



Connection to infrastructure and establishment of public buildings in outposts included in legalization processes

Position Paper

Bimkom – Planning and Human Rights

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Preface

In February 2023, Israel's far-right government acted to regulate the outposts in Area C of the West Bank. Further to this decision, in February 2024, the Minister in the Ministry of Defense, Bezalel Smotrich, ordered the Civil Administration to regularize 70 outposts (35% of existing outposts), which are grouped under 63 "sites for regularization." Without having to wait until a plan is approved for them, the outposts will be immediately connected to water and electricity infrastructures, public buildings will be built and enforcement against them frozen. The law applicable in Area C allows only buildings that have a building permit to be connected to infrastructure. While provisions of the law are stringently applied in relation to Palestinians, Minister Smotrich seeks to exclude illegal construction by Jews through an illegal instruction to the Civil Administration. This position paper attacks the illegality of the move and reviews its legal, planning, and economic consequences. It shows that the planning procedure is nothing more than a cover for de facto regularization of the outposts, since in the vast majority of cases the most basic conditions for advancing regularization are not met.

Introduction

Israel's security cabinet adopted a decision on February 12, 2023, to legalize outposts in Area C of the West Bank. The cabinet initially approved legalization of 10 outposts, which would be declared as nine new independent settlements. Minister Smotrich's Settlement Authority, in coordination with the Prime Minister's Office, is now empowered to declare additional outposts as "sites for regularization." These outposts may be connected to infrastructure and public buildings may be established in them, without the need to wait for completion of the legalization processes. Enforcement proceedings against these outposts were also frozen. Accordingly, on February 23, 2024, Minister Smotrich announced 63 sites for regularization, comprising 70 outposts. He emphasized that this list is not exhaustive, and that legalization of additional outposts may be examined at a later stage.

The government decision, and subsequent announcement by Smotrich, seek to circumvent the law applicable in the occupied Palestinian territory (oPt), which states that only buildings constructed with a building permit may be connected to infrastructure. This is patently impossible in outposts, which were themselves built without an approved plan or building permits. The aforementioned decisions note that the regularization processes, connection to infrastructures, and construction of public buildings are to be undertaken in accordance with the law, but this is a meaningless statement since the decision itself is fundamentally illegal. The settlers' representatives in the Knesset have for years attempted to legalize these measures through various proposed laws,¹ but these were never approved. For example, the Attorney General firmly opposed the proposed law "Neighborhoods and Communities in Process of Regularization," tabled by Smotrich in 2018, and declared it was unconstitutional. In a discussion of this proposed law in the Ministerial Committee for Legislation, the Attorney General's representative stated that it "is liable to cause broad violations of the right to

¹ For example, see the proposed law *Neighborhoods and Communities in Processes of Legalization*, 5783 (P/25/1406) and the proposed law *Connection of Homes in Young Settlements to Electricity*, 5783 (P/25/2482).



property and creates numerous legal difficulties in the contexts of equality before the law and the rule of law.”² The same proposal was tabled again in 2020, 2021, and 2022, but each time was not approved. It should be noted that for many years the state was involved in illegal construction and provision of services to the outposts.³ The current initiative is an attempt to enable support of outpost development by rendering it official. Once the activities are considered legal, larger budgets can be allocated and implementation procedures can be simplified.

Ramifications of Smotrich’s decision

The decision concerning “sites for regularization” possesses numerous legal, planning, economic, political, and security ramifications. The scope of the current legalization process (70 outposts out of 200⁴) and the fact that these outposts will be connected to infrastructure before building permits have been issued, send a clear and strong message that it pays to commit building offenses (if the offenders are Jews). The lawlessness in this instance is particularly egregious, since it entails seizure of public land and violation of Palestinian private property rights. In 49 of the 63 “sites for regularization,” varying amounts of Palestinian land was seized, while five other sites entailed the seizure of land whose ownership was unregulated. These figures do not include cases where establishment of the outpost led to limitations on Palestinians’ access to their lands or the violent take-over of traditional grazing areas, that are defined as public land.⁵ In order to defend illegal building offenders, whose sole purpose is to displace the Palestinian population from the area, the army restricts or entirely prohibits access by Palestinians to their land adjacent to outposts.

This decision additionally exacerbates discrimination against the Palestinian population. In contrast to the flexibility and goodwill shown toward outposts, in cases of unauthorized construction by Palestinians, the state consistently and firmly adheres to the principle that planning must precede building, and regularly introduces new tools to restrict the ability of Palestinians to legalize construction.⁶ The state works vigorously to prepare plans for Israeli settlements, permitting the issuing of building permits and connection to infrastructure; dozens of such plans have been approved over the past few years alone. By contrast, the Civil

² Shahr Hai and Tova Tzimuki, “Ministers Approved Promotion of ‘Regularization Law 2,’ Attorney General: ‘Unconstitutional,’” Ynet, Dec. 16, 2018:

<https://www.ynet.co.il/articles/0,7340,L-5426996,00.html>

³ Talia Sasson, *(Interim) Expert Opinion concerning Unauthorized Outposts*, 2005.

⁴ <https://peacenow.org.il/settlements-watch/matzav/population>

⁵ B’Tselem: *State business: Israel’s appropriation of land in the West Bank through settler violence*, 2021.

https://www.btselem.org/sites/default/files/publications/202111_state_business_heb.pdf;

Yesh Din, *The Road to Dispossession*, 2013, https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/.....+...../MaslulHanishul_Heb_Web.pdf ; Yesh Din, *Plundered Pastures: Israeli settler shepherding outposts in the West Bank and their infringement on Palestinians’ human rights*, 2021

<https://s3-eu-west-1.amazonaws.com/files.yesh-din.org/shepherding+outposts+2021/shepherding+outposts+HEB.pdf>;

Kerem Nevot, *Maskukit* <https://www.keremnavot.org/%D7%9E%D7%A9%D7%9B%D7%95%D7%9B%D7%99%D7%AA>

⁶ Bimkom, *Destructive Planning Policies: West Bank, 2018–2022* <https://bimkom.org/wp-content/uploads/BimkomDemolitionsChangesReport.pdf>

Administration undertakes virtually no planning for Palestinian communities in Area C, and plans submitted by Palestinians themselves are not approved. Of 240 Palestinian communities whose built-up area is situated entirely within Area C, only 21 have a valid outline plan. In most cases, these plans relate to a portion of the area that was already built-up prior to planning and exclude extensive additional built-up areas. Since 2011, Palestinians have submitted 115 plans to regularize existing construction in established villages; only seven of these have been approved. To complete the picture, it is important to note the enormous gap in the scope of land zoned for development for the two populations. While areas in which Palestinians can build legally account for just 0.5% of Area C, the approved plans for the settlements cover 28% of the area.

The discrimination against the Palestinian population inherent in the decision to connect the “sites for regularization” to infrastructure is evident from the state’s reply to a petition to connect the Palestinian village of Daher al-Maleh to the electricity grid (HCJ 826/16 Hussein Khatib et al. v Head of the Civil Administration in the West Bank et al.). Daher al-Maleh was founded in the 1920s, but the Civil Administration began to prepare a plan for the village only in 2011, 44 years after Israel occupied the West Bank. In the absence of an approved plan, the village could not be connected to infrastructure. After the state procrastinated for five years in preparing the plan, a petition was submitted asking the Court to order the Head of the Civil Administration to exercise his authority under Israeli military law and order that the provision requiring the presentation of a building permit as a condition for connection to electricity not apply to the area of Daher a-Malih, given the special circumstances applying in the case, including humanitarian need. In their reply dated May 26, 2016, the respondents stated that the authority of the Head of the Civil Administration on this matter is reserved for extreme exceptions only, and argued this did not apply to the case of the village. They also insisted on the need to approve a plan for the village before connecting its buildings to infrastructure. In the context of comparing this response to the decision regarding “sites for regularization,” it is worth quoting two sections from the state’s 2016 reply:

Thus, the Appellants seek the connection of dozens of illegally constructed buildings, against some of which demolition orders have been issued. The Respondents’ position is that illegal construction does not create exceptional circumstances requiring the granting of an exemption, particularly when the Civil Administration is advancing planning procedures in an attempt to formulate a planning solution for the village [...]
(para. 6).

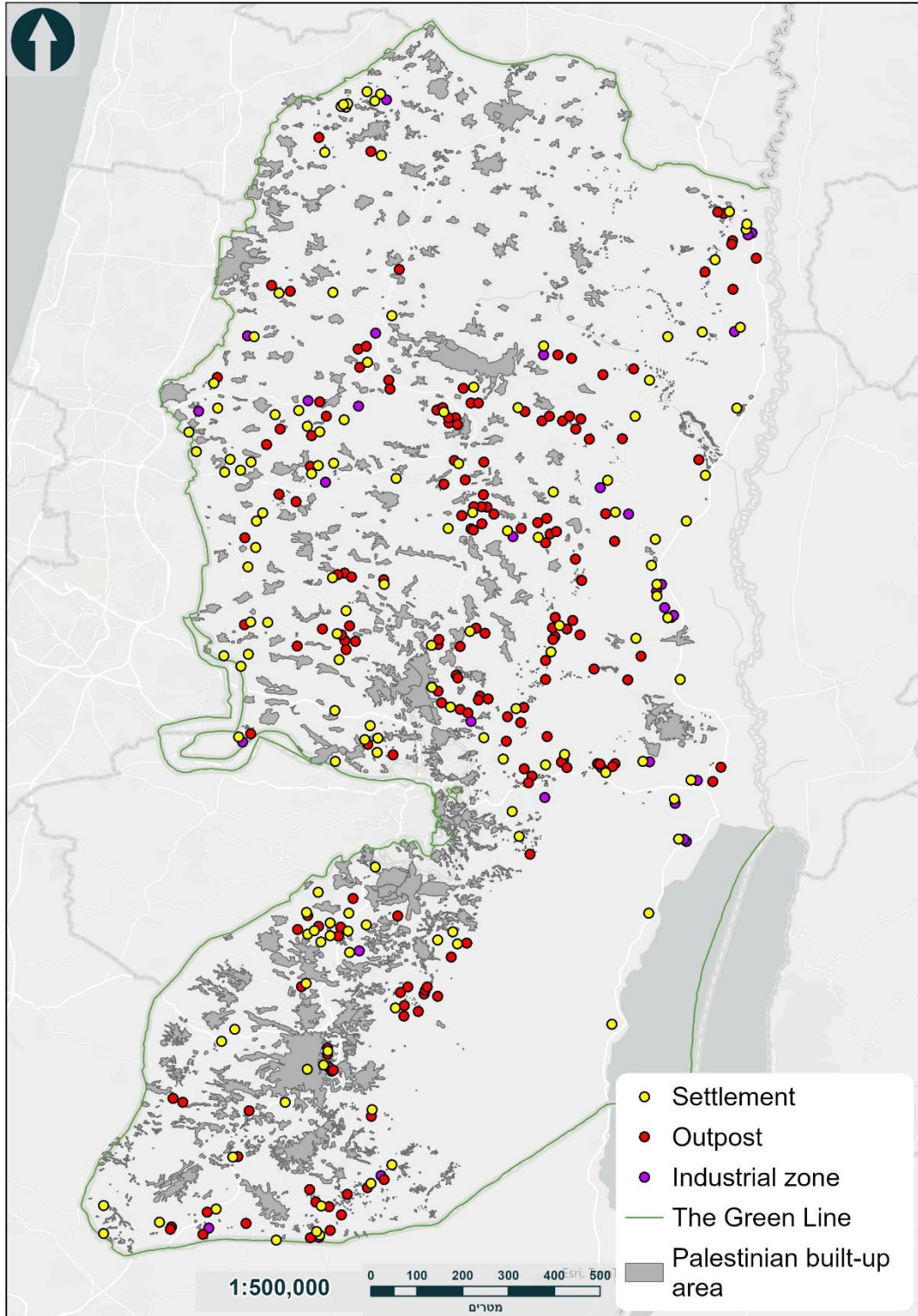
Taken in their totality, these factors show that the guiding considerations against the connection of illegal buildings to electricity are: maintaining the rule of law; considerations of equality in light of a potential claim by owners of other similar buildings also demanding connection to the electricity grid; damage to the authority’s flexibility of action in light of claims by the house owners that their connection to infrastructures is tantamount to statement of a position concerning their legality; and public considerations, in that the connection to electricity of an illegal building

constitutes an improper investment of resources, together with safety considerations (para. 29).

Given these comments, it must be asked how the state can justify the large-scale connection to infrastructure of outposts, including some 3,700 buildings constructed illegally.

Moreover, this government decision shows that illegal construction by settlers is guiding spatial planning in Area C. Instead of the Civil Administration planning the area for which it is responsible according to planning considerations, and for the benefit of the protected Palestinian population, the settlers are shaping reality according to their own interests. The

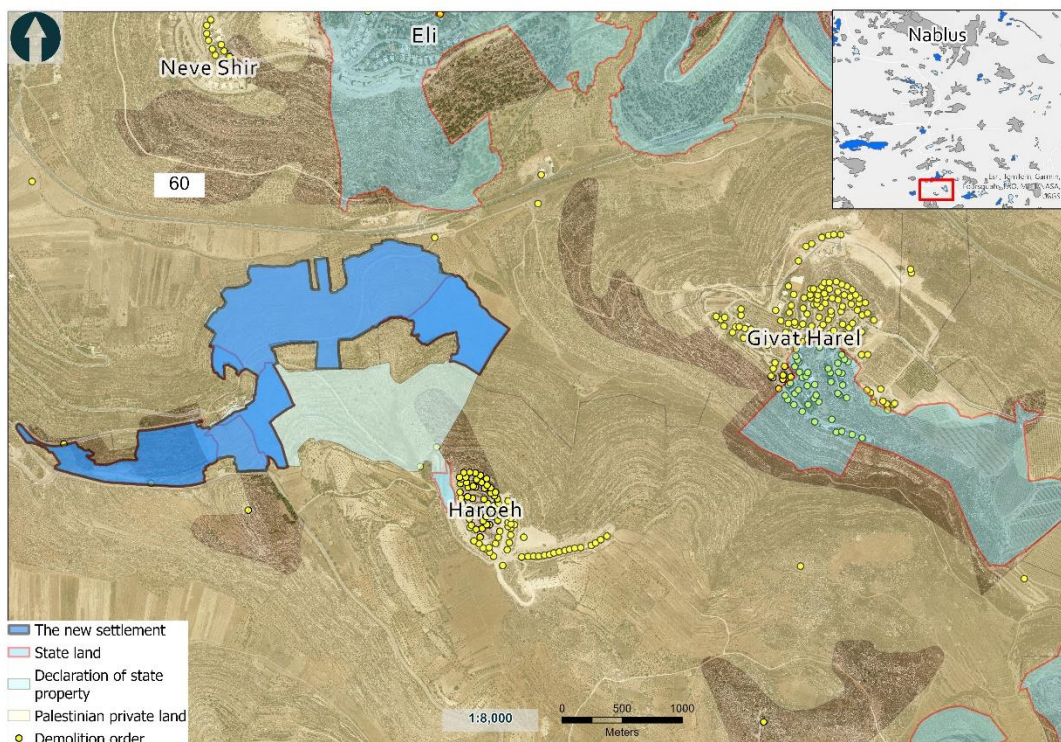
settlers create facts on the ground, and the planning system steps in retroactively, on the order of the political echelon, to approve and expand construction. The planning system thus effectively serves as a tool for the settlers to secure their objectives – the seizure of as much land as possible, the displacement of Palestinians, and the creation of spatial fragmentation preventing the possibility of Palestinian development.





Furthermore, this decision denudes the planning process of meaning, as it allows for the creation of functioning settlements connected to infrastructure and which enjoy services and public buildings, all before a plan has been approved. This weakens any motivation to advance a plan. Even if a plan is eventually approved (which is by no means guaranteed), owners of buildings which may need to be demolished have no motivation to comply with the plan, since they already enjoy services and infrastructure and have no reason to be concerned about enforcement.

Lastly, it is important to consider the price that the Israeli public will pay for this decision. Connecting dozens of isolated settlements to infrastructure, establishing public buildings and security measures, and preparing plans for these settlements will cost the public billions. All of this for small outposts, most of which (as of mid-2023) had fewer than 50 structures (not all of them residential). It must be recalled that most of the structures that will be connected to infrastructure are built in an unregulated manner, without consideration of proper planning principles. Many of them are also located on Palestinian private land. Therefore, they will have to be demolished if a plan for the outpost is drawn up and the property owners wish to obtain building permits, meaning that public expenditure on them will be wasted. For example, in February 2023, the cabinet decided to regularize the outposts of Givat Haroeh and Givat Harel together, and in October of the same year it was defined as an independent settlement by decree. The area of the settlement marked in the decree does not include the existing outposts, most of whose buildings were built on Palestinian private land and whose access roads pass through Palestinian private land. Thus, entire outposts that will be connected to infrastructure cannot be legalized in their current location and will have to be demolished as part of the establishment of the new settlement in a different location.

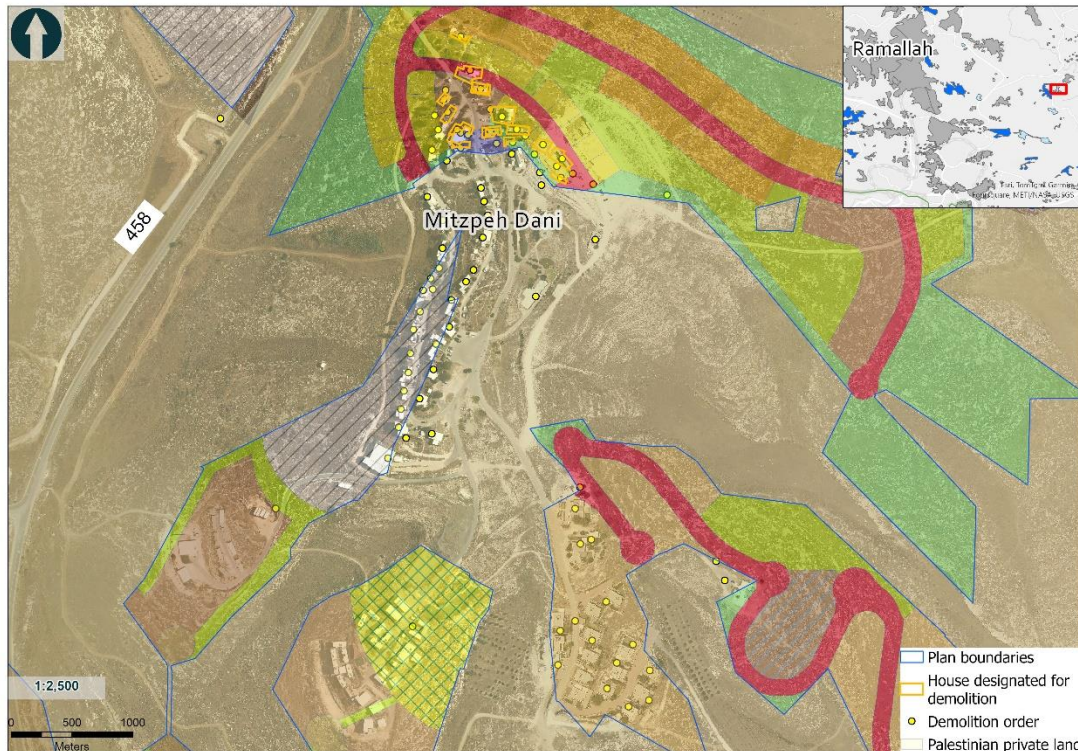


Feasibility of regularizing the outposts

The decision to connect the outposts to infrastructure is linked to processes for their regularization, and the implication is that their legalization is feasible. An examination of the outposts defined as “sites for regularization,” however, shows that **in the vast majority of cases, the most fundamental conditions for advancing a regularization plan do not exist.** In 32 sites, there is no feasibility whatsoever for advancing a regularization plan; in 12 there is only low feasibility; in six there is medium feasibility; and in nine there is high feasibility. It must be emphasized that the assessment that there is some feasibility for advancing a plan for an outpost does not imply that Bimkom agrees that its legalization is professionally justified, but merely evaluates the chances that the state will succeed in advancing a plan.

Even regarding those outposts where we found some measure of feasibility, it is important to note that for almost half of them, planning regularization attempts have been made in the past yet have not progressed. The vast majority of the outposts are more than 20 years old, a sufficient period to advance plans for regularization. In addition, the list of sites includes four outposts that have an approved, up-to-date regularization plan,⁷ but the buildings cannot be connected to infrastructure because they are labeled on the plan as zoned for demolition, inconsistent with the land zonings and/or division into plots, or are located outside the plan borders. Thus, even after a plan is approved for an outpost, the path to final regularization of the homes may be very long and its completion far from guaranteed. As and when plans are prepared to legalize other outposts, it will be possible to examine each plan individually. Even when a plan has some measure of feasibility, it may theoretically be rejected at any of the planning stages.

⁷ These outposts are Hareshet, Mitzpeh Dani, Pnei Kedem, and Tapuah West. The objections to the plan for Tapuah West were rejected recently, but the plan has not yet been validated.



The outpost of Mitzpeh Dani against the background of plans 225/3 and 225/2/4; some of the buildings on private land and some additional buildings are slated for demolition. Buildings in the southern section may also be slated for demolition as part of the detailed plan that will be prepared for this area.

To assess the feasibility of advancing plans for outposts, they were examined only according to the most basic threshold conditions, in accordance with the most lenient standards the state applies to Jewish construction. Many obstacles stand in the way of regularizing illegal construction. Some of these obstacles can be easily overcome by the state, using tools applied solely in the case of Jewish construction. Examples of these obstacles include lack of contiguity to the parent settlement, location within a firing zone, an area of high environmental sensitivity, or a no-construction zone along a main road. The most significant obstacles to advancing plans are related to land ownership and its physical characteristics, and these are more difficult to overcome.

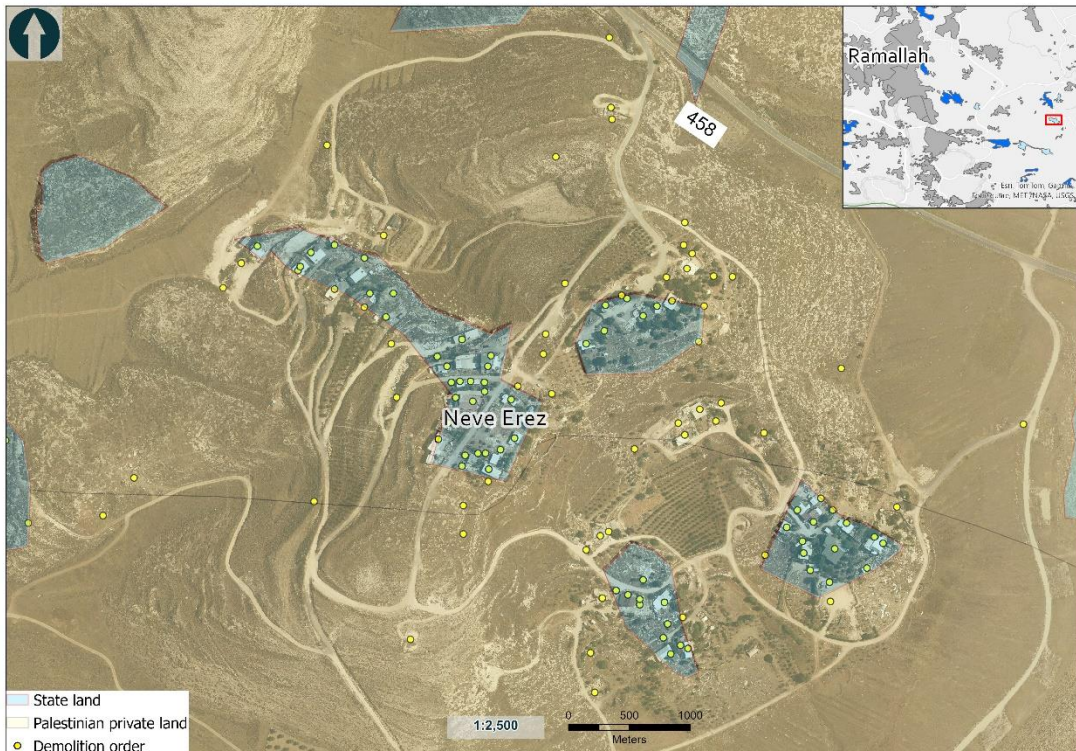
The obstacles are the following:

1. The infeasibility of constructing a statutory access road due to the need to pass through private Palestinian land.
2. The low feasibility of constructing an access road due to technical reasons, including topography, difficulties in creating connections to major roads, or legal difficulties in constructing an access road for Jews only on a public way. The plans for two of the

outposts included bridges crossing private land and linking disconnected areas of state land. This creative solution is intended to create a statutory road while overcoming the difficulty inherent in confiscating private land to legalize the outposts. Even if these bridges pass the legal test, they will in all probability never be constructed due to the high costs involved, the engineering complexities, and the fact that it is much simpler to continue to use the existing road through private land, which no-one intends to return to its lawful owners.⁸

3. All or a substantial part of the outpost is built on private Palestinian land.
4. All or a substantial part of the outpost is built on land whose ownership is undetermined.
5. Difficulty in declaring a new jurisdiction area– the original declaration of state land was made before 2003, according to outdated, unprofessional standards. The settlement's legalization requires the declaration of a new jurisdiction zone, but such a declaration is unlikely to pass legal scrutiny if it is based on the pre-2003 declaration of state land. An updated declaration is improbable, since there are clear signs the land was being cultivated at the time of the original declaration.
6. Unsuitability of state land for the development of a settlement or neighborhood due to the size of the area, contiguity with other state land, and problematic topography.

⁸ This solution was repeated in several other instances of plans for outposts which are constructed on state land but surrounded by private areas.



The outpost of Neve Erez, showing incursions into private land, the lack of contiguity between the areas of state land, the lack of feasibility for a statutory access road and the distance from an approved settlement.

Conclusion

Over the years, numerous attempts have been made to regularize West Bank outposts, but most have remained unregulated for many years. Given this situation, the outposts cannot be legally connected to infrastructure and public buildings cannot be established in them. From the beginning of the outpost phenomenon, state authorities supported them informally, but in recent years settler representatives in the Knesset have attempted to amend the law so that outposts can be connected to infrastructure from the moment a decision is made to begin planning procedures for regularization. These attempts have failed due to the many legal difficulties they raise, but even this did not stop the settler representatives and their supporters, and in 2023, the government decided to try to bypass the law through a simple cabinet decision. This initiative has significant implications, particularly regarding the rule of law, spatial planning in the West Bank, and the Israeli economy. In the meantime, the feasibility of legalization regarding most of the “sites for regularization” is non-existent or low. Even where the approval of a plan is feasible, the promise to connect the outposts to infrastructures, establish public buildings, and freeze enforcement all encourage preservation of the state of illegality. Lastly, this decision provides further evidence that in the oPt there are two separate legal systems – one for Palestinians and one for Jews.