Government-owned Land and Other Immovable Property: Policy and Regulatory Framework

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Background

Recent international research and the global crisis in public finance revealed that efficient, effective, and reasonably risk-free land management by governments is not feasible without proper policy and regulatory frameworks. Moreover, detailed analysis of land management in several countries, including Kosovo, Macedonia, and Serbia, provided numerous examples illustrating a fundamental fact: Regulations of land management typically are distorted, in the sense of overregulating on some issues and not regulating on others at all.

In many countries where the legislation on public land and property remains acutely transitional, there is a window of opportunity for utilizing international experiences for the country’s benefit—in particular, for introducing well-rounded and well-balanced regulations that would avoid typical distortions and allow for deploying the public wealth concentrated in land and property for public benefits.

Purpose of This Document

This document is addressed to policymakers, legislators, and their advisers in countries that are embarking on revising their land governance as it deals with government-owned land. The purpose is to suggest a well-balanced policy and regulatory framework for managing government-owned land and other real estate (buildings, structures), building upon a generalization of relevant international experiences to date. This framework does not consider the issue of property restitution and other issues of property reform. If the country still needs to design and codify property rights, their architecture should be the subject of a special effort.

Key Elements of the Framework

Standard regulatory instruments that governments can use include the following:

- **Laws and ordinances** issued by the legislative branches of government (central and municipal, respectively),

- **Bylaws, administrative instructions, and decisions** issued by the executive branch (prime minister or line minister at the central government level and mayor at the local government level), and
“Policies” and “guidelines” as recommended but not necessarily mandatory; their implementation can be reinforced and encouraged by incentives, and if the incentives are strong enough, following these rules becomes imperative in any practical sense.

Any complete policy and regulatory framework should address three things:

- Define key elements of the subject area that should be regulated,
- Suggest, on the conceptual level, what the regulation should achieve, and
- Define which level of government should regulate on each key element and by which type of document (legislative, executive, or policy/guideline).

However, before municipal land and property can be regulated as a specific form of government property, it should be defined and established, which, again, is a subject for property reform.

Further, this document does not address the issue of how government-owned property should be divided between the state and local governments. One would hope that the general principles that served well in most postsocialist countries can be applied as needed: (i) The state retains only land or property explicitly needed for performance of state functions and state-owned enterprises and land with a special status such as national parks, while the rest becomes municipal property by default; and (ii) partition of state and municipal property will be as simple as possible.

Finally, international experiences suggest that many regulations on land management at the local government level work better (or at all) if the central government was able to apply similar requirements to its own ministries and other state entities first.

1. **Key Provisions to Stipulate in National Laws**

This section lists main principles/rules that should be formulated in national laws. It also provides some clarifications and comments on these rules, in the form of notes.

1.1 **Inventorying and reporting:**

a. Each ministry or agency of the central government is obliged to develop and maintain a list of properties under its control (in “use”) directly, along with a list of transactions with such properties. They are also responsible for similar documents to be prepared by all public enterprises they established.

b. Local governments: There must be similar provisions regarding inventorying property under ownership or use by municipalities and their municipal public enterprises, and inventorying transactions.

c. The inventory records and transaction records must be open to the public.

d. Summary data on property holdings and transactions must be reported as a part of annual budget approval cycle, at both central and local government levels.

1.2. **Internal and external audits:**
a. Management of state and municipal land and property by state agencies, local
governments, and public enterprises should be subject to periodic internal and
external audits by authorized bodies or companies.

b. The Ministry of Finance should issue guidance on such audits for both state and
local governments.

1.3. Introduction of partial rights for both state and municipal property:

a. Both state and local governments should be able to allocate partial rights
associated with land and property they own, such as air rights, underground
rights, and right-of-way and other easements, along with the right to use the
private sector for managing government property.

*Note:* In particular, the ability of local governments to grant partial rights
(e.g., air rights, underground rights) for municipally owned land is
critically important for intensifying economic density of land use in cities
and for increasing municipal revenues from granting such rights under
termed arrangements (i.e., leases and concessions).

b. Holders of the partial rights should be subject to standard urban planning
regulations applicable to their rights (e.g., if the holder of the air right builds a
structure above a railroad, the holder must comply with the height limits on the
site).

1.4 Types of acquisition transactions and rules of acquisition:

The language of the law should be broad enough and explicitly allow for transactions not
specifically listed in the law, as long as they comply with general principles prescribed by
the law.

a. Voluntary purchases in ownership or long-term leases from the private sector
   - Preapproved by the central government or local council;
   - Part of a central agency’s or municipal capital investment plan;
   - Justification, with cost-benefit analysis for the acquisition/long-term lease
     presented to the preapproving body as a background;
   - Acquisition budget allocated or financing (borrowing) approved as an element of
     the preapproval process;
   - If a location of a facility for which the acquisition is conducted is flexible, the
     acquisition should be conducted through open competitive procurement; not less
     than 60 days between the announcement of a land/property specification and
deadline for proposals; acquisition at the lowest price offered, assuming the offer
     complies with specifications;
   - If a location is predefined (bridge construction), a negotiated price of the
     acquisition should be justified by cost-benefit analysis of options.

b. Involuntary takings (expropriation)
   - Permitted for public uses only (roads, other core infrastructure facilities, etc.) and
     only if:
- It is demonstrated that government does not own land/property that can be reused for the required purpose.
- Negotiations regarding voluntary acquisition were conducted and did not succeed.
  - Preapproved within the same framework as voluntary purchases, with additions for reflecting the above remarks on involuntary takings;
  - At market value of property and business, plus relocation assistance/livelihood replacement.

c. Taking donations
  - Accepting donated land/property must be preapproved by the Council of Ministers (for a donation to the state) or local council (for the donation to the local government).
  - Preapproval must be based on a justification presented by the executive branch; the justification should contain the cost-benefit analysis of the scenario of accepting and holding the donated land/property versus not accepting it.

d. Land/property exchange between government entities
  - Preapproved within the same framework as voluntary purchases or disposals;
  - All properties involved in the exchange are valued at the market value, and the difference should be paid in a monetary equivalent.

e. Mandatory dedication of a part of newly subdivided private land for public uses, as municipal property (e.g., roads)
  - Allowed by law, if a private site to be subdivided is larger than a certain threshold. Both the threshold and details must be defined in local ordinances.

1.5 Disposition of government land and other real estate (i.e., sales in private ownership and alienation of partial rights as defined in the table in item 1.8), both state- and municipally owned, to the private sector:

a. General procedural rules
  - Disposition must be preapproved as part of a disposition program by the state government (for state property) or by local council (for municipal property).
  - Disposition must go through an open public competition, with the highest offered price winning.
  - After-competition price discounts for a winner are not allowed.
  - For sales and all forms of alienation of long-term partial rights in land and property to the private sector (examples in item 1.8), the duration of public procurement should be not less than 40 days.
  - Both central government and local governments should adopt and make publically available regulations that define the disposition process and rules, for state and municipal property respectively. For state property, this should be a bylaw mandatory for all government agencies; for local governments, this should be a local ordinance adopted by the local council.
  - Noncompetitive disposition is allowed for the cases specially defined in a law.
  - Other exceptions can be made according to the rules defined in item 1.5.c.
b. Disposition at market value
- Sales and all forms of alienation of long-term partial rights in land and property to the private sector (leases, concessions, etc.; examples in item 1.8) should be in exchange for the government obtaining the monetary equivalent of the market value of these rights or the economic value measured differently (e.g., fair market value), if the use of the other measurement is authorized by a special decree of the central government.
- Exceptions can be made according to the rules defined in item 1.5.c.

c. Exceptions: noncompetitive disposition and disposition below market value
- Sale and alienation of long-term partial rights of specific state-owned land and other real estate without competition or below market value require a preapproval by the central government. A request should be prepared by the executive branch and should demonstrate the economic justification of such disposition.
- Sale and alienation of long-term partial rights of specific municipally owned land and other real estate without competition or below market value requires preapproval by the local council, as part of a special location-specific program adopted in the local ordinance. The program can be adopted only on the basis of a justification for each location (address, block, etc.) and after being a subject of public display and hearing for not less than 30 days.

Notes:
1) The concept is that in a democratic society, local governments should have the right to decide whether it is beneficial for their citizens and settlements to dispose of a specific parcel or property at a below-market price or without public competition. However, such cases must (i) be preapproved by local assemblies whose members are accountable to their electorates, (ii) have rational written justification that demonstrates economic or social benefits from such a disposition, and (iii) be exposed—including the written justification—to the public and discussed at public hearings before they are approved.
2) Specific reasons for granting such exceptions by local governments can vary and should not be limited by mandatory documents of the central government. In many countries, the following cases can be expected:
   - Intention to use a specific area of a city (“employment zone”) for stimulating job creation, thus allocating land in a long-term lease at zero price in exchange for a contractual obligation to create a specified number of jobs in a specified period.
   - Intention to conduct a competition among developers for the right to build on a prominent land site, which will have an impact on the visual image of the cityscape or requires specific expertise for delivering a complex mixed-use development in an urban setting. In such cases, the selection of a winner would be based on multiple criteria (not price for land alone), which may include the reputation of a lead architect on a bidding team, the quality of a conceptual
design, the bidder’s experience with projects of similar complexity, and so on. Such multicriteria selection of a winner is common in modern cities.

- Rules for competitive and noncompetitive allocation of short-term leases, as well as short-term contractual engagements of the private sector in various aspects of managing government property, should be established by the central government and local assemblies for alienation of state and municipal property, respectively, in a decree and local ordinances, respectively.

- For cases when land/property fails to be disposed of at open public competition due to lack of bidders, the central government and local assemblies may establish rules for extensions of deadlines for the competition or “over-the-counter” sales and alienation of such properties.

  Note: This approach is used internationally: If a land site/property is not sold or alienated in open competition, the owner (state or local government) should have an option to sell it at the price asked at the auction to any buyer applying later (over-the-counter disposition). This does not preclude the alternative of conducting a new auction.

1.6 Contribution of state or municipal property (land, etc.) in joint ventures (business entities, companies) and public enterprises:

a. Contributions to business companies/joint ventures

  - Contribution is allowed only for delivering core services on behalf of the government and in quantities needed for such services.
  - A list of specific land sites/properties to contribute should be preapproved by the Council of Ministers (for state property) or local council (for municipal property) based on an economic justification of the contribution (cost-benefit analysis) as a part of preapproval for participation in a joint venture/company. The list of these assets should become a part of the company’s record and reporting. The list should also be recorded in the list of transactions with government properties mentioned in item 1.1.
  - At the moment of contributing land/property in a company/joint venture, land and other property assets contributed by a government partner should be valued at market value. The private partner’s asset contribution should be valued at market value as well. These values should be included, proportionally, in the value of shares received by each partner. This implies that (i) the initial value of government shares cannot be less than the market value of the land/property contributed, and (ii) the initial shares of the government and private partner should be proportional to market value or the assets they contributed.
  - The Ministry of Finance should develop rules for valuation/pricing of the government contribution and shares in such deals.

b. Allocation to public enterprises
Allocation is allowed only for delivering core services on behalf of the government and only in quantities needed for such services.

Allocation should be preapproved by the central government/Council of Ministers (for state property) or local council (for municipal property) based on an economic justification (cost-benefit analysis) of the contribution.

The property right transferred is “management right” or lease only, and details of the rights granted to the public enterprise should be defined in a separate contract on property management/use, signed between the government and its public enterprise.

Land and other property contributed should be valued at the market value of the right granted. This transaction should be recorded in the catalog of annual transactions mentioned in item 1.1.

The public enterprise must report on the value of the government property under its control in its annual report.

Sale and alienation of long-term partial rights in land and other real estate by the public enterprise, along with contribution in subsidiaries, are subject to the same rules as alienation by the government itself (preapproval and other elements in items 1.4 and 1.5).

1.7. Use of government land/property as collateral for borrowing, directly or indirectly:

a. Preapproved by the central government (for state property) or by a local council (for municipal property) is part of the approval process for using any specific borrowing instrument (e.g., loan, bond issue). This applies to land/property held by governments directly and by public enterprises.

b. The preapproval requirement should apply to any forms of encumbrance on government land/property, including its use as collateral for bank loans, contractual long-term obligations to use property-generated income for repaying revenue bonds, and so on.

c. Each particular long-term encumbrance must be recorded in a special section of the transaction register stipulated in item 1.1. They all should be reported on an annual basis, along with other transactions.

1.8 Summary on transactions and their rules:

<table>
<thead>
<tr>
<th>Transaction</th>
<th>Rules</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acquisition:</td>
<td></td>
</tr>
<tr>
<td>Voluntary purchases or long-term leases from the private sector</td>
<td>See 1.4.a</td>
</tr>
<tr>
<td>Involuntary taking (expropriation)</td>
<td>See 1.4.b</td>
</tr>
<tr>
<td>Taking donations</td>
<td>See 1.4.c</td>
</tr>
<tr>
<td>Exchange with other government entities</td>
<td>See 1.4.d</td>
</tr>
<tr>
<td>Mandatory dedication of a part of newly subdivided private land for public uses, as municipal property (e.g., roads)</td>
<td>See 1.4.e</td>
</tr>
<tr>
<td>Disposition:</td>
<td></td>
</tr>
<tr>
<td>Disposition to the private sector (sales, leases, other long-term and short-term contractual transactions with partial rights)</td>
<td>See 1.5</td>
</tr>
<tr>
<td>Contribution in joint ventures, joint stock companies, and other forms of private enterprise</td>
<td>See 1.6.a</td>
</tr>
<tr>
<td>Allocation to public enterprises, for management</td>
<td>See 1.6.b</td>
</tr>
<tr>
<td>Use as collateral for borrowing</td>
<td>See 1.7</td>
</tr>
</tbody>
</table>

1.9 The right to attach conditions to disposed land/property:
   a. Both levels of government should be allowed to attach specific public interest or public use requirements (beyond those in detailed regulatory plans) to land/property of which they dispose.

   Note: A typical example would be a requirement, formulated in auction conditions, that some specified percentage of the land site for sale be developed and maintained by a private buyer as an open space accessible to the public.

1.10 Revenues from disposition of land/property:
   a. Net revenues (i.e., gross revenues less transaction costs) from disposal of long-term rights in public property should be part of the government budget.

   b. Spending of these revenues should be allowed for capital investment and paying off long-term debt only.

   c. Exceptions: For spending on other purposes, case-by-case preapproval by either the Council of Ministers (for state property) or the local council, by a two-thirds majority vote (for municipal property), should be required.

2. The Role of Central Government: Regulations and Implementation

Based on international experiences, the role of the executive branch of the central government in the area of government property may include the following important activities and principles:

Develop standards related to government property, which would be applicable to both state and municipal property. Implementation of these standards should be facilitated by incentives. The Ministry of Finance is in an especially good position to combine performance standards with fiscal incentives.

Implementation of any standards/requirements should start with state property. If they are realistically implementable, the standards can be rolled over to implementation by local governments.

Guidance and technical assistance should be provided to central government agencies and local governments on various issues related to management of land and property, including voluntary standardization. The main subjects can include a methodology for
systematic inventorying of land and property under agency or local government control, introduction of good-quality ordinances, property valuation, development of capital investment plans, and engagement in public-private partnerships. This should be performed in cooperation with professional and other associations. One of the associated functions is to facilitate knowledge exchange and dissemination of good practices.

It may be useful to establish a Center of Expertise on Public Property at the central government level, which would provide this kind of assistance to all local government agencies in need of assistance.

3. The Role of Local Ordinances

In general, local ordinances should specify procedures and rules for municipal property acquisition and disposition, and other property-related activities. Examples include adopting an Ordinance on Land Acquisition and Disposition. The Ordinance on Land Acquisition and Disposition should specify that the executive branch (municipal administration) should develop standard lease and sale contracts and should list key elements that should be included in such contracts.

4. What Can Be Left for “Soft” Policies

“Policy,” preferably articulated in writing, is a statement of a current or intended practice, with the implication that this practice is regular. “Policies” can be codified in law, and, in some sense, the whole Section 1 above can be considered as an outline of the property policy of this kind for the central government. Similarly, local governments can codify their policies in local ordinances.

However, policy also can be “soft,” representing intentions or guidance rather than hard rules. In this case, compliance with the policy is secured either by special incentives or through administrative channels. In the area of municipal land and asset management, policies may deal with issues where opinions can vary (no “right or wrong” ones) and change over time. For such cases at the local level, it would be useful to have a “soft policy” in writing and endorsed by a local council, but it can be either an ordinance (i.e., binding for the executive branch to implement) or a guidance, not legally binding.

Examples of issues to address in a local municipal policy on land are, Should land be allocated in ownership or in long-term lease? How to decide in each particular case? How long should standardized land leases be?