



**THE USE OF THE LEGAL DUE DILIGENCE  
INSTRUMENT IN ESTABLISHING LEGAL  
SECURITY FOR LAND PROCUREMENT FOR  
PUBLIC INTEREST**

by

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**Abstract**

*This paper explores the issue of using legal due diligence instruments in realizing legal certainty over land acquisition for the public interest. Land acquisition for public interest is one of the activities carried out by the government related to its duties and responsibilities to promote public welfare. In land acquisition, careful and thorough inspection of the land is required which is called legal due diligence with the aim of obtaining legal status or legal explanation of land documents or being examined to check the legality of the land owner, checking the level of legal compliance of the land owner; provide legal views or legal certainty in a policy carried out by the government. What legal due diligence does is document proving ownership and control of land and court cases related to the land.*

**Keywords:** *Legal Due Diligence, Legal Certainty, Land Procurement*

## **INTRODUCTION**

Development can improve people's welfare but also cause problems. The problems faced by the government in the implementation of development include the problem of providing land for development itself, because state land that is directly controlled by the state is limited or it can be said that it almost does not exist anymore.

Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia stipulates: "Earth, water and the natural resources contained therein are controlled by the state and used to the greatest extent for the prosperity of the people". This verse means obliging the State to regulate land ownership and direct its use, so that all land throughout the Unitary State of the Republic of Indonesia is used for the greatest possible prosperity of the people. From this verse it is clear that the relationship between the state and the land, water and natural resources contained therein is a relationship of control, not ownership.

One way to fulfill the state's need for land can be done through land procurement agencies. This means that the state takes private rights (on land) from owners by voluntarily relinquishing rights from owners by providing compensation in the form of compensation based on applicable laws and regulations.

Land acquisition for public interest is one of the activities carried out by the government related to its duties and responsibilities to promote public welfare. Such a state task causes Indonesia to be classified as a welfare state (welfarestaat), in order to realize this prosperity the state is given the authority to control land<sup>1</sup>.

*Section A-Research paper*

Land acquisition referred to in Article 1 point 2 of Law no. 2 of 2012 concerning Land Acquisition for Development for Public Interest in conjunction with Article 1 number 2 of RI Presidential Regulation No. 71 of 2012 concerning Implementation of Land Acquisition for Development in the Public Interest is the meaning of land acquisition in general. The definition of land acquisition for public interest is the activity of providing land for public interest by agencies that require land in accordance with and based on the spatial layout plan that has been stipulated by providing appropriate and fair compensation to the entitled party.

In Article 10 of Law no. 2 of 2012 concerning Land Acquisition for Development in the Public Interest stipulates a number of criteria for land acquisition activities that are included in land acquisition for public purposes including oil and gas and geothermal infrastructure, national defense and security, public roads, toll roads, tunnels, railroads, reservoirs, dams, irrigation, drinking water channels, government hospitals or local government hospitals.

Article 2 Presidential Regulation No. 65 of 2006 concerning Amendments to Presidential Regulation Number 36 of 2005 concerning Land Acquisition for the Implementation of Development in the Public Interest: (1) Land acquisition for the implementation of development in the public interest by the Government or Regional Government is carried out by relinquishing or handing over land rights; (2) Land procurement other than for the implementation of development for the public interest by the Government or Regional Government is carried out by buying and selling, exchanging or other methods voluntarily agreed upon by the parties concerned.

Based on its importance, land acquisition is divided into 2 (two) types, namely: First, land acquisition for public

purposes. Parties who need land in land acquisition for public purposes are agencies, namely state agencies, ministries, non-ministerial government agencies, provincial governments, district/city governments, state-owned enterprises. Second, land acquisition for the benefit of private companies. Parties that require land in land acquisition for the benefit of private companies are Limited Liability Companies (PT).<sup>1</sup>

The government has difficulty obtaining land for infrastructure development purposes. A number of regulations have even been issued to address this problem. The results are still not significant, the problem of land acquisition for infrastructure land is even more protracted.

Legal facts that occur in the procurement/purchase of land, including the absence of a land bank (land banking), problems of disharmony and synchronization at the normative level of land law, disputes, conflicts and ongoing land cases, as well as the understanding that there is not even an inch of land free from recognition or juridical control.<sup>2</sup> Other obstacles that arise in land acquisition such as incomplete land title certificates to be compensated, in the event that the owners of the land, buildings and plants to be acquired are not in place, the land to be acquired is in dispute, there are still people who control the land physically without any legal basis. Of course, it is necessary to carry out legal due diligence or due diligence from a legal perspective by confirming the factual truth of the document directly to the relevant agency to avoid legal problems in the future.

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<sup>1</sup>UripSantoso, "PenyelesaianSengketaDalamPengadaan Tanah untukKepentinganUmumJurnalPerspektif, XXI (3) Edisi September, h. 188-189

## PEMBAHASAN

### 1. *Legal Due Diligence Concept*

The term due diligence became known in 1903. Due diligence comes from the word due (something owed or is a moral obligation) and diligence, namely vigilant (persistence), activity (activity), or attentiveness (attention).<sup>2</sup>

*Due diligence* is defined as "the care that reasonable person exercises under the circumstances to avoid harm to other persons or their property<sup>3</sup> or precautions taken by a person in general to avoid harm to other people or his property.

The term due diligence in its development has been used in the business field as *the process of investigation performed by investors, into the details of a potential investment such as an examination of operations and management and the verification of material facts<sup>4</sup>* or the inspection process carried out by investors in detail on investment potential, for example inspection of operations and management and verification of important facts.

*Due Diligence is a term used for a number of concepts involving either the performance of an investigation of a business or person, or of an act with a certain standard of care. It can be a legal obligation, but the term will more*

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<sup>2</sup>Laksanto Utomo. (2008). *Pemeriksaan dan Segi Hukum atau Due Diligence*. Bandung: PT. Alumni, h. 3

<sup>3</sup> S. Rao Vallabhaneni, (2016). *Wiley CIA Excel Exam Review 2016 Focus*. New Jersey: John Wiley & Sons. Inc., p.6

<sup>4</sup> Edward Halibozek & Gerald L. Kovacich. (2005). *Mergers and Acquisitions Security: Corporate Restructuring and Security Management*. USA: Elsevier, p. 160

*commonly apply to voluntary investigations, some common example of due diligence is various industries include.*<sup>5</sup>

Thus, due diligence is a term used for a number of concepts involving the investigative performance of a business or person, or an act with a certain standard of care. This can be a legal obligation, but the term usually applies to voluntary investigations, some common examples of due diligence covering a variety of industries

According to the common definition, due diligence is a process of examining or researching all facts about a company or corporation as necessary according to their interests and legally accountable to third parties.<sup>6</sup>

*Legal due diligence or due diligence from a legal perspective is commonly known as an examination from a legal perspective which includes a legal audit or examination and research from a legal perspective and a legal opinion, namely an opinion from a legal perspective which is the result of analysis and conclusions on the facts obtained from a legal audit.*<sup>7</sup>*Legal Due Diligence is carried out to achieve three objects, namely uncovering potential obligations, finding legal or contractual barriers, forming the basis of the final agreement.*<sup>8</sup>

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<sup>5</sup> James E. Manning. (2010). Public Trust Betrayed: The Truth Behind the Real Estate Appraisal Industry. Oklahoma: Tate Publishing & Enterprises. P. 171

<sup>6</sup> T. GayusLumbuun, (2005). "Legal Due Diligence dalamLingkupHukumAdministrasi Negara: (StudiTerhadapPermohonanIjin Usaha)". Law Review, FakultasHukumUniversitasPelita Harapan, V. (2). November, h. 483

<sup>7</sup>*Ibid.*, h. 485-486

<sup>8</sup> Peter Howson. (2003). Due Diligence: The Critical Stage in Mergers and Acquisitions. England: Gower Publishing Limited. P. 68.

*Legal due diligence is carried out as an effort to obtain objective data related to a planned business transaction. Legal due diligence is a thorough examination from a legal perspective carried out by a Legal Consultant on a company or object of a transaction in accordance with the purpose of the transaction, to obtain information or material facts that may describe the condition of a company or object of a transaction.*

Due diligence in civil law is an effort made by policy holders or those in authority to avoid losses to other parties. Failure to comply with these measures may constitute an act of "negligence". This is conceptually different from an investigation in "due diligence", here there is a factor of obligation that generally must be performed in order to meet a standard of conduct. Often in an agreement it is explicitly stipulated that the parties have an obligation to carry out due diligence.

The importance of a legal due diligence examination is not only in the context of ensuring that a thorough administrative examination of the object being examined is in accordance with applicable law, but also as an effort to mitigate risks against potential legal issues that may arise as a result of negligence or losses incurred by third parties. In other words, a legal due diligence examination is a preventive measure to reduce and minimize the smallest possible risk of potential lawsuits that may arise.

Legal due examination consists of two combinations of different conceptual processes, namely the process of investigating facts (investigation) and the process of evaluating relevant facts based on audit standards (analysis). The logic of these investigations requires that once the facts are identified, the next question becomes how these facts are measured based on standard legal due diligence examinations

carried out through various approaches to obtain a conclusion on the quality and extent of an impact caused by the implementation of company management (both manifest and latent) as well as finding ways to reduce these adverse impacts, designing the best solutions to adapt or revise company policies and various other practices as needed through collaborative efforts involving various stakeholders (stakeholders).<sup>9</sup>

## ***2. Legal Due Diligence in Land Acquisition***

The process of land acquisition always has its own challenges. It doesn't matter whether it's the government or business actors, the polemic when clearing land seems to require a precise strategy. The most important thing is actually trying to mitigate risk as a preventive effort to minimize problems during land acquisition.

Legal issues in land acquisition related to government projects in the form of difficult negotiations with community rights holders or those who control land and problems verifying proof of land ownership. The process of land acquisition is not enough simply to see whether the land permits have been complied with in full. It is also important to know the facts underlying the issuance of permits related to land rights in order to minimize the potential for lawsuits from any party trying to enter due to procedural defects when fulfilling the land rights permits.<sup>10</sup>

According to Aslan Noor, Head of the Government Land Utilization Sub-Directorate, Directorate General of Land Acquisition of the Ministry of Agrarian Affairs and Spatial

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<sup>9</sup>RopaunRambe&Tandry LD. (2011). Panduan Due Diligence: (Legal Audit, Legal Opinion, Legal Reasoning). Jakarta: CV. VariaAdvokat. h. 4

<sup>10</sup> Nanda Narendra Putra, "*Legal Due Dilligence...Loc.cit.*



Planning, in land acquisition for infrastructure, there are three legal aspects that must be considered in land procurement for infrastructure, namely:<sup>11</sup>

### **1. Principle of Balance**

In Law no. 2 of 2012 concerning Land Acquisition for Development in the Public Interest, it is emphasized that land must be available for development in the public interest. Article 4 Law no. 2 of 2012 stipulates that the government guarantees the availability of land for public use. Not only that, the funding is also guaranteed by the government, both at the central and regional levels. However, in reality, development projects often stall due to the community's refusal to relinquish their land rights.

Law No. 2 of 2012 adheres to the principle of balance that the implementation of land acquisition in the public interest must pay attention to the balance between the interests of development and the interests of the community. But maybe, it is less socialized that the community also has an obligation to give up their rights. Article 5 Law no. 2 of 2012 mandates parties who have land rights to release their land during the implementation of land acquisition for public purposes. However, he explained that the relinquishment of rights was not instantaneous. At least there must be compensation or a court decision that has permanent legal force

### **2. Community Engagement**

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<sup>11</sup>KAR “3 aspek hukum terkait pengadaan tanah untuk Infrastruktur <http://www.hukumonline.com/berita/baca/lt574ee9e0b6653/3-aspek-hukum-terkait-pengadaan-tanah-untuk-infrastruktur>, diakses pada 29 April 2017

There are four stages that must be passed in the land acquisition process for infrastructure. First, the project planner must provide detailed location data to be used by the Provincial Government. Second, conduct public consultations. Third, location determination. Fourth, the Ministry of ATR/BPN conducts land acquisition which is carried out by conducting an assessment, deliberation until the release.

In the series of activities carried out by land acquisition agencies from the planning stage to the delivery of results, community involvement is an important element. In the preparation stage for land acquisition, the results of the public consultation determine whether the planned location can be executed or the agency must determine another location.

### **3. Provision of Compensation**

Article 9 paragraph (2) Law No. 2 of 2012 guarantees that land acquisition for the public interest is carried out by providing proper and fair compensation. Compensation is the provision of commensurate compensation, even more advanced so that the former owner can have a better life. So, according to him, it is natural that the compensation received by the former owner is not only limited to the market price of the land he owns.

Behind the government's authority to free up areas for the implementation of development for the public interest, there is an obligation to make a better life for former rights holders as regulated in Article 1 number 1 of Presidential Regulation No. 36 of 2005 jo Article 1 point 3 Presidential Regulation No. 65 of 2006 Amendments to Presidential Regulation Number 36 of 2005 concerning Land Acquisition for the Implementation of Developments in the Public Interest. But often in the negotiation process between the land procurement committee and the community no agreement is reached. He said, to

anticipate problems that could hinder the implementation of development, a consignment effort could be taken. Consignment or compensation from the government which is entrusted to the local district court, is regulated in Article 42 of Law no. 2 of 2012.

In order to prevent problems with land acquisition for public interest early, the most important initial step to take is due diligence to see if the land is problematic or not. Due diligence from the law or commonly called legal due diligence, usually will find important facts which will later become the key when carrying out mitigation efforts. Of course, this due diligence is not only limited to checking between one document and another. This due diligence referred to is up to checking with the relevant permit issuing agency and surrounding locations.

Legal due diligence feasibility study to ensure that: (a) this sub-project has complied with all national rules and laws related to land acquisition; (b) there is no reputational risk for the land owner and for the government; and (c) there are no issues brought up from the past, or disagreements or outstanding payment obligations from the past.

Examination and assessment carried out by legal consultants or land acquisition teams formed by the government, is a legal analysis of one or more company documents carried out for:

1. Obtain legal status or legal explanation of land documents or inspection
2. Check the legality of the land owner;
3. Checking the level of legal compliance of landowners:
4. Provide legal views or legal certainty in a policy carried out by the government.

*Section A-Research paper*

The documents mentioned above must be examined carefully whether they are in accordance with the existing laws and regulations. Apart from examining documents, other matters that fall into the category of Legal Due Diligence that must be carried out include:

1. Physical research or area research, field surveys and observations of a land object to ascertain the truth;
2. Examination of documents related to land objects;
3. Research based on other sources of information, such as courts, financial reports, statements of directors, and so on.

Documents proving ownership and control over land, among others:

1. Land certificate;
2. Proof of land ownership (among other land certificates, tax receipts, etc.);
3. Deed of sale and purchase/grant/inheritance of land;
4. Land Sale Purchase Agreement;
5. Deed or Agreement on Relinquishment of Land Rights;
6. Documents for obtaining land documents at the local Land Agency (BPN) office

Also included in the investigation are court/arbitration cases, namely:

1. Information and documents regarding or in connection with cases (civil, criminal, commercial, administrative, and so on), regarding the land.
2. Information and documents regarding or in connection with the settlement, if any, of the cases referred to in the points above.
3. Decision issued by a court and/or arbitration body, if the land has ever been in trouble.

## **CONCLUSION**

Land acquisition for public interest is one of the activities carried out by the government related to its duties and responsibilities to promote public welfare. In land acquisition, careful and thorough inspection of the land is required which is called legal due diligence with the aim of obtaining legal status or legal explanation of land documents or inspection; checking the legality of landowners, checking the level of legal compliance of landowners; provide legal views or legal certainty in a policy carried out by the government. What legal due diligence does is document proving ownership and control of land and court cases related to the land.

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