



## CHAPTER 5

# Additional Legal Issues Related to Regularization

Private developers have built serviced housing on former *ejido* lands in Mexico, but self-built occupation continues outside the walls.



Promoting progress in the complex field of land regularization encounters a number of legal issues and collateral objectives. Given the importance to society of housing its people, policies that relate to regularization will be expected to address social objectives beyond tenure security, which itself is complicated because there are many forms of tenure other than freehold title that can provide security to occupants.

### TYPES OF TENURE RIGHTS

The residents of consolidated settlements often do not consider titling to be a top priority because they already view their tenure as secure. Some even think that titling is harmful to their interests, as it entails potential future financial burdens and may constrain their ability to use and dispose of

their property if their newly titled property is subject to urban and environmental regulations. However, land titling should matter to all of those living in consolidated informal areas because the understandings that generate the perception of tenure security shared by many residents can and do change.

Land titling remains the main way to promote full legal and durable security of tenure, although tenure security can be provided to occupants by many different types of titles or enforceable rights:

- full individual or collective freehold, obtained mainly through sale, donation by the public authorities, or adverse possession;
- individual or collective leasehold over public land (including variations of long-term leases such as the Concession of Real Right to Use and Concession



of Special Use for Housing Purposes widely used in Brazil);

- the demarcation of Special Zones of Social Interest (ZEIS) allowing the initiation of a new chain of property transfer, made possible by a 2009 Brazilian federal law;
- surface rights, which refers to ownership of the surface land only, with other rights being reserved;
- the *anticretico* right, as used in Bolivia and Ecuador. This is a rental contract wherein the renter pays the landlord a fixed sum at the start of the rental period in lieu of monthly rent; at the end of the rental period the tenant receives the original advanced rental payment back from the landlord; should the landlord fail to return the money, the tenant acquires ownership;
- community land trusts, where a community organization owns the land in a given settlement;
- cooperatives (still influential in Uruguay, for example);
- *titulos supletorios* (supplementary titles) that acknowledge possession, as used in Nicaragua and Venezuela, for example;
- temporary permits or occupation authorizations; and
- social rental contracts.

When land rights are ill-defined or not clearly recognized by the legal system, titling policies may adopt an incremental approach that augments the residents' legal status over time. But this does not mean there is always a continuum of rights or an automatic process leading from a more precarious legal form of occupation to a freehold title.

For example, leaseholders may become freeholders as a result of evolving land policies, but there is no guarantee that this will happen. Nor is there a reason to believe that leasehold is an inferior form of tenure. As a means of enhancing the permanence

of the communities on regularized land, leasehold titles may be a better option than freehold, while collective titles may be better options than individual ones. The choice of legal instrument depends on the realities in each given situation.

Collective legal solutions—such as collective freehold or leasehold, community land trusts, social property (*propiedad social* as in Venezuela), collective property (*propiedad colectiva*), and other forms of communal rights such as the Mexican *ejidos*—may correspond more closely with the collective nature of many informal development processes. Such solutions may also make sense where defining individual plots is difficult because of densely configured settlements and where it is necessary for regularization programs to reach a sustainable scale.

However, collective titling requires rules to be established to define the collective decision-making process for a wide range of issues, including the future sale of legalized land and buildings, or how property and building matters will be decided by a collectively titled community. Economic pressure to bypass such rules and sell plots informally became widespread in Mexican *ejidos* located near fast-growing cities, thus undermining the original community goals.

## LEGAL ISSUES OF LAND OCCUPATION

Three main legal situations of informal land development require different legal approaches and therefore different regularization policies:

- settlements mainly occupied by the urban poor, in which the residents have their own (individual or collective) rights to the regularization of the occupied areas and are recognized by the legal order;
- settlements mainly occupied by the urban poor, in which the public authorities have broader discretionary power to

BOX 4

### Regularization of Nonpoor Settlements

Although it is in society's interest to regularize informal settlements occupied by the nonpoor (sometimes called regularization of specific interest), these settlements cannot be treated with the same legal and technical approach as that used to regularize settlements occupied by the urban poor. After all, nonpoor residents had the option of formal access to land and housing, but chose to live outside the law.

When nonpoor informal settlements are on public land, the direct transfer of the plots to the occupiers without an auction process to achieve the highest possible price cannot be justified using the same laws that authorize the transfer of public land to the poor residents of informal settlements for reasons of social interest. Middle- and upper-class occupiers of public land may be entitled to preference rights at an auction, and to compensation if they are outbid, but in principle they should not be entitled to free direct transfer and privatization of the public land.

- determine the conditions of regularization programs; and
- informal settlements in which the occupiers are not mainly the urban poor (box 4).

One fundamental legal aspect to be taken into account is the original regime of land ownership, since the regularization of consolidated settlements on public land must be implemented differently from the regularization of settlements on private land. Direct transfer of public ownership to land occupiers, be it through sale or donation, usually requires specific legal authorization. When transferring public property under regularization programs, a common confusion is often made between property rights and housing rights.

The main legal role and obligation of the public authorities normally is to ensure access to adequate social housing to those who need it. This is by no means the same as exclusively granting ownership titles or

individual freehold titles to land. In fact, for many settlements on public land, individual land ownership may not be the best option.

Legal systems also vary regarding the legal recognition of ownership by adverse possession. Some countries require a judicial declaration and others, such as Peru, use administrative channels. Adverse possession of private land is often based on the social function of property: occupiers of someone's private property are eventually entitled to being recognized as the legitimate owners following a period of their continuous and pacific occupation. They, unlike the original landowner, have given a social function to the property. Local laws establish the specific conditions for operationalizing this right, such as duration of occupancy and maximum size of land to be adversely possessed.

Brazil's adverse possession policy, known as a special urban entitlement (*usucapiao especial urbano*) requires five years of uncontested occupation and is applicable up to 250m<sup>2</sup>. In Colombia, for cases where the possession was obtained irregularly without good faith or any fair titling, only three years are currently required with no area maximum. This rule applies only to social housing currently defined as being worth the equivalent of about US\$35,000, as defined by article 51 in the urban land reform act of 1989 (*Ley 9 de 1989 [Ley de reforma urbana]*).

Although this is a civil matter between private parties, the public authorities can support communities in having their land rights fully declared, for example, by providing them with technical, legal, and financial help. Whenever adverse possession rights apply, the public administrations need not expropriate the occupied land to promote its regularization, as the residents already have rights that only need administrative or judicial declaration.

The same rationale does not usually apply for occupations of public land. Unless

the legal system explicitly recognizes adverse possession of public property, regularization can be implemented by granting the occupiers tenure status other than freehold. Leasehold forms (such as those being used in Brazil) constitute real rights promoting tenure security and can be registered, transferred, or inherited. Leasehold and social rental housing are two valid alternatives that may be more suitable to the interests of both policy makers and residents of informal settlements. Privatizing public land is not necessary to fulfill the social right to housing; on the contrary, maintaining public ownership of land might well be the best way to guarantee the permanence of communities.

**ENSURING THE DURABILITY OF BENEFITS FOR THE POOR**

No specific form of land titling protects residents against pressures exerted by market forces. In some cases, increases in the value of legalized properties (especially when

located in central city areas) have prompted developers to encourage residents to sell their houses. Many residents have reportedly done so and some have then occupied public or private land illegally, thus starting the process over again. Accordingly, in Peru, in the Brazilian cities of Recife and Porto Alegre, and in Buenos Aires among other places, policy makers have restricted the transfer of newly legalized properties by requiring sales to be approved by residents' associations, or they have banned sales for several years. Such schemes have not worked out well and have merely generated new types of informal transactions (Angel et al. 2006).

Learning from these experiences, some local administrations have moved from focusing on the actions of current residents to seeking ways to guarantee that the land upgraded and legalized at public expense remains in use as housing for less-favored social groups. Rather than imposing constraints on future sales, public authorities use urban



**High- and middle-income residents of Rio de Janeiro expand penthouse apartments informally, with the expectation that they will be regularized later.**

planning regulations and land management tools to guarantee that low-income households continue to be in the majority in the regularized areas, thus minimizing “eviction by the market” or capital gain events.

Some Brazilian municipalities have created Special Zones of Social Interest (ZEIS) that include areas occupied by the consolidated informal settlements. In line with mechanisms of democratic management, each special zone has to approve its own urban regulations. This provides an opportunity to create land use and development procedures to prevent these newly legalized areas from being acquired by property developers and the traditional communities from being replaced by other socioeconomic groups.

The demarcation of ZEIS is a zoning strategy like those for special land uses (e.g., industrial districts or environmental protection zones) or to meet social needs (e.g., exclusive zones for residential use).

Interestingly, such zoning strategies have not been questioned in the same way that the demarcation of land for social housing has been.

A 2006 study of the ZEIS in Recife concluded that antigentrification zoning measures, such as limits on plot sizes, building heights, and number of plots allowed per individual, can significantly reduce development pressures in newly regularized communities when used in conjunction with titling programs (Angel et al. 2006). Rather than creating urban ghettos, as some critics argued, this approach has provided legal support to the poor communities. The special zones are compatible with any form of land titling, and some have recognized individual or collective freehold and leasehold rights. Such regularization of informal settlements may lead to sociospatial integration and guarantee the permanence of the communities.

**Low-rise informal settlements are protected from removal and redevelopment through the ZEIS program in Recife, Brazil.**





**A community meeting gives residents of an informal settlement in Guatemala an opportunity to share concerns and plans.**

**GENDER AND LAND RIGHTS**

Land regularization policies also address the rights of the women living in consolidated informal settlements (UN-HABITAT 2005). Women have long been active agents in the informal markets in Latin American cities, selling and buying land, building and renting dwellings, and developing and maintaining vibrant social and capital networks. In 2009, one-third of all Venezuelan households were headed by women. However, the legal recognition of women’s land rights is often a challenge, as legal systems have traditionally considered the man as the household head, and therefore presumed that the man controls property rights. This presumption is made more complicated by the frequently informal nature of marital relations in the region.

Although women tend to remain on the land with the children, legal systems often do not fully protect them. In some cases, customary traditions prevent women from inheriting land from their husbands or fathers, and they, with their children, have been

evicted from their homes and lands upon the death of their husbands. Other traditional statutory laws discriminate against women by not enabling wives to stop their husbands from selling land. If they divorce or are abandoned by their husbands, they have no legal right to the land. Even when women may legally own their land, patriarchal customs sometimes prevent them from making decisions about its use.

The recognition of women’s equal legal status in relation to land and property rights is an important objective, regardless of the legal nature of marital arrangements. In both Peru and Brazil, land titles have been given jointly to husbands and wives. Progressive judicial decisions have strengthened women’s land rights, such as by cancelling the man’s title when separation is due to domestic violence.

But, there is still a considerable way to go. In the aftermath of the 2007 earthquake in Peru, the government ignored the country’s decades-long tradition of recognizing women’s equal status regarding land

rights by offering a financial bonus for house reconstruction only to men who were officially considered to be heads of households, including in some cases ex-husbands. In other cases women have reportedly asked for their names to be removed from titles, for example in Mexico, because they feared retaliation from abusive husbands or some form of cultural discrimination.

### **ENVIRONMENTAL PROTECTION**

Many consolidated informal settlements have been formed in environmentally sensitive areas, including wetlands, water reservoirs, or steep slopes such as the hillsides of Rio de Janeiro, Caracas, Bogotá, and Medellín. In several cases, conflicts have emerged, with environmental values opposing public policies to regularize or legalize settlements.

In other cases, the environmental opposition may be a veil covering social prejudices against the urban poor, especially those living in central city areas. The same concern may not be articulated when the environmentally protected areas are occupied illegally by middle- and upper-income households. Nor are such concerns so strongly manifested when the informal settlements occupy environmentally sensitive areas on the urban periphery.

Of course, consolidated settlements need to be dealt with pragmatically. Finding solutions where environmental damage is minimized or compensated to some extent has required compromises. An interesting experience of regularization in an environmentally protected area of Santo André, Brazil, illustrates an agreement reached with the informal settlers to promote changes in their behavior to protect the watershed. The participatory process involved more than 10 stakeholder groups, including residents' associations, former landowners and devel-

opers, and the public administration. Residents have participated in the process by preventing further land occupation, planting trees, implementing several ecological measures, and by helping to finance the installation of local sewage treatment systems (van Horen 2001).

Other studies show that intrinsic environmental risk is relatively rare, and the problem is more often lack of risk management. Experience with the PRIMED program in Medellín, for example, has shown that whenever possible risk management strategies are more adequate and less costly than the physical relocation of the communities.

### **SUMMARY**

Providing secure tenure typically involves giving freehold title, but tenure takes many other forms—leasehold, collective ownership, and cooperatives—some of which may be more appropriate for particular situations in terms of enhancing the permanence of settlements. The design of regularization programs will also depend on the characteristics of the residents, the extent of their acquired rights, and the original public or private ownership status of the land. Many countries do not recognize adverse possession of public land or the uncompensated transfer of public land to private owners.

Maintaining neighborhood occupancy by deserving groups (most notably the poor) can be a challenge following upgrading, and some countries, such as Brazil, have taken special steps to maintain community integrity. Moreover, property rights of women often need special attention, as cultural practices may contradict their legal rights. Settlements in environmentally sensitive areas also can raise difficult tradeoffs between protecting the environment and maintaining the community.