

Land Acquisition, Compensation and Local Planning; Principles, Issues and Mitigation

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ABSTRACT

There are many modes to secure lands for developments and public uses. Compulsory takings of alienated (private) lands may include an outright purchase and compensation, way-leave or easement right and compensation, planning acquisition and compensation, acquisition in the process of securing development rights, surrender and reservation of lands for public uses and administrative removal and ex gratia compensation. Compensation as a consideration, also a tool to mitigate adversity and loss to the alienated sites of landowners are sustained in the contemporary development plan and planning control system of the Town and Country Planning Act 1976 (as amended). This is on the premise of sustainable equity of recoupment or contribution for betterment and re-compensation for loss or injury to the land. Planning brings many facets of improvements and at times conflicts; and public infrastructure impacts betterment and adds value or adversity to sites. This paper looks into compulsory land acquisition, compensation and local planning particularly with regard to scope, principles, issues and mitigation notably in planning adversity and conservation situations. It also ventures into extending the concept with new tools and scope to further enhance the embodied sustainable planning notion embraced by the nation.

Keywords : Land Acquisition and Compensation, Local Planning, Compensatory Tools in Planning

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1. INTRODUCTION

There are various modes to acquire or make available land for development or to implement preservation and conservation strategies e.g. purchase, lease, and alienation or privatisation, reservation, exchange, sharing, contribution and etc. These manifest either in a private arrangement or involve state and under statutory underpinning.

Compulsory takings of alienated (private) lands may include the following:-

- An outright purchase and compensation
- Way-leave or easement right and compensation
- Planning acquisition and compensation
- Acquisition in the process of securing development rights, surrender and reservation of lands for public uses
- Administrative removal and *ex gratia* compensation

The powers of compulsory purchase and compensation are derived from the Federal Constitution of Malaysia (under Article 13, (1) & (2)) - legitimating power of acquisition by legal means and legal right to adequate compensation if lands are compulsorily acquired. This is articulated on the principle of 'eminent domain' – inherent right of the state (*Charanjit Lal v Union of India* [1951]) and the doctrine of '*salus populi suprema lex*' – the interests of the public are paramount (*S. Kulasingam & Anor. v Commissioner of Lands, FT* [1982]).

The compulsory acquisition of lands must adhere principally to the interpretations of public interest without *mala fide* motives and with due process (*Syed Omar Alsagoff v Government of Johore* [1979] 1 MLJ 49, *Stamford Holdings S/B v Kerajaan Negeri Johor* [1998] 2 AMR 997). The state authority is also bound by the rules of natural justice (*Goh Seng Peow & Sons Realty Sdn Bhd v The Collector of Land Revenue, Wilayah Persekutuan* [1986] 2 MLJ 395).

The principal statute in Peninsular Malaysia for compulsory land acquisition and related matters is the Land Acquisition Act 1960 (Act 486) and its associated rule. It stipulates among others, the legal powers to the State Authority, purpose of acquisition, process and procedure of land acquisition and appeal, scope and determination of compensation.

Land acquisitions within Act 486 relate to outright compulsory acquisition of whole (transfer of ownership of land parcel in its entirety) or part of land and its relevant interests. If these are involved, the relevant land acquisition under other laws (Town and Country Planning Act 1976 (Act 172), Federal Territory (Planning) Act 1982 (Act 267), Local Government Act 1976 (Act 171), National Heritage Act 2005 (Act 645), Electricity Supply Act 1990 (Act 447) etc.) shall be linked to this legislation.

Another aspect of compensation for use of specific portions of a land parcel is when a corridor of way-leave or easement right is acquired or created (as against outright compulsory land acquisition) under relevant laws. The right acquired is the right for passage, entry and use of the land on definite or indefinite terms. The ownership in title for the affected land corridor is still vested in the registered landowner where limited uses such as agriculture, ponds, or roads are allowable (under power transmission lines). For example, under Electricity Supply Act 1990 (Act 447), electricity providers may enter, use and erect structures on lands for the purpose of power distribution. Similarly, under the National Land Code 1965 (Act 56), a public access

or passage on rural lands could be created by the Land Administrator. Compensation is in the form of capitalised land rent for the use of the land, loss to trees or crops, existing structures and other sustained injury on land. In the earlier rentis example, in practice, the equivalent loss in capitalised rental is normally taken at 1/3 of the market value of the land.

Under the sustainable development notion, it is regarded as good or acceptable when a positive overall outcome of the planning exercise is perceivably gained. Local planning brings many facets of improvements and at times conflicts; and public infrastructure impacts betterment and adds value or adversity to sites. If a loss is incurred in any aspects, it is best practice that a mitigating measure is instituted to remedy the quantifiable loss or to justify the strategy on weightage of the public realm or interest.

Compensation related to planning started as a curative measure of colonial planning introduced by the then Town Planning Enactment 1923 where re-planning and subdivision in planning schemes were advocated. The legislature was largely aimed at prevention, with supporting measures for curing urban ills (slum and poor subdivisions). The curative measures, in the form of compensation, betterment, injurious affection, sales, exchange, surrender, leasing of land etc., were largely let down due to oppositions and poor financial support (Kamalruddin, 2005). Some resemblance is the pilot land readjustment schemes (*Pembangunan Tanah Bersepakat*) propagated in Peninsular Malaysia with varying success. The land readjustment concept advocates re-planning, contribution and improvement with the expectant betterment of the planned area and the increase in land value as quantification of fair compensation.

Mitigation strategy of compensation as a financial instrument in the legislation (Act 172 & Act 267) is applicable firstly, in the acquisition of alienated lands by the Local Planning Authority (LPA-basically Local Government Authorities) for development purposes with the main intention of facilitating implementation and realisation in planning, and secondly, mitigation due to certain injury and losses to the lands as a result of local planning decision and action. The latter may be referred to as regulatory planning compensation. Local planning action in the local plan and special area plan may be in the form of imposing new and significant restrictions on the uses to which land may be put to result in the occurrence of losses by substantially reducing the private usefulness or value of particular parcels. The payment of compensation for such losses where the land has not changed hands is statutorily provided selectively although has yet to be recorded of any incident in local practice. On the other hand, it is significant to note that it is acceptable practice of agreement on the basis of policy requirements, standards, guidelines and rules to reserve and surrender lands and/or contribution of funds for infrastructure and public uses on securing development rights through planning permission and other approvals for development without consideration of compensation in light of deemed betterment in the acquired development right value and set off for public necessities.

The legislation for land acquisition provides legal right to compensation to affected interests in land but does not include tenant at will and illegal squatters or encroachers. Although these categories are not legally provided the right to compensation, there are States' administrative policies of *ex gratia* compensation for social displacement considerations to include removal cost, temporary occupation licence or lease land grant, alternative accommodation of public housing and so forth. These are discretionary payments and affected parties have no legal right to contest on the amount or form of compensation.

On the contrary, the statutory provisions and the compensation system do not cover loss to adjacent lands or remedy to third parties or to the community. For example, landowners where their lands directly abutting public infrastructure development of a limited exit highway with a negative impact are not eligible for compensation if their lands are not scheduled lands or regarded as other lands linked to interests of the scheduled lands under compulsory acquisition. Some other countries have recognised compensation right of loss to adjacent lands where empirical evidence of blight or significant uncommon occurrence effects are present (Purdue, 2006; Kalbro 2007). The common argument for not extending compensation to adjacent lands is that more lands benefitted in the betterment increase in land values and as such the benefits of implementation outweigh the relative costs. However, this particular loss to adjacent land merits a review in light of the practice of administrative *ex gratia* consideration in this country and the recognition of effects as a form of good practice in compensation.

This paper looks into compulsory land acquisition, compensation and local planning particularly with regard to scope, principles, issues and mitigation notably in planning adversity and conservation situations. It also ventures into extending the concept with new tools and scope to further enhance the embodied sustainable planning notion embraced by the nation.

2. THE BALANCING ACT

Land use planning subscribes to sustainable development notion where equity is an important element: *“development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”* (Brundtland Commission, 1987) It generates a more nuanced definition of sustainable development: *“the need to ensure a better quality of life for all, now and into the future, in a just and equitable manner, whilst living within the limits of supporting ecosystems”* (Agyeman, et al., 2003). It is rightfully and legally accepted that whilst private interests are protected, the public interest aspects are also crucial consideration; likewise, the underpinning principle where due to planning decision or action, results in a gain to a landowner, there should be a corresponding balancing act of some costs contribution to the public, and otherwise, if the landowner loses, there are compensatory tools for consideration to mitigate the consequences. Hence, although there are many stakeholders that are affected by planning policy and decision, there should be avenues to correct or address imbalances sustained in the process in an equitable manner.

The recoupment or contribution in the form of conversion or additional premiums (as per the National Land Code 1965 (Act 56), and the respective States' Land Rules) and development charges (allowable under the Act 172 but most LPAs have not utilised the provision) when the landowner's land is permitted for change into a more valuable higher order use or variations in intensification in terms of density and floor space or otherwise there is also avenue for remedy/re-compensation such as the purchase notice instrument (under Section 37, Act 172) in cases of total deprivation of the potential use and value.

3. MODES AND PURPOSES OF LAND ACQUISITION

Compulsory acquisition of land is considered relatively a radical approach, and within this ambit, the State Authority is given the power by the Act 486 to acquire lands compulsorily on its behalf or for others for the purposes of:-

Section 3(1)

- (a) for any public purpose;
- (b) by any person or corporation for any purpose which in the opinion of the State Authority is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public; or
- (c) for the purpose of mining or for residential, agricultural, commercial, industrial or recreational purposes or any combination of such purposes.

The purposes for compulsory land acquisition are broad. Public purpose is not defined in Act 486 but relies on the existence of an extensive case law. Hashim Yeop Sani, J. *“The expression ‘public purpose’ is incapable of a precise definition...but in my view it is still best to employ a simple common sense test, that is, to see whether the purpose serves the general interest of the community”*. (S. Kulasingam & Anor. v Commissioner of Lands, FT & Ors. [1982] 1 MLJ 204).

However, for utility and economic purposes under 3(1)b and relevant uses stated under 3(1)c, it must be within the domain of public interest, weightage on the facts of development proposal (In *Honan Plantations S/B v Kerajaan N. Johor & Ors.* [1998], it is decided that the declaration in Form D is conclusive as to the purpose for which the scheduled lands are required which would mean that the State Authority is the best judge to determine what amounts to a purpose which is beneficial to economic development), financial compensation requirement and implementation capacity of the acquiring entity.

The scrutiny of the acquiring entity is notably being tightened, whilst rights of negotiation and participation of affected landowners are recognised. Registered proprietors are given opportunity to participate in the form of co-operation and commercial arrangement not limited to equity participation. Lands with development approval (planning permission or etc.) if it is not for public purpose (3(1)a) and public utility use under (3(1)b) shall not be acquired. Even if the purpose is for public utility, the registered proprietor is given the opportunity to participate in the project for which the land is intended, and the compulsory acquisition proceedings could only be instituted if the participation is not concluded.

Interpretation of Act 486

“development approval” means any approval for the carrying out of any building, engineering, industrial, or other similar operation in, on, over, under any land, or for the making of any material change in the restriction or condition relating to land use, that has been duly granted by the appropriate authority under the Town and Country Planning Act 1976 or continues to be in force by virtue of Section 59(1) of that Act, or that has been granted under the Federal Territory (Planning) Act 1982, the Street, Drainage and Building Act 1974, or the State land law, as the case may be.

“public utility” includes any road, rail transportation, water and electricity supply, gas pipeline, telecommunications, street lighting, sewerage system, drainage system, public works, and any other similar public service or convenience.

The provisions on the purposes and limitations have the following intentions or implications:-

- It is evidently a safeguard against abuse by the acquiring authority or entity;
- The landowners are given the right to negotiate and participate prior to acquisition proceedings in purposes other than public purpose under 3(1)a;

- Landowners' safeguards against compulsory acquisition for 3(1)b and 3(1)c, are by getting development approval (planning permission, etc.). It gives opportunity for the registered proprietors to proceed with their intended development. The rationale is why allow other entity to disrupt as the registered landowner has obtained development rights;
- Comprehensive redevelopment of areas by way of compulsory acquisition may be of particular hindrance for 3(1)b and 3(1)c, e.g. in a brownfield area, where existing developments are with the benefit of granted development approvals and the compulsory land acquisition route is thus not available.

4. FORMS OF COMPENSATION CONSIDERATION

4.1 Land taken (scheduled land)

Compulsory acquisition for whole lands may occur in large scale projects (e.g. construction of dams or airports and development of new townships) as well as in smaller projects (e.g. construction of hospitals or schools, recreational parks). In other instances, compulsory acquisition may be also used to acquire part of a parcel of lands, e.g. for the construction of a road or mass rapid transit system (MRT). It is pertinent to note that in the context of Peninsular Malaysia, land includes the surface land, the building and structures attached to it, space over the land, and under the land (excluding mineral deposits). The title to the land may vest in the form of a single title (covering all the spaces) or it may be divided to include strata title (on the surface or air space) and stratum title (underground space-by virtue of disposal of underground land-Sections 92A to 92G, National Land Code 1965 (Act 56) (as amended)). The holding interests may consist freehold, lease, sub-lease, tenancy or licence holders. Thus the title interests in alienated land can be separated laterally and vertically. In the case of MRT, compulsory land acquisition for the tunnel construction alignment could be separable from the surface land and the compensation as apportioned from the full market value.

Compensation for land taken is on the basis of market value (where relevant considers potential value) *Ng Tiou Hong v CLR Gombak* [1984], *Bukit Rajah Rubber Co. v CLR Klang* [1968], *Collector of Land Revenue, Kuantan v. Noor Chahaya Binte Abdul Majid* [1979] 1 MLJ 180), and derived on the fact of sales evidence, cost replacement/substitution, or capitalisation of annual rents. Market value is not defined in the Act 486 but provided by courts' decisions on the premise of an arm's length transaction of willing seller, willing buyer with market knowledge. In *Nanyang Manufacturing Co. v CLR Johor* [1954]: "*The market value of the land may be roughly described as the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale & purchase of land.*"

However, statutory principles are provided under Section 1, First Schedule - market value is to be assessed in relation to material date, relevant methodology, relevance of evidence, facts to be considered or ignored, among other things.

4.2 Set off for betterment to remaining or other land (*part or contiguous lands belonging to same landowner (subject of acquisition)*)

In some cases, the acquisition of whole or portion of a land impacts the remaining or other land positively. The appreciation in value of the other land as result of acquired use on the scheduled land, on the basis of before and after scenario analysis, must be considered as a reduction.

4.3 Incidental loss to remaining or other land (*part or contiguous lands belonging to same landowner (subject of acquisition)*)

The remainder or other land may be sufficiently large enough for continued use by the landowner despite its reduced value; or it may be so small that it can no longer be used beneficially. In other cases, a new road may cut through the middle of the parcel, leaving the remainder divided into several unconnected pieces, some of which may be without access routes. These are severance loss incidences.

A part of a parcel may be acquired for a dumping ground. The use as a dumping ground on the acquired scheduled land due to disturbance will injuriously affect the remaining or other land. The negative effect results in the reduction to the value of the remaining or other land on before and after scenario analysis.

Severance or/and injurious affection damages as result of the form and acquired use on the scheduled land could be claimed as compensation. The damages if could be reasonably proven, not only affecting in terms of lateral space but also the vertical space (Figs. 1 and 2).

The Act 486 also allows for acquisition of remaining or other land (Sec. 33), construction of linking roads, bridges etc. *in lieu* of paying severance loss if the claim is excessive on this.

4.4 Removal costs

Costs associated to change of residence or business such as transportation cost, printing stationeries, loss of temporary rentals or profits, dismantling and re-fixing fixtures and fittings etc.

4.5 Accommodation works

Works accommodating the acquisition involving construction or erection of roads, drains, walls, fences or other facilities benefiting any part of land left not acquired. The works provided and the costs incurred by the acquiring authority should be considered as compensation.

The land administrator can also enter into arrangements by way of full or partial substitution for monetary compensation that is equitable to the interested parties (Sec. 25 Act 486).

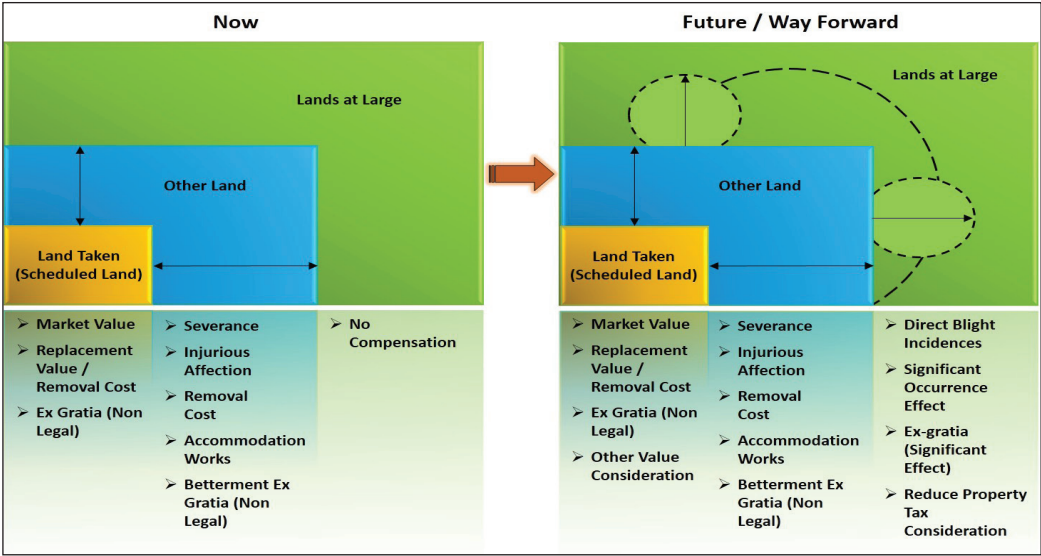


Figure 1: Legal Compensation Consideration & Coverage

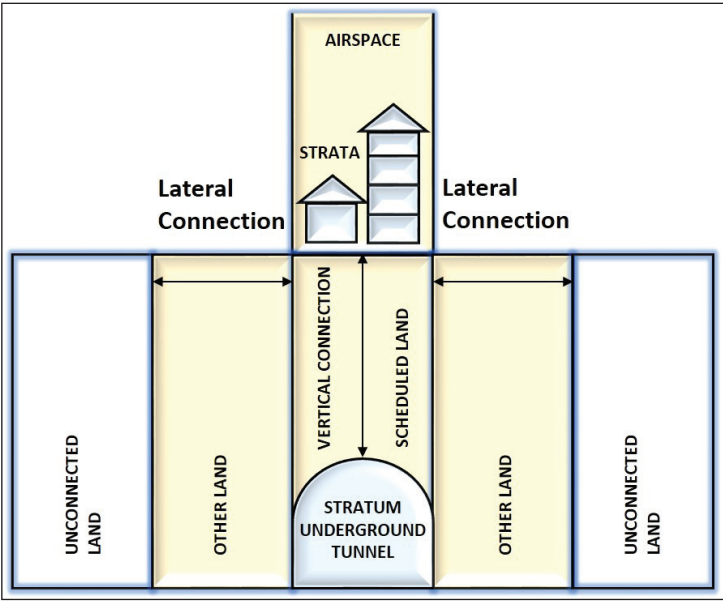


Figure 2: Lateral & Vertical Loss Compensation

5. PRINCIPLES OF COMPENSATION

5.1 Equivalence

The compensation regime rests on the universal principle of equivalence. The loss should be equal to the award of compensation to deem fair and adequacy of compensation or the principle of nothing to gain or to lose in the acquisition exercise. What is fair and equivalent is susceptible to varied interpretations due to scope and limits of legal provisions and interpretations, correctness of basis, availability of data, and appropriate methodologies in quantification.

5.2 Equity

The principle advocates equitable re-compensation to all interests or stakeholders in the acquisition exercise. It should include principles of sustainable displacement and livelihood, transparency in the process and the rights to be heard. However, this is limited to scheduled land and its legal interests and lands linked to the scheduled land and interests. Equity to adjacent lands directly impacted by the acquisition is not considered albeit administrative *ex gratia* compensation to non-paying tenant or illegal occupier on the scheduled land.

5.3 Highest and best use and value to the owner

This principle is associated with the optimal concept of land use and value. The basis of compensation for land taken is either existing use value (on the basis of permitted existing use), or potential use value (on the status of the planning and the potential to attain development rights, the potential value is higher once the development right is certain and approved). In practice, whichever is the higher in value will form the amount of award in conformation with the highest and best use principle. It is adopted principle in practice that incidental claims of removal should be consistent with the basis of the existing use. If there are multiple interests in the land acquired, the summation of the award as apportioned for the interests must be equal to the value in a single whole interest.

5.4 Legality

Statutory compensation must be on the premise of legality. Building type and use must be lawful and correspond with the category or restrictions in title. For instance, an industrial building on an agricultural title shall not be eligible for compensation.

6. PLANNING AND LAND VALUES

Planning matters are among factors having great influence on land/property values, and thus a major input in the quantification of compensation. Planning provisions regulate the use and building being enjoyed on the land or alternatively dictate future use on the land. In effect, planning could create, inflate, shift, rejuvenate, or depress land/property values according to hierarchy of types of use and locality.

In practice, it potentially creates contention in the interpretations in the process of quantification/valuation for compensation among practitioners and legal fraternity. The Act 486 recognises this problem and provides a legislative role to town planners (Sec 9A, Act 486) requiring the State Director, Department of Town and Country Planning (JPBD) or the Director General, Town and Country Planning Malaysia (in the case of Putrajaya) to furnish information on the status of the scheduled land whether situated within LPA jurisdiction, availability of any development plan for planning affecting the scheduled land and planning information in relation to the indicated land use applicable to a scheduled site in the presence of any development plan (structure or local plan) or the absence of such plan, to be forwarded to the Land Administrator who presides on the land acquisition process and decides the fair award. However, at times, incomplete planning information albeit the presence of a local plan leads to varying interpretations and consequently marked differences in valuation opinions. For instance, if the furnished information states the permitted use is commercial without other information/elaboration for a given scheduled land in an urban setting, there is a lot of leeway in interpreting type, density, floor space etc. and which obviously affects the basis and the value of award.

There is also concern on the part of acquiring authority on speculative tendencies to support empirical evidence of inflating prices which is in conflict when planning and development exercises and decisions in the local plan preparation are made transparent in tandem with the principle of consultation in sustainable planning requirements.

7. LOCAL PLANNING

Forward planning, control and implementation are deemed successful when realisations are in tandem with sustainable objectives that expect net gain in economy, physical development, environmental and social spheres. The strategies of instituting changes in land use planning as manifested in forward plans and development control for the past nearly three decades have witnessed dynamic changes to site, scope and content coverage in tandem with the ever-changing basic and priority concerns of the day. The physical development plan system legally provided by the Town and Country Planning Act 1976 (Act 172)(on the basis of 2001 amendments) comprising the statutory National Physical Plan (covering Peninsular Malaysia), Structure Plans (for every state), Local Plans (district-wide), and the Special Area Plans (on the basis of certain site coverage or subject matter).

The contemporary local planning of land use and physical development in Peninsular Malaysia are principally governed by the legislation of the Town and Country Planning Act 1976 (Act 172) and the Federal Territory (Planning) Act 1982 (Act 267) stipulating the use of forward development plans, legal legitimacy for planning control, implementation and rules for guidance and procedures, among others.

Alienated lands may be subjected to land use planning and development control crystalised in the following main sources:-

1. Strategic planning and control – Strategic policies and guidelines at different levels of national, regional and state – Statutory National Physical Plan, Structure Plans and Regional Plans (e.g. Comprehensive Development Plan (CDP 2025) of Iskandar Regional Development Authority (IRDA));
2. Local planning and control – Local policies, zoning, standards and detailed specific planning guidelines – Statutory Local Plans and Special Area Plans. Heritage designation, use and conservation control under National Heritage Act 2005 (Act 645) - Listing of heritage and buffer sites of natural and cultural significance – Statutory Heritage Register, Conservation Management Plan.
3. Non statutory planning guidelines on area or subject matters, and may include departmental initiatives such as Landscape Master Plan;

Bruton (2007) has observed, among others, more coalescence of the intertwined physical planning, economic planning and sectoral policies, the reform of the planning system for the last decade to include radical administrative and executive changes, profound conformation to the hierarchical planning framework, re-emphasis on regional planning and conurbation development, implementation of special projects by private GLCs (Government-Linked Companies), removal of uncertainties and mirror of the contingency approach in public policy.

Local planning had seen the adoption of Act 172 by all LPAs by 2005. By now all forward plans have been prepared and completed covering the entire peninsular. Local plans within dynamic areas are mostly under review. The local plan can be altered, repealed or replaced (s16 Act 172). Bruton (2007) has detected a more precise, site specific and reliance on zoning and the use of detailed guidelines of the contemporary local plans.

Interests on tangible and intangible heritage and its preservation and conservation are reinforced by the coming into force of the National Heritage Act 2005 (Act 645). This in addition to earlier concerns on environmental degradation and protection by controlling landscape and vegetation via the tree preservation order instrument under Act 172 and Act 267, and other relevant environmental laws.

The concerns on development control, implementation and the performance of the delivery system receive a major boost with the integration of land, planning, infrastructure and building approvals via the One Stop Centre (OSC) approach and the quest for electronic dealings as a way forward. On the same note, the Appeal Boards are on the rise in their functional establishments. It is however to be noted that there is little reflection on the financial provisions pertaining to instruments and compensation matters in Act 172 and Act 267 since legislated. However, on a positive note, the Federal agency of the Department of Town and Country Planning is now in the process of studying to provide clearer guidelines on development charge and purchase notice instruments. In contrast, and taking on board strives on good governance, sustainability of development, equity and justice; the 1997 amendments of Act 486 incorporate more safeguards, recognise participatory rights of affected stakeholders and more defined appeal rules on compulsory land acquisition matters.

Generally, the transformation has profound influence on forward planning, development control and the institutional arrangements transcending a wider range of land uses and activities amid the heightened scope and scale of development and extent of control. For instance, more rural, natural and agricultural areas come under the purview of better planning and control at the local level when the onus of implementation is on full areal coverage rather than on pragmatic selective criteria of areal coverage. Concerns for the preservation and conservation of areas sensitive to the environment become a major thrust in every plan.

The contemporary local planning are thus more consolidated and geared toward achieving a matured developed nation status. The current inclination of outcome-based development implementation and impact monitoring via management of spatial information and urban indicators, uplifts local planning to a new level. All these within the framework of increasing environmental conduciveness and quality of life through applying concepts of sustainability, inclusivity, equity, to name a few. At the same time, the public are more conscious of their rights in compulsory land acquisition, regulatory provisions and planning compensation. These represent added challenges to local planning and implementation.

8. FORWARD PLANS-STATUTORY DEVELOPMENT PLAN SYSTEM AT THE LOCAL LEVEL

The latest local plans formulating local planning details are on the basis of district-wide and some have replaced the earlier selective urban area-wide local plans. The local plans work on local policies and strategies of implementation at the local level and are cadastral lot-based on the zoning of uses, use classes, and the application of general and specific planning guidelines. It is supplemented by forward proposals for development implementation and management that are useful for budgetary planning for the various implementing agencies, and also generally prescribes key indications to guide private investment initiatives. The latest local plans incorporate geographical information system (GIS) data bases and analysis and translate into executive information system (EIS) for pragmatic use in development control. Most current local plans are strategised on integrated themes or thrusts in the planning rather than the conventional sectoral approach in presentation of the earlier plans. Where important or relevant, the preservation, conservation and containment of areas sensitive to the environment are strategic thrusts, among other thrusts. In the process, multi-criteria decision analysis and sustainability assessment are measure of tools adopted to ensure the decisions of the development plan are thorough and well analysed. One noted local plan viz. Hulu Selangor District Local Plan 2020 incorporates new transect and form-based ideas to emulate immersive environment in their presentation and guidance for planning and control of development.

In the process of preparation of the new local plans, there are existing local plan(s) already gazetted and in force that in most instances justify a review albeit some partly covering the same planning period.

The special area plans at the lowest hierarchy have replaced the action area plan as per the Act 172. These plans are more detailed covering specific areas or subject matters that require planning attention. These plans are specific and implementation oriented that spell out in more detail; priority, specific and catalyst developments and its connected infrastructural developments, detailed guidelines, the mechanisms of development and management, the phase, the stakeholders and the financial requirements and analysis. If the provisions of Part VII, Section 38-44, Act 172 regarding the declaration of a 'development area' is intended, then the designated area in the special area plan would most likely be of relevance.

9. THE IMPACT OF NEW LOCAL PLANS ON ALIENATED LANDS

9.1 Planning Outcomes

Planning outcomes on the basis of zoning and use classes order to a landowner in terms of value created, adverse or no effect as statutorily stipulated in the development plans, especially the local plans are profound. The landowner inevitably has more reasons to object and appeal during the public notification exercise on the draft local plans if the outcome translates into future losses to the landowner. Changes of allowable land uses and its associated activities and the marked creation/increase or reduction in market and development values of lands on the dictation of planning may result from the following strategies:-

- Extension of development areas;
- Renewal or in fill of areas;
- Increasing density or intensity of development areas;
- Establishment of new or leap-frog development areas.
- Preservation and conservation of areas.

Strategies of containment to include preservation and conservation may relatively curtail development or redevelopment values albeit an incremental enhancement of the market value on the existing or preserved land use due to its defined importance over time. A direct prescription for 'public uses' or implicit/explicit preservation or conservation of areas for heritage, environmental and even food production security importance of affected alienated lands may normally be adverse to private development rights and values. However, the extent of this adversity on development rights and values is dependent upon the transect of the locality of the site in question and the existent, type, scope and scale of development market, supporting infrastructure as well as the economics of implementation culminating in pressure for change in land use and its intensity and may well be reflected in the continuum of development values. In general, planning adversity for development in terms of loss in development right values in natural, rural and agricultural areas are non-existent or minimal but most felt in urban, urban fringe or designated leap-frog new development areas with infrastructure.

9.2 Planning Reviews and Implications

The local plans cover for planning periods of 10-15 years, and periodic reviews are necessary due to the dynamism of planned space and changes and extent in content and coverage. The planning reviews are necessary to rationalise developments in infrastructure, market trends and to accommodate new vision themes within the hierarchical framework of the statutory development plans. In certain local plans there is need to reconcile fragmented planning of the earlier plans, to include priority concerns of sensitive areas for preservation and conservation and awareness of certain areas as potential as heritage sites to be listed under the Act 645.

The effects in the proposals of planning and allowable land uses of local planning on alienated lands are as follows:-

- Up-zoning to a more valuable land use (e.g. agriculture to residential zoning);
- Variations in the planning details whilst maintaining the use class in terms of type, mixture, density, height, etc.;
- Sustaining the *status quo* especially in committed or built up areas;
- Downzoning the land use to be less valuable (e.g. reverting from residential to agriculture zoning);
- Downzoning the land use to a public use, that is non-beneficial to the landowner and with nominal private value; (e.g. zoning open space use or public infrastructure use for land earlier zoned for residential);
- The impacts of allowable land uses/developments on adjoining/adjacent lands.

10. PLANNING CONTROL

10.1 Planning Gain, Adversity and Compensation under Town and Country Planning Act 1976 (Act 172), Federal Territory (Planning) Act 1982 (Act 267)

Act 172 and Act 267 adhere to non-compensation principle as result of provisions of the statutory plans or its amendments especially local plans. Likewise, no compensation is liable for decisions on planning permission as it is on the initiative of the landowner. However, there are specific devices where LPA may be liable for compensation if a loss is incurred by the landowner.

10.2 Planning Refusal or Attached Conditions for Planning Permission

There is no provision with regard to compensation for planning refusal or loss due to injurious affection as result of planning requirements and conditions (preservation, conservation, setback, height limit, land reserved surrender requirements, etc.) consequence to a planning permission. However, compensation for cost and expenditure if the planning permission is subsequently withdrawn or amended by LPA is allowable. Appeal on this compensation can be made to the Appeal Board.

10.3 Development Charge

The LPA shall levy a development charge upon granting planning permission, where a local plan or its alteration effects a change of use, density, or floor area so as to enhance the value of the land (Sec. 32 Act 172, Sec. 40 Act 267). Additionally in KL, the Commissioner may accept payment of a development charge at the prescribed rates in *lieu* of the provision of the spaces for car parking (Sec. 40 Act 267).

In practice, this levy on the planning gain with the enhancement of the development right value is not particularly enforced by most LPAs. For instance, Selangor and Perak have only recently enforced this provision to the tune of 20-30% and 25% respectively on the increase in the land value, whilst Johor is in the process of studying it with a view to implement it soon. This is in addition to additional premium levy on the approval of variations on category/conditions in title of the land under the National Land Code 1965 and the respective States' Land Rules.

11. PLANNING ADVERSITY

11.1 Compensation for Requisition Notice

LPA (Commissioner in KL) has the right with the consent of the State Authority (no consent of Minister required in KL) to issue a requisition notice (Section 30, Act 172, Act 267) to require the owner to discontinue any particular use on the land, or to impose conditions on the continued use of the land or where building or other works on the land need alteration or removal. In compliance to the notice, any affected costs or expenditure and injury loss to the land in that there is a depreciation in the land value, the owner is given the right to claim compensation from the LPA (Commissioner in KL), and if the owner is not satisfied with the offered award, to further appeal to the Appeal Board to determine the final assessment of award.

11.2 Compensation for non-beneficial use – Purchase Notice

This instrument is triggered when a requisition notice issued by the LPA (Commissioner in KL) (e.g. a notice to stop the continuance of a particular use) or the rejection of planning permission due to the zoning for public use/purpose on the alienated land. An affected landowner may serve a purchase notice for the LPA (Commissioner in KL) to purchase or compulsorily acquire the land at a market value that disregards the negative effect of the adverse requisition order or local plan zoning.

In practice, this instrument has two positive benefits. First, it acts as a compensation measure in a situation where a landowner does not know the duration before compulsory acquisition occurs (actual acquisition for public use of the site) as there is no statutory provision for a time-line for actual acquisition by the LPA. Second, it deters LPAs from abusing the “public use reserved area” designation as it requires LPAs to take into consideration the possible cost of compensating landowners when a purchase notice instrument is effective.

However, for the purchase notice to be acceptable, the landowner must show the effect of the adverse planning that results in the non-reasonable beneficial use of the land to the landowner (this must be agreeable to the LPA (Commissioner in the case of KL) and State Authority (Minister in the case of KL)). There is little guidance on the question of reasonable beneficial use or land incapable of reasonable beneficial use in the local context. In the UK, the reasonably beneficial use refers to the existing state, Circular 13/83, paragraph 13, provides guidance as to the relevant factors to be decided on the merits of cases to include the physical state of the land, the general pattern of land uses in the area, whether the land can be used in conjunction with neighbouring land, and profit which may be useful comparison in certain circumstances (Smith, *et al* 1995).

In situations where it is lesser in beneficial use and value, inevitably the instrument is of no particular relevance. For example, a Class 1 or 2 (excellent soil for majority of crops, and normally preserved under agriculture use such as under TKPM – *Tanaman/Tanah Kekal Pengeluaran Makanan*) alienated agriculture land located at the urban fringe with strong pressure for physical development, for the purpose

of public interest is to be preserved as agriculture (There is strong advocacy to preserve under agriculture use- permanent land/cultivation for food production (TKPM)), hypothetical rejection for say planned residential development could not be remedied by a purchase notice.

Currently, there is no instrument that could be held by the landowner to compensate the marked loss in development value for the deprivation and sacrifice rendered to the public interest if the land has still some reasonable beneficial use to the landowner.

Under this instrument, the landowner could only possibly recoup his 'total' loss but not a partial loss as a result of the adverse zoning. It is imperative that partial loss could be considered for compensation in conformation to planning on the principle of equity and fairness in light of the implementation of the reciprocal instrument of the development charge. In the UK, an extension of the purchase notice i.e. blight notice which is similar to a purchase notice in that it is a form of inverse compulsory purchase because it forces the potential acquiring authority to purchase the land ahead of the public scheme. Seriously blighted land normally is still capable of beneficial use, and a purchase notice does not afford a remedy for the fact that the land has become unsellable (Purdue, 2006).

Under the purchase notice instrument, the LPA (Commissioner in the case of KL) has to refer to the State Authority (Minister in the case of KL) and if satisfied will request the LPA to acquire the land under Section 3(1)(b) of the Act 486. In estimating the market value, the fact that the land is shown for public purpose in the development plan or the requirement of the requisition notice must be ignored (Section 37(7) Act 172). Interestingly, the Federal Territory (Planning) Act 1982 (Act 267) is silent on this sub section. There was a similar provision under 1 2B, First Schedule of the Act 486 but notably was repealed. Under 2BA, First Schedule, Act 486, the fact that the land is situated within LPA, and the planning provision for the use of the land under the development plan must be considered. The anomaly between these two Acts creates a double standard, a land with non-beneficial use under a purchase notice of Act 172 will receive higher award as against the same land with the same conditions at a depressed award under Act 486 (similarly under Purchase Notice under Act 267).

11.3 Compensation for Tree Preservation Order

In respect of landscape preservation or conservation, the Act 172 explicitly provides for the preservation order for trees with a trunk girth of 0.8 metre (more than 1 metre in Kuala Lumpur). Any party affected by the order and sustains a loss may appeal to the planning Appeal Board for redress.

11.4 Preservation and Conservation

The Act 172 is not explicit with regard to preservation or conservation of buildings or areas. Preservation and conservation of natural and the build environment are some of the main strategies within the contents of the statutory development plans be it in the form of strategic policies or local planning details. The State Authority may make

rules for preservation, conservation and relevant guidelines to be applicable under this Act 172 (section 58).

11.5 Lands for Public Use and Reserves

There are a number of sources and mechanism to obtain land for public purpose.

- Zoning and requirements for public use under the statutory development plans, rules and guidelines;
- State Authority policy directives;
- Non statutory planning guidelines;
- Requirements and guidelines of related development and control agencies.(e.g. MSMA guidelines for requirements of setting aside retention ponds for flood mitigation by the JPS)

Alienated lands for public use can be acquired by outright purchase, or compulsory land acquisition, lease, exchange, creation of easement or setting aside, reserving and surrendering as requirements and conditions to benefit from development approvals.

In practice, the planning requirements and conditions of setting aside for roads, open spaces, setbacks and buffers, utility reserves, community and agency facilities may take from 20-60% of gross development areas, depending on size and circumstances of development lands. At present there is no quantum threshold and no provision for compensation for total loss or more in the development right value when due to the requirements, the development scheme becomes not viable economically.

12. PLANNING INITIATIVE

12.1 Compensation for Declaration of Development Areas

Development areas could be declared by the LPA (Section 38, Act 172) (Commissioner in the case of KL, declaration of development areas is preceded by an action area order under Sec. 47, Act 267) for special planning area for development in accordance with the local plan to include preservation and conservation areas for certain importance especially the heritage value. An action area under Section 12, Act 267, where the affected landowners are given a grace period to submit planning permission for individual or comprehensive development in accordance with the intention specified or allowed in the action area. The declaration of development area would entail purchase (either by private treaty or compulsorily) or joint venture/commercial arrangements with the stakeholders, and the establishment of a development corporation to undertake the implementation of development.

The declaration of development areas is a tool to intervene and facilitate the LPA to exercise the realisation of planning for its areas albeit rarely used in practice due to among others, consensus issues and its prohibitive costs. Alternatively, to minimise acquisition and site costs and to curtail forced displacement of inhabitants, new approaches with one example; land readjustment development schemes (*Pembangunan Tanah Bersepakat*) are revisited. If the declared development area

has to be taken compulsorily under the Act 486, it is to be acquired under 3(1)(b). It is interesting to note that the material date of compensation is the gazetted declaration date under the Act 172 rather than gazetted notification date under Section 4 or 8 of the Act 486.

There are special provisions and basis of assumptions for compensation of development area pertaining to acquisition of affected premises, buildings, and dwellings (Section 40) which are in principle in tandem with the provisions of the First Schedule of Act 486.

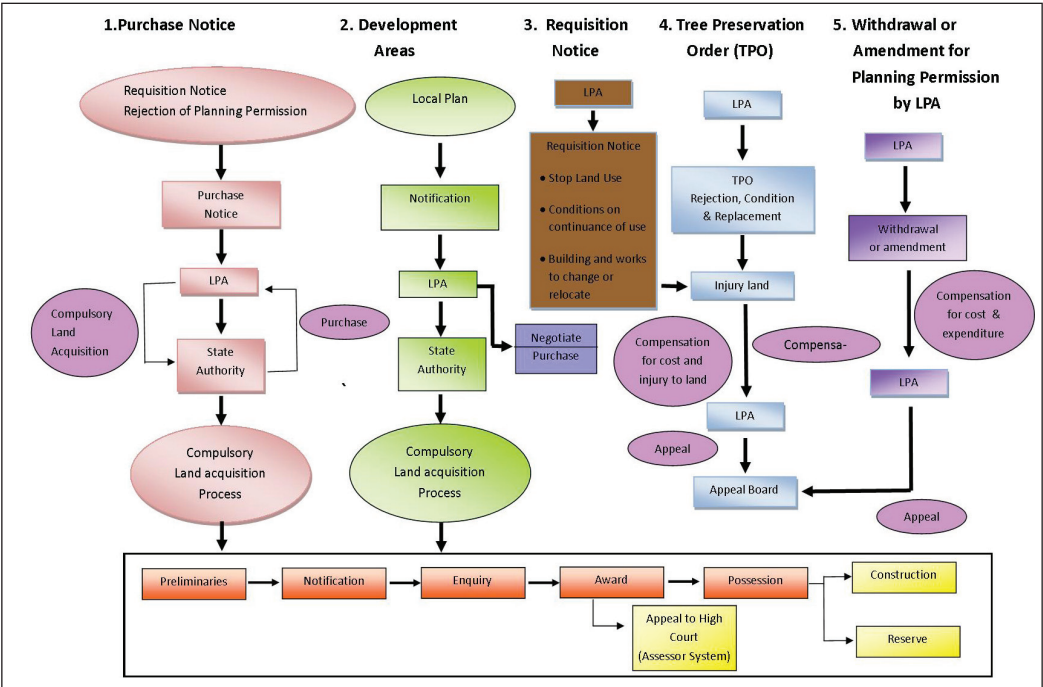


Figure 3: Related Instruments and compensation process

13. Preservation and Conservation Action Impacting Compensation under the National Heritage Act 2005 (Act 645)

National Heritage Act 2005 (Act 645) comes into force for identifying, listing and administering heritage valued sites. The Act 645 statutorily provides for a heritage register, heritage fund, and heritage conservation management plan, among others.

This Act empowers the Commissioner of heritage to list buildings, areas as heritage site, and also to identify heritage buffers to the limit of 200 metres around the deemed heritage site, to administer and manage heritage funds and the conservation management plan for the heritage sites.

“An Act to provide for the conservation and preservation of national heritage, natural heritage, tangible and intangible heritage, underwater cultural heritage, treasure trove and for related matters”.

This Act 645 does not specify the age of the heritage (as 100 years under the repealed Antiquities Act 1976 (Act 168)).

According to this Act 645, the Commissioner with the consent of the State Authority has power to declare an alienated site of natural and cultural heritage importance and its buffer as heritage site and listing it in the National Heritage Register. A heritage fund is provided for the administration and management of heritage sites. This includes:-

- Compensation for damages due to entry and investigations of the site before or after its listing;
- Compensation for purchase or lease of the site;
- Compensation for compulsory acquisition for public purpose (under Act 486) for the intended declaration as heritage site;
- To enter into arrangements with the owner or occupier of the site for investigation, maintenance, conservation and preservation of the heritage site. For these purposes, costs pertaining to improvement and conservation works, and damages due to removal costs can be contributed or compensated by the Commissioner.

Once a site is listed, a conservation management plan for the site and buffer area is to be instituted. The Commissioner, with consultation and correlation with the State Authority and LPA, decides on the implementation of the plan. Any statutory local plans must indicate the heritage sites and its conformation with the conservation planning guidelines. The Commissioner must be consulted by the LPA on planning application and approval for planning permission or development order. The landowner/occupier must bear the duty of care of the site, and must submit and consult the Commissioner for any conservation works and for any intention to charge the public for site entry fee. The Commissioner can consider a grant or lending to fund any conservation and preservation works.

The Act 645 is open-ended pertaining to compensation for damages to entry and conservation works, and costs for removal. As regards compensation for land taken, Act 645 does not seem to provide any instrument similar to the purchase notice under Act 172, as such the compensation amount follows the scheme of the Act 486, i.e. on the basis of existing use value or the depressed value reflective of adverse planning/conservation of land if the land has been zoned or listed as heritage site prior to the compulsory acquisition.

Act 486, First Schedule 1(2) *In assessing the market value-*

- (a) *the effect of any express or implied conditions of title restricting the use to which the scheduled land may be put; and*
- (b) *the effect of any prohibition, restriction or requirement imposed by or under the Antiquities Act 1976 in relation to any ancient monument or historical site within the meaning of that Act on the scheduled land;*

shall be taken into account.

(Act 645 appropriately replaces the repealed Antiquities Act 1976 with similar effect).

Unless there is no such conservation zoning or heritage site listing when the site is compulsorily acquired under Act 486 for the intended heritage site and buffer area, there may be a chance in realising a higher development/redevelopment value loss.

14. **PLANNING ACTION IMPACTING COMPENSATION IN LAND ACQUISITION ACT 1960 (ACT 486)**

The basis of compensation for land taken is the market value. On the authority of court cases (e.g. *Collector of Land Revenue, Kuantan v. Noor Chahaya Binte Abdul Majid* [1979] 1 MLJ 180), market value where relevant includes potential value but legally constrained by the title conditions and planning requirements. This potential value reflects the value attributed to the change to a future land use or value of the development right. One of the main factors affecting the development right value is the planning situation. In *Calamas Sdn. Bhd. v. Pentadbir Tanah Batang Padang* [2011] 5 CLJ 125) the planning under Sec. 9A, 2BA are particularly emphasised. The Federal Court held that by virtue of these provisions, when a land is zoned as housing development it has to be assessed as housing development land. Likewise a land that has been zoned for green belt, though categorised as commercial in the title, must still be valued on its zoning usage as a green belt on the date of the acquisition. It is no longer permissible to value the scheduled land according to whether it has housing development potential. This ruling provides that planning provision supersedes land use in title and planning must be regarded with certainty and not merely potential.

Since the repealed of Section 1 (2B) of the First Schedule of Act 486, reinforced by the Calamas ruling, compensation for land subject to negative planning must consider the stipulated negative planning, perhaps with the exception of compulsory land acquisition under the Act 486 in consequence to the application of the purchase notice instrument under the Act 172.

Repealed Section 1 (2B) of the First Schedule of Act 486;

In valuing lands which are indicated in any development plan as being reserved for a public purpose or subject to a requisition notice, these facts shall be ignored,

Nevertheless, it poses a problem in practice in cases of adverse planning (such as zoned as green belt) for a site will diminish the alternative/future use value, and market value to be assessed will still be on the basis of existing land use (allowable under the stated category of title and conditions as per the National Land Code 1965) on the principle of highest and best use as otherwise to rely on the depressed land use relevant in the stipulated negative planning may result in no compensation situation.

In certain instance, it would appear that LPA may zone a land for adverse use under Act 172 and thereafter compulsorily acquires the land at a depressed figure. The only recourse before the acquisition is for the landowner to submit a purchase notice that is consented by the LPA and State Authority (Commissioner and Minister in the case of KL), the landowner may obtain full development potential value. In France (Renard, 2006), the courts have recognised compensation rights when a landowner has suffered *intention dolosive*, or “intentional injury”, deterring municipalities that may be attracted to the idea of adversely downzoning and subsequently acquiring compulsorily. This loss is claimable in France by a landowner although rarely used in practice when a public authority, usually a municipality, severely restricts the development rights granted by the local plan and then expropriates the land at a price lower than the market price due to the downzoning.

The implications of the issue are as follows:-

- Landowner is worse off under Act 486, for land subject to adverse planning;
- Landowner will be considered for full potential value loss if the acquisition under Act 486 is consequence to a purchase notice instrument under Act 172;
- Uncertainty on the basis of the existing use value, if the land is vacant wasteland then value and compensation is legally nominal. The accepted principle in the least compensation is no compensation although in practice it is a reluctant proposition to adhere. One argument to circumspect the repealed Section 1 (2B) of the First Schedule of Act 486 is to read 3(c) of the of the First Schedule Act 486, *any depreciation in the value of the land acquired likely to result from the use to which it will be put when acquired* is one of the matters to be neglected in determining compensation. Meaning the use to be put which is the same with the use in planning overwrites the latter. However, in light of definite provisions and the court's decision to treat differently the use to be put and the use in planning, the effect of planning or heritage restriction is clearly could not be ignored.

In cases of partial taking of land where severance loss or injurious affection loss is present for the other land (under ownership of landowner under acquisition), again, the landowner may not be able to capitalise on an award for this loss if the land is already zoned adversely.

For rural and natural lands subject to protection, an alternative concept of value perhaps should also be considered; value to the community on the willingness to pay for the enjoyment of the amenity, character, scenic landscape as against the concept of market value which is more tied to principles of market economics (Johnston et al, 2007, Komishi, (2008), the latter indicating very low or non-existent in protected rural and natural lands. In reality, alienated lands in rural and natural areas would normally be under category of agriculture use in title (although physically unused and natural) and the market value ascertained would reflect agricultural use. In other cases, where the amenity, character and landscape are highly significant, a measured community value (compensation above the market value), should equitably be considered for compensation. To a certain extent, a substitution/reinstatement principle adopted by Act 486 has directly recognises the adoption of replacement cost to indicate the value.

Section 1(2C), First Schedule -*In assessing the market value of ...would continue to be devoted to a purpose of a such a nature that there is no general demand or market for that purpose, the assessment shall be made on the reasonable cost...of using or purchasing other land and devoting it for the same purpose to which the scheduled land is devoted.*

An extension of this concept to include value loss to the community would be necessary to reduce uncertainty and to be seen as more justifiable.

15. NEW COMPENSATORY TOOLS FOR CONSIDERATION

The current situation under Act 172 only allows for total loss of beneficial use of land and this has to be compensated monetarily by the LPA or State Authority, and this results in the following:-

- Hesitancy in statutory plans to designate public uses at required locations adverse to alienated lands. In some local plans, to circumvent, public facilities/amenities are expressed quantitatively within location blocks rather than site specifics;
- Reluctance of certain authorities to fund for the acquisition of the said lands unless of utmost necessity. Act 172 provides for LPA even though there are other State and Federal agencies, etc. requiring lands for their purposes. Although there are prior consultations in the local plan preparation, changes may occur due to budgetary constraints or decisions on location which affect the actual takings of designated sites.
- The landowners are left with the existing use or no beneficial use at all before the designation of the plan and disadvantaged due to little chance of realising the total value of the development rights loss due to planning;
- The landowners have no avenue of realising the partial loss of development value in situations where the location and market allow a higher development value (for e.g. land zoned for buffer area, could still be allowed for use as agriculture and as such does not come under the purchase notice instrument);
- Due to the deprivation, the landowners would offer resistance and objection.

Ahmad Sarji (2009) suggests that in order to overcome the reluctance of owners in the case of having their buildings listed as 'heritage', provision of financial incentives by way of income tax breaks, pioneer status and the provision of grants and low or no-interest loans for preservation and conservation activities; and also advocates leasing of properties (50-year lease) for preservation of streetscapes or heritage enclaves for adaptive reuse.

The satisfaction on these 'compensation' initiatives should depend on the quantum loss of the re-development right. In cases where the loss is great where say the heritage building is a two-storey whilst buildings immediately outside the heritage and conservation buffer could be allowed for 30-storey tall, then other compensatory tools to offset the loss should be considered.

It is imperative that total loss and partial loss of development/redevelopment right values be considered for compensation as advocated by 'good planning'. Compensation need not be monetary, and the loss could be transferred and be compensated elsewhere or in other forms. LPA need not be responsible for the fund, it can be provided by the market and private entities. In this regard, LPA has less to worry to embark on adverse planning for public use/interest as the landowners would be willing to accept as their losses are being compensated.

One of the tools that could be considered is transferring or shifting the loss in the development rights to be compensated elsewhere. The principle is similar to the policy adopted by some States to allow the transferring of the required development of low cost/affordable housing to another provided suitable alternative site so as not to jeopardise the development value of an upmarket housing development.

16. TRANSFERABLE DEVELOPMENT RIGHTS (TDR)

TDR is a tool used to remedy or cushion or mitigate a loss due to the dictation for land preservation and conservation in the United States. A site has value on the basis of its existing use and due to location and development market and pressure, among others, may achieve a higher use and value by acquiring the development right of the site. However, if this development right is denied by planning for the purpose of land preservation and conservation of property, then by right to uphold the maxim of no deprivation in planning, the application of an instrument to compensate a loss would be more justifiable and willingly accepted by the affected landowners. The development right has value and can be traded off to realise its monetary value equivalent to the sustainable loss. The affected landowner or a developer purchasing this development right may use it for implementation elsewhere to gain an increase in development density. In this way, the loss in a non-allowable site is transferred or shifted to an allowable site.

Alternatively, rather than buying the development rights and increasing density elsewhere, in a purchase of development rights (PDR) programmes, the government or a private land trust in the U.S. purchases the development rights and retires them (Kopits *et al*, 2003). If this alternative approach is to be adopted in Malaysia, it is relatively lower in price to be paid on the development right value rather than on the full value (existing use value plus the development right value) as in the case of the purchase notice instrument.

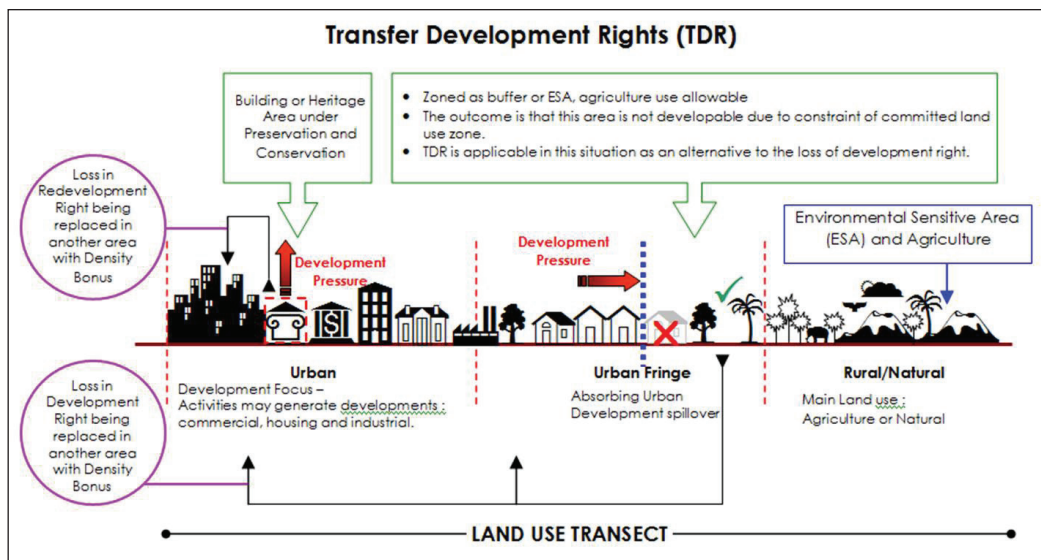


Figure 4: Transferable Development Rights (TDR)

The TDR and its variant PDR are interesting instruments that perhaps Malaysia should consider for implementation in planning as it is a reasonable solution for land preservation and conservation initiatives to be readily accepted by the public and to overcome the statutory anomaly and limitations prevailingly noted. It is also akin to a more sustainable concept as more landowners should be willing to accept planning or development adversity on their lands as their losses are adequately compensated whilst retaining the land ownership.

17. SPECIFIC COMPENSATION DEVICES

17.1 Adjacent Land Right to Compensation

The local planning and compensation in the aforementioned Acts follow the no compensation principle for impact losses to neighbouring lands due to a particular use and operation on a land that is detrimental and decreases the values of adjacent lands, although other lands in the vicinity may experience an increase in land values. One argument is that this loss can be reflected on equivalence via the property taxation; landowners whose land declined in value may pay less property tax while others pay higher tax to reflect the higher land values.

Mitigation measures are used to overcome or reduce a particular negative impact such as requirement for buffer reserves, physical barriers, etc. In Sweden, this right is recognised but limited to being a significant effect and the effect is an uncommon occurrence, and landowners may be compensated 2% to 5% of value to the property depending on situation (Kalbro, 2007). In the UK, blight notice can be served by person having qualified interest when a specified category land is blighted due to the use and operation of an adjacent land. "Planning blight" is described by the report *Future of Development Plans* as "the depressing effect on existing property of proposals which imply public acquisition and disturbance of the existing use." Injurious affection caused by the construction of public works even if no land is taken is also claimable (Purdue, 2006).

18. CONCLUSIONS

18.1 Limitation and Participation in Compulsory Land Acquisition

Compulsory land acquisition is a radical approach when other alternative modes are not feasible or difficult to realise. Whilst there are no limitations for alienated lands to be compulsorily acquired for public purpose, but for other purposes, there are limitations in the form of no compulsory acquisition on alienated lands already granted development approval, and any acquisition proceedings must uphold the concept of public interest and must be preceded by negotiation and consideration of participation of the affected parties. In this respect, the acquisition and compensation regime really work in tandem with the principles of equity, inclusivity, balance and sustainability. However, this provides a challenge for redevelopment of brown field/committed areas in urban areas.

18.2 Loss of Development Right through the Use of the Land

It is noted that land use planning and implementation at the local planning level in Peninsular Malaysia in advocating sustainability in development are desirous to uphold on the principle of balance and the use of instruments and financial provisions as contributory to a gain and mitigate certain losses due to adversity in planning. When development charge is implemented the reciprocity of purchase notice is justifiable.

In the mitigation treatment for the loss of development rights and values in cases of adversity in planning provision, it covers consideration for compensation for total loss but not partial loss. However, extending this compensation for partial loss in relevant areas may require studies to establish the relevant area coverage, extent of development rights and values. It is also ironic that Act 172 allows for compensation for total loss whilst the Act 486 at a depressed award at existing land use value for the same case of full planning adversity. For the sake of consistency and justice and to reconcile the anomaly, repealed Section 1 (2B), First Schedule of Act 486 should be considered for reinstatement.

18.3 Loss Due to Injurious Affection Limiting the Value of the Development Right

In cases of alienated site injuriously affected extensively by planning requirements, the compensation for these losses is not holistic. Provisions in Act 172 provide for payment of compensation and appeal to the Appeal Board, and can include losses in value due to injury to the land in cases pertaining to adherence to a requisition notice and tree preservation order. There is no provision with regard to compensation for injurious affection as result of planning requirements and conditions consequence to a planning permission. Planning requirements and conditions are granted as positive necessities for the public interest, although the threshold limitations are never clear. As for provisions of Act 645, which follows the Act 486, compensation for this loss follows the scheme/provisions of the latter Act.

18.4 Injury Loss to Adjacent Lands and Ex Gratia Compensation

The legal compensation in Peninsular Malaysia does not extend the right to injury loss to adjacent lands, albeit recognition given to a certain extent by some countries. It evidently needs a paradigm shift in instituting recognition of its relevance. Although remedy in the form of compensation could be realised through tort situation and law, and likewise, the discretionary *ex gratia* compensation has been applied administratively for social justice in the land acquisition process, it is perhaps important to re-examine on a holistic approach this particular right to compensation in the statutory provisions.

18.5 Streamlining the Appeal

The relevant appeal entities on the finality of appeal in the matter of facts with regard to compensation claims for losses (as per Fig. 3), are varied presumably in regard to the question of substantiality in the claim for compensation. The high court reference for outright compulsory purchase practices the assessor system in judging the award of compensation whilst the Appeal Board in deciding compensation award under the relevant planning action or instrument has no statutory provision for this requirement. Perhaps the way forward is to incorporate the assessor system when the need arises on the question of compensation award at the Appeal Board.

18.6 Shortcomings Provide Uncertainty and Difficult Choices to Planners and Implementers.

The shortcomings and anomaly in the compensatory tools provide difficulty in allocating lands for public uses in the local plans and general reluctance of

landowners to accept preservation and conservation on their lands. There is a need to look into equitable practical solutions. Are giving incentives, subsidies and grants enough? This will be enough if the sum of financial benefits equal to or more than the difference between the unhindered capitalised redevelopment value of the site (on the basis of alternative highest and best use of the site) and the existing use value subject to preservation or conservation. If the amount is less than this threshold, and the shortfall is enormous to compensate, then perhaps a better instrument such as the TDR would be more practical to adopt.

18.7 There is Need to have Administrative and Political Will in Extending Compensatory Devices

An objective scrutiny on the policy of reserving and surrendering lands for servitude for the public in the planning permission process is essential. There must be a quantum threshold so that there is no total loss or more in the development right value to render the development scheme to be not viable economically. For instance, if a threshold of 50% of the gross development area is adhered, excess reserves must be compensated in a certain way. In the UK, the grant of planning permission subject to conditions may also be the basis to serve purchase notice (*Smith, Richard et al, 1995*).

The purchase notice instrument is justifiable in principle but limited and cumbersome in practice and perhaps to consider extending TDR and PDR for implementation as alternative instruments to generate a win-win situation for the stakeholders.

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