

Brief Notes on Land Acquisition Practice - Part II

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Severance and Injurious Affection

As damages for severance, and consequently injurious affection, would be considered only in relation to other land being reduced in value, it is pertinent to consider what is meant by *other land*. In the United States the courts have outlined two rules in relation to severance damages. One is that, in such proceedings, a parcel of land which has been used and treated as an entity, should be so treated as an entity in determining compensation. Further if a portion of a single tract is taken, the owner's compensation includes any element of value arising out of the relation of the part taken to the entire tract.

In considering what is his other land, the problem to be considered is what is the unit. In the United States three factors are considered :

- i) physical location
- ii) use
- iii) ownership

This did not absolutely require that the land be contiguous rather than being divided by streets or intervening ownerships. However, it had been generally held that intervention of lands owned by other persons destroys the unity of the tracts even if they are used together.

One has to be very careful in instances where the unitary use of two parcels which are not adjacent are used to claim other business losses rather than depreciation in the value of land. The general test would be the integrated use of the various properties held in the same

ownership, physical separation being important only to the extent to show that it indicated that they cannot be operated as a unit.

In Malaysia, the meaning given to other land is fully expounded in the Federal Court decision of **Lim Foo Yong vs. Collector of Land Revenue (1965)**:

Here I would ... agree that the case of Cowper Essex vs. Local Board for Acton is authority for the proposition that for the purposes of ascertaining whether one piece of land has been severed from another piece of land, it is not necessary that the two pieces of land should have been in physical contiguity. It is however, necessary to quote the actual words that set out Lord Watson's reasoning in this connection:

Where several pieces of land owned by the same person are so near to each other and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Acts, so that if one piece is compulsorily taken the owner will be entitled to damage by severance and injurious affection of the remainder.

From a discussion of the above case, it is clear therefore, that in considering what the *other land* or "land held" is, the important factors should be :

- i) possession (ownership)
- ii) situation (physical location)
- iii) control and use (use)
- iv) each giving enhanced value to the whole.

Severance

Severance is depreciation of land by virtue of its own inadequacy after being cut off from other land previously held with it. The phrase "damage due to severance" can have two interpretations:

- i) It may refer to the damage caused to the rest of the owner's land by the loss of a part that is taken. For example where a part of a larger parcel is acquired, the compensation includes the value of the part acquired and also damage for the balance.
- ii) It may also refer to the damage caused where one part of an owner's land is separated from the rest by another part. For example, where an acquisition of a strip of land through a farm separates the farm into two or more parts. Thus in addition to value of land, the owner would be entitled to compensation to increased cost of working and other losses caused by one portion being severed i.e. physically separated from the other.

Whether there in fact was damage is a question of fact and the onus of proof is on the claimant. The argument was very succinctly put in the case of **Lim Foo Yong vs. Collector of Land Revenue (1963)**:

Here there are two questions to be considered. The first is whether any damage at all has been sustained by the Company's remaining land (the hotel land) by reason of the acquired land being severed

from it; and the second is if there has been such damage what is the amount of it? In other words, as a result of the taking away the acquired land has there been any diminution in the value of the remaining land of the owner and if there is what is the value of that diminution?

Injurious Affection

This term indicates a depreciation in value to the land due to the exercise of statutory powers. Where the land is held with land taken, then such depreciation will give a right to compensation provided that the compensation can be traced to some act by the Government, or acquiring authority. Depreciation is due to some act or doing of the acquiring authority or omission of any act.

Injurious affection of land is depreciation of land by what happens on other land acquired. It is similar to compensatable nuisance so long as it arises on land taken by the acquiring body, from the claimant.

In the case of **Duke of Buccleuch vs. Metropolitan Board of Works (1872)**, a strip of land to build an embankment was acquired. The value of land taken was minimal, but the injurious affection due to noise, dust and loss of privacy to the remainder was so high that it was greater than land taken.

The situation has been clearly explained by Tun Suffian in his judgement in the case of **Collector of Land Revenue vs. Mooi Lam @ Looi Lam (1981)**. Quoting the Indian case of **Collector of Dinagpore vs. Girja Nath Roy** and others he said;

A proprietor is entitled to compensation for depreciation of the value of his other land in so far as such depreciation is due to the

anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers.

The above quotation was to answer the Collector's contention that the damage sustained was attributable not to the acquisition of the land, but to the use of it when the bridge has been constructed and opened for use.

Very often properties which are not affected by any proposal for compulsory acquisition are also affected injuriously. However, under the system of law practised in a number of countries (including Malaysia), there can be no claim for injurious affection if no land has been acquired. In some other jurisdictions it is possible to claim for such losses.

The remedy for injurious affection as in all cases of compensatable nuisances is damages. In considering the damages that is payable, the following points need to be considered:

- i) compensation is only payable to an interested person.
- ii) there must be an acquisition on a part of the land, otherwise there can be no claim for injurious affection.
- iii) the damage must be such as would otherwise be a nuisance or an actionable wrong.
- iv) the damage should arise from the execution of the purpose declared or authorised by the acquisition.
- v) injury must be an injury to land and not merely be a personal injury or an injury to trade.
- vi) it must be caused by the construction of the works and not by their subsequent user. All claims are limited to what is done on the land taken.

Measure of Damage

The measure for damages either of severance or injurious affection is diminution in the value of the remaining land (per Aggrawala). However, a perusal of the decision made by the Courts would show that this diminution or depreciation of value is gauged from any one of the following three approaches.

- i) loss in value of retained land by taking a percentage of the market value
- ii) costs to remedy the loss
- iii) loss of profits or earnings from land capitalised to compensate for the loss.

Generally the accepted method of computing severance and injurious affection is through what is called the "Before and After Method". This was stated in the case of **Datuk Dr. Murugasu & Anor vs. Superintendent of Land and Survey First Division, Sarawak (1983)**:

Where a claim is made involving a diminution in value it is essential to have two valuations relating to the appellant's other land, namely, one, the market value immediately prior to the acquisition of the land and the other immediately after the acquisition. The difference between the two valuations may be taken as representing the extent of the injurious affection relating to diminution in value of land taken.

Loss in Value

In the above case, compensation for injurious affection was given at 5 per cent of market value of land taken. The contention that value should be a percentage on retained land was rejected on grounds that insufficient evidence was given.

Costs to Remedy Loss

This approach is sometimes adapted by the courts especially when the courts feel that there is a need for the owner to have mitigated or minimised his losses.

Loss of Income

Sometimes the damage due to severance and injurious affection is computed by the increased costs in operating a firm or an undertaking. Very often the loss in income is used directly to compute the compensation.

Extent of Damage

Even though at the time of the acquisition no damage was found, the likelihood of such damage if anticipated must be taken into account. The injurious affection is not only that which is sustained at the time of the Collector's taking possession but also the damage that is likely to be sustained.

There is no limit as to the nature of the injurious affection except in so far as this is provided for by the other clause of the section- the difficulty is as to the time when the damage is sustained.

The words "at the time of the Collector's taking possession of the land" cannot mean that compensation can only be given for the damages which had actually at that time been sustained without reference to a continuing damage caused by the acquisition.

However, in respect of future damages to the adjoining lands, the damage, which is rather remote as from the time when possession of the land was taken by the Collector, cannot be taken into account.

It follows from the above that

- a) all present damages must be taken into account
- b) claims for injurious affection has no limit
- c) all future foreseeable damages are compensable

- d) the damage is a continuing damage i.e. if the damage gets worse all such damages must be paid

Quantification of Damages

It is not an easy task to quantify the amount of damage that is payable as compensation.

Due care must be given to each case and each case must be considered in its own merit. The following factors should be given due consideration:

- a) consistency in the value of lands taken and claims for damages
- b) size and shape of the remaining land
- c) extent, size and shape of the acquired land
- d) nature and purpose of acquisition and the subsequent use of land acquired
- e) the damages that are sustained and all the probable damages likely to be sustained
- f) demand for the remaining land after the acquisition
- g) potential of the remaining land
- h) location of the remaining land
- i) effect of betterment on the remaining land. □

To be continued...

References

Aggarawala, Om Prakash (1985), Compulsory Acquisition of Land In India. Allahabad: The University Book Agency.

Cases

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