
RIGHTS OF USE AND ACQUISITION OF PRIVATE LAND FOR PUBLIC UTILITIES –

A COMPARISON ON VARIOUS LEGISLATIONS

The National Land Code, Electricity Supply Act, Water Services Industry Act & Land Acquisition Act

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INTRODUCTION

Federal Constitution of Malaysia 1957 the supreme law of the country recognizes the right and freedom to own properties either by the citizens or non-citizens. Private properties likewise are protected by the law. As laid down under Article 13 of the Federal Constitution, ***“No person shall be deprived of property save in accordance with law and no law shall provide for the compulsory acquisition or use of private property without adequate compensation”***

Originally all lands belong to the State. The State Authority – Ruler in Council is given power of disposal by the National Land Code [Act 56 of 1965] to dispose land in certain manners. One method of disposal is alienation in which state land is alienated to qualified person or body by conferment of title which protects exclusive ownership and legal rights of enjoyment over the land. Once the state land becomes private property, the land cannot be confiscated in the name of national interests.

As the nation progresses and develops, there are certain circumstances which require the use or acquisition of private property for the sake of public purposes or other purposes deemed necessary and expedient to the State Authority. This scenario is unavoidable when the needs arise. The power to acquire private property that is land lies in the hands of the State Authority. The State Authority also has the power to permit use of private land for certain purposes and one of them is for public utilities namely electricity, water and telecommunication services. Previously the responsibility to provide utilities came under the purview of Federal Government but utility bodies had been privatized in order to ensure effective and efficient service to the people.

Providing effective and efficient service to the people who are the customers does not come easily to the utility bodies. Often the body or company responsible to provide and maintain public utilities for examples Tenaga Nasional Berhad (TNB), Telekom Malaysia (TM) and State's water company or corporation are facing a lot of problems in carrying out works such as construction, replacement, installation, maintenance and other works related to provision of public utilities especially on private lands.

One of the biggest problems faced by utility bodies is objection from the land owners, occupiers, beneficiaries or any person or body having registered interests on the land against the works intended by the bodies. As a result, projects or works intended to be carried out will halt because the utility bodies or companies have to face and sort out numerous forms of objection which also include objection or challenge to the Court. Inevitably, the planning done at the early stage will be hampered and indirectly the costs incurred will rise especially in terms of money and time spent which at the end will hamper and adversely affect the system and quality of service by the Government.

In order to resolve the problem, there are number of alternatives in the forms of legal provisions legislated by the Federal Government which can be considered in order to bring best outcome not only to the utility bodies or companies but more importantly to the land owners and other persons with different interests. The legislations are Electricity Supply Act 1990 [Act 447], Water Services Industry Act 2006 [Act 655], National Land Code [Act 56 of 1965] and Land Acquisition Act 1960 [Act 486].

This concise paper will attempt to study and analyze the options laid down by the legislations in order to provide best solution from various alternatives available.

RIGHTS OF WAY OR PERMISSION UNDER THE ELECTRICITY SUPPLY ACT [ACT 447] AND WATER SERVICES INDUSTRY ACT [ACT 655]

Under certain provisions of both Acts to be specific – sections 10, 11, 13, 14, 15 and 16 of Act 447 and sections 140, 141, 142, 144, 145 and 146 of Act 655, the licensee (a utility body or company) is empowered to enter and inspect any alienated land or reserved land upon the issue of 24 hour notice served for the purposes of undertaking reconnaissance, taking measurement and other actions to determine the suitability of the land without causing any disturbance or damage to it. The licensee is empowered to enter the land and undertaking the intended constructions subject to full payment of compensation to all interested parties concerning any disturbance or damage or which may be caused by the works. Before entering any alienated or reserved land, the licensee shall serve a complete and accurate notice concerning the nature and extent of actions intended to be carried out. The purpose of such notice is to inform all interested persons or in the case of reserved land the Control Officer or in his absence the Land Administrator regarding the date on which the State Authority shall inquire any objections made. The service of notice under both acts shall follow the methods prescribed under the National Land Code. The interested persons may within the period of 14 days upon the delivery of the notice, enter a written objection against the actions intended by the licensee to the Land Administrator who will refer the

objection to the State Authority. If there is no objection, the licensee may enter the land and carry out the works. If there is an objection, and not withdrawn before the date of enquiry, the Land Administrator shall conduct an enquiry and give all parties opportunity to be heard. Upon conclusion of the enquiry, the Land Administrator may either unconditionally or subject to certain conditions or terms deemed necessary to him, make an order either to allow or prohibit any action proposed in the notice by the licensee.

Any party aggrieved by order of Land Administrator may within 21 days upon receiving the order, appeal against the order to the State Authority who has the power to confirm, set aside or modify the order on any condition or term desirable to it or direct the acquisition wholly or partly of the alienated land according to the Land Acquisition Act 1960 [Act 486] and the costs including the compensation arising from the acquisition shall be borne by the licensee. The decision of the State Authority over the appeal referred to it is final. The Land Administrator shall inform the Registrar on the order made by him or in case of no objection made to him, requiring the Registrar to make an endorsement on the register document title concerning the land affected by the order or the notice. Any act of maintenance, repair, improvement or installation by the licensee or any person authorized by the licensee may enter the land and carry out the works by cutting, felling and clearing any tree or vegetation or to carry out other necessary actions with the condition that the damage arising shall be as minimum as possible and shall pay full compensation according to the assessment by the Land Administrator.

Alternatively, the licensee and the owner of the land or the occupier thereof may enter into agreement between them allowing the use of the land in question by virtue of a right of way for carrying any equipment or structure or other parts of the utility and the existence of such agreement prior to the effect of the legislations shall be operative.

The amount of compensation payable by the licensee is assessed and determined by the Land Administrator upon considering all factors deemed necessary and expedient. In normal circumstances, the Land Administrator will obtain a report of evaluation of the land including any building or structure lawfully erected on it from the Valuation and Property Service Department, the value of any plant, tree or other crops from the related agency or department in assessing and determining the amount of compensation. Practically the compensation is given in the range of 60-80 percent of the value of the land with regard to the damage and economic loss of the land. On top of that, any other damage or loss of trees, plants, crops, lawful buildings or structures will also be compensated. Any person aggrieved by the order of compensation made by the Land Administrator may within 21 days from the date of such order communicated to him appeal to the State Authority whose decision is final.

RIGHTS OF ACCESS AND USE OF ALIENATED LANDS UNDER THE NATIONAL LAND CODE [ACT 56 OF 1965]

The State Authority is entitled to all alienated lands such rights of access and use as are conferred by provisions of sections 57, 58, 59, 60, 61 and 61A. The rights exercisable by the State Authority or on its behalf are related to all the works of preparing, utilizing, maintaining public utilities such as drainage or passage of water, sewer, pipe, cable or wire or other substances including all the necessary supports and other works ancillary thereto. The rights however are limited to extent that it shall not affect or interfere with any building lawfully erected on such land. Any officer or other person or authority appointed by or acting on behalf of the State Authority shall be entitled to free access to any alienated land at reasonable times for the purposes of surveying, putting or marking out the line for the public utilities.

A notice of such works shall be published in the Government Gazette by the State Authority at least one month before carrying or undertaking the related works. The requirement of the notification is however not applicable if consent from the owner of the land, interested person or body thereof such as lessee, tenant easement holder has been obtained. The copies of the notice shall be served according to the provisions of section 433 that is by affixing the notice in a conspicuous position on the land, public venues such as court, market, Penghulu's office, mosque or other public places including in the newspaper if necessary.

Any person who receives such notice may make an objection in Form 3A to the Land Administrator within one month from the date of publication of the notice. When a

notice of objection has been filed in, all works shall not start without the sanction from the Director of State's Land and Mines. The State Director shall appoint person or persons that he thinks necessary to inquire on the spot the proprietary of the intended works and the validity of the objection and soon report to him upon which he will decide whether to allow or disallow or to allow with necessary modifications of such works to be carried out. Any land, tree or crop damage or destroyed as a result of the rights conferred by the State Authority, the proprietor of the land or the owner of the crop shall be paid such compensation as may be agreed or determined in accordance with the provisions of section 434. If any person or body fails to obtain the consent to carry out intended works on any alienated land from the lessee, tenant or holder of an easement, the person or body may apply to the State Director in order to obtain the order allowing such works to be carried out. When he receives such application he shall take all the actions mentioned at the beginning of this paragraph and if he receives an objection, he shall take the necessary actions in the like manner. In allowing the intended works to be carried out, the person, body or agent authorized or its workers shall carry out the works according to the order of the State Director and entitled to free access at any reasonable time without any restriction to carry out works of surveying, putting and marking the lines of the public utilities. If any of the terms or conditions set out by the State Director is violated, the State Director shall make an order requiring the works to be stopped and directing the person or body carrying out the works to restore and rehabilitate the land to its original state of nature.

As mentioned in the preceding paragraph, the compensation on the damage of land, tree or crop shall be payable to any person or body entitled to it and the amount

thereof shall agreed between him and the State Director and in the absence of such agreement, the compensation shall be determined by arbitration according to the Arbitration Act 1952 [Act 93] that is to provide two arbitrators – one appointed by the State Director and another by the person or body entitled to the compensation for the question in dispute brought up by incorporating expressly all the provisions set out in paragraphs (2) to (9) of the First Schedule of the Act. Any compensation agreed or determined by the arbitration shall be payable by the State Authority.

LAND ACQUISITION UNDER THE LAND ACQUISITION ACT [ACT 486]

Under the Land Acquisition Act 1960, the application to acquire private land is determined whether it is for public purpose as the works are to be carried out by the government agencies or departments or ministries at the State or Federal level under subsection 3 (1) (a) or for economic development by any person or body and in this case the utility bodies or companies under subsection 3 (1) (b). A complete application has to be sent to the Land Administrator who will process the application accordingly. If the application falls under subsection 3 (1) (b), the Land Administrator has to obtain a preliminary valuation of the land affected from the Valuation and Property Service Department. Upon receiving the preliminary valuation report, the applicant has to pay 50 percent from the value of the land as deposit and prescribed application fee to the Land Administrator. Then, the application has to be sent to the State's Economic Planning Unit for evaluation and subsequently to Special Committee of Land Acquisition for recommendations before the application is brought to the State Authority for

consideration and decision. The questions of deposit, fee, reference to the State's Economic Planning Unit and the Special Committee do not arise if the application is under subsection 3 (1) (a). Upon the approval of the State Authority in case of application under subsection 3 (1) (b), the applicant shall pay additional 75 percent deposit to the Land Administrator before the Land Administrator can take necessary action publish the intended acquisition under section 4 and subsequently section 8 in the Government's *Gazette*. Upon publication in the *Gazette*, the Land Administrator will obtain detailed valuation report from the Valuation and Property Service Department. The publication in the *Gazette* under section 8 shall be endorsed or cause to be endorsed a memorial thereof on the register document of title.

Upon receiving the detailed valuation report, the Land Administrator shall conduct an enquiry not sooner than 21 days after the notice of enquiry has been served to all interested persons or bodies. In case of the land is needed urgently, Certificate of Urgency can be issued by the State Director to enable the person or body undertaking the works to enter the land 15 days upon the delivery of the enquiry notice.

The Land Administrator shall conduct an enquiry for the purposes of ascertaining the ownership of the land, the occupancy of the land, and any other related matters before determining the amount of compensation payable to the parties involved. The basis of the compensation shall be adequate in the sense that it shall take into account the current market value of the land. The compensation not only covers the value of the land but also the injurious and affection factors, any lawful building or structure involved, any improvement on the land done in good faith, loss of income and any other costs

deemed necessary by the Land Administrator. The compensation shall be payable by the person or body carrying out the work as soon as the order from the Land Administrator is received. The additional charge of interest at the rate of 8 percent per annum shall be imposed in the case of acquisition through the Certificate of Urgency or delay of compensation payment after 3 months from which the notice is received from the Land Administrator. Upon payment of compensation, the certificate of formal possession in Form K shall be issued by the Land Administrator upon which the person or body carrying the work can enter the land and undertake the necessary works or actions. The issue of Form K shall be endorsed on the register document of title. Any objection by the interested person or body against the order of Land Administrator concerning the award of compensation shall be referred by the Land Administrator to the Court whose decision is final. If the land is partly acquired, the applicant shall furnish updated plan to the Land Administrator for the purpose of issuing title in continuation to the proprietor.

THE COMPARISON – ADVANTAGES AND DISADVANTAGES OF THE LEGISLATIONS

Rights of way or permission under the Electricity Supply Act 1990 and Water Services Industry Act 2006

There are several advantages and disadvantages under both Acts as far as the licensee, proprietor and other interested persons are concerned. The advantages include:-

- I. If there is no objection from any of the party, the process to obtain the rights of way or permission may be resolved at **least within 60 days** from the date of application sent to the Land Administrator. The said period may be shorter depending on the number of alienated lands involved
- II. There is security in term of the registration of memorial or endorsement on the registered document of title
- III. The question of using both Acts shall not arise if both the licensee and the interested persons on the land by virtue of agreement or consent between them to the creating of facilities or benefits on their behalf
- IV. The compensation determined by the Land Administrator may reach 100 percent as if the land is acquired under the Land Acquisition Act because apart from the value of the land, other damages on any crop, lawful building or structure are also compensated

Beside the advantages mentioned above, there are also some disadvantages of using both Acts which are:-

- I. The notice from the licensee to all interested persons through the Land Administrator on the nature, limit and type of works intended to be carried out may be challenged by the persons. The persons may enter a written objection **within 14 days** of the notification to the Land Administrator who shall refer the objection to the State Director who shall decide whether the intended works can proceed or not. Similarly any order made by the Land Administrator including the amount of compensation if not accepted by any person may be challenged by virtue of an appeal to the State Authority **within 21 days** of the notification of the order. The State Authority shall make final decision on the appeal referred to it including a direction to the licensee to acquire the land under the Land Acquisition Act 1960
- II. The duration to reach final settlement of the objection or appeal may be lengthy since there are two different objections or appeals to two different authorities
- III. On the value of the land, normally the amount of compensation will only be determined based on the range of 60 to 80 percent of current market value of the land in question
- IV. The rights of way or permission granted under both Acts does not acquire or lessen the area of any alienated land. This means any part of the alienated land which affected by the building or constructing of any utility remain under the proprietorship of the proprietor despite it being incurred economic loss which will adversely affect the value and the potentiality of the land as whole. The land will

become less desirable for any development. For example, any construction of permanent building or cultivation of permanent crop is prohibited

- V. The fact that the affected part remains under the ownership of the proprietor, the proprietor is therefore responsible to pay full amount of rent (quit rent) and other forms of taxation to the respective authorities even though he can no longer enjoy full rights over his land
- VI. In deciding on the appeal brought to it by any person aggrieved by the order of the Land Administrator, the State Authority if it directs the land in question to be acquired under the Land Acquisition Act 1960, then the licensee will have to submit fresh application according to the provisions of the law. As a result, the duration will be prolonged and the delay will only cost the licensee money and time
- VII. The process to obtain rights of way or permission under both Acts will be more problematic if the proprietor of the land is dead and the distribution of his estate is not resolved by the beneficiaries. Similarly if the licensee wants to enter into agreement with the proprietor, it will not be able to do so since the beneficiaries do not have authority or right as proprietor until their interests have been registered on the document of title

Rights of access and use under the National Land Code 1965

The provisions under the National Land Code for rights of access and use of alienated lands can be assessed from the strengths and weaknesses points of view. Among the strengths are:-

- I. Procedure to obtain the rights of access and use under the National Land Code will be much easier if there is agreement between the applicant and the interested persons on the land
- II. The minimum duration to obtain such rights and use is at least 2 months
- III. The determination on the amount of compensation will be much easier if agreement can be reached by all the parties involved

On the other hand, there are several weaknesses on the use of the provisions under the National Land Code that are:-

- I. The existence of limitation on the rights and use if the related works involve building that lawfully erected by the proprietor or other interested persons thereof
- II. A notice on the intended works shall be published in the *Gazette* and delivered to all interested persons on the land **at least one month** before the intended works to be carried out
- III. Any person who objects the intended works shall **within one month** from the date of notification file in the objection to the Land Administrator, and in such

- case the intended works shall not proceed until a complete inspection and report is submitted to the State Director by the persons appointed by him. Upon the submission of the report, the State Director shall decide whether to allow, or disallow or to allow with certain terms or conditions the works to be carried out. There is however no specific duration for the State Director to decide upon the submission of the report to him
- IV. Any person who aggrieved by the decision of the State Director may appeal to the Court under section 418 of the Code **within three months** from the date of the decision communicated to him
- V. The ground for determination on the amount of compensation is on the basis of mutual agreement between the applicant and the interested persons. There is however no specific method to determine the compensation payable for the land, damaged tree or crop and if the agreement is unreachable, the determination of the compensation shall based on the provisions of section 434 of the Code. Based on the said provisions, the amount of compensation shall be agreed by the interested persons and the State Director and in the absence of such agreement, be determined according to the provisions under the Arbitration Act 1952
- VI. The State Government is liable to pay the amount of compensation determined under the Arbitration Act

- VII. There is no specific provision under the Code on the necessity to make an endorsement or a memorial on the register document of title regarding the grant of rights and use. Therefore, problems might occur if there is change in the proprietorship
- VIII. In the case where the proprietor of the land is dead, his beneficiaries have limitation in making any objection or demand since the Code only recognizes persons with registered interest
- IX. The provisions under the Code also do not prescribe the procedure in making the agreement or consent between the persons involved especially on the matters related to the extent of the rights and use, the duration, and the method of execution of such agreement or consent

Acquisition of land under the Land Acquisition Act 1960

The Land Acquisition Act provides acquisition of private property by the State Authority for certain purposes and public utilities are part of it. The advantages of using the Act as the mechanism can be further evaluated as follows:-

- I. The acquisition of private property under the Act guarantees and recognizes the rights of proprietor and other interested persons which is in line with the provision of Article 13 of the Federal Constitution that states “aaaaa”
- II. The procedures and the steps under the Act are very refined in its arrangement and shall be followed accordingly in order to avoid nullity. The

- actions resulted from the systematic method is therefore serves and provides security, protection and guarantee to all persons involved
- III. The determination of the compensation is clearly underlined in the First Schedule of the Act and there is also discretionary powers given to the Land Administrator to be deployed accordingly especially in the light of affected proprietor or other interested persons
 - IV. The likelihood of the acquisition to be challenged once approved by the State Authority in Court is very slim especially when it involves public importance. The objection is only on number of grounds which include the amount of compensation determined by the Land Administrator, the persons to whom it is payable, the measurement of the land and the apportionment of the compensation. There is a limit set by the law in respect of the amount of compensation which may objected by any aggrieved parties that is any amount that exceeds RM 3,000 for the proprietor or other interested persons and any amount exceeds RM 15,000 for the person or body acquiring the land. The objection on the amount of the compensation referred to the Court once decided is final
 - V. Any objection especially that involves the amount of compensation will not stop the acquiring person or body from entering the land to carry out the related works

- VI. Acquisition under the Act is applicable to all lands except Federal lands registered under the name of Federal Land Commissioner. The acquisition of the land whose proprietor is dead or extinguished through dissolution can proceed and until any order or distribution order of the estate or any vesting order is obtained from the Court, the compensation money will be kept in Court or Amanah Raya Berhad. This indirectly will encourage the beneficiaries or other parties that claim interests over the land to resolve their claim or interests as soon as possible in order to claim the money
- VII. Apart from resolving the issue of ownership, land acquisition also serves as effective weapon which can be seen as a bullet that kills three birds simultaneously. Once a private land is acquired, it becomes a state land. This will facilitate and accommodate the acquiring person or body to carry out the related works and the land acquired will also serves as access to other lands located further inside which did not have a proper and lawful access previously. The ownership data which is updated through the order of Court or small estate distribution order is very important to the authorities in order to exercise their rights and powers enshrined in any legislation. For example, accurate delivery of notice for any demand or purpose
- VIII. Upon the acquisition, the State Authority in order to protect the interests of whom the land was acquired has few alternatives to dispose the land in any manner deemed appropriate prescribed under the National Land Code.

Eventually it leads to an effective control and management of the land and indirectly increase in the revenue of the State

Land acquisition even though provides security and guarantee to all of the parties concerned, has certain shortfalls which are:-

- I. The duration for land acquisition processes can be lengthy from at least two to six months and some can be longer especially if the acquisition involves a lot of lands and other issues such as public consultation, realignment of lines or adjustment of plan
- II. The costs incurred by the acquiring body especially on the amount of compensation may be high due to valuation of land based on current market price, other matters such as injurious and affection factor to the land, late payment charge, economic loss of the land, income losses suffered by the persons interested, valuation and attendance fees and further increase in the amount of compensation inclusive of interest as ordered by the Court

CONCLUSION AND RECOMMENDATION

Based on the discussions and analysis provided together with the comparison on the strengths and weaknesses of the legislations, it is clear that the use of the Land Acquisition Act as a mechanism or an alternative in providing utilities on alienated lands proved to be more effective and suitable. The provisions under the Land Acquisition Act ensure the security and guarantee not only to various interested persons on the land but also to the related acquiring utility bodies. The most important matter in acquisition of land that is the payment of adequate compensation is clearly underlined in the Act even in the event of objection to the matter brought to and determined by the Court. Practically the obvious hindrance in using the Act is the duration taken to arrive at the decision and the execution of the Act. The involvement of several departments apart from the stewardship of land office if not properly coordinated will render the use of such Act cumbersome. It is very important for the acquiring bodies or agencies to provide fully furnished and latest documentations to the Land Administrator so that the processes involved can be undertaken efficiently by the respective departments to ensure avoidance of any delay that is very costly.

Unlike the Land Acquisition Act, the use of the Electricity Supply Act 1990 and the Water Services Industry Act 2006 undermines the rights of enjoyment by the owner and other interested persons on the land. Under both Acts, even though the issues of payment of compensation and the procedures involved therein are addressed, the economic loss of the land suffered by the persons is an endless infringement to their rights. They have to endure the loss of an exclusive enjoyment of their rights over their

land which technically still belongs to them. The existence of utilities thereon is an obstacle to them in future planning and development. In term of marketability, such land will not be favourable and viable even though the land has got geographical and other strategic advantages.

The issue of use or acquisition of alienated lands for utilities is too crucial to be neglected since it affects the exclusive rights of owner or other interested persons thereon. The process of alienation under the National Land Code shall be done judiciously with proper and long sighted planning by taking into consideration the various needs for infrastructures and utilities. Similarly the processes of land development under certain provisions of the Code shall also be studied and analyzed carefully without abandoning the requirements and the needs of various utilities. Short sighted alienation and development approval of land can be very costly if the needs or requirements of utilities to be obtained thereon in later period. Conferment of land title to any person or body renders indefeasibility which cannot be easily revoked or deprived.

REFERENCES:-

1. *Electricity Supply Act 1990 [Act 447]*
2. *Water Services Industry Act 2006 [Act 655]*
3. *National Land Code [Act 56 of 1965]*
4. *Land Acquisition Act 1960 [Act 486]*