

## NON-COMPULSORY LAND ACQUISITION, LAND USE REGULATIONS AND GENTRIFICATION

Dr Faranak Seifoddini\*

Dr Michael Harris\*

### **Abstract**

The Public Works Act of 1894 enables land to be obtained for public purposes (Wikipedia, the free encyclopedia). Acquisition usually occurs with the landowner's agreement. If there is no agreement (or the landowner cannot be reached or deceased), the land may be obtained without their agreement (compulsory land acquisition) (Te Tari Taiwhenua, 2015). Compulsory land acquisition under the Public Work Act is rarely used and can be controversial because it takes away private property rights (Te Tari Taiwahenua, 2005). It is argued that compulsory land acquisition is a legal action which happens with compensation. Compulsory land acquisition is usually considered inefficient and not very effective because; (1) It is usually profitable for the owners of the high-value properties; (2) there are different basis for determining compensation. How the amount of compensation is calculated is also argued and is critical considering the efficiency as well as the fairness of the earning (Ram Singh, 2012). For an eminent domain process to be efficient and fair, information about the costs and benefits should be available. If not, the process will be inefficient. In practice, the price for the compensation consists of the market value of the ownership plus calculating other costs such as displacement costs, disturbance, and sense of attachment. Market value of ownership is usually determined on the basis of the value of similar land. Although, it is difficult to find two properties which are exactly the same. Studies show that the actual compensation received by the owners of the acquired properties is generally different from their market value (Burger and Rohan, 1967), Munch (1976), Bell and Parchomovsky (2007). Ram Singh (2012) writes "when direct and indirect costs and benefits of land transfer are considered together, regulated voluntary

\* College of Public Services and Urban Studies, Tennessee State University, Nashville

transactions are more efficient and fair compared with the compulsory acquisition under eminent domain". Recent compulsory land acquisition strategies are based on the compensation in free-market values plus other costs that are compensated. Free-Market systems prefer the non-compulsory methods and without doubt this will continue (Kitay, 1985). This paper presents non-compulsory land acquisition strategies, using land use regulations and their mechanisms.

### Introduction

Land use law, broadly defined consists of the full range of laws and regulations that influence or affect the development and conservation of land. Good planning involves using a range of policies and strategies to achieve land use goals, allowing planners to modify development corresponding with the characteristics of habitat, its importance, and values of local citizens (Soute, 1991; Grant et al, 1996; Duerksen, et al, 1997). Professional planners can provide a full range of options for decision makers. States with strong land-use legislation (e.g. Oregon, Florida, and Vermont) provide local governments the most effective local land use planning and management. "Land use regulation is defined as ordinances of government including requirement of permits and codes created to ensure private use of land such as land use regulations including housing codes, regulations of subdivisions, zoning ordinances and building codes (Business Dictionary.com). This paper is a presentation and an analysis of land acquisition strategies using land use regulation policy. A brief outline of existing strategies and mechanisms used to achieve them are:

Non-compulsory land Acquisition using land use regulations:

A-Regulations

A-1: Zoning Laws and Regulations

- Re-zoning

A-2: Subdivision Laws and Regulations

- Variance

As – of – right Uses

Non-conforming Uses, Abatement, Amortization

## Special-permit Uses

- Variance Types
  - Area Variance
  - Use Variance

## A-3: Site Plan Regulations

- Building Codes

**A-1- Zoning Laws and Regulations**

Zoning is the most important method of applying land use regulations undertaken by local governments. Zoning divides a jurisdiction into geographically contiguous “zones”. Land use and zoning regulate the use and development of real estate. The most common form of land use regulation is zoning. Municipalities use zoning to control and guide the development of land. In 1916, New York city adopted by virtually every major urban area in the United States (Findlaw.com). Land use law is intensively intergovernmental and interdisciplinary laws and there are countless intensively intergovernmental and interdisciplinary. There are also intersections among federal, state, regional, and local statutes. The local zoning ordinance prescribes what may be done in each zone and what may not be done. Majority of the population of the United State live in communities that are zoned. Land use regulations are considered as a part of zoning. Zoning can be used as an incentive to increase property value and as a result can be used as a mechanism for land acquisition.

Zoning is defined in relation with land use regulations, and by other laws and regulations such as environmental, administrative and municipal laws. Zoning allows communities to shape their property tax-base. Most communities try to have developments that raise the value of their personal asset (Fischel, 1944).

By dividing the jurisdictions into zoning districts and prescribing the specifications for land development for each district, local governments create a plan for “development pattern”. In an evolving pattern, sometimes local legislatures can “rezone” district areas and rezoning mechanism can be used as an incentive for land acquisition. For example, a land banking organization can encourage a developer to buy a land with market value and other costs from an owner with the incentive that the residential land will be converted into commercial in the

process of gentrification. Laws and regulations can be used to influence land use decisions. Lands in the edges of a city can be converted into residential land use to provide an incentive for the developers to buy the land converted to residential land value and make investments. In cases such as New York, under New York constitution, specific authority has been delegated to municipalities to adopt comprehensive plans and zoning laws and adopt subdivision and site plan regulation under the village, town and General City Law. The state keeps authority to regulate certain aspects of land use, delegate some authority to county regional agencies. In case of New York, counties can create planning boards and adopt comprehensive plans and official maps. County planning boards can provide technical assistance to cities, towns and villages, regarding the “creation” of comprehensive plans and the adoption of land use regulation. Some local land use decisions have impacts on inter-municipal, county or state levels. These cases should be referred to county and regional boards. The enabling statutes require comprehensive plans to be in accordance with land use regulations (Beginner’s to Land Use Law). “Planning is the essence of zoning”.says the judiciary in New York State. Comprehensive plan is society’s insurance that public welfare is served by land use regulations (Fischell, William, 1944) and comprehensive plan (rezoning) can be used as tool to achieve land acquisition plans for the purpose of gentrification. Local governments regulate land use and link private property” rights with greater “public interest”. Private developers are capable of building large scale communities and their actions can have spillovers and increase in land value (Fischel, 1994). Some communities have piecemeal development created by numerous developers who might not coordinate their efforts (Fischell, 1994). Coordinated efforts beyond immediate neighborhoods can be achieved by regional planning and zoning, and legal doctrines that protect landowners’ interests to limit the government relation with land use (Fischell, William, A, 1944). Freud (1904) wrote that “zoning is universally regarded as part of the government’s police power which is the authority to make regulations and is considered as one the inherent powers of government. Police power is often considered parallel with two other inherent powers: (1) Eminent domain, (2) taxation. Part of zoning laws can be defined as pattern language at national level and to be applied considering local condition (contextualization). But “State Preemption Doctrine” should also be

considered. Preemption is a doctrine based on the supremacy clause of the U.S. constitution that certain matters have national dimensions, as opposed to local (Beginner's Guide to Land Use Law). This principle emphasizes that local land use regulations are not permitted to control matters whose regulation works beyond the state legislature. Local government bodies such as Zoning Boards of Appeals, Planning Board, Conservation Advisory Commission, Architectural Review Board, Historic District Commission, and Wetland Commission roles, the procedures and standards are found in the state statutes. These are often supplemented with local zoning laws and regulations. Local governments have more flexible authority to establish standards and procedures that meet their unique needs.

Some historians of American cities have emphasized that municipalities have long been responsible for entrepreneurial development schemes (Monkkonen, 1988).

Rezoning as a mechanism for land use change can be achieved through: (1) zoning laws/regulations; (2) Consent of all of the neighbors about the property. Some early zoning laws permitted zoning changes if the landowner got the consent of all or nearly all of the neighbors about the property; (3) Exactions: Developers would simply pay the community a sum that could be put in the municipal treasury to be used for additional public services (Beginner's Guide to Land Use Law, 2015). (4) Transfer of Development Rights (TDR), is a form of exchange of zoning that is also called "Barter Arrangements" which means exchange of goods and services for other goods or services. Instead of the community offering development rights in exchange for the developer's cash, the landowner is offered the right to develop elsewhere. This method is similar to barter-like exactions, TDRs are in principle efficiency-enhancing (Mills, 1980; Carpenter and Heffley, 1982).

#### **A-2- Subdivision Laws and Regulations**

Under the typical zoning law, private land use is classified under one of these categories: (1) As-of-right-uses: are principal uses and their accessory uses that are allowed because they are principal uses and as-of-right uses. (2) Non-conforming uses: A land use that existed before determining the zoning restrictions and is prohibited by that zoning. A property's right to continue a nonconforming use may be lost by abandonment. Local zoning laws frequently determine that any discontinuance of the nonconforming use for a specified period constitutes

abandonment. Criteria for amortization are: (A) when the common law of nuisance would allow neighboring property owners to encourage discontinuation of nonconforming use. (B) Where the nonconforming use is somewhat harmful and the owner has little investment in it.(3) Special use permit; Conditional use permit, or special exception is adding uses to as-of-right uses. Other uses of land can be determined if they receive special permit. Special use permit can be used as a mechanism to encourage developers to buy the land and invest. Once a special permit has been issued, it is not personal to the applicant, but it is added to the ownership of land. The local legislature must adopt standards to guide the review, to set the condition, and to approve special uses. For example, the requirements that gasoline stations and drive-in establishments should provide adequate parking, or a developer to be required to provide landscaping can be an incentive for other developers to buy land and invest (Beginner's Guide to Land Use Law, 2015).

Special use permit is used to (1) To achieve a degree of flexibility; (2) To achieve the needed diversity of uses while insuring compatibility with surrounding properties (Beginner's Guide to Land Use Law, 2015).

These permissions are issued by local administrative agency. For example, a residential unit can receive permit to open a pansion with the condition that maximum five individuals are accommodated. Building permits certifies that the submitted plans conform to the standards and specifications of the uniform codes. Building permits are used as a mechanism: (1) to check if the proposal conforms to the "dimensional" and "use" provisions of the zoning law.(2) to check if the proposal conforms with the building codes (uniform codes). The property owner asking for a use variance must prove that the variance, if granted, will not alter the essential character of the neighborhood.

"Variance" is defined as an administrative exception to land use.If a proposed use of a property does not conform to the existing zoning plan, "Zoning Board of Appeals" can issue a permit for the proposed land use. To qualify for a variance, the petitioner should justify the conversion of current use to the proposed use and should prove that proposed land use will be beneficial. Also, suggested use should be compatible with the zoning plan. (Beginner's Guide to land use law). . In relation with zoning laws and regulations "re-zoning" mechanism can be used and in

relation with subdivision laws and regulations, “variance” mechanism can be used (Beginner’s Guide to Land Use Law, 2015). The subdivision and development of individual parcels must conform to the provisions of local zoning which are the (1) use, and (2) dimensional requirements. Subdivision determines details that go beyond zoning plan and protects neighborhoods from flooding, erosion, traffic, congestion, accidents, unsightly design, noise pollution, the erosion of neighborhood’s character( Beginner’s Guide to Land Use Law, 2015).

Changing a land use through zoning and variances can increase land value and can be used as an incentive for the investors to buy the land and develop it.

Variances and zoning delegates more authority and flexibility to local governments. Variances provide flexibility in the application of the zoning law and afford the landowner an opportunity to apply for administrative relief from certain provisions of the law. A property owner may seek a “use” or “area variance” when an application for a building permit is denied on the grounds that the proposal does not conform with the use or dimensional requirements of the zoning ordinance. Alternatively, the property owner could request the local legislative board to rezone the property so that the requested use is allowed (Beginner Guide to Land Use Law, 2015). The zoning board of appeals has been delegated the statutory to issue use and area variances.

### **A-3- Site Plan Regulations**

Third mechanism using regulations as an incentive is “building Codes”. Site plan regulations can use “building codes” changes as an incentive. In most municipalities, the most critical land use decisions are made by the local legislature, which adopts the zoning laws, and other land use laws and regulations. The planning board, the zoning board of appeal control the decisions. These local legislature bodies must adopt standards to guide the review, conditioning, and approval of special uses (Beginner’s Guide to Land Use Law, 2015). Local governments are authorized to adopt regulations regarding the subdivision regulations (the subdivision of parcels of land for development) and Site plan regulations (the development of individual parcels of land). Therefore, local governments should adopt zoning regulations, subdivision regulations and site plan regulations. The general purposes of adopting standards and the procedures for “site plan review” and approval are (1) to assure that the development of

individual sites do not affect surrounding properties negatively, (2) that the community is developing in an orderly and cost-effective way.

### Conclusion

Local governments adopt (1) “zoning regulations”; (2) “subdivision regulations” and (3) Site plan regulations. “Rezoning” is a mechanism that is used in relation with “zoning regulations”. “Variance” is a mechanism that is used in relation with “subdivision regulations” and “Building codes” are used in relation with “Site plan regulations”. The local legislature: “planning board”, and “zoning board of appeal” control the decisions. The local legislature must adopt to guide the review, conditions and approve special uses. For example, requirements that gasoline stations and drive-in establishments provide adequate parking, and the landscape buffering are “special use permits”. Rezoning, variance and building codes are three mechanisms that are used to achieve a degree of flexibility, and to achieve needed diversity of uses, while insuring compatibility with surrounding properties (Beginner’s Guide to Land Use Law, 2015).

Land use regulation not only guides and controls current uses and developments, but also guides future development (findlaw.com).

The result of a comprehensive land use planning is a “comprehensive or master plan”. Comprehensive plan or master plan is an official map for a municipality. Master plan is put into effect by ordinances controlling zoning, subdivision developments, and building regulations. Future developers must plan their subdivisions in accordance with the official map or plan. In recent years, an increasing emphasis has been placed on regional and statewide planning. Recognizing that the actions of one municipality will strongly affect others. Therefore, a regional plan which can provide a framework for preparing comprehensive (master) plans, with a comprehensive vision and one set of regulations is recommended (Findlaw.com).

Land use and zoning regulations can restrict the rights of owners to use their property, or can be defined to provide flexibility in the rights of owners in using their ownership (Findlaw.com). Zoning, subdivision and building codes regulations can be related to the public health, safety, comfort, morals and “general welfare”.

Not all land use restrictions are created by governments. Land developers may also incorporate restrictions in their developments such as limiting the use of the property and prohibiting



certain uses. "Easements" are also now used for public objectives, such as the preservation of open spaces and conservation (Findlaw, com). For example, an easement might preclude someone from building on a parcel of land, which leaves the property open and thereby preserves an open green space for the benefit of the public as a whole (Findlaw.com).

## References

- Bassett, E.M. 1938. The Master Plan, With a Discussion of the Theory of Community Land Planning Legislation. New York: Russell Sage Foundation.
- Beginner's Guide to Land Use Law-2015. Land Use Law Center. Pace University School of Law.44.
- Bell, Abraham and Giden,Parchamovsky. 2007. Taking Compensation Private. 59. Standard Law Review. Pp: 871-906.
- Burger, Curtis, J. and Patrick. J. Rohan. 1967. The Nassau County Study: An Empirical Look into the Practices of Condemnation. 67. Columbia Law Review. pp: 430-58.
- Fischell, William, A. 1944. The Economics of Land Use Exactions: A Property Rights Analysis.
- Goetz, Edward, G. 1991. Promoting Low-Income Housing Through Innovations in Land Use Regulations. Journal of Urban Affairs. 13: 337-351.
- Haeuber, Dale, Richard. 2001. Applying Ecological Principles to Land Management.
- Kitay, Michael, G. 1985. Land Acquisition in Developing Countries. Policies and Procedures of the Public Sector.
- Munch, Patricia. 1976. An Economic Analysis of Eminent Domain. 84. The Journal of Political Economy. 473-97.
- Ram, Singh. 2012. Inefficiency and Abuse of Compulsory Land Acquisition: An Enquiry into the Way Forward. Delhi. School of Economics. University of Delhi. Working Paper No.209.
- Schwartz, Seymour, I. and Robert, A. Johnston. 1983. Inclusionary Housing Programs. APA journal. Winter. 3-21.

- Smith, Marc, Charles, Delaney and Thomas Liou. 1996. Inclusionary Housing Programs: Issues and Outcomes. Real Estate Law Journal. Fall.
- Taub, Theodore, C. 1990. The Future of Affordable Housing. The Urban Lawyer. 22: 659-692.
- Te Tari Taiwhenua. Building a Safe, Prosperous and Respected Nation. Ideas, Options and Issues. Building Sustainable Urban Communities- (discussion document). The Department of Internal Affairs.

