



Technical Assistance Consultant's Report

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TA 7566-REG: Strengthening and Use of Country Safeguard Systems

Subproject: Training and Knowledge Sharing for
CSS Strengthening in the Pacific (Regional)

ACCESSING LAND FOR DEVELOPMENT: INTERNATIONAL BEST PRACTICES AND COUNTRY SYSTEMS TRAINING PROJECT READING MATERIAL XI

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Asian Development Bank

Accessing Land for Development
International Best Practices and Country Systems
Special Procedures of Land Acquisition (xi)

(A) Voluntary land donation

Voluntary land donation is the contribution by households or individuals their own land for a project without requesting compensation or any benefit. In this modality of land acquisition, the state does not use its powers to acquire private property for a public purpose. The person or a household who is engaged in this transaction is free to refuse to donate land. In that case, the project cannot acquire that land with obtaining the State's inherent power over the eminent domain. Genuine and voluntary land donations do not come within the scope of the involuntary resettlement safeguards. But the project should exercise judgment in such cases and conduct due diligence to avoid adverse impacts on affected persons or households and possible reputational risks to donors who funds the project.

Land donation is only suitable for community-driven projects where the community (and each member owning or using land) wishes to provide small amounts of land to support initiatives that will benefit the community. This is the key point in assessing whether voluntary land donation is the appropriate mode of acquisition. The donation of land is not appropriate for medium to large scale infrastructure, particularly in cases where a government agency has a statutory obligation to provide the infrastructure for which land is required. Voluntary land donation as state earlier is most suitable to support a small-scale community infrastructure where impacts are minor and benefits are shared by the entire community. An example is deep tube well. A small piece land is required but its community and individual level benefits are enormous.

It is difficult to determine whether a land donation is in fact a voluntary donation. This is an important determination because if such donation of land is truly voluntary, involuntary resettlement safeguards will not get triggered.

Key Issues in Voluntary Land Donation

- Who will use the land, for how long, and for what purpose?
- Meaning of loss of ownership or right to use the land?
- Does the owner/user have the right to refuse to donate land?
- Any alternative proposals which would allow use other land?
- How to donate land and what costs are involved?

It is not easy to answer above questions in most of countries in the Pacific region, as their land tenure systems are traditional and communal and without completed cadastral surveys and land

registration. As a result, the land situation in many PDMCs is complex and sensitive. A number of factors contribute to this situation.

Many PDMCs do not have comprehensive and formal procedures for land acquisition and, even where formal procedures exist, legal and institutional processes can be complex and time consuming. Different systems of land use and property rights may exist on the same land side by side thereby making eliciting of ownership and area of land belong to particular individual or household very difficult. This situation is further complicated by complex patterns of customary collective ownership that may exist which are inconsistent with private ownership, use rights, or de-facto possession.

These different, sometimes conflicting land systems make it difficult to establish who owns or uses a specific parcel of land. As a result, it is not easy to demarcate precisely the ownership of the land area which is offered as voluntary donation.

Local representation and negotiation processes can increase the risk of informal political or social pressure on individuals and households to 'donate' their land regardless of their decisions. Therefore it is necessary to limit any potential harm that may arise because of land donation. To verify this issue a few preliminary questions can be asked:

Is Land Donation the Appropriate Method of Acquisition?

- Verify voluntary donation is in fact voluntary by checking
 - written records
 - confirmation through an independent third party
- Land donation severely affects household's income?
- Land donation brings direct benefits to the household?
- Land donation cause relocation of the household?
- The terms of land donation
- The beneficiary of the donation
- What alternatives to land donation exist?

There are several best practices that have been evolved over the years to avoid or at least minimize potential harm of a proposed land donation mode of land acquisition. One key safeguard is the limitation of the proportion of land that any individual can donate. It is usually not to exceed 10 percent of the potential donor's landholding. Another safeguard is to ensure that land donation would not cause the household to relocate. It is also a good practice to consider whether there are alternatives to land donation which would adequately support the project such as granting right of way or use of the land for a specific period of time.

In order to ensure that donated land will be used only for the purpose it was donated, a time limit is to be established to use the donated land. If the project fails to utilize the land for the agreed purpose by a publicized date, the land reverts to the original owner or the community. Often it is difficult revert the land parcel back to the original owner it would entail more administrative procedures and costs.

In some instances, the land donor may demand cash compensation for structures and other fixed assets on the land. This could lead to conflict with other donors who may not demand such compensation. Another issue is that a donor may agree to donate only a portion of the required land claiming compensation for the rest of the land acquired. These issues complicate voluntary land donation process and also could delay the project implementation.

The issues and difficulties discussed above compel any project to carefully evaluate any arrangement of voluntary land donation. Careful due diligence and consultation, adequate documentation and engagement of the community in finalizing such land donations are required to avoid future difficulties of land donations. Such due diligence ensures that voluntary land donation (VLD) is sustainable and occurs without causing conflict in the community and without impoverishing the affected individuals and communities.

Steps in Voluntary Donation of Land

- ✓ Document the appropriateness of VLD in the project context
- ✓ Verify the requirements of the donation
- ✓ Formalize land donation through third party engagement
- ✓ Conduct due diligence on owners and users of land donated
- ✓ Conduct consultations and disclose findings and agreement
- ✓ Establish informed consent of the land donor
- ✓ Document legal transfer of donated land
- ✓ Establish a grievance redress mechanism

Due Diligence

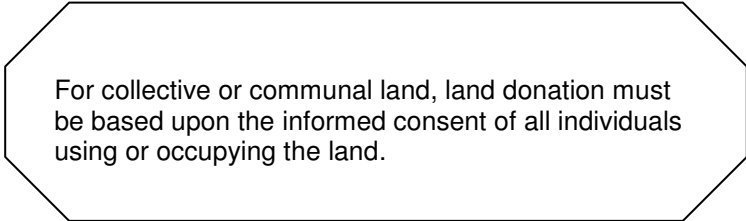
In deciding the appropriateness of VLD, a thorough due diligence is required to understand the type of land rights that exist in the project area and to identify any particular issues relating to land ownership and use. Once the general due diligence is completed, parcel-wise due diligence is also required on the proposed land to be donated. The due diligence will check the owner or owners of the land by scrutinizing documents, if available, or through discussions with knowledgeable in the project area or the community. Once the owners are identified, it is necessary to check the current land users or any parties that occupy the land physically or through ownership of an asset or conduct of livelihood or business activities on the land. It is also helpful to check whether there are any competing claims of ownership or land use or any encumbrances on the land.

Disclosure and Consultation

The land donor should have a good knowledge and full understanding about the project – its objectives, benefits – before any process related voluntary land donation is started. The project authorities will show the boundaries of the project which affected the proposed land to the potential land donor and discuss with the donors the potential impacts that the project may have on them including impacts on their income sources and livelihoods. It is a good practice to disclose in writing early to potential land donors the location and amount of land that is sought be provided and that its intended use for the project and to indicate whether it is permanent or temporary. In the latter case, period of occupation should be clearly stated. The project authorities should advise the potential land owner whom should he or she consult before finalizing the deal. It is also important to clearly state who will bear the administrative cost of land donation.

Informed Consent

Land donation is a complicated process. Therefore the project team should satisfy itself that voluntary land donation is done in circumstances of informed consent or power of choice. This mean being confident that the owner or user of the land understands all aspects of land donation described above. In this context, the project team must inform the potential donor that the right to refuse is a legitimate right, unconditional, and the potential transferor must be capable of exercising it in the local community and political context.



For collective or communal land, land donation must be based upon the informed consent of all individuals using or occupying the land.

Documentation

In voluntary land donation, there are two critical steps: The first is the agreement to donate the land; and the second is the document that carries out and evidences the legal transfer of the land. Both are necessary to complete the process of voluntary land donation. If the process is not completed formally the project is exposed to a significant uncertainty in the future which in turn could impact on the sustainability of the infrastructure and services, and also could create negative effect on community relations. Project team will also prepare a map of the land donated indicating its location and boundaries and area. The project office will maintain a record of the entire process and documentation including copies of each of the formal statements of donation establishing informed consent signed by each owner or user or both.

Grievance Redress

The project specifies means by which land donor or persons whose use or occupancy of the land was not recognized in the transfer of land may raise grievances. The project owner will acknowledge the complaint or grievance and respond quickly. They may also be referred to customary conflict mediation arrangements where they are not directly affiliated with traditional leaders who are a party to the donation process. The grievance process imposes no cost upon those raising grievances, and participation in the grievance process does not preclude pursuit of legal remedies under the law of the country.

(B) Negotiated Land Acquisition

Willing seller- Individuals affected by a project - may be willing to sell their property and assets on a voluntary basis to the project. Under such circumstances—the transfer of unencumbered rights to a willing buyer by a willing seller— involuntary resettlement safeguards are not triggered. However, it is necessary to demonstrate that: 1) land markets or other opportunities for the productive investment of the sales income exist; 2) the transaction took place with the seller's informed consent; and 3) the seller was provided with fair compensation based on prevailing market prices. In the absence of land markets, the project authorities establish a compensation structure that enables sellers of land and assets to restore their livelihoods to levels equivalent to or better than those maintained at the time of sale.

The important principles in negotiate land acquisition and resettlement are informed consent and power of choice. Informed consent means that the person involved is fully knowledgeable about the project and its implications and consequences and freely agree to participate. Power of choice means that the person involved has the option to agree or disagree with the land acquisition, without adverse consequences being imposed formally or informally by the state. Power of choice is only possible if project location is not fixed. The alignment of a rural road project, for example, could be changed if landowners objected. The location of a reservoir of a hydropower project, by contrast, may not be changed as the location is determined to satisfy technical and engineering factors. The former project could allow for voluntary resettlement, the latter could not.

LAR safeguards are triggered if failed negotiations could result in involuntary land acquisition according to land laws of the country. This is the case when the state acquires land for a public purpose. The landowner has no choice to refuse to sell the land and accept the buyer's best offer; otherwise, the land will be acquired by the state based on the right of eminent domain.

The LARP should have sufficient safeguards to protect the land sellers from the risks associated with negotiated transactions that may not fully voluntary. A best practice is to develop procedures which are transparent and consistent. The basic requirement in negotiated settlement is to ensure that persons who enter into a negotiated settlement in land acquisition will maintain the same or better income and livelihood status. The key words in this modality of land acquisition are 'adequate' and 'fair price' for land and/or other assets. The project owner ensures that the negotiating process does not adversely affect the marginality and vulnerability

of any AP. The documents pertaining to negotiated settlements, such as maps, land registry records, sales records, consultation records, decision records, laws and policies pertaining to the negotiations, and development plans are to be disclosed to the affected persons who are involved in a negotiated settlement. The project owner is required to engage an independent external party to oversee and document the negotiation and settlement processes. The independent external party cannot be associated with the project.

(C) Communal Land Acquisition by Agreement

If communal land is required for the project, special procedures will apply.

If a project is to be implemented in an area where the dominant land tenure pattern is communal land ownership, the project owner should look for alternatives to conventional land acquisition modes. This is especially important where replacement land is scarce or non-existent, or where customary land tenure is deemed unalienable. In such situations, negotiated agreements for long-term lease even for physical infrastructure are to be considered. This will avoid or at least reduce social tensions associated with acquisition of communal land.

In a communal land tenure system, the project should look for land users and occupants rather than for land owners. Sometimes one or two persons may claim on behalf of others that land belongs to them. But the distinction between land ownership and land use or occupation is to be emphasized in trying to get communal land for a project. A census of land users and occupants needs to be prepared at the inception of the project in order to identify the affected persons and households and to avoid new comers to the area to obtain compensation and other benefits.

Once the census of land users and occupiers is ready, detailed and well organized consultation process is to be established which covers all affected persons, households and communities in the project area in order to disclose mitigation measures and to arrive at negotiated agreements for restoration of livelihoods or living standards. If the affected communities are vulnerable groups special measures are to be established to ensure that they will not be disproportionately affected by the project compared with other communities. The livelihood restoration and improvement of living standard programs should be backed by adequate budgets and institutional support.

Where replacement land do not exist to swap with required land for the project, the project authorities will clearly explain to all affected persons and households the method of valuation of the losses and obtain their consent. Such agreement may take the form of a negotiated agreement. The consultation minutes, decisions and clauses of agreement will be recorded and translate into local dialects, if necessary, so that all affected persons and households will know the conditions of agreements and the compensation avenues for their collective losses.

If the affected households or the community agreed to enter into a negotiated agreement such as long term lease or land swap, the project authorities in consultation with local government officials will prepare and obtained the approval of the communities affected for a land valuation methodology, detailed description of long-term lease arrangements, and how to provide remedial assistance to users and occupiers of acquired communal land. They will also prepare

a description of the methods by which affected communities are involved in the negotiations, and methods by which terms of negotiated agreements are fully disclosed to them in a manner accessible to the affected community.

The project authorities in consultations with local government officials and affected communities will make arrangements for investing collective compensation the community received, if necessary.