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**REVIEWS OF PRESIDENT NAZARBAEV'S 1995 "DECREE ON LAND" AND  
DRAFT MATERIALS PERTAINING TO HOUSING AND REAL ESTATE MARKETS**

**KAZAKSTAN**

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## ABSTRACT

This is a Trip Report prepared by Lowry Wyman, ICMA Consultant, under Task Order No. 116 that presents analyses and commentary on President Nazarbaev's "Decree On Land"; the Draft Laws on Local Representative and Executive Bodies and Local Self-Government, and; the Draft Housing Code of the Republic of Kazakstan.

# PRESIDENT NAZARBAEV'S 1995 "DECREE ON LAND"

KAZAKSTAN

March 1996

## INTRODUCTION

In my Task Order, you noted that recently "Kazakstan adopted a new Constitution that removed the prohibition on private ownership of land, but required that legislation be put in place to define ownership." On December 22, 1995, President Nazarbaev issued a decree "On Land" which, apparently, is that legislation. As noted below, according to that decree further law-making will be necessary, and is due by April 1, 1996.

You asked me to "clarify the rights to land ownership that are provided to homeowner associations through the Land Code and ... examine possibilities for transfer of land parcels to homeowner associations." You also asked me to examine how the law might be applied to permit individuals working on agricultural land to assert ownership rights in residential premises and other realty not directly connected to agricultural activity. And you asked me to comment more generally on the scope and provisions of this new law, indicating significant differences between the new and the old.

This memorandum is the second in a series of memoranda addressing the law of Kazakstan affecting rights in realty. I asserted in my first memorandum, dated March 16, 1996 and entitled "The 1995 Constitution's Applicability to Practical Realization of Property Rights in Kazakstan," that the viability of any "property regime" in Kazakstan must depend not only on the "law" expressly creating that regime but also on larger constitutional issues, such as the existence of a "hierarchy of sources of law" - from constitutional, to legislative, to administrative. I indicated that the 1995 Constitution, and the "legal culture" of Kazakstan generally, are quite deficient in this regard, and that this deficiency will impair the viability of all legal relations in Kazakstan. In short, I asserted that the Constitution, legislation, decrees, administrative regulations, and judicial decisions of Kazakstan do not compose, and are unlikely in the foreseeable future to evolve into, a coherent, predictable, ascertainable "body of settled law" that can serve as a dependable - let alone rational - basis for action.

The decree "On Land" provides many instances of "hierarchy confusion"; for example, Article 5 ordains: "In accordance with the Constitution of the Republic of Kazakstan, land shall be owned by the state. Land may also be privately owned on the grounds, under the conditions, and within the limits established by this Decree or other legislative acts which do not contradict it." Repeatedly, this presidential decree asserts that it sets forth law that cannot be contradicted by other law, including parliamentary legislation. As noted in my March 16 memorandum, the 1995 Constitution allows for "presidential legislation"; whether such legislation can "trump" later

parliamentary legislation is a huge subject, beyond the scope of this memorandum; apparently this decree presumes that it can, even though Article 61 of the Constitution - recently promulgated by the president - explicitly ordains that parliamentary legislation on the subject matter of this decree can trump presidential decrees thereon. This decree "On Land" arguably raises a presidential decree to the status of a so-called "constitutional law" that governs all "mere" legislation.

But would that presidential presumption be accepted in a court of law? If the parliament adopts legislation that contradicts this decree, and the Government refuses to accept the validity thereof, this question will arise. Since, however, the president essentially controls the Constitutional Council - the "last word" on constitutional questions - his decree "On Land" is likely to remain "the supreme law of the land" unless modified by him or his successors. Rights in land will be only as secure as the president of the moment chooses to make them.

Although this decree, by its terms, requires administrative regulations to fill numerous gaps, it was generally intended to provide a comprehensive new "code" governing land ownership, etc. How well it succeeds in this endeavor will depend on many factors, some of which are addressed in this memorandum. But the threshold point must not be ignored, namely, that this decree's constitutional status and legitimacy are, at best, problematic. In a nutshell, Kazakhstan's law on land, on real estate, and on property rights specifically, would be far firmer if a/ the Constitution itself "made" enough basic law thereon to truly govern and guide all subsequent law-making, and b/ the Constitution itself ordained that only the legislative branch may legislate, and that such legislation alone must form the basis for further administrative regulations, including all presidential decrees. That constitutional "scheme" is not currently in effect in Kazakhstan; property rights, all rights, and all law will remain uncertain, insecure, and unpredictable under the present Constitution.

## **GENERAL OBSERVATIONS**

The decree "On Land" appears to seek to govern all rights in realty, although of course other laws - for example, the Housing Code and Tax Code - will also have a bearing thereon. The decree is very long, detailed, and repetitious, with innumerable references (for example) to "the Republic of Kazakhstan", as if, without such references, the reader might slip into thinking that this decree governs realty relations in Rwanda. Yet the decree also contains gaps and ambiguities that are unlikely to be reduced by subsequent administrative regulations, and are certain to engender considerable confusion.

The general approach underlying this decree - and still suffusing so much else throughout the "Sovietized" world - is that if something is not explicitly allowed then it is implicitly forbidden. This approach leads to unclear and inefficient law-making, which (not paradoxically) tends to reduce the kinds of freedom, innovation, spontaneity, and "ad-hocracy" that characterize a healthy civil society. Thus, this decree goes into exhausting detail regarding all the (foreseen) possibilities and permutations of permissible relationships and activities, etc., yet its inevitable

gaps provide considerable room for unguided bureaucratic latitude - and, hence, opportunities for arbitrariness and graft.

Worse, rather than placing the burden on the Government to demonstrate that a particular activity has been unambiguously forbidden, this law - and the whole legal culture - requires property owners (for example) to carry the burden of demonstrating that their activities have been unambiguously allowed. Inevitably, as the life of Kazakhstan evolves, new and unforeseen possibilities will arise; even if this decree fully "covered the field" of those possibilities to begin with, which it does not, it will have to be amended frequently as circumstances change, or else become an ever-more-anachronistic, and hence oppressive, instrument of control.

Part of the problem is that the law does not start with the simple premise of "fee simple" ownership, with respect to which a/ all lesser estates and concomitant land-use rights have been "carved out" (usually by private agreements or bequests) and b/ all governmental restrictions - especially land- use restrictions - are in fact articulated, ordained, as restrictions.

Instead, Kazakhstan's law starts with the premise - and the recent historical reality - of state ownership of all land. Based on that premise, typical Soviet- style "land use rights" are granted by the Government to various "holders" thereof. This area of the law is relatively developed. For example, Article 36 ordains that such holders "shall be divided into the following categories: 1) state and non-state; 2) citizen and foreign, as well as persons without citizenship; 3) individuals and legal entities; 4) permanent [indefinite, that is, over 99 years] and temporary [further subdivided into short-term (up to three years) and long term (3 to 99 years)]; primary and secondary . . ."

The premise of ownership is almost an afterthought compared with the premise of state-granted land use rights. This is especially apparent in Chapters 5 and 6, entitled "Land Ownership Rights" and "Land Use Rights" respectively.

Article 30 (Chapter 5) ordains that "all land, except for privately-owned land plots, shall be state property." The remainder of Chapter 5, which is short, addresses various aspects of land ownership. Chapter 6 is long and detailed. Although the subject of land ownership rights is treated in this decree before land use rights, it is clear that the former is secondary to the latter.

Indeed, the decree "On Land" reflects the fact that allowing private ownership of land - controversial though it was - did not constitute the main goal of this decree, and remains a sort of "step-child" of this law. The law's main purpose, which was also new, was to create a market in realty, whether privately "owned" or merely "held" in the form of land use rights. This purpose is explicitly spelled out at the end of a list of purposes contained in Article 2; although it is at the end of that list, it composes the most significant departure from prior law and public policy. Interestingly, private land ownership as such is not mentioned in this list of purposes.

Not only is private land ownership, though new, a minor element of this law; more significantly,

under this decree the rights of a private owner of land are little different from the rights - before as well as after this decree - of a holder of a permanent [indefinite] and primary land use right. The latter land use right, as well as inferior rights (long term, secondary, etc.), can be bought and sold, mortgaged and bequeathed; privately owned land can be similarly alienated; but the fact is that this decree does not suggest any compelling reason why a person would want to "own" land rather than "hold" it as a permanent [indefinite] and primary land user.

That question might, however, be clarified in subsequent administrative regulations. As noted, the law requires that such regulations be promulgated by April 1, 1996. According to the "Order of the President of the Republic of Kazakhstan on Measures to Realize the Decree of the President of the Republic of Kazakhstan on Land, Which Has the Force of Law" - dated December 22, 1995 - the following must be enacted:

The procedure and norms for allotting land for ownership and permanent and temporary land use;

the form of the documents that will confirm the right of ownership in a plot of land and the right of land use;

the amounts of established fees for land, which will be sold into private ownership or allotted to land use; and

the limitations on the size of land plots that will be allotted to citizens and legal entities.

Until regulations called for in this "Order of the President" are enacted, Kazakhstan's bureaucracy is not obliged to take any action to implement this decree "On Land". A significant difference between this decree and prior legislation governing the same subject, is that the prior Land Code addressed many administrative and procedural details that are not addressed in this decree. "The devil is in the details." We can only guess at the answers to numerous practical questions, including many that are not necessarily covered in the above Order.

## **TWO ADDITIONAL PRELIMINARY ISSUES**

First: According to Article 6, each and every part and parcel of Kazakhstan is categorized according to its "designated purpose" - that is, its mandated activity, whether residential, industrial, agricultural, etc.; every parcel must be devoted to the purpose for which it has been classified, else the owner or user is liable to loss of all rights with respect to the realty in question. No change in the classification of a parcel is allowed, except with the explicit permission of the Government. However, no criteria or procedures for designating and altering land classifications are provided in this decree; and the above- referenced "Order of the President" does not require enactments to fill this gap.

The best way to fill this gap, as already suggested, would be a) to ordain a general constitutional

guarantee of property rights, including rights in realty; b) to allow all land uses, except those forbidden by generally-applicable zoning laws and land-use regulations; and c) to enact further generally-applicable legislation that would enunciate policies and procedures by which additional land-use restrictions could be competently ordained and fairly enforced. It is obvious that land use policies are central to this decree; it is equally obvious that little thought has been given to their rational development and fair implementation.

Second: Article 15 of the decree "On Land" - dated December 22, 1995 - requires that "the procedure for issuing and transferring land ownership rights and land use rights to a land plot ... shall be established by the Government of the Republic of Kazakhstan." On December 25, 1995 - presumably in compliance with that order - another presidential decree was promulgated, entitled "On the State Registration of Real-Estate Rights and Transactions"; this decree permits rights in realty to arise only after registration.

However, Article 122 of the decree "On Land" - one of several articles entitled "Interim and Final Provisions" - creates a potential self-referential paradox (or at least ambiguity) in paragraph 8, which ordains: "All documents certifying land rights and issued to private individuals and legal entities before this Decree becomes valid, and issued in compliance with legislation existing at that moment, shall preserve their legal force until they are replaced with new documents certifying ownership or use rights in accordance with this Decree." This provision, appearing in a presidential decree that explicitly forbids contradictory laws (including, perhaps, contradictions appearing in a presidential decree issued three days later), may prove troublesome indeed. The question remains: Is registration necessary to "perfect a title" issued before these two decrees were promulgated?

Note that according to Article 122(3), "land plots designated for the construction and maintenance of buildings housing several apartments and/or non-residential premises, shall be transferred into the common ownership of the owners of said apartments and premises or into the ownership of a legal entity formed by said owners from the moment this Decree becomes valid." Is this transfer self-executing, or must the owners register it? Obviously, if the "owners of said apartments" want to transfer ownership, or mortgage their property (individually or collectively), registration will be necessary, but if they do not want to do anything other than carry on living in their apartments as before, will a time come - perhaps three years hence - when they find that their title is no longer good?

I will address this question further in my memorandum on state registration of real-estate rights and transactions.

## **REVIEW OF RELEVANT PROVISIONS, IN SEQUENCE, WITH COMMENTARY**

This section addresses some of the specific issues raised in my Task Order, as well as other points of interest not yet discussed. Of course, this decree is very long; I can only highlight a few parts of it.

## Article 1. Basic Terms and Definitions

Among the terms here defined, three relate specifically to my Task Order:

" 'A condominium' means a form of real-estate ownership under which separate units of real estate, including specific land plots, are individually owned by individuals and/or legal entities, whereas those portions of real estate which are not under separate ownership rights (an indivisible land plot attached to a building, or commonly used land) are owned by real-estate owners under common ownership rights."

" 'Private ownership rights to land' means the right of individuals and non-state legal entities to possess, use, and dispose of land owned by them under the terms and conditions and within the limits established by this Decree."

" 'Land use right' means the right of an entity to possess and use a land plot owned by the state either indefinitely (permanent land use) or over the course of a specific period of time (temporary land use). A land user shall have the right to dispose of the land use rights belonging to him in the instances and within the bounds established by this Decree."

The distinction between permanent [indefinite] and temporary is clarified later in the decree. Temporary means "up to 99 years"; permanent [indefinite] means 99 years or more, and might - in effect - mean the same as "in perpetuity" (which is presumably the duration of "private ownership"). This memorandum generally follows the word "permanent" with the bracketed word "indefinite"; however, it may well be that the term or duration of an ownership right - presumably perpetual - is no longer than the duration of a permanent [indefinite] tenure.

As suggested, a permanent [indefinite] primary tenancy might result in "property rights" that are essentially identical to those commonly associated with ownership. But the law says little about what those ownership rights are, and - turning the analysis on its head - we must infer ownership rights from an examination of use rights: whatever the best use rights are, the ownership rights must, presumably, be better. Except in one possible respect: it appears that the Government intends to essentially give away permanent [indefinite] primary use rights; yet it appears that ownership rights will not be "issued" or "allotted" but "sold" - although the term "fee" is used here to denote what might be the purchase price, might be the annual rental, or might be a document-processing charge. Presumably the regulations can be expected to clarify this subject.

Note the extent of the "disposal right" implied by the right of "ownership" is not addressed in the decree, although the "disposal right" of a permanent [indefinite] land user is. This latter right - presumably a lesser right of "disposal" than that accorded to "owners" - includes "sale, gift, issuance into secondary land use, exchange, relinquishment in other forms, to put under pledge,

to bequeath, to invest in the form of a contribution to the charter capital of commercial associations or as shares in the property of cooperatives, including those with foreign participation, as well as by means of completing other transactions relating to said rights which are permitted by civil and land legislation." (Article 43(1))

Might one argue that "disposal rights" such as the right to sell an option to buy or lease, or to grant a life estate with the remainder to another, are rights which are accorded to owners but not to permanent [indefinite] land users?

Note also that foreigners are prohibited from privately owning certain categories of land (mostly outside cities); furthermore, foreigners cannot be "issued" or "allotted" permanent [indefinite] land use rights (again, these appear to be mostly associated with the countryside and agriculture); but it is not clear whether citizens who have had such use rights issued or allotted to them may then transfer (presumably, sell) those rights to a foreigner; in short, the purpose here may be merely to prohibit non-citizens from getting an allotment of free land from the state. (See Article 40.)

Foreign individuals and legal entities are explicitly granted the same rights as those granted to citizens and legal entities of Kazakhstan, to the extent the decree or other legislation does not restrict those rights (see Article 4(4)); this might imply that any ambiguity in Article 40 should be construed in favor of the foreigner, but one would be unwise to bet heavily on this conclusion.

### **Article 3. The Principles [i.e. Goals] of Land Legislation of the Republic of Kazakhstan**

What is most noteworthy about the goals listed in Article 3 is that no mention is made of the merits of transferring as much realty as possible into private ownership. Indeed, that clearly is not a goal. Private land ownership remains, at best, very controversial and little understood. As "democracy" has gotten a bad name in this region largely because a competent form of "constitutional democracy" has not been tried, so "land ownership" might end up being vilified because the "property regime" that was adopted was flawed, badly implemented, and not subject to review by an independent judiciary.

The Western belief that land with an owner (what in Russian is called a "khozian") is better preserved, developed, and managed than land without an owner, has co-evolved with Western principles of land-use law that are likewise quite unknown in this region. Ownership responsibilities are the other side of the coin of ownership rights. It is evident that the drafters of this decree "On Land" have little appreciation for the ways in which a competent "land law" - contextualized by good law generally - can serve to protect land and natural resources.

### **Article 14. Limits to the Rights to a Land Plot**

Ownership and land use rights are limited to the "surface layer of the soil, fixed reservoirs, and perennial plantings found within the boundaries of said land plot." If the owner or land user

finds anything valuable below the surface of the land, the state will acquire it.

**Article 18. The Right to a Land Plot and the Right to All Buildings and Structures on the Land Plot**

In general, there can be no "severance" of the right to land and the right to the structures thereon. This seems quite draconian. For example, it seems that I cannot rent my garage to another without concurrently renting the land under it, and if my land is not divisible then I cannot rent my garage without renting my house and the indivisible land under both structures. Does this also mean that I cannot rent one room in my house or condominium? The new Housing Code might clarify these matters.

**Article 26. Rights to a Land Plot Attached to a Building Comprising Several Apartments and/or Non-Residential Premises**

1. An indivisible land plot attached to a building housing several apartments (an apartment building) and/or non-residential premises shall be owned or used by the owner (owners) of the building, by the legal entity established by the apartment (premises) owners, or by the state - if attached to non-privatized residential buildings.

Each owner or permanent user of such premises shall have the right to use the attached land plot in order to satisfy ordinary servicing needs.

2. A form of ownership may be applied, whereby apartments and/or non-residential premises are owned by the owners of said apartments (premises), and the common parts of the building outside the apartments (premises), as well as the attached land plot, are owned by the owners of said apartments (premises) under common ownership rights or common land use rights (condominium).

The share of each owner in common ownership shall be inseparable from the ownership of one's own apartment (premises). Unless otherwise established by an agreement between the owners, the value of a share shall be determined by the correlation between the living area of an apartment (premises) and the area of the entire building and the land plot. Such a share may not be allotted in kind (ideal share).

3. Transferring ownership rights to an apartment (premises) to another entity shall entail transferring a corresponding share in the rights to the land plot to the acquirer of the apartment (premises).

4. In order to manage and maintain the common property, and to properly maintain an entire building and the attached land plot, participants in a condominium may form a consumer cooperative of apartment and/or premises owners. If apartment (premises) owners (permanent

users) so wish, they may form either a simple association or a housing cooperative.

5. If the owners of apartments and/or non-residential premises have not chosen any organizational-legal form within 3 (three) months after this Decree becomes valid, then on the basis of the appropriate resolution issued by the local executive body, a condominium in the form of a consumer cooperative of apartment and/or premises owners shall be established for such a building in accordance with the procedure established by the Government of the Republic of Kazakhstan. For buildings with residential premises, a procedure for setting up condominiums may be stipulated in housing legislation.

Article 26 has been quoted in full; it essentially speaks for itself; elements are discussed in the Conclusion.

### **Article 33. Objects of Private Ownership.**

This article is important, but also confusing. It sheds light on the "concept" of private ownership in Kazakhstan, including its murkiness. From this and other articles one gets the impression that private land ownership is conceived of as something that will be first an urban, then a rural, phenomenon; more specifically, it is conceived of as something that will occur initially in towns and cities and in "green belts" surrounding them, and that the "common areas" in such green belts will be employed to experiment with a new form of resource management - a hybrid producers' co-operative - which might later be employed throughout rural Kazakhstan.

According to this decree, private ownership is allowed of "land plots allocated (or to be allocated) for construction, or land that has been developed with industrial or non-industrial buildings, including residential buildings and structures and their complexes, as well as land designated for the maintenance of buildings and structures in accordance with their purposes" (Article 33(2)). Interestingly, this paragraph is preceded by one ordaining a kind of ownership that comes closest to the "land ownership" allowed in Soviet times: "Land plots allocated (or to be allocated) for personal supplementary farming, horticulture, and dacha construction may be held in the private ownership of individuals." (Para 1) Such "green belt" plots may not be owned by foreign citizens. (Para 4)

The concept of "plots for personal supplementary farming, horticulture, and dacha[s]" must not be confused with "agriculture" as such. But there is nothing in the decree that prohibits such plots from being allocated to workers, residents, or pensioners in villages and collective or state farms. Indeed, Article 77(3) contemplates villagers and farmers having "plots of land under ownership rights"; and one gets the impression that these plots are not for homes but, rather, for supplemental horticultural activities. Perhaps the soon- to-be-announced regulations will clarify whether villagers, etc., may "own" land on which they may live (in real houses, as distinct from dachas) as well as cultivate their appurtenant gardens; at what point a "garden" becomes a "truck farm" - or a flourishing vegetable garden becomes "agriculture" - will be problematic.

All other land is "state land" and cannot be privately owned. All "land used for agricultural purposes" is "state land"; it is available for short-term or long-term (3-99 years) land use rights, as well as for permanent [indefinite] land use rights, whether primary or secondary, but it cannot be "owned" as such. As suggested, if the appropriate authorities change the designation of a portion of a collective farm (for example) from "land used for agricultural purposes" to land allocated for residential buildings, then "plots" therein may be "owned"; and Articles 33(1) and 77(3), mentioned above, seem to allow state- and collective-farm residents to "own" remote garden plots. But my sense is that rural land is still the subject of considerable debate at the highest levels. Articles 76(5) and 77(6) suggest that this entire matter is under review, and that a "special land regime" might be in the offing for agricultural (and appurtenant) land.

Other categories of "state land" include "land used for defense purposes"; "specially protected nature territories"; "forest and water stock lands"; and "commonly used land [probably meaning a public park] in populated areas" (Article 33(3)).

Article 33 ends by stating: "Privately-owned land plots shall be considered as real estate." One is left with the impression that the key idea associated with "private ownership" is a "plot"; private ownership is apparently intended to relate to rather small holdings; the decree leaves to the regulations the determination of how large a "plot" may be. Under the prior Land Code, a "plot" was very small indeed - ordinarily about a quarter acre (one-tenth of a hectare).

#### **Article 39. Transfer of Land Use Rights**

This article ordains that "commonly used land" may not be the subject of land use rights transactions; that phrase occurs also in the definition of a condominium, above; this article might therefore be applied to prohibit a condominium association from renting a portion of its "commonly used land" to the neighboring kindergarten, half of whose students (in this hypothetical) are residents of the condominium and will benefit from the expanded playground created thereby. Yet, in Article 39, that phrase appears next to "land allotted for defense needs"; and this decree "On Land" governs every square inch of Kazakhstan, including road berms; in context, therefore, "commonly used land" in this article probably means a city park (the apparent meaning of this phrase in Article 33(3)); if so, the kindergarten children can have an enlarged playground.

#### **Article 48. The Right of a Physical Entity to Move About and Cross Through Another Entity's Land Plot**

There is nothing remarkable about this article, although it reflects attitudes that are very different from those underlying the law and practice in the United States. According to this provision, if an owner has not fenced off his property - and thereby indicated that another person is prohibited from crossing without permission - then "anyone may cross through said land plot unless doing so causes damage to or disrupts the private owner or land user." Perhaps this is why there are so many walls and fences in the Soviet world. Unless land is walled off, anyone may trespass upon

it.

#### **Article 49. The Right of Limited Use of a Neighboring Land Plot or Other Land Plots**

Neighbors may "demand that the holder of private ownership rights or land use rights ... issue limited use rights" to them, so that they may lay, install, or utilize "lines for electricity, communications, water supply, heat supply, melioration (land improvement measures) and other needs of a private owner or land user which may not be provided without establishing a servitude on a neighboring or any other land plot" (para 1 and 2). But the beneficiary will have to pay for losses related to such a servitude, and the neighbor may set a servitude fee.

#### **Articles 56, 57, and 58. The Subject of a Pledge; Restrictions on Pledging Land Plots and Land Use Rights; Pledging a Land Plot or Use Rights to a Land Plot Occupied by Buildings or Structures**

For condominium owners these provisions are important in this respect: a pledge of one's apartment automatically entails a pledge of the share of the commonly used land and realty of the condominium. If the condominium association wants to pledge the entire apartment building, then it must also pledge the land on which it is located. For this, however, the association must obtain the consent of all the apartment owners in the building: "Pledging indivisible, commonly-owned land, or common use rights to indivisible land, shall be permitted on the basis of the written consent thereto of all participants in common ownership or common land use rights." (Article 57(3)) One may not pledge the land without pledging the building also. (Article 58(1)) The law appears to prohibit a mortgage of the land, for example, to secure a construction loan to build a garage. Of course, all pledges must be registered.

#### **Article 60. Grounds for Terminating Private Land Ownership Rights or Land Use Rights.**

Pervasive throughout this decree, and explicitly ordained in this article, is the requirement that a plot must be "utilized according to its purpose." (Para 2(3)) The owner or user risks termination of all rights in the subject property if it is not used as mandated for three years.

An owner, for example, is liable to lose all ownership rights if his empty plot, classified as "residential" property, is "held" for three years without any evidence of a residential building being constructed thereon. This explains the many unfinished building sites in the Almaty foothills: so long as the owner is "building" on his plot, his ownership is secure. Presumably a few bricks have to be added every three years, however, or the entire investment "may be withdrawn from the owner or land user" (Article 71).

The following hypothetical may seem farfetched, but it suffices to make a point: I am a person of modest means, but I love land and I love the country. I have only enough savings to buy a dacha plot. I do not have enough money to buy lumber, etc., to build a dacha. And, truth to tell,

I am not sure I actually want to build a dacha; not quite yet; I might prefer to hold the land and bequeath it to my children or grandchildren. Yet I do know that, if I build a dacha, I would like it to be a birch-log cabin. Such logs being expensive and nowhere in sight, I commence by planting birch saplings, with wild-flowers among them. Children from neighboring dachas come to my lovely garden to play. I decide to generate a small income from their use of my "garden-park" - to invest, for future dacha construction. My neighbors are pleased with this arrangement, as their children are now less likely to trample on the many vegetable gardens in the neighborhood. Almost everybody agrees that my "dacha plot" (sans dacha) is a boon for the entire neighborhood. But one neighbor, whose happiness is increased by ensuring that another's happiness is reduced (a curiously communist malady), and who furthermore dislikes children, flowers, and me, files a complaint with the local authorities - three years after I acquired my land plot - asserting that I am not using it for its designated purpose. Under this decree, notwithstanding its lip-service to preserving and developing land resources, etc., I will have a very difficult time preventing the Government from taking my "dacha plot" away from me.

#### **Article 78. Land Plots Used in Horticulture and Dacha Construction**

As already mentioned, where a group of dachas have common roads, or land plots for horticulture have common irrigation ditches, this decree requires the owners to create organizations of joint ownership to manage these common areas. "The legal status of organizational structures formed by land owners shall be determined either by an agreement between owners or by the charter of the legal entity they formed. ... Upon failure to reach agreement on this matter, through a decision of the body allocating the land plots, a condominium shall be formed in the organizational form of a consumer cooperative of land owners" (Paras 1 and 3).

In the past, people were allotted garden plots and dachas side by side. Now that these have been "converted" to private ownership, the Government is requiring that commonly used "roads, irrigation networks, storage facilities for cultivated production, warehouses and other commonly utilized objects" be converted to condominium or cooperative ownership. Yet how many dachas have (or ever needed) "warehouses"? This might be a "dry run" for agricultural privatization in the future.

#### **CONCLUSION**

1. You asked me to "clarify the rights to land ownership that are provided to homeowner associations through the Land Code and ... examine possibilities for transfer of land parcels to homeowner associations."

Answer: As noted, Article 26(5) states: "If the owners of apartments and/or non-residential premises have not chosen any organizational-legal form within 3 (three) months after this Decree becomes valid [i.e., March 22, the date of this memorandum], then on the basis of the appropriate resolution issued by the local executive body [let's assume that they have issued it], a

condominium in the form of a consumer cooperative of apartment and/or premises owners shall be established [has as of this date been established?] for such a building in accordance with the procedure established by the Government of the Republic of Kazakhstan [whatever that procedure may be]. For buildings with residential premises, a procedure for setting up condominiums may be stipulated in housing legislation [which has not yet been adopted]."

Arguably, as of this date, by operation of law, many consumer cooperatives have been formed; they are legal entities; and they may therefore own Article 33(2) realty, including "land plots allocated (or to be allocated) for construction, or land that has been developed with industrial or non-industrial buildings, including residential buildings and structures and their complexes, as well as land designated for the maintenance of buildings and structures in accordance with their purposes . ." But only individuals, not legal entities, may own Article 33(1) "plots for personal supplementary farming, horticulture, and dacha[s]."

The homeowner association, as a legal entity, would seem to be allowed to purchase an adjoining land plot, or any land plot, but would have to purchase the building(s) thereon unless that plot was divisible. This legal entity could also purchase one, several, or all of the apartments in another condominium, and then rent, lease, or sell them. Such an association could therefore be a member of another condominium association. Now, the Law on Associations, or the Housing Code, or other law might modify the rights of this legal entity, but on the face of this decree "On Land" - which no other law may contradict - these legal conclusions would seem to follow.

2. You also asked me to examine how the law might be applied to permit individuals working on agricultural land to assert ownership rights in residential premises and other realty not directly connected to agricultural activity.

Answer: As suggested, rural land appears slated for a "special regime" that has yet to be conceptualized, let alone enacted. My guess is that all the realty of state and collective farms is currently designated as Article 33(3)(1) "land used for agricultural purposes"; most of it is under cultivation, etc., while some of it includes barns, feed-lots, grain elevators, and similar structures. Unless some portions are currently designated as Article 33(2) "land plots allocated (or to be allocated) for construction, or land that has been developed with industrial or non-industrial buildings, including residential buildings and structures and their complexes, as well as land designated for the maintenance of buildings and structures in accordance with their purposes" - in which case private (individual and associational) ownership thereof is allowed - the appropriate governmental authorities will have to reclassify portions of agricultural land into Article 33(2) land in order to allow agricultural workers to assert ownership rights in residential premises currently situated on Article 33(3)(1) land.

3. Finally, you asked me to comment more generally on the scope and provisions of this new law, indicating significant differences between the new and the old.

I have supplied considerable such commentary in the body of this memorandum. Re-reading the

text of this decree, I keep finding more that could be said, indeed should be said. The decree is very long. And, as indicated, it is about to be elaborated upon by administrative regulations that will fill many gaps, answer many questions, and - inevitably - raise new ones. The subject of this decree is huge; I have tried to address a representative sample of issues while focusing on the most important.

As already emphasized, the principal new goal of this decree appears to be to create a market in realty - whether it is "owned" or otherwise "held"; that is a worthy goal. But a careful consideration of this new law and of the "legal context" within which it has been enacted leads, inescapably, to the conclusion that this goal would be more securely, rationally, and predictably achieved if a) "property rights" were the starting premise, b) all limitations thereof were articulated as limitations, and c) any ambiguities in those limitations were construed against the "drafter" of those limitations, the Government.

It is clear that, for those who wrote this decree, the ideas and "categories of analysis" relating to land use rights were familiar and comfortable; those relating to ownership were not. As a consequence, the decree mentions specific and detailed land use rights, depending upon the classification of "holders" of those rights as well as classification of land, but the decree says little about the rights of "owners" as distinct from "holders"; this memorandum has - perhaps incorrectly - assumed that owners' rights are more extensive than the rights of most-favored "holders": citizen-holders of permanent [indefinite], primary land use rights.

The truth is, we cannot know how well or poorly "ownership rights" will develop and be protected; the words within the four corners of this decree can at best point to the law; they are not the law itself. In any event, those words - at least in Russian and English - point to many questions needing further thought, many answers needing future legislative amendment.

The manner in which this decree is articulated - especially its reflection of the premise that what is not allowed is forbidden - is particularly worrisome, given the absence of a long history and strong traditions in which people, proclaiming pre-existing personal and property rights, created governments to protect those rights. The post-Soviet state - in this instance, Kazakstan - still, in effect, asserts that all rights are based on "positive" law (that is, "enacted" law); pursuant thereto, Kazakstan's president has issued a decree which for the first time grants land-ownership rights in addition to the more familiar land-use rights of Soviet times.

Under this new law, however, as under all law in Kazakstan, a person acts at his or her own peril unless that action is explicitly allowed. Because the essence of all rights is that they are ultimately based upon "unarticulable major premises" about what it means to be a free and responsible person in a dynamic and evolving society, the new decree "On Land" - although representing an improvement over prior law - will unduly restrict Kazakstan's development of a modern "property regime" and related credit, banking, and economic infrastructures, all of which depend for their vitality upon freedom of contract, no less than does constitutional democracy, properly conceived.

# KAZAKSTAN'S DRAFT LAWS ON LOCAL REPRESENTATIVE AND EXECUTIVE BODIES AND LOCAL SELF-GOVERNMENT

KAZAKSTAN  
May 1996

## INTRODUCTION

You recently asked me to analyze two draft laws on the powers of local government, which were presented to the Parliament in January, and will be debated and perhaps adopted next month. These draft laws have not yet been officially published; I obtained copies through a friend.

My review of these drafts - approximately 80 pages - has left me very worried about their contents. This memorandum contains my brief summary of them, plus a detailed review and analysis of some aspects.

The draft laws are preceded by explanatory notes prepared by the drafters, as well as official assessments of their compatibility with the system of governance ordained by the 1995 Constitution of Kazakhstan. Those notes and assessments provide important context, which I have sought to reflect in my analysis.

### Executive Summary of Both Draft Laws

First: The draft law on local representative and executive bodies (D-LREB) supposedly "ordains" much law governing this subject. Only when one focuses on the draft law on local self-government (D-LSG) does one fully grasp the limitations of D-LREB.

These drafts abolish the "legislative branch" - the maslikhats - everywhere except at the oblast level and in Almaty and Akmola. D-LREB focuses on oblast-level governance, but also addresses sub-oblast governance. D-LSG focuses on "representative bodies" at the sub-oblast level, where the maslikhats have been abolished.

The drafters claim that this restructuring of the nature and functions of government at the local level is entirely in conformity with the Constitution of Kazakhstan and will lead to more efficient and effective local governance. The official commentary implies that the Constitution does not require the formation of maslikhats at all local levels, but merely requires legislation spelling out the jurisdiction, etc., of such bodies, if created. I think that this is a pernicious interpretation of the Constitution's requirement.

The "non-governmental bodies of self-government" (as they are called), which replace the maslikhats at the sub-oblast level, are apparently conceived of by the official commentary as a great "breakthrough" in the art and science of governance, but, in my judgment, they are at best highly problematic. Civilized societies have long realized that merely calling a body "non-governmental" does not relieve it from its obligations under the Constitution of fairness and rationality, etc. The map is not the territory; the name is not the thing named; and merely calling something a non-duck does not detract from the fact that it walks and quacks like a duck, albeit - in this instance - a rather sickly one.

Second: The drafts' official commentary explicitly rejects the principle of separation of powers, on the asserted ground that the people are not yet ready for that aspect of democracy. In lieu thereof, the drafts ordain a "vertical" structure of executive authority: the akim, or mayor, of all cities, towns, and districts is a) appointed by the president, b) removable by the president, and c/ reports to and is effectively controlled by the next higher akim, who is also appointed and removed by the president.

Third: The drafts are ambiguous, at best, about the role of the people in the management of local affairs. The abolition of the maslikhats is justified on the ground that the people need only mechanisms of petition and protest to satisfy the requirements of "representative government" at the sub-oblast level. However, adding to the confusion here, the official commentary to D-LREB asserts that the law establishes for the first time the institution of "imperativny mandat", loosely translated as "imperative mandate". Through imperativny mandat the people are said to have the right to demand that their local representative organs carry out their nakazy or orders. But a careful study of the drafts, and especially of D-LSG, reveals that such nakazy must be carried out only if the akim agrees to carry them out. In fact, such nakazy are essentially mechanisms of petition and protest, nothing more.

Fourth: Pursuant to the concept of non-governmental bodies of local self-government, the executive - through the akim system - will have all the power. The "representative body" at the local level (by whatever name) will serve primarily, perhaps entirely, as a buffer between the akim and the people. Under the 1995 Constitution, the legislature at the central government level is supposedly a real legislature, but in fact has little genuine law-making initiative or power. In contrast, these non-governmental bodies of local self-government, although supposedly representative, do not even have the pretense of legislative power.

Fifth: The goal of these drafts is said to be to "ensure sufficient decentralization of government for a modern society while maintaining strict vertical executive control". If adopted, these drafts will create a confusing edifice of "local self-government" built on Orwellian doublespeak.

## ONE

### **Summary and Comments on the Draft Law On Local Representative and Executive Bodies**

D-LREB establishes legislative bodies or maslikhats for oblasts and the two cities of national significance, Almaty and Akmola. It abolishes them elsewhere. This effectively does away with "representative government" at the sub-oblast level. D-LREB is presented as a wholly appropriate and correct interpretation of the requirements of Articles 85-88 of the Constitution. Based on a purely formal interpretation of the Constitution, the abolition of sub-oblast legislative bodies is arguably constitutional, because the Constitution merely provides that "[the jurisdiction of maslikhats, procedure of their organization and activity, and legal status of their deputies shall be established by law." (Article 86, para. 6) Pursuant thereto, the draft abolishes most of them. I submit that the fair intendment of Article 86, para. 6, ought to be that sub-oblast maslikhats shall exist pursuant to legislation ensuring their effectiveness. I submit that any other reading of the Constitution is pernicious. In any event, calling all replacements for sub-oblast maslikhats "non-governmental bodies of local self-government" - and then giving all actual power to akims who are entirely beholden to the president - is hardly "local self-government" at all.

D-LREB is most remarkable for what it does not ordain. It goes on for pages and pages, detailing how the maslikhats will be formed, how the deputies will conduct their business, how these deputies will be removed if they do not properly conduct their business, and how these bodies are supposed to interface with other governmental and quasi-governmental bodies. Yet the reader will search in vain for provisions detailing the business or "jurisdiction" of these bodies. Indeed, the reader must conclude that the drafters intended only that these representative bodies should meet, confer, occasionally pose questions to the executive branch, issue orders or nakazy which the local akims do not have to act on, and then close their meetings.

The drafters' choice of the number of deputies in a maslikhat is interesting; it is set at fifty (Article 2, para. 2). If the drafters had thought that the maslikhat would actually vote on significant legislative issues, they might have provided for an odd number so that a vote would not result in a tie. Of course, since the draft clearly provides for the akim's attendance at maslikhat sessions (indeed, he is probably intended to be the chairman of such meetings, although this is not clear), presumably his vote would break any ties, as does the Vice President's vote in the U.S. Senate. But, unlike the Constitution of the United States, this law is silent on that important question. There are other problems with the number fifty. Various provisions contemplate a 2/3 vote of the deputies; the number fifty cannot be divided three ways (see Article 3, para. 2).

A quorum of a maslikhat may be merely 25% of the deputies, that is, thirteen people (Article 21, para. 1). It is unclear whether 25% is the quorum for all decision-making - but then, it is unclear whether any maslikhat "decision" can govern the akim anyway.

As noted above, the draft does not clearly state what the maslikhats are empowered to do. The draft is filled with references to "mutual agreement" (Article 4, para. 2), "resolving differences" (Article 4, para. 3), "the right to demand the annulment of decisions" of other bodies (Article 5, para. 3), and so on, but on examination the law-making powers of the maslikhats are essentially nil, and the powers of the sub-oblast "representative bodies" are even more opaque. Article 6,

paragraph 2 ordains: "The delimitation of powers of the organs of local government and self-government [again, these are two different kinds of "organs"] shall be realized in accordance with this law and the law on local self-government." The concepts of local government at the oblast level and self-government at the sub-oblast level are decoupled, and one has to consult D-LSG to get a sense of the parameters of this decoupling.

Article 13 lists the possible subjects of a local referendum: a) whether a business, institute, or organization that presents an environmental hazard to the population should be allowed; b) whether the population should be removed from environmentally hazardous areas or districts where a technological catastrophe has occurred; and c) how various residential districts and administrative-territorial units should be named. These are the only questions that may be submitted to a referendum, and even here the akim can decide to settle these matters himself and reject a requested referendum proposal - apparently regardless of the extent of the population's desire to settle these matters by referendum, as manifested by a very large number of signatures on a referendum petition.

An apparent guarantee of openness (glasnost') in the maslikhat's proceedings is the provision that the akim, his deputies, and managers of other bodies of government can attend any of the maslikhat's sessions, whether open or closed, and even demand the floor. D-LREB is silent on the rights of the people to attend sessions of the maslikhat.

This draft frequently mentions the right of the people to place "orders" or nakazy with their maslikhat - as if the population has a general right to demand anything of their maslikhat at any time - but D-LREB requires that non-governmental bodies of local self-government must "present the orders" to the maslikhat, so that the maslikhat can "confirm" them (or, presumably, decline to do so). Yet such confirmation will actually be performed by the chair of the maslikhat - probably the akim (Article 27, para. 5).

The chair of the maslikhat has a variety of ministerial and other responsibilities, including the responsibility to "ensure in accordance with resolutions of the maslikhat that drafts of the most important decisions of the maslikhat are discussed by the citizenry [and] to decide such other questions which may be assigned to [the chair] by the maslikhat or given to him by legislation" (Article 27). Neither the "most important questions" nor "such other questions" are defined, let alone hinted at, in this draft.

The maslikhat's various standing committees are required to make reports to the maslikhat at least once a year (Article 29); the akim is required to present his report on the budget twice a year (Article 65); and the maslikhat itself is supposed to convene for business and be in session at least four times a year (Article 21, para. 3). It appears that D-LREB does not intend that the maslikhat or its standing committees should get much work done, nor that the akim should spend much time keeping the maslikhat informed about his activities; the conception seems to be similar to that of Soviet times, when "legislatures" met infrequently, for only a few days, and ratified every question put to them (always unanimously, until perestroika). Deputies do have

the right to demand that the akim prepare a report (zapros in Russian) on questions that are within the jurisdiction of the maslikhat, but the reader will search in vain to determine what kinds of questions are the proper subject of a zapros (see Article 40). Deputies of the maslikhat are required to make a report to their constituencies at least once a year (Article 37), and are supposed to discuss progress in fulfilling citizens' nakazy in this report (Article 48).

D-LREB ordains a supporting apparat for the maslikhat - with financing, personnel, and organizational limits set and guaranteed by the central government. All employees in this apparat are civil servants, and will not lose their jobs when there is a change in the deputies of the maslikhat. The maslikhat apparently has no say concerning how much (or little) money should be spent to maintain its administrative structure; this is all decided by the central government (see Article 36). D-LREB also ordains that the maslikhat shall have the same number of personnel as the akim shall have in his apparat.

In view of concerns expressed by human rights groups last year regarding the constitutional role of the maslikhats as electors of deputies to the Senate of Kazakstan, it is worth noting that there is only one sentence devoted to this function: "Deputies of the Maslikhats shall serve as electors during elections of deputies to the Senate of the Parliament." (Article 37, para. 5.)

Deputies have the right to insist that any person in their respective executive organs respond to a question raised at a working session of the maslikhat. The response must be made to the working session, in person. The time period for answering this question may be as short as three days. However, if the executive organs need more time to prepare an answer they may have a month or more - from 45 to 60 days (Article 41). It is not clear whether the maslikhat must be called into special session to hear answers proffered after a long delay.

A deputy may attend any discussion by the local executive organs that touches upon "the interests of the citizens of his constituency", as well as "participate" in any review of the implementation of the law. This is ambiguous, and seems over-broad to the point of absurdity. One can only speculate whether the drafters had any idea what should be relegated, respectively, to the executive and legislative branches, and how to resolve disputes between them. All public officials are apparently allowed to check up on any others, but it is unclear whether maslikhat deputies can really intercede in any and all administrative matters.

Deputies are allowed full access to local executive organs (see Articles 42 and 43), but no mention is made of the citizen's right of access. In general, it appears that deputies have been accorded a "watchdog" role, and have few if any genuine legislative functions (see Articles 61 and 62). Again, maslikhats and organs of local self-government are essentially a buffer between people and their akims. This becomes clear when one reviews the powers that D-LREB grants to local executive organs.

The powers of local executive organs are listed in Article 64 through 71; various special powers of the akim are listed in Article 65. In contrast to the provisions covering the duties of the

maslikhat, the provisions covering the duties of the executive are much clearer and quite broad. For example, the akim "creates, reorganizes, and liquidates enterprises, organizations, and institutions, which are constituted out of communal property." He "decides who shall receive plots of land, what plots shall be condemned (repurchased), and decides other questions in accordance with the law on land." The akim also decides what "financial debts, loans, and other long-term obligations should be incurred" by his oblast or sub-oblast administration. In general, the akim can do essentially whatever he wants, but is accountable to the next-higher akim, and ultimately to the president. Thus, local executive bodies "exercise control" over the provision of services to the people and the "preservation and rational use of land and other natural resources." One is reminded of Soviet times, when people were beholden to the Plan as set forth by the Party and administered by the Party Apparatus.

For ICMA's Project, Article 69 of D-LREB is worthy of note. This article deals with the powers of the local executive organs in constructing, managing, and servicing the "communal housing fund" - housing under the jurisdiction of the local Soviets in the current Housing Code. Thus, under the new law, if adopted, control of this housing fund will pass to the executive organs. All decisions concerning housing, including who will be placed on the list as persons in need of improved housing, will be passed to the executive organs. Important questions, such as what uses shall be permitted for non-residential premises, are mentioned in the list of items within the executive organs' competence. The executive organs are also specifically empowered to "decide questions concerning the organization of housing-construction cooperatives and citizen-construction cooperatives, to register their bylaws, and to exercise control over their operations." Also important, the executive organs are specifically authorized to "control the maintenance of the housing fund of enterprises and structures ... which are not part of the communal housing fund".

If there were any doubt whether the maslikhat will have any genuine law-making power, D-LREB makes clear in Article 74 that any proposal by the maslikhat which, if adopted, would increase or decrease the budget in any respect, must first be submitted to and receive the approval of the akim. It seems clear that the akim's judgment whether a proposal falls under this provision is dispositive. In effect, the maslikhat cannot consider any proposal unless the akim agrees that it may consider same. This provision is similar to Article 61 of the Constitution of Kazakhstan, which limits issues that can be considered by the Parliament.

Article 75 of D-LREB identifies the sources of income comprising the local budget. These include: a land tax; a property tax; fees for registering private businesses and legal entities; fees for the right to engage in particular, but unspecified, types of activity; duties levied by the state, and other income. Article 76 gives the akim a free hand in spending what is in the local budget, subject to these constraints: He is limited to what the budget at the next higher level allocates to him, and he will have to report to the higher-level akim on how he has spent this money.

Clearly, D-LREB hardly advances the cause of local-government democracy. The people, their non-governmental bodies of local self-government, and even the maslikhats of the oblasts, of

Akmola, and of Almaty, will have little if any voice in their governance.

## TWO

### **Summary and Comments on the Draft Law On Non-Governmental Bodies of Local Self-Government**

The draft law on local representative and executive bodies (D-LREB) is bad enough. But appended to it is a draft law on local self-government (D-LSG). This draft law is even worse.

An official statement captioned "Act of Legal and Criminological Expertise" accompanies D-LSG. It contains the following assertion: "If to proceed from the premise that self-government should be outside the system of governmental power, then it is legally permissible to include government employees in the work of the organs of self-government."

This draft law contains just what these words - and many others like them - seem intent on establishing, to wit, the legislative and presumably constitutional institutionalization of an "organ of self-government" which, although arbitrarily labeled as "non-governmental", will perform tasks that this legislation claims to be vital to the "governance" (by whatever name) of every village, town, township, and city throughout the country. Tasks, moreover, which cannot escape the constitutional strictures of "government under law" - fundamental fairness and rationality - without making a mockery of the Constitution of Kazakhstan and the whole history of civilized governance based on principles of representative democracy and the Rule of Law.

Apparently, the intent here is to create a "buffer" between the executive organs - especially the local akims - and the people they presumably serve. The people will not only lack a real "representative/legislative body" to act in their behalf and with their consent, but they will also lack direct access to the executive. Rather, their "access" will be mediated by a body that includes the very government officials whom they seek to control.

With this new institution in place, true "self-government" at the local level will be a chimera. This idea is somewhat analogous to doctors grafting a third, lifeless arm onto a body - to distract attention from their amputation of its legs.

The drafters of this novel conception explain that "at the local level, it is not possible to carry through with the 'separation of powers'." Accordingly, a) the akim decides what this organ of non-government is supposed to do (Article 4); b) this organ takes the place of the maslikhat in districts, towns, and cities (Article 5); c) it has the authority to do everything a legislature would be expected to do in Kazakhstan (Article 6); and d) it operates, in effect, as contractor for the provision of the gamut of services that would ordinarily be provided by the local government.

The right to land, for example, will be realized by this organ, in accordance with the procedure established in the President's decree "On Land" and other legislative acts. (see Article 11).

D-LSG's provisions on this organ's budget ordain that the "central executive organs of the Republic of Kazakstan" will ensure that such local bodies of self-government will have enough money to operate, based on the central government's capacity to obtain funds for necessary expenditures (see Article 14, para. 2).

The law also provides for the possibility that the local organs will create sources of income in addition to funds allocated by the central government. The draft calls these sources of income "non-budgetary funds established according to the procedure and under conditions provided by the legislation of the Republic of Kazakstan". Such nonbudgetary funds will be exempted from tax and other state excises, and include a) income from the sale of abandoned and confiscated property; b) voluntary contributions by enterprises, organizations, and citizens; c) income from oblast loan programs, oblast lotteries, and auctions; d) income from conducting subbotniks (Lenin's idea - the people work for no pay on Saturdays); and e/other sources.

Provisions covering the "legislative" activity of this organ notwithstanding, this draft law plainly states that this organ "shall not be part of the system of state power" (Article 26, para. 4). Nevertheless, the people must elect representatives to this organ, as if they were electing representatives to a local legislature (Article 27), and the local akim is allowed to be the head of this organ (Article 39, para. 3).

As noted, the drafters institutionalize something called the imperative mandate. They claim that this institution gives genuine power to the people - that through this institution the members of the organ of local self-government will be required to do some things in direct response to a demand from the people. However, Article 31, para. 3 makes it clear that no such "demand" will have any effect unless the executive - the akim - gives his approval. The imperative mandate is not imperative, is not a mandate, and is nothing unless the akim gives his blessing. Since the akim would be a natural "focus" of any public remonstrance, the imperativny mandat is probably meaningless, pointless, a hoax.

### **Final Comments**

Substantial reworking of these drafts is required. Since there is no good reason for having two drafts - two laws - governing the single subject of local law-making and administration, there is a very good reason for having only one law, a law on local governance that reflects respect for the unalterable facts that a) government is as government does, and b) the governance of Kazakstan, at all levels, would benefit from genuine efforts to foster democracy - people-participation - to a far greater extent than these drafts allow. I think that it is an insult to the people of Kazakstan to assert that they are less capable of genuine participation in their own governance today than, for example, the people of America were 200 years ago.

This insult lies at the heart of these drafts, but I do not believe that it behooves the Government of the United States - or an instrumentality thereof - to accept or endorse it. Doing so, without pointing out the obvious advantages of genuine "government under law" based on the consent

and participation of the governed, will do Kazakstan no good and, in my opinion, will do America and the cause of democracy much harm.

This is not a matter of abstract theory. Bad laws that violate the fundamental precepts of good legislation and administration result in a tangled "legal landscape" that impairs the prospects for further social, political, and economic progress. I am aware that there are those who assert otherwise, endorsing "enlightened" authoritarianism, etc. I believe that they are wrong, and that the people of Kazakstan deserve better than these drafts offer.

I also believe that many "opinion leaders" of Kazakstan are embarrassed by absurd laws like these, and do not want their foreign friends to compound their embarrassment by acting as though Kazakstanis must be "protected" from the truth and from themselves.

# ANALYSIS OF THE DRAFT HOUSING CODE OF THE REPUBLIC OF KAZAKSTAN

April, 1996

## EXECUTIVE SUMMARY

The proposed Housing Code needs major reconceptualization. Its treatment of "landlord-tenant" relationships is especially deficient, largely due to sheer ignorance of this area of the law but partly due to provisions ordaining a confusing array of roles for the state (or state instrumentalities): privatizing agent, allotter of housing to "ordinary" citizens, guarantor of housing to the destitute, landlord and allocator of various categories of residential and non-residential real estate, member-owner of some or many units in a condominium, and "policeman" of land owners, realty users, ordinary tenants, and the poor.

The proposed provisions relating to condominiums reflect considerable "Western advice" that was not fully understood and was hence partially rejected. If the rejected portions were "restored" - and if the Draft reflected a fundamental understanding of the concept of a condominium as distinct from a cooperative - then the "condominium law" in this Draft would be serviceable.

However, a good "condominium law" and a good "landlord-tenant law" would be best if separated from the Housing Code, for many reasons including that both subjects involve properties - including portions of the same structures - that are not residential. The purpose of the Housing Code is to guarantee housing for all; the purposes of landlord-tenant law and condominium law are different; these goals can co-exist, but should not be confused. The Draft leaves them badly tangled. We should help Kazakstan untangle them.

## INTRODUCTION

In my Task Order you noted that "ICMA's work in the shelter sector has been geared toward assisting with legal reform to provide the legal basis for a market-oriented shelter sector" and that this work has included "assistance to draft a new Housing Code, to establish the rights of shelter sector participants within a market-oriented shelter sector, including landlord-tenant rights, the role of the state in the sector, and the rights and benefits of 'socially-protected' groups; and to elaborate various forms of ownership, including a new Condominium Law." You also noted that Target 5 for ICMA's work in Kazakstan involves revision and adoption of a Housing Code including a "condominium law, landlord/tenant rights, and eviction procedures". The target date for adoption of the revised Housing Code is June, 1996.

In light of the foregoing, you have asked me to analyze the Draft Housing Code ("the Draft"); to comment on how the Draft differs from the current Housing Code ("the Code"); and to

recommend how the Draft can be improved. You have noted that the Draft is on the parliament's agenda and is likely to be debated soon, and that ICMA would like to exert a helpful influence on the final version of this law.

This memorandum is the third in a series of memoranda addressing the law of Kazakstan affecting rights in realty; as such, this memorandum builds upon information and ideas addressed in those memoranda.

In anticipation of writing this memorandum, I asked ICMA's local staff lawyer, Maria Poulman, to prepare a detailed study of the differences and similarities between the Code and the Draft. Her study provides a useful perspective, not only upon that subject, but also - and perhaps more significantly - upon the larger challenge confronting Kazakstan in the field of housing law and "government under law" generally. I shall start this memorandum by essentially reproducing (albeit with considerable paraphrasing) the significant elements of Ms. Poulman's comparison; however, in order to avoid unnecessary confusion, I have corrected mistakes she made - while at the same time trying to remain faithful to her overall perspective. It will be clear that I do not agree with much of this perspective.

After presenting Ms. Poulman's perspective, I shall address the two main issues - condominiums and landlord-tenant relations - which a/ due to her perspective (a perspective that needs to be understood by those involved in legal reforms in this region), are issues which she did not address as well as I had hoped, or only noted in passing, and b/ due to that same perspective (a perspective that is shared by those who wrote the Code and the Draft), are issues which are inadequately or mistakenly addressed in the Draft.

### *Part One: The Perspectives of Ms. Poulman's Comparison of the Code and the Draft*

According to Ms. Poulman, the Draft contains various new terms and concepts that are not in the Code, for example, the term "person of limited means" and the concept "condominium"; however, the basic right of all citizens to housing, and the provisions detailing the scope of this right, remain unchanged. The Draft focuses on these housing rights. And they are also the focus of Ms. Poulman's comparative analysis.

Various housing funds have been renamed to reflect the fact of privatization. In the Draft, these funds are called a/ the private housing fund and b/ the state housing fund; the latter is sub-divided into two categories, the communal housing fund, which is controlled by the local executive and representative organs, and the housing fund of state enterprises.

The Draft, in contrast to the Code, permits residential premises to be used for non-residential purposes. Further, the Draft has expanded the rights of owners of residential and non-residential premises, allowing them to alter the fixtures attached to their premises, and to alter the layout. The Draft elaborates on the concept of joint maintenance of residential buildings, providing for the right of co-owners to form a "cooperative of premises owners" to perform this work.

Furthermore, the Draft permits the owner to "leave" his premises for indefinite periods of time without the risk of losing ownership rights.

Whereas the Code lists the kinds of disputes that may be resolved by a court, the Draft ordains that all disputes shall be thus resolved unless another procedure is established; but the Draft does not establish any other procedure.

The provisions in the Code and the Draft regarding foreigners are identical: foreigners have the same rights and obligations as citizens of Kazakstan. The Draft introduces the concept of a "foreign legal person," which is absent in the Code.

In some details, the Draft improves provisions of the Code, but in others, the Code is clearer and more detailed. Ms. Poulman discusses the Draft's provisions under the heading "Private Housing Fund", pursuant to the following subheadings:

1. Acquiring the Right of Ownership in Housing;
2. Maintaining the Right of Ownership in Housing and Conditions Relating to its Exercise;
3. Leasing Residential Premises in the Private Housing Fund; and
4. Termination of the Right of Ownership in Housing.

According to Ms. Poulman, the Code is rather detailed in its coverage of ownership of residential premises, evidently already reflecting the change in attitude in favor of private ownership of one's residence; in this respect, the Draft does not differ substantially from the Code, providing only additional details concerning the legal basis for asserting ownership in residential premises. For example, the Draft contemplates "allotment of housing by the government or by a legal entity, based on state ownership, to a worker or to another citizen." Both the Code and the Draft contemplate allotment of new living quarters to persons whose premises are destroyed or taken for governmental uses.

The Code provides more details concerning the requirement that the apartment owner be given just compensation. But the Draft provides more details regarding the grounds for the state's forcible taking of residential premises; these grounds are: a/ the necessity of foreclosure, in view of the owner's failure to pay a debt; b/ requisition; c/ confiscation; and d/ taking the land plot occupied by a residential building for state needs.

The Draft does not define the term "requisition". In context it appears to mean a taking for a short period of time only, in response to a particular necessity - an epidemic, an earthquake, a war, etc. This unclarity is a shortcoming in the Draft. Fortunately, forcible takings by the state are ultimately reviewable by the judiciary.

Both the Code and the Draft address the question of providing housing to persons with limited means. The Draft lists the categories of persons who "are in need of improved living conditions" and gives them a ranking, putting "persons of limited means" at the top, as a "socially protected" class. This is a new way of handling the issue of supplying housing to the needy. The Draft lists ten categories of such people who shall be considered members of this socially protected class: a/ invalids and veterans of the Second World War (and their dependents); b/ invalids of the first and second category (except for persons who became invalids as a result of having committed a crime); c/ persons who suffer from serious cases of certain kinds of chronic diseases, identified in a list established by law (presumably another legislative act, because this law does not provide that list); d/ old age pensioners, who do not have relatives in the first degree of relationship who are capable of working; e/ orphans who are under 20 years of age and who lost their parents before the age of majority; if these children are called up for military service, this period of time is extended; f/ repatriated refugees; g/ persons deprived of housing on account of widespread ecological or other disasters; h/ families with many children; i/ families of persons who died while fulfilling state-imposed obligations, performing military service, saving another person's life, or preserving law and order; and j/ the single parent.

Ms. Poulman notes that the Code includes others in the general category of persons needing improvement in their living conditions. In her view, the following should be added to the class of socially protected persons in the Draft: people who suffered from non-judicial repressions; adolescent mothers with their children; and families of pedagogical and medical workers. She also notes that the Code provides more detail concerning the grounds for establishing whether someone meets the criteria of a person in need of improved living conditions.

The Draft identifies only one place where a person may claim housing according to the list established for those in need of improved living conditions. Under the Code, a person may apply for housing either with the local administration or at his or her place of work. The Draft provides that a person must apply with the local administration. Although at first glance the Draft's requirement might seem less fair, Ms. Poulman concludes that, given the bureaucrat's tendency to pass off obligations onto another bureaucrat, the Draft's approach is better: it makes clear who is responsible for supplying the housing. Both the Code and the Draft go into considerable detail regarding the grounds for taking a person off the list of those in need of improved living conditions; Ms. Poulman questions the fairness of these provisions in both the Code and the Draft.

The Code and Draft differ on how allotments of rental housing are made from the state housing fund. The Code provides a list, with priority given to certain classes of people. The Draft gives everyone an equal claim to rental housing from the state housing fund, and this housing is made available through local authorities, based on the place of the claimant's residence. The Code, on the other hand, decides how the allotment is made, based on what fund the housing belongs to.

Leasing or renting of premises, according to Ms. Poulman, is dealt with essentially in the same way in both the Code and the Draft. Ms. Poulman does not refer to many aspects of the law in

this area, and does not generally criticize the inadequacy of these laws. But she does offer several observations. She notes that the Code contemplates different rental sums for apartments rented from the state, depending on the quality and the size of the living space, whereas the Draft does not make such distinctions. She thinks such distinctions should remain in the law. She also notes that the Code ordains significant subsidies for rent and utilities for war veterans, invalids, families with many children, and so on; moreover, if the residential premises do not meet sanitary and technical standards, the occupant may hold back up to half the rent. The Draft does not provide for any subsidies, nor does it address rental holdbacks.

Note that I will later critique the inadequacy of "landlord-tenant law" in both the Code and the Draft, as well as the related inadequacy of Ms. Poulman's perspective thereon.

Ms. Poulman continues by noting that the Draft allows ownership by persons living in housing provided by their enterprises or by the state following service in the military, but not for persons of limited means whose housing has been provided from the state housing fund; she thinks this is unfair - indeed, discriminatory - and hence in violation of the Constitution. I will also address this point later.

At the end of her comparative analysis, Ms. Poulman mentions that the Draft establishes, for the first time, the legal regime of condominium ownership. She notes that an entire section of the Draft is devoted to this concept, and she lists the subjects covered: the creation of condominiums, the content of condominium declarations, the rights and obligations of condominium owners, the rights and obligations of occupants, and the concept of a condominium association - which, as already noted, the Draft calls "a cooperative of premises owners". According to Ms. Poulman, the inclusion of the concept of a condominium in the Draft is a very welcome development, because until now people owning premises in multiple-dwelling structures have not been co-owners of their basements, stairwells, stairways, hallways, roofs, heating units, and the like. Ms. Poulman remarks that the state has been the owner of all these common areas, and, as everyone has experienced, the state has let these parts of residential building go to wrack and ruin.

Note that in the next section I will critique the "condominium law" as well as Ms. Poulman's perspective thereon.

Ms. Poulman ends her comparative analysis by saying that the Draft appears to have made some steps in the right direction, for example by providing for condominium ownership. However, she asserts, there are still many opportunities for the bureaucrat to interpret the law according to whim, and some provisions of the Code are better than those in the Draft. She expresses the hope that, when the Draft is debated, its shortcomings will be exposed, and new and better provisions will be added.

In my own conclusion so far, and as context for the next sections of this memorandum, I note that Ms. Poulman's comparative study is rather typical of analyses by local lawyers, and reflects -

as already suggested - a perspective on law that is shared by the architects of the Code, the Draft, and related laws. Pursuant to that perspective, the "welfare state" elements - for example, the categorization of persons entitled to special housing consideration - are very detailed in the Code, reflecting considerable thought and decades of development; much of this detail remains in the Draft, although aspects are modified; and Ms. Poulman focuses on those details. But other elements - especially those relating to the acquisition of property rights and attendant responsibilities (including rights and responsibilities of condominium owners), plus the entire field of what in the West is called "landlord-tenant law" - are elements that a/ are not addressed adequately in the Draft (and are even less adequately addressed, if at all, in the Code), and b/ are barely touched upon by Ms. Poulman. It is to these two subjects that I shall now turn.

### *Part Two: Condominium Law in Kazakstan - Problems, Potentials, and Recommendations*

1. A close reading of the provisions of the Code and related privatization decrees reveals that joint ownership of the common areas in multiple-dwelling structures, and the management thereof by "cooperatives" of resident-owners, was arguably required by the law several years ago.

Prior to the December 22, 1995 promulgation of the decree "On Land" at least one administrative enactment - in January 1992 - seems to have obliged owners of apartments to form cooperative associations to manage the common areas within, and the common lands surrounding, the buildings they jointly owned by virtue of individually owning apartments therein.

The principal difference between that post-1991 ownership regime and the one now being created is the legal institutionalization of the notion that the land under and around a multiple-dwelling (or mixed residential/commercial) building is "attached" to that building and can itself be the subject of ownership rights and responsibilities. Note that in the West we tend to think of a building as being attached to the land; in the post-Soviet world, for historical and perhaps also ideological reasons, land-ownership rights are conceived of as rights associated with - indeed, inseparable from - rights in structures located thereon. And, indeed, one frequently encounters references to land attached to buildings.

A related difference between the post-1991 ownership regime and the new one is that policy makers appear to have been persuaded that the condominium form of ownership is a better, more rational mode of ordaining the legal relationships of co-owners of common areas than is the cooperative form. The co-op, albeit "sovietized" beyond Western recognition, predated land ownership in this region and was an instrument of the "command economy" from its inception. The condo, in contrast, is new; it is the "preferred choice" for apartment privatization. Yet the terminology by which the decree "On Land" and the Draft reflect that choice indicates a deep confusion about condominiums and cooperatives, as well as about voluntary associations, state-mandated "allotments" of ownership rights (and hence obligations), and the ways in which competent law can facilitate good results as well as discourage, indeed criminalize, harmful ones.

It seems evident that the drafters of the proposed provisions governing condominiums got good advice, but did not fully understand elements of it - elements going to the heart of why the word "condominium" itself, if defined by a competent law on condominiums, should suffice to denote both a mode of real-estate ownership and a mode of common-area management. Had they understood this, they would not have confused matters by introducing the concept of "condominium management by a cooperative association"; rather, they would have ensured that the condominium law itself ordain the basics of condominium management. If these basics were supplied, the Draft's provisions would be much improved.

2. Ms. Poulman is wrong in asserting that the Draft's shift from "cooperative ownership" to "condominium ownership" represents a major change in housing law and policy. First, the change actually occurred in the decree "On Land"; second, and more important, the decree's focus was less upon ownership per se than upon creating a market in realty. Although the architects of the decree and Draft reveal considerable confusion about cooperatives and condominiums, it seems clear that they correctly concluded that the condominium form of ownership and management is the best mode of facilitating the creation of a market in apartments, etc.

Arguably, an additional purpose of this change - partially alluded to by Ms. Poulman - was to remove (or relieve?) the state from responsibility for cleaning, maintaining, and managing the common areas of multiple-dwelling structures. Time will tell whether this results in improvements to the safety, habitability, and aesthetics of multiple-dwelling structures and their grounds. Probably such improvements are best attained by facilitating the creation of "condominium associations" (even if misnamed "consumer cooperatives" - see below) that can begin collecting condominium-maintenance fees, accumulating capital-improvement funds, and fostering healthy "attitudes of ownership" which, presumably, will begin to halt the decades-long deterioration of the country's housing stock.

3. Post-1991 housing cooperatives did not "own" their common land areas, but held same with long-term or perpetual [indefinite] use rights. As of March 22, 1996 - by operation of an arguably self-executing provision of the decree "On Land" - such housing cooperatives are, arguably, "condominiums" that will be governed by the provisions of the Draft (as eventually adopted) to the extent that those provisions address condominium formation and management, etc. Given the inadequacies of the decree's provisions relating to condominiums, we should seek to ensure that the Draft, when adopted, contains competent provisions governing condominiums - or, better, that a good Law on Condominiums be enacted by the parliament as a distinct law governing all kinds of condominiums, not as part of the Housing Code.

As warned in my memorandum relating to the decree "On Land" there is considerable question whether its condominium-formation requirements are self-executing. This is a mine-field. Article 26(5) of the decree ordains:

If the owners of apartments and/or non-residential premises have not chosen any organizational-

legal form within 3 (three) months after [December 22, 1996], then on the basis of the appropriate resolution issued by the local executive body, a condominium in the form of a consumer cooperative of apartment and/or premises owners shall be established for such a building in accordance with the procedure established by the Government of Kazakstan. For buildings with residential premises, a procedure for setting up condominiums may be stipulated in housing legislation.

The above paragraph seems to suggest that condominiums will "come into existence" on March 22, but that what that existence means will be largely determined by the Draft, or an amended version, when and if it a/ becomes law and b/ addresses the subject of condominiums. The question is, could parliament adopt separate legislation governing condominiums - outside rather than within the "housing legislation" referred to in the last sentence of Article 26(5)?

4. As discussed in prior memoranda, there is some question whether the parliament is generally empowered to "amend" the decree; but Article 26(5), by its own terms, seems to invite the parliament to enact provisions "setting up" condominiums. The best way to do so would be by enacting a separate Law on Condominiums that clearly ordains that the instrument by which condominiums are "set up" is the instrument by which they are governed - a "condominium declaration" that creates a condominium rather than a cooperative association.

The practical, pragmatic stuff of condominium management should be the focus; clarifying the terminology relating to condominiums is important only from the standpoint of communicating the fundamentals of condominium governance and management. The map is not the territory; the name is not the thing or relationship named; but the sloppy use of words contained in a law can bedevil official and societal understanding of legal relationships. The law must be as clear as possible; the concept of a condominium must be "brought alive" as competently as possible in the Russian language (and as soon thereafter as possible in the Kazak language); only when competently articulated can it be properly understood and implemented. The concepts of "condominium" and "cooperative" should not be confused; each should have its distinct domains in Kazakstan's legal landscape.

5. The Article 26(5) "consumer cooperatives" arguably established by operation of law on March 22 must number in the thousands, even though their members are probably ignorant of a/ their existence, b/ their changed form, and c/ the problems and potentials attending these changes. As suggested, these "consumer cooperatives" look like condominiums. The Draft perpetuates the confusion started by the decree, and uses something close to the phrase - "a condominium in the form of a consumer cooperative of apartment and/or premises owners" - that is introduced by the decree. A "condominium" is a form of organization, and hence management, that is uniquely tied to the law governing real property. A "cooperative" is another form of organization; it is not uniquely tied to land, and is a creature of contract law more than of real-estate law. Although a "housing cooperative" may be similar in some respects to a "condominium", cooperatives and condominiums should not be confused. A condominium, properly conceived, is best suited to the management of mixed-use (residential and non-

residential) and mixed-ownership (private and governmental) developments such as contemplated in the Draft; but that does not mean that the Draft - i.e., the Housing Code - is the best place to put the Law on Condominiums.

6. Any law on condominiums, wherever placed, should clearly state that a condominium is a mode of real-estate ownership and management that governs how the owners of "private interests" within a "common interest development" shall manage, maintain, and improve the "common areas" - defined as the entire common interest development minus the private interests therein, whether residential or non-residential. Any person wishing to be an owner of a "private interest" within a "common interest development" must do so in strict adherence to the law on condominiums, which should include provisions ordaining how all owners of private interests shall act, behave, and conduct themselves with reference to their ownership as (to use the technical English phrase) "tenants in common" of the common areas.

Condominium "members" are, by definition, private-interest owners. By virtue of being such owners, they must (not may) associate together in the management of their common-interest areas. Such association is not voluntary; it is not a product of contract law. It is mandatory - "a covenant running with the land" - a creation of land law. To understand a condominium, one must understand its origin as a creature of ancient but still living concepts of what "real estate" is and how it is governed.

7. A condominium is not a cooperative. Traditionally, and in all the world except for areas dominated by Communism, cooperatives have been voluntary and private - that is, not government-mandated or government-dominated.

Government-mandated co-ops are not true "cooperative associations" and should be called something else, otherwise the term "cooperative" becomes meaningless - indeed, aberrational - as it did throughout the USSR. There are good reasons for maintaining the integrity of the "co-op principle" of voluntariness; this and similar "Rochdale Principles" originated in the early nineteenth century as an integral element of the larger movement towards "civil society" and democracy. There are no good reasons for maintaining the Soviet-style "involuntary-cooperative" now that Kazakstan is taking its first steps towards associational freedom and all that this implies.

8. Because a condominium is not a voluntary association but, rather, is a reciprocal "covenant running with the land" - a creature of real-property law - all heirs and assigns (including "allottees") receive their "private-interest" realty with the liability to perform and the right to enjoy the burdens and benefits of that reciprocal covenant. They have no choice with respect to those liabilities. The "declaration of condominium" that governs their relationship with each other does not allow them, or their heirs and assigns, to "opt out" except by selling or otherwise disposing of their private-interest ownership - thereby, through operation of law, also disposing of their fractional ownership of the common-interest development.

Owners of privatized apartment buildings who are required to associate together in the management of their entire apartment complex, including its grounds and the common areas it shares with non-residential owners, should do so according to a Law on Condominiums that is rooted in, and focused on, real-estate ownership; if some of those owners thereafter wish to form a co-op kindergarten, and to contract with the condominium for the use of specified common areas, they will find that their children - and perhaps the children residing in neighboring condominiums - will benefit from Kazakhstan's ability to maintain the integrity of both "co-ops" and "condos" within its legal landscape.

### *Recommendations for a New Law on Condominiums*

1. The condominium law articulated in the Draft has much to commend it - and that should be the starting point of any discussion with local officials - but problems abound. I propose that I seek to meet with the drafters of the condominium provisions to explain how their proposal could be improved and clarified in various ways, including the following:

A. As a minimum, the Draft should be supplemented with provisions which - I speculate - are similar to ones that the drafters were introduced to, probably by ICMA, but did not at that time understand sufficiently in order to appreciate why they should be included in a law governing residential condominiums.

B. Preferably, however, the drafters should consider removing all operative provisions on condominiums from the Draft - i.e., from the Housing Code - and prepare for parliament's consideration a proposed Law on Condominiums that governs all condominiums, whether residential, mixed- use, or other.

However, unlike the Draft and the decree "On Land", the term "condominium" should not automatically apply to a simple duplex. The Law on Condominiums should not be mandatory for structures with, say, four or fewer units. General provisions of the law on real property - wherever contained (but best contained in the Civil Code) - should distinguish among so-called "joint tenancies" (that is, joint ownership), so-called "tenancies in common" (that is, co-ownership), and rights of partition, etc., thereby supplying enough simple law to govern the common-interest areas of simple holdings.

C. The drafters should be helped to appreciate that a condominium, formed pursuant to a competent Law on Condominiums, is an entity formed for the purpose of management as a condominium. To assert that a condominium must be managed by a consumer cooperative adds only confusion that impairs the integrity of both condominiums and cooperatives.

D. I would like to try to "bring alive" the concept of a condominium in conversations in the Russian language, so that the drafters may understand and appreciate why these and other proposed reconceptualizations and revisions would greatly enhance the ease by which Kazakhstan could make its transition to 1/ a market in realty, 2/ real-estate ownership generally, and 3/ "high-

rise" maintenance, management, and improvement in particular.

2. The Draft is very confusing and otherwise deficient on numerous specific issues that need attention. This memorandum cannot address them all. The following are especially important:

A. As already noted, condominiums associated with structures that contain both residential and non-residential premises are problematic; according to the Draft, owners of residential portions have little voice regarding non-residential portions, and vice versa; arguably, the condominium will be composed of two condominiums, only one of which is subject to the law governing "housing" condominiums. The Law on Condominiums should clearly ordain that, by virtue of owning a private interest within a common-interest development, the owner - whether residential or not - is governed by the same condominium law and the same condominium declaration or plan.

B. The law needs to be clearer, and provide more details, regarding the elements of a condominium declaration or plan, including the distinction between common-interest and private-interest areas.

C. The Draft appears to require that, in the management of the condominium, each "unit" shall have one vote; in contrast, the Draft appears to require that assessments of fees shall reflect each unit's proportional ownership; this distinction between management rights and assessment obligations is important and should not be ambiguous.

D. The Draft contemplates that some, many, or perhaps most of the "units" in some multiple-unit structures will not be privatized - at least not for a while - but will remain state-owned (or owned by local administrations, state enterprises, etc.). The state will therefore have to cast some, many, or most of the votes in some condominium developments, and otherwise participate in their "democratic governance" and management. None of the Draft deals specifically with this subject; it merely hovers in the background of many provisions.

I think this subject needs to be examined from several perspectives. For example, I think the law needs to address conflict-of-interest problems that might arise when the local administration is both a voting participant in a condominium development and its licensor, policeman, and all-purpose nag. I propose something along the following lines: In every electoral district (or similar political subdivision), a quasi-governmental independent agency should be established as a "board of trustees" for all non-privatized units within condominiums located in that political subdivision; these trustees should keep track of the affairs of all condominiums where, by operation of law, the state (or an instrumentality thereof) has ownership rights and responsibilities; the trustees should select one or more representatives to participate in all condominium meetings, etc., and to cast votes in such a manner as will foster 1/ responsible and competent condominium management; 2/ further privatization within the condominium development, when feasible; and 3/ active "hands-on" management of the condominium development by resident-owners, to the greatest extent possible.

In any event, as mentioned, this private-public dichotomy of condominium ownership and management is a major reason why condominiums should be governed as condominiums - not as so-called consumer co-ops; the state is not a "consumer" here, and its participation in "co-op management" of a condominium "consumer cooperative" is absurd and pernicious.

E. The Draft is very confusing regarding the powers of the owners relative to those of the "management" - and is similarly confusing about what constitutes an authoritative decision of the owners. It appears that the owners have limited, enumerated powers; but it is unclear whether the manager or the board can exercise the residuum. Those enumerated powers are: 1/ to select the head manager, 2/ to elect a board of managers and an auditing committee, 3/ to adopt and change the declaration of condominium and the bylaws, 4/ to approve a loan for a sum exceeding 25% of the "expenses" of one year, and 5/ to close the condominium. The Draft is unclear whether the final three items on this list need approval of 75% of the "voices" in a meeting or 75% of the "votes" of the owners. The definition of a "quorum" is confusing, as are the matters that can be decided by a majority of a quorum; 20% of the owners constitute a quorum, and a meeting can make decisions based on a simple majority vote, but arguably the selection of officers and other matters require a majority vote of the owners. Such confusions should be cleared up.

F. It is not clear whether the "consumer cooperative" required by the decree and the Draft is subject to the Law on Associations, in which case 1/ it does not fit comfortably thereunder, but 2/ at least some of its internal dynamics will be governed. The Law on Condominiums should ordain that the "association of owners" is not governed by the Law on Associations; however, it should also provide greater detail regarding how the "democratic governance" of the condominium association shall be achieved. It should focus especially on the rights of owners to information about their condominium's affairs, particularly its finances.

G. The Draft's provisions on condominium management are confusing. I would prefer to have owners elect a Board of Directors from their midst; the number of directors should depend upon the number of owners; and the Board should select and direct a Manager, who may be a professional manager who is not a resident-owner. The Board should have at least three members, including two officers, one of whom - the treasurer - should have operational control of finances subject to oversight by the chief executive officer - the president. In case of disagreement between the treasurer and the president, the full Board should resolve the issue, subject to intervention by owners in specified instances pursuant to procedures for calling special and emergency meetings. Absence of details like this will invite management crises and, ultimately, ensure a "crisis of governance" among Kazakhstan's condominiums. Whatever these details are, they should be specified in the Law on Condominiums.

H. The financial responsibilities of owners, directors, managers, and accountants, etc., including basic accounting standards, should be addressed in greater detail. The nature and use of regular and special assessments, as well as of extraordinary assessments, should be thought through more carefully and incorporated into the Law on Condominiums. The same goes for mortgages

of the entire condominium, the effects of major building damage, and the grounds and procedures for dissolving the condominium. The Draft does not address these matters adequately.

I. There are other problems that need attention. One interesting puzzlement involves an apparent "contradiction" with the decree "On Land": the Draft clearly states that ownership rights relating to condominiums do not exist unless the condominium development is properly registered, etc. The fact that the decree ordains that 1/ such registration is not necessary, and 2/ that the decree cannot be contradicted, is of course interesting but not necessarily dispositive, as discussed in my memorandum thereon. This point needs to be clarified either by a presidential decree or by parliamentary legislation - and preferably in a consistent statement of the law emanating from both sources.

### ***Part Three: Landlord-Tenant Law in Kazakstan: The Necessity for Reconceptualization, and Recommendations***

1. Of the Draft's 38 pages, about 12 are devoted to "landlord-tenant law" where the "landlord" is the state, or a state enterprise or instrumentality. About two pages are devoted to landlord-tenant law where the landlord is a private party, and most of this law ordains how the relationship may be broken. The state's role as a landlord is complicated by its many other roles, as already mentioned and as further discussed below. Upon analysis, "landlord-tenant law" (however denoted) differs, in Kazakstan, depending upon the nature or identity of the landlord.

In general, I must say that I have never encountered a more confusing and less instructive so-called law, and the Draft's approach needs a complete reconceptualization. The problems discussed below are serious in their own right, but are also illustrative of problems not discussed; my proposals and recommendations can only touch upon some of the Draft's problems.

2. There is no history or tradition in Kazakstan of a single and coherent law of real property, as part of a more general "property law" which is itself "nested" within an evolving body of private and public law. And there has never been any general "landlord-tenant law" as such; as noted, neither the Code nor the Draft is intended to govern anything but housing relationships, residential properties.

Housing law in Kazakstan is not part of a system of law in any meaningful sense, and this fact will bedevil this subject for a long time into the future - until the concept of a system of law has been institutionalized.

3. The Code ordains two sets of lease-lessor-lessee relationships, in two chapters respectively, which are identified in Russian as "arenda-arendatel-arendator" and "naim-naimodatel-nanimatel". It is impossible to distinguish between them on a substantive level; there are slight procedural differences - for example, some of the notice provisions differ - but I remain mystified why these two sets of relationships exist in the Code. True, the "naim-naimodatel-

nanimatel" relationship has its origins in the fact that, historically and still to this day, many "employers" have been "landlords" to their tenant-employees; but I shall not pursue this thread further here; the two relationships have little if any legal significance under the Code.

Mercifully, the Draft has eliminated one of these sets, but I cannot understand why it has eliminated the "arenda" rather than the "naim" relationship, inasmuch as the words "arenda-arendadatel-arendator" are the words typically used in Almaty to refer to the "lease-lessor-lessee" relationship. In keeping with already-widespread custom, and for the sake of clarity, I recommend that one set of terms - arenda-arendadatel-arendator - be applied uniformly to the concepts of lease, landlord (lessor), and tenant (lessee).

4. The fact that the state is the principal landlord as well as the sole grantor of "allotments" of various kinds of real-property interests is a major source of confusion. The state makes the law, the state allots the property interests to be governed by the law, and the state has "tenants" of various categories, including persons who would be homeless but for the state's "charity housing" programs.

Additionally, instrumentalities of the state - for example, local administrations, state enterprises, and institutes - also enter the picture as "landlords" and property-rights allocators, etc. The Draft seeks to govern all these combinations and permutations of landlord-tenant relationships, so long as they involve residential realty. The result is both too broad and too narrow - and hopelessly confusing.

That confusion is exacerbated because, as already noted, non-residential tenants occupy many primarily-residential structures; it will get even more confusing if and when the state finds itself the "tenant" of a private owner.

I believe that Kazakhstan should consider the merits of having a single, uniform "landlord-tenant" law; the operative provisions of this law should be elsewhere than the Draft - i.e., independent of the Housing Code.

5. Although the general principles governing the "ordinary regime" of landlord-tenant relationships should be uniform, without regard to the identities of the parties, this "ordinary regime" cannot be applied where the state is the landlord and the tenant is essentially a ward of the state; for this relationship, a "special regime" is necessary.

If the "ordinary regime" of landlord-tenant relations is governed in a law devoted to that subject only, then the "special regime" can be the focus of the Housing Code, whose principal focus, after all, is the provision of housing to all - whether through privatization programs or charitable programs.

But the joinder of "privatization allocations" with "charitable allocations" raises problems that need to be thought through. If an individual or family has been allotted a home under a "housing

privatization" program, of which there have been several and will be more, then the sale of that home at market prices should not be prohibited; and under the Draft it is not prohibited. Yet if the home has been allotted as an act of charity, then restrictions or prohibitions on sale or rental by the recipients of that charity would, or should, stand on a different legal footing.

Realty allotted under the "privatization regime" will not be free from disputes implicating charitable housing, however. In effect, most people have received, or are about to receive, a once-in-a-lifetime allotment of free or below-market-price realty; it seems unfair to deprive a person, however impoverished, of this windfall opportunity. The basis of such a deprivation will often be little more than an educated guess that a poor person claiming a "privatization regime" allotment is too poor to benefit properly from it, and that this person will be unable to do anything other than sell his or her allotment very soon - and then, perhaps after drinking the proceeds, he or she will doubtless request "charitable regime" housing.

In short, the poorer you are, the higher you will be on the list for receiving a charitable allotment which you cannot "cash in" - and the less likely you will be to receive a non-charitable allotment which you can thereafter sell or lease. Ms. Poulman thinks this is unfair and hence violates the Constitution; she may be right. But this entire subject is complicated further by the likelihood that many individuals and families, having been made owners of homes they lived in for many years and long considered "theirs" according to Soviet parlance, will now find that they cannot pay the property taxes, maintenance fees, and utility expenses for "their" homes and must therefore sell or lease them - but not necessarily to their long-term economic or housing advantage. Some might become homeless. I shall not delve further into this aspect of the Draft here.

6. As suggested, the basic principles of landlord-tenant law need to be fully and competently addressed. Here are several elements that the Draft does not cover adequately:

A. The concept that a lease is an interest in realty, and, as such, requires both parties to undertake certain obligations with respect to each other and with respect to the subject realty, is not even hinted at in the Draft. Healthy landlord-tenant relationships are premised on that concept. It should be clearly articulated.

B. The law should spell out the kinds of issues that landlords and tenants may address in a lease. Conversely, it should specify aspects of the landlord-tenant relationship that are not subject to negotiation; for example, a landlord should not be allowed to lease premises for a bargain price based on the tenant's agreement to hold the landlord harmless in the event that a defective heater explodes.

C. While the law should spell out what can and cannot be subjects of lease agreements, many issues are not so clear-cut. Numerous policies enunciated in the law should be expressed in terms of rebuttable presumptions. For example, the Draft specifies that if leased premises are sold, they are transferred to the new owner subject to the lease; this might mean that the parties

are prohibited from agreeing to a provision that the lease will terminate if and when the premises are sold. However, arguably, if this provision appears prominently on the face of the lease (in large type, rather than hidden among boilerplate provisions), and if surrounding circumstances indicate that it reflected the voluntary and informed choices of the parties, then - again, arguably - this provision should be allowed. The law might ordain a "rebuttable presumption against enforcement" of such a provision; but, in proper cases, the presumption having been rebutted, the law should allow the parties to conclude an agreement that manifestly makes sense for them and does not harm society.

D. The Draft does not distinguish between a "sublease" and an "assignment" of a lease. This area of the law needs to be developed and clarified.

E. Neither the Code nor the Draft competently addresses the extremely important question of "habitability". The Code has a provision that is somewhat analogous to the Western requirement that the tenant maintain the premises in good repair (except for ordinary wear and tear), and the Draft ordains that "users" do likewise; the focus here seems to be upon relieving the state from its obligation to maintain common areas; arguably, that is a major purpose of the new "ownership" regime. But the general obligation of landlords to rent or lease only "habitable" premises needs to be developed.

F. The Draft, my personal experience over two years, and my discussions with others lead me to conclude that the notion of renewal rights is fundamentally foreign in Kazakstan. It needs to be developed.

G. The Draft perpetuates the Code's bias in favoring tenants with regard to termination rights. The tenant is not obligated to give as much advance notice to terminate as the landlord, and may terminate a lease for "significant, unforeseen circumstances" with only an ambiguous obligation to compensate the landlord. Although it is not necessary that all obligations be mutual, I think the law should strive for greater mutuality in landlord-tenant undertakings than is reflected in the Draft.

H. The subject of eviction is extremely important; it needs to be addressed not only in the context of landlord-tenant relations but also in the context of limits to the "right" to housing. Both the Code and the Draft enumerate reasons for cutting off people's rights to residential premises, and for taking people off lists that give them priority in allocations of housing from the state housing fund. As already suggested, the state's role as both landlord and "provider" - whether of charity to the needy, or of privatized housing or free land plots, etc., for ordinary citizens - causes great confusion. This problem is especially troublesome with reference to evictions by the state.

Undergirding the Draft is the premise that the state will undertake to provide everyone with some kind of housing, but if the citizen acts badly then he or she will be punished. Eviction proceedings (no matter how denoted) should distinguish between the "independent" occupant -

the true tenant - and the "dependent" occupant; the latter's "charity status" places him or her in a somewhat different legal category. As already suggested, the entire subject of "welfare housing" confuses the landlord-tenant law of Kazakhstan, and the Draft exacerbates this confusion.

### *Recommendations for a New Landlord-Tenant Law*

The Draft - i.e., the Housing Code - should not seek to govern landlord-tenant relations generally. The basic elements of the law governing leases, lessors, and lessees should be uniform, regardless of the identities of the parties or the uses of the realty. The substance of the law in this respect needs complete overhauling; I have only skimmed the surface of the present law's problems. I would like to discuss the possibility of such an overhaul with those who prepared the Draft, to see whether they would be interested in reconceptualizing their work - and revising the law accordingly.

The argument needs to be made that landlord-tenant law, like condominium law, should be separate from the Housing Code, and that a condominium law without a companion law on leases, lessors, and lessees will not be adequate for creating a healthy market in realty.