



The Question of Land and Infrastructure Development in India: Urgently Required Reforms for Fairness and Infrastructural Development

Sebastian Morris
Ajay Pandey

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INDIAN INSTITUTE OF MANAGEMENT
AHMEDABAD-380 015
INDIA

The Question of Land and Infrastructure Development in India: Urgently Required Reforms for Fairness and Infrastructural Development¹

Sebastian Morris
Ajay Pandey²

Abstract

Land in India is problematic largely because of archaic and perverse provisions in the practice and the law. The new Land Acquisition Amendment Bill does go some way to correct the anti-democratic and imperial provisions of the old 1894 Act. Other regulatory restraints stand in the way of fair compensation to sellers whether the deal is a sale or an acquisition using eminent domain. Urban planning being based on the “Ricardian Model” and on top of asymmetrically applied regulatory constraints further depresses the benefit to land owners. As a result very little land is obtainable without dispute and high risk for infrastructure development. In this paper we provide an analytical critique of the law and restrictions as also of the framework of urban planning and provide a justification for why major change is required in the approach to land markets, land acquisition and urban planning. We also provide the key elements of a reformed approach that can create a win-win framework for development. We also present our suggestions on how the proposed Amendment to the Land Acquisition Act can be changed to make the Act functional and remove the residual perversities therein.

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² Professors at the Indian Institute of Management, Ahmedabad.
Email: morris@iimahd.ernet.in, apandey@iimahd.ernet.in

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INTRODUCTION

Land acquisition takes place both through the markets, and by use of eminent domain when the state chooses to use this route to compulsorily acquire land. Both have been highly problematic in India largely on account of inadequacies in the law. Further more regulations related to land use, and the process and assumptions of urban planning have led the exclusion of the poor in the benefits of infrastructural development³. Even the middle classes are able to participate only by parting with vast sums of money as when they buy housing, a large part of which is merely transfer payments arising on account of improper urban planning, highly distortionary restrictions, heavy taxes, poor laws, improper adherence to property rights, and the cost of overcoming these restrictions through a process that is hardly entirely legal. Ignorance of these problems raises the cost especially of urban infrastructure. They also impose very large punishment on those who are the victims of the use of eminent domain. Only by change that is informed by an economic logic, is fair and practical, and when property rights are adhered to, can we move forward. The current distortions have compounding effects and infrastructure constructed without correcting these would be very expensive, exclude many and would continue to be a drag on development.

LAND MARKETS AND USE RESTRICTIONS

Land markets themselves are subject to “market failure”. It is important to understand the nature of the failure here so that the existing land use restrictions, regulations, permissions etc, can be critically understood, since in a situation of change “what exists” need not necessarily be the optimal⁴.

There are three core failures in the market for land: (1) The use of land in can have external effects on the value of adjoining parcels of land. Thus use of land for an industry (even when all pollution control is in place) can reduce the value of land in use for residences close by. And at higher levels of income the value of land in residential use can be reduced considerably even in commercial use of adjoining parcels. This is the core reason for town planning and restrictions/regulation on land use emanating from the same. Yet land use also has vast positive externalities as

³ Morris, Sebastian (2001).

⁴ Morris, Sebastian and Ajay Pandey (2007)

when the use of land in a concentrated way can enhance the value jointly. This economies of agglomeration and joint use is another reason for the price appreciation in land, and the ability for land to generate differential rents even when there is no overall scarcity.

Central place allocation in a market arising from such positive externalities underlie the distribution of rents and (hence of) activities in central places. Central places, when the market is allowed to do so, allocates the most centrally located land to the highest rent payers – typically large national and international firms with much value creation - followed by rich residencies and life style markets, followed in turn by other residences and markets and lastly at the periphery by industrial and intense agricultural activities. When planning seeks to more rationally (than what the market would) allocate the land use, the probability of error is likely to very large since very large positive externalities in land use that the market has a tendency to bring about can be negated, even as the negative externalities are possibly avoided. (2) The hold out problem results in a kind of market failure. Aggregation incentives are lowered since it is always possible for an individual plot holder to hold out against an aggregator to garner a larger part of the value increase in aggregation that a developer hopes for. Therefore the business of aggregation (and disaggregation) essential for land market and for changing use is adversely affected. One visible result of the same is the observation that modern supermarkets requiring larger parcels of land have low chances of acquiring such land through aggregation, and so locate sub optimally in the periphery, creating in unnecessary travel and higher need for private transport. And thereby they reduce the overall efficiency of the city as an economic engine.

THE PROBLEM WITH CITY PLANNERS (IN INDIA)

Unfortunately city planners have not always had an economic approach to planning and land use. Being driven by the profession of architects this is one area that has missed the liberalising reform of the late 20th century. Nineteenth century urbanisation especially in the US which was based more on common sense and collective choices made by the founding fathers of cities, and was liberal while avoiding the immediate negative externalities through rules of location, gave the country its vast and highly functional cities. This has allowed the US to not only be a very efficient economy but also to provide for ample housing and real estate for nearly all its citizens. Indeed, the average available built up space for the working class in cities in the US is higher than what is available even to senior managers in

cities like Tokyo and in the more traditional European cities with their problems arising from legacy.

The UK after much functional growth (some would call unplanned) had in the 20th century entered into the straight jacket of urban planning and plan based restrictions, that still awaits reform. This has made housing costs significantly higher than in Europe and very high in relation to the US⁵. At the core of the problem has been the planner's assumption that the Ricardian Model of rent is the appropriate one to go by in planning and in imposition of use restrictions. Planners have typically assumed that land has no alternative use (this is true if upfront the legal/regulatory restriction is accepted), and hence would derive the rents in land as emanating from the demand for housing. Thus they would consider the high prices of housing to be entirely a function of demand and not because of their own planning imposed land use restrictions or regulatory restraints on use of land for housing. This tautological position was apparently held at the highest levels among planners and apparently still continues to be, to restrict housing supplies and maintain high prices⁶.

THE PROBLEM IN A MODEL

The incorrectness of the position is easy to see by considering the alternative use of land. Land can potentially be used for housing, agriculture, as park land, industry besides commercial and public use (roads, ports etc and in network industries with considerable specific land requirement). How much is available for each in a situation where the market allocates depends upon the rent gradient in use. Thus if we consider a simple model of land use in either agriculture or in housing which is the typical situation that obtains in the periphery of a central place, then the boundary is entirely determined by the growth of the city and the rents that arise in the alternative activities. Thus consider demand for land derived from the demand for housing as represented by **HH** in Exhibit¹. Similarly, the demand for land for agriculture is derived from the demand for agriculture, where agriculture is carried out commercially. The total land available for the two uses together is **OO'**. Since there are very large agglomeration economies and central place value in housing, and the demand for housing is price inelastic the slope of **HH** is much larger than the slope of **AA**. When the market is allowed to allocate the house prices are determined from R_m , and the market allocates OH_m amount of land for housing and $OO'-OH_m$ for agriculture. As housing demand increases more is automatically allocated by the

⁵ Barker, Kate (2006)

⁶ Evans, Alan (2004)

market. With planners releasing less land than OH_m (i.e. OH_p) under the idea that parks/agricultural activities at the periphery needs to be protected etc, the land available being less there is a sharp rise in house prices and rents in land as is easily evident. This creates vast transfer losses to house purchases in favour of landlords. It also creates dead weight losses on society which is the area of the shaded triangle. And the single most important reason for the high prices of housing in the UK for emanates therein. Many planners have been quite insensitive to the costs their regulations impose. Indeed they have rarely been aware that they impose such costs, forget about any method or a process to measure and assess such costs and weigh them against the benefits that planning provides. Some (sensitive planners) would in planning with such land restrictions allow higher densities so that the HH curve itself is lowered. Then it would be consistent with the philosophy of higher concentrations of urban housing and use of public rather than private transport. The point to recognise is the planning can impose very large costs and there are no simple processes or tools available with the town planner to measure or assess these costs. The profession as such is wanting having been caught in a tradition of architectural and landscape approach to city planning. When planners underscore their restrictions and are informed by an appreciation of the organic nature of a city, and recognise the key reason for the city – the access to each other- resulting in high value to central places, then they would do better⁷.

Urban planning in India is doubly constrained by very little formal release of agricultural land. The master plan process being highly contentious and participation ritualised, most planning that necessarily involves changes in land use puts vast rents into the hands of politicians, favoured landowners and civil servants who know the master plans even before they are formulated and can therefore take speculative positions on land. Thus the value of land at the periphery given the restrictions can change significantly from (\leq) R_m to R_p . If master plans do not have to generate these rents to advance information the they will have to work on the principle of mimicking the market in so far as the total land allocation to the superior land use is concerned. Small restrictions would have to be balanced by higher overall intensity of land use in housing which would be justified for building the economics of public transportation especially in metros that need high corridor densities to be socially viable. Only then can the avoidance of negative externalities in land use – the cleaner and greater separation of various uses – be justified.

⁷ This analysis is an extension of Evans, Alan (2004).

Additionally in India since the urban planner operates with vastly lower FSIs than what the market would have picked, the costs of planning are bound to be very much larger than the small benefits arising from the avoidance of negative externalities. Witness that if the demand curve for housing is *HH*(India) rather than *HH* on account of the upfront very low floor space indices (FSIs) in housing then the rents generated and the house prices are far from their market levels. The dead weight losses equal the area of the red triangle and the blue trapezium. That due to the limited land being released for housing is the area of the red triangle, and that due to the impact of low FSI (and the joint impact) is the area of the trapezium. In the UK the value losses of planning are on account of planning pushing for a higher density than what the market (given the prior development of private transport) would have picked. The value losses then are lower than that indicated by the smaller red triangle.

THE HIGH COST AND UNFAIRNESS OF URBAN PLANNING IN INDIA

To summarise, the impact of urban planning (including the development of master plans) in the current approach is the main reason for making access to urban land (housing) difficult for all but the rich and the upper middle classes. It is important to go over the arguments again.

- 1) Had urban land use regulations been more market friendly, i.e., resulted in minimum absolute scarcity rents on land (while generating rents on differential access to central places) then the scope for rent seeking would have been significantly lower. That would have reduced considerably the current transfers of vast values in the form of rents to politicians, builders, land sharks and the mafia.
- 2) Market friendliness would mean giving FSIs that are closer (or higher) than to what the market would have chosen. This would lower the cost of a unit of housing while raising the differential land on land, but lower the overall rent per unit of housing.
- 3) It would also make for higher density and therefore cheaper infrastructure especially since network economies (natural monopoly in industries like electricity, gas, water and sewerage distribution) imply increasing returns to higher density.
- 4) Additionally in areas like public transport, it makes metros socially viable. With feed back effects the cost of living and working declines substantially then to make the city efficient and therefore a growth driver.
- 5) Market friendliness does not mean that use restrictions all go away. There are significant negative externalities between residence and commercial activities on the one hand and industrial (and machinery using commercial) on the other, so that land use restrictions that result in the avoidance of these negative externalities is necessary as well. Parks, gardens and green spaces are justified but then access to them has to be universal.

The above would imply a complete overhaul of the assumptions of urban planning in India.

Urban planning in the pre-independence period moved from the planning and regulation that was largely driven by the city fathers with an overarching colonial framework. While it was elitist and left out vast numbers from the benefit of planning in the older urban habitats, the approach to urban land use and construction in the new cities with their base in the colonial economy itself was more functional and less value destroying. This was certainly true in cities such as Madras (Chennai), Bombay (Mumbai), and Calcutta (Kolkata). The role of business men who controlled the municipalities of these cities was instrumental in ensuring a more functional approach that allowed city forming functions to continue with vigour.

In Delhi though in this period the 'classic imperial' city with the lavish dysfunctional Lutyens Delhi ushered in planning in India. Here the difference between the "civil lines" exemplified by the area north of Connaught Place and New Delhi was stark. While the former suffered from the complete lack of planning, and hence could not avoid the usual negative externalities of mixed and unregulated land use, the latter in being lavish and laid to very low densities imposed large movement and rent cost on the city. Only the transfer of this cost to the rest of the country allowed the city to grow. In the post independence period the imperial planning model of Delhi was picked up to design places like Chandigarh, Gandhinagar which resulted in the imposition of the cost of low densities and spread of the city over a much wider area than otherwise.

When urban planning was institutionalised it was with an orthodox approach that did not consider the limitation of low income and need for public transport. In planning with low densities (in terms of built up area, i.e. low FSIs) construction was distributed over a large geographical area making the city spread over a larger area than otherwise. Lack of integration of the development plans with transport planning further compounded the problem to result in urban sprawls with little high speed corridors other than those that were already there in the pre-independence periods. This was especially so in the metros and the larger cities with their economic dynamism. The years of urban planning under the mistaken idea that low FSIs (as low as 1 are infrastructure saving) has now created the problems that are most visible. The high prices of built up areas means that for much of the poor and the lower middle class very tiny hovels or entirely illegal interstices are all that are possible.

CHANGING URBAN PLANNING TO ENSURE VALUE CREATION AND EQUITY

So one perhaps most important element in the fairness of land use is for wholesale reform and liberalisation of urban planning the elements of which are as follows:

- Staffing of urban planning offices with economists and properly trained urban planners.
- The integration of urban transport planning, regional planning and urban planning through the use of simulation models
- The acceptance of the constraint that no more than 20% of the cost of new built up housing would be land cost.
- Working with much larger FSIs would be necessary.
- In allowing larger FSIs in some areas and not in others there would be substantial spatial discrimination for the common good, which would have to be suitably compensated if the movement to higher FSIs has to be fair, and hence find unequivocal support
- The movement to hierarchical planning that allows easy shift of land use from a lower order use to a higher order use must be part of the reform. This means that use of land from agriculture to industry to housing and commerce must be automatic. Only the consideration that an entire “planning block” must be so considered need be a limitation on this automatic approval. The “block” for such consideration would be as small as a “block” straddled by streets in the case of the movement to commercial use.
- Mixed use of commercial and residential must be allowed except when a housing colony is involved. Commercial and office use in residential areas as along as parking and other externalities are internalised, should not normally be disallowed.
- The integration of transport planning with urban planning would take the layout away from the current circular pattern with ring roads (most antithetical to functional movement in central places) to radial patterns with cross links, with the radials being served by metros and high capacity bus /tram systems.
- The movement of current urban sprawls to the more functional pattern outlined above would need much land for public infrastructure including transport and common use facilities such as parking, water storage, markets etc. These can come through changes in land use, and by intelligent use of current vacant lots which are taken over with suitable compensation.
- The use of transfer of development rights (TDRs) can allow for acquisition for public use without actual financial outlays. Thus for example, if bus stops have to be provided for, then suitable low rise built up areas and vacant lots can be given TDRs and taken over, and the compensation to the owners of such properties can be arranged through the market value of the TDR. The market value of the TDR can be ensured by raising the FSI's along transport corridors of metros and particularly around stations densities as high as 3 to 5, while making the use of such high FSI contingent on purchase of TDRs. Such measures can rationally

locate the population in the city so as to reduce the cost and time of movement. Similarly, when cash is required for public infrastructure development, FSIs can be auctioned to the highest bidder in a planned locality to mop up the potential value to the owner in the regulatory change⁸.

- For extension of the urban area i.e. for extensive growth to bring new areas under the city the use of “Town Planning” (TP) rather than land acquisition would allow quick, easy and workable planning to take place. The practises in Ahmedabad are worthy of emulation in this regard. Essentially an area earmarked for urbanisation under the master plan is not taken over. Instead all the properties are shrunk by a certain proportion and re-worked on a map (with the angularities being reduced) but now with the public amenities –roads, parks, public toilets etc laid out. Contiguity is also protected in most cases. If some plots are too tiny to shrink they are levied charges. Others which are shrunk by more than the average values have higher FSIs than those which shrink less than the average. Similarly TDRs internal to the area can be used. The integrated scheme with the planned infrastructure, the internal settlements, the charges etc are presented to the people, objections invited and settled to finally become the master plan. This is an important and hassle free and fair way to extend the urban frontier. When such extension is also accompanied by changes to planning framework as outlined above then the land rents embedded in house prices can come down dramatically.

TOWARDS DEFINING “PUBLIC PURPOSE” IN USE OF EMINENT DOMAIN

The constraint imposed by land (lack of availability, risks in purchase, use restrictions) constitute among the major sources of risks and delays in infrastructural development. Indeed, today we can say that development and equity would fall victim to the problems that emanate from land. Firstly, it is important to recognise that much of infrastructure being itself subject to market failure of the natural monopoly kind – the natural monopoly emanating from the network aspect (wires business both distribution and transmission in electricity and telecom, pipelines in gas, oil both distribution and trunk, sewerage and sanitation, drinking water, airports, ports mobile telephony, city roads) would require regulation and/or state provisioning.

Similarly, another kind of market failure arising out of the aspect that profit maximising entities would not serve the need given a lack of sufficient appropriability (in sectors such as city roads – due to lack of excludability, sewerage –given the need for complete coverage, primary education and drinking water -given the need for universal service, and village and hierarchically lower order roads) again necessitates either state ownership, mechanisms to deliver subsidies or appropriate

⁸ TDRs have been used to compensate owners of land on whom low densities have been imposed in order to protect heritage sites and natural endowments in the US. Essentially the idea in TDRs is to unbundle development from the land to direct development in a way that results in overall social gains.

contractual arrangements of longer duration with profit maximizing entities, such as PPPs and PFIs. But neither of these two kinds of market failure, nor the solutions chosen for the same by a society, should be confused with whether or not specific land is required for economic activities. It is only the need for specific land that justifies use of eminent domain or compulsion by the state.

We may classify all activities that directly or indirectly add value to society in a scheme that have as their axis the two kinds of market failure to classify them into 4 sets. Further with the consideration of whether or not they require specific land, we would have 8 sets as brought out in Exhibit 2. Thus only the activities in the bottom panel viz those which require specific land are problematic. All others can potentially acquire the land required through market transactions, and no eminent domain is justified. Yet traditionally because activities that were under natural monopoly (**A2N**, **B2N**, **A2S** and **B2S**) were either regulated or owned and provided by the state the associated land required for these activities were considered as being required under “public purpose”.

The “term public purpose” is perhaps most ill-used. There is little clarity in its meaning among economists not to speak of political scientists, since most often all that it means is that the public (rather than some specific business) gains in the purpose being served. Thus all activities with market failure as well as appropriability failure, (**A2S** and **A2N**) require deep involvement of the state and till recently were considered as ‘public’ in the sense there could be no profit maximising here. Hence when the term public purpose was used in the sense of a “non-private purpose” and hence was justified as requiring land, there was some merit since most activities here also required specific land.

Similarly when ‘public purpose’ included activities **A1N** and **A1S** without distinction (since there was no way earlier to perform these through “for profit” entities) there seemed to be some merit in the negative definition of “not for profit” justifying the state making available the land for all such activities that fell in the panels **A**. However now that PPPs (more specifically the PFI subform) allows the performance of many of the activities in panel 1 (where there is an appropriability problem) and for regulation to allow the performance of activities in panel **A** by profit maximising entities, the term “public purpose” being understood in the negative sense as not being for profit is problematic. In other words there is a need today to distinguish between ownership and the nature of the activities. Actually, all economic (including protective and coordinating) activities can be considered as serving the public even if

profits are made by entities. After all the capitalist system can be understood as being socially desirable only because profit maximising leads to social value maximising in nearly all areas other than those with market failure.

Since panel **B** constitutes the bulk of activities of society and are amenable to being provided by profit maximising entities (with regulation in the case of **B2S** and **B2N**) the negative definition of public purpose as “not private” made sense. When today the boundary between **B** and **A** changes with technology and developments in the law, in contracting and procurement, then the negative definition is no longer adequate. Thus when roads are constructed by the private sector under PFIs then the public purpose as earlier understood is of little use in the decision of whether eminent domain is to be used or otherwise. We contend that the core reason for the use of eminent domain is when specific land is required. Thus it would involve all activities in the panel **S** but not those in panel **N** since these would not normally require specific land. Thus a government owned enterprise setting up a steel plant wanting land would not qualify for use of eminent domain for land just as much as a private steel mill would not. Similarly both government or a private road builder would have to be supported by use of eminent domain.

For India today private provisioning or provisioning by profit maximising entities is vital for the development of infrastructure. That means that the link between state ownership and provisioning of public infrastructure as such is not the criteria for use of eminent domain. Therefore any difference in the acquisition of land either in terms of price paid or the process gone through that is derived from the ownership of the facility is not justified merely on account of whether the activity is performed by the government or a private party.

The implications of the above discussion are quite clear. “Public purpose” has to be defined in terms of specific use, and where the land is required for network industries, and eminent domain restricted has to be the same. The Amendment Bill does go forward in this regard to specify the kind of uses for which eminent domain could apply but does not constrain nor provide the logic. More importantly the well recognised principle, valid in all democracies and even in societies where contracts (social and economic) are expected to be functional is that when eminent domain (compulsion is used) the valuation has to be necessarily done by a third party to avoid any conflict of interest is absent in the proposed amendment.

IMPROVEMENTS POSSIBLE IN THE LAND ACQUISITION AMENDMENT BILL

The Amendment Bill was itself informed by our earlier work so all that we can do in terms of fairness in acquisition is to repeat some of our submissions to the parliamentary committee, that examines the Bill.

Sections 5 (v) (vi) concern the specification of public purpose in the Amendment Bill. An attempt is made to define public purpose. Keeping companies out of eminent domain in land acquisition (compulsory land acquisition) is a positive proposal. But that should not mean that PPPs are excluded. The use of the term “controlled by the state needs” to be removed since there are various options under which this can be used by governments to procure land for commercial and other uses on behalf of commercial /vested interests. Moreover controlled by the state is a nebulous category unless it is defined as effective ownership of more than 50%.

More fundamentally the definition of public purpose in the Amendment is in terms of activities. Rather it should be in terms of the specificity of the land required. Eminent domain should be used only in case where the land required is specific. This has been argued in our earlier submission to the government and in Morris and Pandey (2007, 2007a). Thus a clause that the government / authority should show why the land identified for compulsory acquisition is the best land/ only land suitable for the purpose should be incorporated as part of the defining section on public purpose.

Private parties, companies and others wanting to use land for commercial purposes do come in (in the Bill) despite the exclusion otherwise, when they have already acquired 70% of the land they would like to acquire. This provision is to avoid the hold out problem. This is a valuable provision. Nevertheless the same needs to be stated better. Actually there needs to be in place a registry which is maintained by the state government. A private party [or government requiring land] wishing to buy land (and where specific land is not required and hence no “public purpose” (in the sense described) is operative, can register ex-ante, describing the area (with survey numbers aggregating to a contiguous parcel) that it seeks to acquire.

It can then go ahead with purchase and in case he is subject to the hold out problem it can evoke the provisions of this section of the law to acquire the residual 30% (or less) provided he has already acquired (purchased) 70% by both title numbers and the proportion of the area originally entered in the registry. The operative price payable would have to be the highest price paid to any of the parties, for any of the parcels which would apply to all that now that is being acquired through eminent

domain Without an ex-ante registration no such use of eminent domain should be allowed. The registration would put the community of landowners potentially considering sale, in an appropriate bargaining position with the buyer. The buyer too in having other options (which also could chose to register ex-ante) in other parcels (since no specific land is required) is in an appropriate position to negotiate, so the negotiation has a high probability of success, and hence the hold out problem can be considerably reduced. The proposal here is akin to the open offer of an acquirer protecting the interest of minority shareholders in corporate acquisitions.

Unfortunately the Amendment is not clear with the detail and so has been rightly opposed by politicians concerned with the people's interest in an immediate and obvious sort of way. When applied in rural areas, since there is bargaining involved in the sale, rehabilitation is not required since the community always has the choice of rejecting the offer. The fact that the 70% has to be in terms of both title and area would ensure the same since a few large landowners could then not connive with the buyer to cheat the other sellers. In rural areas the additional provision that the Village Panchayat (PRI) would be involved to protect the interest of those who are not landowners but depend upon the earlier economic activity based on land would have to be incorporated. This can be ensured by laying down the provision that when acquisition of an area larger than a third the average size of a village in the locality is involved then all displaced persons would be part of the community that negotiates.

In Section 5 (vii) the replacement of the court by the Authority at the central and state levels is an attempt to bypass courts in the face of delays and pile up of cases at courts, with the object of speedy takeover and award of compensation. Yet in this provision justice and governance may be compromised, and may actually lead to further delays in the long run besides increased contest and litigation. The Authority is not independent (if the details of who can be appointed are recognized) of the executive and is yet given judicial powers. The Authority is better appointed by the high court since being in the nature of an appeals court against the decision of the government / collector it must have the independence of the executive of the government. Even if appointment is by the government using retired civil servants (including retired civil servants) and barring other experts – see 17A (5) and judges / retired judges is a bad idea since the authority has to grapple with tricky questions of valuation which requires economics, the expertise of professional valuers. It is also

important that the Authority can and behave independently both of which would be compromised.

Actually it is far better to rework the Authority as a referral body in the rare case of dispute relating to public purpose and to valuation arises. With such design of the valuation process very few cases would actually come up to the Authority. This would mean making the Authority completely independent of government in staffing and being driven by the judiciary rather than by the government, and simultaneously re-working the section on valuation – determining the market valuation of the land which we consider below.

Section 13 lays out the criteria for valuation of land in compulsory acquisition. The criteria for valuation by the collector is an improvement over the previous Act, but not a substantial one because it is still perverse in process and is likely to be contested in almost every case, thereby making the Amendment Act as vulnerable to litigation as the Act it proposes to change. The valuation process is perverse since the principle is the absurd one of “I (government) cut(s) the cake and I decide on which piece you (land owner) will have”. All eminent domain based land acquisition in democracies have the institution of independent valuation by licensed professional independent valuers. In India this science of land valuation is conspicuous by its absence, since primary value is highly influenced by administrative and ad-hoc land use restraints, and the valuation in acquisition is administratively driven. Even in the case where government or compulsory acquisition is not involved, besides location and the usual hedonistic variables, there is a very large role played by the regulatory aspect and ad-hoc decisions of the government to determine / change land use.

Section 11B (i) and (ii) needs to be replaced by : “The valuation of the land and the assets / resources/ implicit rights on the land such as water rights established through use /traditionally shall be valued by professional licensed valuers of properties using the various principles and methods that these professional bodies have established and use from time to time. If the first appointed valuers’ value is not accepted by the landowners the valuation of a second professional valuer would be appointed whose valuation would be accepted and ruled as final by the collector / government. Acquirees would continue to have the right of appeal on both the purpose of acquisition and the valuation with the Authority.”

It is important that a method of valuation without reference to the specific situation and the economic situation cannot be laid out. In 11B(iii) the word “average” should

be replaced by the maximum. This is necessary to prevent gaming / exploitation of uninformed farmers / persons giving up land to private parties, as well as to avoid the hold out problem. With these changes many portions such as valuation of standing crops etc become redundant.

It is also important to recognise other aspects not addressed by the proposed Amendment Bill. Prior land use restrictions such as the requirement of NAC (Non Agricultural Use Clearance) which are subsequently granted / assumed after the acquisition/sale greatly depress the market prices prior to acquisition / sale in relation to the value post acquisition/sale. All such restrictions which distort markets should be removed. Since such provision cannot be incorporated in a law on land acquisition the following insertion in the section of valuation 11 A /B would be appropriate. "Professional valuers have to recognize the increase in value that results from the government changing the land use (including prior regulatory constraint on use which are removed) and the new assignment of land explicitly carried out after / or along with acquisition. In this regard the overall purpose of the entire acquisition rather than the acquisition of the particular land would have to be considered. In all cases of land required for urbanization, such land use would be deemed for either housing or commercial. Such increase should be assessed by the valuer as arising out of regulatory changes and not on account of proposed investments on the land post acquisition and no less than 40 % of the increase should be recognized in the valuation for award to the claimants of the land"

REHABILITATION

Rehabilitation has been the bugbear of the Indian state hurting among the poorest of its citizens since there is fundamentally no protection offered to citizens affected by compulsory land acquisition. The new bill on Rehabilitation and Resettlement which has been passed by the Lok Sabha is in the right direction, Nevertheless amendments requiring the government to commit to the provisions instead of leaving the same to the will of the government of the day is important. Explicit recognition that all development will be pareto optimal on those suffering displacement could have been the guiding principle in this Act.

OTHER DISTORTIONS AND THE PROBLEM OF TITLE

Other distortions emanating from the taxation, title insecurity, and land use restrictions are similarly very large and adversely affects easy and fair use of land for

development. Thus high transaction taxes kill the market itself since trades would be few relative to final use purchase. But intermediate trade and aggregation would only be possible to a mafia or those in the business since they alone would have the basis (having incurred the fixed costs, and having a “strong arm” to ensure enforcement) of transacting through sale agreements rather than actual change in title, and enforce the same while avoiding taxes.

Similarly the clarity with regard to title is a very serious problem. Indeed so large is the problem that a “title insurance market” cannot exist in India. Clearly post haste government should create the basis to have firm titles in land. The first task is really to merge the offices that record sale deeds and keeps title documents, and to change the title deed format so that all hypothecations and sale agreements are entered on the title itself⁷. This would involve moving to the Torrens system of record and map keeping. In the Indian case the survey numbers (with their plot maps that accompany sale deed/ title documents) would have to be made to cohere with the actual ground survey maps – cadastral maps. This can be aided greatly by computerisation. The integration of both title and sale deeds/ agreements to sale is very important and without that computerisation would only compound the mess, as has happened in some of the states which actively pursued computerisation for its own sake⁹.

Today title “arbitrage” has been responsible for giving very high values to lands sold by governments since therein the title is clear. Lack of clear title is another reason why even when in the few cases compensation is adequate and generous, there is problem in actually identifying the small holder and ensuring that the same reaches him and is not intercepted by others. It can of course greatly smoothen the market processes to give value especially to the small holder, the individual and the poor, and also reduce the risks in development. Most importantly a large part of the risks in renting out built up space arises from the title risk as well as the due to the quixotic rent control act which ensures that nobody and certainly not the small and individual householder would rent out. Mercifully many of the states are now beginning to give up rent control.

SQUATTING CAN BE OVERCOME ONLY BY BEING FAIR

Another serious problem faced by governments especially municipalities in the context of providing urban services and toning up city infrastructure is the problem of squatters. Squatting has been created for various reasons. While in late

⁹ Ramanathan , Swati (2009)

industrialising societies some squatting would always be there, the ubiquitousness of the phenomenon especially in the larger cities in India is entirely due to the planning process that generates vast rents on land to make housing very expensive for all but the rich, and therefore forcing the poor to squat. In the larger metros those living illegally in slums, on footpaths etc could easily number more than third of the population. The actual areas that they occupy in relation to the total areas are quite small so that in the movement to efficient, rational and pragmatic planning as described above much of the squatting problem can be overcome.

Thus higher FSI can be bid out to builders with the bids being based on the total amount of built up space per unit of FSI that they are willing to give back to the government, which the government can use to accommodate the poor. Similarly the bids can be based on the value they are willing to give to the TDRs they buy from the market, the TDRs being assigned to slum dwellers clearing out of slums, when such slum lands are vital for infrastructure (airport, rail expansion for instance). Many roads including arterial roads in Indian metros have been given up to hawkers and squatters. Neither an insistence that they all clear out since the property belongs to the state nor a tolerance for the same would work. To unclog these roads alternatives would have to be provided through redesign of markets, specified squatting rights, and allocation of market rights by the time of the day, besides relocation. Pragmatism and fairness is the key, not the abstract legality emergent out of the law and a process of planning that may itself have not been fair.

STANDARDS NEED TO BE PRAGMATIC

Similarly building standards can often make legal housing quite impossible or unnecessarily expensive. Thus most cities which have building norms that insist that every unit leaves space from the boundary could leave the land owner with built up foot print so small that it is not worth constructing when the plot size is small. Or it would force upon him a merger with neighbours. FSI norms with construction being possible only some distance from roads is all that is required. An inner boundary should provide the opportunity to share with the neighbour a wall to avoid costs. These approaches are quite common elsewhere in the world¹⁰. In other words most of the building rules have to be made functional and neutral to plot sizes.

¹⁰ Morris, Sebastian (2001)

CONCLUSIONS

To conclude therefore we would think that in being fair (and only in being fair) is development and especially infrastructural development possible in any society in the long run. That is because there has to be legitimacy to actions of the government even when not a democracy. Since India is a democracy it is almost axiomatic that fairness is necessary. This is true also of contracts and business deals, where all parties to a deal have to gain if the endogenous risks have to be minimised. With regard to land the following are most crucial

Removing all the regulatory constraints on land which artificially affect the prior values. Most notable of these would be removing the need for NAC and removing the bar on non-agriculturalists from procuring land. Similarly all urban planning based restrictions that do not emanate from a proper publicly whetted and well announced plan should go. Building rules too need considerable liberalisation. Even such restrictions when imposed should be suitably compensated since they amount to 'regulatory takings' as is now understood by town planners.

The process of urban planning needs to become far more liberal, market friendly, truly involve the people, and the rents generated in planning should be minimised. No scarcity rent at all, at the periphery of the urban place is justified. Transparency to the process of master plan development is one key. Another would be bring in economics (especially the economics of land use) into the planning process. All plans should be simulated to check that they are the most optimal. Linkage of such urban planning with transport planning and provision of public infrastructure is essential. There are interesting methods to ensure that such planning and the provision of infrastructure is to a large extent self financing.

Urban planning can be greatly aided when the method of Town Planning – land aggregation and shrinkage without change in title is resorted to. Additionally the usage of offsets and payments through instruments such as TDRs have high potential to increase the fairness and the acceptance and value creation aspects.

Methods similar to TP have the potential to relax the constraints due to "ribbon development" along India's highways to be able to very quickly develop them into corridors by widening the highways and providing link roads which also minimises the need for formal acquisition. It has potential for slum clearance too.

Above all the LAQ Act must change. While the Amendment is in the right direction there are important changes that would have to be brought in. These relate to independent valuation, and improvements in the provisions for private acquisition of land.

Distortionary taxes and constraints on rents would have to go.

Similarly major change in the system of maintaining title records by movement to the Torrens system is necessary.

Additionally since the business of real estate and land valuation is still in its infancy in India, government's role (especially of the central government) in aiding the creation of intellectual capital to this important aspect of business and life is important, since otherwise the reform itself is likely to be hijacked by vested interests who have gained enormously through the administrative and ad-hoc process of determining land use, acquiring land and granting/allocating land.

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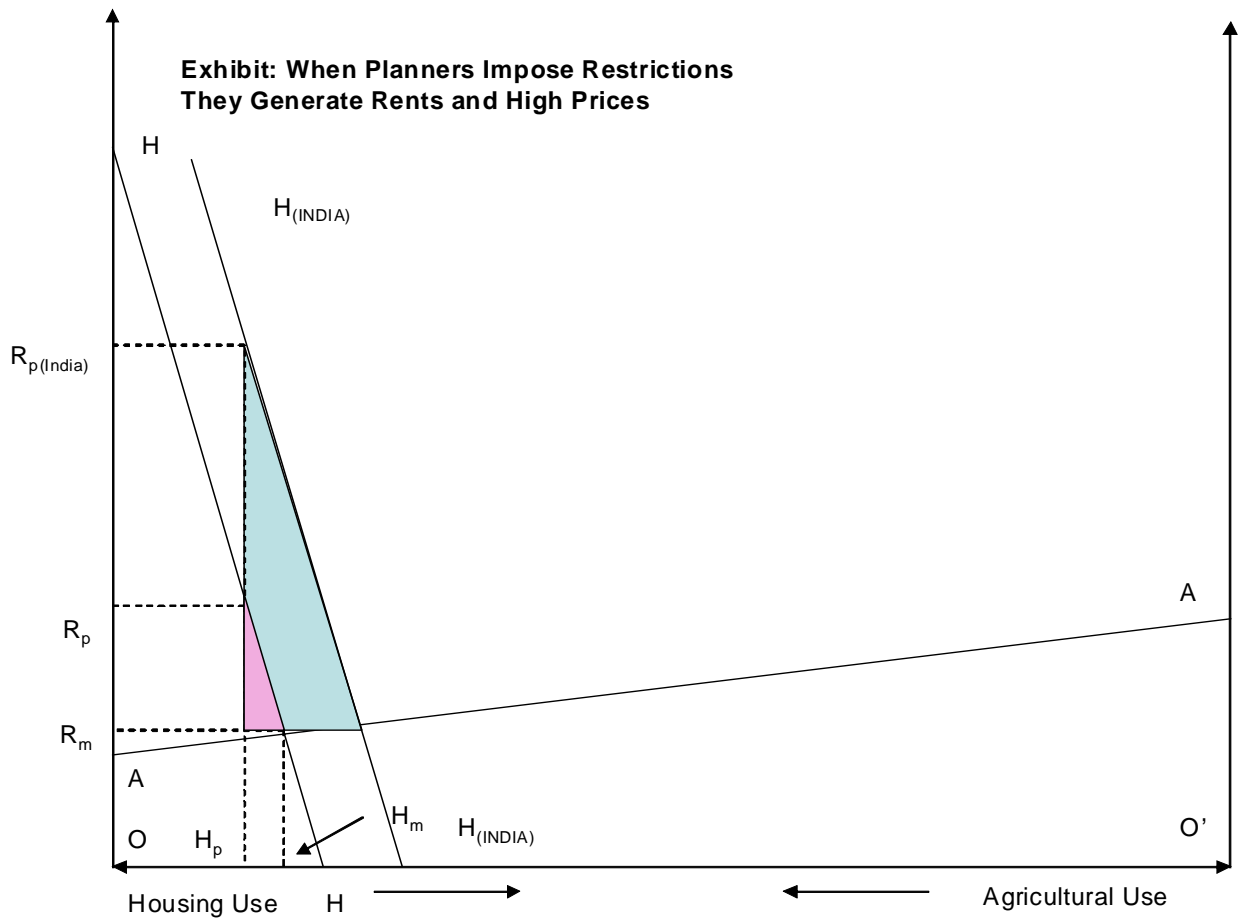


Exhibit 2: A Framework to Understand Public Purpose

Does not require specific land

	Not Natural Monopoly	Natural Monopoly
Appropriability Failure	<p>A1N: Primary education, solid waste collection, broadcast TV and radio, higher education in poor countries, temples and worship,</p>	<p>A2N: Very few activities here Defence, public policing, law and order, justice</p>
No appropriability Failure	<p>B1N: Normal mfg., trading, agriculture, DTH TV, scrambled radio, generation under markets, electricity supply,</p>	<p>B2N: Very few activities here, mobile telephony,</p>

Does require specific land

	Not Natural Monopoly	Natural Monopoly
Appropriability Failure	<p>A1S: Bus stops, public toilets in cities, solid waste disposal</p>	<p>A2S: Sewerage systems, and water supply (in poor countries), city roads, smaller roads, smaller airports</p>
No appropriability Failure	<p>B1S: Mining, prospecting, hydro generation,</p>	<p>B2S: Sewerage and water supply in rich countries, electricity distribution and transmission, telecom, pipelines (gas and oil), cable TV, railways, arterial roads, ports and airports (large), bridges</p>