

9 July 2009

Mr. Menachem Mazuz  
Attorney General  
Ministry of Justice  
Jerusalem

**Re: Land swap agreement between the State of Israel and the Jewish National Fund**

Dear Sir:

On 26 May 2009, the State and the JNF signed the “Principles of the Agreement between the State and the JNF” on the subject of land swaps (hereinafter: “the agreement”). According to the agreement, which was signed by Mr. Yaron Bibi, the director-general of the Israel Land Administration (ILA), and Mr. Menachem Leibowitz, the vice chairman of the JNF’s board of directors, the JNF will transfer its land assets it has allocated to third parties for housing and employment, to state ownership. In exchange for this transfer of ownership, the state will transfer to the JNF (or to the “Himanuta” company) ownership of available and unplanned land of the same amount in the Negev (Naqab) and in the Galilee.

Section 2 of the agreement states, inter alia, that the JNF agrees to the administration of its land by a Lands Authority that is to be established in accordance with the government decision of 12 May 2009 on reforming the ILA (hereinafter: “the Authority”). The Authority will manage the lands “in a way that will preserve the principles of the JNF in regard to its lands.” Section 3 of the agreement states that the Authority will be headed by a council to be comprised as follows: the responsible minister – chairman; seven government representatives from among state employees; and five representatives of the JNF.

The directives of the agreement – regarding both the preservation of the JNF’s principles and the representation of the JNF on the Authority’s council – are illegal and completely contrary to the right of equality and the rules of sound administration, as described below:

**Preserving the principles of the JNF**

1. Administration of lands in accordance with the principles of the JNF stands in complete contradiction to the state’s obligation to act with equality, including equality on a basis of nationality, in administering any land under its authority.
2. The directives of the agreement in this matter constitute an attempt to circumvent the rules of public law and lead to the non-application of the right to equality in regard to lands slated for transfer to the JNF’s ownership in the framework of the agreement. This is because the JNF’s principles prohibit the allocation of rights to lands under its ownership to someone who is not a Jew. In the framework of its response to the

petitions pending in the Supreme Court on the issue of applying the right to equality in regard to lands under its ownership,<sup>1</sup> the JNF has repeatedly explained that:

“The fidelity of the JNF is not given, and cannot be given, to the entire Israeli public. The JNF’s fidelity is reserved for the Jewish people only – on whose behalf it was founded and on whose behalf it operates.

[...]

The JNF will argue that it is not obliged to allocate its lands to those who are not Jews. In regard to the lands of the JNF, imposing an obligation to allocate them to Jews and non-Jews would not only disrupt the operations and missions of the JNF or be detrimental to them, but would completely nullify the unique role of the JNF as the owner of the eternal property of the Jewish people.

[...]

Distributing land for the use of all citizens of the state directly contradicts the objectives of the JNF and its *raison d’être*. It is prohibited for the JNF to allocate lands to all residents of the state. If the JNF is required to allocate its lands for the benefit of all citizens of the state – this would be tantamount to liquidating and nationalizing its assets.” (Sections 7, 27 and 220 of the JNF’s response to the Supreme Court petitions dated 15 December 2004.)

3. Management of the JNF’s lands as stated is liable, therefore, to create a reality in which the JNF’s lands would be allocated for Jewish settlement, and would be withheld from Arab citizens of the state due to their national affiliation. This fear received tangible expression in various statements and reports that accompanied the process of approving the agreement of principles by the JNF, according to which the lands transferred to the JNF’s ownership in the Negev would be used to develop and establish Jewish communities only.
4. In administering the lands owned by the JNF, the Authority would still operate as a public body that is prohibited from adopting discriminatory rules in administering lands. As such, the Authority is obligated to operate in strict accordance with the standards of public administration and the principles of equality, fairness, good faith, and the just allocation of the land resources in the state. In a long series of rulings, the Supreme Court has emphasized the unique public nature of the ILA and the standards, principles and rules that are supposed to guide it:

“The public’s lands must be administered according to state criteria – the adoption of such criteria is the obligation of public authorities in all of their work, and even more so in regard to the handling of property that is owned by the entire public. The translation of these criteria into action underlines, *inter alia*, the obligation to act with fairness and equality, and in accordance with the rules of sound administration.” (HCJ 5023/91 *Poraz v. Minister of Construction and Housing*, Piskei Din 46(2), 793, 801 (1992)).

---

<sup>1</sup> HCJ 7452/04, *Abu Rea et al. v Israel Land Administration et al.*; HCJ 9010/04, *The Arab Center for Alternative Planning et al. v. Israel Land Administration et al.*; HCJ 9205/04, *Adalah v. Israel Land Administration et al.* (cases pending).

And in regard to the **New Discourse NGO**, it was ruled, inter alia:

“The Israel Land Administration serves as the public’s trustee in administering the lands of the state. It must administer them while protecting the public’s interest in them, including the protection of the land for the benefit of the entire public, including the need to refrain from granting unjustified land benefits to others. As required of any administrative body, the Israel Land Administration must act with fairness, in accordance with relevant considerations and with equality, while offering equal opportunities to the entire public. One of the general aims of any administrative body is to act with equality. This also applies in setting and implementing the policy of land allocation.” (HCJ 244/0091 **New Discourse NGO v. Minister of Infrastructure**, Piskei Din 56(6) 25, 64, (2002)).

These remarks also apply, of course, to the Land Authority that is to be established by law and replace the ILA.

5. The agreement of principles and the detailed agreement that is slated to be signed between the state and the JNF cannot release the Authority from its obligation to the right of equality in all of its actions and contracts. Moreover, in the matter under discussion, the transfer of state lands to the JNF’s ownership contradicts, in itself, the ruling that prohibits the state from transferring land resources to third parties that adopt a discriminatory policy:

“The obligation of the state to act with equality in allocating land rights is violated if the state transfers land to a third party that discriminates, on its part, in allocating lands on a basis of religion or nationality. The state cannot release itself from its legal obligation to act with equality in allocating land rights by employing a third party that adopts a discriminatory policy. Indeed, what the state is not allowed to do directly, it is not allowed to do indirectly.” (HCJ 6698/95 **Ka’adan v. Israel Lands Administration**, Piskei Din 54(1) 258, 283 (2000)).

6. It should be emphasized that the directives of the agreement in regard to preserving the principles of the JNF are not only contrary to the state’s basic obligation to act with equality. They are also contrary to your position, which was presented to the Supreme Court in May 2007 in the framework of the aforementioned petitions. According to this position, “The Israel Land Administration must maintain the principle of equality, and it must not discriminate on the background of national affiliation [as well as] in its activity as the administrator of lands owned by the JNF.” This position did not receive any expression in the agreement and it is not at all clear how it is consistent with its directives in this matter.
7. The agreement for swapping land adds another layer to the many years of discrimination against the Arab population in the areas of land, planning and housing. In this case, not only is the State of Israel failing to take action and/or making any special plans to cancel the discrimination and close the huge gaps between Jews and Arabs in these areas, but it is adopting in the framework of this agreement separate and discriminatory rules in administering lands. And these rules perpetuate the discrimination and widen the gaps.
8. In this context, most of the land to be transferred to the JNF’s ownership under the agreement is state land in the Negev region (about 90% of the land), and the rest

(about 10%) is state land in the Galilee. The location of this land intensifies the anticipated harm to the Arab population because this population lives primarily in the Negev and in the Galilee, and is disparate for development, suitable planning and land resources. At the same time that the State of Israel is committing itself in the framework of the agreement to act in accordance with principles that ensure the allocation and development of land resources for the benefit of the Jewish public only, it continues to refuse to develop and/or recognize dozens of Arab villages, most of which were in existence prior to 1948 and where more than 80,000 Arab citizens of Israel reside.

9. The impact on the Arab population is even stronger in light of the fact that most of the lands slated to be transferred from JNF ownership to state ownership are built-up lands that have already been leased to private Jewish tenants. These lands have been marketed over the years to their tenants in accordance with the discriminatory policy that enabled them to be marketed to Jews only. The transfer of these engaged lands to state ownership does not enlarge the scope of available land for the Arab public.

### **Representation of the JNF in the Authority's Council**

1. As noted, the agreement, as well as the proposed law for reforming the ILA currently under discussion by the Knesset Economics Committee, grants considerable weight to the JNF's representatives on the council (about 40%). This composition of the Authority's council is disproportionate and contrary to the principles of public administration.
2. The Land Authority will be a public authority, established by law. It will administer the "lands of Israel" and its roles will include:
  - Setting land policy by which the lands of Israel will be administered;
  - Marketing urban lands for the purposes of housing and employment through sale, and the allocation of lands used for other purposes in locations and in the scope that correspond to the needs of the economy;
  - Acquisition and expropriation of land for public purposes and land redemption.
3. This means that the JNF has become nearly a complete partner (with the government) in administering the public land resources of the State of Israel and in setting the land policy of the State of Israel. And it should be clear that this partnership with the JNF is not limited only to its lands, which will be administered by the Authority, but that it also extends to all of "the lands of Israel."
4. As noted, the JNF regards itself as a body that is responsible for the interests of the Jewish people only. From this perspective, the JNF adopts the position that its lands must be marketed to Jews only, as explained above. Thus, the JNF and its representatives cannot faithfully represent the interests of the entire public in Israel without favoring a particular nationality and/or religion. A public Authority established by law should look after the interests of the entire public in Israel, both Jews and Arabs.
5. This matter takes on additional urgency in light of the importance of the land resources the Authority will administer, which are considered the primary and most essential resource for social-economic development. Considering the fact that the Authority will administer about 93% of the lands in Israel, its policy in this matter will be crucial; it will be empowered to decide who will use land resources and under which conditions. The

representation granted to the JNF on the Authority's council would enable the body, which explicitly declares that it practices discrimination and operates for the benefit of the Jewish public only, to play an active and decisive role in designing a policy that is so important and vital for the entire public, including the Arab population.

In light of all of the above, we ask you to take action to cancel the aforementioned agreement of principles and not to sign the land swap agreement between the state and the JNF, and/or to clarify your position in regard to the administration of state land that would be transferred to JNF ownership under the agreement, including the Authority's commitment to act in accordance with the rules of public law and the right to equality in its administration of these lands. In addition, we ask you to take action to cancel any representation of the JNF in the Authority's council and, alternatively, we ask that the JNF's representation be limited to only one representative on the Authority's council.

In light of the urgency of the matter, we would appreciate receiving your response as soon as possible.

Very respectfully,

Suhad Bishara, Advocate  
Adalah – The Legal Center for  
Arab Minority Rights in Israel

Auni Banna, Advocate  
The Association for Civil Rights  
in Israel

cc: Osnat Mandel, Advocate  
Director of the Supreme Court Petitions Department at the Attorney General's Office, Jerusalem