



# Viet Nam

## Land administration

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The views presented in this paper are the consultant's and are not necessarily those of the Government of Australia or the Government of Viet Nam.

## Glossary

|       |   |
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| ADB   | Asian Development Bank                      |
| BOLUC | Building Ownership and Land use Certificate |
| ASEAN | Association of South-East Asian Nations     |
| CIDA  | Canadian International Development Agency   |
| CIEM  | Central Institute for Economic Management   |
| GDLA  | General Department for Land Administration  |
| JICA  | Japan International Cooperation Agency      |
| LL    | Law on Land of 1993                         |
| SIDA  | Swedish International Development Agency    |
| SOE   | State-owned enterprise                      |
| UNDP  | United Nations Development Programme        |

## Purpose

This working paper outlines some key issues and possible policy directions in the area of land administration in Viet Nam, along with suggested approaches to potential assistance in this area.

## Issues

Land reform in Viet Nam is extremely complex and littered with failures and abandoned projects. Nothing short of new and innovative approaches, based on detailed information, will be capable of stimulating sustainable reforms. The following discussion highlights the main issues likely to impact on aid interventions in the area of urban land reform, looking at both residential and 'commercial' land, where various anomalies form a significant constraint to private sector development.

## Sensitivities

Legal access to land excites debate and contests in all societies. In Viet Nam, the state is acutely aware that decolonisation struggles and ultimately its own legitimacy revolved around the equitable distribution of land. People's ownership and state management of land are central principles of Communist doctrine that underpin legal definitions of land 'ownership' and 'use'. Doctrinal issues are most evident in the regulation of rural and other income-producing land and less relevant to residential land. Finally, the land law regime in Viet Nam is exceedingly complex. An understanding of the information provided in the section 'Background' (later) is assumed in the following sections detailing land problems.

## Land problems

### Problems with the grant of land use certificates (titling)

Wars, regime change and weak local administration have induced land-titling chaos in Viet Nam's urban centers.<sup>1</sup> By 1999 only eleven percent of urban households in Hanoi had received land use certificates. Low conversion (from untitled to titled land use rights) was attributed by authorities to high land allotment fees (up to 20 per cent of the lands value). However, substantial fee reductions introduced by the 1998 Land Law amendments have only partially resolved this problem. Other explanations for low conversion rates are complex

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<sup>1</sup> See Tuong Lai 1996, 'Urban governance from a sociological approach', 4 *Vietnam Social Sciences*, 12, 21,22.

procedures, incomplete cadastral mapping and, more importantly, few substantive benefits conveyed by land titles.<sup>2</sup> For example:

- Not many urban occupiers have access to the kinds of title documents (usually issued by the *ancien regime*) recognised by land management authorities.
- There are few officials capable of certifying long term residency for those lacking title documents.
- Few urban zones have prepared conversion plans for those lacking approved land documents.
- Detailed cadastral maps do not cover the newer urban precincts.
- Some People's Committees have blocked claims made to recover property 'managed' by the state after 1954.
- Bribes are routinely requested to grant some title conversions.

More work is required to ascertain how (if at all) land-titling will affect the poor and women, the most vulnerable members of urban society. For example, under the existing informal land system, many bureaucrats benevolently exercise their discretionary powers to satisfy the housing needs of squatters and the urban poor.<sup>3</sup> By removing legal ambiguities, a uniform land-titling system will also remove the discretionary power of local officials to assist the poor.

The effect of land-titling on the rights of women (and non-paternal relatives) is equally problematic. Under the current system, land use rights are primarily allotted to the family head (usually the eldest male) and others living in the premises are noted on household registration forms attached to the title. Land-titling reforms should investigate whether the individualisation of land ownership that accompanies titling programs will diminish householder entitlements. This inquiry might examine how land management agencies treat titles bearing the name of only one householder.

#### Institutional attitudes to land-titling

*Central state:* The central state wants land-titling to extend the principle of 'land management' over all urban areas. It is currently difficult to control illegal construction and land transfers, because approximately 90 per cent of land users are unregistered. Just as importantly, the state sees land tax as a dependable

<sup>2</sup> See H. H. Van 1999, 'To complete the Grant of Land Use Certificate in urban areas by the 2001', *Troi Tre* (Youth), 4 April.

<sup>3</sup> Research suggests that in Ho Chi Minh City discretionary powers are routinely used to assist the poor. Nguyen Quang Vinh and Michael Leaf 1996, 'City life in the Village of Ghosts: a case study of popular housing in Ho Chi Minh City, Vietnam', 20 *Habitat International* 2, 175, 176; Trinh Duy Luan 1996, 'Nhưng Chieu Canh Kinh Te-Xa Hoi Trong Su Tien Hoa Cua Mo Hinh Nha O Do Thi Ha Noi' (Social and economic features of residential models in Hanoi), *Xa Hoi Hoc (Sociology Review)*, (1) 1.

(difficult to avoid) revenue source. Registration and titling systems greatly increase the reach and efficiency of land taxation.

The World Bank Report A (1999) speculated that the state is partially motivated to more closely regulate land through titling to realise Party policy, enunciated at the Sixth Party Congress in 1996, urging strengthened 'state land management'. This is a central ideological principle discussed in the section 'Background'.

Historically the GDLA has been primarily responsible for issuing land use right certificates for rural land and the Ministry of Construction issued building certificates evidencing building ownership in urban areas. In 1994 the GDLA arranged with the Ministry of Construction to sponsor the joint issue of land use rights and building certificates for urban land. The continuation of this practice requires the ongoing cooperation of the GDLA and Ministry of Construction.

*People's committees:* Local governments are generally ambivalent about land-titling. There is little public demand for the system and procedural clarity may reduce rent-seeking opportunities. In Ho Chi Minh City, Hanoi, Hai Phong and Da Nang housing departments supervised by the GDLA, and housing departments supervised by the Ministry of Construction, have been amalgamated to facilitate the issue of Building Ownership and Land use Certificates (BOLUC). The success of these amalgamations is crucial to future land-titling reforms.

*Foreign investors:* Most large corporate investors are reluctant to accept the risks associated with informal land transactions. They are concerned, moreover, that compensation payments for the residents of unregistered land resumed for foreign investors are complex and expensive. Only titled land is easily encumbered to secure loans and can be listed on searchable land title records. Mortgage laws that allow lenders to enforce security against encumbered land are also required.

*State-owned enterprises:* Most SOEs occupy titled land. However, as they rarely trade in land, or are required to secure loans, land titles are not especially important.

*Households/individuals:* There is a vibrant unofficial land market for untitled residential dwellings. A strong case can be made that compulsory land-titling would disadvantage many residential householders. Untitled land transactions incur no transfer tax (while titled land transfers are taxed at 4 per cent of the sale price<sup>4</sup>) and are sufficiently secure to justify large capital investments. From the state's perspective untitled land transfers avoid tax.

Since banks rarely lend for residential development, there is little incentive to pay land conversion and cadastral survey fees for land use right certificates.

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<sup>4</sup> Tax Law on Transfer of Land Use Rights 1999 and Decree 19 ND-CP 2000.

Residential occupiers currently raise funds through goldshops moneylenders, or more typically family and informal credit circles.

According to conventional economic theory, land-titling reduces transaction costs.<sup>5</sup> However, the assumptions underpinning this modelling may not obtain to small domestic businesses. The level of disputation surrounding untitled land is evidently very low, and these transactions avoid state transfer taxes<sup>6</sup> and legal fees. Further work is required to ascertain the risks associated with the informal market and the likely impact of industry-wide economic reforms.

The World Bank Report A (1999) speculates that land-titling would reduce the risk of owners losing land through fraud if land market information becomes publicly available through transparent registries. It also suggested that there is some evidence that titled land has a higher market value than equivalent untitled land. However, the report (p. 16) also notes that informal land-titling systems 'have merit as long as transactions are mostly between individuals who are members of the same community'. Land-titling primarily benefits those outside local communities such as foreign investors.

#### Problems with land use rights

The 1998 Land Law provides that the people own land, but lesser interests called 'land use rights' are allotted or leased to economic and political organisations, cooperatives and households/individuals. In contrast to land itself, outright ownership of buildings, and improvements to land, is permitted.

#### Tenure disjunction

Attempts to reconcile people's ownership with secure private land tenure have excited some legal anomalies. It is still unclear, for example, whether ownership of buildings automatically conveys rights to the substratum. Disjuncture between limited-tenure commercial leases and unlimited ownership over buildings remains a problem. Building ownership is absolute and unlimited in duration and does not require state transfer approval.<sup>7</sup> A less robust set of rights obtain to commercial leases, which have a limited duration of 20 to 50 years and are not transferable without state approval. Urban residential buildings are unaffected by this problem, because tenures (unlimited) coincide.

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<sup>5</sup> See Philip von Mehren and Tim Sawers 1992, 'Revitalizing the law and development movement: a case study of title in Thailand', 33 *Harvard International Law Journal* (1), 67–102.

<sup>6</sup> See Vietnam-Sweden Co-operation Programme on Land Administration Reform, Land Registration Project VIE 98/1-2, 'Revision of the Land Law and other issues', March 1998, 13.

<sup>7</sup> Civil Code 1995, articles 181, 443–445 (the state certifies, but does not approve house transfers).

### Condominium ownership

Under the existing system there is no capacity to issue land use rights for ‘airspace’, a prerequisite for titling condominiums and subdivided villas. This is especially important for occupants of villas taken over, and redistributed to the needy by the state after independence. Decree No. 61 CP 1994 outlines the Government policy of transferring ownership of state-owned apartments to civil servants. Moreover, by the year 2020 the Government plans to construct 20 million square metres of residential housing. In each case the development of strata-title law and model common property protocols is required.

### Unequal access to land use rights

The 1998 amendments to the Law on Land 1993 entrenched the unequal distribution of land use rights (*quyen su dung dat*). The classification of land use according to the legal status of occupants produces some market anomalies. For example, it is comparatively easy for entities registered under Decree 2 on Household Business 2000 (that is household businesses with a low market capitalisation) to mortgage hotels constructed on residential (allotted) land use rights. In contrast, hotels owned by companies, but constructed on short-term leasehold land are extremely difficult to mortgage. This means that where the hotel industry is unprofitable, Decree 2 entities can unofficially use buildings for any business permitted under applicable zoning provisions. Companies, however, must strictly use leasehold land for licensed purposes, otherwise their land use rights automatically revert to the state.

### Tenure period

In urban areas investors frequently consider that the terms of land leases are too short to allow long term investment decisions, and/or allow an opportunity to develop and sell business with commercially attractive residual terms. This may not be a significant problem for low-capital businesses.

### Land transfers

The state manages land by controlling the transfer of land use rights. This power has been devolved to peoples committees at the provincial and district levels. Provided transfer taxes are paid, transfer approval for urban residential land transfers is routinely given. Since commercial land use is treated as a ‘special means of production’ (see ‘Background’), transfer approval is based on state planning objectives. Official discretion is evidently frequently exercised to frustrate the distribution of land use rights in bankruptcy. Unauthorised land transfers, including subleasing, are punished by administrative sanctions.<sup>8</sup>

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<sup>8</sup> Decree No. 4 Sanctions Against Administrative Violations in the Area of Land Management and Use, 1997, article 5.arato h.



### Security interests

Only Vietnamese banks are currently permitted to mortgage land use rights. Foreign lenders are permitted to mortgage building rights, but this practice is risky because there is no certainty that land use rights in the substratum are transferable to the nominated local agent of the foreign lender (see Land Transfers above).

### Foreign investment

Special rules quarantine foreign investment entities from domestic land transactions. Foreign owned enterprises must, for example, lease land from state agencies. Leases used as capital contributions to joint ventures by Vietnamese parties are cancelled and reissued in the name of joint ventures. This practice enables licensing authorities to insert conditions directly pertaining to joint venture businesses. Since the Vietnamese party, rather than the joint venture, remains liable to pay rent it is unclear what happens in the event of default, or where the joint venture dissolves or is converted into a wholly owned foreign entity. These issues will need to be resolved if the state wishes to attract foreign capital to develop residential housing.

### Problems with land pricing

Since the people own, and the state manages land, in legal theory it has no market value (see Background below). Instead, the state has enacted statutory pricing formula for calculating land values.

According to a GDLA (1996) report, during periods of 'land fever' prices in the 'shadow' market can exceed statutory values by three or four hundred percent. Price differentials between state and market values generate incentives to corruptly allocate land (eg Thang Long Waterpark Case) or illegally convert land use. Commentators also suggest that many SOEs and the army 'illegally' convert industrial land into commercial and/or residential developments.

State price formulas generate anomalies in the calculation of compensation for compulsory acquisition of land for public purposes. For example, price differentials often require transferees to pay twice for land: once for land use fees and rents; and again to compensate occupiers for the differential between the 'shadow' market value and state frame values. Adding to the complexities, buildings scheduled for demolition in investment projects are valued at the same rate as those that will be renovated for further use.

Pricing differentials also hinder the acquisition of farmland for city expansion projects, as farmers are reluctant to accept rural prices for rezoned urban land.<sup>9</sup>

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<sup>9</sup> See Department of Land Administration, Hanoi People's Committee 1998, Report of Pilot Project on Land Valuation Calculation for Compensation in Hanoi, Hanoi, 12 October, 2, unpublished.

Even more problematic, since pricing formulae invest People's Committees with discretionary powers, is the fact that compensation paid for the resumption of land frequently varies according to the status and connection of land occupants.

The legal fiction that land has no market value, but buildings and improvements are marketable because they are capable of private ownership, means that housing values are ascertained in some cases without reference to underlying land values.

## Land management reforms

Since the enactment of the first unified Land Law in 1988, urban land administration has endeavoured to reconcile urban needs with land legislation that is preoccupied with rural policy (see 'Background'). If rural and urban land policies are further de-coupled, the following issues are pertinent:

- In the mixed-market economy, the socioeconomic planning function of 'state land management' should be primarily located in urban planning schemes formulated by Chief Architect Officials, rather than discretionary (asking-giving or *co che xin cho*) powers exercised by People's Committee housing and land departments.
- Some commentators suggest that recent amalgamations of urban housing and land departments have reduced the influence of Chief Architect Officials. This trend may further entrench 'state land management' at the expense of facilitative urban design controls.
- Planning schemes should be publicly available and sufficiently detailed to promote private land planning.
- Controls over environmental, health and safety issues should be consolidated into discrete legislation, instead of cases-by-case discretionary rules.
- Further clarification of the powers and responsibilities of land management agencies is required. A UNDP (1995) report indicated that land management is complicated by unclear divisions of responsibility at the central level between the Ministry of Construction and General Department of Land Administration. Central-local land management conflict is also deeply entrenched, as is 'unlawful' land allocation by People's Committees.<sup>10</sup>

Both Government reports and the press consistently indicate that discretionary powers allowing preferential land allotment and leasing, combined with vague

<sup>10</sup> The vernacular press is full of accounts of corruption scandals involving the 'unlawful' allocation of land. See, for example, Tran Quang Vu 1995, 'Xay Dung Nha Trai Phep, De Yen Phu va Tu Liem Ha Noi Bi Vi Pham Nghiem Trong: Lat Leo Trong 34 Giay Phep Lam Nha Tren De O Ha Noi Cua Ong Trinh Hong Trien, ('Illegal Housing Construction, Serious Violations in Yen Phu Dyke: Some Actions on the 34 Housing Licenses on the Yen Phu Dyke from Trinh Hong Trien'), *Dai Doan Ket (Great Unity)*, 6 January, 1, 6; *Dai Doa Kiet* 1998, (*Great Unity*) no. 91, November, 10; Dao Minh Khoa 2000, 'Ket Thuc Dieu Tra Vu An Thuy Cung Thang Long' (Completion of the Investigation of the Thang Long Water Park), *Bao Cong An Nhan Dan, (People's Police Gazette)*, 26 February 2000, 1, 3.

procedural rules, creates fertile ground for corruption. This involves small-scale bribery to legalise untitled land and authorise transfers, through to large-scale illegal allotment of state land. More precisely drafted land laws and land allotment and implementation rules will go some way to reducing administrative discretion and the opportunities for corruption.

No matter how carefully drafted, precise land laws and procedures can never entirely remove discretionary powers and opportunities for corruption. Indeed, the ‘rule paradox’ suggests there comes a point where greater procedural prescription actually increases corruption.<sup>11</sup> Consideration should be given to shifting from state allocation of land under the doctrine of ‘state land management’ to market allocation of rights-based land leases. This transformation shifts discretionary power from bureaucrats to the people. Without an accompanying shift to universal land-lease titles, land-titling and procedural reforms will do little on their own to alleviate this problem.

## Recommendations

The preceding analysis implies that without systemic normative and institutional changes to the land regime, land-titling will on its own generate few direct benefits, and may potentially harm some domestic land users. For example, it may adversely affect long term occupation rights of ‘squatters’ and ‘household’ rights of unregistered land occupants. A more complete land-titling database will however enhance land taxation and improve urban planning, providing indirect benefits to urban dwellers.

Ideally, land reforms will be far-reaching, and lead to a shift from a concessionary to a rights-based tenure system. One of the difficulties with the existing system is that despite constitutional and legal authority to transfer land use rights, vague administrative procedures coupled with the doctrine of ‘state land management’ impose an administrative consent on transfer. Previous land reform projects have concluded that unless the concessionary approach to land management changes, bureaucrats would continue to routinely disallow statutory rights to land.

Regrettably, comprehensive reform seems an unrealistic vision of system change. Systemic reform is immensely complex, involving not only normative and procedural change, but also institutional reconfiguration. A shift from a concessionary to a rights-based tenure system would simultaneously centralise state administrative powers and devolve more decision-making power to non-state players. These changes would unravel power structures built-up over several generations. Each stage of reform is likely to induce political conflict over the direction and pace of reform, engendering antireform power blocs.

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<sup>11</sup> See D.J. Galligan 1986, *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon Press, Oxford, pp. 34–5.

It seems more realistic to consider a series of staged changes, the precise nature of which will need to be determined in consultation with relevant Vietnamese stakeholders. This suggestion is further developed below.

Improvements in housing for poor communities can proceed without a significant land-titling exercise. Though the precise relationship between infrastructure development and the land regime will need to be further investigated, at this stage the main connection appears to lie in reforming land pricing for the compulsory acquisition of land for projects and introduce strata-titling. As previously mentioned, the allotment of land use rights certificates for new residential projects generates few legal problems.

## Reform strategies

The need to sequence reforms that flexibly respond to policy and institutional resistance is difficult to reconcile with the bias towards ‘decisive action’ in donor programs. Predetermined land reforms that are ‘user-friendly’ for foreign investors – particularly those that conform to ‘harmonised’ land-titling formulae – are unlikely to succeed. Nothing short of innovative, collaboratively designed and situationally informed interventions are likely to succeed.

While it is vital to retain a flexible approach to interventions of this kind, some broad approaches warrant consideration. Two types of reforms are possible within the existing sociopolitical settings.

- **Technical change:** The Viet Nam-Sweden Land Administration System Reform Program with the GDLA demonstrates that procedural and technical efficiencies are possible within the existing land use right regime. For example, market valuation formulas can be improved to more closely replicate ‘shadow markets’. Because reforms of this type largely interact with surface issues that require little (if any) ideological or doctrinal change, they are possible to achieve within medium-term time frames (five years).
  - Land-titling: Interventions designed within the existing legislative framework to accelerate land-titling fall within the category of technical change.
- **Limited normative change:** The poor record of previous land reform projects in inducing a shift from deeply held ideological commitments to ‘state land management’ towards a rights-based normative land tenure system, implies that normative change is extremely difficult. However, the passage of the Enterprise Law 1999 demonstrated that where the benefits to state socioeconomic objectives are clearly articulated, shifts from concessionary to normative regulation are possible. The concessionary market-entry principles in the Company Law 1990 were replaced with more liberal market access policies in the Enterprise Law 1999. Normative change should follow multi-stage processes:
  - familiarisation with new legal concepts and basic rules

- exchange of ideas with those conducting land-titling projects in other ASEAN countries
- allowing time for policy makers and land bureaucrats to internalise ideas and develop locally appropriate norms and adaptations (often in Viet Nam through experimentation with laws), and
- progressively upgrade to a system that is a functional counterpart of land tenure systems elsewhere in the region (eg ASEAN systems).

Multi-stage land reforms elsewhere in Asia suggest that time frames of 10–15 years are required where normative change is largely driven by host country initiatives.

The following points represent areas in which donor-led interventions in land administration should investigate. They are consistent with the constitutional principles of ‘People’s ownership’ and ‘state management’. The principal reform requires a shift from treating ‘land use rights’ as concessionary privileges, to inalienable and universal rights-based land leases.

Ideally, reforms should:

- **Move gradually to absorb the informal land system into the formal system.** This process should involve a careful study of informal practices and wherever possible use them as the template for the formal system. As land reforms elsewhere have demonstrated, where the informal system is treated as suboptimal and inappropriate, it has proved extremely resistant to change.
- **Abolish distinctions between types of urban land by creating leasehold interests for uniform fixed periods (eg 70 or 99 years).** These would be available for any type of land use and to any kind of land user. Legislation, rather than discretionary powers, should be used to determine the rights and obligations of land users. This reform is broadly in line with other institutional changes designed to minimise ‘asking-giving,’ discretionary regulation.
- **The state should not interfere with the negotiation between buyers and sellers and between borrowers and lenders.** Consistent with a recommendation made in the World Bank Report A1999 (p. 22) the state should cease ‘managing’ private land transactions.
- **Treat immovables such as buildings and improvements (trees and crops) as parts of the rights attached to land use rights.** This proposal abolishes the existing distinction between land use rights and house/building ownership.
- **De-couple rural and urban land policy by devolving to urban land users greater decision-making power over land use rights.**
- **Reduce planning powers vested in land allotment and leasing authorities.** Improve the transparency of land planning processes and increase the accuracy of, and detail contained in urban design schemes

- Publicly list and release unallotted state land, according to transparent urban design schemes and procedures (eg public auctions or tender).
- Make the unexpired terms of leases freely transferable at prices established by private treaty. Land prices used by the state to allot, lease and tax land transfers should reflect market values.
- Provide and strengthen the legal framework for forming and enforcing land transfer contracts, establishing a registration authority, registration procedures and revenue collection processes, penalties against illegal transactions, and protecting the urban poor and other vulnerable social groups.
- Strengthen the system for resolving housing disputes. Since BOLUCs cannot be issued where land titles and/or housing ownership is disputed, it is imperative to improve mediation and court dispute resolution processes.
- Formulate a legal, procedural and institutional framework for the ownership of condominiums and subdivisions of buildings. This proposal addresses a need to legally register individual subdivisions within state-owned apartments and villas and develop model by-laws to regulate the day-to-day management of building maintenance of commonly used areas.
- Deregulate land financing and mortgaging.
- Clarify the powers governing, and compensation paid by state authorises compulsorily acquiring private land use rights for public purposes. Clear criteria delineating the grounds for compulsory acquisition, which are capable of being challenged in the administrative court are urgently required. Moreover, the state should move to a policy of paying market value for compensation.
- Consolidate land laws in a code.

### Selecting institutional partners

A World Bank (1992) report reviewing land-titling projects concluded, ‘the institutional dimension is a most or the most demanding aspect of titling projects.’ Others argue that inducing systemic land reform in urban areas is more difficult than in rural areas because it has to overcome urban design, building approval, taxation and many other stakeholder interests.<sup>12</sup> The following discussion evaluates some of the institutional players on the Vietnamese land management scene.

- *GDLA*: This body has the authority to formulate, propose and implement, but not decide land policy. Only the Party and Prime Minister determine land policy. It is known to favour accelerating land-titling, but as a ‘conservative’ body deeply infused with the ‘state managerial’ ethos, it does not support

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<sup>12</sup> See L. Holstein 1996, *Towards Best Practice from World Bank Experience in Land Tiling and Registration*, Orlando Conference Paper, 8.

systemic change. It also lacks the political authority to impose its policies and regulations on other ministries. The World Bank A (1999, p. 25) report recommends the decentralisation of both land title registration and powers to approve allotment and transfers to the district/commune level. This proposal will substantially reduce the power of, and revenue available to the GDLA, and as such is likely to encounter *institutional* resistance. Moreover, the report (p. 31) indicted that GDLA opposes a shift from cadastral land title books to duplicate certificates a title, a key element in the land-titling project. Finally, the report noted that the GDLA did not support simultaneous reform of secondary (mortgage and transfer) registration with primary (land title) registration. The low priority accorded to secondary registration of non-state land transactions supports the contention that the GDLA view land administration through the lens of 'state land management', rather than market-based land allocation.

- *Ministry of Finance*: The Ministry of Finance should be directly involved in any reforms involving the impact of tax policy on land occupants and changes to the land valuation regime.
- *Line ministries*: Since many line ministries, (especially the Ministries of Construction and Agriculture) derive income from large tracts of land, they have resisted movement towards a land tenure system. Commentators believe that some ministries routinely ignore GDLA regulations governing land use conversion and sale. By allowing representatives from different ministries to participate in land reform proposal, pilot projects in Hai Phong and Ho Chi Minh City may stimulate a bipartisan approach.
- *People's Committees*: More than any other state organ, People's Committees are the major players in the land management system, with the most to lose from a shift from discretionary regulation towards universal land tenure rights.

Reforms of this complexity will require policy changes by the party-state, backed by a strong commitment to overcome institutional resistance. Therefore, donors should work separately or simultaneously with a policy development body outside of the land administration orbit with links to central ministries, especially the Prime Minister. CIEM would be one such partner. It has an established research reputation, an interest in land reform for private businesses (an AusAID governance objective) and acts as a policy moderator, informing and challenging institutional positions.

#### Need for further background research

- Several multilateral and bilateral donors have studied various aspects of land administration in Viet Nam. Though fragmented, reports produced by donors contain valuable lessons about the compatibility between donor country land management practices, and Vietnamese institutional and social conditions. It is expected that a summary of available information will minimise

duplication, the chance of repeating previous mistakes and provide a background for devising further interventions.

- The Vietnamese vernacular press has for many years discussed legal and social problems concerning urban housing and land. A series of case studies drawn from these sources will provide valuable insights into the nature of, and social sensitivities surrounding urban land issues.
- In order to identify the main issues, institutional players, sensitivities, and home-grown solutions, interventions should be informed by detailed interviews with land management officials, land users/brokers and the donor community.

#### Substantive areas requiring further research

- Party-state land management policy. What is the current position on deregulation in market pricing, land transfers and mortgaging. This information may be difficult to glean in the run-up to the Ninth Party Congress.
- If party-state policy adheres to the doctrine of 'state land management' what affect will increased state control through land-titling have on the private entitlements of land users and the development of land markets?
- Detailed statistics governing the issue of BOLUCs in urban areas.
- Access to land use rights by unregistered household members (especially women and maternal relatives).
- How will prescriptive rights (acquired through long term use) and customary rights be recognised and recorded in registration systems?
- The compatibility of normative practices in the informal land system with a formal land system? Particular attention should be given to the operation of the informal land transfer system, and how land lease and allocation processes in the formal system impact on poorly connected and/or resourced householders and businesses.
- The institutional relationship between the GDLA and Ministry of Construction and the success of land and housing department mergers in Hai Phong and Ho Chi Minh City peoples committees.
- The protection (if any) land use rights convey to poor householders from compulsory acquisition of land by the state/and or private entities.
- Statistics and case studies regarding the resolution of housing disputes, both informally and through the courts.



## Suggested action plan

### Project identification

- Review and synthesise lessons learnt by previous land reform projects and land law issues discussed in the vernacular press. Ideally this work should be carried out before, and be used to plan the project identification mission.
- Identify the various technical (eg land-titling ) and normative reforms that have been proposed in Party policies, and by the Prime Minister's Office, GDLA, key line ministries (ie: Ministry of Construction), Peoples Committees and Chief Architects offices.
- Evaluate the impact that each of these proposed reforms will have on the urban poor-residential and commercial land users.

### Project feasibility and design

- Identify appropriate counterparts.
- If thought appropriate, collaboratively design a project where technical reforms are primarily (though not exclusively) located in the GDLA and peoples committees and normative change is investigated by a research institution (eg CIEM).
- Reforms designed to gradually change land use policy in discrete economic areas would be both strategically realisable and comport with a core AusAID governance objective of making the land regime more conducive to private sector development.

## Background

### Land use rights

#### Origins and development

Despite their ancient origins, many urban centres in Viet Nam were radically changed by colonisation. French records show that by the declaration of independence in 1945, 'modern' urban planning, cadastral maps and land-titling systems covered most of Hanoi, Hai Phong and Saigon. The Democratic Republic of Viet Nam introduced three types of land ownership in the 1960 Constitution--state, private and cooperative ownership. Though private ownership of income producing rural and urban land was theoretically possible, in practice it was either nationalised or converted into cooperatives (*Land Reform Law 1953*).

Socialist economic theory distinguished income and non-income producing land. Income producing land was treated as a 'special means of production' (*tu lieu san xuat dac biet*), and along with state-owned enterprises was 'managed' according to state production plans. Although, non-income producing residential land was also 'allocated' and 'managed' according to state needs, it was not as tightly controlled as 'productive' land. The state-owned large tracts of urban land confiscated (*tich tu*) from the 'colonialists, traitors and reactionaries'. Those considered wealthy, but non-exploitive, were permitted to retain technical 'ownership' of commercial properties, which were leased to the state for nominal rents. Residents of large villas were encouraged to exchange their houses for smaller premises or accommodate other families. For the majority, socialist land management did not (until 1980) affect house ownership or occupancy rights.

Eventually practice and theory converged in the 1980 Constitution, which vested all rights in land to the state. This principle appeared in the 1988 Land Law, but was changed to 'people's ownership' and 'state management' in the 1992 Constitution and 1993 Land Law. Since the central and local government exercise the 'the right of land ownership' on behalf of the people, they also have rights to possess, use and dispose of land. The Law on Land of 1993 (LL) set out six main principles governing land: (1) land belongs to the entire people;<sup>13</sup> (2) is uniformly administered by the state; (3) which promotes effective and economical usage. Further, (4) the state protects agricultural land; (5) encourages investment in land; and (6) stipulates the value of land. While retaining ultimate control over legislation and policy, the central state has devolved land management to People's Committees. City level People's Committees, for example, possess broad discretionary powers to allot land use rights in urban

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<sup>13</sup> Land on Law art. 1 (1993).

areas. Local authorities are also responsible for promulgating zoning and land use regulations, registration and settling certain types of land use disputes.<sup>14</sup>

As a concession to the emerging mixed market economy, the Land Law 1993 recognised various private interests in land, which can be transferred, leased and encumbered, without disturbing the underlying principle of state ownership of land. These rights were extended and clarified by the 1998 amendment to the Land Law. Land use rights (*quyen su dung dat*) convey extensive occupation, disposal (*vat quyen*)<sup>15</sup> and encumbrance rights. Private ownership of immovables other than land, such as building and trees is permitted under the Civil Code (articles 172–205).

Maintaining the socialist distinction between income and non-income producing land, authorities allocate land for urban residential use on a ‘stable long-term basis.’ Land used for income production, is in contrast, allotted or leased for short periods determined by business production plans.

### Access to land

There are three methods of gaining access to land – namely, allotments, leasing and transfers.

### Allotment

City People’s Committees allot land in urban areas (LL, article 23). This discretionary power is circumscribed by urban planning designs contained in city master plans, business feasibility plans approved by state authorities and socioeconomic policies. Since most urban land is currently being used, allotments only take place where large parcels of state land are subdivided, compulsorily acquired land is reallocated and ‘unofficial land’ is converted to land use rights.

### Allotted and leased land use rights

Although the distinction is not officially recognised in the Land Law 1993, in practice there are two kinds of land use rights, namely ‘allotted’ and ‘leased land’.

‘Allotted land’ (*giao dat*) is the highest form of land use rights. It is only available for non-commercial organisations (unusually political organisations), family households and individuals. Though falling short of full ownership, land allotted for residential use conveys rights in perpetuity to transfer, bequeath,

<sup>14</sup> Law on Land arts. 8, 13-14 (1993).

<sup>15</sup> See Ha Mai Hien, *Discussion on the Ways of Exercising Ownership in Our Country* NHA NUOC VA PHAP LUAT [STATE AND LAW] 2, 35, 37-38 (1995). (These rights approximate Western rights *in rem*.)

lease, and mortgage.<sup>16</sup> After paying an initial land allocation fee, no further state charges apply. In practice, if not legal theory, allotted land differs little from Western freehold estates. Land is also allotted to commercial organisations for infrastructure projects; however, the full range of rights is only granted where fees are prepaid (LL 1998, article 78c).

Commercial organisations (including foreign investors) and households using land for commercial purposes, other than for infrastructure development, are granted leases (LL 1998, article 78d). The rights conveyed by leases depend on the quantum of rent prepayment. For example, commercial organisations paying rent annually are granted rights to mortgage and transfer the unexpired term of leaseholds. Where the entire rental is prepaid, additional rights to sublease or contribute the leasehold as capital for a foreign joint venture are granted.<sup>17</sup> The duration of leases is determined according to business plans that rarely extend beyond 20 years (50 years maximum).

### Land transfers

Private access to urban residential land in both official and unofficial land markets is primarily gained through land transfers. Since land is ‘owned by the people’, legislation refers to land ‘transfers’ (*chuyen nhuong*), rather than buying and selling. Although, the Civil Code (article 694) requires the transfer of land use rights to be based on price formula set by the Ministry of Finance (see the discussion below), in practice, both officially registered and unregistered land is routinely bought and sold according to market prices.

Unofficial land (unregistered land) is bought and sold through land brokers. In most cases, *phuong* (ward) level People’s Committees stamp short sale notes signed by the parties. The purpose of the stamp is not to validate the transfer, but merely certify that that vendor has a residency permit for the demised premises. Seemingly oblivious to the legal uncertainty surrounding these transitions, unofficial land transactions generate few disputes and sustain a vibrant housing market.

In sum, the benefits attached to land use rights depend on both the land use purpose and identity of land users. The highest rights are granted to household/individuals for non-income producing land use, and consistent with socialist economic theory, the lowest rights are given to companies (especially foreign entities) generating profit. Since land use rights cannot be transferred without state permission, they more closely resemble concessionary privileges

<sup>16</sup> Law on Land 1993 (amended 1998); Decree No. 61 – CP on Dwelling House Purchase and Sale arts. 3-4 (Jul. 5, 1994); Decree No. 85-CP Prescribing The Implementation of the Ordinance on the Rights and Obligations of Domestic Organizations with Land Assigned or Leased by the State art. 11 (Dec. 17, 1996).

<sup>17</sup> See Law on Foreign Investment 1996; Decree No. 10 ND-CP on a Number of Measures to Encourage and Guarantee Foreign Direct Investment Activities in Vietnam, 1998, article 17, 18. Additional rights are only granted where leases have more than five years left to run.

(known in Viet Nam as the ‘asking–giving’ or *co che xin cho* system) than land tenure rights.

### Land-titling

There are two methods of acquiring land use right certificates: one, land use right certificates are issued when People’s Committees allot and lease urban land; two, in some circumstances those occupying untitled residential land can apply for the allotment of land use rights. Applicants are required to either provided documentary evidence of officially recognised land documents, or demonstrate long term occupation.<sup>18</sup> Land registration boards comprised of *phuong* and *xa* level People’s Committee officials certify the validity of land title documents and long term residency. Evaluations are based on lists of ‘approved’ land title documents issued by the General Department of Land Administration and ‘studies’ conducted by land registration boards. Provincial/city cadastral departments assess certifications. These bodies then advise People’s Committees whether to allot land use right certificates. Since 1994 urban residential land use right certificates are issued together with house ownership certificates in ‘red books’ (*so do*) or BOLUCs jointly issued by the GDLA and the Ministry of Construction.

### State land management

#### Doctrine outline

The axiom that the state has a duty to ‘manage’ (*quan ly*) land underlies all land laws and policies. Socialist doctrine treats land, along with other income producing resources, as ‘special means of production’ (*tu lieu san xuat dac biet*) that must be managed by the state to ensure maximum productivity.<sup>19</sup> Long after central planning was dismantled in the commodity market, the Marxist–Leninist belief in the superiority of state-directed allocation remains entrenched in ‘state land management’ (*quan ly Nha nuoc ve dat dai*). The state bifurcates income and non-income producing land to ensure that businesses comply with state directed economic and social policy. Bui Xuan Son, Party Central Committee Member and Director of the General Department of Land Administration recently reiterated the centrality of ‘state land management’ to government policies.

There are seven basic principles of state land management:

- land belongs to people
- uniform land management

<sup>18</sup> Circular No. 346 TT-TTDCDC Guiding the Procedures for Land Registration, Compiling Cadastral Dossiers and Granting Land Tenure Certificates, 1998 (General Department of Land Administration).

<sup>19</sup> See Bui Xuan Son 1999, ‘On the present situation of land administration and exploitation’ *Tap Chi Cong San* (4) February, 45–8.

- use land for the right purpose (properly) (*hop ly*)
- strictly protect agricultural land
- enrich land (*lam quau* or *boi bo*)
- environmental protection, and
- shared benefits of land (*quyen cong bang*).

They arose out of and largely reflect issues concerning agricultural collectivisation. Justification for continuing ‘state land management’ after Resolution 10 dissolved rural collectives, flows from the concern that productivity and the equitable distribution of agricultural land is vital for national food security. The state’s preoccupation with rural land policy is also attributable to the bifurcated urban–rural land administration. Cadastral departments regulating rural land historically dominated land law drafting committees, to the neglect of urban land issues emanating from city People’s Committees and the Ministry of Construction. Rural orientated land management policies formulated by the Cadastral Department were enacted into Temporary Decree No 210 in 1979. The Ministry of Construction did not apply the policies in this law to urban areas until the 1988 Land Law imposed rural-orientated land policies over the entire country.

#### Land management classifications

Land is classified into six categories. Agriculture, forestry, rural residential, urban residential, specialist use and unused land. Only city/provincial People’s Committees have the power to change land categories. Within each category, land use rights are issued for specific purposes. For example, urban residential land should not be used for commercial purposes. In reality, the ground floors of numerous residential premises fronting major roadways are used for commercial purposes. Contrasting with the permissive treatment of residential land, leases granted to ‘economic organisations’ contain prescriptive land use clauses. Failure to comply with leasehold conditions attracts administrative penalties and/or leasehold termination.<sup>20</sup>

#### Land markets

The buying and selling of urban residential land/housing continued throughout the socialist period. Personal networks in the ‘shadow economy’ broker land markets. Though, ‘shadow markets’ could not have existed without the tacit approval of local authorities, indiscreet sales resulted in the ‘voluntary’ surrender of ‘surplus’ land. Even after the ‘nationalisation’ of private land in 1980, informal markets for urban housing continued.

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<sup>20</sup> Decree No. 4 CP Sanctioning Administrative Violations in the Area of Land Management and Use 1997, article 1.

The colonial notion of home ownership deeply penetrated popular attitudes to land. The state tacitly accepted the commodification of urban residential, but not commercial land. It is estimated that approximately ninety five percent of household land in Hanoi is bought and sold outside state law.<sup>21</sup> Equivalent informal markets exist in other major cities, including Ho Chi Minh City.

According to Marxist–Leninist theory, because land is owned by the people and managed by the state it has no market value. This maxim does not preclude the existence of land use right markets, however, the state also monopolies the valuation of land use rights. Legal theory also requires commodities to possess two qualities, *gia tri* (value) and *gia tri su dung* (consumption value). Since land is a special (*dac biet*) commodity and can not be consumed, it is not a marketable commodity.

In reconciling legal theory with reality, the state concedes that in mixed-market economies ‘land is commercial’ (*dat dai tro nen co gia*) and its value reflects ‘economic mechanisms’ (*co che kinh te*). Price (*gia*) formulas devised by the Ministry of Finance are used to determine the fees charged for land allotments, leases and transfers and compensation paid for compulsory acquisition and taxation. Decree No. 87 CP Stipulating the Price List Governing Categories of Land 1994 established price frames for agricultural, forestry, rural residential, urban fringe and urban land. Urban land values are based on city classifications (there are five classes of cities), potential for business profitability, infrastructure and location (proximity to city centers, major roads, etc.). In other words, pricing formula attempt to ‘scientifically’ replicate market price indicators.

Acknowledging that centrally fixed prices may not reflect local conditions, People’s Committees are permitted to raise or lower frame prices by 50 per cent.<sup>22</sup> Ironically, local price variations are based on market rates in the unofficial ‘shadow’ land market. The state also stipulates that prices for horizontal land transfers should reflect state pricing formula.<sup>23</sup>

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<sup>21</sup> See Institute of Law Research 1999, ‘The Social Research on Household and Land Use Rights in Hanoi City in 1998’, Ministry of Justice, Hanoi, 57.

<sup>22</sup> Decree No. 22 on Compensation for Damage when the State Recovers Land for National Defence, Security and Public Interests 1998, article 8.

<sup>23</sup> Civil Code 1995, article 694.

## Selected donor projects

- In 1991 a UNDP-funded project commenced with the following objectives:
  - completion of a national cadastral map of all land parcels in Viet Nam
  - establishing an integrated national land registration system
  - issuing an estimated 80 million certificates of title
  - training staff to manage Viet Nam’s Land Management and Land Registration System, and
  - developing a framework to permit the application of modern technology to the Land Management

In 1995 the project was abandoned.

- A SIDA funded project is currently working with the GDLA to research land pricing policy and rural land-titling.
- Various other donors including JICA and the Netherlands Development Institute have worked on land policy initiatives with GDLA and provincial People’s Committees.
- The UNDP, with Swiss funding, has been developing an urban environmental and planning project in Hanoi: VIE/97/007 UNDP.
- World Bank, with Department of Land Administration, Government of Western Australia and New South Wales Land Titles International, Implementation of Land Policies (TF29167) 1999.
- The ADB is funding a provincial towns upgrading project involving land administration.



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