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Ambiguous Rights

Land Reform and the Problem of Minor Property Rights Housing

KARITA KAN

On 25 May 2012, Shenzhen announced the Comprehensive Plan to reform the Special Economic Zone's land administration system (*Shenzhen shi tudi guanli zhidu gaige zongti fang'an* 深圳市土地管理制度改革总体方案) in a move that has been referred to as the city's "third land reform" (*disanci tugai* 第三次土改). The Comprehensive Plan was formally published on 4 July along with two related documents, namely a Near-Term Implementation Plan covering the period 2012 to 2015 (*Shenzhen shi tudi guanli zhidu gaige zongti fang'an* "jinqi shishi fang'an" 深圳市土地管理制度改革总体方案 近期实施方案) and a Notice on the setting up of a guiding committee to steer and supervise the undertaking of land reform (*Guanyu chengli Shenzhen shi tudi guanli zhidu gaige lingdao xiaozu de tongzhi* 关于成立深圳市土地管理制度改革领导小组的通知).

In 1987, the nation's first land auction took place in Shenzhen marking the "first land reform" in post-socialist China. Subsequently, the Special Economic Zone has taken the lead in experimenting with new land-related policies. The spotlight of the municipal government's latest announcement falls on the prevalent problem of minor property rights housing (*xiao chanquan fang* 小产权房). Minor property rights housing is an unofficial term referring to illegal residential structures built on rural, collectively-owned land that is sold or rented to non-local urbanites. Its controversial legal status stems from the dual ownership structure in China's land regime. According to Article 8 of the Land Administration Law, the state claims ownership of urban land, while land in rural and suburban areas is owned, unless otherwise stipulated, collectively by rural residents represented by peasant collectives. Rural collective land is theoretically reserved for the exclusive use of villagers, and should be not sold, transferred, or leased to non-rural residents. The real estate boom and successive hikes in property prices have nevertheless provided strong incentives for rural landowners to capture the monetary benefits of urban development through selling and leasing land and houses to urbanites looking for affordable accommodation.

Beginning in the mid-1990s, minor property rights housing began to emerge in the fringes of major cities, and it proliferated in the early 2000s as housing prices experienced dramatic increases nationwide. By 2007, 18 percent of the 400 residential developments on sale in Beijing were minor property rights projects.⁽¹⁾ In Shenzhen, minor property rights housing accounts for 56 percent of all housing units and accommodates about half of the city's population.⁽²⁾ As of the end of 2011, Shenzhen had an estimated 379,400 minor property rights houses covering approximately half of the city's total construction area.⁽³⁾

On the supply side, minor property rights housing is usually jointly developed by villagers' committees, local governments at the township level, and land developers. Because minor property rights are not recognised by the central state and are hence not a legal right protected by law, buyers do not receive the officially recognised property ownership certificate (*fangchan zheng* 房产证) upon transaction. Instead, township governments

and villager committees produce their own papers such as "township property ownership certificates" (*xiang chanquan zheng* 乡产权证), "village property ownership certificates" (*cun chanquan zheng* 村产权证), and "villagers' jointly-built housing documents" (*cunmin lianhe jianfang xieyi* 村民联合建房协议) as substitutes for formal documentation, in contravention of the Constitution and land laws.⁽⁴⁾

On the demand side, minor property rights housing provides a much-welcomed low-cost alternative, in particular for the middle and lower income group. A study by Paik and Lee finds that most minor property rights housing is 50 to 80 percent cheaper than commercial apartments, even in proximate locations.⁽⁵⁾ For the middle-income group, minor property rights apartments offer larger living space at less cost. Figures from Beijing in 2007 show that a home buyer could afford a 40-square-meter house inside the Fifth Ring Road for about 300,000 *yuan*, but for the same amount of money he or she could get a 100-square-meter apartment with no official property rights at the same location.⁽⁶⁾ The living environment is not necessarily poorer. An investigative report by *Nanfeng Chuang* magazine shows that minor property rights neighbourhoods in Shenzhen are almost indistinguishable in appearance from commercial residential areas, while offering apartments at half the price.⁽⁷⁾ Many people are therefore willing to trade formal rights for more comfortable living.

Minor property rights housing has also been fulfilling the important function of providing shelter for those in the lower strata of society. Housing need is aggravated by problems encumbering government-subsidised housing projects launched by the state. The central government has announced plans to build 3.6 million units of guaranteed housing for the urban poor, but a study conducted by *Caixin* last year revealed that subsidised housing is still too expensive for the least well-off in large metropolises such as Beijing, Shanghai, Chongqing, and Shenzhen. New complexes completed under the rubric of targeted affordable housing have instead been sold to groups holding privileged status within the government and to high-income earners, remaining out of reach for the intended low-income group.⁽⁸⁾

Why is minor property rights housing cheaper? According to formal pro-

1. Li Qian, "Minor property right" – better than none?, *China Daily* online, 11 July 2007, www.chinadaily.com.cn/china/2007-07/11/content_5433121.htm (consulted on 16 August 2012).
2. Chen Jian, "The solution to minor property rights housing," *Century Weekly*, 19 March 2012.
3. Figures from "Shenzhen's land reform to serve as national exemplar," *Securities Times*, 24 May 2012, http://news.xinhuanet.com/house/2012-05/24/c_123183785.htm (consulted on 16 August 2012).
4. Wooyeal Paik and Kihyun Lee, "I want to be expropriated!: The politics of *xiao chanquan fang* land development in suburban China," *Journal of Contemporary China*, vol. 21, no. 74, 2012, pp. 261-279.
5. *Ibid.*, p. 264.
6. Li Qian, *art. cit.*
7. Ye Zhusheng, "Breaking through the problem of minor property rights housing in Shenzhen," *Nanfeng Chuang*, 20 June 2012.
8. Lan Fang and Zhang Yanling, "Cities struggle with affordable housing," *Caixin*, 30 June 2011.

cedures, township governments and village committees are required to pay a substantial land transfer fee (*churang jin* 出让金) to higher-level governments when they wish to convert their rural collective land to state-owned land for commercial and construction purposes. Because the development of minor property rights housing is often not reported, or at least not formally acknowledged, this fee is not paid and developers also avoid a host of taxes and fees applicable to other profit-making activities.⁽⁹⁾

Minor property rights housing is thus the product of an exceptional convergence of interests between lower-level government officials and the non-elites. Paik and Lee argue that it "brings a rare opportunity for grassroots officials, entrepreneurs, and ordinary citizens to find a manner of co-existence."⁽¹⁰⁾ They conceptualise this as a positive-sum coalition game that provides an alternative model of state-society interaction to the near zero-sum game of exploitative land expropriation that is the usual focus of the urban development literature on China.

In violent land grabs, local governments and developers benefit at the expense of peasants, who are forcefully evicted and displaced.⁽¹¹⁾ Research by O'Brien and Li shows that victims usually direct their grievances at local cadres, viewing them as "self-serving, predatory, and high-handed," but generally attribute good intentions to central government leaders.⁽¹²⁾ O'Brien and Li coin the term "rightful resistance" to describe rural protestors' tactic of citing laws and authoritative communications espoused by the centre to challenge local power-holders with the gap between rights promised and rights delivered, while vouching their allegiance to the centre's ideals.

While the relationship between rural residents and local officials is highly confrontational in the case of forced land expropriation, in the development of minor property rights housing rural residents are much more willing, indeed eager, to work with local officials. They are less resistant to having their land expropriated, as they enjoy considerable financial gain not only in the form of compensation for expropriation but also from favourable profit-sharing arrangements. In legal commercial housing developments, land developers take the biggest cut of profits (40-50 percent), while township governments and village committees get 20-30 percent. Rural residents usually receive only 5-10 percent of the profits. In the case of minor property rights housing, rural residents get almost half of the profits, while local governments and land developers each receive about a quarter.⁽¹³⁾ Rural residents thus have a keen interest in cooperating with local officials even as they jointly defy the centre's laws and regulations, constituting what Paik and Lee term "unrightful resistance." Indeed, in the transitioning land regime and real estate market, well-informed peasants are "adapting to the changing economic and political environment and maximizing their interests accordingly, ready to cooperate with anyone, including yesterday's enemy, the local governments."⁽¹⁴⁾ They are increasingly able to take advantage of the multi-level structure of the Chinese state apparatus and align with different actors under different circumstances to aggrandize personal gain.

For their part, buyers of minor property rights housing must live with possible complications arising from ambiguous ownership and use rights. Since the rights of buyers are not legally recognised, they have less protection should conflicts arise with sellers and rural residents. Lawyers are hesitant to represent them, and many local courts do not accept such cases. For cases that make it to court, the example of Songzhuang Village in Beijing's Tongzhou District illustrates the problems that could face unofficial owners of minor property rights housing. In the early 2000s, many Songzhuang vil-

lagers who had given up farming actively sought to sell or rent their property to urban residents. They found eager buyers in a growing migrant-artist community, and many agreements were signed. Into the mid-2000s, escalating land prices provided strong motivation for villagers to unilaterally retract earlier contracts signed with tenants and to demand their property back. According to the *Economic Observer*, 13 artists were brought to court by villagers in the month of October 2006 alone, including renowned painter Fang Lijun.⁽¹⁵⁾ The case that drew the most attention involved a dispute between artist Li Yulan and landowner Ma Haitao, the first of similar lawsuits that reached an outcome and hence considered to have set an important precedent. The two parties signed an agreement in 2002 for Li to purchase Ma's house for 45,000 *yuan*; four years later Ma wanted to buy the house back, and at Li's refusal, took the artist to court, exploiting the informality of the house purchase agreement (*fangwu maimai xieyi* 房屋买卖合同). The Tongzhou District Court indeed determined the agreement to be invalid and requested Li's evacuation, although it increased the amount of compensation that Ma should pay after Li's appeal of the initial decision.⁽¹⁶⁾ The court based its decision on a memorandum released by the Beijing High Court (*jingao fa [2004] 391 hao* 京高法发〔2004〕391号), which stated that agreements concerning the private sale of villagers' property should in principle be considered invalid. However, the legal authority of the memorandum was challenged in a letter jointly signed by more than 300 artists, who worried that the court's verdict might motivate more villagers to disavow contracts and force tenants out.⁽¹⁷⁾ In Beijing's Fangshan District, the court forced another buyer to vacate a purchased farmhouse in 2009. The villager decided to take back the property when he learnt of the local government's decision to redevelop the area and the huge sum he might receive as relocation compensation.⁽¹⁸⁾

While in the above cases the rights of buyers were given limited recognition in that they were given compensation, it must be noted that the majority of disputes are not resolved through formal legal procedures. The prevalence of minor property rights housing has thus meant the rise of informal power relations in society that remain outside the realm of state governance.

9. Paik and Lee, *art. cit.*, p. 265.

10. *Ibid.*, p. 261.

11. Research conducted in 17 provinces and autonomous regions reveals that from the late 1990s onwards, 43.1 percent of the villages surveyed have experienced expropriation, of which 41 percent was for road and railway construction, 12.8 percent for development zones and industrial clusters, 10.8 percent for factories, 5.8 percent for urban residential development, and 5.8 percent as reserve commercial and industrial development. *Century Weekly*, 6 February 2012. Landesa, a US-based non-profit organisation on property rights security, interviewed nearly 1,800 farmers in 17 provinces and found that Chinese farmers on average receive US\$18,000 per acre as compensation, less than 10 percent of the median land sales price of US\$190,000 per acre. Of the displaced peasants, only 18 percent succeed in moving to established urban settings, and only 14 percent manage to attain coverage by the urban social security system. Julie Zhu, "Discontent brewing over land grabs, property rights group says," *Hong Kong Economic Journal*, 25 May 2012.

12. K. J. O'Brien and Li Lianjiang, *Rightful Resistance in Rural China*, 2006, p. 47.

13. Statistics from the State Council Development Research Centre, cited in Paik and Lee, *art. cit.*, p. 266.

14. Paik and Lee, *art. cit.*, p. 274.

15. Zhang Chen, Gou Xinyu, "Songzhuang Land Rights Disputes Boil On," *Economic Observer*, 25 January 2008, abridged translation by Zuo Maohong, www.eeo.com.cn/ens/2008/0125/91713.shtml (consulted on 16 August 2012).

16. Li Jianya, "Songzhuang artist Li Yulan receives compensation upon appeal," *Beijing Times*, 22 October 2008, <http://art.people.com.cn/BIG5/41389/8209412.html> (consulted on 16 August 2012).

17. Link to the memorandum, www.66law.cn/domainblog/7065.aspx (consulted on 16 August 2012).

18. Zhang Yan, "Farmland reclaimed from angry owner," *China Daily*, 4 November 2009, www.chinadaily.com.cn/metro/2009-11/04/content_8909856.htm (consulted on 16 August 2012).

In the shadow of the law

The rampant development of minor property rights presents a difficult governing challenge to the central state. The centre has ample cause to ban the development of minor property rights housing. One reason is the worryingly rapid loss of farmland and the concern for safeguarding national food security, as many illegal developments are built from farmland conversion. In the first six years of the 1990s, 4.85 million hectares (3.6 percent) of cultivated land had already been lost to urban development, most noticeably in East and Central China.⁽¹⁹⁾ The State Council and the Central Committee announced a one-year moratorium on arable land conversion in May 1997, which was subsequently extended to 1999, but tighter regulations did not prevent a new round of the land enclosure movement (*xin quandi yundong* 新圈地运动) from spreading in the early 2000s.⁽²⁰⁾ The provision of cheaper alternative housing also challenges state planning and affects the real estate market.

The central state has thus far come up with few effective strategies to tackle the issue. It has relied most on the issuance of laws and regulations, but legal announcements lack strength without consequential enforcement. In a circular released in May 1999 targeting the heated phenomenon of speculative land trade, the State Council explicitly stated that the trade of farmers' residences to urban residents is forbidden. This was reiterated in the 2004 State Council Decision on Deepening the Reform of Land Administration (Notice 28), which prohibited urban residents from buying rural housing land, and in the 2007 State Council notice (Notice 71), which stated again that urban citizens are not entitled to purchase land or housing in the countryside. In 2008, the Ministry of Land and Resources also released its own notice (Notice 146) to clarify that minor property rights housing is not protected by law, and that urban residents who purchase such estates cannot obtain land use rights.⁽²¹⁾

The centre has also launched highly publicised campaign-style crackdowns in select locales in the hope of achieving deterrence. These, however, have proven short-lived and largely ineffective or even counterproductive. Villagers learning of the state's imminent action usually engage in a race to make their buildings even taller (*qiangjian* 抢建) in a bid for greater bargaining power.⁽²²⁾ Another endemic problem is the limited reach of the centre's governing capacity and the resultant implementation gap. The enforcement of central directives inevitably relies on the compliant action of government agents on the ground, but as the previous section shows, many local officials are benefiting directly from such ventures or are caught up in related webs of interests.

The problem of implementation aside, it is questionable whether getting rid of minor property rights housing is the best solution at all. Demolition is not only impractical to carry out on a large scale, but is also likely to create conflict and threaten stability, as minor property rights housing is providing cheap accommodation for vast populations, especially migrant workers. Given the state's lack of progress in building affordable housing, forced demolition and solutions lacking flexibility (*yi dao qie* 一刀切) are likely to be met with strong resistance. The delicacy of the matter means that the state must tread carefully and conservatively between two ends of the spectrum. While granting formal recognition to existing housing would imply reformational changes in the land ownership system and encourage more such behaviour, full-scale demolition would only create new housing problems and intensify social tension.

For now, all eyes are on Shenzhen. The Special Economic Zone constitutes a unique case, in that all land in the city has been appropriated and converted into urban land by the state (referred to as Shenzhen's "second land reform") and is hence, in theory, state-owned.⁽²³⁾ Nonetheless, according to official statistics released in 2010, rural collectives still technically control 390 out of 917.77 square kilometres, or 42 percent, of construction land in the city. Of this area only a quarter (95 square kilometres) is considered to be legally held.⁽²⁴⁾

The recently released Comprehensive Plan focuses on eight policy priorities, including improving the system of property rights and fostering a more market-led approach to land distribution.⁽²⁵⁾ More powers in land administration will be devolved to local governments, and several neighbourhoods have been designated as experimental zones in the management of minor property rights housing. Nevertheless, while the broad objectives have been laid down, the exact policies remain unclear and underspecified; a deliberate ambiguity, perhaps, to leave room for greater flexibility in interpretation and implementation. Although the Executive Vice-Mayor of the Shenzhen Municipal People's Government, Lu Ruifeng, has remarked that Shenzhen will strike hard against illegal construction and give no leeway (*jianjue daji, bu gei chulu* 坚决打击, 不给出路), the Chinese saying "crossing a river by feeling for stones" (*mozhe shitou guohe* 摸着石头过河) may be the wisest guiding principle for handling this ubiquitous problem.⁽²⁶⁾

Thus far, solutions proposed include the buying up of minor property rights housing by state departments and the imposition of property tax on developers, but the different types of minor property rights housing requires pragmatism and a differentiated approach rather than a one-size-fit-all fix.⁽²⁷⁾ How minor property rights housing is dealt with in Shenzhen is expected to serve as a measurement of the central government's resolve in tackling the issue and a hint of things to come for both developers and buyers nationwide.

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19. G.C.S. Lin and S.P.S. Ho, "China's land: Insights from the 1996 land survey," *Land Use Policy*, vol. 2, 2003, p. 98.
20. You-tien Hsing, *The Great Urban Transformation: Politics of Land and Property in China*, Oxford, Oxford University Press, 2010. The massive loss of farmland during the development zone fever of the 1990s prompted the central government to impose a freeze on conversion and to centralise decision-making power over land use in the revised Land Administration Law of 1998. The expropriation of farmland of any size requires approval from the State Council, and the conversion of other arable land for urban development also requires approval by the State Council or the province. See Jiang Xu and Anthony G. O. Yeh, "Decoding Urban Land Governance: State Reconstruction in Contemporary Chinese Cities," *Urban Studies*, vol. 46, no. 3, 2009, pp. 559-581.
21. For legal details, see Jones Day, "Resolving the minor property right problem in China," August 2008, www.jonesday.com/resolving-the-minor-property-right-problem-in-china-08-28-2008 (consulted on 16 August 2012).
22. Ye Zhusheng, *art. cit.*
23. On Shenzhen's three land reforms, see "Shenzhen's land reform progressing beyond expectation," *Shanghai Securities Times*, 6 June 2012, <http://news.cnstock.com/roll/201206/2059986.htm> (consulted on 16 August 2012).
24. Li Xuena and Zhang Yanling, "Land reform again in Shenzhen," *Century Weekly*, 28 May 2012.
25. "Shenzhen launches major land reforms," *Economic Observer*, 25 May 2012, www.eeo.com.cn/ens/2012/0525/227061.shtml (consulted on 16 August 2012).
26. "Minor property rights housing achieving legal status an optimistic misreading," *Nanfeng Daily*, 11 July 2012, http://house.chinadaily.com.cn/2012-07/11/content_15569544.htm (consulted on 16 August 2012).
27. Chen Jian, *art. cit.* There are three main types of minor property rights housing in Shenzhen. The first is housing built by villagers on housing plots (*zhajidi* 宅基地), the second is housing jointly developed by village collectives and developers, and the third is housing built by developers after obtaining land from village collectives. See "Urban villages rush to build minor property rights housing as Shenzhen announces new land reform," *Yangcheng Evening News*, 6 July 2012, http://news.ycwb.com/2012-07/06/content_3864300.htm (consulted on 16 August 2012).