

DESCRIPTION OF PROCEDURES FOR PRODUCING LEGAL DEEDS TO RECORD PROPERTY TRANSACTIONS IN AFGHANISTAN¹

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In this paper, we attempt to describe the procedures being used for producing legal deeds for property transactions, and to assess the positive and negative aspects of those procedures. The objective of this study is to help design a program for upgrading of this system, in order to correct at least the major problems identified. The overall goal is to produce an improved system for the preparation, archiving and retrieving of legal documents pertaining to property rights which has very good accessibility for the poor and disadvantaged and which has a very high degree of integrity. By “very good accessibility,” we mean that the time and expenses needed to get information into and out of the system are low. By “very high degree of integrity” we mean that the evidence archived in the system concerning to who is the true owner of properties is legally and factually accurate.

The foundation of a deeds based property rights recording system similar to that used in Afghanistan is the archive containing the deeds which document transactions of one sort or another, such as property sales, mortgages, inheritances, gifts and in some cases long term leases. The act of depositing a legal deed in the Courts’ archive gives notice to the general public that a transaction has occurred, that some right to a property (such as ownership) has been transferred to another person. A contract to transfer rights, which is not in the form of a deed and is not recorded in the archive, does not have legal value equivalent to a recorded deed.

Equally important as the archive, are the means of access to the information in the archive. A potential buyer of a property has to have an easy way to find out from the archive who is the true owner of the property, who has the right to sell it. The deed of the seller must be accessible to the potential buyer. In most deeds systems, the potential buyer must also have access to prior deeds to verify that the “chain of title” passing from one owner to another is strong. The archive must also inform the potential buyer of the existence of other interests in the property which may limit the rights of the seller, such as a mortgage.

Archives of deeds based systems typically have indices that help find the deeds which the potential buyer needs to consult. The deeds themselves are stored in a secure environment, and are sorted in ways that facilitate finding the needed ones.

A third element of a properly functioning deeds based system are the mechanisms for assuring that fraudulent information or false documents do not get recorded in the archives. False

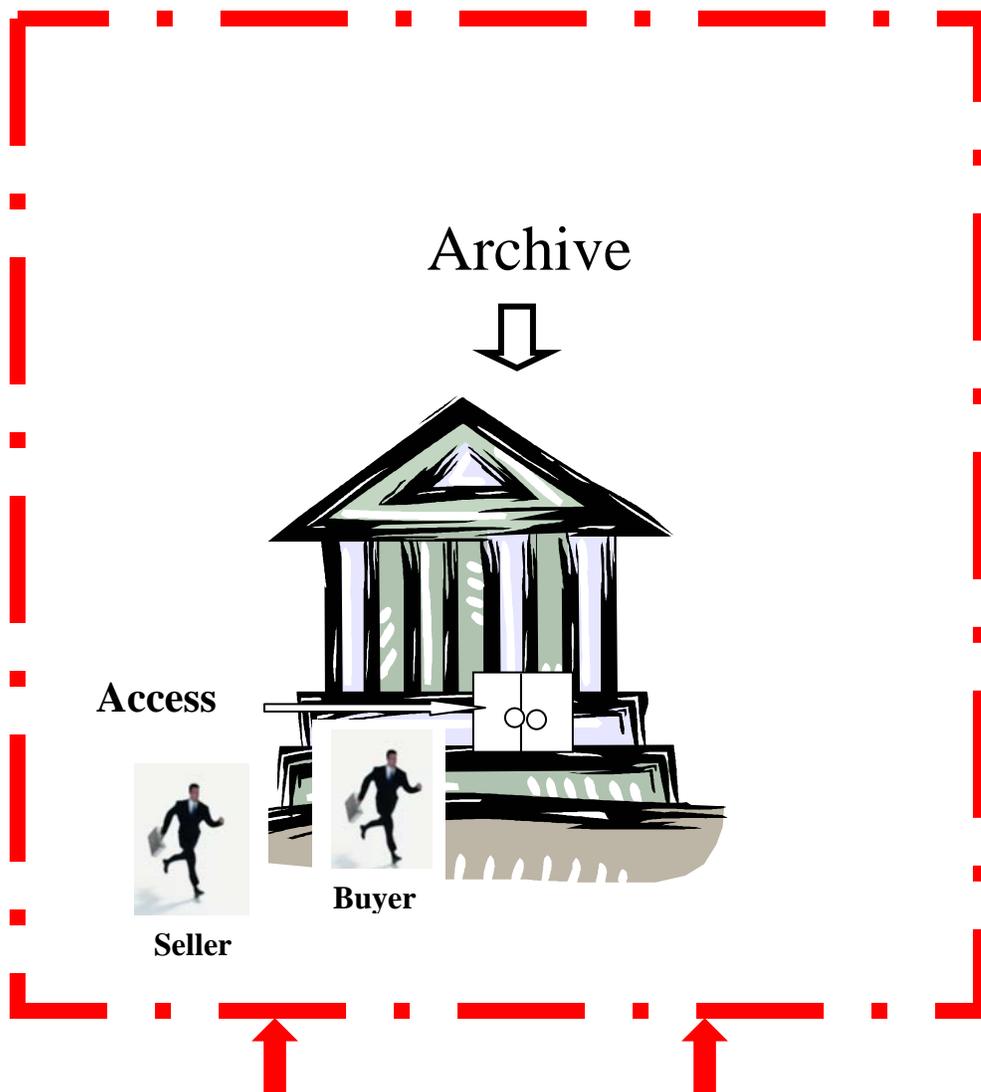
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information, which purports to be true, if scattered through out the archive can quickly destroy the public confidence in the truthfulness of all of the information contained in the archives. Controls over the preparation and storing of deeds by competent professionals are two such mechanisms.

The fourth element of a properly functioning deeds registry is how well the system determines the identity of the parties to transactions. The identity of the “grantor,” the owner who is selling the property, is essential to be sure that the person authorizing the transfer has that right. The identity of the “grantee,” the buyer of the property, is important to determine in order to give that specific person and no other the rights of ownership.

These elements can be visualized as in Figure 1.

FIGURE 1: PROPERTY RIGHTS DOCUMENTATION IN AFGHANISTAN



1. CURRENT PROCESS FOR SALE OF PRIVATE PROPERTY²

This section describes the major steps in the application process for producing a legal deed to document the sale of private land property in Afghanistan. Before describing this process, we provide background on the Government of Afghanistan's administrative units and jurisdictions over land, describe the role of Primary Courts in the deed preparation process and describe some of our observations about the current deed preparation system in Afghanistan.

1.1 BACKGROUND

ADMINISTRATIVE UNITS AND JURISDICTION OVER LAND

LAND ADMINISTRATIVE UNITS IN AFGHANISTAN

Urban land administrative units

Gozar: the smallest urban land administrative unit; a gozar contains a minimum of 500 families; smallest unit of land for administrative purposes ; *gozars* are neighborhoods (UN-Habitat's *Preliminary Study of Land Tenure Related to Issues in Urban Afghanistan with Special Reference to Kabul City*, Nouchine d'Hellencourt et al., p. 9)

Municipal district (*nahiya*): An urban land administrative unit comprised of 7-45 gozars. A municipality is divided into municipal districts called *nahiya* in Dari. Kabul City has recently created several new districts to bring its total number of districts to 22.

Municipality (*shahr dari* in Dari and *sharwali* in Pashto): The urban land administrative unit that comprises the provincial center of each province. A municipality lies inside of a provincial district; provincial municipalities (*sharwali welayat*)--each province, in principle, contains one such municipality (*A Guide to the Government of Afghanistan*, Anne Evans, et al. Afghanistan Research and Evaluation Unit, 2004, p. 8)

Rural land administrative units

Village (*qarya*): The smallest rural land administrative unit ; There are approximately 35,500 villages in Afghanistan (UN-Habitat's *Preliminary Study of Land Tenure Related to Issues in Urban Afghanistan with Special Reference to Kabul City*, Nouchine d'Hellencourt et al., p. 7)

Provincial district (*woluswali*): The major rural land administrative unit. Several provincial districts comprise a province, excluding the provincial center (municipality). Some individuals refer to a provincial district as a sub-province; there are 345 *woluswali* in Afghanistan (UN-Habitat's *Preliminary Study of Land Tenure Related to Issues in Urban Afghanistan with Special Reference to Kabul City*, Nouchine d'Hellencourt et al., p. 7)

Urban and rural land administrative units

² NOTE: DESCRIPTIONS OF PROCEDURES FOR IN SECTION 1.2 ARE IN RELATIVE SUMMARY FORM. ACTUAL PROCEDURES VARY IN DIFFERENT JURISDICTIONS. ANNEX 1 SHOWS A MORE DETAILED DESCRIPTION OF THE STEPS PEOPLE HAVE TO FOLLOW TO COMPLETE THE SALE OF A HOUSE IN KABUL.

Province (*welayat*): Largest land administrative unit in Afghanistan. Each province is comprised of provincial districts and one or more municipalities. There are 34 provinces in Afghanistan.

LAND MEASUREMENT UNITS

Jerib: 2,000 square meters (5 jeribs = 1 hectare and 2 jeribs = 1 acre)
Beswar: 100 square meters
Beswasa: 5 square meters

DISTINCTION BETWEEN MUNICIPAL DISTRICTS (*NAHIYA*) AND PROVINCIAL DISTRICTS (*WOLUSWALI*)

Using the term “district” can lead to confusion because one may be referring to municipal or provincial districts, which are different types of administrative units. Municipal districts, unlike provincial districts, have some limited autonomy in budget execution and in budget preparation. Municipalities obtain some of their operational budgets from revenues that they collect.

AGRICULTURAL VS. MUNICIPAL LAND

PROPERTY OFFICES: AGRICULTURAL PROPERTY OFFICE (*IMLAK*) AND MUNICIPAL PROPERTY OFFICES (*MELKIAT-HA*—plural form)

AGRICULTURAL LAND AND *IMLAKS*: Land that the government classifies as agricultural land is under the administrative jurisdiction of the Ministry of Agriculture. This land includes agricultural, grazing, forested, irrigated, non-irrigated and settled land in rural areas, as well as agriculturally classified land in municipalities.

An agricultural property office, called an “*Imlak*,” is located in each provincial district (*woluswali*). *Imlak* offices have maps of the area under their jurisdiction. Some *Imlaks* have maps from the cadastral survey done several decades ago. *Imlaks* also have other maps and sketches. Some of these maps are at the parcel level. An important function of *Imlaks* is their maintenance of books containing lists of land parcels and their owners.

MUNICIPAL LAND AND *MELKIAT-HA*: Land that the government classifies as municipal land is under the administrative jurisdiction of a municipality. A municipal property office, called a “*Melkiat*” (singular form), is located in each municipal district (*nahiya*). Municipal districts *Melkiat-ha* are under the administrative jurisdiction of the *Nahiya* Presidents in the larger cities, but can also be under the direct administration of the Municipal Mayor. Like *Imlaks*, *Melkiat-ha* have maps, some parcel sketches, and information on ownership of urban land parcels usually with buildings on them.

MINISTERIAL LAND: Many ministries other than the Ministry of Agriculture have jurisdiction over areas of land. Each of these ministries has its own *Imlak* or property office where information about land administered by a Ministry is stored.

CONFUSION REGARDING THE TERM “*IMLAK*”: The word “*Imlak*” has two meanings, which can cause confusion. Strictly translated, an “*Imlak*” is a property office (“*Imlak*” means property in Dari). It can refer to any property office, whether agricultural or municipal, or specifically to an

agricultural property office. It would be less confusing if people used the term “property office” when conversing in English to refer to both *Imlaks* and *Melkiat-ha* and use the terms *Imlak* and *Melkiat* when specifically referring to a agricultural or municipal property offices.

AGRICULTURAL LAND WITHIN MUNICIPAL DISTRICTS

The classification of land as “agricultural” within the municipal limits of Kabul can be confusing. The population of Kabul in the 1950s was around 250,000, according to Professor Brishna, an Afghan architect. The current population of Kabul is estimated at around 3-3.5 million, which is the latest estimate from the Mayor of Kabul . Much of the land now within Kabul City boundaries was farmland and still may still be classified by the government as agricultural land within municipal limits. In these cases people engaging in transactions involving such land would register changes in ownership with the Imlak office.

Many of Kabul City’s municipal Nahiya are mosaics of land classified as agricultural and municipal (or non-agricultural).

ROLE OF PRIMARY COURTS IN DEED PREPARATION PROCESS

PRIMARY AND APPEALS COURTS

There is a Primary Court in most municipal and provincial district. There is an Appeals Court in each Provincial capital city. Each Appeals Court has a *Makhzan*, which is a storage area usually within the same building as the Appeals Court, for the long-term storage for all legal documents prepared by the courts within a Province.

LEGAL RECORDING OF A PROPERTY SALES AND THE PREPARATION OF NEW DEEDS BEGIN AND END IN A PRIMARY COURT

The first step in preparing a new deed is an application by the seller, presented to the Judge of the Primary Court which has jurisdiction over the lands wherein the property is located. The seller applies to the Court for evidence confirming that he (she or they) is the legal owner of the property to be sold. Typically this confirmation involves getting a copy of the deed whereby the seller acquired the property, or a certification from the Judge heading the Makhzan that the deed exists and that the seller has the rights to sell the property. The seller’s deed should show the geographic location of the property, which the buyer should confirm through visits to the Imlak or Melkiat office. The buyer is traditionally responsible for paying a tax amounting to 1% of the value of the property to the District Internal Revenue Dept, and another transfer tax, which is 5% or 6% of the value of the property, deposited to the account of the Primary Court. The value of the property is determined by a commission with variable composition, depending on the type of property. Once these procedures are completed in the District where the property is located, confirmed by a receipt for the payment of the tax to the account of the Primary Court, the seller and buyer return to the Judge of the Primary Court. If the Judge of the Primary Court is satisfied that the applicant has completed all the steps in the process of completing a property sale, and has paid all the necessary taxes and fees, then the judge orders his clerk to prepare two copies of a deed of sale, transferring ownership from the seller to the buyer. The court gives one copy of the deed to the buyer and retains the court’s copy of the deed in a *konda* (defined as “a book for official records”) in the primary court. When a *konda* contains 100 completed legal documents, as well as other forms in addition to the deeds themselves stapled to the deeds, the Judge sends

the Konda to the *makhzan* (separate archive space or rooms storage of for legal documents) for storage.

JOURNALS IN PRIMARY COURTS

A journal, maintained by the Court Clerk, is a daily log of legal documents prepared by a primary court. While the form of the Journal differs across courts, some information is recorded about each document prepared by a Court.

The journal is a bound ledger with paper pages. Each row of a page of the journal is an extract of the contents of the recorded document, including the names of the grantor and grantee of a legal proceeding, the type of document, the date of the document, the sequential number of the document (in numerical order from Day 1 of Month 1 of the year), and special number of the document (the sequential number within the type of document set). A photograph of a page of the journal from the current year of Kabul's District 2 Primary Court is shown below.



Figure 2 A page of the journal from District Court 2 of Kabul City

A translation of the column headings is shown below. The order of the headings is from right to left.

Daily Journal from Primary Court No. 2												
Cost of Blank Form	Name of Grantee				Name of Grantor				Document No. and Date			
	Residence	Grandfather's Name	Father's Name	Name	Residence	Grandfather's Name	Father's Name	Name	Date of Document	Special Number: Number of Document	Type of Document	Serial Number: Number in order of receiving document

Figure 2: Translation of Court Journal Headings

COLUMN HEADINGS IN THE JOURNAL

SERIAL NUMBER: Sequential number of the all the legal documents prepared by the court for that year. The first document issued the first day of the year (March 21 in the Western calendar), is number 1. When we visited the court in late February, the last journal entry was for the 508th legal documents prepared by the court that on the 10th day of the 11th month of the year.

TYPE OF DOCUMENT: Identifies type of legal documents. There are approximately 28 types of legal documents issued by primary courts.

SPECIAL NUMBER: Sequential number of the specific type of legal documents prepared by the court for a given year. On one of the entries, we noted that the entry was “118” for a “Receipt of payment debt”, indicating that there have been 118 such documents prepared during the year. The last number of property deeds was 8, indicating that the primary court had only prepared eight deeds of sale that year.

GRANTOR INFORMATION: In the case of deed, the grantor is the seller.

GRANTEE INFORMATION: In the case of deed, the grantee is the buyer.

IDENTIFICATION OF PARTIES: The name of the grantor and grantee, the fathers’ names of each, as well as the grandfathers’ name and the residence of the grantor and grantee are noted. When there are more than one grantor or grantee, such as in instances of joint ownership of a property, only the first name listed in the deed is recorded in the Journal.

COST OF BLANK FORM: This is the official cost of these printed forms.

SIGNIFICANCE OF PRIMARY COURT JOURNALS

The existence of this journal in a primary court is significant. Some Primary Courts send the journals when they are completed for a calendar year to the Makhzan. Others send them directly to the Supreme Court for archiving. These Journals are important for the following functions:

1. To create approximate primary grantor and primary grantee indices. These journals list the name and residence of the first grantor and first grantee in any list of these two parties.
2. To create a unique document identifier for each document. It might be coded as: Primary Court-Code of document type-Date-Sequential number for that document type that year, plus general and specific number.
3. To authentic the documents in the archives. If these journal have not been tampered with (no forgeries), the listings in these journals could be used to verify the recorded buyer and seller for properties which subsequently change hand or which are involved in litigation. Even if the deeds stored in the makhzans were altered (forged), we doubt that anyone bothered to change the entries in these journals. This existence of these journal could prove to be a major contribution to the adjudication of multiple-claim deeds.
4. The fact that only eight property deeds have been prepared by one of the Courts we

visited during the past year as determined from the data of the Journals suggests that the legal deed preparation may have ground to a halt, likely due to exorbitant “facilitation fees”. If further investigation supports this finding, then it could be used to support the need to re-engineer the deeds administration systems and possibly remove its function from the Primary Courts.

OBSERVATIONS ABOUT THE DEEDS ADMINISTRATION SYSTEM

LEGAL PROPERTY DEED PREPARATION HAS EITHER SHARPLY DECLINED OR HAS GROUND TO HALT IN AFGHANISTAN

A preliminary examination of the number of legal property deeds prepared by District 2 Primary Court in Kabul indicates that only eight legal property sale deeds were prepared by the court in the previous 11 months. The property dealers interviewed indicated that they are mostly deal with rental properties, although their experience has been that many property sales are not registered with the courts. A statistical analysis of property deed books (*kondas*) indicates that the number of property deed *kondas* has fallen sharply in recent years. If further investigation indicates that the legal application of property deeds has drastically declined, one cause could be the actual lack of sales. A more likely explanation is the skyrocketing costs of special processing fees required by officials who work in the system which drives people away from the formal, court based system for producing legal property deeds.

“SPECIAL PROCESSING FEES” ARE SKYROCKETING AND DISTORTING THE DEEDS BASED RECORDING SYSTEM

Apparently, paying small or perhaps even nominal special processing fees has been “the cost of doing business” in Afghanistan for many decades. The real problem now is that since the overthrow of the Taliban, the scale of special processing fees has skyrocketed. We recently heard a story of a businessman who paid \$1,000 in special processing fees two years ago to start a business. In February 2005, he had to pay \$25,000 in special processing fees to start a comparable business. Although the size of this increase probably is unusual, the stories that we have heard clearly indicate that special processing fees and exploitation is now distorting the whole legal deeds preparation system in Afghanistan.

Afghan citizens who are not powerful individuals do not challenge the authority of government officials. Consequently, many officials now seem to be demanding exorbitant special processing fees. It appears that the amount of these fees exceed what many people are willing to pay to get a legal property sale deed. One person interviewed said: “Government officials are the real kings of the world. If [special processing fees] are constantly on the rise, who is going to complain?” Rather than complain, many people may simply be arranging private contracts of sale, which are not recorded in the Primary Courts.

CONVERSION OF STATE-OWNED LAND TO PRIVATE OWNERSHIP

In several interviews, people indicated that since the fall of the Taliban, approximately 50% of the state-owned land has been “grabbed” by warlords and other powerful people. Some of this “conversion” has occurred through presidential order (*Hokum*) and some has occurred when powerful people “persuade” property office officials to re-classify state-owned land into their

private ownership.

Powerful people can request the government officials to make an order to an *Imlak* to convert state-owned land into private ownership. The order describes the purpose of this ownership conversion, location and size of the property, and whether the conversion is a purchase or a lease. The Imlak asks a cadastre team to subdivide the state-owned land according to the order and make a sketch of the newly created property. In an official letter, officials at an Imlak certify the new owner or leaser has purchased or leased the property described in the letter. If the person purchased this property, he takes this official letter to a primary court to obtain a legal deed.

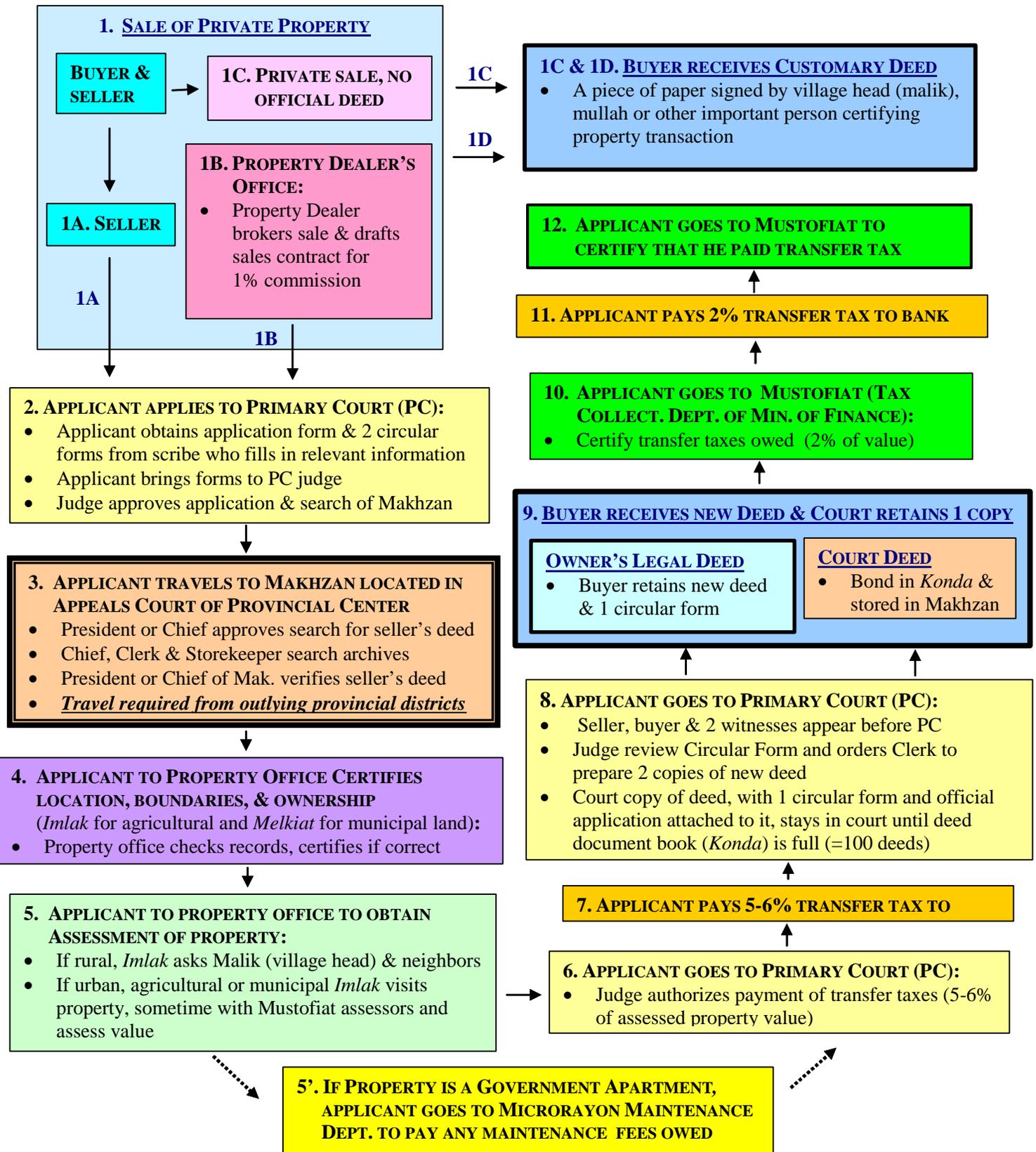
1.2 CURRENT PROCESS FOR PRIVATE PROPERTY SALES

STEP 1. SALE OF PRIVATE PROPERTY

The designations 1A, 1B, 1C and 1D listed in the subtitles below refer to steps in the flowchart of this process.

1A. BUYER AND SELLER NEGOTIATE SALE AND SELLER APPLIES FOR CERTIFICATION OF HIS OWNERSHIP AND NOTIFIES THE JUDGE OF AN INTENT TO SELL: Buyer and seller may enter into a private contract to transfer ownership of a property for an agreed upon price. If the seller of a property possesses a legal property deed, then the seller of that property applies to the primary court in his district for the preparation of a property sale deed (*qabalee qatae*).

FLOWCHART: DEED PREPARATION PROCESS-PROPERTY SALE V1.6



Property dealer may facilitate sales of property: In Kabul, and we assume other urban areas, people can use the services of a property dealer (who also called themselves real estate agents) to sell or buy properties. The Ministry of Justice licenses property dealers, who must renew their licenses annually. This license entitles them to open new offices and engage in the sale, lease and rent of property.

Sellers can ask these dealers to find buyers and buyers can ask them to locate properties for sale in certain neighborhoods. Once a property dealer identifies a buyer for one of the properties that he is selling, he invites both the buyer and seller to his office. There he negotiates a sales price for the property and drafts a sales contract for both parties to sign. This sales contract is not a legal document. Property dealers generally charge a 1% of the cost of the property for these services. Payment of the fee normally is split between the buyer and seller, but sometimes the buyer pays the whole fee.

1B. PROPERTY DEALER REGISTERS FOR A NEW DEED. For an additional 1% fee, the dealer will arrange for one of his agents or expeditors to apply for a new deed for the property. This fee does not include the cost of property transfer taxes, government document recording fees and special processing fees.

1C. NEITHER SELLER NOR BUYER APPLY FOR A NEW DEED: This practice that was once common in rural areas now appears to be common practice in both urban and rural areas. In District 2 Primary Court in Kabul, covering part of the central city, only eight new deeds were prepared in the first eleven months of this year. If this finding proves widespread in Afghan primary courts, it means that legal process for new deed preparation has nearly ground to a halt. If this is true, skyrocketing special processing fees is the likely cause.

Apparently, the custom in rural areas is to document property sales through “customary” rather than legal deeds. This practice appears to be supplanting legal deeds in urban areas as well. In villages, the buyer and seller usually conduct their property sale transactions in private. Afterward, they ask their *malik* (chief of the village or community), mullah (a village-level religious leader and preacher) or another important person in a village to write a statement verifying that the transaction occurred. All three parties sign this document. Generally, the malik or other important person does not charge a fee for this service but often a buyer and seller give them small gifts as tokens of gratitude. In Afghanistan, this document is referred to as a “**customary deed.**” A customary deed contains a description of the parcel location, the names of adjoining owners on the north, south, east and west boundaries of the parcel, the size of the parcel, the sale value and the buyer’s and seller’s identity. The legal system does not recognize a customary deed as a sufficient evidence of a property ownership transfer, but it does have strong local value for documenting that a transaction has occurred, and that the transaction is acceptable locally.

1D. PROPERTY DEALER DOES NOT REGISTER FOR A NEW DEED. Apparently, many property buyers who use the services of a property dealer do not bother to obtain legal deeds for their properties. The estimate of one property dealer is that 60% of property sales in the urban center of Kabul are not legally registered with the government. From the number of deeds prepared by District 2 Primary Court in Kabul, this estimate may reflect historical rather than current practices, and that

the percentage of sales that are not registered is actually much higher than 60%.

STEP 2. APPLICANT APPLIES FOR A NEW DEED AT A PRIMARY COURT

APPLICANT: The seller is normally the person who prepares an application for the preparation of a deed of sale. Because other parties, such as the buyer and seller together or an expeditor (see below), can apply for the preparation of a deed of sale, we refer to the party who initiates the process of preparing a deed of sale as the “*applicant*.”

EXPEDITORS: Expeditors are individuals who carry out the steps of a legal application process for their clients. Apparently, expeditors often work for property dealers or for property developers. Expeditors work on a basis of trust with officials involved the deed preparation process. They know how much each official expects in the form of a special processing fee and they divide the overall fee accordingly. Sometimes expeditors use specially colored ink on forms to identify themselves, thereby expediting the application process.

We interviewed an expeditor who told us that he could complete all steps in the application process in 1-2 weeks, assuming that the buyer and seller were willing to pay the necessary special processing fees. The higher the special processing fees, the faster the processes.

We have heard that the application process can take as little as 2-3 days, if the fees are high enough. This raises the question of whether the root cause of long processing times for deed applications is a result of poorly organized records or intentionally slow work on the part of the individuals involved in the process to drive up special processing fees. Of course, very high fees could cause these individuals to skip lengthy processing steps all together and issue forged documents to expedite the process.

POWER OF ATTORNEY: A **Power of Attorney (*Wakalat Khat*)** is becoming a frequently used device. Buyers and sellers who are living abroad, who are disabled or are busy people can grant a Power of Attorney to another person to act in their name to conduct a transaction. The application for power of attorney includes statements and photographs of the person granting the Power of Attorney, and that of the person so designated. The judge of the primary court gives the agent a letter, addressed to the municipality, which requests the municipality to verify the identity of the individuals requesting power of attorney. The agent must return to the primary court to obtain an official certification of power of attorney. We do not know at this time whether expeditors need a power of attorney to carry out the deed preparation process, or whether they are known by court personnel or whether they are registered as official expeditors by the court.

2A. APPLICANT OBTAINS OFFICIAL APPLICATION FORM AND TWO CIRCULAR FORMS FROM A “APPLICATIONS SCRIBE”. The process for preparing a property sale deed begins when an applicant presents a formal application for a new property deed, two circular forms and two photos of the seller to a primary or appeals court judge with jurisdiction over the area where the property is located. The applicant purchases these forms from an “applications scribe” (our term), many of whom sit outside of the courtyard selling forms and helping illiterate people with filling them out. They sell and help fill out these two types of form

The official application contains the following information:

- House number, district and area (for example, the Qala-e- Fathullah area of Kabul where EMG’s compound is located);
- The seller’s deed archive number and the date the seller’s deed was issued;
- Boundary description (east, west, north and south);
- Seller and buyer names;
- Sale price of property;
- Statement that seller wants to sell property to buyer;
- A statement about whether the property is mortgaged.

The front page of the official application is shown below.

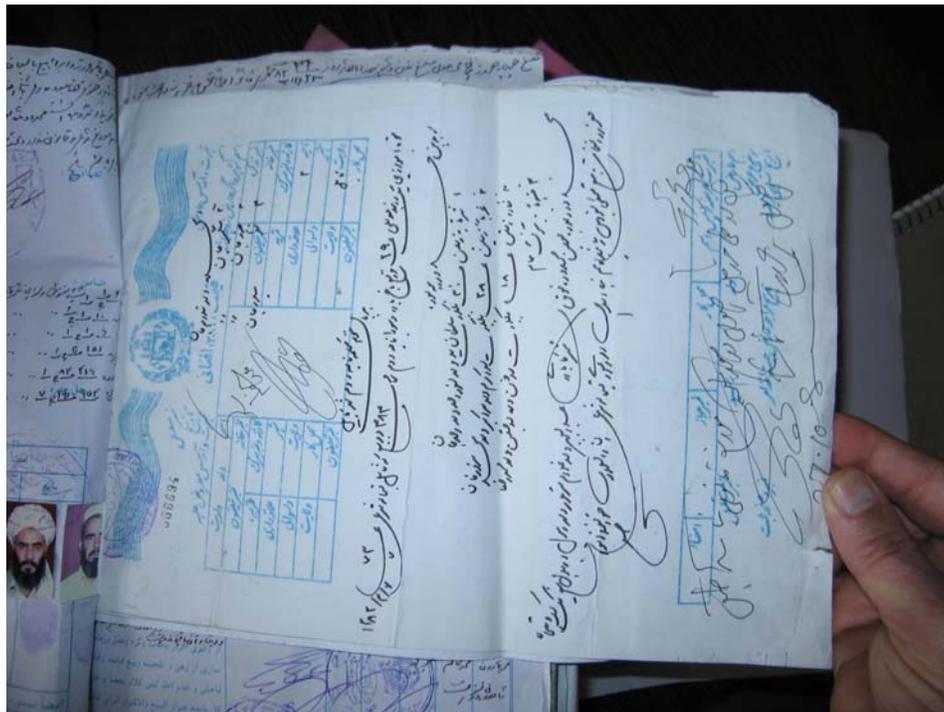


Figure 3 Official application for new deed that the applicant presents to court to initiate the deed preparation process

CIRCULAR FORM: The circular form is intended to help guide the applicant for a new deed through the process by indicating what offices need to review the proposed transaction. The design of the circular form has changed from time to time, indicating changes in the steps to be followed in completing a transaction. A major change from the format of the form in the mid 1990’s is today’s elimination of the requirement to visit several banks to verify whether the seller had a mortgage on the property to be sold. No formal mortgages are being arranged today. Applicants purchase two blank circular forms along with the official application for a new deed form from the applications scribe. The applications scribe or applicant fills out the information in box 1 of the circular forms (see below). This person is quite important in a society with an approximately 30% literacy rate.

Two circular form formats are in use presently, one for the sale of land and one for the sale of houses, with the main differences being the agencies required to review the proposed sale. Both

forms contain for the following boxes for information and signatures of the relevant authorities who have a role to play in every transaction:

1. Information on seller and buyer;
Boundary of the property;
Total price of property;
Seller's deed number and date seller was granted his deed date;
Boundary of property (N, S, E and W)
Petitioner (seller) signature;
2. Certification by Makhzan judge that seller's deed is correct and that seller that is same person who's picture is on the court's copy of the seller's deed;
3. Endorsement of the related Imlak Office of the relevant district as to the location of the property if it is a rural property;
4. The value of the property, from the Cost Estimation Board;
5. Endorsement of the property office (*Imlak*) Municipality if the property is urban;
6. Receipt from the Revenue Office (Mustofiat) of the Finance Department;
7. Confirmation of transfer tax payment from the Taxation Region;
8. Endorsement of the Personnel Directorate of Financial Department regarding taxation staff signatures;
9. In the case of government built apartments, endorsement from the Microrayon Maintenance Department;
10. Signature of the Head of Primary Court.

Photographs of a circular form for the sale of a land parcel are shown below.

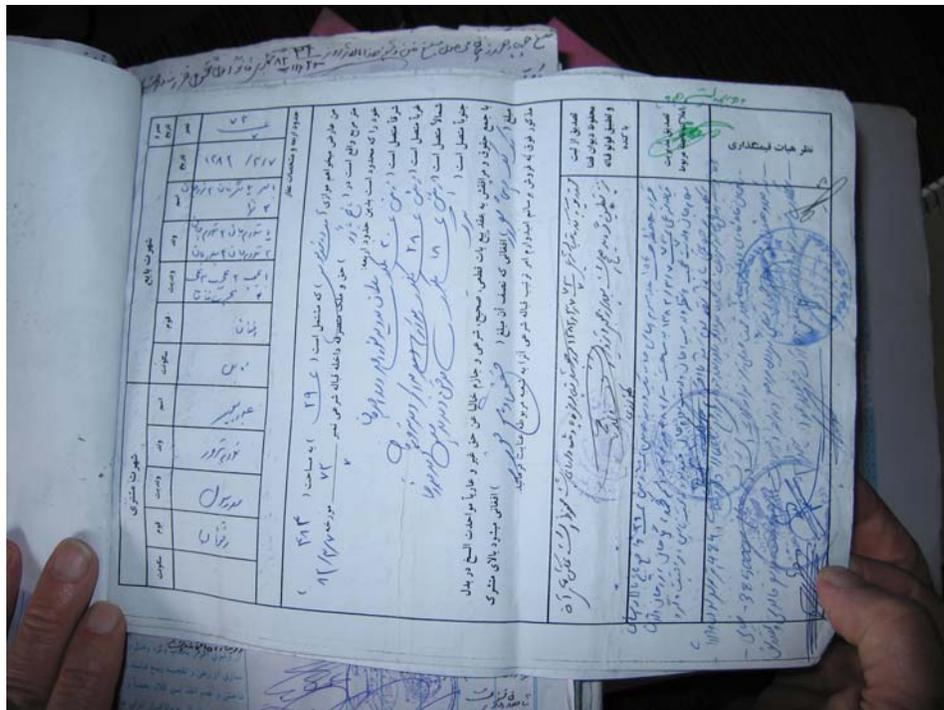


Figure 4 Front of Circular Form



Figure 5 Back of Circular Form

2B. APPLICANT SUBMITS FORMS TO JUDGE TO AUTHORIZE THE PREPARATION OF A DEED DOCUMENTING A PROPERTY SALE FROM THE SELLER TO THE BUYER. Applicant submits official application for a new deed, two completed circular forms, and two photos of the buyer and two witnesses, to the President (a judge) of either the Appeals or Primary Court in which the property is located. If the judge approves the application, he signs the circular forms and he writes a statement on the deeds application form to the effect of “take the appropriate legal steps.”

STEP 3. APPLICANT TRAVELS TO MAKHZAN LOCATED IN APPEALS COURT OF PROVINCIAL CENTER AND MAKHZAN STAFF SEARCH FOR SELLER’S DEED IN THEIR ARCHIVES

Applicants living outside the provincial center (principle municipality in a province) may have to travel long distances to request a search for the seller’s deed in a Makhzan that is always located an Appeals Court, which is located in the provincial center. The applicant goes to the Makhzan and presents the Chief (President) of the Makhzan with his deed application form, two circular forms and a photo of the seller. Upon receiving this information, the Chief of the Makhzan, approves a search for court’s copy of the seller’s deed and gives the forms and photos to the Head of the Makhzan. The Head, Clerk and Storekeeper of the Makhzan conduct the deed search together based on the information supplied by the applicant. Once the Konda is located that contains the copy of the seller’s deed, the Head of Makhzan checks its accuracy and authenticity of the deed. If he is satisfied that the deed is correct, he signs both circular forms. This process then is repeated by the Chief of the Makhzan, who both signs and stamps the two circular forms. It is crucial that the Chief of the Makhzan stamp the circular forms. The application form is retained by the Makhzan but the two circular forms are given back to the

applicant.

STEP 4. APPLICANT GOES TO PROPERTY OFFICE TO CERTIFY PROPERTY LOCATION, BOUNDARIES AND OWNERSHIP

CERTIFICATION OF PROPERTY'S LOCATION, BOUNDARIES AND OWNERSHIP: After confirming the seller's ownership of the property, the applicant takes the circular forms to a property office (*Imlak*). The property office is responsible for verifying the location, boundaries and ownership of the property. If the property is on agriculturally classified land, the applicant goes to the local *Imlak*. If the property is on municipally classified land, he goes to the local *Melkiat*. If the officials at the property office have a map or sketch of the property, they certify the location and boundaries of the property. Similarly, if they have current records on the ownership of the property, they certify that as well. If the property is on municipally classified land, the Human Resource Directorate of the municipality certifies the signatures and identity of the buyer and seller.

If the *Imlak* does not have a map of the property, the *Imlak* sends a request to a cadastre office for certify the property's location (parcel or cadastre number), boundaries and ownership. If the cadastre does not have a sketch of the property, it sends a cadastre surveying team to the property to make a sketch of its boundaries and certify the ownership of the property. Similarly, a *Melkiat-ha* would send several municipal engineers or a cadastre survey team to the property to do the same thing.

STEP 5. APPLICANT GOES TO PROPERTY OFFICE TO OBTAIN AN ASSESSMENT (VALUATION) OF PROPERTY

The assessment procedures differ between rural and urban property assessments. In rural areas, *Imlak* officials meet with the malik (community leader) of the village or community and neighbors to determine the value of a property. In urban areas, officials (engineers or assessors) of a municipal or agricultural property office (*Melkiat* or *Imlak*) assess the value of a property. Property owners usually pay assessors special processing fees to reduce the amount of an assessment.

At least within Kabul City Municipality, representatives from both a property office and the Mustofiat (provincial revenue office—see below) make an assessment. The director of Kabul City Mustofiat told us that property office representatives usually relied on the original cost of the property and building to determine the amount of an assessment, instead the appreciated value of the property. This recent change in how assessments are conducted has significantly increased government revenue from property transfer taxes.

STEP 5'. IF THE PROPERTY IS AN APARTMENT IN A FORMER GOVERNMENT-RUN APARTMENT COMPLEX, APPLICANT GOES TO MICRORAYON MAINTENANCE DEPARTMENT TO PAY ANY MAINTENANCE FEES THAT HE OWES AND TO CERTIFY THAT HE HAS PAID ALL HIS MAINTENANCE FEES

Formerly, there was a "mortgage check" step at this point in the deed preparation process that required applicants to visit certain banks to certify that the bank did not hold any mortgages

except for those listed on the seller's deed. According to M. Y. Safar, prior to 1992, Afghans who were applying for a deed for agricultural land needed the certification of the Afghanistan Development Bank declaring that the bank did hold any mortgages on the property that were not already listed on the deed. Afghans went through a similar procedure when the Construction and Mortgage Bank was in existence. Apparently, this step has been eliminated.

STEP 6. APPLICANT GOES TO PRIMARY COURT TO OBTAIN STATEMENT OF TRANSFER TAXES (TARIFF) THAT HE OWES BASED ON THE ASSESSMENT OF THE PROPERTY

Applicant present two completed circular forms to court and court calculates transaction taxes owed (5% of assessment if less than 1,000,000 Afghani and 6% if more than 1,000,000 Afghani). Court gives applicant a tariff for transfer taxes owed on sale transaction.

STEP 7. SELLER PAYS TAXES AT A SPECIFIC BANK AND GETS RECEIPT

Applicant pays transfer tax into Primary Bank account at a specific bank and obtains a receipt.

STEP 8. SELLER, BUYER AND TWO WITNESSES GO TO COURT TO MAKE DECLARATIONS, JUDGE AUTHORIZES PREPARATION OF NEW DEED AND BUYER RECEIVES NEW DEED.

Applicant presents the following to judge at primary court:

- Two completed circular forms;
- Two photographs of each of the following: the buyer, seller and two witnesses;
- The buyer and seller's identification cards (*Tazkera Tabiat*);
- Bank receipt for payment of transfer taxes.

The judge certifies that applicant has completed each of the steps represented in the circular form. He takes declarations from the buyer, seller and both witnesses. The judge orders primary court clerk to draft two copies of the new deed. Buyer, seller and witnesses sign the two copies of the deed. Buyer receives new deed.

STEP 9. COURT MAINTAINS ITS COPY OF NEW DEED UNTIL THE DEED KONDA CONTAINS 100 DEED AT WHICH TIME IT IS TRANSFERRED TO THE MAKHZAN FOR PERMANENT STORAGE

When the clerk finishes drafting the court's copy of the new deed, the deed remains bound in the Konda (bound volume for each type of legal document) as a stub. Various documents are attached to the court's deed, which is bound in the Konda. A new Konda contains 100 sheets of blank legal documents. On the right side of each sheet is the buyer's copy of the new deed that will be cut out of the Konda and given to the buyer. On the left side of each sheet is the court's copy of the deed that will stay bound in the Konda. Once all 100 deeds have been prepared, the Konda is ready for storage. Various documents are stapled to each of the court's copy of a deed, including the official application for a new deed, circular form, power of attorney document, etc. Photos of a property deed are shown below.

STEP 10. APPLICANT GOES TO MUSTOFIAT TO CERTIFY TRANSFER TAXES OWED ON THE PROPERTY

A *Mustofiat* is the provincial revenue or tax collection office of the Ministry of Finance. They

are located in the provincial center of each province. Kabul City has one Mustofiat, which is the main Mustofiat for Kabul Province. These are essentially branch offices of the main provincial Mustofiat in each provincial district (*woluswali*).

An applicant brings his circular forms to a Mustofiat to have a Mustofiat official certify the amount of the transfer tax that the seller owes on his circular form. This transfer tax currently is 2% of the assessed value of the property. One-half of this tax (1%) is a government assessment tax and the other 1% is a tax (really a fee) for the services of the Mustofiat. A Mustofiat official gives a tax bill to the applicant to take to a bank and pay the transfer taxes owed on the property.

STEP 11. APPLICANT GOES TO BANK TO PAY TRANSFER TAXES

Applicant goes to bank and makes deposits in government accounts at the bank. Bank staff stamp give applicant a receipt of payment.

STEP 12. APPLICANT RETURNS TO MUSTOFIAT TO OBTAIN CERTIFICATION THAT HE PAID THE TRANSFER TAXES.

The applicant returns to the Mustofiat and presents the receipt to a Mustofiat official, who then signs and stamps the circular forms certifying payment of the 2% transfer tax.

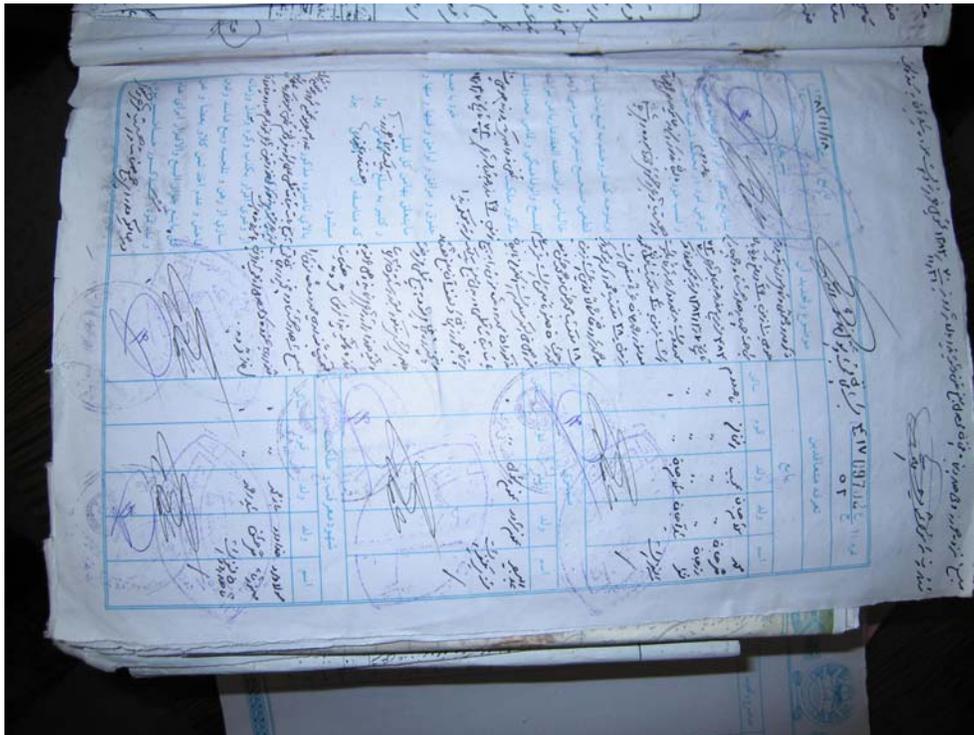


Figure 6 Front page of property deed



Figure 7 Back page of property deed



Figure 8. Property deed *konda* showing completed property deeds (stubs that eventually comprise a completed *konda*) on the left of the *konda* and a blank property deed (which will be given to the next new property owner granted a property deed by the court). Below the *konda* is the primary court's journal, which lists each legal document prepared by the court in sequential order in a given year. The clerk's lower finger in the photo is pointing to the yearly sequential number (serial number) in the journal.

2. ASSESSING THE AFGHAN DEEDS BASED PROPERTY RECORDS SYSTEM

The Property (land and buildings) Records System in Afghanistan is composed institutionally of the Primary Courts that take in the applications of sellers of properties when they wish to sell and that prepare the deeds (as well as the deeds for other types of transactions), the Provincial Makhzans (archive) where the deeds are stored and the various agencies which are required to review the proposed transaction, depending on the type of land involved, and the revenue collection offices. The Provincial Makhzans (archives for the Provincial Courts and property documents from the Primary courts) are of central importance for verifying the ownership of the seller and for recording the deed of transfer with the name of the new owner.

Several features of the system are quite positive. The contact of the records system with the public begins in the Districts, through the Primary Courts although the document archives are in the provincial centers. There is a useful degree of administrative decentralization for facilitating the access of the public to the deed archives and to the procedures for carrying out legally recorded transactions. Another positive feature is the standardization of the deed formats, and the limitation of most deeds to just two pages.

However, there are also problems with the system, the most obvious being the disorder in the document storage and the significant time it takes to do even the simplest title search.



Figure 9 Makhzan Archive of Property Documents before Reorganization

One of the first priorities in the Land Titling, Registration and Economic Restructuring Project, Component 1, is to rehabilitate the Makhzans physically (remodeling of rooms, provision of storage cabinets, repairing of electrical system, etc), and make secure the property related documents stored there through the reorganization of the archived documents.



Figure 10 Makhzan Archive of Property Documents after Reorganization

This rehabilitation of the Makhzans and the re-organization of the documents in the archives involves sorting the documents so that all volumes (*Kondas*) containing the same type of document (for example, deeds of sale), and from the same District Court, are organized by year in metal cabinets. Subsequently the plan is to produce digital images of all documents, and produce Grantor-Grantee indices and “tract” or block indices, to facilitate locating documents needed to substantiate claims of owners that they are the true owners of the properties. This work should substantially reduce the time needed to find deeds, and should reduce the cost and time of the search process. Thus, a major constraint on the transactions and mortgages—the time needed to find documents proving ownership of the seller or mortgagee—should be largely remedied. The digital copying of the documents will also reduce the likelihood of modification and falsification of documents that can threaten the security by which people hold rights to land.

In itself, this rehabilitation effort should greatly improve the efficiency and transparency of the deed preparation process under the supervision of Primary Court Judges and the administrators of Makhzans.

The yearly processing of deeds of sale as processed by the Makhzans varies. For the Kabul Makhzan, we have prepared the following tables showing the approximate number of deeds of sale, prepared within five-year periods. The deeds are stored in bound volumes of approximately 100 deeds each. Nearly 36% of the deeds of sale, representing formal, registered transactions occurred in the 15 year period between 1320 (1941) and 1335 (1956), with another active period (about 20% of all sales) being the 15 years between 1365 and 1380 (1986 and 2001). An indication of the significant drop off in the number of actual sales that were recorded is that between 1941 and 1986 the population of Kabul increased significantly, but the number of recorded sales dropped by 43%. There may be various explanations of this decrease in registered sales, but it seems likely that the major reason is that many sales were done outside of the formal deed preparation system.

The low total for the period 1380-1383 (2001-2004) is mostly due to the retention by the Primary Courts (there is one Primary Court for each of the administrative Districts of the Kabul Province)

of all deeds until the bound volumes of deeds are complete. However, there may be other reasons for not forwarding the bound volumes to the provincial archive (Makhzan), or for there being relatively few sales being recorded in the prescribed way. During the present year through the 11th month of 1384, in the Primary Court for the Nahiya 2 of the City of Kabul, which incorporates much of the central commercial areas of Kabul, there have been only 8 registered property sales, and one of them was the sale of land from the Municipality to a private person. It appears that people are not recording a significant number of transactions in the property rights recording system.

Table 2: DEEDS PREPARED IN FIVE YEAR PERIODS—KABUL PROVINCE

NO	5 YEAR TIME PERIODS	NO OF DEEDS
1	1295 - 1299	200
2	1300 - 1304	1,700
3	1305 - 1309	1,700
4	1310 - 1314	6,600
5	1315 - 1319	38,200
6	1320 - 1324	64,700
7	1325 - 1329	58,000
8	1330 - 1334	57,600
9	1335 - 1339	35,800
10	1340 - 1344	27900
11	1345 - 1349	27900
12	1350 - 1354	27600
13	1355 - 1359	27700
14	1360 - 1364	22500
15	1365 - 1369	37500
16	1370 - 1374	39900
17	1375 - 1379	26400
18	1380 - 1384	4700

Total: 506,600

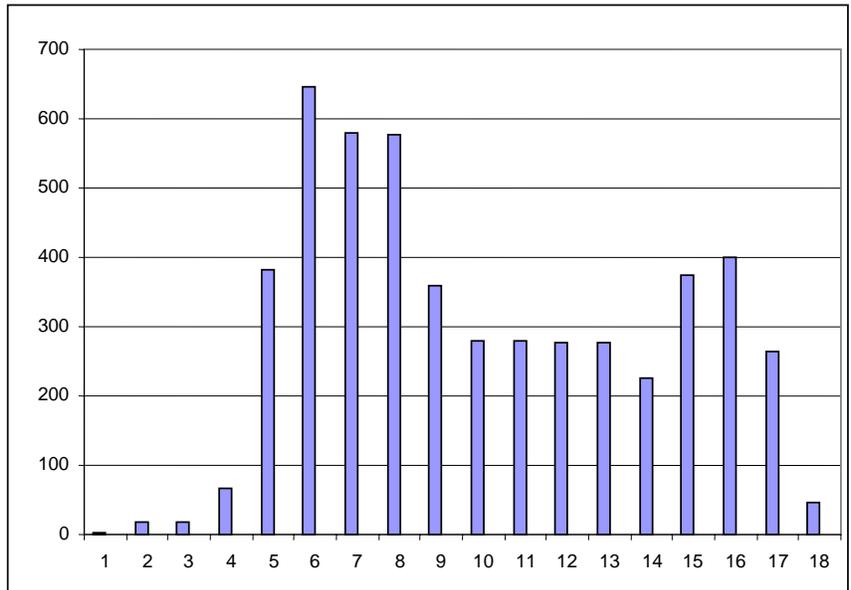


FIGURE 11 No. of Deeds (in 100's) by year

3. CONSTRAINTS

The recording of rights to land and buildings suffer from serious inadequacies:

3.1 FRAGMENTATION OF INFORMATION ABOUT RIGHTS TO LAND

Some recording of rights to land and building is presently carried out by various Property (*Imlak*) offices in various Ministries, the main ones being the Ministry of Agriculture, and the Municipalities. Many Ministries have Property Units within them for the management of properties, which are the responsibility of the Ministries. While the law requires the recording of original allotments of land done by such offices, and any subsequent transactions, with the Judges and their Provincial Makhzans, the difficulties and costs of such recording and the lack of information in the general public about the importance of such recording have constrained these actions. The original allotment documentation and those subsequent transactions which the landholders bring to the attention of these offices may be in the Ministerial Property Offices, but are frequently not in the Makhzans.

Moreover, many transactions carried out in rural villages are witnessed and documented locally, and the documentations, when they exist, are not recorded in any Court Makhzan or Property Office. Finally, there is an unknown proportion of transactions which are carried out through private contracts kept by the parties to the transactions, and not recorded in any office or registry. In Kabul city, it is estimated that 60% of the housing units and other constructions are “informal”, that is, they do not meet the criteria established in law for ownership being legal. These properties change hands like other properties, despite their uncertain legal status. So it is likely that at least 60% of the sales and inheritances which occur are not recorded anywhere other than in the homes and offices of the parties to the transactions. We can call the recording of these transactions “private”.

In essence recording of changes in rights to immovable properties has become highly fragmented. Such fragmentation makes it very costly for people to engage in transactions, and opens the door to corruption and fraudulent transactions. A “one-stop-shop” which encourages people to bring transactions in to be recorded is at least part of the solution to this fragmentation of recording functions. A single office could provide registered information about who holds what rights to land to the general public engaged in transactions and mortgaging of land.

3.2 INEFFICIENT MULTIPLE APPROVALS OF TRANSACTIONS

For transactions to occur legally, the sellers must go to the Provincial Makhzans to verify their ownership through searches of the Makhzans’ archives, after applying for a transaction at the District Primary Court. Sellers also must get the endorsement of the District Property Offices for urban or rural land, the Municipal or Regional taxation offices, and the Microrayon Maintenance Department (if the property is an apartment). Some evidence exists that these approvals often result in un-necessary delays and the payment of unofficial “special processing” fees which add to the cost and complexity of transactions without other benefits. An assessment is needed of the necessity of these endorsements, and how they may contribute (or not) to the efficiency and transparency of the service. Also attention should be paid to eliminating the need for travel to the Provincial Makhzans to verify the ownership of the seller.

3.3 LACK OF GEOGRAPHICALLY PRECISE PROPERTY BOUNDARY DESCRIPTIONS

The descriptions of properties in deeds, formal and customary, presently describe the boundaries of properties by reference to the names of the neighboring owners, along with addresses of some sort. The cadastral mapping effort of the 1960's and 70's covered approximately 30% of the agricultural land of the country, and subsequent cadastral mapping covered some urban areas. However, these maps are out of date and in any case contains very few of the valuable urban properties which comprise most of the properties being transacted.

While a valuable information source, the age of this mapping and its limited coverage do not provide a useable mechanism for describing properties, and such information is not used in the deeds being drawn up to identify the location of properties.

Property taxation also suffers from the lack of comprehensive cadastral maps. Finally, not having properties defined graphically and linked with the legal information on the deeds precludes the use of this information in the planning and implementation of infrastructure improvement projects.

3.4 LACK OF TRANSPARENCY IN THE OPERATIONS OF THE PROPERTY RECORDS SYSTEM

Rumors abound about significant bribes being common in the Courts, and particularly to get Makhzan functionaries to extract copies of property deeds from the Makhzans and to record the deeds when completed. The disorder in the archives has been a contributing factor to the abilities of functionaries to extract "special processing fees" from the general public to get access to the deeds stored in the Makhzans.

Moreover, the complexity of the transaction process also contributes to these irregularities, as does the lack of oversight of the actions of Judges and Court employees. The result is high transaction costs if the parties to a transaction want to follow the formal rules and get court approved documents as well as the formal recording of these documents in the courts' archives.

3.5 COURT DEEDS ARE APPARENTLY BEING ALTERED IN MAKHZANS

Three people, the Makhzan Storekeeper, Clerk and sometimes the Chief of the Makhzan, participate in the search for the deed whereby the potential seller of a property became the owner of that property. In essence, these three people have to agree that the deed establishing the seller's ownership is sufficient proof of that ownership. It should be difficult for anyone to introduce fraudulent deeds into the Makhzan, or to modify an existing deed after it was been deposited in the archives. They would have to pay special processing fees to three people. Somehow, in spite of these precautions, such payments frequently happen.

Speeding up the procedures of documenting transactions is one objective of such payments. However, a more serious problem for the integrity of the archives is the payment of money to facilitate the introduction of fraudulent information and false documents into the archives. If the archives cannot be trusted to produce clear evidence of the rights that people hold to property,

their entire purpose is compromised. One response to this problem is to introduce more oversight of the actions of the employees and managers of the Courts and Makhzans. Another response would be to create archives that would be very difficult to modify, such as digital, “read only” archives with multiple copies outside of the control of the Makhzan managers or staff. Given the number of deeds in the archives, this would be a massive task. But a start could be made.

3.6 UNCLEAR DRAFTING OF DEEDS

But the problem of achieving archive integrity is not limited to the ways that the archives are administered. Deeds describe the transfer of property rights from one party to another, which must be described by putting words on paper.

Even a casual review of the recorded deeds demonstrates several problems with the integrity of the archives. First, the deeds are written very poorly by hand, or as one person remarked, very probably written by a person holding a pen between his toes, to account for the unclear writing. Second, traditionally the terminology used in the text of the deed is typically a mixture of Dari or Pashto, and Arabic. People literate in Dari or Pashto may not be able to read and readily understand the Arabic words. If the deed can be found, people must be able to read it. Making such a simple act difficult increases the likelihood that errors are not found and the intent of the parties incorrectly described.

3.7 VERIFYING THE IDENTITY OF THE PARTIES TO A TRANSACTION HAS SOME WEAKNESSES

Another issue is the establishment of the identity of the parties to a transaction (sale, inheritance, mortgage, gifts). In the present system, such identity is established through multiple proofs of ownership:

- The names of the grantees (buyers) and grantors (sellers), their father’s name, their grandfather’s name, their tribe, and residences;
- The Identification Card Number of both grantee and grantor;
- The fingerprints of the grantor and grantee;
- Photographs of the grantor and grantee;
- Names, photographs, and fingerprints of two or three witnesses who testify that they know the grantor and grantee;
- Names, photographs and fingerprints of two other witnesses who testify that they know the other witnesses and vouch for their character.

This multi-layered method of establishment of identity of the parties is apparently quite strong. But the lengths the courts go to establish the identity of the parties indicate that identity is in fact hard to determine. Part of the problem comes from the different customs for naming of children. Another problem comes from the ease by which a person can get an identification card. The multiple mechanisms used to establish identity is an attempt to overcome the apparent weakness of any single way to establish identity

Moreover, if there is a dispute about identity, the fingerprints of the seller on the deed have to be

verified. Other claimants can challenge the fingerprints on a deed by getting the Criminal Technique Office of the Ministry of Interior to compare the prints on the deed with the prints of the seller. This office can conclude that they are not identical, thereby throwing into question the validity of the entire deed. Such a decision is open to influence from one or other of the parties to the transaction. Does this happen? We found a case where this apparently happened, but we do not know the extent of the problem.

A second aspect of the identity problem is the lack of a Grantor-Grantee index, which would make the location of deeds easier when people know only the name of either the seller or buyer in the cases of past sales. Perhaps the ambiguities in the names of the people make such an index problematic.

3.8 HIGH TRANSACTION TAXES

The financing of government services comes at least partially from the revenue generated from taxes and fees collected when there are transfers of properties from sellers to buyers. Taxes and fees are also collected from other transactions involving real estate, such as the recording of a will, distributing of property among heirs, and recording of mortgages. At present, the transfer tax payable by the sellers is 2% for Mustofiats and 5-6% for Primary Courts. For properties valued at less than 1 million Afghanis (equivalent to approximately US\$20,000) the transfer tax at Primary Courts is 5% and it is 6% for properties valued at 1 million Afghanis or more. The valuation of properties is done by the Imlaks (Property Departments), in the Municipality for urban properties and in the Ministry of Agriculture for rural ones. The tax on a gift of property to a minor is 10% of the value of the property, as is the tax on recording a will.

With these high taxes on property transactions, which are collected at the moment of transaction, there are two reactions from the general public: 1) negotiate with the assessors to set property values at much less than market values, and complete the transaction according to the formal rules; or 2) avoid the formal rules entirely and conduct the transaction as a private contract, with the option later of bringing the private contract into the formal system and pay the tax owed, after doing also 1). The result is an ineffective property taxation system, which generates low revenues while people expend large sums in acquiring properties. Another result is the deterioration of the Court archives, due to the large proportion of transactions which are not recorded there.

3.9 ACCESS TO THE ARCHIVES IS LIMITED

In order to minimize the introduction of fraudulent documents and the illegal modification of documents stored there, the access of the general public to the archives is severely limited. Theoretically, only Judges can deposit documents there, and only Judges can extract copies of documents stored in the archives. This monopoly of access in the hands of a few Judges is functional to protect the integrity of the archives, but starts to fail in its purpose when the pressures of special processing fees focus on and corrupt even the most upright of a very small number of persons.

Probably more important is the lack of organization of the archives to make the access to an

archive easier. The Kondas or volumes of assembled deeds do not have unique identification numbers. Even if they had such numbers, there is no index of the deeds to identify the parties to the transactions, the type of transaction, the year of the transaction, the location of the properties. Without a simple index of names and a second index of the approximate location of the properties, people can get access to deeds only through the number of the deed, if they know it, **and** the year of the transaction.

4. RE-ENGINEERING

A “re-engineering” of the transaction documentation procedures is needed to improve and protect the integrity of the deeds archives and at the same time convince people to use the formal system. How might this be done?

- Restructure the organizations which administer the archives;
- Devise new and improved procedures, where warranted,
- Improve the monitoring of the actions of people charged with administering the archives:
- Internalize new professional ethics among these administrators and in the population as a whole to give high value to the integrity of the archives.

Institutional improvement of the property records system need to be considered, options defined and decisions made.

4.1 WHAT CAN BE DONE TO IMPROVE PROCEDURES PRESENTLY BEING USED?

It is important to make immediate improvement in how recording of transactions is presently being done, while institutional issues are being studied and solutions devised and implemented. Several steps could be taken immediately to improve the existing system:

- Carry out an emergency mapping of the boundaries of the smallest administrative unit in the country, probably Gozars in cities and Villages in rural areas, which would become “tracts” in the property rights recording system and which would be used in future adjudications of title;
- Instruct the Primary Court Clerks and Judges to introduce into the deeds then name of the “tract” in which the property is found;
- Assign a unique number to each Konda already in the Makhzan and as the newly filled ones leave the Primary Courts for the Provincial Makhzan;
- Instruct the Primary Court Clerks to improve their writing of the deeds;
- Implement the notation of simple information about each deed in a Grantor-Grantee index and in a Tract Index;
- Develop a system of digital photographing, indexing and archiving of all new deeds which are produced. Begin the digital copying of all documents which enter the system after an established date. Such a procedure would be difficult to implement due to the lack of electricity and lack of skills, but a system could be devised during the interim period when these deficiencies will be corrected. In the meantime, with such a digital backup archive, it would be more difficult to compromise the integrity of the archives. It

would also permit the searching of the archive without physically handling of the deeds, thereby helping to preserve their physical integrity.

4.2 WHAT STRATEGIC RE-DESIGN OPTIONS SHOULD BE CONSIDERED?

Besides these interim measures, several strategic re-engineering issues could be profitably discussed and decisions made:

A. Should there be an integrated information system containing the documentation of legal rights and the spatial description of properties to which those rights attach?

To follow the trends in Europe and elsewhere, the answer should be “yes”. The legal information should be integrated with the mapping information. However, the nature of this integration has to be defined and a strategy for its implementation elaborated. Included in these decisions should be the definition of a system for assigning unique property numbers to each property which will be noted on the property maps for areas given priority in any future adjudication effort. Such numbers will be used in the deeds to identify the properties involved in transactions. The assigning of “tract” numbers to each deed will be a step in the direction of assigning unique parcel numbers, once an effort is undertaken to adjudicate the title for each property within a tract.

As mentioned above, a first step could be to add the gozar or village, the smallest administrative unit available, in which a property is located to each deed. Such a description does not identify the exact location of a specific property, but it does locate a property more precisely than District or Province. This Gozar or Village method for locating properties is similar to the “tract” method used in most jurisdictions in the U.S. A “tract index” could be created, where for each tract all transactions affecting any property in the tract could be noted, thereby facilitating the location of a property based on which tract it is located in.

A basic need for adjudication of title, if such an effort is justified, and for the creation of tract indices, is a cartographic framework into which can be noted all transactions affecting properties within tracts, and in which to fit any sporadically prepared cadastral survey plans used in systematic adjudications of title.

But even the tract approach to location of properties has a cost, in that the maps of these lowest level administrative units are not readily available. One of the activities of the project could be to produce such maps as soon as possible in the areas where most of the transactions are occurring, and to provide them as appropriate to each Primary Court.

An alternative is to undertake systematic adjudication of title to properties in priority areas, such as urban areas slated for renovation (such as the Old City part of Kabul), or areas planned to be the target of special investments, such as the rehabilitation of an irrigation system, or areas of social conflict where insecurity of tenure is inhibiting private investments, such as informal urban settlements. The adjudication of title in such places in a systematic way can be quite costly. At the same time, once titles are adjudicated the values of the properties with clear title are typically at least 30% more valuable than they were prior to establishing a clear title. Part of this “windfall” increased value which the private owners would capture, could be shared with the

entity carrying out the systematic adjudication to help finance the effort.

B. Should the recording of rights function be in a well defined, professionally managed, self-financed office?

At present the Chiefs and Heads of the Makhzans are under the supervision of the Supreme Court and are appointed by that court. As entities monitored by judges distant from the day to day operations, these offices suffer the twin constraints of lack of effective supervision and at the same time the rigidities of being judicial and not administrative offices. The fees they collect are not used to finance the improvement in the operations of the offices, or even the staff salaries and other operational costs. These weaknesses could be remedied by creating separate Deeds Recording Offices, headed by Registrars, with administrative responsibilities over the recording of legally prepared transaction forms. If the fees they generate could be used to finance the operations and improvements of the offices, the staff should be motivated to improve the efficiency of the office and to become more client centered, in order to encourage people to come into the offices and record their transactions.

Such a concept has been described in a draft Law for the Recording of Legal Documents.

The administrative control over Recording Offices is envisioned to be in the Judiciary, although options have not been clearly analyzed. In some countries (e.g., Spain) the Registrar operates the Registration Office much like a private business, with some governmental oversight and control. In others, the Registrar reports to the head of local government concerning financial and procedural matters, but operates using the fees generated from transactions independent from local or central government budgets. In other countries, the offices operate like other government service agencies.

C. Should there be an improved, integrated deeds based recording system?

A title registration system is based on the parcel/property, as described on a parcel index map. For each parcel there is a “registry page”, on which is recorded the information about ownership, leases, mortgages, and other encumbrances. The registry page gives conclusive proof of the rights attached to the parcel. A registrar examines a transfer document and issues a new certificate of title in favor of the new owner. The certificate shows the name of the owner, and identifies the land parcel as well as any easements or charges such as mortgages. The main limitation on Afghanistan going from its present deeds system to a title registration system is the cost of producing the parcel index maps and the cost of adjudicating title for every property in the system. It is possible to move from a deeds based to a title system on a parcel by parcel basis as transactions occur, placing the cost of the conversion on the participants in transactions. The high cost of survey and adjudication of title would probably inhibit people from carrying out legally registered transactions. In the formerly socialist countries that have wanted to move from public ownership to private ownership after the big political changes of the early 1990's, there was not much transaction history to deal with, and thereby very low adjudication costs, the creation of title registration systems was feasible.

These conditions do not exist in Afghanistan. So, we have to work on making the existing deeds

based recording system work better. This is actually not a major issue--title versus deeds--since there is growing consensus that in actual practice the two are converging as computers and the need for land use planning have encouraged the deeds based systems to use maps to describe properties, and the complexities of title have moved the title based systems to adopt many of the procedures of title searches used in the deeds based systems.

D. How can the low public opinion of the courts and Makhzans be improved?

Many Afghans have a negative opinion of the courts and their Makhzans due to their lack of transparency, complex procedures, slow processing times and increasingly higher special processing fees. Several options would have to be explored to correct these deficiencies, including removing the administration of the legal deeds/cadastre from the direct administration of judges and courts. Professionally trained Registrars, who would be accountable to the local community through either audit and oversight or periodic non-partisan election, could replace the judges and courts. In addition, the transaction process should be simplified and the property transfer tax should be drastically reduced or eliminated.

E. Decentralization or Centralization?

A formal system will probably not work if it is distant from the population, and if its procedures are mystifying and costly for the general population to use. The present Property Records System is quite decentralized, in that it relies on the District Primary Court Judge to initiate the documentation of transactions for properties in his District. The Circular Form outlines what local government agencies the seller has to visit for approvals of various sorts. The only trip required is to the Provincial Makhzan archives, to obtain certification that the seller has a valid ownership deed for the property being transacted. The District Primary Court Judge is involved in the final preparation of the deed for transferring rights to the property. The system is decentralized.

The proposed Office for the Recording of Legal Documents would function in the Provincial Center, and would probably eliminate the local Primary Court from having its presently substantial role in transactions. The proposal would, to a degree, centralize the recording process. But perhaps with having a more efficient service the total time needed to carry out a transaction could even be less than it is now.

If it is decided to decentralize the recording offices, and open a service in each District, there would probably be relatively few transactions each month, meaning that it would probably be more difficult to generate sufficient fees to finance the functioning of the office. In that case, one option is to combine two or three Districts into one Recording Office. It may also make sense to economize on administrative costs of offices and staff, and create local recording offices which combine property rights recording with the registration of births, deaths, marriages. The fees generated from all of these activities would help finance the secretarial staff, office space, heating, light and supplies. Also, the existence of evidence about the identity of parties to transactions in the local recording office along with the deeds archives would facilitate the verification of the identities of parties to transactions.

F. Information about property rights

One of the means for reducing the perceptions of corruption in administrative systems, such as the property records system, is to make the information stored in the system publicly accessible. This accessibility is even more important for property rights recordation, which has as a major function the displaying “for the entire world” who has what rights to what properties. It is a common international phenomenon for bureaucratic agencies which have a monopoly on information to jealously guard the portals into the archives, and earn “rents” on giving access. Such behavior is very damaging to the public service functions of the property rights recording system.

In this regard, information technology can be of help. Unlike physical record based archives, making digital copies of documents recorded in the archives, and making those digital copies accessible, can facilitate access to the copied documents without allowing any changes to be made.

In any case, the free flow of information can be a major stimulus to the market economy and can provide evidence that the information contained in the property archives is secure and accurate.

How to assure this free flow of information is a topic worthy of serious attention.

5. CONCLUSIONS

In summary, the existing recording system for immovable properties has positive features. Notwithstanding these positive features, the system is plagued by a significant disorder in the document archives. Organizing these paper deed archives and preserving the deeds through digital backup archives will be a major improvement in the system. However, these improvements will not be sufficient to correct all of the problems of the existing system.

A reform commission could be formed to consider how a “re-engineering” should be done to produce a modern immovable property rights recording system. The phases and funding needs of this re-engineering should be encapsulated into some sort of Property Recording Action Plan so that over a period of years the investments can be made in an additive manner, resulting the desired efficient, transparent and accessible property rights recording system.

ANNEX 1: STEPS FOR THE PREPARATION OF NEW OWNERSHIP DEEDS DUE TO THE SALE OF A HOUSE IN KABUL

