

**FLEXIBILITY AND CONTEXTUALIZATION IN
DEFINING LAND ACQUISITION POLICIES AND
STRATEGIES FOR GENTRIFICATION**

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Abstract

One of the basic and fundamental elements of the gentrification process is land acquisition for the urban renewal process. At the beginning, lands were obtained through a compulsory process called "Eminent Domain". This paper is the result of detailed research about land acquisition trend in three dimensions: (1) Eminent Domain and Compensation; (2) Eminent Domain and the determination of "Public Purpose" concept; (3) Eminent Domain and the responsible organization. Analysis of the trend shows that with the passage of time and in an evolving trend, two concepts have been applied in relation with the three above dimensions: (1) Flexibility and (2) Contextualization: The social, economical, and environmental condition of where gentrification occurs. In relation with compulsory land acquisition is toward substituting the compulsory process with incentive-based policies.

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Introduction

Land Acquisition is defined as obtaining a land or interest in a land through purchasing, donation, exchange and transfer. Purchasing a land might happen as the result of (1) Compulsory Purchase or (2) Incentive-based or Just Purchase.

Land acquisition goals and objectives lay the foundation for the land management strategy. Land acquisition is the most complicated step to achieve urban renewal or gentrification goals (Housing Policy.org). The terms urban renewal and gentrification are sometimes used interchangeably (Kennedy, M, Leonard, B, 2001).

This research is an attempt to prove that trend in the land acquisition policies and strategies is toward applying more flexible and contextualization policies in defining land acquisition policies and strategies. Also, the trend is to give more authority to organizations that are not necessarily governmental organizations but have the authority to administer the land acquisition process.

Compulsory Land Acquisition, Compensation and Property Rights Trend

The idea of eminent domain can be traced back to the ancient Rome, when the Roman government could obtain a property for public uses, with the condition of compensating the price. England land acquisition system enjoyed similar powers, and used private property for public uses (Dear, 2007).

After the time that American colonists gained independence, they drafted their constitution, and it is written in Fifth Amendment that “nor shall private property be taken for public use without just compensation”. This shows the ability of governments to transfer property from private owners to itself in order to provide for “public use”. This is called the power of “eminent domain”. There were debates during the past two centuries about the meaning of “Public Use”.

Many interpret these words strictly to public goods like parks, schools and military bases. Others interpret the word as “public purpose” or “public benefit”. Trend in application of these three concepts will be explained in this paper.

Acquisition means obtaining land through purchase, donation, exchange or compulsory actions (Reclamation Land Handbook, 2013). Land acquisition plan can take various forms depending on a situation. For instance, acquisition of a few small parcels would require minimal planning

effort and documentation (Reclamation Land Handbook, 2013). Acquisition of several hundred parcels of land as part of large projects would require significantly more planning and coordination (Reclamation Lands Handbook, 2013). Considering the Fifth Amendment to the U.S. constitution, whenever the United States acquires a property through eminent domain, it has a constitutional responsibility to justly compensate the property owner for the fair market value of the property. See *Bauman. V. Ross*, 167, U.S. 548 (1897); *Kirby Forest Industries, Inc. V. United States*, 467.U.S. 1, 9-10(1984). Eminent domain has been utilized traditionally to facilitate transportation, water supply, construction of the buildings, and aid in defense readiness.

Justin John Paul Stevens (1920) argued that “Public Use” and “Public Purpose” in this context can be used “synonymously”. Stevens essentially argues that so long as the use of eminent domain results in “economic development”, it is justified. Under the influence of Stevens thoughts “Public Use” definition included private developments that provide for private uses (for example building affordable houses).

In 1954 case, *Berman V. Parker*, the court upheld the government’s power to use “eminent domain” to initiate “urban renewal” where the government could eliminate slum and urban blight in the neighborhoods. In 1954, *Berman* wrote that “public use” can be considered as an equivalent to “Public Purpose”. In 1984, *Hawaii Housing Authority V. Midkiff*, the court broadened the definition of “Public Use” that private residential property can be obtained through land acquisition and be transferred to other private groups in order to break a “Land Oligopoly”(Darr, 2007). Thomas Jefferson favored eliminating all remnants of feudalism, and pushed for “allodia ownership”(A summary view of the Rights of British America). James Madison who wrote the Fifth Amendment for the United States Constitution, had a more moderate view, mandating “just compensation” and for “Public Use” (Wikipedia, eminent domain). The Fifth Amendment did not create the national government’s right to use the eminent domain power, it is simply limited it to “public use”. In 1832, the Supreme Court gave the right to the states to make their own determinations of “public use”. In 1896, Fourteenth Amendment required that when states can take private property, and they are required to devote it to a public use and compensate the property owner for his loss (Nowak, Rotunda, 2004). This was the beginning of what is known as the “selective Incorporation Doctrine”. Selective Incorporation refers to the application of Federal Constitutional rights for the states. In 1905, the Supreme

Court acknowledged that different parts of the country have unique circumstances and the definition of “Public Use” varies with the conditions of the case (contextualization). In 1954, an extended definition of eminent domain was reaffirmed in *Berman V. Parker*, in which the Supreme Court decided that land could be transferred to private redevelopers who would construct condominiums, private office buildings and a shopping center. The Supreme Court ruled that the project should not be judged on the basis of parcel by parcel but on the basis of the plan for the area. In 2005, the Supreme Court’s decision in *Kelo V. City of New London*, affirmed that the responsible organization can take non-blighted private property by eminent domain, and then transfer it to a private developer only for the purpose of increasing municipal revenue. So, the concept of “Public Use” has been extended to “Public Purpose” and then to “Public Benefit” to encompass any economically beneficial use (Eminent Domain, Wikipedia). National constitutions and law typically refer to “Compulsory Land Acquisition” being used for “Public Purpose”, when it comes to defining “Public Purposes”, there is great variety among national laws, in the extent of specificity. List of items included are (Keith, 2001):

- Transportation uses including roads, canals, railways, bridges and airports.
- Public buildings, schools, libraries, hospitals, factories, religious institutions and public housing.
- Public utilities for water, sewage, electricity, gas, communication, irrigation and drainage, dams and reservoirs.
- Public parks, playgrounds, gardens, sport facilities and cemeteries.
- Defense purposes.

Compulsory acquisition is the power of government to acquire private rights of land for a “Public Purpose” (Keith, 2008). This power is known by a variety of names depending on a country’s legal traditions, including “Eminent Domain”, “Expropriation”, “takings” and “compulsory purchase”. Compulsory acquisition is considered as a development tool for the governments, and for ensuring that land is available when needed for essential infrastructure – a condition that land markets are not always able to meet (Lindsay, 2012).

There are two ways to define “Public Purpose”: (1) Open-ended definition of “Public Purpose”, and (2) Exclusive Definition. There is a move from exclusive definition of “Public Purpose” to

“Public Benefit”. In the United States, for example, eminent domain has been one strategy. It is considered as one of the policies of local governments to assemble land for “urban renewal”. Land might be used ultimately for “private low-cost” housing or a commercial building intended to stimulate economic revival in a blighted area. Government and their development partners increasingly emphasize the importance of “use to maximum advantage” of private investment for activities that have traditionally fallen within the public domain (Lindsay, 2012). Open-ended definition of “Public Purpose has advantages such as: (1) Having different choices and interpretations. For example: In case of considering “Comprehensive Plan” or “Planned Unit Development”(PUD), the idea of open-ended definition will work and “Public Purpose” concept can be used with more flexibility and can include or exclude many things, (2) Government may eventually need to acquire land for a public purpose that was not anticipated when the law was written (Keith, 2008). The exclusive definition of “Public Purpose” has the advantage of providing a degree of definite definition of type of use. The disadvantage is excessive inflexibility and may fail to provide for the full range of public needs.

Despite the variations that exist in using “Public Purpose” concept, a basic principle is that government’s “taking” powers are “extraordinary” powers that will provide people’s needs that might not be provided through the operation of market (Keith, 2008). Having a comprehensive plan or Planned Unit Development (PUD) can provide majority of an area’s residents’ needs (facilities, utilities and infrastructure). This principle justifies the strategy of having an open-ended definition of “Public Purpose”.

In the United States, eminent domain has been used as a tool and the authority of local governments to assemble land for “urban renewal”, even when the ultimate end use is private low-cost housing or a commercial building intended to stimulate revival in a blighted area. Governments and their development partners increasingly emphasize the importance of “use to maximum advantage” private investment for activities that have traditionally fallen within the public domain (Lindsay, 2012). “Eminent domain” power can be used to facilitate private economic redevelopment applying “Public Purpose” concept because it would increase the city’s tax base. Open-ended definition of “Public Purpose” can include “private activities” that eventually contribute to “national economic growth”. Therefore, users of lands or property can be public, private, or public/private(Lindsay, 2012).

Determining Market Value

“Market Value” is usually used as a benchmark for most compulsory acquisition laws when it comes to the calculation of compensation for a land obtained (Lindsay, 2012). Two other concepts are also used in laws and constitution (1) Just, (2) Fair. Just compensation was explained in the Fifth Amendment as the following: “nor shall private property be taken for public use, without just compensation”. Just compensation is defined as just the formal market value of a parcel or property that must be paid to a land owner. In case of “market value”, a common legislative approach is to define “market value” as the amount a “willing buyer” would be willing to pay a “willing seller” on the open market where some choice exist (Lindsay, 2012). There are several reasons that calculation of land on the basis of market value might not work:

1. The question of land values as opposed to other land assets.
2. Normal land markets may be non-existent.
3. Limits might exist on the sale of categories of land or place.
4. Poor defining of land rights in terms of content or duration.
5. Right valuation of land (Lindsay, 2012).

Laws and constitutions may also refer to more broadly concept such as “fair” compensations. But because of economic, social and cultural setting in which “taking” occurs, there is no fix method for calculating the property (Lindsay, 2012). To design compensation packages that will ensure that people are no worse off than they were before the taking, requires tailoring to local realities. Lindsay (2012) divides land ownership rights into two groups: (1) Prescriptive land rights (statutory) and (2) Customary land rights.

Customary land rights are defined on the basis of local realities(contextualization). Recent decades have witnessed a growing willingness on the part of a number of national governments to give some formal recognition of customary rights. A more desirable approach would be to explore the possibility of building flexibility into legislative when needed (Lindsay, 2012). Highly market economies generally recognize that compensation needs to go beyond the market value and should calculate losses associated with disturbance; costs related to a business displacement; costs related to moving; costs related to transition (e.g., South Australia, Land Acquisition Act, 1969). Customary rights are determined on the basis of social, economical and

environmental conditions(Lindsay, 2012). Beside “just” and “fair” compensation, third type of compensation is called “incentive-based compensation” when prices higher than market value is an incentive for the owner to sell which is always higher than “ just” or “fair” price. Factors determining land values are:

1. Normal land market
2. Informal Land markets
3. Variety of proxies, not one year land value but three years and calculating average
4. The price of comparable land

None of these approaches are ideal and there might be divergence between “legal” and “actual” market value of land. Considering factors determining land value, the importance of assessing land value within a context is justified.

Conclusion

Therefore: (1) there is a move from “just compensation” property value to “fair compensation” and then to “incentive-based compensation; (2) There is a move from “Prescriptive Rights” to “ Customary Rights”. Customary rights have been considered and are determined on the basis of social, economical and environmental conditions. (3) There is a trend toward giving more authority to other organizations other than private organization. Therefore, study of the trend shows the application of “Flexibility” and “Contextualization” concept in relation with land acquisition activities.

Obtaining the land, then, can be summarized as:

- By government → to →by an organization that has the authority.
- For Public Use →to → Public Purpose →to → Public benefit.
- To build public facilities → to →to build not necessarily public facilities but whatever construction that has public benefit.
- Determining the amount of compensation: Just compensation determined by government → to →Fair compensation determined by market-value→ to → Incentive – based compensation determined through bargaining.

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