

Vince Mangioni
University of Technology, Sydney
Member of the Asia-Pacific Centre for Complex Real Property Rights

Vincent.mangioni@uts.edu.au

Urban cleansing and renewal

Redefining the principles of compensation in compulsory acquisition

Abstract

The process of compulsory acquisition for the purposes of urban renewal and economic development are becoming more common as populations continue to grow in urban built up locations and more intensive uses of land is warranted. The most practicable process for site assembly and the provision of higher and better uses of land may well be argued to be through the process of compulsory acquisition.

This paper explores the hybrid use of compulsory acquisition powers for the taking of land by local government from one party and the reselling of that land to a developer for a more intensive and similar use. It contrasts the use of the Pointe Gourde principle between traditional public purposes and the emerging purpose of economic development in the assessment of compensation.

Two cases are used defining the emerging purpose of economic development in Australia and United States. A third case demonstrates a dichotomy between the compensation principles of assessing betterment in partial acquisition cases and contrasts this against the opposing principle used in total acquisitions in the specific circumstances of economic development. A model is developed which defines the dispossessed party is a stakeholder in the economic development of land, in which consent for the defined purpose of economic development is a natural progressive step in defining the highest and best use of land.

Keywords: Compensation, Economic Development, Just Terms, Public Purpose, Pointe Gourde.

Introduction

In contrast to the traditional purposes of compulsorily acquiring land for the provision of public infrastructure, the emergence of economic development used for the regeneration of existing locations has tested the boundaries of whether such purposes constitutes a public purpose. Whilst not specifically defined, economic development is the process of redeveloping land for a similar more intensive use to the use it was put prior to its redevelopment. This may constitute the taking of a residence for high density housing, or the taking of a business premises for a larger more intense business.

The use of the compulsory acquisition process raises further questions as whether the current principles of compensation designed to compensate dispossessed parties for traditional public infrastructure purposes, are appropriate for land acquired by government and on-sold or co-developed for similar uses. This issue is of importance from a number of perspectives including population growth, the regenerating of underutilized land and economic stimulation arising from the activity of the regeneration process.

The Australian Bureau of Statistics (2008) highlights that 64 percent of Australia's population live within its six major cities. As urbanization continues, the generation and regeneration of Australia's cities is a rapacious process which must provide for both its existing and anticipated populations. Australia is host to two of the world's one hundred most populated cities, namely Sydney & Melbourne (Westman 2007). Rosenberg (2005) highlights the density dilemma facing government as 90 percent of the earth's population live on approximately 10 percent of the land mass, with many cities having reached geographic limitations.

In meeting the needs of expanding cities and their populations, governments are taking more initiative in site assembly and amalgamation for uses beyond infrastructure. The public purpose rule in the site assembly process is described by Miceli (2004:218-219) as;

“a narrow economic rationale for eminent domain as a way of forestalling costly holdout problems that plague land assembly for large scale urban redevelopment projects, whether private or governmental. In this view, efficiency is served by any process that gets the land into the hands of parties who value it most highly.”

The overarching principle of utilitarianism provides the basis for the taking of land for the benefit of the greater community. This principle whilst not unchallenged has been accepted in the main for the taking of land for the provision of infrastructure, however is questioned for the use of site assembly

in urban renewal and redevelopment projects. Utilitarianism is described by Mill, cited in Hollander (2000) as an action which supports the greatest good for the greatest number of people. The primary question asked is how do traditional principles of compensation address non-traditional purposes of acquisition.

The following cases highlight the changing trends towards the acquisition of land for regeneration purposes and define perspectives of acquiring authorities which legitimize the gentrification and cleansing of established parts of suburbs. In the following cases the uses to which the acquired land is put, is similar but a more intense uses of the existing use prior to its acquisition.

The term economic development and its application do not proffer the same principles of compensation to those of infrastructure. This is particularly the case where the acquiring authority shares the uplift in value resulting from bringing land to its highest and best use. The developer and local government each sharing of a developers profit in contrast to a builder's profit margin associated with traditional infrastructure projects.

The evolution of urban cleansing - United States & Australian comparison

Economic development as a purpose in the acquisition of land has evolved in the United States since the 1950s. The first noted case involving "economic development" occurred in 1954, *Berman v. Parker* 348 U.S. 26 (1954) where Turnbull & Salvino (2006) notes eminent domain being used in a slum clearing program in Washington D.C., in which land acquired was sold onto private developers for redevelopment. Again in 1981, *Poletown Neighbourhood Council v. City of Detroit* 304 N.W. 2d 455 (Mich 1981) the city paid for land using eminent domain which was on-sold to General Motors for a new factory.

Prior to examining the two most recent cases on the subject, it is first useful to examine the evolution and progression of the public purposes and their construct. Figure 1 provides an overview of the evolution of compulsory taking of land over the past 25 years in which the developer rather than the builder has played an increasing role in the public purpose.

Figure 1: Progression of public purposes in Compulsory acquisition

| Purpose | Government action | Process | Profit |
|---|---|---|---|
| Road works | Government acquires land pays compensation to dispossessed land owner and engages road builder to build the road | Road builders compete for the contract and the successful contractor builds the road. | Road builder takes the builders profit and provides employment during construction period. |
| Road works (Private public partnership) | Government acquires land pays compensation to dispossessed land owner and engages company to build and operate the road. | Development company engaged to build and operate the new roadway collecting revenue by way of tolls and either builds the road or contracts the building of the road out to a building company. | Road builder takes the builders profit and provides employment during construction project. Developer takes an amortized annual profit for the ongoing running of the roadway. |
| New civic centre with retail / office space & residential units | Government acquires land, pays compensation to dispossessed land owner and approves the more intense use of the land and resells the land onto the developer at a profit. | Developer engages building contractor to undertake construction of the civic centre and hand that back to government. Developer develops the units and retail and either sells these on at a profit or retain the development and takes profit as a rental stream. | Builder undertakes the construction and collects the builders profit. The developer takes the developers profit margin from the project profit, which includes a component in the uplift in value resulting from the rezoning of the land. The council takes part of the uplift in profit from the developer. |

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The following United States and Australian cases provide a summary of the local and international evolution, issues and outcomes resulting from economic development, being the public purpose for which land is acquired. It provides further context to the examples set out in Figure 1. In summary these case demonstrate the use of acquisition powers for urban cleansing and gentrification, highlight the objection to both the purpose and give rise to the question as to what actually constitutes adequate compensation when the primary purpose of the acquisition is to dispossess one party for the direct and benefit of another for a similar use.

Figure 2: Case summary & review

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| <p>United States - Kelo v City of New London 125 S. Ct. 2655 (2005)</p> <p>Summary of facts</p> <p>Kelo and others resided in a rundown part of the City of New London, Connecticut in which the Local Government elected to acquire the subject and surrounding land and provide this land to a developer for the purposes of urban renewal and redevelopment of that quarter of the City. Kelo choose not to move and resided in her property for four years after the order declaring the acquisition was issued. In settling the matter, the City of New London agreed to move Kelo’s house to an alternate parcel of land and further pay compensation to settle the matter. Whilst it may appear that Kelo’s plight was compensation, which whilst undisclosed was not a matter of monetary compensation, but a matter of being placed in the same position (in her home) in an alternate location, which may be more or less than the value of the location she was dispossessed of.</p> <p>Justification and dissention for compulsory purchase & ruling</p> <p>In the Kelo case the court was faced with an absence of specific legislation defining a public purpose in acquisition statutes. The case resulted in a broadening of the uses being established for eminent domain or compulsory acquisition through the result, which in essence supported eminent domain for the transfer of acquired land to private parties for urban renewal and job stimulation. The public purpose doctrine is described by Miceli (2004:218-219) as;</p> <p>“a narrow economic rationale for eminent domain as a way of forestalling costly holdout problems that plague land assembly for large scale urban redevelopment projects, whether private or governmental. In this view, efficiency is served by any process that gets the land into the hands of parties who value it most highly.”</p> <p>In deliberating on the Kelo case, the court</p> | <p>Australia – R&R Fazzolari Pty Ltd v Parramatta City Council; Mac’s Pty Limited v Parramatta City Council [2009] HCA 12</p> <p>Summary of facts</p> <p>Fazollari & Mac each own retail shops in the town centre of Parramatta in Sydney. In 2007 the Council sent proposed acquisition notices to the owners of the land located in the town centre of Parramatta. The land was required as part of a redevelopment referred to as ‘Civic Place’ comprising a civic square, 250 apartments and 45,000 m2 of retail / office space. The redevelopment was to be carried out under a Private Public Partnership (PPP). “Under that agreement the council would transfer certain of the acquired land to Grocon and receive substantial financial payments and other consideration from Grocon.” In the first instance the Land and Environment Court ruled that the proposed acquisition was unlawful on the grounds that the purpose of the acquisition was the re-sale by council to the developer. Council appealed the matter to the Court of Appeal of New South Wales, which unanimously set aside the declarations made in the lower court. In conclusion, the High Court of Australia found that the primary purpose of the acquisition was for re-sale and reinstated the decision of the Land & Environment Court NSW finding that the proposed acquisition was unlawful.</p> <p>Justification and dissention for compulsory purchase & ruling</p> <p>The High Court have considered in detail the agreement between Council and the developer and found that the primary purpose of the taking was for the on-sale of the land to a developer.</p> <p>Local Government Act Section 188</p> <p>“A council may not acquire land under this Part by compulsory process without the approval of the owner of the land if it is being acquired for the purposes of re-sale.”</p> <p>(a) the land forms part of, or adjoins or lies in the vicinity of, other land acquired at the same time under this Part for a purpose other than</p> |
|--|--|

decided in favour 5-4 for eminent domain for redevelopment purposes. An important précis of the decision follows;

The majority opinion, by Justice Stevens, found that it was appropriate to defer to the city's decision that the development plan had a public purpose, saying that "the city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue." Justice Kennedy's concurring opinion observed that in this particular case the development plan was not "of primary benefit to . . . the developer" and that if that was the case the plan might have been impermissible. In the dissent, Justice Sandra Day O'Connor argued that this decision would allow the rich to benefit at the expense of the poor, asserting that "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." She argued that the decision eliminates "any distinction between private and public use of property—and thereby effectively delete[s] the words 'for public use' from the Takings Clause of the Fifth Amendment".

the purpose of re-sale,

In response to sub-section 2 (a) of the Local Government Act, the High Court confirmed the position of the primary judge that this sub-section it did not apply, as the adjoining land acquired by council itself was acquired for the purposes re-sale, which was acquired in November 2004 and December 2006.

The High Court ordered that each appeal to the court should be allowed with costs. Further, cost should also be awarded in favour of the appellants for the courts below the High Court viz NSW Court of Appeal and NSW Land & Environment Court.

Subsequent action

NSW Parliament moved an amendment to the Land Acquisition (Just Terms Compensation) Act 1991, through an Amendment Bill 2009 and with support of the opposition it was passed. The amendment removes the ambiguity of the requirement for council to gain consent from a dispossessed owner, where the intended purpose of the acquisition was for the purposes of resale to a developer where it had not acquired its own land adjoining the land being acquired. Moore (2009) has raised concerns of the motives and uncertainty created by this amendment.

Source: Austlii.edu.au & Cornell University Law School

Methods of valuation & principles of compensation

Following the above cases this section provides a critique of the valuation methods of assessment which underpin the principles of compensation. It highlights the differences between the principles of compensation for traditional public purposes against those of emerging purposes which include economic development and the use of private public partnerships.

The basis of a claim for compensation and the methods used to assess such compensation will depend on the basis of the acquisition, impact of the acquisition on the dispossessed party and in the case of a partial acquisition the impact of the land taken and its use on the land retained by the dispossessed. The nature of the claim will impact on the Heads of Compensation claimable and most importantly will drive the valuation methodology used in the assessment of compensation. Figure 3

distinguishes the difference in a claim for the heads of compensation and method of assessment or valuation (Mangioni 2007).

Figure 3: Total v Partial Acquisition Approach

| Basis of acquisition | Method of valuation | Heads of compensation |
|-----------------------------|----------------------------|---|
| Partial acquisition | Before & after method | Market value, Special value, Disturbance, Severance, Betterment / injurious affection |
| Total acquisition | Piecemeal method | Market value, Special value, Disturbance, Severance |

Source: Mangioni 2010

In the before and after method, all heads of compensation excluding incidental items of disturbance are generally encompassed in this method. In essence there is no additional carve out element of value to be determined. However where the taking of a portion of the land results in the severance of a land and its operation as a business, there may well be additional items for consideration. In these cases the extent of the severance must first be assessed in determining whether the basis of compensation is market value on extinguishment or severance where the business can be reinstated elsewhere and the cost of that reinstatement is less than its extinguishment value.

The acquisition of land and the extent of the acquisition is primarily determined by the requirements of an acquiring authority. An acquiring authority is not compelled to acquire any more land than is required for the public purpose. Whilst case law prohibits the taking of any additional land than is required for the public purpose as defined in, *Minister for Public Works (NSW) v Duggan* (1951) 83 CLR 824 and *Thompson v Randwick Corporation* (1950) 81 CLR 87, the State of Tasmania has the statutory power to enter into agreement under section 10 Land Acquisition Act 1993 to acquire more land than is required by agreement. In NSW, it is not uncommon for an acquiring authority to negotiate the acquisition of the total property, particularly in the case of residential property, where a partial acquisition has been proposed and is not in the best interest of the dispossessed party. In Figure 3, it is noted that in partial acquisitions of land, an additional head of compensation, injurious affection / betterment is to be considered and the method of assessment differs from the assessment of compensation total acquisition. In the case of total acquisition, the formula for this approach follows:

Piecemeal Formula:

Market Value + Special Value + Disturbance + Severance = Sum of Compensation

This formula requires the addition of the sum of each element of compensation payable. This model assumes each of the heads of compensation are payable, however this is to be determined on a case by case basis. In the case of the partial acquisition of land, an additional element of consideration is required, injurious affection or betterment which is to be considered and assessed in the compensation payable. This method adds an additional layer of conceptual complexity in the assessment process and judgment of the valuer. In contrast to the piecemeal formula, Hornby (1996) highlights that the before and after method is not the sum of values, but a judgment of the assessment of the properties value before acquisition and the value of the residual after acquisition, with the difference between the two values constituting the impact of the acquisition on the property retained. This method is not clearly understood by some valuers or property owners who have been dispossessed of part of their property. The value of the land taken is not the subject of compensation, but it is the impact of the taking on the residual of their property that is the matter to be assessed in partial acquisitions. This is primarily due to the case that the use to which the acquired land is put enhances the value of the retained land and hence no compensation is payable (Hyam 2004).

Injurious Affection & Betterment the antithesis of Pointe Gourde

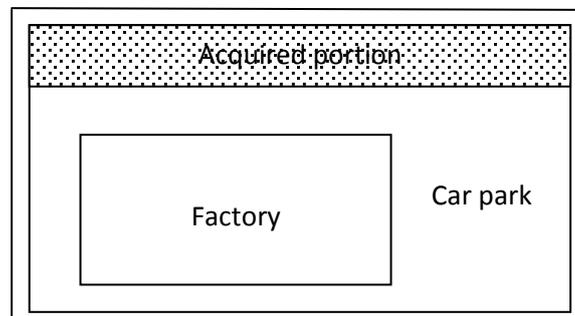
The following examples highlight the difference in the principles of compensation between a partial and total acquisition of land, with specific reference to the total acquisitions in land in which any uplift in value resulting from the scheme underlying the acquisition in value is to be disregarded under the Pointe Gourde principle. This is in contrast to partial acquisition in which betterment and injurious affection are to be taken into account in the assessment of compensation.

Partial acquisition - Injurious affection

Injurious affection is defined as the negative impact the use to which the acquired land is put, has on the retained land of the dispossessed party when part of the land is acquired (Hornby 1996). In Figure 3, the acquired portion accounts for 20 percent of the total land, this however does not equate to 20 percent in loss of land value. In the before assessment of value, the property had vehicular access from the side street in addition to the front street. The acquisition has resulted in the use of the land taken denying access to and from the side street which has impacted on the existing and potential uses of the property. This has resulted in the value by virtue of its corner position being restricted to sole access from the front of the property, negating much of the value of the property as a corner property. In contrast to diminution in value by reduction in size, similar property the size of the subject less the acquired portion not on a corner will be considered in

assessing the after value of the retained property. This will result in a reduction in value of more than 20 percent of the value of the land taken.

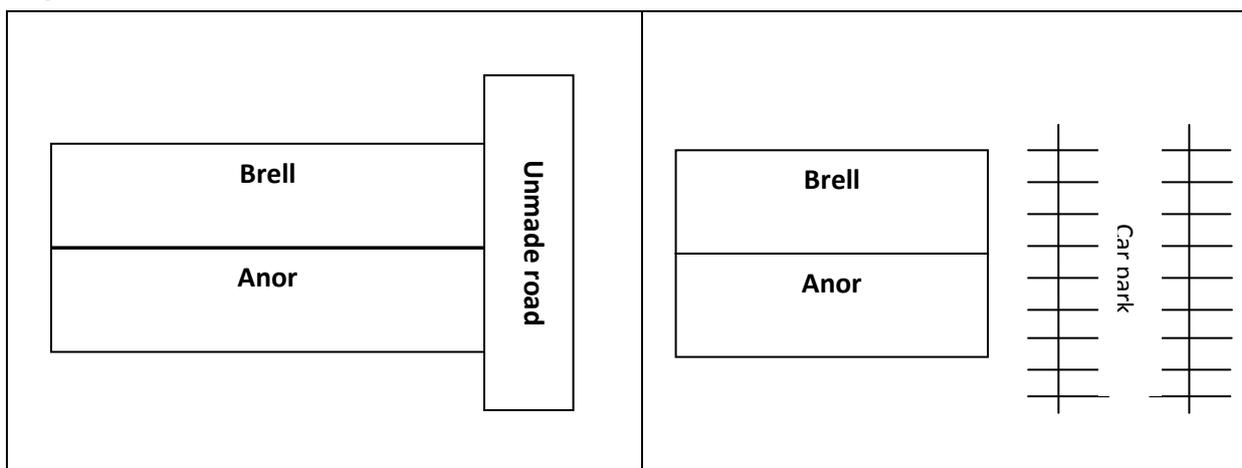
Figure 4: Injurious affection



Partial acquisition - Betterment

In contrast to the impact of injurious affection highlighted in Figure 4, the reciprocal of this impact is Betterment, which must also be considered in the partial taking of land, and a valuer assessing the impact of a partial taking must also weigh up the benefits of the use to which the land taken has on the value of the residual land retained. This principle was defined in *Brell anor v. Penrith City Council* (1965) 11 LGRA 156, as highlighted in Figure 5, in which a small portion of land at the rear of shops was taken to form part of a public car park, which enhanced the value of the residue of the property. In this case it was shown that the use of the acquired land enhanced the value of the residual land beyond its value as unmade roadway prior to the acquisition and no compensation was determined for the value of the land taken.

Figure 5: Betterment



Total acquisition – Pointe Gourde

In the case of total acquisition the Pointe Gourde principle requires the scheme underlying the acquisition to be disregarded in addressing the compensation. In contrast to the betterment / injurious affection impact in partial acquisitions, in cases of total acquisition, it is argued that the Pointe Gourde principle applies to the same affect. If the scheme underlying the acquisition would have reduced the value of the property, that impact and any reduction in value is to be disregarded. In contrast, if the scheme underlying the acquisition would have enhanced the market value of the acquired land, then that increase in value is to also be disregarded. This principle was established in *Pointe Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands (Trinidad) [1947] AC 565*.

The primary issue with this principle, is that it was designed to safeguard in cases where there was potential for a reduction and restrict an increase in value resulting from the potential scheme. In the case of economic development the potential exists for the uplift in value to a more intense use of the land, with no potential for a reduction in value. In order for this to occur, there must be an underlying demand for that use. In determining the highest and best use of land the Australian Property Institute (2007 p.233) highlight the criteria in assessing the highest and best use of land as follows:

1. Physically possible
2. Legally permissible
3. Financially feasible
4. Maximally productive

The primary instrument used by councils in the cases covered in Figure 2, is the implementation of the approval process after acquisition, to the exclusion of the dispossessed party in which a market demand exists for that use, which is conceptually set out in the private public partnership agreement.

Designing change – a partnership framework

In dealing with the issue of urban cleansing and economic development, the following questions must be answered:

- 1) Is whether urban gentrification and cleansing constitute a public purpose, and if it is to be considered a public purpose;
- 2) How does the uplift in value created by government through its planning powers after its acquisition equate, to 'Just Terms' compensation to the dispossessed party, when the use to which the land is put incorporates the very use in which the land was used prior to its acquisition.

To the second question, the relevance and continued use of the Pointe Gourde principle must be questioned where a land use is already established and is being replaced within a scheme that incorporates that very use. In the United States case of *Kelo* the house was replaced with a housing estate, In the Australian *Fazzolari* case, the shops are to be replaced with shops, offices and a civic centre.

What is emerging under the evolving privatization of the 'public purpose rule' through the potential urban cleansing and gentrification of suburbs, is the legitimized use of compulsory acquisition powers for the transfer of the underlying value of land from property owner to government and developers. The argued byproduct by government is the benefit to community which apart from construction jobs has not been demonstrated or articulated in the ongoing benefit to the community as highlighted by Black (2001), who questions the ongoing community benefit. If there are defined benefits for the community and the underlying value of the land supports those benefits, the value of these benefits must also be shared with the dispossessed property owner.

The Planning Institute of Australia (2009) in considering the 'Net Community Benefit Test' (NCBT) raise the issue of equity and highlight that whilst some may have an overall benefit, others in the community may experience disbenefit. Its criticism of the adhoc application of the NCBT highlights that the test has not been applied consistently. In many respects, the dispossessed party may well be one of the disbenefited parties as they are dispossessed of their property with no provision for either reinstatement under current compensation principles, or the provision for sharing in the highest and best use of their land. This results from the withholding of its rezoning by the party acquiring their property for re-sale at a profit.

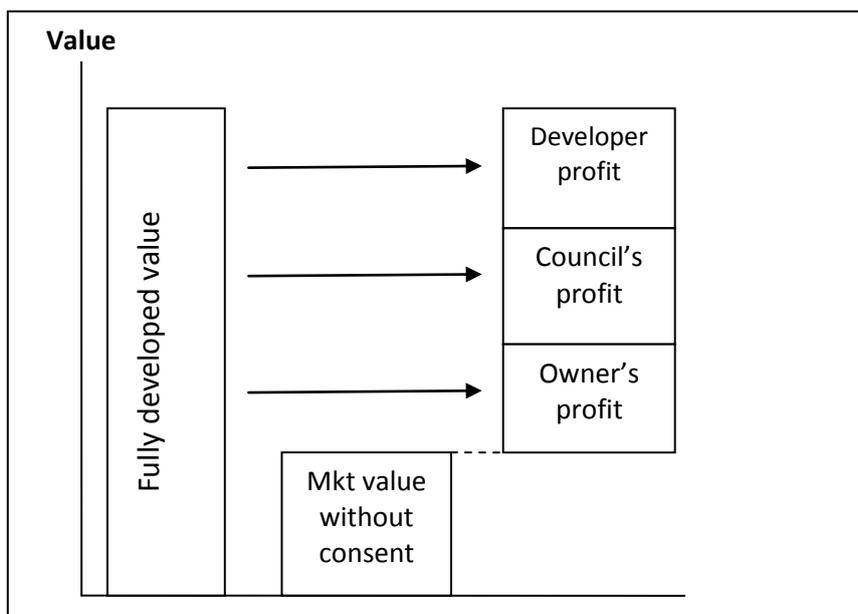
Government in its pursuits to act as a commercial facilitator in both the role of dispossessing property owners on one hand and acting as part developer through the approval of developments on the other hand, is a concern for any property owner. Haddad (2009) has responded to this dilemma and has raised the recommendation that developers be permitted to deal direct with

property owners in cases of economic development. This may then pave the way for the development of a local government betterment tax on the gains made from the uplift in value by reference to their rezoning of the property.

To omit any share of the uplift in value in meeting market demand for a higher and better use which is subject to the consent by the authority which stands to gain from its own actions, is stated by Warren (2009) to constitute a one hundred percent betterment tax on the land of the dispossessed party. There is no tax in Australia or internationally levied at one hundred percent. In the Fazzolari case it may well be argued from a taxation perspective that the windfall gain is taxed at one hundred percent by council acting as both consent authority and collector of a gain in part derived from its own actions.

Figure 6 is a framework for the recognition and apportionment of the uplift in value of the subject property in which part of that value is assigned to the property owner for the existing and proposed use of the land, being identified as part of the profit. The council's role in facilitating the process and approving the project is reflected in a component of the profit. The developer also takes a portion of the project profit of which the risk has been minimized through the preapproval of the development by council. This framework also provides a transparency process for the articulation of value in development projects which often clouds the development consent process of councils. In this framework the process and increments of value are explicitly defined and transparently available for each participant to the process.

Figure: 6 - Voluntary framework with owner, developer council profit



Conclusion

Population growth and the evolving demand for more intensive uses of land in urbanized location requires a business approach from government in the redevelopment process. Where the acquisition of land is the first step in the site assembly process for more intensive uses, it must first be recognised that the Pointe Gourde principle is not a business concept. The principle does not account for, or articulate a process for engendering a willing buyer willing seller outcome. This principle primarily evokes confrontation and does not fully account for the highest and best use of the land in cases of urban renewal and economic development. Further the principle does not conform to or engender the objectives of land acquisition statutes to achieve acquisition by negotiation over compulsory purchase (s. 3(1)(e) Land Acquisition (Just Terms Compensation) Act 1991.)

In perspective however, as the property forms part of a larger project which adds to the value of the acquired property, the dispossessed property owner is not entitled to the full uplift in value resulting from the project. In cases of lengthy holdouts and ransom value being sought by potential dispossessed owners, there is no option but for government to use compulsory acquisition powers. This objective should be an option of last resort and cannot be achieved without a fully consultative process of engagement of the stakeholders. This is a skill that government has yet to acquire in moving itself into a facilitation role environment.

Government cannot on one hand act a business partner with one party to the process and then act as government authority towards the other party using the courts as a blunt instrument to assert its authority. The proposition that government is the gate keeper of land uses, provider of development consent and enforcer of utilitarianism does not auger well with dispossessed parties internationally and has raised concern among dispossessed parties as highlighted in the cases critiqued in this paper. The potential benefits for government to resolve this situation through a well defined policy of an 'offer to treat and negotiate' with developers and existing property owners is needed to bring itself into a role of facilitating change with parties to the process.

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