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# ASSESSMENT OF THE LEGAL AND REGULATORY FRAMEWORK PERTAINING TO COMMON LAND AND FACILITIES

**April 28, 2006**

**This publication was produced for review by the United States Agency for International Development. It was prepared by the Residential Heating Project's team.**

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## **DISCLAIMER**

The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.

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## INTRODUCTION

This report documents the review, assessment and recommendations for improvement of the legal and regulatory framework pertaining to property rights in common land and the improvements (facilities) used for residential heat supply systems in Armenia<sup>1</sup>. The focus is on servitudes, including how they are established, the scope and limitations for their use, cadastre registration matters, special problems with internal networks and other issues. Servitude is considered an appropriate legal mechanism to secure the right towards construction and exploitation of external pipelines that are extended through land parcels owned by other parties.

Our preliminary investigations, direct interviews, and discussions showed that stakeholders consider as major legal obstacle related to the use and control over the land and facilities of boiler houses those issues that arise during the lease of the land and facilities of boiler houses from communities by private entities. Therefore, the legal framework pertaining to leasing and ownership transfer in boiler houses and boiler equipment from communities to private entities is also examined.

Overall, the report can serve as useful reference source for either those involved in heat supply activities (ESCOs, design institutions, multi-apartment management bodies, etc.) or those involved in designing and implementing state policy for development of the heat supply sector in Armenia (state and local self-governance bodies, international organizations, NGOs, think tanks, etc.).

## BACKGROUND

Servitude (also known as an easement in the common law) is the establishment of a legal right to use someone else's land for a particular, specific and limited purpose. An easement is a useful alternative property right when underlying ownership in land is neither required nor desired by the easement holder. For example, a utility company may acquire an easement to run its electric cables, gas pipelines or water pipes on or under private or public property in order to provide utility services to its customers. Someone other than the utility company is the legal owner of the property burdened by the easement, but the utility company has the legal right to use a portion (described in the easement) of the property for its cables, pipes, etc.

The use of servitudes in the Armenia heat energy sector will be important for restoring heat supply to residential end users. The envisioned scenario involves a private heat supply/developer company engaged in district heating or another form of centralized heating operation for the benefit of numerous residential apartments (or condominiums) in one or more buildings. For example, the heat supply company may desire to take control and make use of an existing local boiler house, the external network of piping that connects the boiler house to one or more buildings and the internal piping networks within the buildings. In this scenario, the heat supply company will obtain rights of possession, use and dispose of certain common land and facilities that were previously used for residential heat supply. The heat supply company will invest capital to rehabilitate the boiler house, install new equipment and rehabilitate the external network. In some cases, the heat supply company may install a new external network. In these

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<sup>1</sup> This review and assessment was conducted based on unofficial translations of applicable RoA laws. The results of the review and any conclusions and recommendations must be qualified in terms of consulting official versions of the legal and regulatory framework.

situations, the heat supply company will also be interested in securing any easements necessary to establish certain and definite legal rights for access, possession and use over the underlying property and the existing heat related improvements and infrastructure. Complete ownership of the underlying property is either not practical or may be restricted.

## **SERVITUDE (THE LEGAL FRAMEWORK)**

The legal framework for servitude principles in Armenia is recently developed and embodied primarily in the Civil Code (1998) and new Land Code (2001). To a lesser extent, other Republic of Armenia (“RoA”) legislation also complements the framework. The Civil Code is quite extensive and provides the legal foundation for most private sector activity in Armenia. It governs many commercial issues and transactions, including property rights. The provisions of the Civil Code that regulate land relations are enforced with consideration of existing provisions of the Land Code<sup>2</sup>. The norms of civil law contained in other statutes must also correspond to the Civil Code<sup>3</sup>. The Civil Code explicitly covers property rights and the legal framework is of specific importance in light of the perceived increased role for private party participation in the heat energy sector.

The Civil Code defines and prescribes a variety of property rights. These property rights include ownership, servitudes, leases, liens, mortgages, loans, rent and financial liabilities. The Code also sets forth the legal procedures for establishing and transferring the property rights. The Civil Code and Land Code have complementary provisions with respect to the servitude legal framework. The Civil Code at Chapter 13 (Right of Ownership and Other Property Rights in Land) and the Land Code at Chapter 13 (The property rights for land parcels of legal and physical persons) contain the core provisions for servitudes. The Civil Code, Article 170 also recognizes servitude as a separate property right that may belong to persons who are not owners of a property. This Article provides that any change in the underlying ownership of the property shall have no effect (e.g. termination) on the validity of the servitude.

The Land Code, Article 50 (Civil Code, Article 210) provides that servitudes may be established on a voluntary basis or through compulsory action by court decision. In the case of voluntary servitudes, the legal framework (Civil Code, Article 211) specifies that servitude must be documented by a written agreement between the party seeking the establishment of the servitude and the owner of a neighboring parcel. The period of effectiveness and the conditions of the servitude must be indicated and a map of the immovable property burdened by the servitude, with an indication of the location of the servitude, shall be attached to the contract.

In some situations a compulsory (involuntary) servitude will be warranted. These situations will arise when it's absolutely necessary (there are no other feasible alternatives) to cross someone's land for a legitimate purpose. The legal framework (Civil Code, Articles 210, 212; Land Code, Article 50) provides that compulsory servitudes may be established only in certain situations, and these situations include the cases for installation and exploitation of pipelines and other needs of the owner of the immovable property that cannot otherwise be ensured without the establishment of the servitude. Recent amendments to the Civil Code (Article 212.3(1)) clarify that free,

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<sup>2</sup> Article 1.4 of the Land Code

<sup>3</sup> Article 1.1 of the Civil Code and Article 9.6 of the Law on Legal Acts

compulsory and permanent servitudes may be established on any land parcel for the infrastructure which serves the public need, including electricity, gas, water and heat supply systems.

The following are specific provisions of the servitude legal framework that pertain to servitude creation, documentation, compensation, registration, longevity, termination, conditions for granting compulsory servitudes and the use of servitudes with respect to buildings and other structures. Order N 205-N of the State Committee of Real Estate Cadastre of January 12, 2003 specifies the state registration procedures for free, compulsory and permanent servitudes.

- Servitude can be established on any land parcel, irrespective of the ownership rights and can be established on either a temporary or permanent basis<sup>4</sup>.
- Servitude can also be established with respect to buildings, structures and other immovable property<sup>5</sup>. This is particularly important with respect to external and internal heat networks.
- A voluntary servitude will be established based on a written agreement between the party seeking the establishment of the servitude and the owner of a neighboring parcel. The servitude contract must indicate the period of effectiveness, the conditions of the servitude and include a map of the immovable property burdened by the servitude. The servitude must be certified by notarial procedure<sup>6</sup>.
- The owner of a parcel burdened with servitude has the right to demand payment for the use of the parcel from the person in whose interest the servitude was established<sup>7</sup>. However, as previously mentioned, a free servitude may be established on any land parcel for the infrastructure which serves the public need, including electricity, gas, water and heat supply systems.
- Servitude should minimally burden the land parcel<sup>8</sup>.
- A compulsory servitude shall be established by the court, on suit by a person demanding establishment of the servitude, for cases of failure to achieve agreement on the establishment or conditions of a voluntary servitude<sup>9</sup>.
- The owner of a land parcel may terminate a servitude if the underlying basis for the servitude lapses<sup>10</sup>.

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4 Article 50.4 of the Land Code

5 Article 217 of the Civil Code

6 Article 211 of the Civil Code

7 Article 214 of the Civil Code

8 Article 50.5 of the Land Code

9 Article 212.1 of the Civil Code

10 Article 216.1 of the Civil Code and Article 50.7 of the Land Code

- The owner of land parcel has the right to demand termination of the servitude in court in cases when a land parcel belonging to a citizen or legal person, as a result of a burden by a servitude, may not be used in accordance with the purpose of the parcel<sup>11</sup>.
- The right of servitude is subject to State registration by State Committee of the Real Estate Cadastre adjunct to the Government of Armenia<sup>12</sup>, for which state duty equal to 1000 Armenian Drams must be paid<sup>13</sup>.
- In situations of failure to establish servitudes based on court rulings, contractual obligations, laws or other legal acts, a party can be penalized the sum equal to 50 times the legally established minimum monthly salary<sup>14</sup>.

The Energy Law (2001) also contributes to the servitude legal framework. Article 7.2 provides that a compulsory and free-of-charge servitude shall be established for state-owned lands used for the safety zones and structures of existing energy facilities (generating plants, cables and overhead lines, substations, gas regulation joints, gas and thermal energy pipelines, etc.) for the benefit of Energy Licensees. The Energy Law specifies that Energy Licensees are legal entities holding a License issued pursuant to the Energy Law. Typically, an Energy License is required for certain specified activities, including thermal energy generation, transmission and distribution by boiler houses with installed capacity exceeding 5.8 MW.

The Land Code and Civil Code also specify a legal framework for other forms of property rights for persons who are not property owners, in essence alternatives to servitudes. These property rights may be in the form of use rights, including the uncompensated use and lease rights (Civil Code, Articles 205, 206; Land Code, Articles 46, 47, 48) but the examination of the framework shows that for the heat supply sector and from the perspective of a heat supplier, establishing servitude rights for external networks and land are superior and desirable to other forms of property rights.

An essential condition<sup>15</sup> for the validity of a contract is the object of the contract, which must be propriety to the parties. In Armenia there is a problem with unauthorized buildings.<sup>16</sup> Article 188 of the Civil Code says that a person who constructs an

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11 Article 216.2 of the Civil Code and Article 50.7 of the Land Code

12 Article 135 and 213 of the Civil Code, Article 53 of Land Code and Article 11 of the Law on State Registration of Property Rights

13 Article 16 of the Law on State Duties

14 Article 54.1 of the Administrative Violations Code

15 Article 448 of the Civil Code

16 Article 188 of the Civil Code says that an unauthorized building is a dwelling house, other structure, construction, or other immovable property made on a land parcel not allocated for this purpose by the procedure established by a statute and other legal acts or created without receipt of the necessary permissions thereto or with substantial violation of city planning and construction norms and rules. A person who constructs an unauthorized building does not obtain the right of ownership to it. He/she does not have the right to dispose of the building, to sell, give, lease out, or make other transactions.

unauthorized building does not obtain the right of ownership to it. So if someone wants to install pipelines through unauthorized buildings for the operation of boiler houses she/he can't make a written agreement (Voluntary Servitude) with a person who has made an unauthorized building because she/ he hasn't ownership of that construction. The legal framework needs further improvement to address satisfactory resolution for these situations.

## **SERVITUDE AND INTERNAL NETWORKS**

A heat supply company will face similar issues for gaining rights of access, use and disposal over internal networks as it will experience for boiler houses and external networks. Rights of access to internal networks are important in order to perform installations and disconnections and to make repairs and maintenance. However, as a practical manner it is not feasible to secure servitude rights over internal networks. One factor for this position is that the legal framework is presently undergoing new development to address uncertainty with identifying the legal owner(s) for internal networks.

Servitude can only be obtained from the legal owner of the subject property. Although the Condominium Law and the Law on Management of Multi-apartment Buildings partially addresses issues of ownership and control in common property, the process for identifying and dealing with the multiple legal representatives (eg: condominium associations, multi-apartment building owners) can be lacking. For example, the Law on Management of Multi-apartment Buildings addresses rights and responsibilities for access and maintenance and repair of heat supply pipes<sup>17</sup>.

Article 224.1 of Civil Code says that to the owners of apartments in a multi-apartment building belong, by right of common shared ownership the mechanical, electrical, technical and sanitary, and other equipment outside or within the apartment that serve more than one apartment. The same wording is used in Article 6 of the Law on Management of Multi-apartment Buildings. Some local experts tend to interpret the word "equipment" as one which includes also internal piping, while other do not share this view.

A reasonable alternative for heat supply companies is to secure access and use rights over internal networks through legal contracts principles. Heat suppliers can enter into heat supply contracts with either individual apartment owners or applicable condominium associations and these contracts can also provide for the establishment of legal use and control rights for internal networks.

## **SERVITUDE AND STATE REGISTRATION (CADASTRE)**

The Civil Code, Articles 135 and 213 specify that servitudes, both voluntary and compulsory, are also subject to State registration (Cadastre) requirements. The legal framework for the Armenia cadastre system is found in Article 33 of the Land Code and the Law on State Registration of Property Rights. The scope of this report does not allow for a comprehensive review of the Cadastre legal framework. However, it is important to note the following features of the Cadastre system to the extent that it impacts property rights (servitudes) related to heat sector activities.

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<sup>17</sup> Articles 7 and 10 of the Law on Management of Multi-apartment Buildings.

The RoA Cadastre system provides that many forms of real estate property rights must be registered in accordance with cadastre registration procedures in order for the property rights to be preserved and effective against claims by third parties. The Armenia legal cadastre system is a database regarding ownership and use rights of the registered owners and users of certain land plots and other types of real estate. It also contains information regarding restrictions, including servitude<sup>18</sup>. The legal framework provides that State registration is required for ownership and other property rights in land. The State registration of ownership and other property rights in land, including any changes and termination is also subject to regulation by the Law on State Registration of Property Rights<sup>19</sup>.

The main objectives for the Law on State Registration of Property Rights include a provision for State recognition, guarantee and protection of property rights<sup>20</sup>. The requirement for State registration is implemented through a system of state unified cadastre of real estate, which consists of a national public administration body authorized by the RA Government and its territorial subdivisions<sup>21</sup>. In fact, if a servitude or other property right is not registered within the required timeframe, the transaction establishing the servitude or other property right is deemed to be invalid<sup>22</sup>. These servitude registration requirements are consistent with other parts of the servitude legal framework. The registration requirements specify that servitude shall be in the form of a written contract or court decision and include the nature of servitude, the time limit of operation, the size of any payment, every condition or restriction with regard to the servitude, and information on the person granting the right of servitude and the servitude user<sup>23</sup>.

The Armenia cadastre legal framework provides special status for public utility servitudes. It provides that any unregistered servitudes for public utilities, service and protection of main lines and communications and rights-of-way (electrical and radio communication, water lines, canals, railway, highways, etc.) that were in existence prior to the effectiveness of the Law on State Registration of Property Rights are nonetheless valid and effective<sup>24</sup>. This last provision is important to the heat sector because it establishes legal validity for preexisting public utility burdens on property and could facilitate easier transfer of servitude rights to interested parties.

Even though the legal framework for the establishment and registration of servitude rights is in place, meetings with the representatives of heat supply companies showed that the level of awareness of the latest group on importance of registration of servitude rights is very weak. The establishment of servitude relations and the registration of servitude rights are not considered by the majority of heat supply companies as an important mechanism to secure their right to use other parties' lands and to secure property rights over external pipelines.

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19 Article 33 of the Land Code and Article 11 of the Law on State Registration of Property Rights

20 Article 135 of the Civil Code and Article 11 of the Law on State Registration of Property Rights.

21 Article 4 of the Law on State Registration of Property Rights.

22 Article 5 of the Law on State Registration of Property Rights.

23 Article 23 of the Law on State Registration of Property Rights.

24 Article 37 of the Law on State Registration of Property Rights.

25 Article 41 of the Law on State Registration of Property Rights.

## **LEGAL FRAMEWORK CONCLUSIONS**

The legal framework for servitude is described in the Civil Code, Land Code, Law on State Registration of Property Rights and to a lesser extent, the Energy Law. These laws are fairly recent and well developed. The servitude legal framework described in this legislation is considered adequate, except as noted below, in terms of facilitating a program for improved heating sector management and delivery of heat supply in Armenia. The legal framework (as distinguished from the regulatory framework) is basically sound in terms of allowing servitudes to be established, either on a voluntary or compulsory basis, to the extent that they are needed by a heat supply company to develop and operate its business.

Two recommendations are made for clarifying the legal framework. The legal framework should be clarified with respect to establishing ownership rights over internal heat networks. There is some uncertainty with the interpretation of the current applicable law.

The legal framework should also be clarified for situations involving the establishment of servitudes on property with unauthorized or illegal improvements.

## **SERVITUDE (THE REGULATORY FRAMEWORK)**

Regulatory frameworks are used to provide specific guidelines for implementing or otherwise administering the subject of a related legal framework. A regulatory framework is mandated when the legal framework purposely provides for the delegation of authority for implementing general legal principals. A regulatory framework is also appropriate in situations when the legal framework is lacking in specific detail.

With one exception, the treatment of servitude in Armenia is sufficiently addressed in the legal framework so that a complementary regulatory framework is not warranted at this time. The exception is for cases involving the establishment of compulsory servitudes. For these situations, the legal framework provides that a compulsory servitude shall be established by the court, on a suit by a person demanding establishment of the servitude, in the case of failure to achieve agreement on the establishment or conditions of voluntary servitude<sup>25</sup>. The legislation does not specify which criteria should serve as basis for the court's decision on establishment of compulsory servitude.

The Residential Heating Project suggests creating a framework which would provide guidance for the need of compulsory servitudes and the scope and conditions associated with their creation in the heat sector. The initial threshold question is determination of need, including alternatives for addressing the need, for the proposed facilities. After an adequate demonstration of need by the proponent, the next question addresses the site selection process and consideration of cost, environmental and reliability factors. Given these parameters, the best use of the land should be taken into consideration as well as the interests of other potential stakeholders.

## **REGULATORY FRAMEWORK CONCLUSIONS**

The legal framework for servitude is sufficiently developed. One exception is for cases involving the establishment of compulsory servitudes. Development of guidance and criteria for the need for compulsory servitudes and the scope and conditions associated

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<sup>25</sup> Article 212 of the Civil Code and Article 50 of the Land Code.

with their creation in the heat sector can serve to address situations when parties cannot otherwise agree to the servitude essential terms and conditions.

## **BOILER HOUSES/EQUIPMENT-LEASING AND OWNERSHIP TRANSFER RIGHTS**

The development of the heat supply sector may also involve issues related to leasing and transfer of ownership rights in boiler houses and boiler equipment from communities to private entities. Some stakeholders have expressed concerns that the legal framework may not facilitate, even hinder, the acquisition of adequate possession, use and disposal by private heat supply entities over this essential property. Fortunately, the legal framework for this subject is well developed; enunciated primarily in the Civil Code and clarified in the Land Code and other RoA legislation. Both the Civil Code and the Land Code allow community-owned land to be leased or the ownership to be transferred to private entities. However, two major conditions must be addressed before State or community-owned land or other property may be leased<sup>26</sup>. First, the object and purpose of the lease must be in accordance with applicable land use and main settlement plans<sup>27</sup>. Second, the award of a lease is subject to and must be in accordance with a tender process<sup>28</sup>. Other requirements for leases are similar to servitude requirements. For example, lease contracts must be in writing, are subject to notary ratification and must be registered with the State<sup>29</sup>. The Civil Code provides the legal framework for the minimum requirements for leases<sup>30</sup>. There are similar requirements for ownership changes in state and community owned boiler houses and boiler equipment<sup>31</sup>.

The legal framework pertaining to leases and ownership transfer between communities and private parties for boiler houses and boiler equipment is well developed and not seen as an unreasonable impediment for growth and development of the residential heat supply sector in Armenia. No specific changes are recommended for the legal framework.

The Government typically undertakes several steps to transfer the property of boiler houses to the ownership of the communities, as indicated in the following example. According to the Decree of the Government N 1112-N of August 21, 2003 the boiler houses of “Heating Company” State Closed Joint Stock Company were transferred to Yerevan Municipality ownership<sup>32</sup>. Further, Government Decree N 785-N of May 13, 2004 permits Yerevan Municipality to pass for lease to private companies the boiler houses. The lease of the boiler houses is possible only in cases that they will be used for heating purposes. Based on this Decree, the Yerevan Municipality signed several lease contracts with heat supply companies. However, the Residential Heating Project heard about complaints of heat supply companies, that practical implementation of the

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26 The following discussion pertains to both leasing and ownership changes in land. The legal framework is also applicable to improvements such as buildings (boiler houses) and other constructions (boiler equipment) through the provisions of the Land Code.

27 Articles 76 of the Land Code.

28 Articles 76-78 of the Land Code.

29 Articles 610 of the Civil Code.

30 Chapter 35, Section 1 (Articles 606-628) of the Civil Code.

31 Articles 61,63,66,67,68,69 of the Land Code.

32 All in all around 390 boiler houses were transferred to Yerevan Municipality

mentioned decree is facing major bureaucratic obstacles, because of which several heat supply companies were refused the right to lease boiler houses.

Based on provisions of the Land Code and the Law on Self-governance state owned land and the real estate property situated within the boundaries of the communities were passed from the state ownership to the ownership of the communities<sup>33</sup>. Based on this rule in all other major cities of Armenia (besides Yerevan) boiler houses and the land of boiler houses were transferred to the ownership of local communities. The law did not put any restriction on possession of boiler houses situated in major cities of different regions of Armenia. At present a number of boiler houses were transferred to the ownership of private entities and in the majority of the cases those boiler houses are not used for heating purposes.

The heat supply companies which lease boiler houses from Yerevan Municipality also expressed concerns about the provisions of lease contracts. Yerevan Municipality signed the lease contracts based on the same provisions for all heat supply companies, using their own Sample Form of Lease Contract of Boiler Houses. Thus, the representatives of the heat supply companies point that the short period of applicability of lease contract (10 years), non existence of guarantees to exceed the period of lease contract or to privatize the boiler house after the end of lease period, prohibitions for sub-lease of the boiler house or the land of boiler house, prohibitions for activities other than heat supply provisions all serve to increase investment risks of private companies.

Even though the legal framework is in place, the Residential Heating Project suggests undertaking activities, which will promote the enforcement of the Government Decree that stipulates transfer of boiler houses in Yerevan for lease by private companies. Also it is worth suggesting to work with Yerevan Municipality and to improve certain provisions of Sample Form of Lease Contract of Boiler Houses, which will mitigate to a certain extent the above mentioned concerns of heat supply companies.

## **CONCLUSIONS AND RECOMMENDATIONS**

The legal and regulatory framework pertaining to common land and facilities (boiler houses, boiler equipment, external networks and internal networks) in the Armenia heat supply sector is well developed. It is primarily described in the Civil Code, Land Code and to a lesser extent in other RoA legislation. The framework applicable to servitudes is sufficiently detailed that, with one exception, a corresponding regulatory framework is not warranted. Establishing use and control over internal networks is probably best accomplished through legal contracts rather than through servitude rights. The legal framework for leasing and transfer of ownership rights for boiler houses and boiler equipment from communities to private entities is also well developed and is considered adequate for the development of the residential heat supply sector.

Meanwhile, several recommendations are offered to enhance the legal framework for servitudes in the heat energy sector.

- Guidance and criteria for the need of compulsory servitudes and the scope and conditions associated with their creation in the heat sector should be developed. This can serve as legal basis for the courts in their decision-

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<sup>33</sup> Article 56 of the Land Code and Articles 47-49 of the Law on Self-governance

making on establishment of compulsory servitude, when parties cannot otherwise agree to the servitude essential terms and conditions.

- The legal framework should be clarified with respect to establishing ownership rights over internal heat networks. There is some uncertainty with the interpretation of the current applicable law.
- The legal framework should also be clarified for situations involving the establishment of servitudes on property with unauthorized or illegal improvements.

Overall investigations, direct interviews and discussions with stakeholders (heat supply companies, condominium associations and local self-governance bodies) showed that legal regulation of servitude issues can not be considered a primary legal obstacle, which hinders the development of heat energy sector<sup>34</sup>.

This document and stakeholder discussions indicate that the primary issues related to the use and control over the property of the land and facilities of boiler houses are those arising during the lease of the land and facilities of boiler houses from communities by private entities. Even though the investigation showed that the legal framework is in place, the suggestion is to undertake the following activities to enhance the existing situation with the transfer, by lease, of boiler houses from communities to private entities.

- The Government Decree pertaining to the transfer, by lease, to private companies for boiler houses in Yerevan should be enforced widely and without subjective limitations, ensuring that the land and boiler houses are used for heating purposes.
- Work with the Yerevan Municipality to improve the Sample Form of Lease Contract of Boiler Houses in order to mitigate to concerns of heat supply companies, and work with other municipalities to expand the use of this form.

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<sup>34</sup> In April 2006 Residential Heating Project team organized the series of round-tables with participation of main stakeholders to discuss and prioritize main legal issues which hamper the development of heat energy sector.