

EXPROPRIATION IN THE SIMPLE CADASTRE

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ABSTRACT

In this paper we investigate the necessary interaction between expropriation and the cadastre. We investigate first the role of expropriation in modern society and the stake holders and then analyze the interaction with land registration and cadastre. The “simple cadastre” framework allows a treatment independent of national particulars. A simple cadastre is a minimal model that satisfies the needs of the users of the cadastre and abstracts from non-essential aspects, any national legislation is full of. In this paper we investigate how a cadastre supports expropriation and what the necessary interface is. We conclude that the expropriation procedures need access to registration data and a process to register a transfer of ownership effectuated by a court judgment, but no special arrangements that would only serve expropriation procedures.

1. INTRODUCTION

The implementation of most infrastructure projects requires land, often not owned by the public. The construction of a highway is an example for an infrastructure project, it requires a continuous piece of land connecting the end points of the highway wide enough for the road. Special legal procedures are in place in most countries to acquire land from individuals for

projects in the common interest, e.g., infrastructure projects, even if the individual owners of land or other rights do not consent to transfer ownerships of land to the authority constructing the project. The standard procedures of subdivision and transfer of ownerships cannot be used because the cooperation of the land owners is required. Without expropriation procedures, any land owner could stop the infrastructure project if he refuses to sell or abuse his monopolistic situation to extract an unjustified high price. A process is necessary to balance between the interest of the private owner and the public.

In this paper we discuss the process of expropriation and its connection to the cadastre. We use the conceptual framework of a simple cadastre (Frank to appear 2007), which fulfills two roles here:

- focusing the investigation on the necessary components of land registration and avoiding the obfuscation by particular national legislations, and
- identifying the procedures that should be included in designs for new land registration legislation in countries that renew their cadastral systems.

The remainder of the paper is structured as follows: We define necessary terms as simply and generally as possible to be able to cover a large number of jurisdictions. Next, we identify the parties involved in expropriation and identify their needs. Finally we identify the interface between the expropriation process and land registration.

2. SIMPLE CADASTRE

2.1 Rationale

A simple cadastre is a theoretical abstraction from real cadastral systems to focus our attention on the essential aspects of land or title registration.

2.2 Components of a Simple Cadastre

The simple cadastre records the relationship between persons who have rights in land and delimited parts of land. The simple cadastre must contain a list of persons holding rights and an exhaustive list of all land parcels.

Ideally a cadastre would contain all information about persons having rights in land. Recording of rights and transfer of rights resulting of contracts can be enforced or made attractive to the right holder, but many such rights are created by public or private law and exist without being recorded.

2.3 Procedures

In the minimum a simple cadastre must have procedures to

- create originally land parcels with a determined owner holding all rights;
- split land parcels without change of ownership;
- alienate an all or specific right from a bundle of rights a person holds and transfers it to another person.

The last process is usually constructed as a transfer of ownership rights, possibly generalized to transfer of all of a right a person holds, and a set of specific procedures to grant particular (smaller) rights to a person, understanding that the right of the previous owner is thus reduced.

2.4 Simple Cadastre

Cadastral systems as implemented in most countries are complex systems grown over time. They were shaped by the specifics of the centuries, and the social and legal system they work in. Therefore we find many different types of land and title registration (Dale and McLaughlin 1988, pp. 22-25; Zevenbergen 2002, pp. 47-82). However, the functional differences between the systems are small when discussing the theoretical aspects only (compare Frank 1996;

Navratil and Frank 2004). When discussing the simple cadastre, we use here cadastre and land registration system as synonymous and do not use the (Austrian) terminological distinction between cadastre as a technical system to determine boundary location as separate from the registration of ownership. The simple cadastre is an attempt to specify the set of functions, which a cadastral system must fulfill (Frank 2004). These functions and the data structures required for the functions define a simple, theoretically valid model. This model is called simple cadastre and can be used as a framework in which to analyze questions of land management, independent of national particular solutions.

The simple cadastre fulfills primarily the purpose of guaranteeing ownership and other right in land. Real land or title registration systems are often burdened with many other functions that hinder this primary objective (Stubkjær, Frank et al. submitted 2006). The concept of a simple cadastre tries to abstract from the difference between title and land registration; the simple cadastre concepts provide a framework to identify the differences in procedures for the two fundamentally different approaches to achieve essentially the same goal: protecting ownership of rights in land.

3. EXPROPRIATION

Expropriation is “*to take land from its owner; esp., to take for public use or in the public interest, as by right of eminent domain*” (Neufeldt 1997). In law-governed state an expropriation procedure balances the interest between the public—the common good—and the interest of the particular, owning the land. Expropriation is therefore

- taking of a right (typically ownership of land)
- without the consent of the owner
- in the public interest, and
- against compensation.

Before expropriation procedures start authorities typically try to acquire the land (or other rights in land) through contract and negotiate with the owner. Only if such negotiations do not lead to a voluntary transfer of ownership, expropriation procedures are started. Clearly the possibility of expropriation influences the owners decision to negotiate a contract.

3.1 Object of Expropriation

In principle any right can be expropriated, but the prototypical case is a right in land. This is most often ownership, but owners of land can be forced by right of eminent domain to grant any kind of easement, e.g., to tolerate a pipeline on his ground.

3.2 Public Interest

In an expropriation procedure the public interest must be documented. Legislation in most countries list projects that typically are in the public interest and allow the authorities or agencies responsible for them to initiate expropriation procedures; e.g., national railways, highway agencies or water authorities have this right, as well as the military, etc.

3.3 Compensation

The land owner must receive compensation for his loss. In cases of expropriation of land the compensation will usually be monetary, but other solutions are possible. For example the authority expropriating can offer a comparable piece of land. In rural reallocation procedures, a proportional deduction is made from the land of every owner involved for the construction of the infrastructures in the interest of all land owners; and all land owners receive smaller but more valuable land areas as compensation.

3.4 Expropriation Procedure before a Judge

Ownership rights are in most countries protected by the constitution and taking by the state requires a general permission in a law (e.g., tax law) and legal process that may be before an

ordinary civil court, an administrative or a specialized expropriation court. Expropriation reduces the rights of the land owner and he receives compensation. The interest of the expropriated owner and the interest of the expropriator are conflicting: the first looks for a minimal reduction in his right and a maximal compensation, the second wants the necessary rights for the lowest price possible. Typically a court law or a special administrative court decides the extent of the expropriation and the compensation—with regular possibilities for the parties to appeal. Expropriation provides a framework for settling a conflict of interest between the parties. The traditional method of settling disputes in a society is to ask a third party for a decision; i.e., a court where a judge decides on the dispute. Laws on expropriation fix the rules for this particular legal procedure. The most important questions a judgment must settle are:

- Does the public interest exceed the interest of the current owner?
- What is the extent of the expropriation?
- What is the compensation?

The expropriation should be minimal, both in space as in the rights it takes. In some cases it may not be necessary to transfer the right of ownership. Airports, for example, require areas for landing strips and the right of ownership is crucial for these areas, but the areas necessary for the approach, can be secured as an easement to tolerate crossing the area in a specified flying height. The court must balance the interest of the public and prevent land owners from benefiting from public needs by requesting inflated prices. However, the public shall also not take the land with little or no compensation at all.

The expropriation process is more expensive than a purchase because its procedures are more complex, take longer, and more people are involved. The costs for the expropriator are higher than the procedural cost of buying the land from a consenting land owner. The costs of the expropriation process is thus influencing the willingness of the expropriator to settle through contractual negotiations.

3.5 Parties involved in the expropriation process

The expropriation process is usually organized as a contradictory process between the expropriator and the expropriated and is decided by a court. Therefore, the parties involved in an expropriation procedure are

- the authority (agency) that seeks expropriation
- the owner of the right
- the court that decides the case.

3.5.1 Expropriated

An expropriation procedure is only stated, if the owner does not want to sell. The reasons for the owner for not wanting to sell are manifold. They may be economic considerations (the remainder of the land may be without value), ecologic reasons (the owner does not like the ecologic effects of the planned project), family attachments, or simple stubbornness.

3.5.2 Expropriator

The expropriator is the authority wishing to acquire the right. It may be a public body and increasingly, private companies in public ownership performing such functions benefit from expropriation procedures; (an example for a private company would be an energy supplier).

3.6 Emergence of Expropriation

Historically, the need of land acquisition for railway companies was contemporaneous with the creation of modern systems of land administration and the organization of expropriation procedures. The law on expropriation for railways in Austria, for example, was enacted even before the laws on maintenance of the cadastre (Franz Josef I. 1878; Franz Josef I. 1883). The question under which circumstances a company (i.e., not a body created by public law) can perform state functions, including initiating expropriation procedures is novel and will have different answers in different jurisdictions.

3.7 Result of Expropriation Process

As A result of the expropriation process, the expropriator becomes owner of the land or the rights necessary against payment of the fixed compensation.

4. EXPROPRIATION AND LAND REGISTRATION

What are the interactions between expropriation procedures and the (simple) cadastre? There are two types of interactions to consider:

- the expropriation procedure requires information inputs the cadastre can provide, and
- the result of the expropriation processes are changed ownership rights that must be recorded in the cadastre.

4.1 Information Needs of Expropriation

Expropriation benefits from a well organized land registration system (cadastre): The process needs reliable information about ownership and other rights in land; if these can be obtained from a well kept, authoritative registry the process is smother than without.

Expropriation procedures benefit if the land registration system records prices for all land transfers. Complete lists of prices paid in the neighborhood help the court to decide on the just compensation for the owner. Such recordings of land prices paid interact in problematic ways with other legal procedures (especially tax laws) and are not included in the simple cadastre, because they are not necessary for the primary goal of the cadastre: recording rights to land. Land price records are also ‘nice to have’ but not crucial for expropriation. The case that the recorded owner is not the legal owner poses the same problem and asks for the same remedies than transfer of ownership from a recorded but not on the part of the expropriator.

4.2 Recording

The result of the expropriation process is the transfer of ownership by a final judgment of a competent court. In most expropriation laws, the expropriator has acquired the rights and must pay the compensation with the valid judgment.

This creates a difficulty for an authoritative (positive and negative) land registry: the reordered owner and the true owner differ after expropriation; the previous owner is still recorded, but he is not the owner any more; the registry still shows the previous owner, but the expropriator is already owner by the judgment.

5. INTEGRATION OF EXPROPRIATION AND SIMPLE CADASTRE

Does the above described interaction between expropriation and cadastre require particular preparations and rules for expropriation in the cadastre? Guided by a principle of parsimony (Occam's razor!) we should strive for simplicity and not create specific procedures when procedures that can be used for many similar cases are in place and can be used. With regards to the information needs of the expropriation process we observe:

The expropriation process requires ownership details not different from other legal processes where rights to land are transferred or disputed. The desire of expropriation judges to know prices paid in similar cases to arrive at an objective assessment of value of the right, is not sufficient justification to reword compulsory all prices for all transaction. First, expropriation is a relatively rare event and to collected large amounts of data for an uncertain need is not effective. Second, the prices recorded and how comparable to the expropriation they are is doubtful and needs careful analysis by an expert; the raw recorded prices are of little value to the expropriation process. With regard to the recording of the changed state of ownership rights: The result of the expropriation process is a transfer of ownership, which (in most jurisdictions) is effective with the judgment and does not require registration for the transfer. There must be a procedure to have such judgments of transfer of ownership registered without the consent of the previous owner. This procedure to register transfer of

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ownership through court judgments is not specific for expropriation, but is generally needed for several legal procedures, where ownership is transferred without consent of the previous owner. Most common is the case, where the former owner has deceased and cannot consent and the heir acquires ownership through inheritance procedures, i.e., a court judgment.

A general procedure to register transfer of ownership through court judgment is sufficient even for the expropriation case. Regarding the information needs of users of the cadastre at large: The fact that an expropriation process is started may be annotated in a land registry. Again, this is not particular for expropriation, but land registration laws prepare for such annotations for several similar legal procedures that are important to know for persons intending to acquire rights in a parcel.

6. CONCLUSIONS

Expropriation is necessary to allow the realization of infrastructure projects even if the owners of land required for the project refuse to sell it. Expropriation is taking of a right against just compensation by the public and it is a crucial aspect of land management. The costs and duration of the process influences the willingness of the parties to negotiate a sales contract. The question to explore is what support a cadastre must provide and how it influences expropriation procedures. Land or title registration are very diverse; to allow a generalized discussion independent of the particulars of national laws, the interaction of simplified and generalized expropriation procedures with a theoretical construction of a 'simple cadastre' has been used. The foregoing analysis shows that the expropriation process does not pose particular requirements for the land registration system.

1. Expropriation requires comparable information about ownership as other processes.
2. The resulting transfer of ownership by judgment and the cadastral procedures for registration of judgments are different from an ordinary (consensual) transfer of

ownership through sales where the owner consents to the transfer; but the transfer by judgment without consent by owner is fairly general and a single cadastral procedure for registration of judgments serves them all.

3. The recommended annotation of parcels for which an expropriation procedure is pending is also just one of a number of such annotations.

Expropriation procedures benefit from records of actual sale prices, as many land registration systems contain. Such records are problematic and difficult to maintain at a high level of truthfulness. They are not a crucial part necessary for land registration in general nor for expropriation in particular; they are therefore not included in the “simple cadastre”, and not necessary for the expropriation process. It is questionable if recording of prices for all land sales can be justified by the (small) positive effects such records have in the rare expropriation case.

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