situation needs to be undertaken, focusing on, inter alia; nature of planning problems; planning practices, systems and procedures in place, existing planning capacities and the application of planning standards. Outlined in the Scope of Work will be the key steps that will be undertaken to ensure the participation of all key agencies. The important agencies to be included are the State Ministries of Physical Infrastructure and local government structures, especially County offices and town councils where they exist and Land Commissions at national and state levels. Non-state actors working in land administration and planning will need to be included as well. It is envisaged that the national legislation will be comprehensive in nature, paving the way for coherent planning and land administration practices at the State level and below.

I.4 CAPACITY ISSUES

A major constraint in South Sudan is the lack of adequately trained, skilled and experienced human resources. This is especially true with regard to the land sector. In general, academic institutions are not offering training for students in important fields in the land sector, especially land-use planning, land administration, estate management, valuation, surveying and land policy implementation. Additionally, previous attempts at 'on the job training' have not proven effective in developing a cadre of land use professionals. SRLG and interventions by other partners are providing significant training and other support in important aspects such as land-use planning, conflict management, etc. Given the critical shortage of adequately trained human resources, there is a limit to which such strategies can achieve. Thus, in the absence of adequately skilled human resources, the sustainability and effectiveness of SRLG's activities and those of other agencies in land administration, land-use planning and land-conflict management remain doubtful. The pressing requirement is that the country starts to put in place measures to develop its own human resources.

In response to the existing capacity constraints, SRLG has been providing training on land laws, legal principles and best practices in land use planning and land administration. In addition to improving the basic understanding of key principles, such training sought to explain some of the legal ambiguities that have been stalling government work. For instance, misunderstandings created by legal provisions such as 'land belongs

to the community' and the 'regulatory function of government' stalled government work in land acquisition, land use planning and land administration. In this regard, SRLG has developed legislative explanatory notes on some of the key legal provisions, as well as promoting understanding and facilitating dialogue sessions between officials and communities on identified legal provisions.

Another important step achieved by SRLG to date is the formation of the State Working Groups in the pilot States of Western Equatoria and Jonglei. Although the State Working Groups have no legal standing, the amalgamation of line-ministries working on land has proved to be important in galvanizing state support in SRLG's land use planning and land administration activities. As part of the strategy of developing the capacities of members of the State Working Group, SRLG will also undertake a training needs assessment to determine capacity building needs of sector ministries 'in legal reform and land administration based on responsibilities prescribed by the Land Act 2009 and Local Government Act 2009.' The point of discussion is that this approach can be replicated in other States as well. The envisaged new legislation can also provide for the establishment of coordination mechanisms for line ministries dealing with land, possibly emulating the function of the State Working Group. The analytical review can make appropriate recommendations in this regard.

SRLG is also in the process of developing a land-use planning training module that will target County Land Authorities, the State Working Group (and other relevant government officials), and community leaders. Among other issues, the training module will cover the following issues: rationale of land-use planning in rural contexts, rural land problems and the relevance of land-use planning, stakeholder and community participation, legal issues in land-use planning, competing and conflicting land-uses, environmental sustainability, institutional and implementation frameworks, trade-offs in land-use planning, monitoring the performance of and reviewing land-use plans. It is hoped that such training will improve the capacities of government officials and local leaders to deal with land use and land administration challenges they face. As efforts to create and operationalize County Land Authorities intensify, such capacity building initiatives should be extended to the newly created structures. Apparently, there are other several interventions working to build the land use planning infrastructure in the country, a case in point being the World Conservation Society's interventions in Jonglei, Central and Eastern Equatoria. It is expected that the analytical review will capture the experiences of such interventions with a view to contributing to the development of the new planning legislation.

In summary, capacities are required in a number of areas, including the following: legal drafting, development of a system for reporting land use conflicts, building skills of government officials in land use planning and land administration, assisting academic institutions to introduce training programs (degree and diploma levels) in land administration and planning, setting up a Scholarship Fund to train South Sudanese cadets in the key fields of land-use planning, land administration, estate management, valuation, surveying and project management; and implementation of planning interventions at state and county levels. Local institutions do require capacities to research on land issues. Expanding pilot interventions and demonstration projects in land use planning and land administration will further improve the visibility and impact of such interventions. Land Commissions at national and state levels can also function as repository centers for information on land use planning and land administration. This will assist in addressing the scarcity of land-related information in the country.

2.0 RECOMMENDATIONS

The following steps are recommended to begin the process of drafting the Town and Country Planning Act as provided in the Draft Land Policy:

- Mobilize appropriate State ministries. It is expected that the key Ministries of Physical Infrastructure at State level and the Ministry of Housing at national level will readily identify with and buy-in into this type of intervention. Ultimately, when consensus is reached, it is expected that the Ministry of Housing will lead the process, supported by an external agency
- Commission analytical work. This involves the review of planning legislation and existing planning practices in South Sudan. The review should recommend any amendments required to the Local Government Act and the Land Act in order to adequately address land use planning issues. In addition, a review of international best practices on planning law will further provide guidance on key content and process issues. As argued, it is important for the new planning legislation to provide for adequate public participation. The brief has recommended that the Ministry of Housing at GOSS level should steer the process, supported by an external agency led by a professional planner.
- Prioritize work on the development of the legislative framework for land use planning. In addition to the enactment of the Town and Country Planning Act, other important milestones are: development of planning standards, development of guidelines for public participation in land use planning and implementation, development of land use planning regulations and development of guidelines for payment of compensation for land acquired for development purposes
- Provide training to existing staff. Adequate human-resource capacities are urgently required at all levels of government. Needed are people with planning skills, supported by other land administration personnel that include surveyors and land valuation experts. Existing staff need further training on planning practices, land administration and planning law.
- Accelerate the establishment of County Land Authorities (CLAs) and provide rural CLAs with training and technical assistance to implement participatory processes to agree cattle access routes near human settlements and address any other land use conflicts.
- Build capacity of CLAs to implement land use planning as a conflict mitigation strategy in the immediate and interim period. Interim measures include assisting them to demarcate and mark cattle routes and wildlife corridors, implementing buffer zones to protect the Nile's critical water resources etc.
- Develop land use regulations. Such regulations will regulate the planning and use of land for various purposes. This will distinguish between rural and urban land uses, stipulating the necessary conditions that govern the operationalization of zoning frameworks. Such regulations will provide for the implementation of buffer zones for environmental protection.

The list of recommendations is not exhaustive, but provides some of the most pragmatic suggestions to make first progress in addressing South Sudan's land use and planning challenges.

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