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# REQUIRED LEGAL MEASURES TO MODIFY AND IMPLEMENT A PARCEL- BASED DEED SYSTEM

EGYPT FINANCIAL SERVICES PROJECT  
TECHNICAL REPORT #71

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## ACRONYMS

EFS	Egyptian Financial Services Project
EHFC	Egyptian Housing Finance Corporation
ESA	Egyptian Survey Authority
REPD	Real Estate Publicity Department
LE	Egyptian Pound
MFA	Mortgage Finance Authority
MHUUD	Ministry of Housing, Utilities and Urban Development
MSAD	State Ministry for Administrative Development
MOF	Ministry of Finance
MOJ	Ministry of Justice
RO	Registry Office
<i>SIGUEL EI-SHAKSI</i>	Personal Deed Registration System – Law 114/1946
<i>SIGUEL EL-AINEE</i>	Title Registration System – Law 142/1964
USAID	Unites States Agency for International Development

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## Executive Summary

### Context and Findings

Egypt has a multi agency institutional model for the delivery of registration services to the public. Responsibility for the cadastral survey and mapping component is assigned to the Egyptian Survey Authority (ESA) whilst responsibility for the registration of legal rights is assigned to the Real Estate Publicity Department (REPD). Moreover, it should be noted that there are not two but three separate entities - the cadastre (ESA), the Justice Ministry and the Courts (MOJ), the registry offices (REPD) with each having some degree of self-interest. Moreover, although legal principles are an important foundation of any registration system, the operation of registry offices is essentially an administrative function. Currently, REPD has virtually no autonomy in establishing technical procedures that administer the operations of registry offices, despite the fact that the real expertise on the operational side resides with senior REPD personnel. Based on World Bank experience on registration projects such multi agency models have been characterized as the most difficult to deal with in creating modern cadastre and registration systems. They often exhibit management inefficiency and lack of cooperation. Separate bureaucratic entities tend toward competitiveness rather than cooperation. In the absence of a common management body assuring cooperation, policies may need to be reconciled through time-consuming negotiations in which no entity has sufficient incentive to compromise.

Therefore, an efficient system requires close coordination of policy and procedures between the cadastre and registry. Recognition of this lead to Government assigning the role of integrating and automating the business processes to MSAD.

Complicating matters further, Egypt has two operational registration systems. Title registration (also referred to as *Siguel El-Ainee*) has been applied since the mid 1970s in agricultural areas under Law 142/1964 with mixed results and in urban areas, the personal deed system (Law 114/1946 also referred to as *Siguel El-Shaksi*) remains operative. Government now plans to introduce title registration in nine urban districts in the Greater Cairo area under the National Urban Title Registration Project managed by MSAD.

Public response to both registration systems has been poor. The benefits of registration are not understood and the prevailing perception by the public is that registration does not convey benefits and is costly and time consuming. The public are poorly informed and lack knowledge of the registration procedures and required documentation. Clear steps need to be taken to educate the public on the important benefits derived from registration and consumer outreach and education campaigns are therefore an integral component of our work plan.

Mortgage lenders on the other hand are more knowledgeable on both deed and title registration requirements and employ legal specialists that review pending registration applications for borrowers prior to issuing any loan commitment. Indeed the driver for modernization of the registry (whether it is deed or title – they have no preference) are the lenders and the Mortgage Finance Authority.

REPD registry office operations and efficient service to the public are constrained by overly complicated statutes, executive regulations and technical instructions (or lack thereof) resulting in a business culture of extreme bureaucracy predicated on a real fear of senior judges to whom they report. Based on discussions with legal practitioners there is strong anecdotal evidence that it is common for lawyers to be retained by applicants to complete and expedite registration applications.

The main problem with *Siguel El-Shaksi* lies in the fact that REPD and MOJ do not recognize/appreciate that registration is required to support the dynamic nature of real estate market transactions, particularly the needs of lenders, in a timely and prompt manner.

Expected outcomes for Task 2 focus on 1) legal and regulatory recommendations to ensure that Egypt's laws and regulations that govern property rights and registration of these rights conform to and meet internationally accepted legal standards and principles; and 2) modernization of the legal framework governing property registration and an operational modern civil law registry. Finally, legal and regulatory reform is best assured through a broad stakeholder forum comprised of members from lenders, the MFA, developers, MSAD, MHUUD, and the process owners.

## Recommendations

1. Law No.114/1946 - *Siguel El-Shaksi* should be amended to offer positive legal incentives for its use. That law should clearly state the legal benefit of the blue deed. Any amendment should include more than just a governmental recognition of the ownership that it evidences. It is recommended that consideration be given to amending Law No. 114/1946 to provide indefeasible title and thereby offer a stronger incentive for the public to register title.

2. A legal notice provision should be formulated and added to the *Siguel El-Shaksi* law to ensure that it has the legal effect that all persons dealing with a parcel of real estate are presumed to have knowledge of all currently valid registered legal rights and obligations affecting the parcel, whether or not the person dealing with the property actually checks the registered records. This protects the holders of registered rights by ensuring that subsequently acquired rights are acquired subject to their prior registered rights. It is recommended that a provision providing for notice be added to Law No.114/1946.

3. All transactions should be administered and processed at the respective registry office in which the property is situated. Presently mortgage finance agreements are registered in the REPD central offices whereas other transactions are registered in district offices. This opens the opportunity for a mortgage finance agreement to be in process in the central office while at the same time an unscrupulous seller sells on contract to a second purchaser who then starts registration in the district office.

4. We recommend that new procedures be evaluated and implemented that allow registry offices to rely on ownership determinations by specialists and lawyers. Currently, mortgage finance company and lender personnel must appear on the property with ESA in preparation of any property appraisal and survey report. As part of this process these specialists should be authorized to complete the adjudication of ownership claims on site. The registry office would review the findings only for sufficiency of the stated evidence based on a sworn declaration of the outside attorney as to the evidence reviewed and conclusion. If there are no objections a blue deed would be issued.

5. We recommend that an adverse claim mechanism be evaluated and introduced either with regard to any claim or specifically regarding mortgage finance agreements which will allow claimants including lenders to protect the noticed rights against subsequent purchasers. This would have to work in tandem with an appropriate legal notice provision in the *Siguel El-Shaksi* law. Their rights are protected by priority of registration. It is recommended that in order to support the mortgage market in the near term an executive regulation or directive could be

adopted that allows notices of adverse claim. In the longer term Law No.114/1946 can be amended by adding this provision.

6. Registry Offices should treat sales purchase installment contracts with developers in the same fashion as any other sale contract, but subject to a lien in favor of the developer. A second document will assign the seller's rights to installments and the lien securing payment of the installments to the lender/financier. The result of the transaction will be a blue deed showing the purchaser as the owner and containing two notations. The first notation will be the reservation of the lien for installments to the seller contained in the mortgage finance agreement itself, and the second notation will be the assignment of the right to the installments and the lien securing payment to the lender/financier. The information that would be shown is the date of the agreement and the name and identification data of the purchaser.

7. We recommend that the practice of using part of the registration fee to pay the actual costs of ESA be continued. However applicants who elect to have a detailed survey of the interior floor plan of their property at the time of registration would pay the full fee of such a service to ESA. In addition, where lenders require a detailed survey and valuation of the property prior to issuing a loan said fees will be paid by the borrower/applicant owner.

8. We recommend that REPD remove externally imposed requirements from their applications that police other land administration functions such as building permits, planning and zoning law, and property taxes. An efficient registration system should be neutral to these issues and not be used to police other land administration functions, particularly those that are regularly violated. This step would remove the most often cited reasons for rejection of applications. To accomplish this objective we recommend that REPD issue a new directive.

9. It should be a prime goal of the REPD to minimize the time for evaluation of applications for registration. All registration applications should be processed in the district offices. The proposed directives at the end of this report suggest a regulatory change to accomplish this.

10. Pragmatic evidentiary standards should be adopted by REPD in the processing of applications. Minor *de minimis* errors should be ignored by the registry office and the application processed without delay. The proposed directive in this report contains a provision that is intended to implement this recommendation. In the case of mortgage finance agreements the lenders have sophisticated and well trained staff who review the documentation, require the proper powers of attorney, and assist in the submission of an application to registration office. Because of the significant due diligence that the lender undertakes, as well as the purchaser who must ascertain that the seller is actually the owner of the property, registration of ownership rights is straightforward. In these cases it highly likely that the documentation is thorough and complete. We recommend that Law No.114/1946 be amended and suggested language is included at the end of this report.

11. We recommend that a broad stakeholder forum comprised of members from lenders, the MFA, developers, MSAD, MHUUD, and the process owners be constituted in 2007 to review the above legal and regulatory reforms. EFS plans to prepare agendas with materials and conduct four quarterly workshops in 2007 with the stakeholder forum.

*Note: This report does not include an assessment of the legal framework governing the cadastre and the Egyptian Survey Authority. This work is being done by the Task 2 cadastral team. Task 2 is currently revising ESA regulations/technical instructions pertaining to cadastral methodology, preparation of*

*individual survey requests by lenders and applicants, and methodology to produce cadastral index maps linked to individual property units.*

## 1. Background

World experience historically indicates that land or real property registration systems can often incorporate a complex system of procedures that are not only time consuming for each first registration, but also for transactions of any but the most mundane. This is so because title is considered to be “adjudicated” title and is expected to carry with it a higher degree of security and reliability than do the records in a deed recordation system where there is no adjudication by a governmental staff or the courts and government is merely the keeper of records.

The danger for such registration systems is that the procedures become overly complex and burdensome without a concomitant benefit in security. In fact, where registration systems are too complex and have failed they are often replaced by simpler deed recordation systems. In cases where Title registration systems have succeeded this is in large part due to efficient administrative procedures, clarity and understanding of the documentation requirements by applicants and a commitment to service by registry office personnel. In fact, over the last fifty years title registration systems of the Torrens type have been systematically streamlined by substituting administrative procedures for court hearings and orders addressing complicated transactions where due process is not at issue.

The major benefit of title registration systems is that once in place they are easier for both specialists and the general public to use and understand. There is no need to engage title examiners to examine long chains of title to come to an opinion as to the status of title. However this requires a knowledgeable public as well as the dedication of the registry system to service. There will always be a relatively few complicated transactions involving death of an owner, divorce, bankruptcy and others that will need to be scrutinized by legal experts at the registration office so that title remains adjudicated. However, for the most part, normal everyday type transfers of title and other transactions should be able to be dealt with by administrative staff without analysis by legal experts.

Complicated transactions often involve many documents that must all fit in place for the examiner at the title registration office who is required to pass on the sufficiency of the submitted documents to transfer or otherwise deal with the title. The procedures and documentary evidence need to be well defined and the public needs to be aware of precisely what documentation is necessary for a particular transaction. It should be noted that complicated transactions are regularly reviewed in registration systems by competent examiners in a matter of hours. But to maintain an orderly business environment in the registration office rules for times for submission of complicated transactions must be widely known by the public and adhered to. In addition, the examiners must be subject to adequate time frames for review and should only be allowed to deviate from the norms in very exceptional circumstances.

The *Siguel El-Shaksi* system in Egypt has all the attributes of a deeds registration system<sup>1</sup> and the advantages of a registration system. However, there is generally a lack of knowledge on the part of applicants of the registration procedures and the required documentation (though this is not the case for mortgage lending companies because

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<sup>1</sup> See EFS Technical Report on Deeds System date March 12, 2006 at p. 8.

they employ specialists that are quite familiar with the procedures). REPD registry office operations and efficient service to the public are constrained by overly complicated statutes, executive regulations and technical instructions (or lack thereof) resulting in a business culture of extreme bureaucracy predicated on a real fear of senior judges to whom they report.<sup>2</sup> Even very knowledgeable practitioners are not aware of very technical positions taken internally by the REPD, which makes it difficult or impossible to predict in some cases what documentation will suffice for a transaction<sup>3</sup>. This means that in many cases only the REPD is aware of the procedures and the rules are not accessible to the public.

Moreover, based on discussions with legal practitioners there is strong anecdotal evidence that it is common for lawyers to be retained by applicants to complete and expedite registration at considerable cost.

In addition, there is a legal culture in Egypt that has long recognized private conveyance contracts (known as *Ourfi* contracts) on the one hand, and ignored registration of such contracts on the other, despite a provision in the *Siguel El-Shaksi* law that unless registered such contracts are void. There is no public confidence in the registration system. Where property has been registered in the *Siguel El-Shaksi* system there is, however, recognition of its value. If the procedures for *Siguel El-Shaksi* can be made transparent and simple, the value of the system would increase and its use with confidence by the public would follow.

However, the *Siguel El-Shaksi* system is presently dysfunctional and the legal culture on the part of the Ministry of Justice is much to blame. Although legal principles are an important foundation of any registration system, the operation of registry offices is essentially an administrative function. Currently, REPD has virtually no autonomy in establishing technical procedures that administer the operations of registry offices, despite the fact that the real expertise on the operational side resides with senior REPD personnel. Fundamentally there is a lack of recognition by both MOJ and REPD that registration in modern times should be a real estate market facilitator and requires an efficient, pragmatic system with simplified procedures that supports real estate market needs to secure transactions and provide support for the disposition of rights. Until the public officials responsible for the system understand this and perform their service for the public, any system (either deed or title) will not be trusted and never garner the confidence that makes it useful to the public in general and the mortgage market in particular.

REPD officials are aware of these problems but suffer from low salaries, lack of incentives, limited career growth opportunities and poor training – either formal or on the job. Moreover, complicated procedures hinder access to registration and introduce opportunities for rent seeking.

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<sup>2</sup> An attorney for Taamir Mortgage Company mentioned that there are criminal penalties if procedures are not strictly followed.

<sup>3</sup> A good example is that the REPD in some cases has, unbeknownst to knowledgeable experts, not been accepting powers of attorney that had been executed before a notary in a district different from that where the real estate is situated. This will be discussed in more detail later in this report.

## 2. Legal Culture of Registration

The legal culture of title registration matters. The fact that regulations allow commencing procedures in one office with no way of conclusively checking title, and because rights might be registered in more than one office, reflect a fundamental misunderstanding of the purpose of registration. The registration system is not conceived primarily as a “guarantee” system, which protects the legal rights of land and real estate holders and facilitates future transactions. Instead, the primary role of the registry is apparently conceived as the essential first stage of regulation and control, and fixing the relationship between the government and private real estate owners on which all subsequent dealings are to be based.

Essentially the current systems are designed in such a manner as to control private real estate resources. This can be deduced from the fact that as a part of the application process for registration applicants are required to attach building permits, demolition permits, tax statements and the like. The system is seen as an officially sanctioned repository for officially established private rights. An important but neglected function of *Siguel El-Shaksi* should be to provide an open and easily accessible mechanism for parties to “examine title” in advance of engaging in real estate transactions and offer a legal framework that allows reliance on the title examination as well as security for all registered rights. Simply stated, *Siguel El-Shaksi* must be oriented to the needs of the public and only secondarily to the needs of the institution maintaining the records. That this purpose is not accommodated can be seen in the fact that the law contains no appropriately conceived provisions for priority. There are provisions for priority in Articles 184-212 section 8, Chapter 2 of the REPD directives, third edition, 2001, but require further elaboration and clarity.

Mortgage finance companies and lenders realize that the transactional benefits of the system are lacking. By necessity they think of this in practical terms. If they happen to discover something in advance they avoid the transaction. This can be characterized as weak transactional protection. Strong protection, however, should be part of the legal framework through provisions designed to allow those that examine title to rely on their examination of the record and laws that explicitly secure registered rights against claims by persons subsequently dealing with the real estate. These provisions should expressly state that persons acquiring rights in real estate are legally bound and take subject to prior registered rights. The *Siguel El-Shaksi* Law does not provide this strong security of tenure and is not designed to facilitate real estate transactions. It treats rights in real estate more or less like mummified artifacts. Greater recognition of the dynamic needs of the financial markets, introduction of pragmatic evidentiary standards to enable prompt registration and a cultural change towards improved customer service are urgently required.

The *Siguel El-Shaksi* law should be amended to offer positive legal incentives for its use. First the law should clearly state the legal benefit of the blue deed<sup>4</sup>. This should offer

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<sup>4</sup> To continue the terminology used in many of the prior EFS technical reports, the term “blue deed” will be used to designate the *Sanad El Mulkkaya*. In some of the translations of laws the document is referred to as a certificate of title, which might actually be a more fortunate term. In some reports it is referred to as a title deed. These English translations, however, should be avoided, because there are comparable documents under the *Siguel El-Ainee* system and there needs to be a translation that can distinguish between these.

more than just a governmental recognition of the ownership that it evidences. The following proposed Article would do that.

Every person should accept that the rights disclosed by the blue deed are the only registered rights affecting the land or other real estate described and the person named as owner therein shall hold the land or other real estate free from all rights and encumbrances, except the rights and encumbrances noted in the blue deed.

Contrast this type of positive statement of rights with the negative found in the *Siguel El-Shaksi* Law No. 114:

Article (9)<sup>2</sup>

All actions which may establish conveyance, modification or elimination of in-rem titles and the final judgments of acknowledgement, should be registered and recorded. These actions include endowment and will. Failure to register results is that the rights referred to are not transferred, changed or expired neither among parties concerned nor third parties. Unregistered transactions have no effect other than personal commitment among the persons concerned.

First of all the last sentence of this provision seems to contradict the statement “neither among parties concerned<sup>5</sup>. The real meaning here is that ownership will not be transferred even between concerned parties. Ownership is transferred only by 1) registration and 2) recognition that other rights terminate by their terms or other reason (payment of mortgage debt). However, this termination occurs in actuality whether or not a document confirming that fact is registered or not. But more importantly, this provision penalizes parties if the transaction is not registered, rather than granting significant benefits for registration. Where benefits are granted there is a strong incentive to register. In the United States all deeds and registration systems are purely voluntary, but the benefits granted by the legal framework insure that most parties to transactions do record or register their transactions. Where penalties are the consequence of not registering, experience in Egypt proves that people ignore the law and enter into informal contracts that they recognize between the parties and from transaction to transaction. The penalties have little affect, whereas benefits, security and protections would provide the incentives for registration<sup>6</sup>.

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<sup>2</sup> The last three clauses are added by Article one of Law 25 of 1976.

The Real Estate Publicity and Notarization Department Instructions, Third Edition 2001, Article 5 is also inconsistent with the law in that it states “Non registered transactions shall have no effect except for the personal liabilities between concerned persons.

<sup>5</sup> The Real Estate Publicity and Notarization Department Instructions, Third Edition 2001, Article 5 is also inconsistent with the law in that it states “Non registered transaction shall have no effect except for the personal liabilities between concerned persons”.

<sup>6</sup> We know from a meeting at EHFC that mortgage lenders seek some protection from the system in the form of an informal note regarding the mortgage finance agreement. How much better for the lenders if the law declared positive, formal benefits

To provide real transactional support and inspire and encourage registration not only should the system function properly, but the registration law must provide strong protections. In addition to the positive provision just suggested, the principle of legal notice must be properly elaborated in the law. The notice provision should be formulated so that it has the legal effect that all persons dealing with a parcel of real estate are presumed to have knowledge of all currently valid registered legal rights and obligations affecting the parcel whether or not the person dealing with the property actually checks the registered records. This protects the holders of registered rights by ensuring that subsequently acquired rights are acquired subject to their prior registered rights.

At the same time, the law should provide that those engaging in real estate transactions take their rights free and clear of any registrable rights that are not registered. This allows purchasers, mortgagees and others to make informed decisions regarding their investment and protects them against claims based upon secret transactions. Lastly, the law must introduce the principle of priority of rights and rigorously define the legal consequences of relative priorities. The following language is suggested for the *Siguel El-Shaksi* law.

Every document from the time of its registration shall be notice to persons dealing with the land or other real estate thereafter<sup>7</sup> of the rights created in the document<sup>8</sup> and that the rights created in the document are binding as against all persons subsequently dealing with that land or other real estate.

Thus, if a mortgage is registered against a parcel of real estate a subsequent purchaser is bound by the terms of the mortgage. If a servitude is registered and a mortgage is subsequently registered, the mortgagee takes the mortgage subject to the servitude. If a mortgage is registered and there is a subsequently registered mortgage, the second mortgagee is bound by the terms of the first mortgage. However, this recommended legal amendment from negative to positive statement may take more time than the life of the EFS project.

These principles are basic to registration systems, provide protection for registered rights, and allow a person to examine title and determine title (ownership and encumbrances) in advance of engaging in a transaction involving the real estate in question. It is these legal principles that give legal meaning to the registration system and provide real legal incentives for registration. These provisions broaden the effectiveness of title registration and make it important in the real estate market, and indeed go beyond security of tenure by providing an orderly mechanism for avoiding or resolving competing, conflicting claims. Such legal provisions act as positive incentives for registering ownership, mortgages and other rights.

It is clear that these notions are not well understood by officials and practitioners in Egypt and follow up discussions regarding these important provisions should take place between Egyptian specialists and a legal consultant familiar with the application of notice

<sup>7</sup> Registration of right is not notice to the world of that right, as one too often hears, but is only notice to those dealing with the real estate subsequent to the registration of the right.

<sup>8</sup> The phrase "created in the document" precludes notice of rights merely mentioned in the document., which may or may not still be valid.

and priority The consultations must deal with use cases involving a whole range of rights in real estate, including priorities between mortgages and leases, mortgages and servitudes, mortgages and restrictions, priorities among leases, servitudes and restrictions, and priority regarding the transfer of ownership. An understanding of these principles and incorporation of the concepts in the legal framework will produce confidence in the system and legally encourage its use. They, in effect, flip the benefits of the system from the government to those engaging in real estate transactions.

### **3. Central Registry Office and Registration of Mortgages**

Mortgage loans are being made under the provision of the law that states that loans can be made where the transaction is eligible to be registered. The mortgage finance agreements (tripartite) are to be registered in the central registration offices, though most evidence suggests that no mortgage finance agreements are being registered at all, whether in the central registration office or in the districts<sup>9</sup>.

The reason that mortgage finance agreements are to be registered in the central registration offices is because that it was felt at the time that the Mortgage Finance Law was passed in 2001 there would be more expertise in the central registration offices and that the tripartite agreement could be more efficiently registered there. This creates a problem, however, because the normal course of registration for other sales transactions and encumbrances commences with the district office in the district in which the real estate is situated. Since mortgage finance agreements are registered in the central offices whereas other transactions are registered in the district offices it is possible, and it has happened, that a tripartite mortgage finance agreement is in the process of being registered in the central office and at the same time an unscrupulous seller sells on contract to a second purchaser who then starts registration in the district office.

The second purchaser has no way of knowing that an application for the registration of the mortgage finance agreement has been accepted by reviewing the records in the district office. Both the central office and the district office will start to process the registration for the same property, but in the case described, in the name of different purchasers. The procedure normally takes longer in the district office, but as part of the procedure ESA will eventually review the mutation form that discloses any activity that has occurred regarding the parcel. At this time, it will be discovered that the tripartite mortgage agreement is being or (assuming that there were actually registrations of these agreements) has been registered in the central office. By this time the second purchaser has already paid the purchase price for the property and the seller has disappeared.

Obviously, not confining all registration activities to one registration office creates duplication of authority to perform the same services and there is no internal cross-check of records between the central office and the district office. One might assume that any purchaser should first do a title examination in the central office and, only if there are no transactions or applications pending there, proceed to register his rights in the district office, but this will not protect him/her. Consider the case where a purchaser checks the central office and finds no activity. A registration proceeding is then commenced in the

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<sup>9</sup> Ali Abdel Salam suggested that he is aware that one mortgage finance agreement had been registered in each of the north and south Cairo central registry offices.

district office and thereafter a mortgage finance agreement application is submitted to the central registration office. Whichever is reviewed first by ESA will be noted on the mutation form for the real estate, but *Siguel El-Shaksi* law does not clearly establish which rights will have priority<sup>10</sup>. One of the parties, either the purchaser under the mortgage finance agreement or the purchaser under a normal purchase contract will lose his/her investment in the property. Also, after registration has been completed all blue deeds are kept in the central registration office and all encumbrances thereafter are registered in the same office. Thus, it is prudent for any purchaser to first check the records in the central office, but as has been described, this will not protect purchasers of unregistered real estate.

It is proposed in the model directive a part of this report that the functions of the central and district registration offices be redefined and that all registrations take place in the district offices. The records should also be kept there, for they are geographically more convenient and can provide better service for persons dealing with local transactions who are required to visit the registration office multiple times to complete a registration.

#### **4. Adjudication Simplification**

The bottleneck in the deeds registration process is the depth of inquiry that is made under *Siguel El-Shaksi*, where the registration officer often spends valuable time reviewing irrelevant or outdated records as part of the effort to determine ownership. The process should be greatly simplified and can be done without compromising the system. The benefits gained by a tedious and “in depth” analysis in the REPD offices does not necessarily result in more accuracy or security of title.

An important way registration is being simplified in some countries is to rely on certified title opinions by lawyers or other specialists in the adjudication process. The approaches vary, but the concept is the same in the jurisdictions that have adopted this method of simplification. The private attorney provides an opinion as to title along with the evidence of title. A certificate of title is then issued and there is a publication period. At the end of the publication period the title is fully registered. This is a modification of traditional title registration in that the title investigation is not completed by professional bureaucrats in the title registration office<sup>11</sup>

At least one neighboring country to Egypt has recently adopted a private adjudication approach. The demand for registration services increased significantly in Libya after 2001 and the real estate registration agency has shown a desire to improve services to the citizens through better laws allowing expedited service in the surveying sector and for the production of legal adjudication and documentation involved in first registration. The measures privatizing both the surveying/engineering services and the adjudication procedures were implemented by changes in the Law on Registration, because the registration offices were incapable of keeping up with the demand for registration.

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<sup>10</sup> Article 33 of Law No. 114 (1946) as amended (*Siguel El-Shaksi*) covers the situation where two applications are filed and accepted in the same registry office, but this does not resolve the problem under discussion. The law really does not contain a clear statement of the concept of priority and should be amended to cover this.

<sup>11</sup> See the “Possessory Title” procedures implemented in Minnesota, U.S. A. Minn. Stat. chap. 508A. This is a supplement for the traditional Torrens type title registration that can be found in Minn. Stat. sec. 508.

Demand for registration of real estate increased, in part, as a consequence of the adoption by the government in 2001 of a housing purchase money loan program introduced to mitigate the housing shortage in Libya. A precondition for qualifying for the loan is that the property to be pledged as security for the loan must be registered. Libya privatized part of the registration process by authorizing lawyers to perform first registration adjudication in the field. This allows for a very efficient registration of real estate on a sporadic basis to support its housing loan program.

The process of adjudication requires that the lawyer and the owner desiring to register a parcel meet on the property together with neighbors and other interested parties. The lawyer conducts an on-site investigation/hearing and then prepares a report. This report comprises several pages and includes a recitation on the first page as to the legal authority for completing the field adjudication and a list of the persons that appeared for the field review. The second page is a list of the documents that the lawyer has reviewed dealing with this specific parcel. Page three is a set of what appear to be standard questions that are answered on site by the owner. The questions are:

Are you the owner of this property and by what right?

Is the property under your control, possession and use?

Are you aware of any disputes or claims against the property?

Are there any mortgages (loans) against the property?

Do you have any further comments?

If any person has an objection it can be raised and the process must then proceed to a registry office committee for determination. Any irregularity that the committee is unable to resolve then goes to the civil court. This inquiry is very similar to the inquiries that are a part of the adjudication process in the best registration systems world wide and is clearly intended to allow any objections or concerns to be raised and to adjudicate all rights in the property at one time.

Despite the fact that the adjudication functions have been privatized there is a very low percentage of titles that are subject to claims or objections in Libya. The majority of claims that do arise have to do with Islamic inheritance laws, which actually have little to do with how effective the registration procedures are designed and implemented.

Privatization of the adjudication process for first registration is consistent with developing international best practices and has been introduced without significantly compromising due process and the effectiveness of the procedures. After a committee in the registration office reviews the proof lodged by the private attorney to support the registration application, there is a publication period of 20 days, notice is given to the local court and the local municipality. If no claim is lodged during the time period allowed by law, which is 60 days, title is registered in the name of the applicant.

Similar procedures could be implemented in Egypt for precisely the same reasons. The mortgage finance companies must appear on the property with ESA in Egypt and as part of the process their specialists could be authorized to complete the adjudication at the

same time. In addition, the standard mortgage finance sales contract contains a certification by the owner similar to the following:

Ownership of the ..... was transferred to the First Party by virtue of -----  
----- . The first Party hereby testifies that the real estate or sold unit is fully-  
owned by him/ her and that no third party has any original or subsequent  
rights thereon. He/ she testifies that it is not leased and that he/ she has a  
stable and evident holding rights over it, without any physical or legal  
contest from third parties. He/ she also testifies that the construction permits  
were issued by the concerned official authorities and are still valid; that  
works to be executed are in compliance with the construction permits and  
with the technical rules and principles and that there exist no contraventions  
whatsoever.

Considering that both the purchaser and the mortgage finance company have a considerable investment in the transactions, they will have completed significant due diligence to verify the ownership of the seller. They have much more to lose than the REPD in determining the proper owner and it is suggested that these safeguards will preserve the integrity of the *Siguel El-Shaksi* system. Such procedures would require a change in the *Siguel El-Shaksi* Law No. 114/1946, but could be implemented more easily if the Ministry of Justice and the REPD were amenable to improving registration services to implement the Mortgage Finance Law.

This trend should be brought to the attention of the Mortgage Finance Authority, which may have the political influence to effect the necessary changes. These procedures are being implemented elsewhere world-wide and in the region and could be adapted in Egypt to support its innovative loan programs. The timing of such legal reform remains difficult to predict but clearly MFA can be instrumental in driving such a reform.

## 5. Notice of Mortgage

EHFC has sent a letter to the Mortgage Finance Authority to work with the REPD to allow filing some sort of note in its records that there is a mortgage against a particular parcel of real estate until any formal registration of the mortgage can be effected. In a system such as Egypt where every transaction is scrutinized by the registration office this might have the effect of arresting additional transactions with the property by the owner, which would protect the lender.

However, such a system would compromise the registration system by allowing informal procedures, whereas instead there should be well thought out formal procedures to allow registration of the mortgage itself and provide the protections granted by law. There is a serious question whether or not the registration office has the authority to obstruct further transactions based upon such informal notice. Legal theory suggests that the REPD would be acting *ultra vires* (outside of their authority) in recognizing rights where the law itself does not provide for the recognition. However, in the absence of a functioning formal system, lenders are now seeking such informal recognition of unregistered rights by the REPD.

Technically the equivalent could be accomplished under Article 13 of the Executive Regulation to *Siguel El-Shaksi* which states in part:

In addition, registering lawsuits for entitlement of any real estate rights or a related notation as the case may be shall be registered. Contract validity lawsuits on any real estate rights shall also be registered.

The notations and registrations referred to shall take place after listing the lawsuit document at the court's list

This article allows a lender to file a court case asserting the validity of its mortgage and then registering what amounts to a notice of pending cases with the REPD. There would still be certain administrative issues that might arise, but such a notice of pending cases could be registered and indexed by name of the parties to the court case. If, thereafter, a document were submitted for registration it is presumed that the mortgage would have priority.

Many registration systems, however, do contain a special provision that operates in conjunction with well conceived priority provisions and gives legal recognition to rights that for whatever reason cannot be registered. This is accomplished by introducing the concept of a "Notice of Adverse Claim" or in some jurisdictions *caveats*. Simply stated a "notice of adverse claim" provision in a registration law is a mechanism to provide legally validated notice of rights without the actual registration of the rights. Such statutes are intended for use where there is no legal mechanism for getting the rights themselves registered. An example of a notice of adverse claim statute is as follows:

#### Adverse Claim

Any person claiming any right in registered real estate adverse to a registered right may file with the registrar a written statement verified by affidavit of the claimant setting forth fully the alleged right and how or from whom it was acquired, and designating an address to which all notices may be served upon the adverse claimant. The registrar shall note the claim by memorandum on the proper certificate of title.

Upon the petition of any party in interest to a court of competent jurisdiction the court shall grant a timely hearing upon the validity of such adverse claim and enter such decision and decree as justice may require.

If the adverse claim is adjudged to be invalid, the registration thereof shall be cancelled by order of the court. A certified copy of the order shall be registered by the registrar and the memorandum of the adverse claim, together with the order of court shall be discharged from the certificate of title in the same manner as a termination of mortgage. If the claim shall be found to be valid it shall be noted in the decree of court and the decree shall be registered with the registrar showing the validity of the right. If the decree

calls for transfer of an ownership right the title report shall be updated accordingly.

This establishes a legally valid mechanism for making note of a right that cannot otherwise be registered, but at the same time, allows a party aggrieved by the filing to have the validity of the right claimed in the notice determined by a court of competent jurisdiction. As a practical matter such court challenges to the claim rarely occur. Normally both the claimant and the party against whose interest the claim is registered agree about the claim, but both recognize that the only way to protect the claim against subsequent persons is to resort to the notice of adverse claim procedure allowed by law.

An adverse claim mechanism introduced in Egypt either with regard to any claim or specifically regarding mortgage finance agreements would allow the parties who at the inception of the transaction are on good terms to protect the rights of the mortgagee. Where the relationship between mortgagor and mortgagee has broken down the filing of the adverse claim would probably not be amicable, but it is unlikely that there would be a challenge.

The notice of adverse claim procedure would operate without the intervention of the court in contrast to Article 13 of the current Executive Regulation. Such notice can be registered and in cases where the owner disputes the notice, the validity of the claim can be examined and determined by the registry office.

The introduction of a procedure for filing adverse claims is recommended. The effect would be fourfold (assuming a proper notice statute was incorporated into the *Siguel El-Shaksi* law).

The notice of adverse claim would provide legal, formal recognition of rights that otherwise cannot be registered.

After the notice of adverse claim is noted in the registry with regard to a particular parcel of real estate all persons subsequently dealing with the parcel of land would be legally bound by the rights noted in the adverse claim and would be said to take their rights or title subject to the rights noted in the adverse claim.

Any party in interest would have the right to have the claims noted in the adverse claim swiftly adjudicated in an expedited court proceeding to either validate or invalidate the rights.

And the statute would provide direction to the registration office for dealing with the rights after the decision of the court<sup>12</sup>.

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<sup>12</sup> Where the author adjudicated rights base upon a notice of adverse claim in the Fourth Judicial District Court of Minnesota, he provided detailed instructions to the registrar in the form of a court order, which contained findings of fact, conclusions of law, and specific directions to the registrar for handling the matter in the registry.

## 6. Mortgage Finance Agreements

### Structure of Transaction

The purchase money mortgage finance agreement is a tripartite agreement in which an owner/seller agrees to sell real estate to a purchaser for a stated price on stated terms and further agrees to transfer ownership to the buyer. In the same agreement the seller reserves a lien to secure the payment of future installments with the following or similar language:

The remaining amount, L.E. ---- (only -----) shall be paid on monthly installments each of which amounts to L.E. ----- for -- ----- months, as per the installment schedule attached to this Agreement, guaranteed with the seller lien as legally determined on the sold real estate.

The seller then agrees to assign the rights to the installments to the so-called financier and this assignment is accomplished by a separate document.

The First Party hereby testifies that he accepts to assign his rights in the gross price installments, mentioned in article 7, to the Third Party (the Financier) in return for an accelerated payment and upon agreed terms and conditions by virtue of a separate document attached herewith, that incorporates the provisions governing such assignment and its effects including the legally-stated priority of the price over the sold real estate or unit.

The assignment of the seller's rights does not require the approval of the purchaser, but it is governed by the Civil Code and general contract law. Contract law allows the free alienability of the contract rights of either party unless the contract states otherwise. There is no restriction on the assignment of the seller's rights in Egypt, but a typical mortgage finance agreement additionally contains a clause that the purchaser by entering into the agreement also agrees to the assignment of the seller's rights to the installments to the lender/financier.

Likewise, the signature of the Second Party (the Investor) onto this Agreement is considered an acceptance of the assigned rights and an attestation of their entry into force.

Presumably, a transfer of the right to the installment payments from the seller to the lender/financier also transfers the security in the realty, i.e. the lien, though there is

nothing in the law that states this expressly. In a well documented system the lien rights as well as the right to installments would be transferred<sup>13</sup>.

The seller agrees to register the ownership in the buyer and the buyer agrees to register the lien to secure the installments.

The Mortgage Finance Law provides that the purchaser may only transfer or dispose of the purchaser's rights with the consent of the lender/financier. The financier can only withhold approval for "serious reasons that would expose his interests and rights to danger" and must notify the reasons, in writing, within 30 days from the date the investor notifies him of the intent to dispose of the "security realty".

The lender/financier agrees to register the real estate:

The Financier shall be obliged to submit an application for registration of the real estate collateral to the Real Estate Publicity Bureau, including:

- Name and other particulars of the Financier and the Investor;
- Value of the installments and the securitized rights; and
- Maturity date for full payment of the installments.

The application must be attached to the Mortgage Finance Agreement, title deed in name of the Investor or the Finance guarantee in name of the Financier.

A mortgage finance agreement for construction is similar to the purchase money mortgage finance agreement, except that the "investor" (i.e. the borrower) is already the owner of the real estate that is to be built upon or repaired. The following clause is recommended:

Ownership of the land plot was transferred to the Second Party (the Investor) by a registered contract No. -----, Issued by -----, or by an allocation contract No. ----- Issued by ----- dated ---/---/-----.

The Second Party (the Investor) hereby testifies that this land plot is fully-owned by him/ her and that no third party has any original or subsequent rights thereon. He/ she testifies that it is not leased and that he/ she has a stable and evident holding rights over it, without any physical or legal contest from third parties. He/ she also testifies that the construction permits

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<sup>13</sup> There is a term in the English translation of the mortgage finance document "priority of price". This is not a legal term of art in English, but may be a translation of a term in the Arabic that means "lien".

were issued by the concerned official authorities and are still valid; that works to be executed are in compliance with the construction permits and with the technical rules and principles and that there exist no contraventions whatsoever.

## **7. Registration Instruction for Mortgage Finance Agreements**

From a legal standpoint the structure of the mortgage finance agreement is quite simple and contains two main elements: the sale agreement and the creation of the lien to secure payment of the installments under the sale contract. The sale contract conveys ownership to the purchaser and the seller reserves the lien, which is assigned to the lender/financier.

From the perspective of the REPD the sale agreement should be treated in the same fashion as any other sale contract, but subject to a lien in favor of the seller. A second document will assign the seller's rights to installments and the lien securing payment of the installments to the lender/financier. The result of the transaction will be a blue deed showing the purchaser as the owner and containing two notations. The first notation will be the reservation of the lien for installments to the seller contained in the mortgage finance agreement itself, and the second notation will be the assignment of the right to the installments and the lien securing payment to the lender/financier.

The REPD directive under development explaining how to handle mortgage finance agreements should be issued accordingly and a suggested model is attached to this report which covers how the parties will appear on the blue deed pursuant to the transfer of title, the reservation of the lien, the assignment of the lien, and the fees to be charged, transfer of owner's rights, and the termination of the lien.

It should be noted that Article 2 of the Executive Statutes of the Real Estate Finance Law stipulates that if the property that is the subject of the real estate finance is not registered in the seller the mortgage financier may accept the mortgage of other real assets of the purchaser. Presumably, such mortgages would be shown as a notation of the blue deed of the purchaser for those other real assets. This procedure would be according to traditional mortgage notations, which the REPD well understands.

This raises the question how many purchasers pursuant to mortgage finance agreements have other real estate that could be given as security for the mortgage finance agreement installment payments.

## **8. Mortgage Security Pending Registration**

An important element of security of mortgage finance companies is that they hold all the documents required for registration of ownership, transfer, powers of attorney, mortgage lien, assignment of rights and others. These muniments of title traditionally serve as the only documents evidencing title where no registration system or deeds system exists<sup>14</sup>. They certainly constitute important security for a lender where neither a registration

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<sup>14</sup> In some systems, the tradition of examining muniments of title carries over even after formal public recordkeeping systems have been established. It is also interesting that in Egypt where informal ourfi contracts are used, a purchaser will ask that he receive all the documents upon purchase of the real estate, fully expecting to have to pass these on to any future purchaser.

system exists nor a deeds system functions, such as in Egypt. This gives the lender certain informal security, since without this documentation it is far more difficult, if it is possible at all, for the seller or the buyer to transfer ownership or other rights to a good faith purchaser in derogation of the lender's mortgage rights.

Related to this possession of the muniments of title is that it has been a traditional function of certain companies in the United States to act as closing agents for real estate purchase-sale settlements and mortgage transactions. Very often the closing is performed by title insurance companies that will also be issuing a title insurance policy. Normally title insurance coverage will commence on the date the insured rights are registered. As a part of a transaction, however, the title insurance company is often asked to issue its title insurance policy effective on the date of the settlement rather than on the date the documents are actually registered. This has become known in the industry as so-called "gap insurance", because coverage includes the period of time, i.e. gap, between settlement and registration.

Gap coverage is used by title insurance companies in marketing their products. However, title insurance companies will only move the date of coverage to the date of settlement if they have conducted the settlement and control all the documents from that point forward. In other words, if they can completely manage the timing of the registration process they might provide the gap coverage. Where the settlement takes place in a lender's or attorney's office or with some other settlement service the title company will wait until all the documents have been registered, reexamine the title and then issue their coverage as of that date. If any new rights have been created or been registered between the time of settlement and the date of registration of the insured's rights, the title policy will list these rights in schedule B of the policy as exceptions to the title insurance coverage.

In the United States the recording or registration of ownership and mortgage rights is a simple administrative function and only takes a matter of minutes if the documents are all in proper recordable form. For deed recordation systems in the United States this generally means that the documents are on the proper type and size of paper, contain original signatures and are properly notarized. There is no legal review of the documents to insure that parties have the right to do what the documents purport to do or that the parties even have an interest in the property. If the documents are in recordable form they are recorded, indexed, photocopied or scanned and returned to the parties.

The title company, therefore, can properly assess its risk that the documents will be registered before any additional rights might be registered at the time of settlement. The greatest risk involves when the documents arrive at the recording office. If the title company is concerned for some reason, such as a precarious financial position of a purchaser, it can hurry the documents to the recording office out of concern that involuntary rights such as tax liens or judgment liens might be recorded against the purchaser between settlement and recording of the insured rights. If a transaction has a very large dollar amount the title company will take this into account in determining how it will handle the documents after settlement and whether or not it will even include gap coverage. The title company always reserves the right to deny gap coverage and may not inform the parties until the settlement itself.

In the normal course the timing of recording is made by the title company on a pure business risk basis and it adjusts its recording practice based upon the volume of transactions, impracticality from a business standpoint of rushing every settlement package immediately to the recording office, the size of a particular transaction, or peculiar details of a transaction. Of key importance is its knowledge of the local practices in the recording office itself. In jurisdictions where there is a lot of bureaucratic interference the title companies won't provide gap insurance at all.

This topic is mentioned here, since there has been a lot of discussion over the last six months by the Mortgage Finance Authority and the Federation of Egyptian Insurance Companies about title insurance as a product to help reduce title risk for Egyptian lenders. If a title registration system operates properly there is little reason for the introduction of title insurance. The reason that the topic has acquired a special interest in Egypt is because of the near impossibility or the very long wait for the registration of mortgage finance agreements. As a part of the title insurance discussion the subtopic of "gap" insurance has been raised. It is the opinion of this consultant that where a registration system is dysfunctional, as it is in Egypt, no title insurance company will take the risk of issuing this gap coverage. There is a misconception that title insurance has been a focus of this project. Nothing could be further from the truth. The solution for reducing title risk for lenders is to improve the registration system.

## **9. Installment Sales Purchase Contracts**

A review of the standard installment sales contract used by developers in Egypt discloses that it is quite similar to those used in the United States and these generally pose no problems for registration authorities. There has been little discussion of the registration of installment sales contracts in Egypt though a memorandum of different scenarios was prepared during an earlier assignment that has been praised by certain authorities as being a very good clarification of how installment sales contracts should be registered.

The developer installment sales contracts differ substantially from the mortgage finance agreement, which is also in part an installment sale contract. The difference lies in where title is vested during the period in which the installments are being paid. For the mortgage finance agreement, as has already been explained, ownership transfers to the purchaser at the time the agreement is entered into, subject to a lien in favor of the seller.

For installment sales contracts used by developers ownership transfers after all installments have been completed and do not transfer when the agreement is entered into. The purchaser receives a right to receive ownership if all payments are ultimately made. The question is whether or not this right to receive ownership at a future date upon the condition of full payment is a right in real estate that is entitled to be registered or not. There is a difference in practice among jurisdictions regarding this question.

Some jurisdictions treat installment sales contracts as a purely personal contractual right and not a right in *rem*. In these jurisdictions installment sales contracts usually cannot be registered. In other jurisdictions installment sale contracts create a right in the real

estate that can be registered, possibly as a charge.<sup>15</sup> In the latter jurisdictions the contract is simply shown as a memorial on certificate of title of the owner/seller. The better rule is to treat the purchaser's right as an in *rem*, because the purchaser has a substantial interest in protecting his/her rights in the real estate against a second conveyance of the same property by the developer, since the purchaser has paid a hefty down payment. The best way to do this is through the registration system. Possession is often a method for protecting the purchaser's rights where the installment sales contract cannot be registered, but this may not be effective in Egypt, since the purchaser cannot take visible possession until the real estate, most often a house or apartment, has been built.

In Egypt the issue must be clarified whether or not the purchaser's rights under an installment sales contract is a personal right or a right in *rem*. If the latter it would be entitled to be shown as a notation on the developer/owner's blue deed. The information that would be shown is the date of the agreement and the name and identification data of the purchaser.

## 10. Fees

### Publicity and Survey Work

On July 15, 2006 the Ministry of Justice promulgated Decree No. 5424 Notarization and Publicity Fees in Law No. 70/1964 In Respect Of Notarization and Publicity Fees Amended by Law No. 83/2006 (hereinafter referred to as Law No. 83 /2006) which amends the fee schedule of existing laws so that the registration fees do not exceed 2000 LE and will not exceed 1000 LE for the majority of apartments. The law was published and took effect as of August 7, 2006. Article Three of Law No. 83 is clear that these fees include the cost of the survey work that would be completed by ESA. It states in pertinent part:

Fees stipulated in Chapter Three under Part One in the mentioned law no. 70 of 1964 inclusive of cost of survey operations for each alienation of the same parcel, real estate unit or recording in a real estate petition shall be determined according to the following...

### Division of Fees

As of yet there is no agreement between the REPD and ESA as to a division of the fees, but the developing practice is that the REPD collects the registration fee from the applicant for registration. The applicant then goes to ESA for the engineering services associated with the registration process and pays ESA the actual costs for ESA's services. The applicant then returns to the REPD and is reimbursed from the filing fee for the amount paid to ESA<sup>16</sup>. The REPD former practice was to forward the remaining amount to the Ministry of Finance. This practice apparently continues, but there is reason in the law to understand that this practice should change.

<sup>15</sup> An interest in property that is held as security for a debt. A charge can include both liens and mortgages.

<sup>16</sup> Discussion with Mosaad Ibrahim, former Director of ESA and now EFS Senior Cadastral Surveying and Mapping Advisor

The survey agency, ESA, used to receive 190 LE from each transaction, but there is no clarification in the new law as to how much ESA will now receive. It appears that the registration fees may not cover the actual costs of the field work, especially where ESA will be contracting with private surveying companies to provide this service

It is suggested that the practice of using part of the fee to pay the actual costs of ESA be continued. However applicants who elect to have a detailed survey of the interior floor plan of their property at the time of registration would pay the full cost of such a service to ESA. In addition, where lenders require a detailed survey and valuation of the property prior to issuing a loan, the fees will be paid by the borrower/applicant owner.

### **Fees REPD Services and Performance Rewards**

In many jurisdictions around the world the law generally states to which authority the registration fees are to be credited and if to more than one agency then in what proportion. This can either be to what amounts to the governmental general fund or it might be earmarked for payment for the registration services in the jurisdiction in which the property is situated. Often the law apportions part of the fees to the general budget and a portion to the registration offices. This is especially the case where fees have been increased to allow for modernization of registration offices. The fees must ultimately contribute to the recovery of costs of operating the registration system,

Apparently the Ministry of Justice in Egypt viewed the old fee structure that was based upon a percentage of a sales transaction as a tax, but views the new fee structure to be a fee for services. This issue must be clarified and since the real estate registration offices are badly in need of modernization it would be an excellent idea to use the fees for this purpose.

Note that, Article 4 of Law No. 83/2006 contains the following clause:

The Minister, after presentation to the Cabinet, may develop a system or more (sic) for rewarding the Real Estate Publicity and Notarization Department employees according to their performance rates and volume of achievements.

This is a clear indication that the new fees are to be, at least in part, used for the payment of services to the REPD. In addition, it provides the possibility of rewards to individual employees of the REPD for performance. The Ministry of Justice/REPD should develop a performance based incentive reward schedule to promote better customer service.

### **Fees for Multiple Owners**

At the Heliopolis Registration Office the Director stated that when purchasers are buying a parcel of real estate jointly each of the tenants is being charged 2000 LE<sup>17</sup>. The buyers vociferously challenge the appropriateness of this interpretation of the Regulation. One case was mentioned in a later conversation that in one case there 18

<sup>17</sup> Meeting at Heliopolis Registry Office on August 23, 2006.

heirs to a parcel of real estate and the Registration Office attempted to charge the registration fee eighteen times. Discussions with the mortgage lenders confirmed that this was the practice in some registration offices<sup>18</sup>.

Ali Abdel Salam has confirmed that an instruction has recently been sent to all district registration offices advising them that only one fee per parcel should be charged and not a fee for each partial owner of the property. Though it seems that the problem has been solved the situation should continue to be monitored to make sure that each registration office has received the clarification of the regulation and is now properly charging a one time fee per parcel.

A draft directive has been included in the directive proposal in this report.

## 11. Power of Attorney Instruction

Powers of Attorneys are fundamental to the registration process because the contract for the sale of real estate is not finalized until the end of the registration process. The purchaser will demand as part of the documentation from the seller an irrevocable power of attorney to complete the contract at the end of the registration. The necessity actually arises because of the convoluted procedure requiring a preliminary contract and ultimately a finalized contract. Delays in the registration process make this necessary; since the seller may not be available execute the final contract or other documents necessary to the registration. Two problems have been identified with the manner in which powers of attorney agreements are interpreted by the REPD.

The first was described in the Holl Report of March 2006 as follows:

Directives are applied inconsistently from registration office to registration office<sup>19</sup>. One example is a power of attorney from a registered owner to a current purchaser to register a sales/purchase contract. Where the registered owner, who is the principle in the power of attorney, has died after giving the power of attorney some registration offices still accept the power of attorney. Other offices will reject the power of attorney and will not allow registration without resolving the inheritance issues raised by the death of the principle. Although it is a general rule regarding powers of attorney that they do terminate upon the death or incapacity of the principle, some registration offices, nevertheless, allow continued registration by the attorney in fact based upon the theory that even where there has been a death, the exercise of the power of attorney to register property only benefits the parties and therefore ought to be enforced.

The second problem is that the Ministry of Housing has been requiring that powers of attorney to deal with a parcel of real estate be executed in front of a notary in the district in which the parcel is situated. This seriously compromises the effectiveness of powers of attorney, since one of the important reasons for giving a power of attorney is so that

<sup>18</sup> Meeting at the EHFC on August 28, 2006.

<sup>19</sup> The inconsistency was raised at a meeting with Taamir Finance Co. on February 8, 2006 attended by Richard M. Gaynor, Justin T. Holl, Jr. and Shamsnoor Abdul Aziz.

the principal need not be in the district physically but can grant powers to an attorney-in-fact to act locally on behalf of the principal. Apparently the Ministry of Justice has stated that there is no such policy, but there is evidence that a particular real estate transaction involving a power of attorney required special intervention from the Ministry of Justice to solve. It would be impossible to resolve all such cases on an ad hoc basis, so it is important that this issue be brought to the attention of the Ministry of Housing and, if there is such a policy, have the policy changed.

A simple Instruction for the REPD would solve both problems for registration purposes, though unless the Ministry of Housing were also bound by the Instruction there might still be a problem with notaries dealing with a power of attorney to execute final contracts.

The following provision settling this issue has been added to the proposed directive to improve the system of *Siguel El-Shaksi* attached to this report.

A power of attorney shall be accepted for registration purposes if validly executed and notarized in any jurisdiction<sup>20</sup> and shall survive the death of the principal for registration purposes.

## **12. Other Problems with Administration of *Siguel El-Shaksi***

### **Remove External Imposed Requirements for Policing other Land administration Functions**

Perhaps the single most expedient measure for making the registration system more attractive for persons engaging in real estate transactions would be to remove the requirement that permits and licenses be attached as part of the application. A functional title registration system should not be used to police other land administration functions, particularly those that are regularly violated. This would remove one of the most common reasons for rejection of an application. The requirement certainly deters owners from using registration for fear that they will be required to either procure the permits or pay fines and penalties for violation, and the removal would be a first step in demonstrating a commitment on the part of the government of Egypt that the purpose of the registration is security of tenure and the facilitation of real estate transactions<sup>21</sup>, rather than control and regulation of land resources.

The Civil Code states that no transaction shall be made in violation of the law. Unfortunately this has led to the MOJ and REPD interpretation that it is the REPD registry offices obligation and responsibility to enforce all laws dealing with real estate. REPD enforces many, many laws other than Law No. 114.<sup>22</sup> For example, an owner is required to obtain a building permit for any building or improvement to an existing

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<sup>20</sup> This could be limited to any jurisdiction in Egypt, but the better practice would allow a power executed anywhere in the world. This would, however, raise questions as to how to determine whether the power of attorney was validly executed in another country. There are ways of doing this, but the topic is beyond the scope of this report.

<sup>21</sup> In fact, this consultant is informed by Ali Adel Salam, former REPD attorney and now advisor the EFS Project, that when an application is submitted the REPD official is responsible for ensuring that all laws related to real estate are complied with.

<sup>22</sup> For a comprehensive discussion of this topic see section 4.1.6 of the Gaynor Report dated May 2005.

building with a value that exceeds 5000 LE<sup>23</sup>. As a practical matter, a permit is required for any new construction or improvement of any significance. The REPD considers the enforcement of these laws one of its important functions when an application to register a transaction is submitted<sup>24</sup>. Article 22 of Law No.114/1946 requires that data related to the tax obligation should be part of the application if there will be a change in the tax obligation records<sup>25</sup>.

The sole function of the REPD should be the determination of the status of title and it should not be the enforcer of other laws. Only by limiting the function of the REPD to the fundamental purpose of a market based title registration will the system work to the benefit of those using the system. This will also remove significant disincentives for people engaged in transactions from using the system. This in conjunction with the positive enhancements discussed in this report under the heading “Legal Culture of Registration” would greatly enhance *Siguel El-Shaksi*.

### **13. Central Office versus District Office – Clarity of Roles and other Legal Measures**

It should be a prime goal of the REPD to minimize the time for evaluation of applications for registration. The first manner in which this could be achieved is by amending the relative roles of the Central Registration Office and the District Offices. Invoke the assistance of the Central Registration Office only in those cases where there is an exceptional legal issue or a special problem.

All mortgage finance agreements should be processed in the district registration offices. This would require the amendment of the role of the Head of the District Office so that he could also handle technical legal and engineering issues.

This would effectively eliminate the Head of the Central Registry Office from further decisions regarding local registration. With a minimum of training and the proper instructions all transactions could be dealt with in the District Registry Office.

#### **Complete Documentation with Application**

The applicant should provide accurate data with the application, but the required documentation should vary depending upon how complicated the transaction is. The lack of what the REPD considers proper documentation is one of the main reasons for the rejection of registration applications. In the case of mortgage finance agreements the lenders have sophisticated and well trained staff who reviews the documentation, requires the proper powers of attorney, and assist in the submission of an application to registration office. Because of the significant due diligence that the lender undertakes, as well as the purchaser who must ascertain that the seller is actually the owner of the property it is highly unlikely that there will be problems with identifying owners. In these cases it is also unlikely that the documentation will not be substantially complete. Minor

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<sup>23</sup> Law Relating to Directing and Organizing Building Works, Law No. 106 of 1976, Article 1.

<sup>24</sup> For a comprehensive discussion of this topic see section 4.1.6 of the Gaynor Report dated May 2005, p. 32 *et seq.*

<sup>25</sup> It is assumed that this means if there will be a new owner thus causing a change in the tax obligation.

non consequential errors should be ignored by the registration office and the application processed without delay<sup>26</sup>.

All registration applications where a blue deed has already been issued and there is no change in the configuration of the property should be processed administratively in a day or two without the need for legal review, where the sales contract lists as seller the person named as owner in the existing blue deed. The sales contract will need to be properly executed and notarized.

### **Reduce the Time for processing Application**

The law requires that the application be processed by the registration office within one year of its submission. This has the effect of lulling the REPD into taking the process less seriously than it would treat applications if the law called for more urgency. It is almost certainly the case if the law reduced the time to three months they could actually be processed in that time frame. The suggestion has been made that the time period be reduced to six months<sup>27</sup>, but there is no reason why most registrations could not be completed in a much shorter period and the law should require this. Presently an application for registration is accepted for processing within about 7 days and it takes about 3 days for the REPD to confirm that that seller has not conveyed the property. This is for cases in which the property has previously been registered and the records are up to date. Of course, more time is needed in the cases where the real estate is being registered for the first time. Even here, for standard sales purchase transfers this should not take more than a few days. Where there is a valid sales contract the recommendation has already been made that the REPD rely on certifications of ownership contained in the sales contract.

### **Application Rejected or Put on Hold**

In processing applications to register several administrative problems have been identified. Typically REPD personnel:

- put complicated cases aside for fear that they will make a mistake thus delaying processing,
- find minor inconsequential problems to justify sending the file back to the submitter,
- Reject cases without complete analysis and disclosure of all possible problems i.e. reject for first reason found without comprehensive review,
- Expedite transactions for frequent filers often without complete review,
- Hound the Registry Office Head or other competent employee to take the complicated case or review and let them decide whether to register or not.

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<sup>26</sup> An example of a minor problem that can stop registration is that all applications in agricultural areas require that the Hod be identified in the application. Where the application fails to do this it is easily ascertainable by ESA in its review. Yet registration is often stopped for this reason.

<sup>27</sup> Discussion with Ali Abdel Salam.

## Create a Parcel Based Index

A part of the scope of work under this assignment is as follows:

Evaluate whether new executive regulations or technical instructions are required to support this transition and if so, prepare appropriate outline content for proposed draft regulation or technical instruction for further review and consultation with REPD, MOJ and/or ESA.

This consultant is of the opinion that no change in the law is necessary to create parcel based indices under the *Siguel El-Shaksi* law. As stated in the report of March 2006:

No provision of the *Siguel El-Shaksi* law requires that the index be according to name. The law simply states that indices be created and maintained and refers in the remaining provisions that mention the index to "index books"<sup>28</sup>. With an Executive Regulation and agreement by ESA the information in mutation forms could be transferred to the REPD and set up as indices complying with the *Siguel El-Shaksi* law.

Realize that there are two different situations that must be covered. The first regards parcels that have already been registered under the *Siguel El-Shaksi* system. For such parcels there is a mutation form, generated by the ESA district offices, that constitutes the substantive equivalent of a parcel based index. The information that is contained in the mutation forms is as good as most parcel based indices one encounters in countries where successful registration occurs<sup>29</sup>. The Mokattam model registration office will be a modern one and there will be linked communication with data maintained by ESA (i.e. the mutation forms containing cadastral data and unique property identifier). The key will be assisting ESA in converting the existing mutation forms into electronic format and creating new mutation forms using modern technology. There is likely the need for a memorandum of understanding between the Ministry of Justice/REPD and ESA for the coordination, but parcel based indices will exist for the already registered parcels.

Where new parcels will be registered new mutation forms will need to be created and they will be linked to a comprehensive cadastral index map. EFS is currently assisting ESA in the preparation of technical instructions that govern the production of cadastral index maps linked with individual property data. Training materials and courses for ESA and private sector personnel are also under development.

ESA will engage private companies under performance base contracts to assist in mapping building footprints on parcels with text descriptions on the number of residential units contained within the building envelope. All cadastral index maps will be digital. Once the cadastral index maps are created each document that is registered will be indexed using the unique property identifier linked to the parcel. Where new parcels are

<sup>28</sup> Law 114 (1946) (*Siguel El-Shaksi*) Article 4 "indexes", Article 5 "prepare an index for all documents", Article 6 "prepare indexes", Article 8 "index books", Article 35 "index books" and Article 36 "index books".

<sup>29</sup> For a discussion of this see Holl Report March 2006 p. 6.

being registered this will require field work to create the parcel, but the title information will be entered directly by the REPD with the proper title information. Thereafter, a search can be done against any parcel and all the title information will be available. For existing mutation forms the information contained therein may have to be keyed in order for it to be searched. Alternatively, there may be technology that will provide searchable solutions for the data that appears on existing forms. However, it is important to note that even a scanned picture of the mutation forms will suffice as an adequate index for legal purposes. Until recent technological innovation and automation, parcel indices around the world were in paper form and were capable of being used for the title search. The lawyer would find the proper page of the parcel index, make a list of the documents that affected the parcel and then review the documents to form an opinion as to title.

## **Annex A: Proposed Amendments to Law No. 114/1946**

### Evidence of Title

The application to register shall be accompanied by a sworn declaration by an attorney at law setting out in detail the facts establishing that the applicant to the best of his knowledge and believed is the owner of the real estate which is the subject of the application and that there are no claims or objections to the ownership other than those set out in the declaration, the registry office shall, if satisfied that the person named in the application is entitled to have the real estate described therein registered in the name of the applicant, issue the blue deed accordingly, subject to rights and claims as acknowledged in the application.

### Indefeasible Title

Every person should accept that the rights disclosed by the blue deed are the only registered rights affecting the land or other real estate described and the person named as owner therein shall hold the land or other real estate free from all rights and encumbrances, except the rights and encumbrances noted in the blue deed.

### Notice

Every document from the time of its registration shall be notice to persons dealing with the land or other real estate thereafter<sup>30</sup> of the rights created in the document<sup>31</sup> and that the rights created in the document are binding as against all persons subsequently dealing with that land or other real estate.

### **REPD Directive to Improve Siguel El-Shaksi**

The following clauses are for incorporation in the proposed REPD Directive. Mr. Ali Abd Salam, Senior Property Registration Advisor – REPD Counsel will draft the final text in consultation with REPD.

#### Article 1: District Office to Process All Applications to Register

All applications to register should be completed by the district office in the district in which the real estate that is the subject of the application is situated.

This includes mortgage finance agreements under Mortgage Finance Law No. 148.

No review by the REPD Central Office shall be conducted.

The Central Registration office will make policy decisions to speed the processing of registrations and these shall be communicated to the district offices. The Central Office may review applications where there is a challenge to the registration.

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<sup>30</sup> Registration of right is not notice to the world of that right, as one too often hears, but is only notice to those dealing with the real estate subsequent to the registration of the right.

<sup>31</sup> The phrase “created in the document” precludes notice of rights merely mentioned in the document., which may or may not still be valid.

## Article 2: Notice of Adverse Claim

Any person claiming any right in registered real estate adverse to a registered right may file with the registrar a written statement verified by affidavit of the claimant setting forth fully the alleged right and how or from whom it was acquired, and designating an address to which all notices may be served upon the adverse claimant. The registrar shall note the claim by memorandum on the proper certificate of title.

Upon the petition of any party in interest to a court of competent jurisdiction the court shall grant a timely hearing upon the validity of such adverse claim and enter such decision and decree as justice may require.

If the adverse claim is adjudged to be invalid, the registration thereof shall be cancelled by order of the court. A certified copy of the order shall be registered by the registrar and the memorandum of the adverse claim, together with the order of court shall be discharged from the certificate of title in the same manner as a termination of mortgage. If the claim shall be found to be valid it shall be noted in the decree of court and the decree shall be registered with the registrar showing the validity of the right. If the decree calls for transfer of an ownership right the title report shall be updated accordingly.

## Article 3: Simplification of Notarization

Notarization of the sale agreement should be completed prior to the submission of the application and this sale contract shall be the basis for the issuance of the title deed.

There is no necessity for a second finalization of a sales contract by a notary.

## Article 4: Time within Which to Complete Registration

An initial review of the application to register must be made within 7 days of the submission to the RO for registration and at the same time that the request to the EDO is made to investigate the premises.

Where there is no change in the spatial configuration of the real estate no review by ESA is required.

A complete analysis of the application should be conducted during this 7 day period and all deficiencies must be communicated to the applicant for correction if necessary.

The actual determination of legal ownership and any encumbrances shall be completed within 3 months.

Minor inconsequential matters that will not have substantive bearing on the registration shall, with the approval of the director, not impede the progress of the registration.

## Article 5: Administrative Processing of Parcels Already Registered

All registration applications where a blue deed has already been issued and there is no change in the configuration of the property should be processed administratively without the need for legal review, where the sales contract lists as seller the person named as

owner in the existing blue deed. The sales contract will need to be properly executed and notarized.

#### Article 6: Simplified Documentation

The application to register, to which is attached a validly notarized sales contract along with a certification by the owner and his attorney that they are the owner in form found in the standard mortgage finance agreement, shall be sufficient evidence of the title to enter a title certificate in the name of the purchaser under the sales contract.

#### Article 7: Power of Attorney

A power of attorney shall be accepted for registration purposes if validly executed and notarized in any jurisdiction and shall survive the death of the principle for registration purposes.

#### Article 8: Fees

Only one fee pursuant to Law No. 83 (2006) shall be charged per application to register regardless how many owners result from the registration.

#### Article 9: Scope of Review of Applications

The scope of review of applications to register and applications for the registration of notations shall be limited to the objectives set out in Law No. 114 (1946) as amended (*Siguel El-Shaksi*), namely registration, and shall not encompass the enforcing of compliance with other land and building codes, regulations and administrative procedures.

## **Annex B: REPD Directive for Registering Mortgage Finance Agreements**

This Directive clarifies the procedure for registering right pursuant to Mortgage Finance Agreements pursuant to the Mortgage Finance Law No. 148/2001

### Article 1: Parties and Fees

The parties to a mortgage finance agreement are the seller, the purchaser/investor and the lender/financier.

The fees to be charged for the registration of the mortgage finance agreement are in accordance with Law No. 83/2006.

No fees shall be due for the procedures related to registering the real estate collateral of the official mortgage or lien.

### Article 2: Transfer of Ownership

The transfer of the ownership to the purchaser, which is part of the mortgage finance transaction, shall be processed according to existing general instructions.

### Article 3: Lien to Seller for Installments

The mortgage finance agreement contains a reservation of a lien to the seller to secure installment payments. A notation of the lien securing the installments shall be entered in the margin of the blue deed listing

- the date of the authentication of the mortgage finance agreement, which is also the date of the reservation of the lien to the seller,
- the amount of the lien, and
- the name and data of the seller as the beneficiary of the lien,
- Termination date, if any.

### Article 4: Assignment of Payment Rights and Lien

A separate assignment of the seller's rights may accompany the application to register the real estate that is the subject of the mortgage finance agreement. This assignment must be duly executed and authenticated according to law by the seller/beneficiary named in the notation in Article 3.

A second notation must be entered in the name of the assignee in the document. This notation should contain

- A statement that the seller has assigned all right rights to the assignee and has no further rights in the property or lien,
- The name and data regarding the assignee

#### Article 5: Transfer of the Owner/investor's Rights

The owner of real estate registered pursuant to a mortgage finance agreement may only dispose of all or a part of those rights with approval of the beneficiary of the lien.

If the real estate remains subject to a notation as to lien rights any transfer of all or part of those rights must be accompanied by the approval of the beneficiary of the noted lien.

This approval must be executed and authenticated by the beneficiary of the lien in the transfer document or by separate document submitted with the application or the application cannot be processed.

#### Article 6: Termination of Lien by Document

A termination of lien must be executed and authenticated by the party listed in the notation as beneficiary of the lien.

The termination must identify the lien that is being terminated by reference to the date established, the original amount of lien, and the original beneficiary.

If there is a notation that the lien has been assigned, the termination must identify the date of the assignment, the name of the assignor and the name of the assignee.

Only the assignee may execute a termination of lien where the lien has been assigned.

#### Article 7: Termination by Time

A lien may state an automatic termination date, in which case the registration office may assume that the lien has terminated on the termination date, unless an extension of time has been submitted to the registration office and appears as a notation on the blue deed.

#### Article 7: Clearing Title

If a lien has terminated either by document or by expiration of time, at the request of the owner or other party in interest, the registration office may issue a new blue deed to the appropriate party free and clear of all notations relating to the terminated lien.