

MSIA Reading Series 17

LAND ACQUISITION ACT 486 (AMENDED): CRITICAL ISSUES AND THE ROLE OF SIA

24 Ogos 2023
(2.30 – 4.00 pm)

by

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HARD TALK

LAND ACQUISITION ACT 486 (Amended) Critical Issues and the role of SIA

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**ISU-ISU KRITIKAL DALAM
PENGAMBILAN TANAH dan
PERANAN SIA**



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1. Introduction

MSIA Reading Series 17 presents an understanding of the subject of land acquisition in the country and the issues relevant to it. This topic is rarely discussed amongst social impact assessment (SIA) consultants but an understanding on land matters particularly focused on land acquisition certainly have dire social and socio-economic impacts upon parties affected. Hence, consultants preparing SIA reports should have adequate exposure and appreciation on the subject matter as impacted stakeholders' property are affected. Having adequate understanding in land acquisition matters would ensure SIA consultants are more thoughtful and empathetic during the process of preparing good SIA reports.

This reading series is a proceeding of the Malaysian Association of Social Impact Assessment (MSIA) HardTalk entitled Land Acquisition Act 486 (Amended): Critical Issues and The Role of SIA. This discourse was provided by Prof Dr Ismail Omar who is an Honorary Professor of Kuala Lumpur Infrastructure University and the First Present of Pertama. The session was moderated by Puan Herlina Ab. Aziz, President of the MSIA. The followings are the sub-topics deliberated:

- Land acquisition in Malaysia
- Land Acquisition Act 486 (Amended) 2015
- Factors taken into Consideration on Assessment of Compensation
- Acquisition of Waqaf Land
- Land acquisition in Selected Countries
- Issues on land acquisition and SIA

2. LAND ACQUISITION IN MALAYSIA

Land is an essential resource in the development process that has the potential to generate economic returns to its owners. Socially, land property ownership provides a sense of belonging and security to the proprietor. The significant value that society attached to its ownership has led private land property rights towards individuals' land property ownership and the right to peaceful enjoyment of land to be two of the most fundamental rights recognized by international treaties (Noor Asyikeen, 2024). However, it is firmly established that the Government may acquire any land including privately owned land to meet national and public needs. Without land acquisition, the Government would face difficulties to develop public infrastructure. When properly undertaken land acquisition can succeed to fulfil the potential needs and various interests upon that parcel of land.

In Malaysia, Act 486 is the Land Acquisition Act 1960. According to this Act, land acquisition is permissible under Section 3 of the Land Acquisition Act 1960. The

Government or State Authority may acquire any land which is needed for the intentions of:

- (a) for public purposes*
- (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.*

An application for the acquisition of any land under paragraph (1)(b) or (c) shall be made in writing to the Land Administrator in the form as prescribed in the Rules made under this Act.

The issue of private land being acquired for development has significant impacts upon the original property owners. Land acquisition would involve compensations to the original owners. Land acquisition is directly exercised under the Land Acquisition Act (1960), and provided under Article 13 of the Federal Constitution:

“..that no person may be deprived of property in accordance with law and no law may be provided for compulsory acquisition or for the use of property without adequate compensation.. “ (Land Acquisition Act, 1960)

Adequate compensation necessitates appropriate and fair valuation of the land property to ensure that the original owner is justifiably compensated. Valuation is a complex exercise incorporating various factors.

“Valuation is an art and science in estimating the worth of property interests for a particular purpose, at a particular time considering factors like physical, economic, market and investment alternatives.” - Professor Alan Millington.

A pertinent issue that arises is that the compensation value is based on its value at the time of acquisition. However, it is common knowledge that the value of acquired property would increase exponentially after development.

3. LAND ACQUISITION ACT 486 (Amended) 2015

A discussion of the Land Acquisition Act 486 (Amended) 2015 necessitates further understanding that land acquisition can be characterized into four major elements. It arises from a:

- Multitude of complex needs including physical, technical, economics and business opportunities
- Limited land sources are available at certain desired location
- Rapid development that requires certain parcel of land be acquired
- The existence of high demand by the people for certain goods and services that the development project can offer

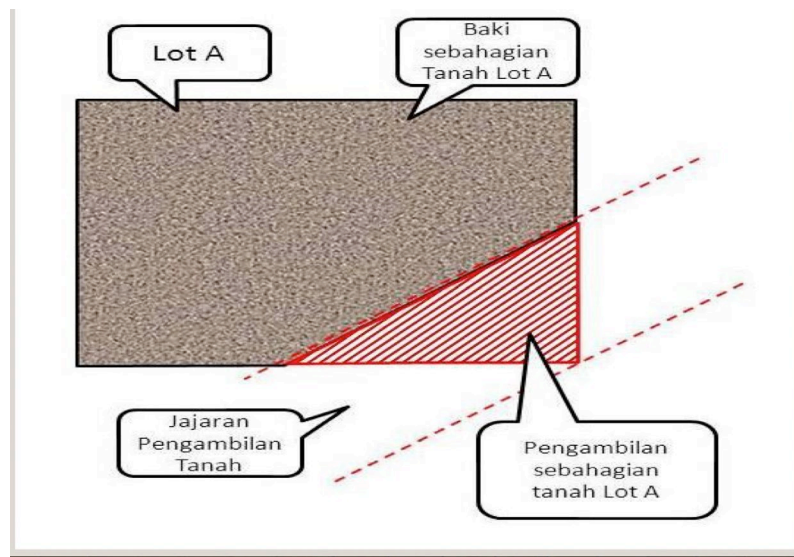


Further, there are also pertinent issues on land acquisition that the Act has been made to handle. Among them are discussed below:

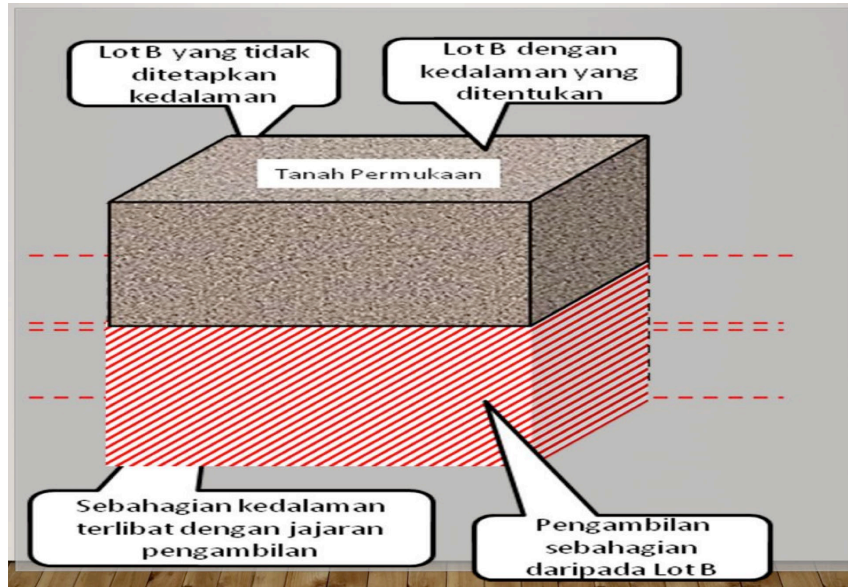
3.1 Under-Ground Land Acquisition

Land acquisition may involve either above ground or below ground. The best way to understand such land acquisition is by the illustration below.

- i. Acquiring a portion of a land lot

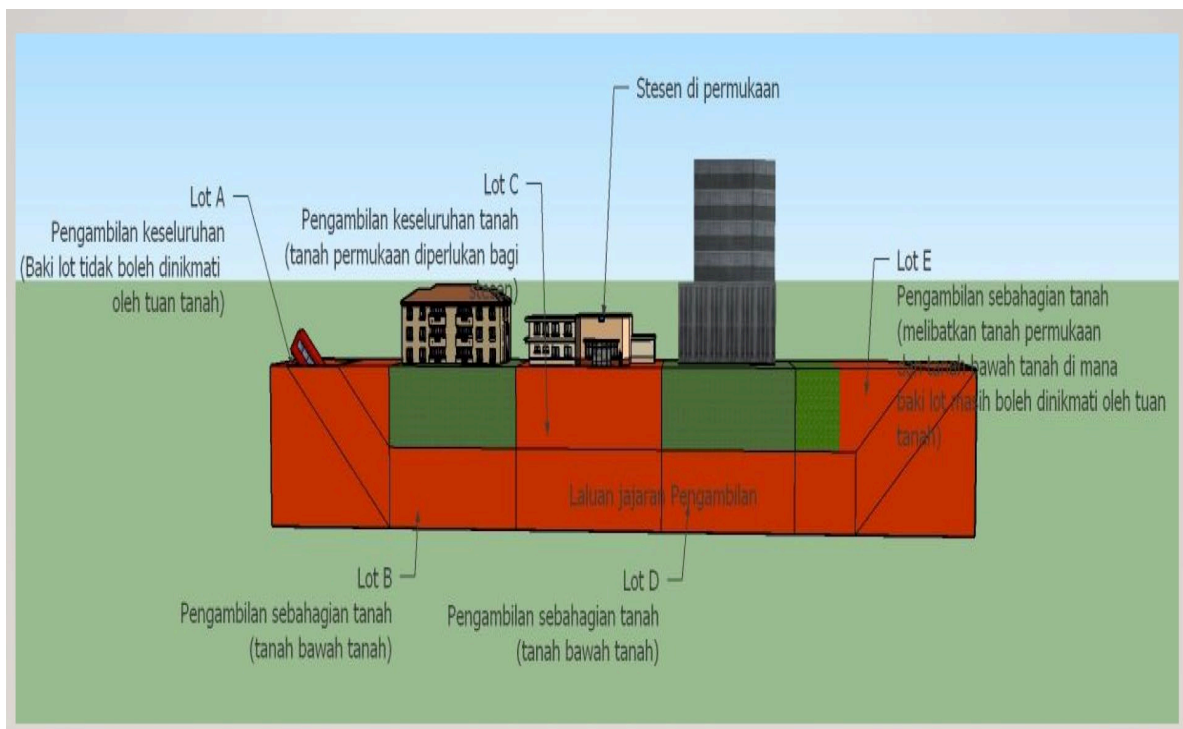


- ii. Acquiring of land lot involving under-ground acquisition



The need for such land acquisition is depicted by a development project depicted below. Land acquisition may involve various multi-faceted situations:

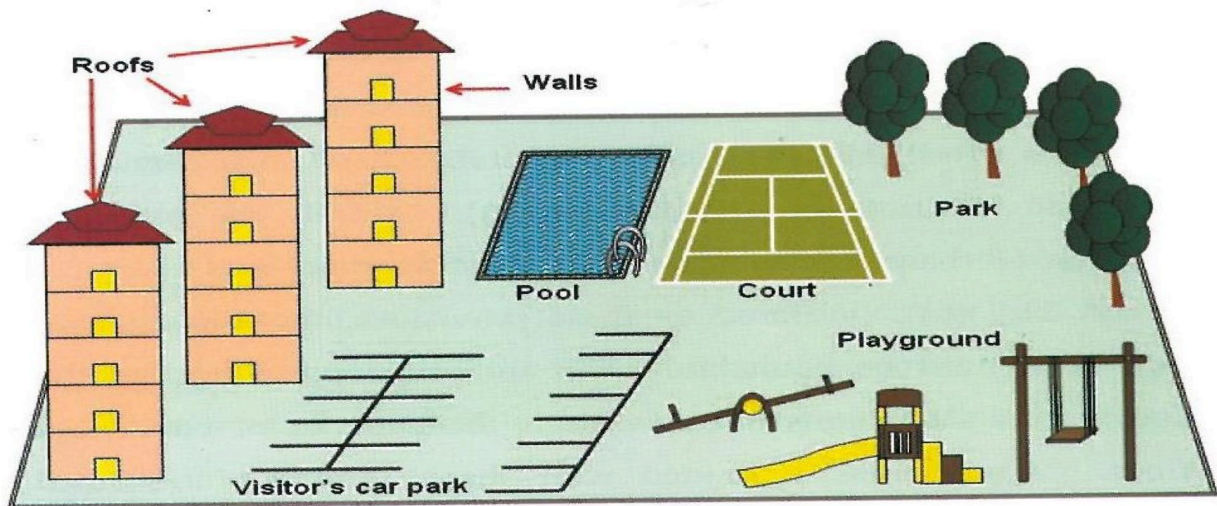
- Acquisition of the whole lot whereby then the land owner could not benefit from the unutilized portion as in Lot A below.
- Acquisition of a portion of under-ground land as in Lots B and D.
- Acquisition of the whole land to be fully utilized for development as in Lot C
- Acquisition of a portion of land involving surface and under-ground land whereby the remaining land lot could still be utilized by the land lot owner.



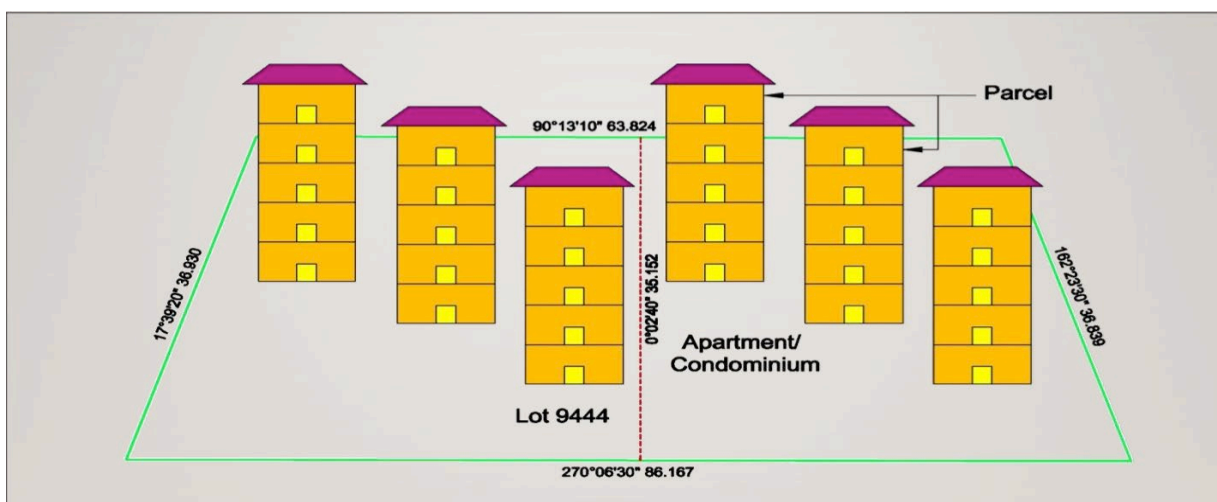
3.2 Acquisition of Strata Land

In Malaysia, the current laws governing strata properties are the Strata Titles Act 1987 (“**STA**”), Strata Management Act 2013 (“**SMA**”) and the Housing Development (Control and Licensing) Act 1966 (“**HDA**”). There are also regulations issued under the abovementioned Acts, such as the Housing Development (Control and Licensing) Regulations 1989 (“**HDA Regulations**”). There are many issues concerning the managing the strata developments. One of them concerns land acquisition. Just as in under-ground land, the acquisition of strata land may involve several combinations:

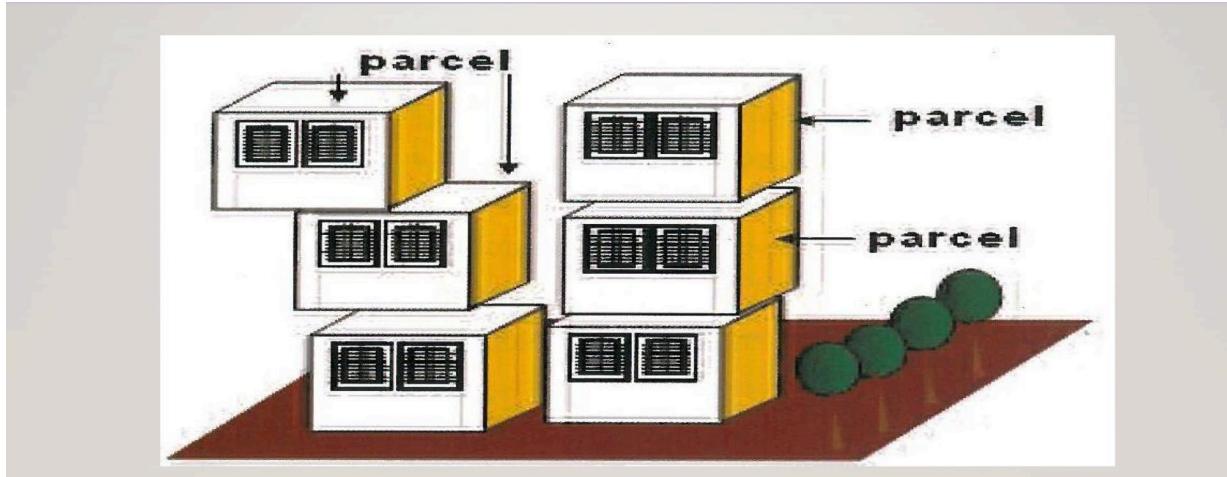
i. Full Acquisition



ii. Partial Acquisition



iii. Parcel Acquisition:



4. FACTORS CONSIDERED IN ASSESSMENT OF COMPENSATION

The Land Acquisition Act 1960 is an Act relating to the acquisition of land, the assessment of compensation to be made on account of such acquisition, and other matters incidental thereto.

The assessment of compensation can take several forms. Of interest are:

- Compensation value for Restriction-in-Interests Land, such as TRM, MCL, native not including Waqaf Land.
- Based on acquisition purpose of development end:
 - i) For construction of roads, all people can use, based on market value without restriction;
 - ii) For construction of mosques, should have to consider value restriction of interests.

To ensure adequate compensations are awarded, several factors are taken into account including:

- Land value (including buildings)
- Affected damages
- Severance
- Nuisance ex-gratia payment
- Others like cost of attendance, transportation and printing; and
- Award of compensation could be paid in monetary form or building or in kind

5. ACQUISITION OF WAQAF LAND

The Majlis Mu'tamar Al-Fiqh Al-Islami held in April 1988 has provided some resolutions pertaining to the acquisition of Waqaf Land:

- Acquisition of land have to respect individual ownership right and provide protection to them in all conditions.
- Acquisition of land ownership must come with adequate compensation payment and in immediate time based on the agreed amount decided by qualified party and not to be less than the actually right value.
- Land acquisition must be implemented by the authority or its representative.
- Land acquisition must be based on the purpose of public interest or public needs (*Darurah 'Ammah*) such as for the construction of mosques, roads and etc.
- Land acquisition from its owner cannot be used for the purpose of investment either for the benefit of the public or of certain individuals.
- Land acquisition of owned land cannot take place before the time it is really needed.
- The decision for land acquisition must be relevant, reasonable, acceptable and capable to resolve certain problems that usually occur.
- The benefit from the land acquisition has been put forward by experts and professionals, among them religious-legal experts and experts in related fields.
- The benefit from the land acquisition will directly avoid hardship that could happen, and will bring beneficial ease, in-line with the Firman Allah Taala that means “.. and I do not create for you in religious matter of any hardship..”
- The land acquisition is to be used for all (*al- Kulliyat*) that is to bring benefit and avoid hardship to all humankind. If the benefit is only for or monopolized by a small group of people (*Juz'iyat*), then that cannot be the base of setting the rule.
- The act of acquiring the land fundamentally does not take away or cause disruption to other needs that is more or equally beneficial.

The Standard of Maslahah (Common Good) in Acquisition of Waqaf Land requires that

- Acquisition of Waqf Land for the common good must be based on benefits that are *Haqiqiyyah* (truthfully) and *Qat'iyyah* (certainly) the common goods, and not *Wahmiyyah* (just illusionary good).
- The land acquisition must be in-line with the meaning and demand of the *Syara'* rule, not denying the original ruling, not against any rules that are *Qat'ie* (certain/fixed). It must also be in accordance with the common good demanded and accepted by the *Syara'* rule based from the al-Quran, al-Sunnah dan Qias. It must be in-line with the *Fiqh* method that all practices depend on the *Niyyah* (purpose and intention).
- The necessity for the land acquisition must also be included in the *Maqasid al-Syar'iyyah* (Objectives of the Syara' Rule) for the protection of the five elements; religion, life, mind, family lineage and wealth, eventhough involving individual rights.

It should be noted that there are contradictions between *Maslahah* (common good) and

Mafsadah (problems or bad effects) in the acquisition of waqaf land. Among them are

- Forced land acquisitions are usually exposed to corrupt and abuse of power by parties with interests.
- In the acquisition of Waqaf land, there could be, not only contesting two *Maslahah* (common goods), but there could also be complexities in the contradictions between *Maslahah* (common goods) dan *Mafsadah* (bad effects or problems), that involve various aspects especially in terms of the purposes of acquisition and the procedures when acquisition takes place.

Among the Muslim scholars there are differences in opinions on the matters of Waqaf land acquisition. In the opinion of the Hanafi Mazhab, the trading and exchanges due to *Darurat* (emergency) circumstances are based on the following conditions:

- The waqaf property generally no longer provides benefits.
- The waqaf property no longer produces benefits and has no potential to be developed.
- There is no wrong doings in the transaction trading of *Istibdal*. The *istibdal* method is used to solve problems related to the affected waqaf property from its utilization. If the waqf property can no longer be used to achieve the original purpose for which it was endowed, then the *istibdal* method must be implemented to achieve its objective.
- The authorities administering the process of *Istibdal* must possess the expertise and practical experience to avoid implications to the status and position of waqaf property.
- Waqaf property must be replaced with fixed property, and cannot be exchanged with cash money to avoid misuse by any parties, because not many buys the replacement of waqaf property.

Imam Ibn Taymiyyah provided two conditions in the acquisition of waqaf land by the authorities:

- There is a specific need or interest (*hajat*).
- Land acquisition due to a very clear common good (*al-Maslahah al-Rajihah*).

Both of these conditions are included in the *Maslahah 'Ammah* dan *Darurat* (Common good and problem).

6. LAND ACQUISITION IN SELECTED COUNTRIES

The discourse too provides land acquisition practices in other countries.

6.1 Land Acquisition in India

The process of land acquisition in India has proven unpopular with the citizenry. The amount reimbursed is fairly low with regard to the current index of prices prevailing in the economy. Furthermore, due to the low level of human capital of the displaced people,

they often fail to find adequate employment.

Land Acquisition Act 1894 (India); The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 took effect on 1 January 2014.

...an award of the market value of the land multiplied by the factor specified, plus the value of assets attached to the land and building/s, and a solatium.

... to pay up to about five times the market value of the land under acquisition for undertaking any project, besides providing for the rehabilitation, resettlement and entitlement for the landowners and families whose lives are wholly dependent on the land acquired, as well as the infrastructure and amenities.

There have been a rising number of political and social protests against the acquisition of land by various industrialists. They have ranged from Bengal, Karnataka, and Uttar Pradesh in the recent past. The acquisition of 997 acres of land by Tata Motors in Bengal in order to set up a factory for the cheapest car in India was protested. Similarly, the Sardar Sarovar Dam project on the river Narmada was planned on acquired land, though the project was later canceled by the World Bank.

The Act also introduced changes in the land acquisition process, including a compulsory social-impact study, which needs to be conducted before an acquisition is made. The 2013 Act focuses on providing not only compensation to the land owners, but also extend rehabilitation and resettlement benefits to livelihood lost from the land, which shall be in addition to the minimum compensation. The minimum compensation to be paid to the landowners is based on a multiple of market value and other factors laid down in the Act.

6.2 Land Acquisition in Indonesia

On January 14, 2012, the Government of the Republic of Indonesia issued Law No.2 of 2012 on Land Procurement for Development in the Public Interest ("Land Acquisition Act"). The issue has not been resolved through previous regulations (such as Presidential Regulation No. 36 of 2005 and Presidential Regulation No. 65 of 2006). Therefore, the Land Acquisition Act is intended to ensure the acquisition of land for such purposes.

It is without doubt that the Land Acquisition Act and its implementing regulation, i.e. Perpres 71/2012, are intended to promote good planning, deliberation, time, and legal certainty in each process as well as fairness in compensation. As for compensation, it is also regulated that the compensation may be in the forms of money, replacement land, resettlement, stock ownership, and/or other forms as agreed by the parties.

6.3 Land Acquisition in Hong Kong

The Lands Tribunal shall determine the compensation: (if any) payable under subsection

(1) on the basis of-

- (a) the value of the land acquired together with any buildings erected thereon at the date of vesting;
- (b) the value of any interest, right or easement in or over the land acquired, owned, held or enjoyed by the claimant at the date of vesting;

7. ISSUES ON LAND ACQUISITION AND SOCIAL IMPACT ASSESSMENT (SIA)

With the above recognitions of that development projects may require land acquisitions and with that the need for compensations, there is certainly a connection to SIA reporting. An SIA is a process of research, planning and the management of social change or consequences (positive and negative, intended and unintended) arising from policies, plans, developments and projects (UNEP, 2007). The core focus of an SIA is on the important impacts of projects and developments beyond the impacts on natural resources.

SIA Example: Tourism Development

An increase in tourism, in part as a result of the hotel expansion, will have both positive and negative socioeconomic impacts.

Potential positive impacts are:

- Rise in local community employment opportunities
- New outlets for agriculture and fish products

Potential negative impacts may include:

- Increase cost of fish to villagers as demanded at higher prices
- Overfishing of the already declining fish stock to meet demand.

In order to mitigate the social impacts of this project, the following measures are proposed:

- Assist surrounding local communities in raising their education level
- Special efforts to train locals
- Giving experienced and skillful local youths job opportunity priority
- Negotiations with locals to sell their commodities among others.

When a development project involves land acquisition, the role of SIA becomes more critical as the sense of belonging and security to the land owner is totally lost if not partially severed.

7.1 The Need for SIA in the Land Acquisition Act 1960

The SIA report has to be clear in its Statement of Needs as to the purpose of acquisition as stated in the Land Acquisition Act for public and economic development purposes and depending on what the final product of completed development looks like.

In the mitigation measures involving compensation, special attention has to be given upon the compensation value. The open market value of the land has to be taken.

There are the issues of the Do's and Don'ts involving:

- Value of land taken to utilize the appropriate valuation method whether the comparison method, or transactions method.
- To incorporate or not the Injurious Affection for damages to the remaining land not acquired
- To incorporate the Severance Value (before and after)
- To incorporate the Disturbance Value which necessitate inflating the cost.

7.2 Issues on Land Compensation Under the Electricity Act 1980

Issues arise involving the electric lines pathway or trails when land is not fully taken / touched, but the pathway have to be cleared and maintained regularly. The value of compensation is less, up to 40% of the value of land taken. This is mostly unfair due to Tenaga National privatization policy. Land Acquisition Act 1960 has been used (for the pylon sites) and access of maintenance. It should be noted also that there is an impact on land taxes and rates (local property taxes).

7.3 Issues on the Need for SIA under the Waqaf Land Enactment

Pertaining to waqaf land acquisition, how far is the concept of “*maslahah ammah*” applicable and quantifiable on the valuation of compensation? The Fatwa on waqaf land taken is that the acquired land must be replaced with similar land nearby. There is the constraint on Which land? What size? What value? Similar adaptation to Schedule 1 Land Acquisition Act 1960 upon the injurious affection, severance, disturbances etc. applies.

7.4 The Need for SIA in the Acquisition of Malay Reserved Land (MRL) and Native Land

Under Article 89 Federal Constitution, any acquisition of MRL must be replaced / substituted with similar or better land. There are concerns upon Where? When? What price? And Willingness of the State Authorities? When an SIA report is mandated, these concerns would be deliberated. The lack of SIA studies and reporting could be observed via case studies below:

- Kampong Bahru Malay Agricultural Settlement (MAS) Kuala Lumpur 1991/1992 proposed land acquisition was withdrawn due to high value of compensation – Has any SIA study been undertaken?
- Sungai Baru Kg Bahru Kuala Lumpur 2023 involving no MAS but leasehold – Has any SIA study been undertaken?
- Schedule 1 was adopted by using sale comparisons with falsified evidence at RM400 psf whilst the nearby land was valued at RM1200 psf.

CONCLUSION

This reading series has deliberated upon a critical matter pertaining to the Land Acquisition Act in Malaysia. The practice illustrated and the issues that have arose have been deliberated. Old and obsoleted law of land acquisition and electricity supply must be amended to incorporate SIA elements as in other countries. To move forward and be fair to the affected landowners, the valuation methodologies must be reviewed and harmonized accordingly. Similarly, a review on the law and valuation methodologies must be undertaken in the valuation of MRL, waqaf land and native land. Without a fair and deliberate process, procedures and valuation, the delay in acquiring land for development will occur and the people will suffer.

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