

Brief Notes on Land Acquisition Practice

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Introduction

Irrespective of a country's stage of economic development, compulsory acquisitions of lands by the state are sometimes inevitable in order to undertake the development. The maxim *salus populi suprema lex* i.e. the welfare of the people or of the public are paramount and the maxim *necessitas publica major est quam privata*, which means "public necessity is greater than private" legitimise the acquisition of private property by the State. Various terms have been used in different jurisdictions to describe the compulsory taking of land viz. compulsory purchase (UK), eminent domain (United States), expropriation (Canada) and land acquisition (India, Malaysia), resumption (Hong Kong). For the purpose of this paper, the term adopted is land acquisition.

The practice of land acquisition differs from country to country. How different are we in the land acquisition practice from the others? This paper is an attempt to provide a comparison on land acquisition practice in a number of countries. It is hoped that by comparing how other countries address similar issues, valuable lessons may be drawn. In this instalment, comparisons are made on rights of interested parties and principles of compensation.

Rights to Property

Although the interest of the public is paramount, the private rights to property must be preserved.

As a general observation, in most countries where land acquisition is practised, the Constitution provides for the protection of an individual's right to property. The Constitution not only allows acquisition of property in accordance with law and procedure, but also such law provides for "just" or "fair" or adequate compensation. The constitutions of the United States, India and Malaysia, for example, recognise this right and have accorded this right constitutional protection.

Right to be Heard

All jurisdictions provide for a notice to be given to the individual that his land is to be acquired. This is in line with the basic right of the individual, enshrined in the maxim *audi alteram partem*, the right to be heard.

Right to Object to Land Acquisition

Some jurisdictions allow the individual affected and other persons subject to the principle of locus standi, to raise objections to

any land acquisition proceedings. This right is available in India, Australia and United Kingdom but is not generally available in Malaysia and Singapore.

Right to Claim Compensation

All jurisdictions allow the affected landowners to be heard on their claims for the loss of property. Detailed procedures are laid out for enquiries to be held to determine compensation. All affected persons, not only landowners, are given the right to put in a claim for the losses suffered. At the enquiry all such claims are scrutinised before the acquiring authorities to determine the compensation payable. The amount of compensation is notified in a written form to enable landowners and others, to avail themselves of legal and technical opinion before they accept the offer.

As a general rule, all those who have an interest in land, legal or equitable, are allowed to make claims. Where illegal occupiers are present, a form of *ex-gratia* payment could be made payable.

Right to Object to Compensation

Landowners and others entitled to compensation can accept or reject the compensation. If they reject them, they have recourse to a higher legal tribunal such as a Lands Tribunal (UK), Valuation Review Board, or a High Court (Malaysia, UK) for a full trial before determination of compensation.

Principles of Compensation

The constitutional protection given in most jurisdictions on “just”, “fair”, or “adequate” compensation has not been clearly defined. However, the legislation which governs

the payment of compensation often refer to market value as equivalent to “just”, or “fair”, or “adequate” compensation.

In jurisdictions that mirror closely the legal practice found in the UK, the oft-quoted principle of compensation is:-

“the right to be put, so far as money can do it in the same position as if his land has not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater.”

Scott J in *Horn V Sunderland Corporation*.

This principle coupled with the constitutional protection protects the individual’s right to “a fair”, or “just”, or ‘adequate’ compensation.

All the jurisdictions provide for a market value basis for compensation, although in a number of countries market value determination is subject to a number of restrictions. Market value would be the best possible means of compensating an owner for the loss of his property, since, if the owner willingly disposed his property in the open market, on a “willing seller” basis, that would be the best price that he would have obtained.

Market Value

The general basis of compensation used in most jurisdictions is market value. This is often understood to be “a price that is obtained by a willing seller from a willing buyer with whom he has been bargaining for some time”. Though the wordings vary, the essence of the concept is a price struck between a willing seller and a willing buyer.

However, in some jurisdictions such as the UK, market value has been narrowed to mean the value to the owner, on the assumption that the value to the owner would in most cases exceed the open market value. In other jurisdictions, such as Malaysia and India, market value is not necessarily the value to the owner, though the law does not necessarily exclude such an assumption. It is submitted that the concept should be market value and not value to the owner. If this is acceptable, the standard for market value should be the same as used in the International Valuation Standards.

In determining market value, legislation in different countries have sought to place certain conditions.

a. Potentialities/Zoning

Potentialities are as much part of market value as the concept of a willing buyer and willing seller. Any purchase of land will include the potential for which the land can be used. In countries that practice rigid zoning codes, potentialities would depend on the zoning allowed. In other countries, such potential may not be easily determined. Nevertheless evidence of transactions used in determining compensation would provide abundant proof of potential. Potentialities would be a matter of fact, and would therefore need to be determined by the compensating authority, if claimed.

b. "Pointe Gourde" principle

Potentialities must be recognised only if the potentialities can be achieved in the absence of the acquisition. If the potential is as a result of the acquisition, and the enhancement is as a result of the

scheme underlying the acquisition, any increase in value needs to be disregarded. This was laid down by the Privy Council in the case *Pointe Gourde Quarrying case* and practiced in the UK and Australia.

c. Planning provision

Other jurisdictions require market value to be determined in accordance with planning provisions. Where an adverse planning position is noticed, or no proper planning is allowed, certain jurisdictions (UK) allow for the application of an alternative planning certificate to be used for the purposes of claiming compensation.

This practice appears to be good, because it provided certainty in the determination of compensation.

d. Illegal buildings, use etc.

Most countries (UK, Malaysia, Hong Kong, Singapore) prohibit additional compensation payable to an owner, if the use of the land or buildings is for a purpose contrary to public health, safety or law.

Even though this rule may appear harsh, it is fair, because owners take a risk when they try to circumvent existing laws when they erect or use the land or buildings for a use that is not condoned by law.

e. Increase or decrease in compensation because of the use to which the land acquired will be put to

Any increase or decrease in value because of the use to which the acquired land will be put to is often disregarded

specifically by legislation (Malaysia). This is only fair as it would not be right for an affected landowner to be paid less because of the proposed use of the land by the acquiring authority and similarly it would also not be fair for the authority to pay more because of the proposed use.

f. Urgency of the acquisition

In a number of countries the urgency with which lands are to be acquired are to be disregarded. The only recourse is to give interest from the date of taking possession of land prior to payment of compensation (Malaysia and India). In other countries a certain amount of *solatium* may be paid.

g. Disinclination to part with land

A number of countries expressly exclude any disinclination of the owner to part with land. In the past, some payments were allowed to reflect the compulsory nature of land acquisition. However, since the basis of compensation is market value, a deemed sale by willing seller and willing buyer is envisaged and this would negate any additional payment being made for the compulsory nature of the whole process.

h. Special suitability

In the UK one of the rules used in determining compensation requires that special suitability or adaptability of the land for a purpose shall not be taken into account, if that purpose is a purpose to which the land could be applied only in pursuance of statutory powers, or for

which there is no market apart from (the special needs of a particular purchaser or) the requirements of any authority possessing compulsory purchase powers.

i. Restrictions in use, title etc.

Strictly speaking, in all jurisdictions, any conditions restricting the use or ownership of land must be adhered to and the market value would be subject to those conditions. However, the various legislations affecting use and ownership also allow for rescission, adaptation and variation of those restrictions and conditions with or without additional payment. In all these cases the likelihood of that variation, adaptation or rescission should be taken into account. This would be especially true where the land being acquired has some potential over and beyond its existing value.

j. Reinstatement principle

There are properties, which may be acquired, that are seldom, if ever, sold in the open market. Examples are temples, mosques and churches. Since they are not old, there is no evidence of market value. The better way to compensate such uses would be the cost of equivalent reinstatement in another place. However, before such reinstatement can take place, there must be a genuine desire to reinstate the use.

In most instances, owners of such buildings may opt to claim for market value based on the highest and best use.

If so, then the value of the land would be the market value for that use; no recommendation would be made for reinstatement.

Date of Valuation

The date of valuation varies according to the legislation in each member country. Some are on the date of notification whilst others are on the date of possession being taken. For ease of computation and certainty of compensation it is recommended that the date of valuation must be predetermined with the safeguard that the compensation should be determined and paid within two years of gazette notification.

To be continued ...