

White Paper on Tenure Security and Community Based Upgrading in Kabul

Ministry of Urban Development

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Preface by the Minister of MOUD

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INTRODUCTION

It is estimated that at least 70% of the population of Kabul is currently residing in property which has not been formally registered or that falls outside the formally planned parts of the city. This percentage represents an approximate number of 2.5 million people. Although many of these residents are legitimate occupiers, they have no security of tenure and no means by which to formalize and register their rights of tenure. The lack or under provision of basic services is another major problem faced by informal residents in the city. Despite the lack of sewer systems, potable water, electricity, roads, schools and clinics, and other basic services, according to the World Bank, residents have invested an estimated \$1 billion in informal settlements. As the Deputy Minister of Urban Development succinctly stated, “the formation of informal settlements demonstrates a weakness of [the formal system] which has been unable to provide land plots to poor people despite the availability of thousands of hectares of vacant lands. It could be argued that the formation of informal settlements has been as much a solution as it is a problem.”¹

In January 2006, a three-day conference on informal settlements and tenure issues was held in Kabul. The conference was hosted by MOUD and KURP. The conference was organized with two main objectives: 1) to build consensus among stakeholders on methodologies to approach problems of tenure insecurity in informal settlements in Afghanistan; 2) to draft an action plan and proposal to the government on methodologies for the formalization of property rights in informal settlements. This draft white paper on informal settlements is the product of the conference.

The draft white paper describes existing reality on the ground, and provides a succinct discussion of proposed tenure security and upgrading program, principles and norms for land use, land titling and spatial planning and management, and legislative measures needed to stabilize the current situation in informal settlements. The proposed upgrading program implementation will require the modification of the current legislative framework to include laws on anti-eviction and formalization of informal property rights; a framework that not only incorporates the doctrine of adverse possession but also authorizes fairly elected community structures to adjudicate property rights and provide prima facie evidence of legitimate occupation or ownership and resolve other land-related disputes. The regularization of land tenure, cooperative land use management and upgrading can not only address existing land-related conflicts, but it can also deter future unlawful occupation or development of land. The program amalgamates the strengths of the municipal and national government and the resilience of communities into a positive, cooperative system of land use, land titling, spatial planning and land management which will both support economic development and nourish the tendrils of peace.

¹ Dr. Djalalzada, Opening Statement, Conference on Informal Settlements and Tenure Issues, January, 2006 Kabul

SECTION A: CURRENT REALITY

It is estimated that at least 70% of the population of Kabul is currently residing in property which has not been formally registered or that falls outside the formally planned parts of the city. Although many of these residents are legitimate occupiers, they have no security of tenure and no means by which to regularise and register their rights of tenure.

70% of the population of Kabul currently resides in informal settlements; the residents have no tenure security.

In addition, the development control policy, which has been erratically applied by the Kabul Municipality (KM) and the Ministry of Urban Development (MOUD), has contributed to a strong sense of insecurity but has not prevented the unauthorised occupation or ownership of land or encouraged the registration of transfer of land. Ambivalence with regard to upgrading informal settlements has prevailed although several small-scale infrastructure upgrading projects have been undertaken, with varying degrees of success by different organizations.

Development control policy has led to a strong sense of insecurity.

There is confusion and uncertainty regarding the roles and responsibilities of the MOUD and Kabul Municipality with respect to policy making, planning and implementation.

Confusion and uncertainty in policy making is paramount.

There has also been a fragmentation of service delivery, with the Central Authority for Water Supply and Sewerage (CAWSS) under MOUD being responsible for water supply and for the Macrorayans; Kabul Municipality for sanitation and solid waste disposal, roads, greenery, canalization etc.; Ministry of Water and Power for electricity; Ministry of Interior for traffic regulation; and the Ministry of Transport for public transportation and national roads.

Fragmentation of service delivery among governmental institutions hinders development.

In general, environmental issues have been ignored by those occupying land without authorisation and some residential properties are situated in areas which are particularly vulnerable to natural disasters such as landslides, flooding and earthquakes. Inadequate sanitation, sewerage disposal and water supply have resulted in high levels of contamination of the water table.

Environmental issues have been ignored by those occupying land without authorisation.

The most recent Master Plan for Kabul was undertaken in 1978; in the absence of a more recent plan there is no other framework upon which to base planning and decision making.

The 1978 Master Plan for the city of Kabul is outdated and not responsive to current needs.

SECTION B: PROPOSED TENURE SECURITY AND UPGRADING PROGRAM

Experience from other countries with similar experience reveals that land tenure formalization projects have generally succeeded where the methodologies employed were sufficiently embedded in the local environment. One of the strengths of the Kabul Municipality is its decentralised structure and the potential for the efficient functioning of its District Offices. These offices, when working in close cooperation with local communities, have the potential to provide an ideal vehicle for the implementation of a community based upgrading program which aims to:

- Release of land for residential purposes;
- Permit community based participatory decision making to take place at the local level;
- Encourage legitimate and sustainable land use planning, land development and land use control;
- Facilitate land registration and tenure systems;
- Improve infrastructure and service provision; and
- Provide mechanisms for resolving disputes and the adjudication of land occupation or ownership rights.

In order to succeed, the policies, administrative practices and laws relating to upgrading programs should be:

- Clearly and simply described;
- Accessible to all interested parties;
- Serve as guidance and information not merely as regulatory measures; and
- Facilitate the promotion of trust, acceptance and cooperation between local residents and the municipal authorities.

The success of community based programs depends upon:

- Organisational support for democratically elected and fully representative structures;
- Legal and paralegal support for adjudication and dispute resolution processes;
- Support for local detailed planning;
- Engineering support for infrastructure projects; and
- Administrative support for recording data and formal record keeping of land tenure information.

The 22 district offices in Kabul Municipality are essential to the implementation of community based upgrading program.

Administrative practices and laws should meet minimum requirements to respond to current needs.

The success of community based programs depends upon various support factors.

It is proposed that legislation is enacted which provides for tenure security and upgrading projects to be initially authorized in Kabul, under the auspices of MOUD and the Kabul Municipality, and subsequently on a national scale.

Legislation should provide for tenure security.

It is proposed that legislation be enacted which provides that the doctrine of adverse possession be applied to all land held by private persons in the City of Kabul in accordance with the principles of Islamic jurisprudence in order to determine whether or not current occupiers have a legitimate right to occupation or ownership. This legislation should provide that elected community representative structures are authorized to collect information, keep records and apply the doctrine in accordance with a prescribed process.

Legislation should incorporate the doctrine of adverse possession.

The Kabul Municipality should seek funding for further programs from international development aid agencies.

Additional funding is required to scale up upgrading programs in Kabul.

SECTION C: PRINCIPLES AND NORMS FOR LAND USE, LAND TITLING AND SPATIAL PLANNING AND MANAGEMENT

The proposed program is based on the following principles:

- The principle of fair and good governance requires that spatial planning, land use management, and land development should be democratic, legitimate, beneficial to the community and participatory;
- The principle of efficiency requires that the desired result of land use should be produced with the minimum expenditure of resources; and
- The principle of sustainability requires the sustainable management and use of the resources making up the natural and constructed environment.

Three principles guide the development of community based upgrading programs.

The proposed Land Tenure and Upgrading Program has as its basis the following elements which encapsulate the principles set out above:

Formalization of land tenure through the application of the “Doctrine of Adverse Possession”

It is proposed that the doctrine of adverse possession, if applied according to the principles of Islamic jurisprudence, will be a legitimate, efficient, beneficial and effective means to redress problems created by the lack of effective land use management in the past. The application of this doctrine to all current occupation or de facto ownership of residences will provide the basis to determine which land occupation or ownership is legitimate and which is not.

The doctrine of adverse possession, applied in accordance with the principles of Islamic jurisprudence is essential to adjudicate and regularize property rights.

Resolution of disputes, adjudication of property rights and temporary record of rights through community based processes

It is proposed that the most efficient way to apply the doctrine of adverse possession is through a community based upgrading program in which the local community collects the required data and applies the rule according to the law to determine whether residents legitimately occupy or own the land they claim.

Adverse possession is an important element of self-governance and community based formalization effort.

Disputes over boundaries, inheritance and other interpersonal disputes regarding rights to immovable property should be resolved by the same community-based representative body.

Recognition by land tenure registration systems of data collected and verified by duly authorised community based representative structures which provide prima facie proof of legitimate occupation or ownership of land

It is proposed that once the duly elected and authorised community representative body in each local area has gathered information and assessed the legitimacy of each resident’s claim of right of occupation or ownership in accordance with the doctrine of adverse possession, the confirmation together with the evidence thereof will be accepted by the body authorised to register such right and provide security of tenure for the occupant.

Confirmation of ownership or occupancy and proof thereof by community based representative structures should be recognized.

The data collected will include identification of boundaries of each parcel of land recorded on adequate mapping, together with details of the occupier, and proof of right of ownership or alternatively proof of the occupier having met the requirements for ownership under the doctrine of adverse possession.

The integration of local spatial planning, regularisation of land tenure, co-operative land use management, and upgrading to redress past problems and prevent future illegal occupation or ownership of land

The key to successful local spatial planning, land use management and land development is the establishment of an effective link between the forward planning and development control functions. It is not desirable to use development control as the means of implementing forward planning. The essence of development control is the power to stop particular types of land development. Implementation of spatial planning requires that appropriate mechanisms be in place in order to achieve the desired types of land development.

For the purposes of this document, the term “land use management” includes the following activities:

- The regulation of land-use changes such as the re-zoning of a property from residential to commercial use;
- The regulation of the development of previously undeveloped land;
- The regulation of the subdivision and consolidation of land parcels;
- The regulation of the formalization and upgrading process of informal settlements and other areas requiring such processes, primarily through community based upgrading processes; and
- The facilitation of land development through the active co-operation between local communities, the municipality, funding agencies, service providers and relevant Ministries.

The last two of these five activities are different from the rest in that they require a more proactive, positive and co-operative approach from local government towards land development; one that moves well beyond the role of a mere regulatory body.

Land-use management has two main underlying rationales. The first is to address the widespread resistance to the idea of uncontrolled land development and the second is the commonly expressed desire to promote various types of appropriate land development.

The resistance to uncontrolled development is motivated by a number of concerns, the combination of which is determined by the particular social, economic and political contexts of different times and places. In the context of Kabul, essentially these concerns include the following:

- Environmental concerns: uncontrolled development of land can have adverse effects on natural habitats, landscapes, and air and water quality;
- Health and safety concerns: uncontrolled development can lead to overcrowding and unsafe construction, exposure to flood, landslide and earthquake damage;

Development control is not an effective means to implement forward planning; and mechanisms should be in place to develop the use of land.

Land use management mechanisms include a variety of activities that are interrelated and that address uncontrolled land development.

Land use management requires a proactive local government.

Uncontrolled development is commonly resisted by policymakers.

Uncontrolled development issues include environmental, societal and financial concerns that should be addressed for the

- Social control: the control of land use and building types has long been a means of exerting social control, particularly through the exclusion of certain groups, households or economic activity from certain areas through the application of particular development controls. These development control mechanisms manifest themselves in prescribed limitations such as plot sizes and plot coverage;
- Efficiency of provision of basic services and traffic management: increasingly it has become clear that without the provision of adequate basic services and traffic management, the grant of development permission alone may result in negative outcomes. Similarly, when costly infrastructure is provided without taking into account the relevant and likely land-use and settlement patterns the opportunity costs to society are very high;
- Determination of property values for purposes of rating the market value of land is the basis for property valuation and the extent and nature of the development permitted on the land is a key factor in that valuation;
- Aesthetic concerns: the control of land development enables the government to prescribe certain design parameters for buildings; and
- Rule of law: there is a major concern that uncontrolled development has the potential to encourage land grabbing and other forms of unlawful occupation of land.

development of a land use management system.

The Land Tenure and Upgrading Program will provide a nexus for all of the above elements of land use management to be incorporated with the approval and cooperation of local communities.

It is proposed that the municipality engages directly with each local community in land use planning as part of the upgrading program. Such planning will determine the needs and priorities of the community for service provision and upgrading, the land use requirements of the local areas and the future development issues which would require forward planning. This approach links the provision of basic services and infrastructural upgrading to the cooperation and participation of local residents and provides a basis for future cooperation for planning and management.

Cooperative land planning between the municipality and community forms the basis for future land management.

It is further proposed that MOUD continues to actively formulate appropriate policies for the upgrading of informal settlements and urban land development with the view to replicate urban upgrading programs in other urban areas. MOUD ought to continue to provide policy oversight to ensure that upgrading programs in Kabul are implemented in line with the national development strategy.

MOUD should continue to coordinate and oversee the replication of successful urban upgrading programs.

SECTION D: COOPERATIVE REGULATION OF LAND USE, LAND TENURE AND LAND USE MANAGEMENT

The main emphasis in this approach is that the existing communities take responsibility and are given authority for:

- The collection of data regarding the land use, land titling and spatial planning and management in their respective local areas;
- The confirmation of rights of tenure and the recording of prima facie proof thereof;
- The assessment of claims for land tenure, mediation of disputes and referral for adjudication;
- The assessment of the benefit or detriment of continued occupation or ownership of land where regulations have not been followed and occupation or ownership is illegal;
- The implementation of established common law principles under Islamic law for the application of the doctrine of adverse possession in all circumstances
- The recording and subsequent registration of the right of occupation or the ownership to land as established by this process;
- The establishment of community based structures which implement this process; and
- The establishment of formal co-operative processes between community structures and local and central government structures for the implementation of this process and well as for the implementation of spatial planning and management processes relating to future land use, infrastructure and service provision.

An essential factor in the successful implementation of the proposed program is the establishment of community based representative structures. These structures have to be carefully elected by means of a fully inclusive community process to ensure full and adequate representation of all interests in the local community and limit the opportunity for misdirection and corruption.

Local communities should be authorized to resolve a variety of issues related to the formalization of their informal settlement.

Self-governance is key to the implementation of upgrading programs.

SECTION E: LEGISLATIVE ACTION

The existing legal framework is insufficient for the formalization of property rights. Although the question of property rights can be seen as part of the broader land issue, to avoid delay of process and complications, two legislative measures can and should be taken immediately. These are: 1) an anti-eviction law and 2) a special formalization of informal settlement law. These legislative actions should be taken as stabilizing measures that are crucial to immediately address the chaotic land situation in urban areas.

The drafting of an anti-eviction law and a law that supports the formalization of informal settlements is a priority.

Anti-Eviction Law

At present, there is no legislation that protects informal settlement residents from forcible and arbitrary eviction or from the demolition of their property. There is an immediate need for a legislative measure that suspends all forcible and arbitrary eviction until the government provides formal policy guidance on tenure issues in informal settlements. Of course, the law should strike a balance between the state's right of eminent domain and protection of individual property rights. When the government finds it necessary to expropriate land for public use, the law ought to enable the government to acquire the property. At the same time, however, the law should enable the property owner or holder to be provided with alternative housing, land or other compensation.

No legislation exists that protects residents of informal settlements from forcible and arbitrary eviction or from the arbitrary demolition of their property.

Informal Property Formalization Law

The law should embody the following principles:

Purpose: The law should be drafted and enacted to formalize property rights in urban areas. Simultaneously, it should aim to prevent expansion of informal settlements in urban areas and unlawful access to land.

Scope of Application: The law should be applicable in all settlements in urban areas. The law, however, should distinguish between squatters and land grabbers as indicated in the USAID/LTERA report on Informal Settlements and Land Tenure Issues, and should not be applicable to land grabbers.

Adverse Possession: The doctrine of adverse possession should be used as a tool to formalize informal property rights consistent with Islamic law and the country's circumstances. Following are some suggestions:

- The concept's applicability should be limited only to public land and de facto privately-owned-land. In the latter scenario, the claimant must have a legitimate claim to property that is not owned by another person or persons, be it physical or juridical. Extending the scope to property that another private person owns would foster community disharmony. In many cases where individuals have occupied property belonging to another, the true owners were living outside the country during the war and may have only recently returned. While Islamic law recognizes the abrogation of rights to property due to lapse of time and allows a person to acquire ownership right to land that he has occupied peacefully and continuously for a certain amount of time, the exceptions found in the Islamic *fiqh* (jurisprudence) such as absence from the area where the property is located, insanity, age of minority and imprisonment makes the probability that a person would legally takeover ownership of another individual's property by virtue of a lapse of time very unlikely. Therefore, the rule should be designed in a way that will not prevent a real owner who was not in control or possession of his land for a prescribed amount of time from taking a legal action to eject the possessor if the real owner was prevented from assuming control of his property due to the exceptions found in Islamic jurisprudence;
- The rule must discourage violent invasions by incorporating a requirement that possession must be pacific;
- The rule should clearly state under what conditions adverse possession is not applicable. For example, the rule may not be applicable on the grounds of public safety such as where land is susceptible to natural calamity, or the doctrine may not apply if the land is required for public use; and
- The law should prescribe an end date after which recognition of informal property rights may no longer be considered under the law. This will provide the municipality to minimize rapid urbanization and plan for the provision basic services.

Building Permit: The buildings in informal settlements should be deemed legal, albeit constructed without meeting the legal requirements for housing construction.

Adjudication Body and Process: The law should recognize the value of community resources with respect to property ownership and establish a community based adjudication process. Such a mechanism should be established with the following purposes:

The application of the doctrine of adverse possession is consistent with Islamic law.

Its application should be limited to public land and privately owned land with a clear title.

A community based adjudication system should be in place and be provided by law.

- Determine the veracity of formal or customary documents;
- Determine ownership claims in the event no documentation is available;
- Apply formalization standards to determine legitimate ownership of residents with informal property rights including those who do not hold any document;
- Facilitate re-registration of formal deeds and the formal registration of newly formalized rights to property; and
- Provide transparency and raise confidence in the registration process and rule of law.

Establishment of an Adjudication Process and Body: The law should provide for the establishment of a community based adjudication process in informal settlements that have undergone or are in the process of implementing upgrading projects. In order to be recognized by the law, such upgrading projects must have the prior approval of MOUD and the Municipality. The law must establish the composition, authority and responsibility, and work procedure etc., of the adjudication body.

The law should provide for the establishment of a community based adjudication process in informal settlements.

Registration or Re-Registration of Rights: The law should provide the conditions of registration or re-registration for each class of property rights holders and the documents to be issued in recognition of legal rights to immovable property.