

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

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The government use of compulsory purchase and land use control powers appears to be increasing worldwide as competition for useable and livable space increases. The need for large and relatively undeveloped space for agriculture and conservation purposes often competes with the need for shelter and the commercial and industrial development accompanying such development for employment, product production and distribution, 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 to regulate the use of private land for the health, safety, and welfare of its citizens, and to help provide roads, water, sanitation, and other public facilities, as well as schools, parks, airports, and the like. Accomplishing the former—regulation—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.

The Asia-Pacific region and its rapid urbanization has generated a need for both land use control and use of compulsory purchase powers. The same rapid urbanization and the need for accompanying public facilities has generated areawide interest in the mechanics (rather than the theory) of compulsory purchase and related land use control mechanisms. While there are certain commonalities among the 11 countries that form the basis of our comparative study, there are differences as well, some of them (such as the ratio of public and private land ownership) fundamental. The purpose of our study was to summarize the principal compul-

sory purchase and land use control systems in the 11 countries that make up the basis of our comparative study, 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 was no exception.

What follows in the next part are the major themes that emerged from our study. The practices of the individual countries of the study are then summarized, with explanation and analysis of the laws applicable to compulsory purchase and land use control in each country.

Major Themes

Land Use Control

Virtually every country studied has some mechanism for the control of private land use, particularly those uses most often associated with urbanization: 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 developable land, 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—China, Hong Kong, Malaysia, and Singapore—the state owns virtually all of the land, though 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 the state owns most of the land, 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 China, Hong Kong, and Singapore, the government retains the power to unilaterally 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.

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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 respecting 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 Australia and China 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 setting broad policy and the local implementing it at the construction and development level.

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. Others, like the United States, have mainly local plans where there is often 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 conformance with the appropriate level of 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 comes at the local level, through some sort of zoning. Hong Kong, Japan, Korea, and Taiwan 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 U.S. states through either court decision or zoning enabling act, though conformance with plans, if any, is often more honored 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 (sometimes guided by national, as in Japan) zoning ordinance, resolution, or rule, together with a process, if any, for changing the zones upon petition of the landowner/lessee/user of a parcel 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—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 localized 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, Hong Kong, and Singapore. 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 the same 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 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 clash with town planning and land use regulatory schemes that 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, Korea, New Zealand, Singapore, 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 Taiwan and Thailand. 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 less enforcement problems in Japan, Singapore, 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. There is also a problem with meaningful public participation in the process 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 defense to such a governmental exercise of compulsory purchase or reclamation, absent some clear evidence of bad faith. The only remedy, as appears 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 Japan, Malaysia, Taiwan, Thailand, and the United States. Australia's Constitution (federal) provides limitations only for federal exercises of the power, and state constitutions are by and large silent. Neither China's Constitution nor Singapore's Constitution 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 recognized, the weaker the power of compulsory purchase. Our study does not necessarily validate this presumption. Either by common law (United States) or by statute and practice (Australia, China, Korea, Malaysia, and Singapore) most of the countries make broad statements of public purpose as justifications for the exercise of compulsory purchase powers. China and especially Hong Kong, however, where there is virtually no fee simple private ownership of land, contain limitations 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 such 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 particular government program, and 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—as in Australia, the United States (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. Australia and China provide compensation largely 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, New Zealand, Singapore, and the United States), though the method varies 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 (Australia, China, and Singapore), though Australia provides increased compensation up to an additional 10% of market value for "solatium": "intangible and non-pecuniary disadvantage resulting from the acquisition."¹ A very few provide for compensation for a so-called regulatory taking as, for example, when a governmental regulation prevents virtually all economically beneficial use of a parcel of land. (See previous discussion under "Regulatory" Taking.)

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 Japan's system or by that of Taiwan, which appropriates 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 (Korea, Malaysia, Singapore, Taiwan, and the United States) 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 (Singapore, Thailand, and the United States), and most countries provide for negotiation at some

1. See Australia Land Acquisition and Compensation Act, 1986 (Vict.) §44.

stage of the process. Virtually every country requires notice to the occupier/owner of the land (or interests therein) to be acquired.

Most countries also provide a process for appealing, 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 does the bulk of the government "condemnations," as in Singapore with its powerful Urban Redevelopment Authority.

Country Summaries

Australia

Australia began planning municipalities in the late 1800s to provide its citizens with residential areas unaffected by industrial smoke or other nuisances.² Since the 1920s, many planning schemes began to focus more on environmental conservation and historic preservation. These planning schemes map what is permitted, what requires permission, and what is prohibited in all sections of cities, states, and territories. Once a state creates its general planning scheme, that scheme is separated into state and local sections.³ If a municipality wants to vary the scheme based on its unique environmental, cultural heritage, or natural disaster concerns, it must create its own overlays to the plan or condition its planning permits.⁴ Rezoning and permission for certain projects in discretionary land use zones require public notice in all cases and environmental impact assessments for major developments.⁵ Major planning concerns taken into account at this point include such things as public amenity, pollution protection,⁶ environmental conservation,⁷ and heritage preservation.⁸ An appeals process exists for parties dissatisfied with initial decisions,⁹ be they developers or members of the public impacted by proposed development.

2. See ROBERT FREESTONE, *MODEL COMMUNITIES—THE GARDEN CITY MOVEMENT IN AUSTRALIA* (1989). Parliamentary debates at this time referred to the town-planning movement as a justification for land use reforms. For a detailed history of planning law in the Australian territory of Victoria, see Murray Raff, *A History of Land Use Planning Legislation and Rights of Objection in Victoria*, 22 *MONASH U. L. REV.* 90 (1992).
3. See DEES ECCLES & TANNETJE BRYANT, *STATUTORY PLANNING IN VICTORIA* (1999), for a more detailed explanation of Victoria's planning system. See also TANNETJE BRYANT ET AL., *PLANNING AND ENVIRONMENT SERVICE (VICTORIA)* (1995) (loose-leaf service).
4. See *Planning and Environment Act, 1987* (Vict.).
5. See *id.* §12. See Murray Raff, *The Renewed Prominence of Environmental Impact Assessment*, 12 *ENVTL. & PLANNING L.J. (AUSTRALIA)* 241, 251 (1995).
6. See *Planning and Environment Act, 1987* (Vict.) §84B, which requires that the Victorian Civil and Administrative Tribunal (VCAT) "take account of and give effect to any relevant State environment protection policy declared in any Order made by the Governor in Council under §16 of the Environment Protection Act 1970."
7. See *Department of Conservation & Natural Resources v. Robson*, 15 *ADMIN. APP. TRIB. REP.* 35 (1995).
8. *Town and Country Planning Act, 1961* (Vict.).
9. In Victoria, the appeals body is the VCAT; in New South Wales, it is the Land and Environment Court; in Queensland, the Planning and Environment Court; in South Australia, the Environment Resources and Development Court; in Tasmania, the Resource Management and Planning Appeal Tribunal; and in the Australian Capital Territory, the Planning Appeals Tribunal.

The appeals process for compulsory land acquisition is less regimented. Australia's Constitution (federal) requires compensation for land takings,¹⁰ but who gets that compensation and why remains debatable. A recent High Court decision (*Newcrest Mining Ltd. v. Australia*)¹¹ found that, for example, a mining company can be compensated for the loss of income for being unable to use cyanide leaching in a fragile environment, but Aborigines cannot obtain compensation from the government for taking that same land for preservation.

While the Australian Constitution limits federal land acquisition and requires some compensation, the state constitutions do not.¹² In Australia, state governments view compulsory acquisition as taking back land previously held privately before the grant of a freehold tenure to private citizens.¹³ Compensation is therefore generally limited to the owner's market value of the land¹⁴ and loss of its then use,¹⁵ with damages from nearby public projects or changes in the planning scheme only obtainable through nuisance litigation or other torts.¹⁶ Compensation for regulatory "expropriation" is generally unavailable, although the High Court seems to be leaning toward such compensation for total loss of economic use.¹⁷ The government can use private land for "public good" with little difficulty. Public good can include infrastructures such as roads, electrical supply, sewage, and telecommunications, as well as public health, safety, and environmental protection. Takings for these goals can include physical use and loss of title as well as changes in the planning scheme that alter the uses available to a landowner. The public responsibility of the landowner means expropriation may not have occurred.¹⁸

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10. See AUSTRAL. CONST. §51(xxxi): The Australian Parliament may make laws for the peace, order and good government of the Commonwealth with respect to:

(xxxii) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. . . .

Id.

11. (1997) 147 A.L.R. 42.
12. See *New South Wales v. Commonwealth (Wheat Case)* (1915) 20 C.L.R. 54.
13. *Land Acquisition and Compensation Act, 1986* (Vict.); *Lands Acquisition Act, 1989* (Austl. Cap. Terr.); *Lands Acquisition Act, 1994* (Austl. Cap. Terr.); *Lands Acquisition Act, 1996* (N. Terr.); *Land Acquisition (Just Terms Compensation) Act, 1991* (N.S.W.); *Acquisition of Land Act, 1967* (Queensl.); *Land Acquisition Act, 1969* (S. Austl.); *Land Acquisition Act, 1993* (Tas.); and *Land Administration Act, 1997* (W. Austl.).
14. See *Land Acquisition and Compensation Act, 1986* (Vict.) §40 ("Market value [is] . . . in relation to any interest in land on a particular date, . . . the amount of money that would have been paid for that interest if it had been sold on that date by a will[ing] but not anxious seller to a willing but not anxious purchaser.").
15. See *Pastoral Fin. Ass'n Ltd. v. Minister* [(1914)] A.C. 1083.
16. See, for an overview, GERARD M. BATES, *ENVIRONMENTAL LAW IN AUSTRALIA* 50-57 (4th ed. 1995). More detail can be found in HAROLD LUNTZ & DAVID HAMBLY, *TORTS—CASES AND MATERIALS* (4th ed. 1995) and FRANCIS A. TRINDADE & PETER CANE, *THE LAW OF TORTS IN AUSTRALIA* (1999).
17. See *Newcrest Mining (WA) Ltd. v. Australia* (1997) 147 A.L.R. 42.
18. *Australian Tape Mfrs. Ass'n Ltd. v. Australia* (1993) 176 C.L.R. 480, 510 ("In a case where an obligation to make a payment is imposed . . . as a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, it is unlikely that there will be any question of an acquisition of property within s. 51(xxxi) of the Constitution. . . .").

China

The Chinese Constitution has no system for compensation for compulsory land acquisition. Because the state officially owns all land, and only allows collectives, businesses, and individuals to use it,¹⁹ the government can reclaim its land at any time. China uses specific legislative acts, not the Constitution, to calculate damages paid to land users for resettlement and for such individual national projects as building hydroelectric dams or maintaining flood control.²⁰

There are nevertheless some limits to what land government can seize. For example, land taken from farming collectives, or state-owned land that is having its use changed, must be used for national economic, infrastructure, defense, or social service projects, all of which are defined by the federal government.²¹ Also, state land bureaus must approve any government use of, and construction on, the land. The failure of either condition results in the failure of land appropriation.²²

The government grants payment for resettlement costs and for probable or real loss of use, not for how the land might have been used or for emotional loss. The organization that will use the expropriated land actually pays the compensation. If the present land users must be moved before expropriation, the new users must relocate the old.²³ If the original land users move themselves, the new users must compensate them.²⁴ Compensation takes the form of cash, bank deposits, or direct replacement of buildings and/or crops. That compensation must be used according to a plan prepared by the original land user and approved by the expropriating organization,²⁵ with strict disciplinary measures for failure to comply.²⁶

19. P.R.C. CONST. (1988) art.10 ("Land in the urban areas of cities shall be owned by the state. Land in rural and suburban areas shall be owned by collectives except for the portions designated as owned by state according to law. Residential district, reserved district and reserved mountain shall be owned by the collectives.").

20. See, e.g., Rights to the Use of Land Ordinance in Shanxi Gansu Ningxia Remote Area (1944); Compensation Act for Flood Control Construction in Henan Province (1952); Expropriation Act for the Construction of the National Project (1953); Amendment for Country Cooperatives Projects Ordinance (1962); Expropriation Ordinance for National Projects (1982); Field Law of the P.R.C. (1985); Fishery Law of the P.R.C. (1986); Land Administration Law of the P.R.C. (1986); Law on Reinstatement of Land (1988); Law on Compensation, Resettlement Subsidies in Compulsory Land Acquisition for Big or Medium Water Supply and Hydroelectric Power Plants (1991).

21. Land Administration Law of the P.R.C., arts. 21 and 22:

Article 21

When the state need to requisition land owned by collectives or to use state-owned land for economic, cultural or national defense construction projects and for initiating public works. . . .

Article 22

Upon approval, construction units may apply for use of land needed for those state construction projects which are listed in the state fixed assets investment plan or which may be built in accordance with state provisions.

22. See *id.* art. 25.

23. *Id.* art. 34.

24. *Id.* art. 28, cl. 1.

25. See *id.* art. 30 ("[a]ll kinds of compensation and resettlement subsidies . . . shall not be used for other purposes and shall not be appropriated by any unit or individual").

26. *Id.* art. 49. Article 155 of Criminal Law (embezzlement) applies to cases with no extenuating circumstances, with sentences ranging from fewer than five years of incarceration to death.

Each region sets its rules for compensation use and its standards of compensation for resettlement. Calculation of compensation for land is very specific, and is determined by the use of the land before its expropriation, and by a multiple of the average amount earned by that land over a set number of years.²⁷ If the land had been used by the state for offices, armed forces, or nonprofit organizations, the state would pay for the material costs of the demolished buildings on the land. If the land is to be used for "special" circumstances, such as for water supply on hydroelectric power plants, different calculations would be used, based on the specific legislation for those land uses.²⁸ Calculations for the loss of residences are based on the material costs of the buildings, and compensation includes residences in the new location, either via rent money or providing the residence itself.

If land compensation and resettlement payments according to the government equations still fail to put people back at their original level, restitution follows.²⁹ The national government decides all of the values, and national policy dictates what use of the land is most appropriate and by whom.

China's land use planning appears to revolve around whether land is designated urban, suburban, rural, or mountain. All cities are owned by the state, while collectives (local forms of administrative rule) own the suburban and rural areas unless designated as state-owned areas. Collectives also own residential districts and mountain reserves. Because the government owns all of China's land, and dictates how that land will be used, the government resolves any land disputes, not the courts. Thus, the government decides the land use and allows citizens the right to fulfill that use.

Hong Kong

Hong Kong is the ultimate landlord.³⁰ Hong Kong's federal government, as the landlord and planner for the island, controls every element of land use through planning ordinances, lease conditions, and building ordinances. While the People's Republic of China officially owns all the land, Hong Kong manages the property according to its long-term plans for density, location, and manner of development. The island has three population density zones that are maintained through the building ordinances³¹ and leasing conditions, which are created when leases are renewed, modified, or newly granted. These leases, however, are site-specific. Therefore, zoning changes can only be implemented piecemeal and sometimes slowly, because most leases are for 75 years.

The building ordinances also follow the zoning plans and are site-specific. These ordinances are for safety and to maintain continuity in an area.³² The Building Authority ensures a building maintains the appearance of a neighbor-

27. See *id.* art. 30.

28. See, e.g., Law on Compensation, Resettlement Subsidies in Compulsory Land Acquisition for Big or Medium Water Supply and Hydroelectric Power Plants.

29. See Land Administration Law of the P.R.C. art. 29.

30. See *Shun Shing Hing Inv. Co. Ltd. v. Attorney General*, [(1983)] H.K.L.R. 433, 434 (describing the Hong Kong government as the sole landlord).

31. See Hong Kong Building (Planning) Regulations.

32. See *Kemal Bokhary, Section 16(1)(g) of the Building Ordinance (Cap 123)—A Shooter's Guide*, (1989) 19 H.K.L.J. 314 (1989).

hood, and implements the density controls of the site's zone, as set out in the Town Planning Ordinance.³³ The Building Authority has no control over the permitted change of a building's use, but only over changes or development of its structure.³⁴

Two types of nonstatutory plans³⁵ and two types of statutory plans³⁶ set the stage for development in Hong Kong. The nonstatutory plans set out standards and guidelines on such topics as the environment and residential densities, and create medium and long-term planning strategies for Hong Kong's five sub-regions. These broad plans provide the platform for the more local statutory development plans. The Town Planning Ordinance allows the planning board to permit certain uses within the development plan, which includes descriptive notes to its zone maps.³⁷

The board reviews contested decisions made by one of the board's two planning committees. Any further review goes to the Town Planning Appeal Board, whose decision is final, unless a judicial review is approved.³⁸ Like the original plans, these decisions do not include public input or hearings; they are matters only for the developer and the appropriate committee. Permission comes after consideration of a detailed master layout plan and with conditions, such as that permission will lapse unless the project begins within three years. For violations of a development plan, the Director of Planning has three methods of enforcement³⁹: issuing a notice requiring the development to be made conforming,⁴⁰ requiring the development be stopped,⁴¹ or requiring the land to be reinstated to its original use.⁴² Not all development goes before the planning committees, however. If the land is not part of a statutory development plan, the developer must only meet the requirements of the applicable building ordinances and lease conditions.

Because the government owns all the land, and can regain complete control upon the expiration of leases, it rarely exercises compulsory acquisition. It does, however, occasionally reclaim leased land before the lease expires, often including that option in the lease. The Lands Resumption Ordinance also allows takings if the property has become a health hazard, is needed for national defense, or is needed for a "public purpose."⁴³ At least one month's public notice is required, and during that time either the land's owner or an interest holder may agree to a voluntary sale. With such an agreement, the resumption procedure ends, and the transac-

tion becomes a sale.⁴⁴ Otherwise, the land still reverts to the government at the end of the notice period, but within 28 days, the government must begin the compensation procedure.⁴⁵ Compensation is paid on the value of the land (determined by the amount of time left on the lease), the value of any legally built construction on the property,⁴⁶ and the costs of disrupting the owners'⁴⁷ and the neighbors'⁴⁸ livelihoods. These amounts, which usually relate to the amount expected if the property were offered on the open market, can be appealed to the Lands Tribunal,⁴⁹ but the "resumption" itself cannot. The land user can also appeal compensation amounts for takings of easements or parts of his land for roads, railways, and airport height restrictions, as well as partial takings through changed ordinances. Compensation for property affected by conservation areas or by changes in land value because of new zoning is rare, however. Thus, although the Basic Law of Hong Kong requires compensation only at market value,⁵⁰ the government has learned that to speed the acquisition of land, it should pay higher compensation than legally required.

Japan

Japan has a multitiered system of land planning, from the national to the municipal. All are based on public safety and even distribution of industry and residential zones, while preserving set percentages of historic and natural areas. The national plan includes such considerations as use of natural resources, protection from natural disasters, locations and sizes of urban and suburban areas, industry locales, and projections of electrical needs for metropolitan areas.⁵¹ Because of the rise of land values in Japan, the country enacted the Land Fundamental Law in 1989, declaring, through policy objectives, the country's vision of organized development while preserving public welfare on multiple levels.

Public welfare also controls the expropriation of private land, which is limited by Japan's Constitution.⁵² Most land expropriation⁵³ includes a negotiation among the project initiator, the landowner, and any other concerned parties, even when it is the type of project listed under the Land Expropriation Law.⁵⁴ If the project planner thinks negotiation will be difficult, he can ask for "recognition" of the project

33. See Hong Kong Buildings Ordinance (Cap. 123) §16(1)(d).

34. "Building works" require Building Authority approval, and a use change that does not require any "building works," or structural changes, does not fall under Building Authority jurisdiction.

35. See Hong Kong Territorial Development Strategy; Hong Kong Planning Standards and Guidelines.

36. See Outline Zoning Plans and Development Permission Area Plans.

37. One column for each zone lists permitted uses, and the other column lists uses requiring an application for a permit from the Town Planning Board. Anything not listed is never allowed in that zone.

38. See *Henderson Real Estate Ltd. v. Wo Chai Wan* (1996) 7 H.K.P.L.R. 1; (1997) H.K.L.R.D. 258.

39. Hong Kong Town Planning (Amendment) Ordinance, No. 4 of 1991. See Anton Cooray, *Enforcement of Planning Control in Rural Hong Kong: Reflections on Recent Legislative Reforms*, 1 ASIA PAC. L. REV. 108 (1992).

40. Issued under the Hong Kong Town Planning Ordinance §23(1).

41. Issued under the Hong Kong Town Planning Ordinance §23(2).

42. Issued under the Hong Kong Town Planning Ordinance §23(3).

43. See Hong Kong Lands Resumption Ordinance §2.

44. See *id.* §4A.

45. *Id.* §6(1).

46. *Id.* §10(1).

47. *Id.* §10(2)(c).

48. *Id.* §10(2)(b).

49. *Id.* §6(3).

50. See Basic Law art. 105:

The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without delay.

51. See TSUYOSHI KOTAKA, *LAW OF ADMINISTRATIVE ACTIVITIES* 79 (1984); YORIYAKI NARITA, *LAND POLICY AND LAW* 46 (1989).

52. See JAPAN CONST. art. 29, ¶ 3.

53. See TSUYOSHI KOTAKA, *RESEARCH ON JUST COMPENSATION* 28 (Miejo Law Series No. 4, 2000); TSUOSHI KOTAKA, *COMMENTARY TO THE LAND EXPROPRIATION LAW* (1980); MICHIKAZU OZAWA, *INTERPRETATION OF THE LAND EXPROPRIATION LAW* (rev. 1995).

54. Enacted in 1951 under JAPAN CONST. art. 29, ¶ 3.

by the Minister of Land Infrastructure and Transport, who then sets the extent of land needed, how it will impact the public and the environment,⁵⁵ the exact list of interested parties,⁵⁶ and how much compensation the owner deserves.⁵⁷ The recognition process may require less diplomacy, but it is time-consuming and "bureaucratic." The project initiator, the landowner and any interested parties also must sign the record of land and articles.⁵⁸

National guidelines decide the compensation required by Japan's Constitution for the public taking of both private and public property.⁵⁹ Complete physical loss of private property receives full economic compensation,⁶⁰ via market value, but nothing for potential economic, subjective, emotional, historical, or cultural value.⁶¹ If any party is dissatisfied with the appropriation of the land or the amount offered in compensation, that person may request an investigation by the Minister of construction or file a lawsuit. If a public facility is appropriated, the project initiator must replace it elsewhere, not just pay replacement value. A recent decision by the Sapporo District Court that held illegal the government's taking process relating to the construction of a dam owing to the failure to adequately consider the cultural interests of indigenous Ainu property owners is instructive.⁶²

Some regulations also lower the value of property by limiting its uses. For example, a regulation that limits the use of or lowers the value of a property to prevent disasters will not be compensated because such a regulation has more value in public safety and welfare.⁶³ Seen as forms of public welfare, zoning⁶⁴ and regulations for public works,⁶⁵ maintenance,⁶⁶ and safety also do not require just compensation. If the regulation is to protect historical, natural, or cultural sites, however, that kind of regulatory taking requires compensation.

Compensation is paid for the value of the lost use of the land if an actual loss in property can be proved.⁶⁷

South Korea

The South Korean Constitution guarantees the property rights of all citizens, including just compensation for compulsory acquisition.⁶⁸ Strict land use planning acts, such as the Urban Planning Act (UPA) and the Building Act, limit constitutional rights of property ownership, particularly concerning construction. If these restrictions require specific sacrifices of owners, beyond accepted zoning prohibitions, the government may owe compensation, but that is rare. With South Korea's small landmass, general limitations on construction are widely accepted.

Orderly urban growth controls most South Korean planning decisions, with both safety and aesthetics playing a role. For South Korea's system of Specific Use Areas, planners consider the shape and quality of the land to find its best purpose, and then prevent any contradictory uses. After dividing the land into urban and nonurban areas, the government further divides the land into four nonintegrated categories: residential, commercial, industrial, and green.⁶⁹ Each urban area has zoning restrictions on the types, sizes, and locations of buildings and their functions. The regulations governing land use in each area determine the respective landowners' rights. A landowner will not be compensated for lack of ability to use his land in a manner that the regulations prohibit.

The "zone system" determines those development regulations. Zoning attempts to evenly spread population, services, and facilities, including agriculture, parks, and green belts, through four zones: Urbanization Control, Detailed Planning, Metropolitan Planning, and Development Restriction (green belt). Once determined, the UPA provides the specific regulations for the zones. Administrative actions that change one's land designation may be considered a taking that requires compensation.

Whether such restrictions should be compensated is being debated now, because only a "restriction of private property for public necessity" warrants compensation under the South Korean Constitution.⁷⁰ Interpretations of that phrase vary. If, for example, one owns property that later rezoned, scholars believe that the owner makes a special sacrifice and is owed compensation,⁷¹ while the government views a rezoning as the constant creation of the expected social boundaries and limitations of land ownership, which do not

55. See Land Expropriation Law art. 20.

56. See *id.* art. 8, ¶ 3 proviso.

57. *Id.* art. 71.

58. See *id.* arts. 36, 38.

59. See Guideline of Standard for Compensation for Loss Caused by Acquisition of Land for Public Use (1967).

60. "Full compensation" has been determined to mean "just compensation," as found through the Land Expropriation Law's "adversary doctrine" (art. 48, ¶ 3; art. 49, ¶ 2), which is a manner of compromise created among the project initiator, the landowner, and other interested parties.

61. See Guideline of Standard for Compensation for Loss Caused by Acquisition of Land for Public Use art. 7; *id.* art. 8, ¶ 4.

62. See *Kayano v. Hokkaidō Expropriation Comm.* [Nubutani Dam decision], 1598 HANREI JIHŌ 33, 938 HANREI TIMES 75 (1997), 38 I.L.M. 394 (Mark A. Levin trans., 1999) (Sapporo Dist. Ct. Mar. 27, 1997). The annotated translation of this decision (*available at* <http://www.hawaii.edu/law/facpubs/nibutani.html> and *at* <http://www.hawaii.edu/law/facpubs/nubutani.pdf>) (last visited July 20, 2001) offers a concise, real-life example of Japan's expropriation process. See also Mark A. Levin, *Essential Commodities and Racial Justice, Using Constitutional Protection of Japan's Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 N.Y.U. J. INT'L L. & POL'Y 419, 445-55 (2001) (setting out the administrative process in the Nibutani case in fine detail).

63. See Masami Takatsuzi, *Study on Property Right*, 38 JICHI-KENKYU 4, 3 (1962).

64. For an example, see City Planning Law art. 7.

65. See, e.g., *id.* arts. 53, 54; Readjustment of Town Lots Law art. 76.

66. See, e.g., Road Law arts. 4, 44; River Law art. 54; Coast Law art. 7; Port Law art. 37; and Mining Law art. 64.

67. See Sup. Ct. Nov. 27, 1968, 22 Keishū 12, 1402. The Land Expropriation Law was made a partial amendment in July 2001.

68. See S. KOREA CONST. art. 23, which guarantees citizens' right to property, that property rights must conform to public welfare, and that expropriation and just compensation will be governed by law.

69. See *id.* art. 120(2) ("The land and natural resources shall be protected by the State, and the State shall establish a plan necessary for their balanced development and utilization.")

70. *Id.* art. 23(3).

71. YUN HEM PARK, A NEW LECTURE ON ADMINISTRATIVE LAW 717 (1997); DONG HEE KIM, THE ADMINISTRATIVE LAW 315 (1997); NAM JIN KIM, THE ADMINISTRATIVE LAW 526 (1995). On the side that it does not require compensation, see WON WOO SUH, ADMINISTRATIVE LAW THEORY IN AN AGE OF TRANSITION 863-76 (1997).

require compensation.⁷² Under consideration now is the request of people living in the Development Restricted Zone (DRZ) (2.2% of the national population) for compensation through elimination of the zone because of the low economic value of their property and an arguable lack of "public necessity" of that type of zone.⁷³ Another debate revolves around how much compensation for rezoning is needed. According to the Constitutional Court, compensation for rezoning by designation of a DRZ is based on the immediate change of value, not on projected earnings on the land as it was zoned before.⁷⁴ The value differential is substantial, especially because the court found compensation necessary only for a building site.⁷⁵

Another difference is that between the compensation given to those who accept the government's offer through consultation⁷⁶ and those who adjudicate.⁷⁷ When the government wants to physically appropriate private land, the agency involved must both publicly and directly notify local authorities, the landowner, the project contractor, and other concerned parties. Upon surveying the land and structures, an offer is made to the owner. Usually the offer is much lower than that which could be obtained through adjudication by a land commission. This is an added concern because the number of acquisitions rose from 96 in 1980 to 2,010 in 1991, due in part to strong economic development and a resultant increased number of public projects. The landowners can agree through consultation with the government or appeal the land's appropriation, its proposed use, the length of that use, and the amount of compensation, unless the property is needed for temporary emergency public safety requirements after natural disasters or other major accidents. The latter type of land appropriation cannot exceed six months.

Malaysia

While the Malaysian Constitution protects a person's right to own property,⁷⁸ that right is not absolute. All land is vested in the state, and the state allows citizens to own the land subject to the state's needs. In this regard, only the state is empowered to dispose of state land. The government can impose categories of land use on land's title, make conditions and restrictions on interest in the land,⁷⁹ and reacquire

any land ostensibly needed for the country's economic development, public need, or recreational purposes. The government determines the land use (agricultural, building, or industrial)⁸⁰ when someone buys or leases the land, assuring that the use conforms to long-term development plans. The use is documented on the register document of title.⁸¹ Aside from allowing the owner to make a living from and enjoy his land, use and enjoyment of land is restricted to that of lawful use and reasonable enjoyment.⁸²

For the taking of private land, the Land Acquisition Act 1960 (the Act) requires due process for government appropriation. Government appropriation is considered valid for any public or recreational purpose,⁸³ or to improve the economic status of Malaysia,⁸⁴ all of which are hard to disprove.⁸⁵ However, the landowner is entitled to a hearing during which the owner may object to the amount of the award or attempt to show *mala fides* on the part of the state. The government rarely loses such cases, but occasionally the government has faced difficulties with the initial application process to acquire the land. The specific government agency must prove that the purpose of the compulsory land taking is in the public interest or for the economic development of the nation, and that the taking is feasible. A new amendment to the Land Acquisition Act of 1991, however, implies that whether or not the government uses the appropriated land as proposed, the appropriation will remain valid.⁸⁶ Only if the appropriation is not completed within two years of being "gazetted" (officially advertised) will a legal technicality nullify the acquisition proceedings and return ownership of the parcel to the private landowner.

Compensation for government appropriations is based on the owner's present and future possible uses (if they are not too remote) for the land under existing planning zones.⁸⁷ Prices on similar tracts of land in the area help determine the amount of compensation,⁸⁸ and compensation is available only for buildings on the land that meet regulation codes.⁸⁹ No law regulates the specifics of compensation amounts, but the guiding principle is to put the claimant back into an economic position equivalent to that before the land was taken.⁹⁰ The First Schedule of the Act explains compensation computation by finding the market

72. See Constitutional Court Decision of June 3, 1991 (89 Heon ma 46); Constitutional Decision of Sept. 16, 1991 (89 Heon ma 152); Supreme Court Decision of Aug. 8, 1990 (89 bu 2); Ministry of Construction and Transportation, An Opinion to the Constitutional Court Decision of Nov. 3, 1991 (89 Heon ma 213); and An Opinion to the Constitutional Petition Regarding Article 21 of the UPA (Nov. 11, 1993).

73. For more discussion about this debate, see 1 DO CHANG KIM, THE GENERAL THEORY OF ADMINISTRATIVE LAW 588 (1990); 1 YUN HEUM PARK, A NEW LECTURE ON ADMINISTRATIVE LAW 690 (1997).

74. See Constitutional Court Decision of Dec. 24, 1998 (97 Heon ba 78).

75. See *id.*

76. See Act on Special Cases Concerning the Acquisition of Land for Public Use and the Compensation for Their Loss.

77. See Land Expropriation Act.

78. See MALAY. CONST. art. 13:

(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

79. See National Land Code 1965 §105.

80. *Id.* §52(1).

81. *Id.* §78(3).

82. *Id.* §103.

83. *Id.* §3(1)(c) (1977).

84. See *id.* §3(b) (1991) (land may be acquired by a state agency "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 . . .").

85. See *id.* §8(3).

86. *Id.* §68A (1991) ("Where any land has been acquired under this Act, whether before or after the commencement of this section, no subsequent disposal or use of, or dealing with, the land, whether by the State Authority or by the Government, person or corporation on whose behalf the land was acquired, shall invalidate the acquisition of the land.").

87. See *id.* §§3(2), 3A (1997).

88. See *id.* ¶ 1A of the First Schedule (1997).

89. See *id.* ¶ 3A (1997).

90. See Pentabir Tanah Daerah Gombak v. Huat Heng (Lim Low & Sons) Sdn.Bhd., 3 M.L.J. 282 (1990).

value of the land⁹¹; any value increase or decrease because of the anticipated, new use; and what elements are to be ignored. The landowner or other interested party can contest the award amount,⁹² but only if the amount exceeds RM 15,000⁹³ and only before accepting the money or within a certain time limit.⁹⁴ The burden is on the owner to prove that the amount offered is inadequate.⁹⁵ A judge and two land assessors hear the case, and their judgment is final.

The method of compensation in Malaysia may be changing. Instead of paying the landowner for appropriated property, the government is considering a system of land exchange within the same area.⁹⁶ This method may improve the landowner's sense of participation, but it has yet to be implemented.

New Zealand

A requiring authority,⁹⁷ through direct negotiations between the government and the owner, statute, compulsory requirements for public works, or an Environment Court order,⁹⁸ may appropriate land in New Zealand. The defining legislative acts follow the principles of sustainable management⁹⁹ and regulate takings and compensation for public works.¹⁰⁰ If a requiring authority needs the land for a public works or utility, the land can be "designated." This means that once the requiring authority proves its need and the legality of a land taking, through a public notice and hearing process, the then-designated land can be taken despite objections, so long as its planned use legally fits the area's development plans.¹⁰¹ The designated land must be acquired for its stated purpose within five years, or the designation lapses.¹⁰² Any interested person can seek a "resource consent" from someone in control of the land.¹⁰³ The resource consent lasts only two years.¹⁰⁴

New Zealand does not consider compulsory land acquisition¹⁰⁵ as an infringement on property rights, but more as a need to provide adequate compensation. Compensation entails economic replacement for the land on the ba-

sis of fair market value¹⁰⁶ and planned use,¹⁰⁷ as well as resettlement costs together with a small amount for loss of enjoyment.¹⁰⁸ The government also pays compensation to affected holders of future estates, neighbors, and tenants.¹⁰⁹ Objections about the proposed taking go before the Environment Court, but the court does not decide compensation amounts.¹¹⁰

If the Environment Court reverses compulsory acquisition, barring appeals to the High Court, the land must be offered for resale to its original owner, if practicable.¹¹¹ Otherwise, the land may be offered for sale to adjoining landowners or to the public.¹¹² By default, it also could be labeled "Crown Land,"¹¹³ something the indigenous Maori continue to fight.¹¹⁴

Singapore

Singapore's State Lands Act regulates state land in the nation,¹¹⁵ and sets out four methods of alienating land from the state to private owners. Two of these methods (the estate in perpetuity¹¹⁶ and the lease) are subject to state conditions and covenants,¹¹⁷ and the leases cannot exceed 99 years.¹¹⁸ The government can change the conditions and covenants at any time, and the land grantee or lessee is bound by the changes, with or without notice.¹¹⁹ One method, the fee simple, does not include these conditions, but it is very rare for the state to alienate land in fee simple.¹²⁰ The other method, the temporary occupation license, is governed by the State Lands Rules.¹²¹

The Planning Act defines all legal rules of planning in Singapore. The Planning Act includes the "master plan," which is reviewed every five years. It is the framework for zoning under which the Urban Redevelopment Authority (URA) and private developers work.¹²² Public works and urban planning authorities can submit proposals for changing their area's master plan at any time.¹²³ The Planning Act also

91. See *Kho Choon Jee v. Superintendent of Lands & Surveys*, Third Division, 1 M.L.J. 265 (1972) (market value is "the price which an owner willing but not obliged to sell might reasonably expect to obtain from a willing purchaser with who he was bargaining for the sale and purchase of the said land").

92. See National Land Code §37.

93. See *Re Yeap Char Ee*, S.S.L.R. 94 (1932).

94. See *Mohd Saperi Mohd Nasir lwn Pentadbir Tanah Daerah Alor Gajah*, 5 M.L.J. 800 (1997). ("lwn" = "v." in Bhasa Malaysia).

95. See *Ong Yan & Anor v. Collector of Land Revenue, Alor Gajah, Malacca*, 1 M.L.J. 405 (1986).

96. Malaysia is considering introducing land readjustment, as is done in Japan.

97. A "requiring authority" is a public, civic body or a private company that embarks upon public works.

98. The Environment Court is a specialist court that reviews takings claims, among other resource management, planning, and conservation questions.

99. See Resource Management Act, 1991 (N.Z.).

100. See Public Works Act, 1981 (N.Z.).

101. See Resource Management Act, 1991 (N.Z.) §166.

102. See *id.* §184.

103. See *id.* §88.

104. See *id.* §125.

105. Public Works Act, 1981 (N.Z.) §§23-27, explains the compulsory acquisition of land procedures.

106. See *id.* §60(1).

107. *Id.* §62(2).

108. *Id.* §§62-68 (compensation); §§72-74 (financial assistance).

109. *Id.* §63.

110. *Id.* §23(3).

111. *Id.* §40.

112. *Id.* §42.

113. *Id.* §42(3).

114. See *Gisborne Ltd. v. Smiler* (Court of Appeal) CA No 182/98, Apr. 26, 1999.

115. See Cap. 314 (1985 rev. ed.). See generally 7 W.J.M. RICQUIER, LAND LAW (2d ed. 1995).

116. See SHERIDAN, MALAYA AND SINGAPORE, THE BORNEO TERRITORIES ch. 13, at 14 (1961).

117. See State Lands Act §§4-6; see generally RICQUIER, *supra* note 115, at 12-13.

118. *Id.* rule 10 ("The title ordinarily to be issued shall be a lease for a term not exceeding [99] years.").

119. See *id.* §8 ("An assignee of, or any person who becomes a proprietor of any land in Singapore, shall be bound by such exceptions, reservations, or covenants (restrictive or otherwise) contained in the Crown grant or lease, or State grant or lease, irrespective of whether he has notice (actual or constructive) of such exceptions, reservations or covenants.").

120. *Id.* §§14-18.

121. See State Lands Rules 1968, rules 19-25.

122. Planning Act, Cap. 232, pt. II, §§6-11.

123. See *id.* §7.

contains development and subdivision plans.¹²⁴ A landowner cannot subdivide¹²⁵ or develop his property in any way that changes the outer appearance of buildings or land without getting permission from the authorities, who look to the master plan.¹²⁶ Permission for any changes also requires a development charge, which is a percentage of the estimated appreciation in the land's value after the development is complete.¹²⁷ Noncompliance at any level is a criminal offense.¹²⁸

One way that Singapore has been able to retain control over its growth is through the compulsory purchase of land. As of 1975, the state owned about 65% of the nation's land, compared to 49% in 1969, and the trend toward increasing state ownership seems to be continuing.¹²⁹ Much of the planning work of the past 30 years has been accomplished by the URA,¹³⁰ which is responsible for accumulating land, planning future growth and resettlement of those whose land the government takes, preserving history, and maintaining property acquired for future plans.¹³¹ The URA may also declare an area to be an urban development area, thus setting in motion the government's acquisition of the area within three years.¹³² Other public agencies can also appropriate private land if they can prove the land is needed for their functions, such as for roads and other public infrastructure or facilities.¹³³ While the Land Acquisition Act requires the government to first attempt private negotiation for land, the courts have ruled that negotiation is too much of a burden. To speed along acquisitions, the government often resorts to compulsory purchase.

Singapore amended its Constitution to eliminate a guarantee of adequate compensation for all compulsorily taken property.¹³⁴ Now, the Land Acquisition Act governs compensation. This compensation includes the property's present market value, damage to land still owned by the private party, resettlement expenses for home or business, and title fees. The Act provides that property to be taken requires public notice and printing in a gazette.¹³⁵ Such "gazetting" is considered sufficient evidence that the property is required by the government.¹³⁶ The printing in the gazette also sets the date of acquisition by the government.¹³⁷ When the need for the property is particularly urgent, the government can take the land prior to public notice, if the notice is published within a week of taking possession. Only "interested par-

ties"¹³⁸ (does not include tenants)¹³⁹ can apply for compensation, which has no set procedure for allocation or amount. If a party disagrees with the amount offered, that person must object immediately or lose the chance of an appeal. The Appeals Board¹⁴⁰ decides on the amount or existence of the payment, or, if the amount is accepted, the collector takes possession of the property upon payment.¹⁴¹

While the regularity and ease of compulsory purchase are beneficial, the level of compensation has been a cause of concern. In accordance with a formula set out in the Land Acquisition Act, the date upon which the property is acquired determines the rate at which the property will be assessed.¹⁴² The market value is based on retrospective values¹⁴³ and the lowest of possible uses, either that for which the landowner used the land, or that for which the government plans to use it.¹⁴⁴ Improvements made to the land two years prior to government acquisition are not taken into account, nor, among eight other factors, are the urgency of its acquisition or the injury caused to the landowner by the land's taking.¹⁴⁵

Taiwan

Taiwan's three-tiered planning¹⁴⁶ begins with the national, flows to the regional, and then to the local, with the higher tier guiding the lower one. The national plan sets the policies for the country and standardizes the ideas for regional plans,¹⁴⁷ which focus on development and natural resource preservation. The national plan, unlike the regional plans,¹⁴⁸ lacks legal stature. The local plans split between regulating land use within the urban and nonurban¹⁴⁹ areas. The urban area¹⁵⁰ is divided into several zones to which use and development must conform, or the landowner will be subjected to fines and orders to remove, change, or stop using the building or land. Every five years, the governmental authority reviews the zones: residential, commercial, industrial, agricultural, conservation, administration, culture and education, scenic, and specified use zones.¹⁵¹ However, despite the enforcement mechanisms for these zoning controls, land use violations are evident everywhere, due apparently to the nonbinding status of the national plan, and the lack

124. See *id.* pt. III, §§12-24.

125. *Id.* §12(3).

126. *Id.* §3(1).

127. *Id.* §36(1)-(6).

128. *Id.* §§12(4), 30.

129. See PHILIP MOTHA, SINGAPORE REAL PROPERTY GUIDE 7-13 (2d ed. 1982).

130. Established by the Urban Redevelopment Authority Act of 1973.

131. See Urban Redevelopment Authority Act, Cap. 340, §6 (1990 rev. ed.).

132. See *id.* §8.

133. See Street Works Act, Cap. 320A.

134. See Republic of Singapore Independence Act 1965 §6. Also, in 1966, a recommendation to reinstate a measure of adequate compensation for compulsory acquisition was rejected; see generally S. JAYAKUMAR, CONSTITUTIONAL LAW (1976).

135. See Land Acquisition Act §3.

136. *Id.* §5.

137. *Id.* §33(6).

138. *Id.* §2.

139. See Cap. 58, 1985 Rev. Ed.

140. See Lands Acquisition Act §23.

141. See *id.* §16.

142. *Id.* §33(1) (1995); Collector of Land Revenue v. Ang Thian Soo (1990), 1 M.L.J. 327.

143. See the Lands Acquisition Act §33(1) (1995); the property can be assessed at rates as old as those from January 1, 1986, to as recent as January 1, 1995.

144. See *id.*

145. See *id.* §34.

146. The highest tier is "Land General Development Planning," the middle tier is "Regional Planning," and the lowest tier is "Urban Planning" and "Non-Urban Land Use Planning."

147. Presently, four regional plans exist: northern, central, southern, and eastern Taiwan.

148. The regional planning was promulgated under the Regional Planning Law, enacted in 1974.

149. Nonurban zones are managed through the Regional Planning Law and Rules for the Non-Urban Land Use Control, with options for more than 10 possible zoning categories.

150. About 444 urban planning areas currently exist.

151. See the Urban Planning Law art. 32.

of serious enforcement efforts by the responsible government authority.

The public has little chance to comment on any of the processes of land use planning. Aside from a 30-day comment period on creating urban land use zones, landowners have no opportunity to present their opinions. For example, if land is zoned nonurban, landowners can neither complain, nor seek compensation. Instead, the landowners must donate their land and money to the government to establish the nondevelopable land for environmental protection.¹⁵²

While Taiwan's Constitution provides for property rights,¹⁵³ it says nothing about expropriation. The Land Expropriation Act of 2000 fills that gap with the requirements and methods of compulsory acquisition.¹⁵⁴ Such takings are grouped into general land, political, and zoning expropriations. General land takings are for specific public needs such as national defense, infrastructure, environmental protection, government facilities, public education, and "others."¹⁵⁵ The only qualification for these public needs is that government or a government-assigned entity must operate them.¹⁵⁶ Political land expropriation enables the state to ban private ownership of certain land, like that within a certain distance from the coast,¹⁵⁷ or that which is beyond the maximum amount allowed to one owner.¹⁵⁸ (This is in the law, but has never been practiced.) Lastly, government can acquire land in a specified zone, in whole or in part, for planned development or improvements.¹⁵⁹

The purpose for acquisition is almost always approved, with little to no public comment. Unless the land is needed for an emergency, defense, transportation, water conservation, sanitation, or protection of the environment, the agency must first attempt to negotiate directly with the landowner. Only if negotiations fail will the land be expropriated.¹⁶⁰ Once public announcement of the appropriation is made, the landowner can make no changes to the land for 30 days.¹⁶¹ The negotiation can include relocation of any improvements found on the land and reimbursement for improvements that cannot be moved.¹⁶² Price is determined by the latest official land price set by the local government together with replacement costs for any improvements.¹⁶³ The

government land prices relied upon for compensation often are below market prices, and public officials would be punished criminally for offering more than the official prices.¹⁶⁴ Indeed, the Land Expropriation Act does not require market rates,¹⁶⁵ and the government rates are set every July 1. Within 15 days after the expiration of the announcement, the promoter of the new development must pay the compensation.¹⁶⁶ If payment is not made, the appropriation is invalidated, unless the lack of payment is because the landowner refuses to accept the payment, in which case the money will be deposited anyway, and the compensation will still be treated as received.¹⁶⁷ Objections by neighbors and the landowner as to the appropriation or the compensation amount will be heard and are allowed on appeal.¹⁶⁸

In the case of zone appropriation, maps must be filed for approval with the Ministry of the Interior,¹⁶⁹ and affected landowners can comment within 30 days. If landowners prefer, they can apply for a percentage of offset land instead of full cash for compensation.¹⁷⁰ Available offset land is defined by whatever is left over after the development is complete, and should be at least 40% of the appropriated land.¹⁷¹ After the offset land has been allocated, the rest of the unused land is designated for such public facilities as roads, parks, and schools.¹⁷² Any remaining land can be sold.

While so many types of legal land acquisition may make public undertakings simple, Taiwan relies heavily on the process without consistently protecting the right to private property. For example, in 1997, Taiwan expropriated 2,275 hectares, and in 1999, the government expropriated 5,893 hectares.¹⁷³ Proving need is easy for the state,¹⁷⁴ and constitutional protection has become secondary at best. Other national acts uphold the Taiwanese Constitution, but are seem-

est promulgated by the government." *Id.* art. 46. *See also id.* arts. 30, 31, 33, 34.

164. Article 131 of the Criminal Code provides that "[a] public official who, either directly or indirectly, seeks to profit from a function under his control or supervision shall be punished with imprisonment for not less than one and not more than seven years; in addition thereto, a fine of not more than 7,000 Silver Dollars may be imposed."

165. *See* Land Expropriation Act art. 30:

For expropriated land, compensation shall be paid at the government-promulgated official prices of the current term. . . . As necessary, an additional percentage may be provided. The additional percentage shall be proposed by the municipal or competent city/county government, in line with prices of normal trading, to the Land Price Evaluation Commission, which will come to a final decision on the grounds of the government-promulgated official prices of the current term.

166. *Id.* arts. 17, 19, 20.

167. *Id.* art. 26.

168. *Id.* art. 22. Objections can be heard by the municipal or city/county government, or through Administrative Appeal Law and Administrative Litigation Law. *Id.*

169. *Id.* art. 38.

170. *Id.* art. 40.

171. *Id.* art. 33.

172. *Id.* art. 44.

173. From statistics released by the Ministry of the Interior for the years 1997-1999.

174. About 50 years ago, Shih Shang-Kuan, a well-known expert in Taiwanese law, said of Taiwan's land expropriation methods: "Very seldom can one find throughout legislation the expropriation procedures as oversimplified as the Land Law of our country." SHIH SHANG-KUAN, *THE THEORY OF LAND LAW* 522 (1951).

152. Based on the Rules for the Non-Urban Land Use Control, yet the Regional Planning Law only authorizes the Ministry of the Interior to enact these rules by executive order.

153. *See* TAIWAN CONST. art. 15 ("the right of property shall be guaranteed to the people").

154. *See* the 1930 Land Law, "Land Expropriation" chapter. *See also* Equalization of Land Rights Act, Urban Planning Law, Encouragement of the Upgrading of Industry Act, Science-Based Industrial Park Establishment and Management Act, and the Public Housing Act as further examples of expropriation clauses.

155. *See* Land Expropriation Act art. 3.

156. *See id.* art. 56.

157. *See id.* art. 14.

158. *See id.* arts. 28, 29.

159. *Id.* art. 4.

160. *Id.* art. 11.

161. *Id.* art. 23.

162. *Id.* art. 5.

163. As expressly set forth in Article 46 of the Equalization of Land Rights Act, the municipal or competent city/county government shall, for land within their precincts, survey the updates of land price and evaluate the land prices from time to time and promulgate them on July 1 every year. The land prices so promulgated by the municipal or competent city/county government are "official land price lat-

ingly ignored.¹⁷⁵ When the federal government is looking for land to appropriate, landowners, local government agencies, and other affected landowners get little to no chance to speak. As a result, until recently, almost all land appropriation applications have been approved.

Thailand

Thailand has divided its land use planning into multiple levels, beginning with a five-year National Economic and Social Development Plan. The Plan determines the national framework, by providing guidelines for land use planning at the regional, provincial, and district levels, as well as for town plans. Therefore, all of the regional, provincial, district, and town plans are to some extent consistent with one another. Thailand's rapidly expanding population undermines its series of specific planning laws, especially conservation ones, which are not strictly enforced. While the Town Planning Act of 1975 was to control urban land use through zoning, it has not been effective even though it has been amended twice. People buying agriculturally zoned land have converted it to nonagricultural uses to make it more profitable,¹⁷⁶ with no repercussions.¹⁷⁷ Agricultural land takes precedence over forests,¹⁷⁸ the density of urban centers continues to increase, and the pressures for land increase.¹⁷⁹

The Constitution of Thailand includes rights to private property¹⁸⁰ and to compensation for conditional land acquisition.¹⁸¹ The Thai Constitution gives the government the right to compulsory acquisition, but only if a specific law allows acquisition for a specific use.¹⁸² Acquisition must be for the public good, and compensation must be fair and paid within a reasonable period of time.¹⁸³

Several specific laws allow for the acquisition of property. The Immovable Property Acquisition Act of 1987 allows the state to expropriate real estate property, and other legislation specifically allows for acquisition of property for such things as airports, railways, highways, and industry.¹⁸⁴

Agencies follow a series of steps toward acquisition, from requesting that the property be donated, to negotiation for sale, to issuing a royal decree or announcing the Immovable Property Act to cover that specific piece of property. Compensation then entails the government's valuation of the land and its assets, damage to properties, demolition costs of any immovable properties, labor and material costs, inconvenience, and a computation of the value of the land prior to acquisition versus prospective value. Negotiation ensues, with appeals available.¹⁸⁵

Because of rising competition for land, negotiations often break down, which can cause endless delays, because the executing agency can only take over the property when the compensation has been completely paid. The appropriation process lacks efficiency, inter alia, because of public protests, obstructions to government projects, and lack of compensation equations.¹⁸⁶ The lack of formulaic methods also means that many experience long delays in receiving their compensation, making landowners less likely to cooperate, and extending the appeals process. Because it takes so long to acquire the amount of needed land, public works projects often take 20 years to complete, letting some appropriated land lie unused the entire time. Thailand, like Malaysia, is considering trying the concept of land readjustment, as is done in Japan,¹⁸⁷ but whether that will help the efficiency problem and land-utilization backlog remains to be seen.

United States

Land use controls in the United States are generally exercised at the local government level. The most effective of these controls is zoning, which is used by local governments to divide regions into use districts. Statutes permit local governments to divide their jurisdictions into zones with permitted uses and restrictions.¹⁸⁸ Another local land use method that has gained popularity is the subdivision process, which requires an area of land to be completely platted and those plats to be approved before lots can be sold to individuals, who will develop their lot according to the approved plat. Subdivisions must include plans for their own infrastructures and public facilities, as well as dedicating open spaces and public buildings, thus managing local growth and expenditures.¹⁸⁹ In the same vein, developers must often pay impact fees to the community that provides the subdivision with such public facilities as sewers and roads, both on-site and off-site, but only if the improvements can be found to be required because of the subdivision.¹⁹⁰ Building (prospective) and housing (retroactive)

175. Land Law art. 208 ("The land expropriation shall be limited to the scope only as indispensable to promotion of the undertaking"); Enforcement Rules of Land Law art. 49 ("Land expropriation shall be carried out within the scope, not against the expropriation objectives at the least possible damage.").

176. According to the Office of Agricultural Economics of the Ministry of Agriculture and Cooperatives, between 1986 and 1988, the main rice production region (central region) lost much of its agricultural land to residential, commercial, and industrial areas.

177. No laws presently prohibit land subdivisions.

178. See Office of Agricultural Economics, Number of Agricultural Households and Average Farm Size Between 1981-1995. Average farm sizes have continued to shrink between 1981 and 1995.

179. See Ministry of the Interior, Population Census of 1909, 1919, 1929, 1937 & 1947. Thailand's population increased from 26 million to 61.5 million between 1960 and 1998.

180. THAIL. CONST. §48, cl. 1 ("The property right of a person is protected. The extent and the restriction of such right shall be in accordance with the provisions of the law.").

181. See *id.* §49.

182. *Id.* ("The expropriation of immovable property shall not be made except by virtue of the law specifically enacted for the purpose of...").

183. *Id.* ("and fair compensation shall be paid in due time to the owner thereof as well as to all persons having the rights thereto, who suffer loss by such expropriation, as provided by the law").

184. See, e.g., Airport Authority of Thailand Act 1979, §32; State Railway of Thailand Act 1981, §37; Highways Act 1992, §68; and Industrial Estate Authority of Thailand Act, 1979, §32.

185. See Immovable Property Acquisition Act, §§9, 10, 23, 25 (cl. 2), and 28.

186. Communication from Justice Prapant Subsaeng of the Thailand Supreme Court (undated; on file with authors).

187. This method of the government trading land for land potentially could reduce the state's costs. No legislation specifically supports the concept yet, and it is only being run on a trial basis.

188. A model Standard Zoning Enabling Act from 1923, drafted by the U.S. Department of Commerce, usually forms the basis for the state statutes.

189. See ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH: POLITICS, TECHNIQUES, AND IMPACTS* 16 (1993).

190. David L. Callies, *Impact Fees, Exactions, and Paying for Growth in Hawaii*, 11 U. HAW. L. REV. 295 (1989); Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The Second Generation*, 38 WASH. J. URB. & CONTEMP. L. 55 (1990); Julian C. Juergensmeyer, *Funding Infrastructure: Paying the Costs of Growth Through Im-*

codes list minimum standards for the health, safety, and welfare of the public.

Some states have reclaimed their land use control¹⁹¹ through regional¹⁹² or statewide¹⁹³ zoning and planning. Often this is to protect a resource and to control developments that impact an entire region.¹⁹⁴ Also, the federal government has overriding statutes and implementing regulations for clean air¹⁹⁵ and water,¹⁹⁶ for managing coastal zones,¹⁹⁷ and for protecting known flood zones.¹⁹⁸ Regulations that leave a landowner without economically beneficial use require compensation as if the land were compulsorily purchased. Regulations that deprive a landowner of some, but not all economic use, may require compensation, depending upon such factors as the investment-backed expectations of the landowner and the character of the governmental action.

As with land use controls, local, state, and federal governments all have the power to acquire land by compulsory purchase. The U.S. Constitution limits this ability, however, by requiring that such a taking must be for a public use, and the

private owner must be justly compensated.¹⁹⁹ Compensation is generally calculated for the value of the land and its present improvements (or the loss of value, depending upon the kind of taking involved) at the time of the confiscation, with no consideration given to the future worth of the property after its confiscated use.²⁰⁰ Various local government authorities have the right to condemn private land for such things as housing,²⁰¹ airports,²⁰² convention centers,²⁰³ and other public purpose projects. Public utility corporations may also acquire land through compulsory purchase because of their quasi-public functions. To allow for taking immediate possession and use of a condemned property, quick take provisions often require the condemnor to pay a deposit of sorts with the court, which then orders surrender of the property.²⁰⁴

A non-negotiable condemnation action usually begins with an agency filing a complaint in court.²⁰⁵ The complaint must include the government's plans for the land and a specific mapping of it.²⁰⁶ The court summons all interested parties to decide on a fair price and to verify that the government will use the land as claimed.

Most federal agencies try to negotiate with landowners during the process of compulsory purchase.²⁰⁷ The property is appraised, with the owner able to comment on various values that may not be readily apparent. The sales records of comparable properties are checked; replacement costs, loss of business, and the fate of tenants are all considered in the compensation process. Often not considered are such things as business goodwill, loss of future business, frustration of plans, and costs of removing buildings or fixtures, unless specifically provided in the statute.²⁰⁸ Once an offer is made, the owner can agree, or condemnation proceedings may begin in court.

Not only must the landowner be fairly compensated for the highest and best use of the land, but he must also be given "due process"²⁰⁹: fair notice of the government's intent to acquire the property²¹⁰ and a day in court if he so desires.²¹¹ In California, for example, if a landowner can prove that the particular agency does not possess appropriate compulsory purchase power, that the proposed use will not be public, that the property will be used for a different purpose, that the

Impact Fees and Other Land Regulation Charges, LINCOLN INST. OF LAND POL'Y MONOGRAPH, Feb. 1985, at 85-5; EXACTIONS, IMPACT FEES, AND DEDICATIONS (Robert Frellich & David W. Bushek eds., 1995).

191. See FRED P. BOSSELMAN & DAVID L. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971); ROBERT HEALY & JOHN ROSENBERG, *LAND USE AND THE STATES* (1979); THOMAS G. PELHAM, *STATE LAND USE PLANNING AND REGULATION* (1979); JOHN M. DEGROVE, *LAND, GROWTH, AND POLITICS* (1984).
192. For discussions of these systems and the "takings" cases challenging them, see BOSSELMAN & CALLIES, *supra* note 191; DEGROVE, *supra* note 191; and FRED P. BOSSELMAN ET AL., *THE TAKING ISSUE* (1973).
193. For example, Florida, Hawaii, Oregon, and Vermont. See KELLY, *supra* note 189; J. BARRY CULLINGWORTH, *PLANNING IN THE U.S.A.* (1997).
194. For a general overview, in Japanese, see DAVID L. CALLIES, *LAND USE CONTROLS IN THE UNITED STATES* (Makitaro Hotta trans., 1994). See also for various analyses of land use law, DAVID L. CALLIES, *PRESERVING PARADISE: WHY REGULATIONS WON'T WORK* (1994); DAVID L. CALLIES, *REGULATING PARADISE: LAND USE CONTROLS IN HAWAII* (1984); BOSSELMAN & CALLIES, *supra* note 191; DANIEL R. MANDELKER, *ENVIRONMENTAL AND LAND CONTROLS LEGISLATION* (1976 & Supp. 1982) [hereinafter MANDELKER, *LAND CONTROLS*]; PHYLLIS MEYERS, *ZONING HAWAII* (1976); David L. Callies, *Land Use Control in an Island State*, 2 *THIRD WORLD PLAN. REV.* 187 (1980); David L. Callies, *Land Use*, 2 *U. HAW. L. REV.* 167 (1979); Tom Dinell, *Land Use Zoning in a Developing State*, 2 *THIRD WORLD PLAN. REV.* 195 (1980); Daniel R. Mandelker & Annette Kolis, *Whither Hawaii? Land Use Management in an Island State*, 1 *U. HAW. L. REV.* 48 (1979); DANIEL R. MANDELKER, *LAND USE LAW* (4th ed. 1997 & Supp. 2000); JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* (1999); *STATE AND REGIONAL COMPREHENSIVE PLANNING* (Peter A. Buchsbaum & Larry J. Smith eds., 1993).
195. Clean Air Act, 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
196. Clean Water Act, 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
197. See Coastal Zone Management Act of 1972, 16 U.S.C. §§1451-1465, ELR STAT. CZMA §§302-319. For general description and comments, see Sarah Chassis, *The Coastal Zone Management Act*, 46 *J. AM. PLAN. ASS'N* 145 (1980); Gilbert Finnell, *Coastal Zone Management: An Introduction*, 1978 *AM. B. FOUND. RES. J.* 153; FRED P. BOSSELMAN ET AL., *FEDERAL LAND USE REGULATION* (1977); *NATURAL RESOURCES DEFENSE COUNCIL, LAND USE CONTROLS IN THE UNITED STATES* (1975); and MANDELKER, *LAND CONTROLS*, *supra* note 194.
198. Federal Disaster Protection Act of 1973, 42 U.S.C. §4056 et seq.

199. U.S. CONST. amend. V. For an overview of eminent domain in the United States, see the newsletter *JUST COMPENSATION* (Gideon Kanner ed., 1974).
200. See, e.g., HAW. REV. STAT. §101-24 (2000).
201. The Hawaii Housing Authority is an example. HAW. REV. STAT. §356-18.
202. See, e.g., the Airports Division of the U.S. Department of Transportation; HAW. REV. STAT. §261-4(b).
203. See, e.g., the Convention Center Authority; HAW. REV. STAT. §208X et seq.
204. *Id.* See Title III of the federal Uniform Relocation Assistance and Real Property Acquisition Act of 1970, 42 U.S.C. §4604.
205. See, e.g., HAW. REV. STAT. §101-15.
206. See, e.g., HAW. REV. STAT. §101-16.
207. See *supra* note 204.
208. 11 McQUILLIN, *MUNICIPAL CORPORATIONS* §32.92 to 32.92c (2000).
209. The right of due process, like compensation, derives from the U.S. Constitution's Fifth and Fourteenth Amendments.
210. See *In re South Dakota Water Mgmt. Bd. Approving Water Permit No. 1791-2*, 351 N.W.2d 119, 123 (S.D. 1984).
211. *Id.* See also *Weiner v. Nebraska Dep't of Rds.*, 137 N.W.2d 852 (Neb. 1965).

property will not be used within a set amount of time, that the property is not subject to compulsory purchase for that purpose, or any other ground provided by law, the landowner can keep his land.²¹² The government must also be careful not to take more land than it needs, and to avoid so publicizing its eventual condemnation that it lowers the

value of the to-be-condemned land. Sometimes the government can prove the necessity for excess condemnation,²¹³ but if it ever abandons the use for which the land was initially condemned, statutes often require that property to be resold to the original condemnee.

212. Santa Cruz County Redevelopment Agency v. Izant, 37 Cal. Rptr. 4th 141 (1995).

213. David L. Callies et al., *Value Capture Policy*, 42 PLAN. 22 (1976); 2 PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN §7.516 (rev. ed. 1997).