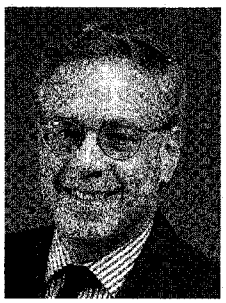
Taking Land: Compulsory Purchase and Regulation of Land in Asia-Pacific Countries*



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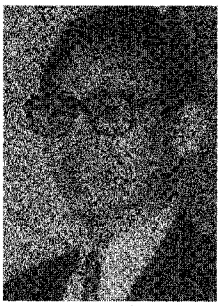

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The government use of compulsory purchase and land use control powers appears to be increasing worldwide as competition for space increases. The need for large and relatively undeveloped areas of land for agriculture and conservation purposes often competes with the need for shelter and the commercial and industrial development accompanying such development for employment, the production and distribution of commodities, and other largely urban uses. The free market does not always – some would say often – result in a logical and equitable distribution of land uses and attendant public facilities necessary to serve the use of land. One function of government is therefore:

(1) to regulate the use of private land for the health, safety and welfare of its citizens; and
(2) to help provide roads, water, sanitation, and other public facilities, as well as schools, parks and airports, etc.

Accomplishing the former is generally done in accordance with some form or level of plan. Accomplishing the latter often requires the exercise of compulsory purchase powers, providing public land or interests in land in order to construct such public facilities or infrastructure.

Due to its rapid urbanisation the Asia-Pacific region has generated a need for both land use control and the use of compulsory purchase powers. The same rapid urbanisation and the need for accompanying public facilities has generated area-wide interest in the mechanics (rather than the theory) of compulsory purchase and related land use control mechanisms. While there are certain similarities among the 11 countries that form the basis of our comparative study, there are differences as well, some of which (such as the ratio of public and private land ownership) are fundamental. The purpose of our study was to summarise the principal compulsory purchase and land use control systems in the 11 countries, and to attempt to draw some parallels and note some differences among them. However, any comparative study of law and administrative practice is bound to be somewhat general if truly comparative. Our study is no exception.

Set out below are the major themes that emerged from our study. The practices of the individual countries of the study are then summarised, with explanations and analysis of the laws applicable to compulsory purchase and land use control in each country.

Land use control

Virtually every country studied has some mechanism for the control of private land use, and in particular those uses most often associated with urbanisation: residential, commercial, industrial and institutional uses of land. These mechanisms range from the relatively detailed to the relatively broad-brush. What follows is a summary of the major themes that emerge from examining each Asia-Pacific country's concepts of land use and planning.

Ownership of land

There is some private ownership of land or rights in land in most of the countries studied. In countries like the United States, most land suitable for development, and virtually all land in urban areas, is privately owned. Much the same is true in New Zealand and Australia. However, in a significant number of countries – Malaysia, China, Hong Kong and Singapore – virtually all of the land is stated owned, although in Hong Kong and its administrative region, it is theoretically possible for a citizen to acquire the equivalent of a fee simple interest in government land through adverse possession over a 60-year period. There is no record of anyone having ever done so, however. This has considerable implications for the regulation of land use. In those states where most of the land is state owned, private development takes place almost exclusively on leased land with the government as lessor. The lease provides an added – sometimes the principal – method of control through lease covenants, often of a sophisticated nature, as in Hong Kong. Indeed, in Hong Kong, China and Singapore, the government retains the unilateral power to modify the terms of the lease, and in Hong Kong, a lessee's increased use of leased land requires the payment of a premium to the government-lessor.

Statutory framework

The majority of the countries studied provide for land use controls through a national statute that either imposes a minimum level of land use control or sets out a framework for regional and local control, or both. Indeed, only the United States appears to be virtually silent on national land use policy with respect to the private use of land, although virtually every state has an enabling Act that permits local land use controls through zoning. This, of course, may be due principally to the federal nature of the United States, where most powers of an internal nature reside with the states rather than with the national government, coupled with the country's comparatively large land mass (only China and Australia are comparable in this sense) and historic distrust of land use control in all but urban areas. Japan is a typical example of a country with national legislation that both sets policy and provides minimum standards. Most urban areas are required to undertake a minimum level of land use control. Each is further required to use roughly the same dozen use zones in regulating land use. Most, like Taiwan, further require consistency, more or less top-down, among national, regional and local land use regulatory schemes, with the national scheme setting broad policy and local schemes implementing it at the construction and development stages.

Plans and planning

Virtually every country integrates some sort of land use planning into the control of land use and development. Some, like Japan and Thailand, have national plans. In others, like the United States, the government generally delegates authority to the localities concerned, often with only the most rudimentary of plans even at the local level. Still others, like Australia, exercise the planning function at the state or regional level. Most countries require compliance with the appropriate level according to the plan document, and further require the compliance of the next governmental tier down with the plan immediately above. Thus, Taiwan's three-tiered planning system begins with the national, flows to the regional, and then to the local, with the higher tier guiding the lower one.

Zoning

In a majority of the countries studied, the implementation of land use controls is at the local level, through some sort of zoning. Korea, Japan, Taiwan and Hong Kong make it clear that such zoning must conform to the applicable – usually local – plan or planning document. The same is true with respect to most US states through either a court decision or a zoning enabling Act, although compliance with plans, if any, is often more honoured in the breach.

Typically such zoning divides the jurisdiction of a local government into various residential, commercial/business and industrial zones, sometimes with open space, agricultural and institutional zones as well. The uses permitted in each zone are found in a local zoning ordinance, resolution or rule (sometimes guided by national authority, as in Japan), together with a process, in some cases, enabling the changing of zones upon petition of the landowner/lessee/user of a parcel of land within a particular zone. In some of the countries studied – such as Japan and Korea – the national government imposes a standard set of zoning districts on all local governments. In others – like the United States – the choice of districts remains in the discretion of local governments, which may choose not to zone at all.

Building regulations

A surprising number of countries (eg Japan, Korea and Taiwan) regulate buildings as well as land use by means of a national statute. In others (such as the United States) building codes are the most localised of land development controls.

Courts and common law

The United States appears to be alone in its reliance on vast numbers of cases in the shaping of the land use regulatory framework, although a few also appear in Australia, Singapore and Hong Kong. This may be due largely to the common law traditions in these countries, together with the history of private rights to develop land, whether through leasehold or fee simple ownership.

'Regulatory' taking

In the United States, since 1922 at least, a town planning or land use regulation that goes 'too far' may be treated by courts in the same way as a physical taking or compulsory purchase. Usually to be so treated, the landowner must have been deprived by regulations of all economically beneficial use of the subject parcel of land. Similar 'regulatory taking' theories appear in Japan and Korea. In Japan, where a town planning zone designation 'takes' all future use and requires the cessation of existing uses, the landowner is entitled to compensation. In Korea, a designation that prevents all construction similarly requires landowner compensation.

Indigenous peoples

The accommodation of indigenous peoples, their rights and traditional practices, often clashes with town planning and land use regulatory schemes which are directed primarily at land development issues. In particular, Australia and New Zealand are dealing with this emerging land use issue.

Colonial heritage

The land use planning schemes of many countries are rooted in colonial practices imported from outside the country. This sometimes results in an overlay of outside influence over traditional notions of property, particularly if the basic real property law of the country remains rooted in its pre-colonial history. Australia, New Zealand, Singapore, Korea and the United States are examples of countries dealing with some of these issues.

Common problems

Principal among the problems that commonly arise under the various land use planning and control systems is enforcement. The pace of development has been swift in many Asian countries and violation of planning policy and regulation is common, particularly in Thailand and Taiwan. Often there is a concomitant loss of open space and agricultural land to more urban forms of development, as reported in Korea and Thailand. On the surface, there appear to be fewer enforcement problems in Singapore, Japan and the United States. Australia has two methods of enforcement: its municipal councils criminally prosecute breaches, and any person can bring a civil case against another. In addition, a problem with meaningful public participation in the process is reported in Taiwan and Thailand.

Eminent domain

Every country in the study claims the right of government to take or reclaim private property. Without such a right, public works of any kind would be extremely difficult to undertake. There is virtually no private landowner defence to such a governmental exercise of compulsory purchase or reclamation, without some clear evidence of bad faith. The only remedy, as stated below, is compensation, and even this is not necessarily guaranteed. What follows are some general themes that emerged from the study.

Source of authority

While generally held to be a natural attribute of sovereignty, virtually every country provides some written authority for exercising its compulsory purchase powers, generally phrased as some sort of limitation on that power. The majority of countries provide such articulation/limitation in a constitution, as in the United States, Japan, Taiwan, Malaysia and Thailand. Australia's federal constitution provides limitations only for federal exercises of the power, and state constitutions are by and large silent. Neither China's nor Singapore's constitutions contain compensation provisions, but both countries allow for compensation through individual legislative acts. This makes protection tenuous, however, because those laws could be changed or eliminated at any time, leaving land occupiers no protection from the governments' landholding policies because no clear constitutional protection exists. The process for exercising compulsory purchase powers, however, is almost universally a matter of national or, where relevant, state statutory law.

Public purpose and the extent of power

One would expect the extent of the power of compulsory purchase to depend upon the particular country's view of private rights in land – the more private rights are recognised, the weaker the power of compulsory purchase. Our study does not necessarily validate this presumption. Either by common law (the United States) or by statute and practice (Malaysia, China, Australia, Singapore and Korea) most of the countries make broad statements of public purpose as justifications for the exercise of compulsory purchase powers. In China and especially Hong Kong, however, where there is virtually no fee simple private ownership of land, limitations are set on the power of eminent domain. China limits the taking of interests in land from collectives. Hong Kong sets out specific purposes for which leaseholds may be appropriated, although these are sufficiently broad and numerous that they probably provide very little protection against compulsory acquisition by government. Both view such compulsory purchase as 'reacquisition'. Australia, on the other hand, finds a need to force citizens to be socially and environmentally responsible, without an even balance being struck with a constitutional protection of private property. The Australian High Court has now decided what is required of the citizen who is sacrificing property for the benefit of the wider community via a government programme, and to what compensation that citizen is entitled.

Compensation

Virtually every country provides some measure of compensation to the private owner of rights in property for the interests taken by compulsory purchase. Many – eg the United States, Australia (limited to federal acquisitions), Korea and Malaysia – require such compensation in their respective constitutions. Others, such as Singapore, provide for it by statute. However, the level and circumstances of compensation vary widely.

China and Australia generally provide compensation for raw land value only. Moreover, China provides for compensation on a legislative, case-by-case basis. Thus, for example, one province provided compensation of five or six times the value of the average output for three years for compulsorily-taken agricultural land.

Many of the countries studied provide for resettlement costs (China, the United States, New Zealand and Singapore), although methods used to calculate such costs vary widely. Some of China's provinces, for example, provide for the cost of relocation plus up to one month's lost wages for displaced workers. Others provide little or no compensation in particular circumstances (Singapore, China, Australia), although Australia provides increased compensation up to an additional ten per cent of market value for 'solatium': (ie intangible and non-pecuniary disadvantage resulting from the acquisition). A very few provide for compensation for a so-called 'regulatory taking' as, for example, when a government regulation prevents virtually all economically beneficial use of a parcel of land. (See discussion under 'Regulatory taking' above.)

Japan is also one of the few countries to use the idea of 'land readjustment', whereby the state returns to the landowner a stake in the 'combined project' for which the landowner's land was compulsorily taken. Malaysia and Thailand are considering the concept of exchanging government land for newly appropriated land. Thailand's problems with its backlog of appropriated land and its inefficient methods of appropriating that land may be answered by emulating the systems of Japan or Taiwan, which appropriate extra land for a

project to give to the original homeowners in an 'offset' manner.

Due process

Most countries articulate a need for some minimum process that guarantees certain procedural rights to the landowner. Several of the countries set out a broad right of due process in their respective constitutions (the United States, Malaysia, Taiwan, Korea and Singapore) although in at least one country (Singapore) the courts rendered such process unnecessary. Some countries require negotiation between landowner and government to precede some or all exercises of eminent domain (the United States, Thailand and Singapore), and most countries provide for negotiation at some stage of the process. Virtually every country requires notice to be given to the occupier/owner of the land (or interests therein) to be acquired.

Most countries also provide for a process of appeal, if not the declaration of public purpose, then at least the process or the compensation award. Most also require at least one public hearing. Some countries provide a specific tribunal for appeals purposes (Hong Kong, New Zealand and Singapore). Others grant extensive compulsory powers to a 'super agency' that carries out the bulk of government 'condemnations', eg Singapore with its powerful Urban Redevelopment Authority. ■

Note

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